



The Guardianship of European Constitutionality

A Structural Critique of European Constitutional Review

Agustín José Menéndez



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ARENA Centre for European Studies
University of Oslo
P.O.Box 1143, Blindern
N-0318 Oslo Norway
www.arena.uio.no

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Abstract

Under the cloth of the projection of the national principle of proportionality to Union law, European courts have radically altered the substance of European law. This has been done both to supranational and national constitutional law and by means of redefining its substantive content. European courts have through proportionality assigned an abstract and a concrete constitutional weight to the right to private property and to entrepreneurial freedom through the four economic freedoms and the principle of undistorted competition. That has placed outside the realm of the constitutionally possible key public policies without which some of the fundamental collective goods at the core of the Social and Democratic *Rechtsstaat* become extremely vulnerable. This paper shows how this accentuated bias of the European socio-economic constitution follows from the way in which European courts have defined economic freedoms as the yardstick of European constitutionality. This entails the automatic assignment of the argumentative benefit to economic freedoms, the construction of all other constitutional goods in the semblance of economic freedoms, and the use of asymmetric standards of evidence when having to justify the adequacy and necessity of economic freedoms and other constitutional goods.

Keywords

Collective goods – Constitutional Review – Economic Freedoms – Judicial Dialogue – Proportionality – Socio-economic rights

1. Introduction¹

The European Union Treaties require the European Court of Justice and the General Court of the European Union (hereafter, the European Courts) to ensure that the ‘law is observed’.²

On the basis of such a mandate, the European Courts have not only been key promoters of the interpretation and application of European law in a constitutional key, but have turned themselves into constitutional courts to all effects and purposes.³ This is despite their constant pretence of doing nothing else but applying the law.⁴

A key, cause of the wide acceptance of this radical (self-) transformation of the role of the European Courts can be found in the fact that the European Courts are regarded as having gone about the business of constitutional review in roughly the same fashion as national constitutional courts. The European Courts have defined the European canon of constitutionality by reference to a set of fundamental constitutional positions, as is the case with national canons of constitutionality. It is said that the European canon of constitutionality is made up of fundamental rights, originally derived from the constitutional traditions common to member states, as enshrined in the Charter of Fundamental Rights. This canon is said to be specifically defined by the relevance of the ‘four’ economic freedoms and the principle of undistorted competition, as affirmed in the founding Treaties of the European Communities. These may be (and regularly are) depicted as fundamental rights. It is not frequently added that economic freedoms are the operationalisation of the right to private property and entrepreneurial freedom. By the same token, the key method used by the European Courts to determine the European constitutionality of supranational and national laws has been proportionality review, the working tool *par excellence* of post-war European constitutional courts. Both choices have contributed to render plausibly the assumption that the role that European Courts play as guardians of the European constitutional law is but the projection to the supranational level of the role that national constitutional courts play as guardians of national constitutions. Indeed, such affinity and homogeneity is at core of the (at least once) ever more fashionable understanding of the relationship between the European Courts and national constitutional courts as a matter of ‘judicial dialogue’.⁵

¹ This is a longer version of a chapter to published in Andenas, Bekkedal & Pantaleo (eds), *The Reach of Free Movement*, Springer (T.M.C. Asser Press).

² Article 19.1 TEU reads: ‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed’. There is also a third European Court, the Civil Service Tribunal, which decides controversies between the institutions of the Union and the supranational civil service. This entails that such a Court rarely decides questions with a constitutional dimension. For that reason, I do not pay attention to it in this paper.

³ See Stein 1981; Mancini 1989; Weiler 1991; and Rasmussen and Boerger 2014.

⁴ With the key difference that European Courts remain, contrary to national constitutional courts, free to make the lack of a formal mandate to review the constitutionality of norms to bear.

⁵ See for example Claes, de Visser, Propelier and van den Heyning 2012, and Rosas 2012.

In this paper, I claim that the similarities between the original model of constitutional review in national constitutional review and its alleged reflection, or extension, in supranational constitutional review are more apparent than real. Under the cloth of a supranational version of the national principle of proportionality, the European Courts have radically altered the substance of European constitutional law (both supranational and national) by redefining its substantive content. The extent to which the abstract and concrete force of the right of private property and freedom of entrepreneurship has been altered under the form of proportionality review is the key in this regard. From *Cassis de Dijon* onwards, the substantive content of the four economic freedoms and undistorted competition has been emancipated from substantive national constitutional law. The European Court of Justice, quite frequently relying on the arguments of the European Commission, has put forward an autonomous, self-standing and substantive content of the said economic freedoms by reference to a rather maximalist understanding of the right to private property and entrepreneurial freedom. This is tantamount to a sort of constitutional revisionism that relativises the key post-war constitutional choices that cut the sharpest corners of private property and entrepreneurial freedom to create the political space in which different socio-economic policies were possible. The 'new' understanding of the four economic freedoms and of undistorted competition closes this political space, and in the process, renders some of the fundamental collective goods at the core of the Social and Democratic *Rechtsstaat* extremely vulnerable. The consequences for European proportionality review is to take it away from the weighing and balancing of competing fundamental rights positions in full attention to the specific circumstances, place and time in which they enter into conflict (as is the case at the national level). European proportionality review becomes the conduit through which the resolution of conflicts between economic freedoms and any other constitutional good is biased in favour of the former over the latter.

To put it differently, the review of European constitutionality has become a means of reaffirming the primacy of the rights to private property and freedom of enterprise, repacked as the subjective fundamental economic freedoms and the collective good enhanced competitiveness. The primacy is over all other fundamental rights positions, and very particularly, socio-economic rights. As a result, the normative foundations (fundamental rights) and the argumentative syntax (proportionality) of post-war democratic constitutional law have been turned upside down and used to justify fundamental decisions that collide with the substantive content of the post-war European constitutions.⁶

The argument is structured in three parts. In Section 2, I challenge the standard characterisation of the principle of proportionality in the mainstream European legal studies and I propose using proportionality as a critical reconstructive yardstick.

⁶ This is due to the national constitutions of the member states (as, I would argue, the founding Treaties of the Communities) are underpinned by the characterisation of the state as a Social and Democratic *Rechtsstaat*, aimed at the simultaneous realisation of the civic, political and socio-economic rights of its citizens, something which required playing down and circumscribing the protection afforded to the right to private property.

In Section 3, I reconstruct the structure of the principle of proportionality as applied by the European Courts. I show particularly why we need to consider two steps in addition to the ‘canonical’ three (adequacy, necessity and proportionality in a strict sense). I do so by reference to how proportionality is usually reconstructed, namely by the translation of the underlying social conflict into constitutional language and the assignment of the argumentative burden and benefit. In Section 4, I approach the European Courts’ principle of proportionality using proportionality as a critical reconstructive yardstick. I show that the biasing of the European constitutional law, resulting from how European Courts practice proportionality, stems from (1) a problematic definition of the breadth, scope and substance of economic freedoms as the yardstick of the constitutionality of national laws; (2) the automatic granting of the argumentative benefit to the parties advocating the resolution of conflicts in favour of economic freedoms; (3) the constant re-characterisation of collective goods and in general all constitutional norms in the image of economic freedoms; and (4) an asymmetric assignment of the burdens of proof.

2. What proportionality is and what it is not

Mainstream European legal scholarship revolves around three incorrect assumptions regarding what proportionality is. The first assumption concerns the status of proportionality. It is assumed that proportionality is a principle of positive law. The second assumption concerns the function of proportionality. Proportionality is often characterised as a legitimising template. If a decision has been written following the three ‘canonical’ steps for how proportionality is reconstructed, the resulting decision will be legitimate. In subsection 2.1., I show that proportionality is not a principle of positive law, but a structure of general practical reasoning applied in legal reasoning. In subsection 2.2., I argue that the legitimacy resulting from the mechanical application of proportionality is purely procedural, and thus rather limited. I show that we can use proportionality differently. We can use it as a critical reconstructive device, with the help of which to render explicit the implicit substantive choices with which courts, institutional actors or interpreters of the law at large ‘fill in’ the formal structure of proportionality.

2.1. Proportionality as one of the characteristic syntaxes of constitutional reasoning in democratic constitutional states, not a positive constitutional principle

In the European studies it is usually assumed that the principle of proportionality is a ‘legal transplant’. Originating from the German administrative law, the principle of proportionality has been imported into the European law by the European Court of Justice, according to this assumption. Thus, the ‘incoming tide’ of the European law has resulted in its transplantation into all national constitutional orders.⁷

⁷ Among others, Jacobs 1999.

This assumption not only confounds a pattern of influence (that of German administrative law on the reasoning of the European Court of Justice) with the genealogy of the principle of proportionality, but also fundamentally obscures what proportionality actually is, namely a syntactic pattern of legal reasoning borrowed from general practical reasoning.

Proportionality is a structural principle of general practical reasoning, which is put to use in legal argumentation.⁸ Use of proportionality is especially intense in legal systems characterised as modern democratic constitutional systems, by commitment to a pluralistic set of values. Once law is expected to be the main tool of societal integration, not only by means of solving specific conflicts, but also by means of coordinating action with a view to achieve collective goals, law tends to be written by reference primarily to legal principles, not to narrow legal rules. To put it differently, once law becomes an empowering device, and not a restraining device of state action,⁹ the democratic discipline of state power is carried through legal principles that are established to *programme* state action. As state action unavoidably collides with other legal principles, we need a structural framework to help analyse these problems. That framework is proportionality as a structural principle. Indeed, as Alexy reminds us in *The Theory of Constitutional Rights*:

There is a connection between the theory of principles and the principle of proportionality. This connection is as close as it could possibly be. The nature of principles implies the principle of proportionality and vice versa. That the nature of principles implies the principle of proportionality means that the principle of proportionality with its three sub-principles of suitability, necessity (use of the least intrusive means) and proportionality in its narrow sense (that is, the balancing requirement) logically follows from the nature of principles.¹⁰

Proportionality seems promising in terms of doing what is the core point of the Social and Democratic *Rechtsstaat*.¹¹ Namely combining a commitment to both a plural set of principles – which are far from obviously open to be easily reconciled, starting from the reconciliation of the regulatory ideals of the *Rechtsstaat*, the Democratic State and the Social State – and to being capable of acting, in order to be capable of determining what the reconciliation of such principles entails in each concrete instance or case. Proportionality imposes the consideration of *all relevant* interests at stake: the pondering of both the abstract and the concrete importance of the principles in conflict. Nonetheless, proportionality leads to a considerate judgment, which settles the conflict because ‘[proportionality] makes it possible to

⁸ Alexy 1989 pp. 212-22 and Alexy 2002 pp. 66-69.

⁹ García Pelayo 1977.

¹⁰ Alexy 2002 p. 66.

¹¹ See Heller 1929, later enlarged and published as a book Heller 1930; English translation Heller 1987. I have read the Spanish translation, Heller 1985.

compare and evaluate interests and ideas, values and facts, which are radically different in a way that is both rational and fair'.¹²

2.2. What is proportionality? A legitimising device or a critical reconstructive device?

Most scholars within the law field in the EU consider proportionality as a legitimising template. In other words, the fact that a court reaches a decision according to the 'canonical' three steps in which proportionality is usually disaggregated (adequacy, necessity, proportionality in a narrow sense) constitutes a guarantee of *correctness* of the ruling at hand.¹³ Such an understanding can be criticised on two accounts.

Firstly, this understanding overestimates the legitimacy that can be drawn from deciding a conflict by reference to proportionality. A *formal reasoning structure*, such as proportionality can only produce *formal legitimacy*. Proportionality is guaranteed, if the three steps are followed correctly and that all the relevant aspects of the case have been taken into account before making a decision. At most, proportionality guarantees a very thin substantive legitimacy; just as the classical *Wednesbury* review in British administrative law (which could be regarded as a variant of proportionality). Proportionality review ensures that a decision is not foolish in the sense that its aim makes sense and that there is no obvious alternative solution reconciling the colliding principles at stake available. However, proportionality cannot guarantee the *substantive correctness* of the decision in full. Substantive correctness depends on the correctness of the substantive choices used to fill in the *formal syntactic structure* (proportionality).¹⁴

Secondly, proportionality can still be useful when it comes to substantive choices, not as a legitimising template, but as a critical reconstructive device. Instead of considering legal reasoning from the standpoint of institutional actors interpreting and applying the law, we should consider legal reasoning from the perspective of *citizens* aiming at determining whether the law has been interpreted and applied *correctly*. Proportionality provides critical lenses used to render explicitly all substantive choices made by judges. Proportionality as a critical reconstructive device allows us to move from the surface structure of the argument to the deep structure of the argument. In the process, we make explicit the complete supporting arguments that fill in the structure of proportionality (including empirical arguments about how the world is or how it will be, interpretative arguments, precedents,

¹² Beatty 2004 p. 169. Both Alexy and Beatty would further add that a constitution cannot exist without reference to proportionality as an optimizing principle (of the realization of constitutional principles) (Beatty 2004 p. 163). But perhaps we can suspend our disbelief on this regard, as it may well be, as Habermas claims, that such understanding of principles fails to give proper due to some specific norms in modern legal systems, such as the prohibition of torture, which *should not* be regarded as being subject to being *optimised*. But that is not of essence in our previous discussion. What matters is that proportionality is not a positive principle, but a structural principle of legal reasoning.

¹³ Tridimas 2006.

¹⁴ Alexy 1989 p. 230.

dogmatic arguments, and, critically, general practical reasons). This is a necessary step in order to assess the substantive correctness of the decision by reference to the coherence between the substantive choices underlying the ruling and the substantive choices that a systematic reconstruction of the legal order would have required. To put it briefly, it is necessary to turn upside down the way in which we use proportionality. To some extent, what makes a ruling legitimate is the fact that the court conducts an assessment of proportionality. To a larger extent, the court makes *justified* substantive choices *when making proportionality*.¹⁵

3. Sharpening proportionality as a critical reconstructive tool of the case law of the European courts

In this section, I argue that the reconstruction of how European Courts go about proportionality should take into account the structural differences between European and national constitutional law as a yardstick of constitutionality. While in national constitutional law a wide agreement on the constitutional vocabulary can be taken for granted, this is not the case for European constitutional law (subsection 3.1.). This accounts for the reconstruction of proportionality review as a five-, not a three-pronged test. Thus, adding to the ‘canonical’ adequacy, necessity and proportionality in a strict sense, (1) the translation of social conflicts into constitutional language and (2) the assignment of the argumentative burden (subsection 3.2.). This specific reconstruction of proportionality does not result from the idiosyncratic character of European constitutional law, but from the fact that the contested character of the European constitutional vocabulary renders problematic what national constitutional courts tend to do in a rather routine fashion (subsection 3.3.).

3.1. The lack of a common European constitutional vocabulary and the way European courts go about proportionality

The key thesis I put forward in this section is that the way in which the European Courts apply proportionality is better reconstructed by means of a five-prong, not a three-prong, proportionality test. In practical terms, this entails adding to the ‘canonical’ steps of adequacy, necessity and proportionality *stricto sensu*, two extra

¹⁵ Proper attention to the *structural* nature of the principle of proportionality as a syntactic structure of general practical reasoning should lead us to distinguish very clearly between the *formal* requirements of practical reasoning and the *substantive* elements with which we fill in the syntactic structure, and to which I have just referred. The correctness of a legal argument depends not only on following the structure of proportionality, but in getting the substance right. Indeed, in that distinction, in rendering us capable of making that distinction, resides the key analytical value of the principle of proportionality. It allows us to distinguish what parts of the decision are required by the very structure of legal reasoning (as a special case of general practical reasoning), which parts of the decision are dependent on substantive assumptions made in a rather uncontroversial way in previous legal decisions (essentially, through acts of constitutional significance and importance) and which parts depend on substantive assumptions made by the decision-maker. In particular, attention should be paid to the actual foundation of assumptions on the argumentative and proof burdens, the specific conceptions of each legal principle and the abstract weight assigned to each of them.

steps: (1) that of translating the underlying social conflict into constitutional language and (2) that of assigning the argumentative burden (and consequently, the benefit).

These two additional steps should be taken seriously because, contrary to what is the case at the national constitutional level, the European Courts enjoy considerable discretion when doing both. A lack of strong consensus on the proper constitutional vocabulary, when it comes to translating social conflicts into constitutional conflicts, adds a normative dimension to institutional pluralism, which is a characteristic feature of the European constitutional law. Under such circumstances, the European Courts do not only enjoy a considerable margin of discretion, but can also implicitly and explicitly justify the use of it on purely functional reasons.

National constitutional courts (and in general all institutional actors and all individuals) can rely on a very dense web of previous authoritative constitutional decisions. These contribute to the detailed conceptualisation of the principals involved and to the determination of their constitutional weight, and both abstract and specific terms. In particular, national constitutional vocabulary is shaped both by the constitutional debates following key constitutional decisions, and the political debates triggered by the passing of new legislation, in which the relationship between the new norms and constitutional norms is revisited.¹⁶

A European common constitutional vocabulary does not stem in an unproblematic fashion from authoritative decisions on the identity, shape and breadth of constitutional principles. Nor does it stem from a wide-ranging and vibrant political debate revolving around a common constitutional language. Indeed, the peculiar way in which legislation proceeds at the European level restrains the authoritative guidance to be derived from legislative debates, even from such debates in the European Parliament. By the same token, it certainly makes full sense to speak of the common constitutional law (i.e. the collective of national constitutions) as the deep constitution of the European Union. However, while the normative commonality underpinning the common constitutional law is very marked, it does not extend to a wide and deep background agreement on a common constitutional vocabulary. The peculiar constitutional path through which the European Union has evolved entails that contestation over the proper conceptualisation of basic constitutional principles is rendered endemic by the structural fact that Union law is the constitutional framework in which a (growing) number of constitutional legal orders integrate. Thus, while the constitutional principles are largely the same in all legal orders, the way that such principles are fleshed out is far from homogeneous.

Indeed, it is not far from plausible to conclude that the ubiquity of proportionality in the reasoning of the European Courts is largely the result of the European Courts operating in a far more pluralistic constitution than national constitutional courts.

¹⁶ Explicit constitution-making processes in 'revolutionary' constitutional traditions -such as the French, Italian or to a rather large extent, Spanish one- and key constitutional moments in 'evolutionary' constitutional traditions -such as the British or to a rather large extent, German one.

3.2. The five steps of the European proportionality review

The review of the European constitutionality of a legal norm is triggered by a *prima facie* or *apparent* conflict between a supranational or national legal norm, and a European constitutional legal norm. In *Cassis de Dijon*, there was a conflict between the national German law prohibiting the sale as 'cassis' of liquors having less than 25 degrees on the one hand, and on the right to free movement of goods on the other (Art. 30 TEC). In *Avoir Fiscal*, there was a conflict between a particular French norm included in the French tax code (regulating the assessment of the tax debt in the corporate income tax), and the article the freedom of establishment of companies (e.g. Article 52 TEC).

3.2.1. Step one: Figuring out the fundamental norms in conflict

The first step in the assessment of proportionality consists of determining what principle underpins the EU constitutional norm *allegedly* infringed and what principle underpins the *allegedly infringing* supranational or national legal norm. To put it differently, the first step consists of the translation of the underlying social conflict into constitutional language, i.e. into a conflict between the constitutional principles underlying each of the social positions at stake.

This translation tends to be largely taken for granted in conflicts before national constitutional courts. If it reappears it does so as one of the dimensions of the adequacy test. In the not so frequent cases where the conflict is solved in a rather straightforward manner because the norm breaching one of the constitutional interests at stake is found incapable of realising the constitutional principle intended to justify it. In most cases, however, the disagreement between the parties does not extend to the 'translation' of the conflict into constitutional language, but rather focuses on the way in which the conflict has to be resolved. This is largely due to the strength of the underlying consensus on the vocabulary of constitutional law and politics, or likewise, on the consensus on the categories by reference to which to characterise constitutional conflicts.

3.2.2. Step two: Assignment of the argumentative burden

Once the two principles underlying the norms in an apparent conflict are identified, the next step is to determine the *prima facie* normative centre of gravity of the case, or similarly, what is the principle to be regarded as *prima facie* being infringed and finally, what is the principle considered as *prima facie* *infringing* the other. This depends on which of the conflicting principles is regarded as being normatively more salient in the concrete factual and normative setting of the case.

The determination of the centre of gravity of the case is of great practical importance, because it determines which party bears the argumentative burden and which party enjoys the argumentative benefit. It is important to notice that the commutative principle does not clearly apply to legal argumentation. Whether we start considering if it is justified to breach freedom of movement of goods to realise the collective goods of consumer protection or protection of human health, or, whether

we consider if it is justified to breach the collective good of consumer protection or the protection of human health to realise the subjective right to free movement of goods, may be far from irrelevant. The party bearing the argumentative burden may still prevail, but has to make a bigger argumentative effort. Therefore, the way we allocate the argumentative burden makes a big difference. It may indeed mark the difference at the end of the day.

3.2.3. Step three: Adequacy

The third argumentative step requires us to assess the adequacy of the *allegedly infringing* norm to realise the principle underlining it. Put differently, we have to test whether, as a matter of factual possibility and not merely legal possibility, the action that infringes one principle actually realises the other.

3.2.4. Step four: Necessity

The fourth step consists in determining the *necessity* of the allegedly infringing norm, or put differently, whether there is no other normative alternative that would also realise the principle underlying the allegedly infringing norm while not affecting the allegedly infringed principle (or infringing it to a significantly lesser extent).

Necessity calls for consideration of factual possibilities, but contrary to what is the case in the adequacy step, such possibilities tend to be largely hypothetical. The court may be provided with actual empirical evidence of the consequences of the allegedly breaching norm, but can only speculate on the consequences of an *alternative* derivative rule that would solve the conflict in a different fashion.

3.2.5. Step five: Proportionality in a narrow sense

Finally, we have to weigh and balance the conflicting principles, so as to decide which should carry more weight in this concrete case. The weight to be assigned to each of the competing principles depends on the two variables: the *abstract weight* of the principle (resulting from the 'place' the principle has in the constitutional system) and the *concrete weight* of the principle (which results from the degree of infringement of the principle in the case at hand). The facts that render visible steps of translating the conflict into constitutional vocabulary and assigning the argumentative burden render the discretion enjoyed by the European Courts wider when undertaking proportionality review in a strict sense.

3.3. Five steps in proportionality as an indicator of European constitutional law being *sui generis*?

Should we conclude from the observation that the way European Courts use proportionality, requires a more nuanced reconstruction of proportionality review, that European constitutional law is *structurally different* from national constitutional law? Does this finding give comfort to the *sui generis* characterisation of the European Union and of European Union law? My view is that it does not. The very distinction of the two additional steps is the result of the perception, lacking at the national constitutional level, that European Courts are exercising massive and very relevant

discretion when translating into constitutional language the underlying social conflicts, and when assigning the argumentative burden. The point is not that national courts do not translate conflicts into the constitutional language, or that they do not assign the argumentative benefit and the argumentative burden. The point is that while the background consensus on the constitutional vocabulary largely predetermines how national constitutional courts go about these two steps, so there is no decision in a meaningful sense being taken. This is clearly not the case for the European Courts.¹⁷

To put it differently, it is not so much that European law is radically different, but that there are good reasons why some steps, taken for granted and largely unproblematic at the national constitutional level, become highly problematic at the supranational level.

As we will see *infra*, these two first steps in the way the European Courts do proportionality are indeed at the core of the tension between European and national constitutional law.

¹⁷ It should be added that the lack of a common constitutional vocabulary is a contingent feature. It is the result not of what European is a strong sense (in a deep ontological sense, if such pedantic expression is necessary), but of how it has become to be what it is. Similarly, the in-built bias in favour of economic freedoms, implicit in the automatic assignment of the argumentative burden to economic freedoms, is not intrinsic to what European Union is, but the result of a discretionary choice taken by European Courts that can be reversed.

4. Review of European constitutionality: From proportionality CJEU style to the structural bias in European constitutional law

I apply proportionality as a critical reconstructive yardstick with a view to make explicit the implicit decisions taken by the European Courts when reviewing the European constitutionality of national laws in this section. I show that the European Courts distort the meaning, salience and constitutional force of fundamental legal positions in both national and European constitutional law when 'filling in' the structural principle of proportionality with highly problematic substantive choices.

This distortion follows in particular from (1) the peculiar definition of the yardstick of European constitutionality by exclusive reference to a highly contestable conception of economic freedoms; (2) the automatic assignment of the argumentative burden to plaintiffs claiming that a national law constitutes an obstacle to the realisation of an economic freedom; (3) the re-characterisation of all constitutional positions in conflict with economic freedoms by reference to the political philosophy which the Court claims underpins economic freedoms; and (4) the application of standards of proof depending on whether evidence is being gathered regarding the adequacy and necessity of economic freedoms or of constitutional positions in conflict with economic freedoms. The European way of practicing proportionality, far from being the projection to the supranational level of the understanding of proportionality characteristic of national constitutional courts, is actually at odds, both in procedural and substantive terms, with national constitutional understandings of proportionality.

4.1. (Mis)translating the conflict: a too wide understanding of a far too narrow yardstick of constitutionality

I claim is that we need to focus on the way in which the European Courts translate underlying social conflicts into constitutional conflicts, and in particular, the way in which the European Courts characterise economic freedoms as the yardstick of European constitutionality (especially when reviewing the validity of national laws).

European legal scholarship takes for granted that European constitutionality should be determined by reference to a yardstick of constitutionality made of two key components, namely, economic freedoms and fundamental rights.

Firstly, this definition of the yardstick of European constitutionality is far from obvious, being that it is the outcome of the acceptance of the case law of European Courts themselves. The European Union was not constituted through a formal constitution defining a 'canon of constitutionality' or 'constitutional yardstick'. The European Union was instead established by a set of international Treaties that came to be constructed in a constitutional key by the European Court of Justice (with such a reading being progressively accepted, more tacitly than expressly, by national institutional actors). European Union law is based on the regulatory ideal of a common constitutional law, only partially fleshed out in the founding Treaties and

national constitutions.¹⁸ As a result, the yardstick of European constitutionality is not formally established in a single authoritative constitutional document. Instead, the European Courts have played and keep playing a key role in defining the implicit constitutional yardstick. This role is at the core of the process of *transformative constitutionalisation*, the internalisation by constitutional actors (especially, national constitutional actors) of the constitutional character of European Union law.¹⁹ The process was rather belated. While the Court had enunciated the core structural principles governing the relationship between Community law and national constitutional law in the early 1960s (*Costa*,²⁰ jointly with *Van Gend*,²¹ laying the ground for both the reading in a constitutional key of the Treaties and for the primacy of Community over national law, the two foundational blocks of European constitutionality review), it was only in the 1970s that structural principles were filled in with constitutional substance, or what is the same, that the yardstick of European constitutionality was defined. The leading case on the protection of fundamental rights (*Internationale*²²) was decided in 1970 (a year after the first tentative affirmation of the unwritten principle of protection of fundamental rights in *Stauder*²³), and the leading case on the direct effect of economic freedoms was *Dassonville*,²⁴ decided in 1974. The Court turned the Treaty provisions enshrining the different fundamental freedoms into key components of the yardstick of European Constitutionality by means of affirming that the articles in which they were affirmed were to be acknowledged direct effect.²⁵

Secondly, the canon of European constitutionality may seem *prima facie* as largely equivalent in both functional and normative terms to national canons of constitutionality. However, the two canons are substantially different once we

¹⁸ Fossum and Menéndez 2011.

¹⁹ *Ibid.*

²⁰ Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 6.

²¹ Case C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

²² Case C-11/70 *International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125.

²³ Case C-29/69 *Stauder v City of Ulm* [1969] ECR 419.

²⁴ Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 82.

²⁵ In formal terms, thus, the role played on national constitutional texts by the norms affirming a 'constitutional core' (as the eternity clause in the German constitution, the norms distinguishing different review procedures and making more onerous to amend certain provisions of the Constitution in other constitutional traditions; or the norms defining the set of fundamental rights whose protection citizens can directly seek from the constitutional court) is played in Community law by the criteria which make of a Treaty provision one with direct effect. The "economic" side of the substantive constitutional yardstick was only very preliminary developed in the early case law of the ECJ on customs (as in *Van Gend en Loos*) and in the old Article 95. But it was fleshed out in earnest from mid-1968 onwards, that is, once the fourth stage towards the common market was completed. From that date onwards, the ECJ considered that three of the four economic freedoms (and the principle of undistorted competition) were so defined in the Treaties as to merit to be acknowledged direct effect once the transitory phases were over. The fourth freedom (the free movement of capital) was so circumscribed and limited in the original drafting of the Treaties as to be considered as not having direct effect. That would remain being the case until the 1988 Directive (ad intra) and the Maastricht Treaty (1991) radically changed the Community legal discipline and consequently the status of this freedom, which within a decade moved from Cinderella to über-freedom.

analyse them in more detail. There is no doubt that fundamental rights are a key component of the canon of national constitutionality, while economic freedoms can be regarded as the operationalisation of the right to private property and entrepreneurial freedom, and consequently, as part of the yardstick of constitutionality *as* fundamental rights. However, the emphasis on economic freedoms is clearly *particular* and *peculiar* of European Union law. In national constitutional vocabularies, however, the fundamental status of the right to private property and of entrepreneurial freedom is highly contestable. Indeed, they are not regarded as *fundamental rights*, but as *ordinary rights*, with an abstract and relative constitutional weight lower than that of ordinary rights. It could be counter-argued that the Treaties themselves stress the importance of economic freedoms as key means of achieving the very socio-economic and legal integration that the European Union aims at. It can further be argued that this justifies the decision of the European Court of Justice to consider them as part and parcel of the canon of European constitutionality. However, the practice of the European Court of Justice has not resulted in the integration of economic freedoms as an *instrumental* component of the canon of European constitutionality, but in the implicit affirmation of economic freedoms as *the* yardstick of the European constitutionality of national laws. This is the result of the deeply asymmetric way that European constitutional review has proceeded, which has prevented an *integrated construction of the two components of the yardstick* of European constitutionality.

On the one hand, the European Court has tended to review the European constitutionality of supranational law (regulations and directives) more nominally than substantially by reference to economic freedoms, and in very deferential ways by reference to fundamental rights. Review by reference to economic freedoms has been more nominal than actual because courts have tended to search in the very regulations and directives operationalising economic freedoms for the substantive criteria by reference to which review those same regulations and directives take place.²⁶ Review by reference to fundamental rights has been very deferential, with courts finding in favour of the validity of the contested norms. On the other hand, European Courts have (rightly) defined review of national laws by reference to supranational fundamental standards as beyond their competence. As a result, not only the exclusive yardstick by reference to which national laws have been reviewed has been economic freedoms, but also the way economic freedoms have been defined

²⁶ This is the lasting legacy of the fact that under the traditional Community Method, the Council of member states was required to support unanimously a given legislative proposal for its becoming Community law in force. Even if procedurally speaking a decision of the Council (even if unanimous) was rather different from a decision taken in an Intergovernmental Conference, the fact of the matter was that a unanimous decision of the Council came close to a decision supported by a constitutional will. In fact, the ECJ tended to look for inspiration to construct Treaty provisions on secondary legislation and not the reverse. Even if qualified majority making and co-decision have changed things, the fact still is that the degree of legitimacy which a regulation or directive carries with it makes the ECJ very cautious when undertaking review based on economic freedoms. Very different considerations apply when it comes to the protection of fundamental rights. Here it is not only the case that the main reference point cannot be the decisions of the Council of Ministers (a body of an open executive nature), but the substantive contents of national constitutions.

has been totally autonomous and emancipated from the substantive requirements of fundamental rights. Indeed, as we will see, fundamental rights are regarded not as defining the very way we understand economic freedoms as canons of European constitutionality, but merely as reasons that can justify the breach of an economic freedom.

Thirdly, at the very same time that European Courts have affirmed economic freedoms as the yardstick of European constitutionality of national laws, they have radically expanded the breadth and depth of economic freedoms. This transformation has been the result of a double process.

First, the European Courts have assimilated all economic freedoms to the right to free movement of goods, to a quite large extent overcoming the literal tenor of the Treaties. This strongly suggests a differentiated analysis of the right to free movement of goods on the one hand and the other three economic freedoms on the other hand. The Treaties, today as when they were written, do not contain a single chapter enshrining all economic freedoms nor clearly assigning them a fundamental status. To start with the 'physical location' of economic freedoms, there is no single chapter dealing with all economic freedoms; rather, we find one chapter that deals with the right to free movement of goods, and there is another chapter where the other three economic freedoms are enshrined. Interestingly, between these two chapters we find a chapter consecrated to common agricultural policy. It is of essential importance to notice that the *means* of achieving the goals are very different in each case.

In the original Treaties there was a detailed calendar aiming at the realisation of free movement of goods largely by means of reducing and then eliminating customs duties, quantitative restrictions and measures with an equivalent effect. A common market on agricultural products was envisaged, but this was expected to result from public intervention in both structures of production and on the very prices at which agricultural products were sold. Finally, the other three economic freedoms were to be realised *after* positive 're-regulation' of the key background conditions of each of the economic freedoms (indeed, the Treaties explicitly aimed at guaranteeing not free movement of capital *tout court*, but freedom of payments). This structure of the Treaties is not casual or random, but it reflects the socio-economic vision underlying the post-war democratic constitutions (even if, less so originally, the socio-economic policy implemented under the referred constitutions). The common market aimed at liberalising movement of goods, while creating the conditions for national autonomous regulation of socio-economic policies, something that was regarded as requiring regulation of labour and capital. In other words, external trade in goods was to be turned into an engine of economic growth, while the regulation of labour and capital (whether national or supranational) was to ensure the autonomy and actual capacity of member states to pursue economic policies aiming at realising the key objectives of the Social and Democratic *Rechtsstaat*.

This structure calls for a differentiated construction of the right to free movement of goods on the one hand, and the other three economic freedoms on the other hand, which was largely corresponding to the case law of the European Courts until the eighties.

What we find from the eighties is a progressive construction of all economic freedoms (and the principle of undistorted competition) *as if the Treaty* did not contain significant literal elements pointing to the need of pursuing a differentiated interpretation. In practical terms, the European Court of Justice reconstructed the right to free movement of workers (later persons), the right to freedom of establishment and the right to free movement of capital. Additionally, the European Court of Justice reconstructed the principle of undistorted competition *in the semblance* of the right to free movement of goods, setting aside not only the Treaty's literal basis for a differentiated interpretation, but also the very different constitutional implications of each of the economic freedoms.

Second, the European Courts have reconceptualised all four economic freedoms. If, since the mid-eighties, the European Courts have originally characterised economic freedoms as operationalisations of the principle of non-discrimination on the basis of the literal tenor of the Treaties, they have favoured a new understanding of economic freedoms as self-standing constitutional standards.

Under the common market conception of the Treaties, economic freedoms aimed at operationalising the right of residents or economically active non-nationals are to be treated in the same way as the right of nationals. Thus, a right more likely to be infringed than that of citizens for the very simple reason that European non-nationals are denied the right to vote in national elections, and as a consequence, lack in most cases direct means to influence the actual content of legislation.²⁷

In the late seventies economic freedoms were transformed into self-standing constitutional norms, the substantive content of which is to be determined by reference to a transcendental ideal of freedom. The right-holders of economic freedoms are no longer non-nationals, but actually all European citizens, including nationals, as the very aim of the single market is to get rid of all borders and distinctions, including reverse discrimination and purely internal situations. Any *obstacle* to the exercise of *any* economic freedom of *anybody*, including a non-discriminatory one, was now regarded as breaching Community law. Breaches of economic freedoms are thus no longer limited to discriminatory normative patterns (which implied the anchoring of the European yardstick of constitutionality to the national one, because non-discrimination is a formal, not a substantive, principle), but are now extended to cover any 'obstacle' to the realisation of the economic

²⁷ Their right not to be discriminated through the enjoyment of Community fundamental rights and economic liberties compensates the democratic pathology stemming from the mismatch between the circle of those affected by national laws and those entitled to participate in the deliberation and decision-making over national laws. This is perhaps the core implication of Weiler's principle of constitutional tolerance. See Weiler 2002.

freedoms (something which by definition could not be determined by reference to national constitutional standards).

The shift from the common to the single market conception of economic freedoms in particular and of the internal market in general is to be traced back to *Cassis de Dijon*. In that case, the ECJ established a derivative constitutional rule according to which goods in compliance with any national regulatory standard should be allowed unhindered access to all national markets, as all national regulatory standards would realise a functionally equivalent regulatory function. Indeed, the Commission drew the conclusion that the derivative constitutional rule affirmed in the *Cassis* case could be generalised into the wider paradigm of the mutual recognition of laws. Mutual recognition, the Commission claimed, rendered unnecessary positive European regulation before incorporating specific goods or sectors to the *common market*.²⁸ This jurisprudential move was fully confirmed when the line of jurisprudence in *Cassis* was extended to the other three economic freedoms,²⁹ which was a further step in the remaking of the other three economic freedoms in the semblance of free movement of goods. The shift was normatively crowned in the ruling in *Martínez Sala*,³⁰ as the European Court of Justice started to refer to citizenship as the new fundamental principle which economic freedoms operationalised under this new paradigm (and in the process, identifying European citizenship with a set of economically based, even if not economically conditioned, faculties).³¹ Later judgments such as *Viking* and *Laval* are concrete applications of this new understanding of economic freedoms.

At this point, it is necessary to take stock of what the ‘obstacle’ conception entails from a constitutional perspective. The obstacle conception implies a transcendental yardstick of European constitutionality, emancipated from national constitutional law, and mysteriously derived by the Court from the rather dry and concise literal tenor of the Treaties.

First, European constitutional law emancipates itself from national constitutional law. The substantive content of economic freedoms while understood as an operationalisation of non-discrimination was still determined by reference to national constitutional law. What economic freedoms required was, but that non-nationals were treated in the same way as nationals. But once there is an autonomous substantive content of economic freedoms, they require more than equal treatment. They require being treated in line with what the autonomous substantive content of

²⁸ Cf. ‘Declaration of the Commission concerning the consequences of the judgment given by the European Court of Justice on 20 February 1979 (“*Cassis de Dijon*”), OJ C 256, of 30.10.1980, pp. 2 and 3.

²⁹ Key leading cases were Case C-76/90, *Säger*, [1991] ECR I-4221; Case C-55/94, *Gebhard*, [1995] ECR I-4165; Case C-415/93, *Bosman*, [1995] ECR I-4921; and after the entry into force of Directive 88/361 on free movement of capital, Case C-163/94, *Sanz de Lera*, [1995] ECR I-4821. On the literature, see Castro Oliveira 2002, Hatzopoulos and Uyen 2006, Wymeersch 2002, Mohamed 1999, Landsmeer and Flynn 2002, Andenas, Gütt and Pannier 2005. An overall interpretation congenial to the one hinted at here, can be found in Somek 2008.

³⁰ Case C-85/96 *Martínez Sala* [1998] ECR I-2691.

³¹ See Somek 2008 and Menéndez 2010.

economic freedoms demands, whether or not such treatment is the one required by national law, or whether it enters into conflict with what national law requires. This emancipation is especially momentous and transcendental because European courts expanded at the same time as and at the width and breadth of economic freedoms, disconnecting them from the legislative competence of the European Union. The result is the expansion of the normative force of European constitutional law, which now reaches in its revamped form (economic freedoms as self-standing constitutional standards) all four corners of national legal systems. The re-calibration of economic freedoms has resulted in a massive growth of the horizontal effect of European constitutional principles. Areas of national law that had not been much Europeanised through supranational law-making (such as personal tax law) or which seemed clearly outside the scope of the Treaties (such as non-contributory pensions), were *absorbed* into European constitutional law, with national policy decisions being progressively subject to a review of their European constitutionality. This is why we are confronted with vertical conflicts, in which the collision between supranational and national law is not the result of a horizontal conflict among national constitutional norms competing to define the common, collective standard, but rather the result of a conflict between an autonomously defined supranational constitutional standard as well as national ones (even most or even all national constitutional standards, viz the kind of situation underlying Viking or Mangold). Indeed, *Cassis* implies the idea of a constitutional space in which economic freedoms do not mediate the constitutional validity of any national legal norm. Indeed, the idea of a *diagonal* conflict (as in Joerges' theory of constitutional conflicts) is either quaint or obsolete if one embraces *Cassis*, or else it constitutes an implicit vindication of the old understanding of economic freedoms as principles of non-discrimination.

Second, control over the substantive shape of integration shifts from the law-making process (precisely at the time when that was becoming potentially democratic with the direct election of the Members of the European Parliament) to the constitutional adjudication process into which preliminary requests have been turned into processes of review of the European constitutionality of national statutes. To put it differently, if one endorses *Cassis de Dijon*³² and *Centros*³³, one is endorsing not a process of juridification (as these are matters which are within the realm of the law anyway) as a process of judicialisation. As the shape of economic freedoms as constitutional standards became progressively specific, the negative move in mutual recognition was harder to combine with the positive move of re-regulation, because the combined effect of the constitutional decisions by the European Court of Justice was to foreclose the realm of national legislative autonomy. *Centros* is, indeed, a poignant case. The best illustration of how far the judgment reinforced the structural power of capitalists and weakened the taxing and regulatory grip of the state as *longa manus* of the public interest is provided by the 400% increase of the number of 'shell' companies constituted in England after *Centros*, most of which were German.³⁴

³² Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

³³ Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* ECR I-1459

³⁴ The figures are from Becht, Mayer and Wagner 2008.

It should be added that the more the Court has developed its jurisprudence, the more it has foreclosed the actual realm of re-regulatory discretion on the side of the member states. This is, in my view, fully illustrated by the tragic case law of the Court on personal taxation,³⁵ where the much maligned harmonisation has, to a large extent, progressed thanks to the iron fist of market adaptation accelerated by the ECJ. The decoupling of the breadth and width of European constitutional review from the legislative competence of the European Union leads indeed to the judicial empowerment of big market actors, equipped now with legal tools to subvert political integration. The price of substituting politically led harmonisation by market-led harmonisation is always paid in the hard currency of (a lesser modicum) distributive justice, in flat contradiction with the basic principles of the Social and Democratic *Rechtsstaat*.

4.2. Automatic assignment of the argumentative burden

The development of a jurisprudential bill of rights entails not only defining which rights are *fundamental* (something on which there is far from being complete agreement among the member states), but also how different fundamental rights are to relate to each other (as indeed, the Social and Democratic *Rechtsstaat* is based on the full convergence, of the ideals of the rule of law, the democratic state, and the social/welfare state). The solemn proclamation of the Charter of Fundamental Rights and its later formal incorporation into the primary law of the Union should be regarded by the European Courts as authoritative decisions relieving them of many discretionary choices. However, as I will argue in the coming paragraphs, the Charter renders even more visible the problematic character of the assignment of the argumentative benefit to economic freedoms and the criteria the European Courts follow when assigning specific weight to European constitutional principles.

A fundamental feature of the review of European constitutionality of national norms is that European Courts always assign the argumentative burden to the party that argues in favour of solving the underlying conflict *against* the narrow yardstick of European constitutionality. The actual consequences of the automatic assignment of the argumentative burden are multiplied by the fact that European Courts have developed a very wide conception of what constitutes an infringement of economic freedoms.

As a result, the review of European constitutionality does not really consist in the weighing and balancing of conflicting fundamental legal positions, as in the determination of whether there are good reasons justifying *the infringement* of an economic freedom or of the collective good to undistorted competition.³⁶ This in itself

³⁵ Menéndez 2011.

³⁶ Or eventually, with the principle of non-discrimination on the basis of sex by reference to Article 157 TFEU or to citizenship to the extent that it gives rise to autonomous rights.

implies that the review of European constitutionality is seriously biased in favour of economic freedoms as understood by European Courts.³⁷

It is no longer the case that the argumentative preference granted to the narrow yardstick of constitutionality can be justified on the basis that economic freedoms and the collective good of undistorted competition were positively enshrined in the Treaties, while the principle of protection of fundamental rights were not. Since the affirmation of the principle of protection of fundamental rights in *Stauder* and *Internationale*, the solemn proclamation of the Charter of Fundamental Rights in 2000, and even more so since the full incorporation of the Charter into the primary law of the Union, such a premise is simply wrong. At any rate, it cannot be sustained by claiming that the literal tenor of the Treaties limits the *yardstick* of constitutionality of Union law to the narrow yardstick of European constitutionality.

The coupling of the automatic granting of the favour of the argumentative burden to the party that favours the narrow yardstick of European constitutionality and the very wide understanding of what constitutes a breach of an economic freedom are contrary to the characterisation of European Union law as a constitutional order. If European Union law is to be understood as the means through which constitutional states integrate by reference to constitutional norms, there is a very good case to follow the consistent practice of national constitutional courts. Such a practice is based on the case by case consideration of several relevant variables. These variables include the abstract constitutional weight of the fundamental legal positions in conflict (determined by reference to the literal tenor and systematic structure of the fundamental law itself, the constitutional debates and the interpretation consolidated in statutes and previous judicial decisions) and the specific weight of the fundamental legal positions in conflict in the case at hand (and in cases resembling the case at hand). It is on such a basis that the normative centre of gravity of each case is determined, leading to the assignment of the argumentative favour to the party advocating the resolution of the conflict in favour of the fundamental legal position that constitutes the said centre of gravity.

³⁷ The argumentative benefit granted to economic freedoms was rather inconsequential as long as economic freedoms were understood as operationalisations of the principle of equality, and thus were substantially defined by national standards. This was so because the national standards of protection of economic freedoms were the result of weighing and balancing economic freedoms with other constitutional principles, so that the renvoi to national constitutional standards implies that the argumentative benefit is based on a previous balancing undertaken at the national constitutional level. Indeed, when national norms enter into conflict with economic freedoms as operationalisations of the principle of non-discrimination, what is put into question is exclusively the personal scope of application of the national norms, not their inner normative logic. Things change considerably once we conceptualise economic freedoms as self-standing, transcendental standards defined at the end of the day by the European Courts. This is so because the Community conception of economic freedom replaces the national standard, and as such, does away with the crafted balance reached at the national level. But if that is so, there is no obvious reason why we should assign an argumentative favour to economic freedoms.

Indeed, the full acknowledgment of the constitutional nature of the Treaties *after the formal incorporation of the Charter* would require a deep reconsideration of the assignment of the argumentative burden.

This was hinted at in the opinion of the late Advocate General Ad Geelhoed in *American Tobacco*.³⁸ Geelhoed revisited in his opinion the relationship between economic freedoms and social goals in Community law. He argued that at the stage of development a decade ago (following the solemn proclamation of the Charter in 2000), Community law did not aim exclusively at the creation of a single market, but also at other fundamental legitimate goals of Community action, such as the protection of public health. The basis of the competence of the Union might still be grounded on the realization of the basic economic freedoms,³⁹ but this did not entail that the *actual* exercise of Community competences was to be exclusively aimed at market-making.⁴⁰ Indeed, some of the social goals constitute basic preconditions for a single market. This prompted the late Advocate General to hint at a radical change in the structure of the review of European constitutionality. Instead of focusing in a first step on whether a given national provision distorts the common market, and only in a second step on whether such a measure can be justified by reference to some legitimate public goal, some paragraphs of the opinion invite a shift of the argumentative burden.⁴¹

The opinion of Advocate General Pedro Cruz Villalón in *Santos Palhota and Others*⁴² might be hinting at something similar. The AG considers in particular the impact that the changes introduced by the Lisbon Treaty and the incorporation of the Charter of Fundamental Rights, must have in the solving of conflicts between freedom and establishment and fundamental collective goods. Cruz argues explicitly for recalibrating the specific weight to be assigned to the principle allegedly infringing a Community freedom in the fifth step of the proportionality argument (when considering proportionality *stricto sensu*), but seems to be favouring implicitly a thorough reconsideration of the way in which proportionality is applied in line with the new literal tenor of the Treaties. It is worth quoting at length:

³⁸ Case C-491/01 *British American Tobacco* [2003] ECR I - 11461.

³⁹ Case C-112/00, Opinion delivered on July 11, 2002, Par. 100: "The issue boils down to the following: if a (potential) barrier to trade arises, the Community must be in a position to act. Such action must, as I construe the biotechnology judgment, consist in the removal of those barriers. Article 95 EC creates the power to do so".

⁴⁰ *Ibid.* Par 106: "In other words, the realisation of the internal market may mean that a particular public interest – such as here public health – is dealt with at the level of the European Union. In this, the interest of the internal market is not yet the principal objective of a Community measure. The realisation of the internal market simply determines the level at which another public interest is safeguarded" (my emphasis).

⁴¹ *Ibid.* Par. 229: "The value of this public interest [public health] is so great that, in the legislature's assessment other matters of interest, such as the freedom of market participants, must be made subsidiary to it".

⁴² Case C-515/08, opinion of 5 May 2010.

As a result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the member states, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality.⁴³

4.3. Adequacy and necessity distorted (1): Redefining and distorting fundamental legal positions in conflict with the narrow yardstick of European constitutionality

The third set of problems concerns the fact that the European Courts systematically distort the meaning and implications of fundamental legal positions in conflict with the narrow yardstick of European constitutionality. The European Courts appraise and de facto redefine the fundamental legal positions in conflict with the narrow yardstick of European constitutionality by reference to the goal of the realisation of the single market.

When confronted with a conflict between the right to strike and the right to freedom of establishment in *Viking*⁴⁴, the Court of Justice of the European Union (CJEU) opted for not solving the conflict between the right to freedom of establishment as understood in its case law and the right to strike as understood in the constitutional traditions common to the member states, which constitute the constitutional law of the European Union. Consequently, the ground on which Article 28 of the Charter stands, but between the right to freedom of establishment as understood in the case law of the CJEU and a peculiar conception of the right to strike, in particular, the right to strike that would be *functional* to the full realization of the single market as the CJEU understands it.

Similarly, when the Court of Justice is confronted with a conflict between the right to freedom of establishment or the right to free movement of capital and the collective good of a progressive and coherent tax system (in the jargon of the CJEU the principle of coherence of the tax system), the Court does not resolve the underlying conflict so much as it redefines coherence of the tax system as the kind of coherence that would further the realization of the single market.

⁴³ Ibid. Par. 53.

⁴⁴ Case C-438/05 *Viking* [2007] ECR I-10779

By de facto redefining all conflicting fundamental legal positions by reference to the normative vision of the 'single market' underpinning the CJEU's current understanding of economic, the European Courts 'do' proportionality in a very different manner than national constitutional courts. In fact, one can actually doubt whether it is proper to speak of a proportionality review at all.⁴⁵ The national constitutional practice of proportionality takes the pluralism of constitutional principles, seriously. One of the key social tasks of constitutional law is indeed that of resolving conflicts, including conflicts involving constitutional principles. The solving of all conflicts entails that the principles at stake are far from fully realised in the case at hand. However, the principles retain their normative identity after the conflict is solved. This is certainly not the case in the case law of the CJEU. The right to strike was not only left aside in *Viking*. The way in which the Court *redefined* the right to strike implied that it was basically *defined away*. The collective good of a progressive and coherent tax system was not only defeated in the saga of cases referred to above, but redefined as a subjective right of individual citizens.

The systematic re-characterisation of fundamental constitutional positions in conflict with economic freedoms entails a structural bias in the European review of constitutionality. Instead of taking seriously the *normative point* and *underlying philosophy* of both subjective rights and collective goods, of the narrow yardstick of European constitutionality and the whole set of relevant constitutional positions, the European Courts assume that the *meta-constitutional* standard in European law are the rights to private property and entrepreneurial freedom.

In addition, European Courts assign a much higher abstract weight to economic freedoms than to fundamental rights when the two 'arms' of the yardstick of constitutionality come into conflict. While this conflict was present all through the process of European integration, the case law of the European Courts remained rather unproblematic until the late seventies. Indeed, the European Courts solved this conflict in line with the basic constitutional choices of post-war national constitutions. It is worth keeping in mind that the first cases on the protection of fundamental rights concerned in many occasions the conflict between the right to private property and the collective goals pursued through common agricultural policy. By means of giving preference to the latter, the European Courts may have been furthering European integration, but in doing that, they were solving the conflicts in a way congenial to the characterization of private property in the Social and Democratic *Rechtsstaat*. In fact, the key leading cases concerned conflicts in which Community law fostered collective goods and interests, and plaintiffs claimed that it was in breach of their right to private property.⁴⁶ However, once the European Courts affirmed an autonomous and self-standing conception of economic freedom, the tension at the core of the yardstick of European constitutionality could only mount over time. This is a typical, almost millenarian, conflict at the core of

⁴⁵ Niglia 2016.

⁴⁶ Typically, Case 4/73 *Nold* [1973] 491 and Case 44/79 *Hauer* [1979] ECR 3727, where the right to private property was invoked against regulatory powers on coal retailing and on use of agricultural land.

fundamental rights protection.⁴⁷ *Viking* and *Laval* are but late chapters in a long saga from this perspective.

4.4. Adequacy and necessity distorted (2): Proof burdens

European Courts apply different evidence standards to the parties arguing in favour of the prevalence of the narrow yardstick of European constitutionality and those arguing in favour of the prevalence of other fundamental legal positions. Such asymmetry affects both the adequacy and necessity steps of the review of proportionality, especially the latter.

Whether a measure is adequate or not to achieve a certain objective and whether there is a feasible alternative rule better at reconciling the two fundamental principles in conflict, depends largely on the assumptions we make about the external (empirical) world. Such assumptions do not follow from the principle of proportionality, but depend on substantive decisions on how we pass judgment on the probability that a future event will come to happen.

The European Courts should apply the same criteria to consider the likelihood of events whether they support the adequacy and necessity of the infringing norm or they work in the opposite direction. However, this is not always the case. The European Courts tend to lower the threshold of proof of the probability of a fact happening in the future when that fact contradicts the adequacy or necessity of the infringing principle; and do the opposite (raising the threshold of proof) when the fact supports the adequacy and necessity of the infringing norm.

The ‘effectiveness of fiscal supervision’ was one of the first ‘rules of reason’ or ‘overriding interests’ to be acknowledged by the ECJ as justifying the infringement of an economic freedom even if not explicitly stated in the Treaties.⁴⁸ The Court has turned the principle almost ineffective by applying unrealistic proof standards to member states invoking the principle. Firstly, the ECJ has systematically rejected that the curtailment of economic freedoms can be justified by any evidence of a revenue loss. No revenue loss is by itself proof that economic freedoms have to be curtailed. Secondly, the ECJ once and again has rejected the argument that the monitoring of tax compliance is hampered by ‘informative’ deficits concerning economic transactions on other member states, and thus restricting economic freedoms *ex ante* was justified. Member states have once and again stumbled on the rock of Directive 77/799, despite the fact that the Commission itself has recognised the limited

⁴⁷ What is revealing is that it is substantively identical to the ones that have been at the heart of public debate in the last years, with the revealing difference that what conflicted with collective goods was a Community protected economic freedom, and that the Court solved the conflicts according to a different normative logic.

⁴⁸ Indeed even before personal taxation was subject to review of European constitutionality in *Avoir Fiscal*. It was in the leading judgment on *Cassis de Dijon*, precisely in the ruling in which ‘rule of reason’ exceptions were first referred to, that the ECJ coined the justification (see par 8 of the ruling).

effectiveness of cross-border tax administrative cooperation,⁴⁹ and that indeed the Community seems now to be heading to automatic exchanges of tax information.

Similarly, a peculiar set of (highly artificial) factual assumptions concerns the rationale which moves tax lawyers to create complex corporate structures and incorporate companies in a multitude of jurisdictions where they have no observable business.

The ECJ has claimed that a breach of an economic freedom is justified if it is intended to avoid that ‘wholly artificial arrangements’ (my italics) are employed to reduce the tax bill.⁵⁰ This was confirmed in *Lankhorst*,⁵¹ *Marks and Spencer*⁵², *Halifax*⁵³ and *Cadbury Schweppes*.⁵⁴ Still, the residual justification is not only limited, but the phrase ‘wholly artificial arrangements’ is also indicative of a rather peculiar understanding of economic and legal realities. In line with the structural implications of *Centros*⁵⁵ and *Inspire Art*⁵⁶ on freedom of establishment, the ECJ has said that ‘the fact that the company was established in a member state for the purpose of benefiting from more favourable legislation [thus including tax legislation] does not in itself suffice to constitute abuse of that freedom’.⁵⁷ It is only an abuse when what is being used is a mere ‘letter box corporation’. Only that seems to qualify as a ‘wholly artificial’ institutional structure.⁵⁸ *A contrario*, partially artificial structures, or for that purpose, any structure that is not ‘wholly artificial’ should be considered as the exercise of economic freedoms, and consequently the justification could not be invoked. Can this be regarded as factually accurate?

⁴⁹ See for example the Commission Communication (2006) 254 on a European strategy to combat tax fraud.

⁵⁰ Case C-264/96, *ICI v. United Kingdom*, [1998] ECR I-4711, par 26: “As regards the justification based on the risk of tax avoidance, suffice it to note that the legislation at issue in the main proceedings does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation, from attracting tax benefits, but applies generally to all situations in which the majority of a group's subsidiaries are established, for whatever reason, outside the United Kingdom. However, the establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the State of establishment”

⁵¹ C-324/00, *Lankhorst*, [2002] ECR I-11779.

⁵² C-446/03, *Marks & Spencer*, [2005] ECR I- 10837.

⁵³ C-255/02, *Halifax*, [2006] ECR I-1609.

⁵⁴ C-196/04 *Cadbury Schweppes*, [2006] ECR I- 7995.

⁵⁵ Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* ECR I-1459.

⁵⁶ C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I- 10155.

⁵⁷ Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* ECR I-1459, par 27.

⁵⁸ Opinion of AG Mengozzi in C-298/05, *Columbus*, [2007] ECR I-10451, para 182 and 183: actual physical existence plus financial activity are enough to pass the test.

5. Conclusions

In this paper, I have claimed that European Courts have come to play a key role as guardians of European constitutionality. In discharging such a task, European Courts have made use of the working tools par excellence of national constitutional courts, a yardstick made up of fundamental rights and the argumentative syntax of the principle of proportionality. This has contributed to the acceptance of the self-assigned role played by European courts as guardians of European constitutionality.

Making use of the critical potential of proportionality, I approach the case law of the European Court of Justice on economic freedoms. This leads me to four key problems in the fleshing out of European constitutional law in the jurisprudence. Firstly, I find that while the affirmation that economic freedoms constitute a key part of the canon of European constitutionality is well-grounded, the ECJ has shifted its characterization of economic freedoms from operationalisations of the principle of non-discrimination on the basis of nationality and building blocks of a common market, to concretizations of a self-standing and transcendental economic freedom and vanguard of the single market. Such a shift may seem to have been endorsed (even if, *ex post casu*) by the Treaty amendments introduced by the Single European Market and the Treaty of Maastricht. However, I claim that it remains difficult to reconcile with the synthetic constitutional identity of the European Union and impossible to square with the constitutional identity of the Member states as Social and Democratic *Rechtsstaats*. Indeed, it seems to me much more plausible to conclude that the jurisprudence of the European Courts took a *wrong turn* when it shifted from one conception of economic freedoms to the other. In other words, *Cassis de Dijon* and the later jurisprudence expanding the 'obstacles' conception of breaches to economic freedoms are properly characterized as part of a 'constitutional dérapage' in the development of Community law.

Secondly, I find the tendency of the European Court of Justice to invariably assign the argumentative benefit to the economic freedoms and the argumentative burden to the principle underlying the colliding norm extremely problematic. This is difficult to reconcile with the fact that for a long time fundamental rights have been acknowledged to be part of the yardstick of European constitutionality, and have become formally and undeniably so after the formal incorporation of the Charter of Fundamental Rights to the primary law of the Union. The opinions of Advocate General Geelhoed in *American Tobacco* and of Advocate General Cruz Villalón in *Santos Coelho* could be so constructed as to become precedents of a more flexible and balanced approach.

Thirdly, I have serious objections to the standards that the European Court of Justice employs to determine the probability of events when assessing the adequacy and necessity of the norms colliding with an economic freedom. While the ECJ assumes without paying much attention to any evidence that all breaches of economic freedoms would result in a *grave infringement*, it eventually sets a too high threshold to prove the adequacy and necessity of infringing norms. This was exemplified by the fully unrealistic assumptions the ECJ makes on the alternative means on the

hands of member states to ensure the effectiveness of fiscal supervision (flatly contradicted by the several legislative initiatives of the Commission, only partially successful, to increase the degree of tax assistance, especially in the form of automatic exchange of tax data).

Fourthly, the European Court of Justice tends to fail to apply on its own terms the principles underpinning the norms colliding with economic freedoms. The breadth and scope of these principles is not only defined in the most restrictive manner, but the inner normative logic of these principles tends to be neglected. This was exemplified by considering the peculiar characterization of the overriding national interest in the coherence of the national tax system. Such a conception should be reconsidered and revised in the case law of the European Court of Justice. It does not only sever a basic source of legitimacy of Community law (the transfer of legitimacy through the key role played by the common constitutional law as the deep constitution of the European Union), but runs the risk of placing Union law at constitutional odds with national constitutional law, to the extent that the latter keeps on being inspired by the normative goal of reconciling the rule of law with the democratic and the social state. The Court should indeed take seriously the pluralistic basis of Community law, and keep in mind that its role as guardian of European constitutionality means that it together with national courts has to be especially attentive to the substantive content of the constitutional law common to the member states. Where the European Courts to persist in putting forward this peculiar understanding of economic freedoms, it is more than likely that national constitutional courts would act on the basis of their legitimate role as part of the collective of guardians of European constitutional law.⁵⁹

Having argued all that, it might not be completely improper to make in the conclusions a plea for the recalibration of the case law of the European Courts. There is a very good case for the European Courts to play a key role in the guardianship of European constitutionality. The European Court of Justice was reasonably successful in the way it discharged this task in the first decades of European integration. Not only were the rulings very attentive and indeed deeply informed by the pluralistic nature and institutional setup of the European Union, but the Court avoided pushing its autonomous characterization of the norms of Community law too far. The paradigmatic shift which followed from *Cassis de Dijon* led not only to a major structural change in the conception of economic freedoms, but also to paying much lesser attention to the pluralistic nature of European integration. The argumentative benefit assigned to economic freedoms, coupled with a tendency to distort the understanding of other colliding principles when assigning concrete weight to them and resort to biased criteria to determine the probability of future events have stressed if not severed the fundamental link between national and European constitutional law. The price of the wider autonomy in the short run may be a loss of

⁵⁹ A most benign manifestation of such a role would follow the path of the German Constitutional Court in several of its 'European' judgments, including the Lisbon judgment. A rather less benign result would ensue if national constitutional courts would limit themselves to act as guardians of the national constitutional law.

legitimacy in the long run. The Court runs a double risk in that regard. As a supranational institution, it is not in a position to search for cover in the direct legitimacy of European decision-making processes, as that direct legitimacy is still very thin. As a judicial institution, it is in a position to limit the realm of what is politically possible, but not of taking constructive political decisions – not even when the cumulative effect of its case law is the full disempowerment of all levels of government.

Finally, let me add that the characterisation of the relationship between European and national courts as a ‘judicial dialogue’ is premised on the two parties speaking a common language, or similarly, on all courts applying legal systems premised on the same normative principles through methods of reasoning and argumentation that are basically equivalent. Leaving aside whether the concept of ‘dialogue’ is really fit when describing the relationship between courts, the arguments I have put forward in this paper should lead us to the conclusion that there can be no real dialogue between European and national courts because the courts have radically different understandings both of what is the substantive content of the yardstick of European constitutionality and about the key methods of constitutional reasoning. Formal similarities (a yardstick of constitutionality pitched to fundamental rights, proportionality as the key working tool of the courts) cloak in plain sight fundamental disagreements. The growing number of constitutional conflicts pitting the European Court of Justice against national constitutional courts is a symptom of both the judicialisation of politics in Europe and of the tensions that have been explored in this paper. For a period, conflicts were largely confined to matters of competence between courts, even if expressed through different understandings of how specific fundamental rights were to be constructed. By now, as the recent rulings of the Italian and the German Constitutional Court seem to indicate, the conflict has become a fully substantive one. If European integration continues to unfold in the way it has in the last years, it is just a matter of time until constitutional conflicts with courts are but a herald of political constitutional resistance.

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