To be a constitutional judge in the European society On responsibilities and styles*

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Abstract

The EU-Treaty as well as domestic constitutional law call on all constitutional judges to conceive themselves as judges within one European society and to handle accordingly their supreme principles. First, I show that European society is a powerful legal concept to grasp what 70 years of European integration have achieved. Second, I lay out the importance of constitutional principles for European society and thereby the role of constitutional judges as their main interpreters. Thirdly, I argue that the judges of different courts hold a common, but differentiated responsibility, which rationalizes and hedges the tensions between them. Lastly, I present two archetypes of processing such tensions, one epitomized by the German Federal Constitutional Court in PSPP, the other by the Italian Constitutional Court in Taricco.

1. European society

My basic argument is to conceive constitutional law in Europe in light of European society. This is not science fiction but a scholarly reconstruction. Its legal anchor is Article 2 TEU, which explicitly refers to *society*[1].

There are many European societies: almost 3000 European public limited companies in the legal form of *Societas Europaea* and thousands of civil society organizations, ranging from the European Society of International Law to the European Society of Cardiology to the *European Society* for Spiritual Regression. The term *society* in Article 2 TEU encompasses all of these, but it means much more. It means the social whole that operates under the EU Treaty: all EU and national public institutions, all private enterprises, all private interactions between citizens.

This social whole of all institutions and relations is the broad meaning of society as in Max Weber's seminal book *Economy and Society*[2]. This meaning is common in Europe, as the European Convention on Human Rights illustrates. Many of its provisions refer to 'a democratic society' (cf. Article 6 para 1, Article 8 para 2, Article 9 para 2, Article 10 para 2, Article 11 para 2 ECHR). The Convention thereby refers mainly to citizens, but to the public institutions

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[1] The term has received little attention from legal scholars, but see S. Mangiameli, 'Article 2', in H.-J. Blanke and S. Mangiameli (eds), *The Treaty on European Union (TEU) : a commentary* (2013), at paras 35-41.

[2] M. Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie* (5 edn, 1972), esp. at 28 ff., 122 ff., 514 ff.

of the Convention states. Of course, the question remains whether European society, as a society that does not form a state, can develop and sustain democratic public institutions. Many traditional legal scholars think this is impossible, but the authors of the European Treaties clearly think otherwise, as Article 2 TEU shows.

According to the authors of the Treaties, 70 years of European integration have not produced a European state or a European people, but they have resulted in a European society. Article 2 TEU envisions a European society without a European state – not, however, a stateless society. It posits the Member States, including all their public institutions and thereby all national courts, as part of European society. The *society* of Article 2 TEU is not limited to the sphere of economic relations which Article 3 para 3 TEU addresses as the 'internal market'. Nor does it mean *civil* society, that is the sphere of social engagement, as used by Article 11 para 2 of the EU Treaty. In Article 2 TEU, *society* means, as with Weber or the European Convention on Human rights, the social whole, which encompasses the institutions of the Union and its Member States as well as all their citizens and other residents. Under Article 2 TEU, society is thus the ultimate social reference of European law.

Article 2 refers to *European* society[3] – and not to the societies of the Member States[4] – because it uses the singular, 'society'. It does not allude to the global (or world) society, because it refers to the EU Member States and to democratic values[5]. The reference to values also highlights that Article 2 does not conceive of society in opposition to the concept of *community*: The German dichotomy between society and community is of no use when it comes to Article 2 TEU.

That dichotomy goes back to Ferdinand Tönnies, who distinguished between society and community by emphasizing the specific significance that values hold for a community[6]. Following Tönnies, society is often understood as a group that is only integrated in market terms, whereas community is taken to mean a more integrated group, one integrated through values. A society has rather thin, community rather thick normative bonds. The path and terminology of the European Treaties exhibit an almost opposite logic. The Treaty maker started in 1957 with the Community of the EEC Treaty and in 2007, after half a century of integration, postulated a society based on values.

The factual statement in Article 2 TEU, namely that there is a European society, is sociologically robust[7]. Of course, numerous questions remain as to how to conceptualize

[3] CJEU, Case C-574/12, *Centro Hospitalar de Setúbal EPE and Serviço de Utilização Comum dos Hospitais (SUCH)/Eurest Portugal – Sociedade Europeia de Restaurantes Lda*, Opinion of Advocate General Mancini of 27 February 2014 (ECLI:EU:C:2014:120), at para. 40.

[4] Thus P.-Y. Monjal, 'Le projet de traité établissant une Constitution pour l'Europe. Quels fondements théoriques pour le droit constitutionnel de l'Union européenne?', 40 *Revue trimestrielle de droit européen* (2004) 443, at 453 f.

[5] On the scarcity of values in world society, N. Luhmann, 'Die Weltgesellschaft', 57 *Archiv für Rechts- und Sozialphilosophie* (1971) 1.

[6] M. Riedel, 'Gesellschaft, Gemeinschaft', in O. Brunner, W. Conze, and R. Koselleck (eds), *Geschichtliche Grundbegriffe Historisches Lexikon zur politisch-sozialen Sprache in Deutschland Bd 2* (1975) 801, esp. 830 ff.

[7] See, W. Outhwaite, *European Society* (2008).

European society and how to observe it. To interpret Article 2 TEU, it suffices to understand society as social interaction or communicative practice[8]. Legal scholars observe such practice mainly through the study of certain texts: constitutions, treaties, laws, decrees, directives, judgments, and scholarly publications.

Lawyers concentrate on juridical disputes, which are an especially intense form of social interaction and communicative practice. Accordingly, European society becomes reality in the many conflicts involving the terms of Article 2 TEU, when *European* rights, *European* justice, *European* solidarity, *European* democracy, or the *European* rule of law are fought over. European society creates itself in these disputes[9]. European law plays a constitutive role in this process, inasmuch as it conceptualizes the conflicts as European conflicts, cabins them, and renders their legal outcomes valid, effective, and legitimate.

Is addressing all Union citizens as part of a European society merely an external ascription? Or can we understand European society also as a self-description of European citizens? Sceptics will point out that just a few people concocted Article 2 TEU in the Brussels bubble surrounding the Rue de la Loi. However, most constitutions emerged in even smaller bubbles, and in processes that were less public, less dramatic, and less political than that of the Lisbon Treaty from 2003 to 2009. The latter involved a convention staged to maximize publicity, a first dramatic failure in the French and Dutch referendums, then two Irish referendums, a series of Member State ratifications with qualified majorities, and some spectacular court cases10. It seems feasible to interpret the singular society posited in Article 2 TEU in 2007 as a self-description of European citizens. In the crises of the last decade, and ultimately the Russian war against Ukraine, the perception of most EU citizens of belonging to one European society has certainly sharpened.

2. The role of constitutional judges

Constitutional judges have a particularly important role for European society, as they are the foremost interpreters of the constitutional principles that characterize this society. The authors of the Treaties, that is, the 27 Member States' political systems in cooperation with EU institutions, use constitutional principles to characterize European society. According to Article 2 TEU, European society is a 'society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail,' it is a society characterized by the values of 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.

I interpret this statement as the manifesto, identity, and constitutional core of a *democratic* society. This take is not mere academic speculation: the German government's Memorandum on the Lisbon Treaty states that the values of Article 2 TEU 'constitute the essence of a

[8] H.-P. Müller, 'Auf dem Weg in eine europäische Gesellschaft? Begriffsproblematik und theoretische Perspektiven', 17 *Berliner Journal für Soziologie* (2007) 7, at 24.

[9] J. Přibáň, 'Introduction: on Europe's crises and self-constitutions', in J. Přibáň (ed), *Self-Constitution of European Society Beyond EU politics, law and governance* (2016) 1, at 3.

[10] J.-C. Piris, *The Lisbon Treaty. A Legal and Political Analysis* (2010), at 25-63; D. Phinnemore, *The Treaty of Lisbon. Origins and Negotiation* (2013), esp. at 16 ff., 148 ff., 178 ff.

democratic society'[11]. Thus, Europeans should understand that European integration has ushered in a European democratic society. This takes the bull by the horns: Democracy is the key concept in the struggle on how to understand and develop our society.

Some will question whether Article 2 TEU can serve as the constitutional core of European society. With its many concepts it sounds much like a compromise. Indeed, it mediates between many ideas, identities, interests, traditions, and world views. Yet in the Hegelian tradition, in which I am writing, this is an asset, not a shortcoming: 'Mediation is the path of the spirit'[12]. A society's constitution, properly understood, is a system of mediation[13]. Article 2 TEU establishes the standards by which European society must seek its compromises. Compromises, i.e. mediations, characterize true democracies[14], while immediacy is the promise of hybrid or authoritarian regimes[15].

The spirit of compromise expressed in Article 2 TEU lies at the democratic heart of European society. The haggling in Brussels is what Europeans want if it produces mediations that meet the standards of Article 2 TEU. Now, these standards' meaning, if disputed, is eventually in the hands of constitutional judges, at the domestic as at the European level.

3. Common, but differentiated responsibility

European society is pluralistic. This basic principle is reflected in the pluralism of its institutions. European law is not subject to one apex court, as in India or the United States. All, and even final responsibility is common by a whole series of institutions that are integrated into different, not strictly hierarchical contexts. This is obvious for the legal basis: The CJEU's legal basis lies in the EU Treaty, that of the ECtHR's in the ECHR, and that of the Member State courts' in their respective constitutions. The judges swear different oaths of office. At the same time, all courts are under the principles expressed in Article 2 TEU. Thus, all courts have a common but differentiated responsibility.

Already the CJEU and the ECtHR share a common, albeit differentiated, responsibility for European law and European society. The same applies to the courts of the Member States. The legal basis for their European responsibility is contained in Article 4 para 3 TEU, the mandate of the Member State courts under European law, and the 'Europe clauses' of the Member State constitutions. It also follows from the rule of law principle: Often, a decision by the Luxembourg or Strasbourg Court requires a further decision by a national court if it is to be realized in societal reality, since the CJEU and ECtHR generally cannot overturn national decisions[16]. Structurally, common responsibility results from the responsibility for one's own

[11] Memorandum on the Treaty of Lisbon of 13 December 2007, *Bundestag* Document BT-Drucks. 16/8300, at 133, 153.

[12] G. W. F. Hegel, 'Vorlesungen über die Geschichte der Philosophie I (1805-1806)', in E. Moldenhauer and K. M. Michel (eds), *Werke in zwanzig Bänden mit Registerband Bd 18* (1970), at 55.

[13] G. W. F. Hegel, 'Grundlinien der Philosophie des Rechts (1821)', in E. Moldenhauer and K. M. Michel (eds), *Werke in zwanzig Bänden mit Registerband Bd 7* (1970), para 302, addition.

[14] D. Innerarity, *Democracy in Europe. A Political Philosophy of the EU* (2018), at 61 ff.

[15] G. Frankenberg, *Autoritarismus. Verfassungstheoretische Perspektiven* (2020), at 255 ff.

[16] There is an exception concerning the Central Banks. CJEU, Joined Cases C-202/18 and C-238/18, *Rimšēvičs* (ECLI:EU:C:2019:139), paras 69 ff.

legal order, since the latter's good functioning depends on the other legal orders due to their close interweaving.

Here, the constitutional courts are of particular interest because the case law of the CJEU and the ECtHR has affected their traditional role more than that of all other courts. While the powers and importance of most Member State courts has increased as a result of their Europeanization, the monopoly of the constitutional courts on controlling the legislative power has come to an end. Scholars have researched the resulting conflict intensively. Ideal-typically, the constitutional courts have two options: to resist[17] or, in view of their European responsibility, to participate[18].

All constitutional courts have accepted change, but with significant differences. Most have actively promoted much of the change triggered by the CJEU and the ECtHR. One should particularly note their recognition of the precedential effect of CJEU and ECtHR decisions. Moreover, with regard to the CJEU, constitutional courts withdrew most of their review of national acts of transposition. Some even made the violations of the duty to refer cases to the CJEU sanctionable under domestic law. The apotheosis of a supportive attitude is when a constitutional court complies with its duty to refer a legal question in a preliminary ruling procedure to the CJEU, and implements the CJEU's decision on the matter[19].

At the same time, Member State constitutional courts have positioned themselves as review bodies vis-à-vis the ECtHR and the CJEU, usually by invoking democracy or identity. The dispute about the scope of the primacy of EU law is well known. The doctrine of the CJEU assumes Union law's unconditional primacy over the constitutional law of the Member States[20]. While the Member State constitutional courts recognize this primacy in principle, they impose provisos that enable them to check the CJEU.

This dispute is symbolic of the fundamental structures of European public law and belongs to basic legal knowledge. In this way, legal education engraves European pluralism into the legal worldview of future generations, just as they were previously schooled in Kelsen's pyramid of norms. They learn that in European society, not every important question must be definitively resolved, that its controversial nature can be part of a democratic society.

The political sphere lives well with the openness that inheres in this constellation. On the one hand, policymakers have never attempted to correct the CJEU's case law on primacy, although the many amendments to the Treaties granted them numerous opportunities to do so[21]. The Member States have also never complied with the demand, advocated by prominent

[17] Paradigmatically, J. Komárek, 'Why National Constitutional Courts Should not Embrace EU Fundamental Rights', in S. de Vries, U. Bernitz, and S. Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument Five Years Old and Growing* (2015) 75.

[18] Paradigmatically, D. Paris, 'Constitutional Courts as European Union Courts. The Current and Potential use of EU Law as a Yardstick for Constitutional Review', 24 *MJ* (2017) 792.

[19] M. Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure', 16 *GLJ* (2015) 1331.

[20] K. Lenaerts, J. A. Gutiérrez Fons, and S. Adam, 'Exploring the Autonomy of the European Legal Order', 81 *ZaöRV* (2021) 47.

[21] K. J. Alter, 'Who Are the ‚Masters of the Treaty'? European Governments and the European Court of Justice', in K. J. Alter (ed), *The European Court´s Political Power* (2009) 109, at 128 f.

voices, that a court of competences replace or even review the CJEU[22]. They have even explicitly supported its case law on primacy: in 2009 in Declaration No. 17 to the Lisbon Treaty. On the other hand, however, policymakers have never attempted to establish the remedy of appeal so that the CJEU (or ECtHR), as superordinate courts, could invalidate the judgment of a national constitutional court. Nor have the Member States taken up proposals to entrench, in national law, the Member State constitutional courts' duty to refer[23]. Carl Schmitt identified this point with his observation that a genuine federation the question of who has the final say remains open[24].

Following the President of the Austrian Constitutional Court Christoph Grabenwarter, who is much propelling the cooperation of constitutional courts in Europe, the specific responsibility of the Member States' constitutional courts can be summarized in three functions, namely of connection, legitimation, and review[25]. The *function of connection* expresses the fact that the constitutional courts form an important link between the state courts and the European courts. Conversely, constitutional courts are often the first courts to engage new, constitutionally relevant case law from the CJEU and ECtHR in detail and thus introduce it into domestic legal discourse. There are many channels of communication.

Furthermore, constitutional courts have a *function of legitimation*. By processing European decisions and citing them affirmatively, they grant them additional legitimation, which is often decisive for domestic reception. The *function of review* is closely related to this: Some constitutional courts claim the power to review CJEU and ECtHR decisions and to be able to impede their effects in the domestic legal order. We can interpret this review function constructively as belonging to the checks and balances of European public authority, so that the Member State courts assume European responsibility. The arguments mostly revolve around the identity of the national constitution.

Thus, conflicts are bound to occur, particularly when it comes to the interpretation and application of the constitutional principles that are enshrined in Article 2 TEU. It is important that such conflicts do not escalate, meaning that they must be managed in the light of common responsibility. In this context, it is conducive that the interaction between the courts in the European legal space is very flexible. This flexibility expresses a remarkable development. The Kelsenian model of constitutional jurisdiction offers only limited possibilities, since it only provides for the nullity of the act found to be flawed. By contrast, in the European multi-level cooperation of legal orders, there are many options, but there is never the hard legal consequence of nullity[26].

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[22] J. H. H. Weiler *et al.*, 'Certain Rectangular Problems of European Integration', *Project IV/95/02, European Parliament Directorate General for Research* (1996) at 69.

[23] J. Bergmann and U. Karpenstein, 'Identitäts- und Ultra vires-Kontrolle durch das Bundesverfassungsgericht. Zur Notwendigkeit einer gesetzlichen Vorlageverpflichtung', 4 *ZEuS* (2009) 529.

[24] C. Schmitt, *Constitutional theory* (2008), at 387 ff.

[25] Christoph Grabenwarter, „Zusammenfassung der Ergebnisse der vorangegangenen Sitzungen für den XVI. Kongress der Konferenz der Europäischen Verfassungsgerichte", in: Verfassungsgerichtshof der Republik Österreich (ed.), *Die Kooperation der Verfassungsgerichte in Europa. Aktuelle Rahmenbedingungen und Perspektiven*, Wien 2014, S. 174-179.

[26] F. Schorkopf, *Staatsrecht der internationalen Beziehungen* (2019), at 40 ff.

The ECtHR's judgments are essentially declaratory in nature. As a result, they already grant the States parties leeway in remedying a declared violation of the Convention. The possibility of appealing an ECtHR decision before the Grand Chamber of the ECtHR also contributes to this flexibility. In this way, the ECtHR, in its most authoritative composition, can correct chamber decisions that have given rise to serious conflicts[27].

The CJEU has greater authority than the ECHR. Nevertheless, it, too, demonstrates flexibility. Its doctrine of primacy shows as much. In the 1960s, it was disputed whether the primacy over national law established in the *Costa/ENEL* case should be conceived as a primacy of validity, with the consequence of nullity, or merely as a softer primacy of application. The softer solution prevailed. Furthermore, the operative part of CJEU judgments – that is, the decision's holding – offers possibilities to handle conflicts constructively. The CJEU often limits itself to providing the national courts with guidance, leaving them not only with the actual decision but also with the balancing of interests in the individual case[28]. The *Taricco* case shows that Article 267 TFEU can even serve as a kind of legal remedy against an earlier CJEU decision, meaning that the CJEU can correct its decision in the light of the constitutional courts' objections[29].

The relevant doctrines of the constitutional courts are also extremely flexible. One might view them as a joker in the courts' power game[30]. The common responsibility is reflected in the fact that this joker is only very rarely played to take a trick. It is widely held that Union law should remain unapplied only as a means of last resort. A constitutional court has to justify such a move with a grave threat to fundamental constitutional principles. Moreover, it should first give the CJEU the opportunity to remedy the conflict.

4. The German and the Italian Style

Common responsibility is exercised in very different ways. Ideal-typically, we can distinguish between a maximalist style, which insists on a right to the final say, and a minimalist style, which is relational. The German Constitutional Court stands for the former and the Italian Constitutional Court the latter.

When the German Constitutional Court perceives a conflict between EU and constitutional law, it tends to tell the European Court of Justice in pithy terms within what limits it is prepared to accept the primacy of EU law. We need only consider the reaction of the Karlsruhe Court to the broad interpretation of the Charter's scope in *Åkerberg Fransson*. Two

[27] Exemplarily, the *Horncastle Saga*, ECtHR, *Al-Khawaja and Tahery v. United Kingdom*, App. No. 26766/05 and 22228/06, Judgment of 20 January 2009, ECHR 2009 – IV; *R v Horncastle and others* (2009), UKSC 14; ECtHR, *Al- Khawaja and Tahery v. United Kingdom,* App. No. 26766/05 and 22228/06, Judgment of 15 December 2011.

[28] D. Sarmiento, 'Half a Case at a Time. Dealing with Judicial Minimalism at the European Court of Justice', in M. Claes *et al.* (eds), *Constitutional Conversations in Europe Actors, Topics and Procedures* (2012) 13.

[29] L. S. Rossi, 'M.A.S. e M.B. e la torre di Babele: alla fine le Corti si comprendono... pur parlando lingue diverse', in C. Amalfitano (ed), *Primato del Diritto dell'Unione Europea e Controlimiti alla Prova della 'Saga Taricco'* (2017) 153.

[30] CJEU, Opinion of Advocate General Cruz Villalón, Case C-62/14, *Gauweiler et al.* (ECLI:EU:C: 2015:7), para. 59.

months after the CJEU's judgment, it stated – and did so, moreover, in an *obiter dictum,* that is, without cause – that the *Åkerberg Fransson* decision 'must not be read in a way that would view it as an apparent ultra vires act... The decision must thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights set forth in the EUCFR'[31]. As a rule, the German Constitutional Court leaves little room for interpretation. This is also the case here: The CJEU must interpret the precedent of *Åkerberg Fransson* narrowly if it wishes to avoid serious conflict.32 In this sense, the German Constitutional Court also established a detailed catalogue of non-transferable state tasks in the Lisbon judgment. Its formulation in the OMT lawsuit is similarly categorical[33]. The German Constitutional Court assumes common responsibility by clearly articulating its position.

In *Taricco,* the Italian Constitutional Court chose virtually the opposite approach. The case concerns the effective punishment of tax fraud to the detriment of the EU budget. Because the Italian judiciary often works slowly, such offences frequently fall under the statute of limitations, which considerably harms the protection of European interests. Therefore, the CJEU found the Italian statute-of-limitations rule to be inapplicable in the case, since it violates the principle of effectiveness under Union law[34]. The competent Italian criminal court then referred the question of whether to comply with this CJEU judgment to the *Corte*. The Corte, in turn, again referred the question to the CJEU pointing out that punishment would violate the elementary prohibition of retroactivity under constitutional law.

The order for reference 24/2017 to the European Court of Justice undoubtedly contained a threat. The *Corte* made it clear that it would likely use its strongest weapon, its *controlimiti* doctrine, if the CJEU were to uphold its Taricco judgment. Unlike the *Bundesverfassungsgericht*, however, it did not outline the decision it expected the CJEU to make. Rather, in a minimalistic move, it limited itself to declaring a conflict between a CJEU judgment and one of the highest principles of the Italian Constitution. And unlike the *Bundesverfassungsgericht*, it also did not elaborate on the principle's scope in the order for reference, leaving open what it would ultimately consider acceptable. Thus, it took the step to enter a conflict that is important for its constitutional authority while at the same time keeping practically all options open.

Both the German and the Italian approach allow conflicts to be managed constructively. The CJEU has adjusted its standards pursuant to the preliminary reference of the Italian Constitutional Court. The same applies to the *Åkerberg-Fransson* case law that responds to the German Court's criticism[35]. However, I hold that the relational Italian style better suits the courts' common responsibility, as it calls for dialogue.

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[31] BVerfGE 133, 277, *Counter-Terrorism Database*.

[32] 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 *Eur Const Law Rev* (2013) 315, at 327 ff.

[33] BVerfGE 134, 366, *OMT Decision*.

[34] CJEU, Case C-105/14, *Taricco* (ECLI:EU:C:2015:555), paras 35-44.

[35] See CJEU, Case C-265/13, *Torralbo Marcos* (ECLI:EU:C:2014:187); Case C-198/13, *Julian Hernández* (ECLI:EU:C:2014:2055).

The courts' common responsibility brings considerable costs for legal certainty and the length of proceedings[36]. But they seem an acceptable price to pay. No one should overlook the civilizational gain that inheres in the way the pluralistic European society manages its conflicts in the courts, cabins, and often resolves them. However, this civilizational gain is only achievable if the courts base themselves on a common conception of the function of a constitutional court, are aware of their common responsibility, live the fundamental European principles, and Europeanize themselves[37].

In summarizing these observations, we can turn to the metaphor that Davide Paris introduced to the discussion. It is the image of a silently growing forest in which, every now and then, a tree crashes loudly to the ground.[38] For sixty years now, the forest of European judicial cooperation, a crucial aspect of the development of European society, has been growing under common responsibility. It gives European society air to breathe. Therefore, conflicts attract a lot of attention. We are right to be concerned when we think we see a squad of judges with axe in hand[39]. But the logic of common responsibility leads us to expect that conflicts will generally not escalate.

This does not mean that we should ignore the trees that fall with a crash. The ECtHR in particular has had to struggle with cases of non-compliance[40]. But the CJEU, too, has had cases of non-compliance, especially the PSPP judgment of the German Constitutional Court's Second Senate[41]. Here, the courts were no longer able to manage the conflict together. Consequently, German policymakers had to act. They settled the problem with the least possible fuss: In a decision against which only the right wing parliamentary group of the *Alternative für Deutschland* ('Alternative for Germany') voted, the *Bundestag* declared that, unlike the Second Senate, it did not doubt the lawfulness of European action.[42] Thus, it resolved the conflict in favour of Germany's European responsibility. To me it seems better to go the Italian way, not least because the judicial branch of the European society could solve the dispute by itself.

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[36] A. Albi, 'An Essay on How the Discourse on Sovereignty and on the Cooperativeness of National Courts Has Diverted Attention From the Erosion of Classical Constitutional Rights in the EU', in M. Claes *et al.* (eds), *Constitutional Conversations in Europe* (2012) 41.

[37] See M. Cartabia, 'Courts' Relations', 18 *ICON* (2020) 3.

[38] D. Paris, 'A Falling Tree Makes More Noise Than a Growing Forest. On the Constitutional Courts' Underestimated Contribution to the Domestic Enforcement of the European Convention on Human Rights', 77 *ZaöRV* (2017) 581.

[39] F. C. Mayer, 'Auf dem Weg zum Richterfaustrecht? Zum PSPP-Urteil des BVerfG' *Verfassungsblog* (7 May 2020).

[40] A. von Staaden, *Strategies of Compliance with the European Court of Human Rights* (2018).

[41] S. Cassese, 'Il guinzaglio tedesco' *Il Foglio* (19 May 2020); J. Imad, 'Nicolas Goetzmann: ‚L'Allemagne cherche à germaniser le droit européen" *Le Figaro* (6 May 2020); N. O'Leary, 'How a German Court Fired a Shot that Could Unravel the EU' *The Irish Times* (13 May 2020); C. Reiermann, 'Dieses Urteil ist ein Attentat' *Der Spiegel* (8 February 2020).

[42] Online services of the German Bundestag, *Bundestag: EZB hat Karlsruher Vorgaben zu Anleihekäufen erfüllt* (2020), available at https://www.bundestag.de/dokumente/textarchiv/2020/kw27-de-anleihekaeufe-703660 (last visited 11 March 2022).