Op-Ed

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The storm provoked by the German Federal Constitutional Court (FCC) with its decision in *Weiss* (English translation here), led to the resurfacing of the almost forgotten idea of a hybrid constitutional organ. That hybrid composition is due to the inclusion of national constitutional judges and judges of the Court of justice of the European Union. Whether such an idea is a mere rainbow after the storm or indispensable for the completeness of the EU’s system of legal remedies has prompted a stimulating academic debate. Leading this debate, Professors J.H.H. Weiler and D. Sarmiento have launched a broad consultation on how to concretise such an idea. Following their invitation for collective forward thinking, they have compiled the input and have provided a reply in order to further deepen and clarify their original idea.

Following up on their reply to my input, where I suggested not waiting for a treaty revision but to formalise judicial cooperation on contentious constitutional matters through the ‘assistant rapporteur’ mechanism, this response will provide further details, clarifying my perception of the *via media* that constitutes the ‘assistant rapporteur’ mechanism. To that aim, this piece will recall the broader context stressing the need for a hybrid constitutional organ (I), it will then assess the current legal framework that excludes such an option (II), briefly recall the original proposal for a mixed constitutional chamber (III), and the main aims/constraints any hybrid constitutional organ should observe (IV). Finally, the proposal for an *ad hoc* advisory body will be discussed (V) as an immediate step to prepare any future formalisation of judicial cooperation by treaty revision (VI).

I. The context pleading for a hybrid constitutional organ

Constitutional frictions between the national legal orders and the EU legal order are not a recent phenomenon. They have become unavoidable since the slow but steady treatment of areas of constitutional interest by EU law. This is of course not to say that the EU institutions enjoy the prerogative of shaping areas of constitutional law by means of legislative or regulatory action. Three streams of case law, not chronologically ordered, indicate how such frictions have been shaping the EU’s legal and judicial landscape over recent decades. The first stream concerns the very protection of fundamental rights by the EU, while

the second focuses more on the material content of the standards to apply. The last stream refers to some norms and principles of constitutional rank, that allegedly require the exceptional intervention of national constitutional or supreme courts to preserve them.

Specifically, a summary of the first stream of case law can be found in the seminal case *Stauder*, paragraph 7, where the Court of Justice recognised that fundamental rights can form part of the general principles of EU law and thus need to be taken into account when assessing the validity of an EU measure. The protection of fundamental rights by EU law and the jurisdiction of the Court of Justice to uphold such protection was confirmed in another seminal case: *Internationale Handelsgesellschaft*, paragraphs 3 and 4. This case presents a transitional stage towards the second stream of case law concerning not only the protection of fundamental rights but especially their material content. This second stream already illustrates the potential constitutional frictions.

Intervening as a response from the Court of Justice to national constitutional and supreme courts in the context of *Solange I*, this case excluded the application of rights stemming from national constitutions in favour of the same rights stemming from EU law. National courts have responded with what appears to be a carrot and stick answer: as far as EU law preserves fundamental rights in an equivalent manner, regarding the national constitutions, the national judges will refrain from directly applying their national standards. If not, EU law will be discarded in favour of national constitutional law. This is the spirit of *Solange II* from the German FCC and *Frontini* from the Italian Constitutional Court. The French *Conseil d'Etat* also seems to adopt this approach in *Arcelor* with a case-by-case assessment of the equivalence of protection.

The initial exceptionality of interference of EU law with national constitutional law, combined with its limited extent, mostly to justify derogations to market related fields, allowed the *Internationale Handelsgesellschaft* stream to survive. Its survival is confirmed in cases such as *Omega* (paragraph 34) or *Sayn-Wittgenstein* (paragraph 89) where the Court of Justice recognised as part of EU law the material content of principles stemming from some national constitutions. However, the development of EU law to cover intrinsically constitutional fields, especially after the emergence of the area of freedom security and justice (AFSJ), demonstrated the limits of this second stream.

The origin of the third stream of case law can already be found in *Maastricht-Urteil*, where the FCC introduced two tests comforting its jurisdiction regarding the (indirect) assessment of EU law. The first is the ultra vires test, fine-tuned in *Honeywell* (English translation here), essentially consisting of excluding the effects in Germany of EU acts (and rulings of the Court of Justice) that, according to the FCC, are exceeding the competences transferred to the EU. The second is the constitutional identity test, fine-tuned in *Lisbon-Urteil* (English translation here), consisting in controlling the conformity of EU acts with regard to the constitutional nucleus of Germany. It is crucial to stress that this case law of the FCC does not simply concern the material equivalence of standards but rather raises definite limits to EU law and claims jurisdiction for the FCC to uphold them even in case of direct conflict with EU law.

Despite the German FCC remaining the iconic figure of the third stream of case law, it is significant to acknowledge that other national constitutional or supreme courts have raised similar claims and that the Court of Justice does not provide a clear-cut methodology on how EU law proceeds regarding those contentious constitutional issues. To give only one example outside the AFSJ, in *M.A.S.* (known also as *Taricco II*) the Court of Justice handled in an agile way the claim of the Italian Constitutional Court that the ruling in *Taricco I* could lead to a violation of Italian constitutional identity. By containing the mechanism of primacy and the subsequent obligation of the national judge to set aside national law in compliance with the *Simmenthal* doctrine, the Court of Justice preserved both the constitutional specificity of Italy and the integrity of EU law. The tension was diffused in *M.A.S.* in point 45 of the judgment, where the Court raised the absence of full harmonisation regarding the contentious point and thus excluded any direct conflict.

Generalising and explicitly recognising the articulation of any potential constitutional conflict on the basis of the degree of harmonisation regarding the issue at stake appears as a cogent methodology for potential material claims. However, as testified in *Weiss*, the situation is more delicate when the claim is merely procedural, methodological and competence related. Indeed, in the latter scenario it is no longer a matter of the extent to which EU law provides for a specific material framework. The essence of the contentious point becomes the very applicability of EU law and the way to proceed in order not to frustrate its alleged limits. The parallel judicial monologues are insufficient to resolve such issues and the broader spirit of loyalty that characterises the EU as a legal system is an insufficient remedy. It is precisely in those contexts that the usefulness of a hybrid judicial body, enjoying legitimacy from both the national and the EU level of governance, becomes obvious.

II. The current legal framework

Two provisions currently in force exclude the formal emergence of a hybrid judicial organ that would be able to rule on contentious constitutional issues. First, Article 19 TEU limits the number of judges at the Court of Justice to one per Member State. Such a limitation excludes the appointment of national constitutional judges in addition to the judges already appointed at the Court of Justice for a given Member State. Secondly, Article 4 of the Court's Statute requires that the judges of the Court do not have any other professional activity. This exclusion rules out the very possibility of nominating to the Court of Justice an active national constitutional judge, since the latter does exercise a professional activity.

In addition, Article 17 of the Statute of the Court of Justice links the validity of the deliberations with the number of judges participating. By doing so, this provision excludes any decision-making power for any person or organ outside the judges of the Court who, in accordance with Article 253 TFEU, are appointed by common consent of the governments of the Member States.

Those provisions make any formal emergence of a hybrid constitutional organ conditional upon the launching of an intergovernmental conference that would lead to their amendment. In other words, for the active national constitutional judges to be able to become judges at the Court of Justice, even with

limited participation in a mixed chamber, a long and tumultuous political phase is indispensable.

III. The proposal for a mixed chamber

To resolve constitutional conflicts, likely to affect the coherence of both national and EU legal orders, Professor Weiler and Professor Sarmiento are pleading for a formalised permanent solution through the introduction of a mixed last instance chamber. According to their proposal, such a chamber could only be solicited after the Court of Justice has provided a ruling. Procedurally, access to that last instance chamber would be managed by the introduction of a new direct action, reserved to the privileged applicants of Article 263 TEU, and a special form of preliminary reference procedure, open for that purpose to constitutional and supreme courts.

Interestingly, the proposal for a mixed chamber suggests that the latter should not rule on judgments of the Court of Justice, even in the presence of ultra vires claims, but only on the validity of the EU act at the origin of any contentious judgment. Drawing inspiration from Article 256 TFEU, the proposal retains a rather high threshold of review for the mixed chamber. Indeed, such a review will not concern simple competence breaches, falling under the 'normal' jurisdiction of the Court of justice, but will focus on manifest breaches.

IV. Preserving the autonomy of EU law: judicial cooperation as a means and goal

While supporting a rather ground-breaking reform, the proposal for a mixed chamber did not compromise any of the fundamental characteristics of the EU legal system, pertaining to the very autonomy of the EU and of its law. On the contrary, the proposal appears sensitive to preserving those characteristics of the EU's judicial system that express the procedural façade of the 'structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other' (*inter alia* paragraph 167 here and paragraph 109 here).

In that regard, both the centrality of the Court of Justice and the prominent place of the preliminary ruling procedure within the EU's judicial system are crucial components of the legal autonomy of the EU. As such, not only do they guarantee the effective functioning of its articulated system of principles and procedures, but they preserve the quintessential principle of equality among Member States. In addition, the preservation of the constitutional structure of the EU, understood as the core of its autonomy, is only logical since it forms the main criterion for the compatibility of any external adjudicatory body with EU law (*inter alia* paragraph 2 and paragraph 33). Without any attempt to assimilate a reform of the Court of Justice with the introduction of external adjudicatory bodies, it would be unrealistic and dangerous for the legal consistency of the EU not to comply with the general features of its judicial system.

A. The centrality of the Court of Justice

Entrusting to a central judicial body the coherence of the law and of the whole system, even in the presence of a complex judicial network liable to producing competing rulings, is arguably a

common denominator of any legal order. At the EU level, the drafters of the treaties have entrusted the Court of Justice with such a task. From the outset of the EU, the Treaty of Rome recognised the Court of Justice as the authentic interpreter of EU law and the only competent judicial organ to rule on the acts flowing directly from the founding treaties. The progressive expansion of the legislative and regulatory competences of the EU did not put into doubt the relevance of upholding the centrality and judicial authority of the Court of Justice. The reasons for this are as multifaceted as the EU's judicial system itself.

Maintaining the centrality of the Court of Justice is not only beneficial to individuals and companies across Europe, because of the effective material and formal rules resulting thereof. It is also indispensable for respect of the principle of legal equality among Member States and the very rejection of unilateral action within the EU. Undeniably, those parameters remain subject to balancing regarding the equally important constitutional parameters that are often solicited to challenge EU law. The centrality of the Court of Justice upholds the judicial aspect of such a balancing, avoiding its absorption by the political one and demonstrating that judicial cooperation remains subject to fundamental rules in the context of an EU governed by the rule of law.

In that light, the centrality of the Court of Justice takes a more principled perspective, because it pertains to the question of how the balance is to be traced and not whether such a balance is legitimate or needed. As a result, any procedural transposition of the specific proposal to entrust the mixed chamber with the (mere) control of the validity of EU acts should not frustrate the centrality of the Court of Justice in interpreting EU law (even if the control of the validity would be, in this context, shared between the 'current' Court of Justice and its 'new' mixed chamber). In more concrete terms, the procedural transposition of the proposal for a mixed chamber needs to exclude that the latter could act as if it was not part of the Court of Justice of the European Union.

B. The preliminary ruling procedure

To ensure full application of EU law, as well as the effective (judicial) guarantee of rights stemming thereof, the EU's judicial system 'has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law […], thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties […]' (*inter alia* paragraph 176 here and paragraph 37 here). This iterative formula does not manifest an inherent constraint of the EU to formalise or enhance judicial dialogue and cooperation because of the existence of the preliminary ruling procedure. What it stresses relates to the very capacity of the European Union to properly function and to achieve its attributed objectives.

Currently being the only formalised procedure for judicial dialogue and cooperation between the national and the EU level, the preliminary ruling procedure guarantees the participation of all national courts or tribunals. As such, this procedure empowers any national judge to seek the correct interpretation of EU law and to render rulings consistent with the latter. Aware of the

necessity not to diminish the effectiveness of the preliminary ruling procedure, the proposal for a mixed chamber expressly addresses the issue and reserves the recourse to the mixed chamber (enacted by a national supreme or constitutional court) only after the rendering of a first preliminary ruling from the Court of Justice and as an alternative to a second reference that would constitute 'a mere waste of time'.

Despite the proposal being consistent with the (very) exceptional character of the mixed chamber, it is liable to diminish the capacity of ordinary national judges to seek preliminary rulings, especially when the national supreme or constitutional courts are favouring solutions incompatible with EU law. Such a concern is not an abstract reconstruction of the established case law empowering the ordinary national judge to disregard a higher-rank national ruling that violates EU law. It results from the preoccupying context in Hungary and Poland regarding the upholding of the foundational value of the rule of law. There is no need to recall the efforts of some Polish judges for upholding the rule of law by challenging the controversial reforms initiated by their government through various preliminary references. It is however important to stress that following the *Weiss* ruling, the current head of the Polish Constitutional Court declared that, to her understanding, national constitutional courts are maintaining the last word (reported here).

In a context where controversial heads of national supreme courts could rule – even together with their peers from other Member States – on contentious but crucial issues such as those related to the independence of the judiciary in one Member State, it does not seem plausible that the preliminary ruling procedure would remain relevant. Indeed, the ordinary judge who could enact a first preliminary reference would probably be discouraged to do so since, even after a ruling from the Court of Justice, the constitutional or supreme judge of her Member State could 'activate' the mixed chamber. One could (legitimately) oppose this reservation as the proposal for a mixed chamber is limited to the review of EU acts. However, an exclusion of the arguably most fundamental issues of EU law from this new hybrid sphere of judicial cooperation and dialogue would be at least strange.

Even if one accepts the premise that the new mixed chamber could rule on issues such as the legal effect of Article 2 TEU, or Article 19 TEU and Article 47 of the Charter, the question of the relevance of a preliminary ruling and even of the very existence of the mixed chamber remains pending. Far beyond the potentially dissuasive effects on the preliminary ruling mechanism, having a mixed chamber partly composed by national judges unwilling to cooperate in good faith, and thus unable to engage in a sincere dialogue, diminishes the usefulness of the voice/exit theorem (every time the solution achieved is not their favourite, they will choose the exit either by avoiding to refer or by simply ignoring the material response). This rather exaggerated (yet unfortunately existing) configuration is not a way to reject the proposal for a mixed chamber. It is an invitation to systemically assess its concrete transposition, keeping in mind the overall issues at stake.

In my view, a proper systemic solution necessarily passes from the express recognition of an autonomous duty of loyalty, capable of clearly structuring legal relations within the EU. However, since this piece is not dealing with such

a proposal but merely with the one concerning the mixed chamber, the following analyses will exclusively focus on how an *ad hoc* advisory body could facilitate the passage to a more formalised form of judicial cooperation and dialogue.

V. The proposal for an *ad hoc* advisory body

To cover in an authoritative manner any possible aspect of constitutional friction, this hybrid advisory body should be composed not only of national constitutional or supreme judges and judges from the Court of Justice, but it should also include judges from the European Court of Human Rights (or at least its president). This alternative intermediate proposal refers to a body and not to a chamber to fully comply with the current legal framework. Its *ad hoc* character implies that the hybrid body will be composed of given members, to provide advice in the context of a given case. The *ad hoc* advisory body should not be composed at every session of judges from all 27 Member States. Only three or four national judges should be solicited for a given case, together with the representatives of the Court of Justice (the judge rapporteur in the case at hand and/or the President of the Court) and the representative of the ECHR.

Every time the context of a case (its legal basis or legal effects) presents both an EU law aspect and a national constitutional law aspect, potentially conflicting, the national ordinary or supreme judge should request the activation of the *ad hoc* advisory body. This could be the case in the context of a direct action or of the preliminary reference procedure. The grounds are also broader than those of the original proposal for a mixed chamber, since the *ad hoc* body could provide advice beyond mere competence issues. Once the demand for the activation of the *ad hoc* body has formed, the national judges from other Member States willing to participate in the preparation of the advisory opinion should manifest their will explaining the legal relevance of their future input.

The specific choice of the Member States that their national judges will be solicited in each case should be done by the president of the national court at the origin of the demand, the president of the Court of Justice and the president of the ECtHR. This decision should take into account two sets of parameters. First, the involvement of the Member States in the case at hand, to allow the directly concerned supreme or constitutional judges to express specific fears or form specific advice. Secondly, the different legal traditions and regions of Europe from which the judges providing advice are coming from. Given that the hybrid organ should not become a chamber of judicial veto (which the original proposal also excludes) or a judicial battlefield to neutralise the will of the EU legislator or the prerogatives of the EU institutions, it appears largely sufficient to have input only from a certain number of national judges.

Having an advisory role, such a body will not rule on the validity or interpretation of EU law but rather provide a formalised platform of enhanced judicial cooperation among the highest judicial authorities in the EU. In their reply, Professor Weiler and Professor Sarmiento stressed that while an advisory body of this kind might well express national concerns with an authoritative ‘voice’, the expression of national concerns already comes through the vehicle of written and oral submissions of the Member States, as well as through the Advocate General’s Opinion. As a result, settling questions of competence would

require more, namely that the national constitutional or supreme judges participate in the decision-making.

This alternative proposal fully shares the relevance of the role of the Advocate General and of the submissions of the Member States in avoiding constitutional conflicts. However, the purely judicial composition of the hybrid body (judge-to-judge) is able to effectively prevent even competence conflicts such as the latent conflict in *Weiss*. Indeed, while it would be quite uncommon for a Member State to submit, for instance, a detailed position on proportionality assessment or for an Advocate General to suggest a methodological replacement of a Union-wide proportionality test in favour of a national way of assessing it, both the mixed chamber and the hybrid body provide for a more appropriate platform.

The original proposal for a mixed chamber does secure a better exchange among the judges and thus supports a profound understanding of any legal reasons and of the relevance of such proposed changes. This could also be achieved by including the given national judge in the advisory body. The key here remains the sincere attachment of national and European judges to loyalty regarding the law and the objectives it pursues.

A. The legal basis

The Statute of the Court of Justice already provides two legal bases able to sustain the emergence of the *ad hoc* hybrid body previously introduced (composed by national constitutional or supreme judges, of at least one judge of the Court of justice and at least one judge of the ECHR). First, Article 13 of the Statute allows the nomination of assistant rapporteurs, able to assist and thoroughly inform the Court before it renders its ruling. Secondly, Article 25 of the Statute allows the nomination of experts, in this case constitutional experts, to support the Court's analyses on specific issues relevant to a given case.

1. Article 13 of the Statute of the Court of Justice

Article 13 could become the legal basis for the emergence of the constitutional rapporteurs forming the *ad hoc* hybrid judicial body. This article reads as follows:

> 'At the request of the Court of Justice, the European Parliament and the Council may, acting in accordance with the ordinary legislative procedure, provide for the appointment of Assistant Rapporteurs and lay down the rules governing their service. The Assistant Rapporteurs may be required, under conditions laid down in the Rules of Procedure, to participate in preparatory inquiries in cases pending before the Court and to cooperate with the Judge who acts as Rapporteur.
>
> The Assistant Rapporteurs shall be chosen from persons whose independence is beyond doubt and who possess the necessary legal qualifications; they shall be appointed by the Council, acting by a simple majority. They shall take an oath before the Court to perform their duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.'

The requirements and procedures laid down in Article 13 do not present any formal incompatibility for active national constitutional

judges or for the ECHR judges to become assistant rapporteurs at the Court of Justice. The nomination of all the national constitutional or supreme judges should be envisaged, together with all the judges of the ECHR. However, only a given number of those judges will effectively be involved in a given case, according to rules to be defined in the Rules of Procedure of the Court. It is worth mentioning that involving the European Parliament and the Council of the EU, as required by this provision, enhances the political legitimacy of the overall endeavour and, if adopted, diminishes the grounds for national constitutional judges to refuse participation.

2. Article 25 of the Statute of the Court of Justice

Article 25 of the Statute, procedurally 'lighter' than Article 13, introduces a mechanism empowering the Court of Justice to seek expert opinions. Read in a creative manner, it could lead to the emergence of a pool of constitutional experts serving the consistency of EU law. This provision reads as follows:

> 'The Court of Justice may at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion.'

Article 25 provides for a literally *ad hoc* nomination, according to the specificities of each case. If this provision should prevail over Article 13, the Court of Justice should revise its rules of procedure to introduce some guiding rules on the use of that mechanism for resolving contentious constitutional issues. Specifically, the number of constitutional experts charged with rendering an expert opinion should be defined, as the configurations in which the Court of Justice could refuse soliciting expert opinions for contentious constitutional matters should be delimited (for instance in the context of an urgent procedure for interim measures). The objective of such self-restraining from the Court of Justice consists in incentivising the participation of national constitutional or supreme judges by comforting loyalty and sincere cooperation.

B. Refocusing the existing forms of judicial dialogue

This proposal for an *ad hoc* hybrid body entrusts the Court of Justice with the enactment of the formalisation of judicial cooperation regarding contentious constitutional matters. Supporting that the initiative for such a cooperation-oriented body should come from the EU's highest judicial authority is not pleading for imposing participation, but demonstrating readiness for enhancing cooperation. In this context, any formal action towards the introduction of the *ad hoc* hybrid constitutional body should be preceded by a concrete coordination phase via the already existing informal settings of judicial dialogue among the Court of Justice and the national supreme or constitutional judges, as well as the judges of the ECHR.

Both Articles 13 and 25 of the Statute provide ways for enhancing and formalising constitutional cooperation without tempering the decisional powers of the Court of Justice or, by any means, affecting the formal role of national constitutional courts. Used constructively, those provisions could therefore achieve the conciliation between the pluralistic elements of the EU and the unity necessary to effectively uphold the rule of law. In that spirit, despite not being legally bound by the opinions of the *ad hoc* hybrid body, the Court of

Justice should act in a way that maintains the synergic balance between loyalty and trust.

Concretely, the Court should expressly engage in its reasoning with the position given by the *ad hoc* hybrid body. Such a scrupulous attachment of the Court of Justice to the result of the *ad hoc* hybrid formalisation of judicial cooperation should of course be followed by the same degree of implication by all national constitutional or supreme judges when they render their own rulings. Under those circumstances, any potential conflict with a judgment rendered after consultation of the *ad hoc* hybrid body would become a mere violation of the principle of loyal cooperation. It will thus justify an infringement action and, most importantly, enable the ordinary national judges and administrative authorities to merely disregard the conflicting ruling.

VI. Immediate practice to inform future steps

The immediate applicability of the *ad hoc* hybrid body, far from precluding the proposal of Professor Weiler and Professor Sarmiento, might even foster it. Given that the objective of both proposals – the one concerning the mixed chamber and the other the *ad hoc* body – is not to alter the nature or the way of expressing constitutional conflicts but rather to bring judicial cooperation within the EU at a higher level of maturity, testing the formally lighter solution of the *ad hoc* body could inform the concrete aspects of any future treaty revision on further formalisation of judicial cooperation.

With the aim of deepening the culture of loyalty, trust and sincere cooperation among the highest judicial authorities within the EU, the *ad hoc* body could ultimately function as a stimulus for a judicial 'cognitive process' able to conciliate the grounds of any potential conflict with the imperatives of coherence and effectiveness. Such a goal does not only constitute the formal expression of an EU governed by the rule of law. By smoothly integrating conflicting constitutional parameters within the EU's judicial system, it notably facilitates the upholding of the rule of law beyond the state. The rather long informal history of the European council before it became a fully-fledged EU institution could also shed some light on the relevance of letting established practice guide treaty revisions.

According to this alternative intermediate proposal, the institution that should bear the burden of any progress regarding the enhancement and formalisation of judicial cooperation in constitutional matters is the Court of Justice itself. While encouraging the Conference on the Future of Europe to formalise the existence of a hybrid constitutional chamber, the Court should also be innovative for the sake of its own mandate and for the sake of the foundational principles of the entire Union.

Panagiotis Zinonos is a doctoral researcher at the DTU-REMS program and working on a joint PhD at the University of Luxembourg and the University of Strasbourg. His research focuses on the systemic analysis of the Union and the synergy between the concepts of loyalty and trust.

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