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Conflict or concord?

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SUMMARY

The purpose of the present doctoral dissertation was, as already suggested by its title, to examine the jurisprudential response of the national constitutional (and supreme) courts of Germany, France and the United Kingdom to the primacy doctrine articulated by the Court of Justice of the European Union in relation to the claimed primacy of European Union law over national (constitutional) law. The jurisdictions reviewed included the German Federal Constitutional Court, the United Kingdom Supreme Court (as well as its precursor, the House of Lords Judicial Committee) and the French Constitutional Council. The period primarily examined ran from January 2005 to December 2015. The research question first aimed at answering the query how the relationship between the three national courts and the Court of Justice could be characterized, as based on their jurisprudential interactions in cases linked to European Union law in the 2005-2015 period. Further, the research question also sought to the proverbial lessons to be learnt from those interactions, whilst also taking account of recent developments.

Subsequent to the introduction, Chapter 2 of the thesis examined the role of constitutional courts and their traditional role as guardians of their respective constitutional orders. The chapter offers the opportunity to reflect on the origins of constitutional adjudication in this regard, particularly the question of the appropriateness of constitutional adjudication. Additionally, Chapter 2 also contained a reflection on the specific nature of the United Kingdom's system of government and the role of judicial dialogue within the wider system of EU law. Thereafter, Chapter 3 proceeds to examine the notion of primacy under EU law, including its doctrinal origins in the Court of Justice's formative jurisprudence. In this context, the chapter also engages in a comparative consideration of the primacy doctrine under EU law with the supremacy doctrines in federated countries like the United States, Canada, Germany and Switzerland. Chapter 3 then examines the preliminary ruling procedure under Article 267 TFEU and reflects on the issues encountered as a result of the duty to refer and the existence of the *acte clair* and *acte éclairé* doctrines. Another pillar of Chapter 3 was the analysis of the scholarly discussion of the theory of constitutional pluralism, which seeks to deal with the existence of two competing claims for precedence within the wider legal order on the European continent – namely those postulated by the Court of Justice, and those by various national courts.

In Chapters 4 to 6, the dissertation turns its attention towards an examination of the EU-related case law of the three selected courts, particularly placing an emphasis on answering the question whether any friction between the national courts and the Court of Justice on the issue of primacy could be discerned. The picture that emerged from an analysis of the relevant jurisprudence was a rather nuanced one, pointing to neither an imminent collapse of the EU legal order and its systemic undermining by the national courts, nor the unqualified acceptance of the primacy doctrine as stipulated by the Court of Justice in its formative case law. Rather, there is a contestation of the scope of the primacy doctrine – and to which extent it applies in individual cases. This is primarily achieved through the formulation of various jurisprudential doctrines about the outer permissible limits of EU law vis-à-vis the respective national constitutional order, respect for fundamental rights and conformity of the EU with the division of competences enshrined in the founding Treaties of the Union.

Broadly speaking, the dissertation confirmed the German Federal Constitutional Court's active engagement on issues of EU law, not the least due to the preponderance of vital jurisprudence occurring in the vicinity of the 2005-2015 period. Shortly after its creation under the Basic Law, the court established a reputation as a fierce guardian of (West) Germany's constitutional order, including in European affairs – as most famously demonstrated in its *Solange* line of cases. Its influence was not hampered by its late participation in the preliminary ruling procedure – given its prominent role, it was able to wield its influence by virtue of its significance within the European legal order. The United Kingdom Supreme Court (as well as its predecessor, the House of Lords Judicial Committee) were active in referring cases to the Court of Justice. Whereas it refrained from overtly questioning the primacy doctrine, the Supreme Court was frequently willing to use its interpretative leeway to evade the strictures of the Court of Justice's jurisprudence. The doctrine of parliamentary sovereignty, as well as the mandate conferred by the European Communities Act 1972 played pivotal roles in ensuring the relative fidelity of the UK's highest courts to the legal framework set by the Court of Justice. The French Constitutional Council, for much of its existence, has been institutionally constrained and has been reticent to refer any cases to the Court of Justice. There has been little engagement with the Court of Justice, something that has not changed since the Council's first preliminary reference to the CJEU in 2013. Whether further development of the *Question Prioritaire de Constitutionnalité* will herald a change in attitude remains to be seen – however, the Council was the least influential and active judicial body of the three examined.

In Chapter 7, the dissertation focused its reflections on the *Weiss* case which led to the first instance of open defiance against the Court of Justice on part of the German Federal Constitutional Court. Whilst the PSPP/Weiss saga itself may have been resolved in pro forma terms, its impact reaches beyond the immediate factual background of the case. Combined with a series of other recent challenges by national courts, as well as the rule-of-law crisis triggered by the Polish Constitutional Tribunal's open defiance of the principle of primacy itself (rather than its mere scope, despite protestations to the contrary by the Polish government) constitute a substantive and substantial challenge to the legal order of the European Union – solutions to which merit consideration and creativity. It is in this spirit that the remainder of Chapter 7 considers a range of options for reforming the interactions between the national (constitutional) courts of the European Union and the Court of Justice, seeking to create new pathways for legitimate contestations of the scope of the primacy doctrine, whilst enshrining the doctrine itself in the founding Treaties. The recommendations proposed in this final chapter are intended to improve cooperation between the national (constitutional) courts of the European Union with the Court of Justice, place their relationship on a more equal footing and channel conflicts in a constructive manner as to further the development of European law without conflicts spiralling out of control.