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Conflicts by Convergence and Deep Disagreements in European Constitutional Law

by

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Abstract

In this essay the question of what kind of conflicts are at stake in the context of European pluralism will be considered, with special focus on the shift from "conflicts by divergence" to "conflicts by convergence" and on attempts to conceptualise these issues by means of the concept of "complex antinomy". It will be argued that this analysis needs some refinement and the concept of "levels of disagreements" will be introduced as an alternative. A specific focus will be maintained on the impact of different interpretive methodologies: in this way it is possible to underline the structure of "deep" and "superficial" disagreements in the context of European law. In order to illustrate this point, some notes on the recent *Taricco* saga will be developed. Finally, the relevance for European constitutionalism of deep disagreements on interpretive methodologies will be underlined.

Key-words

constitutional conflicts in Europe, *Solange*/counter-limits doctrines, disagreements in the law, interpretive methodologies, *Taricco* saga

1. Introduction

The nature of contemporary European Public law as a quite peculiar, almost mysterious legal system is almost common knowledge among lawyers. The interlocking of several systems, both national and supranational, challenges our traditional understanding. For instance, the classical Kelsenian model, i.e. the pyramid of hierarchically ordered norms and authorities[I] is clearly insufficient to conceptualize the complex entanglement between the European Union and national legal systems, as a widespread literature on "legal pluralism"[II] has often underlined.

This essay does not attempt to give a comprehensive solution to these questions: here the focus will be on a specific issue, namely the kind of conflict determined by the overlap of principles between national and supranational levels. It will be pointed out that the continuous extension of EU norms in the field of fundamental rights has inevitably created an interlaced zone between national and supranational norms on rights. Scholars have duly captured this point and proposed an account of these conflicts through the notion of "complex antinomy". The leading question of this essay is whether this conceptualisation is correct overall or whether it is possible to develop a more perspicuous representation of this kind of conflict.

In section 2 the shift in the European context from conflicts due to absence of a common ground (conflicts by divergence) to conflicts caused by its existence (conflicts by convergence) will be briefly considered. In section 3 the idea of "complex antinomy" previously proposed in academic literature to conceptualize this topic will be scrutinized and some crucial difficulties will be underlined. In section 4 a more comprehensive account will be proposed, based on the notion of "levels of disagreements" in constitutional law. This concept will be further developed in section 5 where the *Taricco* saga will be employed as an example of constitutional conflict due to convergence and an account of it based on the notion of "levels of disagreement" will be furnished.

As a result, hopefully, a single tile of a much wider mosaic representing the silent but stunning clash of *lato sensu* political forces underlying legal debate on European and national rights will be set.

2. Conflicts in Europe: from Divergence to Convergence

The history of European Public law is an affair of perennial conflict both "inside" EU law and between EU and National law, thus generating an antinomy, a conflict between two rules.[III]

The internal conflict is of course at stake when we consider norms that would clearly be considered by any lawyer as belonging to the EU legal system. Opinion 2/13 of the European Court of Justice (ECJ), harshly confronting the principle of autonomy of EU law with its "opening" towards the European Convention on Human Rights,[IV] is an example in this sense.[V] Autonomy in the end prevailed, but it is hard to deny that the opinion showed a deep and crucial case of conflicting principles *inside* EU law. The principles at stake are clearly EU norms, typical of the European legal system.

This leads us to the second group of conflicts, those between EU law and National law. Intuitively, the original purely economic function of the European Communities set up the stage for spurious conflicts between National and EU law: since States feature general aims to be pursued, including fundamental rights, while the EU had an exclusively economic function,[VI] conflicts arising between the two levels could easily derive from different grounds.

During the last fifty years, however, the deep structure of European law has evolved from its original conceptual roots. A succession of fundamental decisions issued by the ECJ starting from the late Sixties produced a *corpus* of rights to be respected at the supranational level (Weiler 1991: 2417-2419 and 2437-2438). These human rights were at the same time fundamental rights: they did not only represent a catalogue of moral claims regarding human nature and justice, they also represented a legal parameter that allowed for the scrutiny of supranational norms. They were employed as grounds for legality and were, in this sense, "fundamental" for the enactment and employment of supranational norms.[VII] This of course was at least in part strategically aimed at mitigating the disruptive effects of the "primacy" doctrine and sweeten the democratic deficit (ibid.: 2417). Moreover, some reberverating clashes between the ECJ and national constitutional courts, especially the Italian and the German ones, probably had a role in fostering this evolution too. The *Solange* saga[VIII] and the progressive refinement of the Italian counter-limits doctrine[IX] forced the ECJ to develop a more and more refined set of fundamental rights to be protected

right up to the EU level, as part of the "general principles of EU law". These were developed looking both at the "common constitutional traditions" and at the international conventions on human rights accepted by Member States, in particular the ECHR as interpreted by the Strasbourg Court. This process was eventually completed once the Charter of Fundamental Rights acquired legal value in the Lisbon Treaty:[X] this represented the final codification of EU fundamental rights and the clearest example of overlap between national and EU rights. Most of the rights we can read today in the Charter were already part of the ECJ's case law (Pizzorusso 2008: 9). It is worth noting that the ECJ did not limit itself to "listing" the rights commonly shared by Member States but was creatively involved in a process of adaptation of the common traditions to the aims and the context of EU law (Cozzolino: 2003). Sometimes this approach led the Court to a case by case, almost "nonchalant" cherry picking of the most suitable traditions, so that the value of "common constitutional traditions" turned out to be purely rhetorical. As a result, in some cases harsh reactions at the national level were brought about as in the famous *Mangold* case.[XI] Nevertheless, in other cases the ECJ actually looked at fundamental rights and principles shared among many European countries before employing it as grounds for European legality. Therefore, it is in general true that due to the "National" origin of EU fundamental rights, a common ground between the supranational and the national level was little by little developed. Consequently, a new kind of conflict between EU law and national law arose.

While conflicts based on different grounds, such as those between the fundamental freedoms and fundamental rights, can be described as "conflicts by divergence" (CBDs), the new kind of conflicts are defined by the wording "conflicts by convergence" (CBCs) since a specific conflict has the *same* fundamental right as a basis.

The classical example of the kind of conflict at stake in a CBC is the *Cordero Alonso* case.[XII] According to Spanish legislation in the case of employer's bankruptcy a certain amount of money was due to fired employees, but only if recognised by an administrative or judicial body. Private agreements between employers and workers were not legally binding in this sense. On the other side, EU law – as in directive 80/987 modified by directive 2002/74 – considered every source, including private agreements, as sufficient in order to legally concede compensation.

What is relevant for us is that both norms – the Spanish one denying compensation and the EU one conceding it – were grounded on the general principle of equality before the law. The interpretation of this principle given by the Spanish Constitutional Court allowed for this specific kind of discrimination, while the interpretation of the very same principle given by the European Court of Justice did not. Considering the principles of autonomy and primacy of EU law, the case was resolved by privileging EU legislation, but what is relevant for us is that different interpretations of the very same principle triggered different and conflicting legal consequences.

How can we conceptualize this kind of conflict? Is there something new that we can learn from this? Do we need new theoretical tools to handle the peculiar conflicts that the CBC embody? The next paragraphs will be devoted to answer these questions.

3. Complex Antinomies

In order to understand the conflicts at stake here the notion of "complex antinomy" has been used in scholarship. A brief analysis of this concept, as one of the attempts to tackle the issue, will be quite useful: it will allow to both enter deeper in the details of the problem and to figure out which problems remain to be fixed. Let us try to scrutinize this notion in detail. Here is the text that we are going to start from (Martinico 2014: 1350-1351):

> "In this sense, one could say that an antinomy is complex if it cannot be resolved by looking at the relations between legal orders: in other words, starting from the assumption of the prevalence of order A over order B, we cannot say that norm x always prevails over norm y because x belongs to order A while norm y succumbs because it belongs to order B. This occurs because in an integrated and interlaced system x and y could belong to both legal orders, A and B.
>
> This situation is also characterized by the absence of a clear and univocal supremacy clause. The absence of univocal norms of collision influences the 'reducibility' and the 'resolvability' of the constitutional conflict in a multi-layered system. Looking at this scenario, multilevel constitutionalism in fact suffers from the absence of an unambiguous primacy clause. The antinomies can only be resolved on a case-by-case basis, and not by an unequivocal solution offered by a precise rule for collision norms (such as a clear and undisputed supremacy clause), because in a context like this a provision which seems to belong to the national level could actually be the repetition of another norm existing at international or supranational level".

Let us try to summarize this concept and capture its essential features. The interlaced structure of European Public law, where norms are extensively exchanged between EU and national legal systems, favours the emergence of particular conflicts that we call "complex antinomies". An antinomy is complex if and only if:

1) It is impossible to apply an intersystematic criterion according to which, if norm x belongs to A and norms y belongs to B, x trumps y in every possible circumstance thanks to A's prevalence over B. This simply happens because both norms belong to A *and* to B.

We will call this feature the *Doppelganger problem*.

2) There is no single criterion to solve the antinomy, once it has risen, or at least it is not a sufficiently clear-cut one. Thus, conflict can only be solved on a case by case base. Again, this feature is considered as a consequence of the interlaced structure of norms in the European context ("*because in a context like this a provision which seems to belong to the national level could actually be the repetition of another norm existing at international or supranational level*").

We will call this feature the *Primacy problem*.

It will be argued that this notion underlines some crucial features of CBCs, especially the lack of ultimate rule of collision, but that it also needs some refinement, especially due to the norm-source distinction that should be considered. Let us begin with vices before moving to virtues.

3.1. The Doppelganger problem

First, the Doppelganger problem shall be examined, and in order to do that we will try a little thought experiment.

Let us imagine a very simple case: in legal system A there is a single legal authority creating new norms, call it A^1; similarly, B^1 is the only legislator in legal system B.

A^1 enacts the statute D^1 according to which "it is forbidden to drive faster than 50 km/h", while B^1 commands in statute D^2 that "it is allowed to drive faster than 50 km/h". Suppose that no interpretive problem arises because of linguistic clarity, so that norm N^1 "it is forbidden to drive faster than 50 km/h" perfectly corresponds to the text D^1 and norm N^2 "it is allowed to drive faster than 50 km/h" corresponds to D^2 (interpretive

isomorphism). Now suppose then that the intersystematic criterion C^1 "norms belonging to A prevail over norms belonging to B" is valid here (so that, for example, N^1 trumps N^2).

Let us see what happens in a more complex and interlaced legal system in which norms belonging to A also belong to B and *vice versa*, such as in the European context here at stake.

a) *One-sided overlap (A)*

Suppose that A^1 enacts D^2 "it is allowed to driver faster than 50 km/h" and that, therefore, N^2 now also belongs to A. Then, N^2 belongs to both A and B, while N^1 only belongs to A. Thus we will have three norms: N^{2A}, N^{2B}, and N^1. Let us consider all possible combinations:

- N^1 and N^{2A}: in legal system A the antinomy between N^1 and N^{2A} and the consequent conflict whether it is allowed or forbidden to drive faster than 50 km/h will be solved by looking at some criteria to solve the antinomies that we can assume belong to A (*lex superior, posterior, specialis* etc). For instance, N^1 "it is forbidden to drive faster than 50 km/h" will be confronted to N^{2A} "it is allowed to drive faster than 50 km/h" and the conflict will be solved according to, let us say, the *lex superior* criterion employed in legal system A. Alternatively, system A could lack criteria of this kind, so that the conflict would remain unsolved. In any case, all of this depends on the normative context typical of A. The inter-systematic criterion C^1 is irrelevant.

When we consider the relations between A and B, it goes:

- N^1 and N^{2B}: the antinomy can be solved looking at the criterion C^1, so that N^1 prevails as a norm of A;
- N^{2A} and N^{2B}: here there is no apparent antinomy. The twin norms N^{2A} and N^{2B} are perfectly identical, so that law-applying institutions could not even distinguish the results of applying one of the two. E.g. *two* norms of the kind "it is allowed to drive faster than 50 km/h" will be confronted with no result in terms of conflict. This is probably what is meant by a wording like "we cannot say that norm x always prevails over norm y because x belongs to order A while norm y succumbs because it belongs to order B": the idea seems to be that there can be no conflict between

'x' and 'x' or 'y' and 'y'. But there is no reason not to imagine that officials could employ the C^1 criterion and consequently prefer and apply N^{2A} instead of N^{2B}, *although* the applicative consequences would be irrelevant. This may seem pure formalism, but it is not. Perfect equivalence only holds as long as we talk about *norms*, but norms do not come from heaven. Generally speaking, lawyers have to "obtain" them by means of interpretation of sources,[XIII] as we will consider in more detail later. In other words, the crucial distinction between "sources" of law, in the sense of mere legal texts to be used in order to obtain legal norms and legal norms *stricto sensu*, as the meanings of these texts, shall be remembered.[XIV] The problem of interpretation is irrelevant only in cases of perfect isomorphism, where there is only *one* norm corresponding to each source. But isomorphism is purely hypothetical and it is actually quite rare in legal practice. As a consequence, the C^1 criterion would imply that officials are bound to give precedence to A-sources over B-sources. So, they would probably have to choose between slightly different sources, whose meaning (norms) could be partly different and perhaps conflict. Therefore, the irrelevance of the antinomy could quickly disappear.

b) *One-sided overlap (B)*

Suppose B^1 enacts D^1, so that "it is forbidden to driver faster than 50 km/h" is part of authoritative legal texts in B and N^1 "it is forbidden to driver faster than 50 km/h" also belongs to B. Thus we will have three norms: N^{1A}, N^{1B}, and N^2. This situation is perfectly symmetrical to case considered in a) and the same consequences follow.

c) *Two-sided overlap*

Imagine that A^1 enacts D^2 *and* that B^1 enacts D^1 and suppose again that interpretive isomorphism is at work here, then we will have that both N^1 and N^2 belong to A and to B. Thus, we will have four norms: N^{1A}, N^{2A}, N^{1B}, and N^{2B}.

Again, either we have antinomies internal to A or to B (e.g. between N^{1A} and N^{2A}), so that *internal* criteria to solve antinomies are applied, or the possible conflicts are:

- N^{1A} v. N^{1B}: same rule, thus apparent antinomy;
- N^{1A} v. N^{2B}: N^1 prevails because of C^1;
- N^{2A} v. N^{1B}: N^2 prevails because of C^1;

- N^{2A} v. N^{2B}: same rule, thus apparent antinomy;

As a result, either the C^1 criterion applies, or we face an apparent antinomy again. In any case, there is no circumstance in which the mere overlapping between legal systems A and B *for itself* forbids the application of the criterion C^1. What could happen is that interpretive isomorphism makes it irrelevant or, if interpretive isomorphism is not working, the C-criterion will become again relevant and applicable. Thus, the Doppelganger problem is not mistaken, it is simply a special case of a more general picture, featured by interpretive isomorphism. But it is for theory to consider the whole problem and this is what must be done here: we shall refine the analysis going beyond the special case.

3.2. The Primacy problem

Let us face the second defining feature of the notion of complex antinomy. It is the Primacy problem, i.e. the lack of any viable general norm of collision in cases of conflict between the two levels of norms. The point here is that, as a matter of fact, we do not have something as a C-criterion providing a stable and general solution to antinomies between interlocked legal systems. This situation can arise either because officials do not share a C-criterion or because it is doubtful whether the relevant criterion is C^1 or C^2, C^3, etc. But, as we have seen, this problem is linked to the interlaced relations between European legal systems.

There are probably two possible ways to make sense of this claim.

The first is the literal one according to which strictly speaking the lack of a single C-criterion is caused by the interlocking, but this line of reasoning seems not to be compelling. It is certainly true that in a context like the European one the C-criterion is hardly clear, but that this depends on the overlap of similar or identical norms is more questionable. As we have seen in the previous paragraph, we can imagine a context in which two legal systems share some norms, but can still be coordinated by a C-criterion. Moreover, the hard "resolvability" of complex antinomies turns out to be nothing more than its case by case method of resolution, which is typical of many other collisions of rules, such as fundamental rights conflict in the context of national constitutional norms (Zucca 2007: 54). Thus, it is hard to consider it as a defining and essential feature of complex antinomies.

The second interpretation is the following: since the conflicting rules are "twins", a clear-cut conflicting rule would be *useless*. For instance, if principle N^1 is part of both A and B, no clear cut rule will ever be able to solve the conflict, simply because there is nothing to be solved: N^1 and N^1 cannot conflict because a rule cannot conflict with itself.

This interpretation seems to be more robust, but – as we have previously seen – holds only as long as interpretive isomorphism is at the field. N^1 can be an exact *doppelganger* only if the same wording is interpreted exactly in the same way or at least if interpretations are so similar that no conflict arise, but this is far from being necessary.

In a nutshell, it does not seem to be true that the interlocking of legal systems *for itself* entails that no C-criterion will be available to solve conflicts (first interpretation). It does not seem either to be useless *because of* this merging, apart from some marginal cases of perfect isomorphism (second interpretation). Again, the concept of "complex antinomy" is quite sound, but it seems to be created to explain some special cases where no interpretive problems arise. As a result, it emphasises and generalises the phenomenon of non-resolvability of conflicts that is likely to be quite circumscribed.

4. Conflicts by Convergence and Interpretive Disagreements

Let us try to summarize. As we saw, the overlap between national and supranational fundamental rights has determined conflicts of a new kind, between national and the supranational instances of the shared norm. For instance, if the principle of non-discrimination (and the right not to be discriminate) is shared by the Spanish and the EU levels – such as in *Cordero Alonso* – the two could conflict in an unprecedented way.

Concepts like "complex antinomy" were thought sufficient to conceptualise the specificity of this phenomenon, but they are hardly capable of doing that mainly because they lack the essential distinction between norms and legal sources and between different levels of generality of norms. In other words, the very point of paragraph 3 was to underline that if we try to understand CBCs by means of a concept that does not consider: a) that what is actually shared is a set of legal sources; and b) that legal principles can be specified in different ways; we are doomed to an incomplete understanding of the issue or at least we are forced to limit ourselves to some special cases. The analysis of the "Doppelganger" problem was aimed at showing that what could *seem* to be norm sharing is

usually merely source-sharing and that in those cases conflicts that *are* solvable by means of a general C-criterion arise. The Primacy problem, on the other hand, shows that the mere overlap between two legal systems does not prevent the possible emergence of a C-criterion.

Thus, conflicts due to different interpretations of similar sources can be a feature of interlaced systems, and the difficulties in solving the antinomy will depend on the difficult acceptance of a shared general criterion to coordinate legal systems. Yet, there is something crucial in the concept of CBC and it is fundamentally correct to search for a conceptualization that does not limit itself to underline the unquestionable lack of an intersystematic C-criterion,[XV] but also considers the area of overlapping norms as the key to understand the issue.[XVI] An essential intuition in this sense is sketched in other paragraphs of the considered essay, for when describing the *Cordero Alonso* case, a different and probably more explicative lexicon is used, namely the concept of *interpretive disagreement*.[XVII] Trying to follow this line, I depart from concepts like "complex antinomy" and try to develop a different approach to the issue that puts some pressure on agreements/disagreements between the interpreters, in particular on interpretive disagreements. Therefore, the idea is that we can learn from the shortcomings of the approach previously considered and from the argument employed to underline them in paragraph 3. What we can learn is that a specific focus should be reserved to the norm-source distinction, to the specification of norms, especially principles, and to the role (or lack) of C-criteria to coordinate legal systems.

The difficulties risen by the CBCs actually are problems of norms specification:[XVIII] a certain highly abstract and general norm has to be specified by means of interpretation. Assuming that both A and B share a certain principle N^1 and that N^1 is exactly the same in A and in B, a CBC arises when interpreters specify N^1 as N^2 in A and as N^3 in B. This is what the *Cordero Alonso* case shows.

Moreover, what A and B actually share is a set of raw legal materials, i.e. legal sources,[XIX] to be interpreted.[XX] Thus, different interpretations could already appear at this stage because of possible textual differences (Dolcetti – Ratti 2013: 314-317). If this does not happen and the interpretation is the same – so that from the similar but not identical sources S^1 and S^2 the same N^1 is derived – then it is the specification of N^1 the could determine diverging interpretations. In a sense, the problem at stake here is more exactly a

problem of sources/norms distinction: the lack of a detailed examination of this distinction is the reason why the "complex antinomy" doctrine remains confined to a special case.

As a result, we can define interpretive disagreements as "those situations where different and diverging doctrinal conceptions about the meaning of legal sources in a certain legal system are held by different participants" (Dolcetti – Ratti 2013: 307). These conflicts derive from preferences for certain interpretive methodologies held by the interpreters, which, in turn, derive from *lato sensu* ethical preferences and opinions[XXI] (at the meta-interpretative level).

In the situation we are dealing with, namely conflict over the interpretation and application of shared fundamental rights, conflict is often inevitable.[XXII] Quoting Torres Perez (2009: 11-12) on this topic:

> "Given the typical, indeterminate language of fundamental rights clauses, they admit several interpretations. Moreover, fundamental rights embrace basic values for individuals and societies so that their meanings tend to be contested. Hence, the members of a community might reasonably disagree regarding fundamental rights' interpretation".

Therefore, due to both the semantic vagueness and ambiguity[XXIII] of fundamental rights language and to the fact that their role is crucial in contemporary societies,[XXIV] disagreements about them can easily emerge. Note that in the described circumstances disagreements can *emerge*, which means that in many other cases they could remain simply hidden. As Dolcetti and Ratti (2013: 318) put it:

> "In our view, this line of argument is misleading in that from convergence on a certain set of particular solutions it infers that such solutions are univocally justified by means of the same interpretative and meta-interpretative standards. But that is a proposition which must be empirically proved, as our analysis suggests. Moreover, overlooking the fact that, legally, different courses of interpretation are available (mostly, in a diachronic perspective) obscures the fact that the common solution is merely a pro tempore 'conventionally right' solution".

In other words, mere convergence on a certain solution does not entail for itself agreement on the reasons for the solution: two interpretive methodologies M^1 and M^2 could easily converge on result N^1 and still be different.

Conversely, disagreement over the interpretation of a certain right does not necessarily entail conflict:[XXV] for instance, the scope of application of the polities in which rights are applied could be different enough to prevent conflict, although this is probably more and more unlikely in contemporary Europe.

Relying on this framework, I argue that to explain the issue we need to employ the concept of "levels of disagreement".[XXVI] CBCs can be explained if we consider that law is an argumentative practice[XXVII] in which arguments[XXVIII] are provided in order to hold certain outcomes in terms of norms. What happens in the case of CBCs is that convergence arises at the level of legal sources or at the level of some highly abstract norms (principles).[XXIX] Yet, this agreement "can emerge across disagreement or uncertainty about the foundations" of principles (Sunstein: 2007, 8): in fact, the convergence on general principles is often *superficial*. Beyond it, we face disagreement at the higher level of theory of legal interpretation. We do not share the same methodologies to interpret legal sources or at least we do not have a clear criterion to order those methodologies.[XXX] This disagreement is the reason why – for example – the Spanish Constitutional Court and the European Court of Justice interpret the very same principle in a different way.

At an even deeper level, officials often disagree about meta-interpretative canons and – at the end of the chain of justification – on some *lato sensu* ethical or ideological judgements that lie at the basis of legal ideologies.[XXXI] In other words, we agree that something counts as a legal source, but we cannot agree (1) on how to interpret it or (2) on how to specify it; both the agreement on sources and the disagreement on methods of interpretation/specification, in turn, depend on some broader ideological claims themselves interlocked in various ways.

As a result, the disagreement, that was temporarily set aside, immediately strikes back when we try to obtain particular outcomes, i.e. when we try to fix valid norms and apply them in particular cases. Thus, we have disagreement at the deep level (interpretive and meta-interpretive criteria), agreement on an intermediate ground (legal principles or sources), and again disagreement at the lower level (detailed outcomes).

Note that this account is not fully explicative of CBCs: disagreement at the level of interpretive and meta-interpretive criteria is a common feature of contemporary legal systems (Dolcetti – Ratti 2013: 314-317). Consider contexts like the US legal system: several judges are bound to interpret and apply the US Constitution and its Bill of Rights

and we can easily imagine disagreement on how to interpret the same legal materials;[XXXII] this happens in Europe in the very same way. Hence, this cannot be the pivotal point that completely explains the pluralist European context. In order to complete the picture another tile shall be added: as we have previously pointed out, legal systems such as the American have the distinction of an ultimate authority vested with supreme power to adjudicate over deep disagreements.[XXXIII] This does not happen in European Constitutional law. As a result, no C-criterion is ultimately established[XXXIV] and the hypothetical resolution of CBCs drawn in 3 cannot be put into practice.

Consequently, what distinguishes CBCs is their complex structure of convergence and disagreement: 1) deep disagreement on interpretive methodologies and on meta-interpretive criteria; 2) disagreement on the C-criteria to solve antinomies between interpretive methodologies and uncertainty on the authority entitled to do that; 3) agreement on low-level principles and on a set of legal sources; 4) superficial disagreement on detailed outcomes.

5. Conflicts by Convergence today: the *Taricco* saga

What has been argued is far from being a set of abstract or hypothetical scenarios regarding constitutional conflicts in Europe. In this section I would like to argue that CBCs are right now at the centre of European Public law and represent a "hot topic" in scholarship.

In order to do that, I will focus on the recent *Taricco* saga that currently involves a tense confrontation between the ECJ and the Italian Constitutional Court and represents an example of CBC. This case clearly shows the relevance of CBCs in European studies, since it threatens the very fundamental roots of European law. The *Taricco* saga – as we will see – could perhaps involve the application of the "counter-limits" doctrine by the Italian *Corte costituzionale*, this way determining a harsh conflict between national and supranational level.[XXXV]

As a preliminary remark, it shall be pointed out that the *Taricco* saga has been widely analysed and considered by both Italian and European scholars.[XXXVI] Therefore, here the scrutiny will be limited to a very specific point, namely the different interpretations given by the two courts to the very same principle, namely the principle of legality in criminal

law. More in detail, the focus will be on the arguments offered by the courts in holding their views. This way the concept of "levels of disagreement" previously shaped will be considered in practice, to show how different views regarding interpretation can influence the judicial application of norms. In turn, the dependence of interpretive methodologies on broadly "ethical" claims hold by the interpreters will be underlined.

Factually, the *saga* regarded VAT fraud: the defendants were charged with setting up an organization in order to conduct fake trading of champagne. In particular, the company "Planet Srl" received fake returns from shell companies and wrote the VAT off. This way, Planet deceived the Italian treasury and, since part of VAT is an EU tax, the EU treasury too.

The crime had reached the stage of preliminary hearing before the *Tribunale di Cuneo*, but – due to the complexity of investigation and to some procedural delays – the court was fairly sure that no verdict could ever be reached before the expiration to the statutory limitation period, allowing for *de facto* impunity (Timmerman 2016: 780-781). Yet, the referring judge foresaw that this very short limitation period would determine systematic impunity of VAT frauds in Italy due both to the usual complexity of investigation in tax fraud matters and to the common three-stage, long-lasting structure of Italian criminal trials. Therefore, a potential conflict between Italian and EU law was at stake, according to the referring judge, since VAT is also an EU interest to be pursued by means of national criminal law. More specifically, according to EU law and in particular according to article 325 TFEU, Member States shall guarantee effective, proportionate, and dissuasive criminal penalties (including prison) in order to prevent VAT fraud and its disruptive effects on EU financial interests. The Italian Law No. 251 of 2005, on the other hand, modifying the last subparagraph of Article 160 of the Italian Criminal Code, provided for limitation periods to be extended only by a quarter following interruption, this way conferring a possible impunity on VAT defrauders. As a result, in its *Taricco* decision[XXXVII] the European Court of Justice commanded immediate disapplication of Italy's rules on limitation periods.

It is quite interesting to look at how this conclusion was reached and in particular at the role of article 49 of the Charter of Fundamental Rights. According to the Court's decision:

> "§ 54. In that respect, several interested parties which submitted observations to the Court referred to Article 49 of the Charter of Fundamental Rights of the European Union ('the Charter') which enshrines

the principles of legality and proportionality of criminal offences and penalties, according to which, *inter alia*, no one is to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed.
§ 55. However, subject to verification by the national court, the sole effect of the disapplication of the national provisions at issue would be to not shorten the general limitation period in the context of pending criminal proceedings, to allow the effective prosecution of the alleged crimes, and to ensure, if necessary, that penalties intended to protect the financial interests of the European Union and those intended to protect the financial interests of the Italian Republic are treated in the same way. Such a disapplication of national law would not infringe the rights of the accused, as guaranteed by Article 49 of the Charter".

As we can see, the ECJ recognises the principle of legality and the principle of proportionality as belonging to EU law, but the principle of legality is interpreted as merely requiring that punishable actions or omissions already constitute crimes under National law when committed. The principle of legality is not considered as also requiring the limitation period to act retroactively: disapplication of National law that merely shortened the limitation period would not represent a violation of EU fundamental rights, since these only entail that crimes are clearly identified as punishable when committed. On the other hand, the ECJ is worried by the risk of systematic violation of EU financial interests, as clearly stated in § 42:

"§ 42. In the present case, it can be seen from the order for reference that the national legislation lays down criminal penalties for the offences at issue in the main proceedings, namely, *inter alia*, conspiracy to commit offences in relation to VAT and VAT evasion amounting to several million euros. Such offences constitute cases of serious fraud affecting the European Union's financial interests".

As a result, since the risk of huge financial loss would surely jeopardise both EU financial interests and the EU norms aimed at safeguarding them, national judge are required to dis-apply them. Moreover, once again, this would not put at risk the application of the principle of legality in criminal law, considered the limited meaning given to that norm by the ECJ.

Trying to sum up, the reasoning by the ECJ seemed to be grounded on three arguments:[XXXVIII]

1. *literal* argument: the interpretation given by the Court to article 49, especially in paragraph 54, traces the same wording of the Charter and does not add up any kind of systematic connection between article 49 and other fundamental principles of criminal law. By means of this literal interpretive methodology, the meaning and scope of the norm is limited;
2. *teleological* argument: § 42 and § 55 are quite clear in underlining the importance of financial EU interests. As a consequence, the interpretive methodology is set up and norms are "built" so that they can safeguard this specific goal;
3. *authoritative* argument:[XXXIX] the ECJ employs an external, but authoritative and trustworthy source, namely decisions by the European Court of Human Rights, as a ground for its interpretation.[XL] In paragraph 57 the ECJ argues that article 7 of the ECHR, quite similar to article 49 of the Charter, is interpreted by the Strasbourg Court as if the principle of legality does not prevent shortenings of the limitation.[XLI] Thus, the concept of "principle of legality" employed by the two courts is a very similar one. Therefore, since a generally recognised authoritative interpreter on human rights gives a certain meaning to similar sources (art. 7 of the ECHR), then an analogous path is possible and advisable.

The reaction by the Italian Constitutional Court (CC) was a moderate one, but quite indicative of the deep disagreement between the two Courts. By means of the decision at stake, order 24/2017,[XLII] the *Consulta* asked for a new interpretation of article 325 TFEU. In particular, the interpretive reference was based on a doubt regarding the correct interpretation of article 325 TFEU: whether it prescribed the disapplication of internal norms on limitation periods even when this would jeopardise its degree of determinacy. More specifically, according to the Court the notion of "considerable number of cases" is vague and it is impossible for a common citizen not trained in law to foresee the disapplication of favourable norms on time limitations on the ground of article 325 TFEU. In turn, this doubt is based on the idea that the limitation period is grounded on the principle of legality in criminal law, as interpreted in the Italian legal system, and must therefore be perfectly clear and predictable. This principle is considered as part of the "untouchable core" of the Italian constitutional identity: therefore, it can never be disapplied, even when primacy of EU law is at stake: this is the core of the so called counter-limits doctrine.

What is interesting to the limited aims of this essay is the way in which this interpretation is advocated. The point through the eyes of the Italian Court is the meaning of the principle of legality in criminal law: where in the European interpretation of this norm (both by the ECJ and by the ECtHR), the principle of legality only entails that (1) criminal acts or omissions are clearly identified as crimes before the fact occurs and that (2) punishment is adequately identified, the principle in the Italian context has a broader meaning. Here the limitation period is considered as "part" of the punishment. In the vocabulary employed by the Italian Court, it is a "substantive" instead of merely "procedural" interpretation of the norm. The argumentation employed by the Court to ground this interpretation lies on two arguments:

1. Argument from *substantive reasons*: according to the Court (*Considerato in diritto*, § 4) the limitation period is part of the circumstances that determine whether someone will be punished or not. Thus, limitation is justified by the idea that punishment corresponds to a specific level of social threat and that the mere passing of the time is capable to lower this level. As a result, a right to forget the offence arises when sufficient time has passed. Therefore, punishment will not be applied anymore. If the punishment is not to be applied, then a sort of "negative" condition for the punishment is at stake: if something is capable to influence the application of the punishment both as a positive and as a negative condition, then this is part of the punishment itself and it shall be duly predictable and clearly stated. Thus, limitation is "covered" by the principle of legality too.
2. *authoritative* argument: another authoritative institution is close to this interpretation, namely the Spanish *Tribunal Constitucional*, so that the argument employed by the ECJ when relying on the ECtHR is somehow mirrored.

As a result, a different interpretation of the very same principle is on the ground. This is exactly the situation defined as a CBC.

Let us try to employ the idea of "levels of disagreement" to understand this conflict more in detail. Before we move in this direction, anyway, it is worth noting how the *Taricco* saga (still in progress) is a perfect example to illustrate how much CBCs matters for European Constitutional Law. Clashes on different interpretations of similar principles in Europe are surely among the great engines of evolution of the interlocked European legal

system. It is probably unnecessary to underline how relevant this can be in the eyes of scholarship.

So, let us move to the conceptualisation of the issue. In paragraph 4 we distinguished four levels of disagreement: 1) level of legal ideologies; 2) interpretive level; 3) low-level principles level; 4) detailed outcomes level. The *Taricco* conflict between the national and supranational levels actually fits this description. I would like to start from the lower level and then follow a "conceptual ascent" up to the more general one (Sunstein 2007: 18-20).

The *Taricco* saga demonstrates a superficial disagreement on detailed norms regarding limitation: according to the CC, limitation shall be clear and predictable and modifications to the limitation regime cannot act retroactively if they imply negative consequences for convicted people. Thus, it is hardly acceptable that in order to apply EU law the diminished limitation period is again extended. For the ECJ, instead, there is no problem with the idea that in order to limit VAT frauds the limitation period will be extended again, although this was not perfectly clear and predictable.

This superficial disagreement depends on the different meaning given to a shared low-level principle, namely the already analysed principle of legality in criminal matters.

In turn, these interpretations of similar sources depend on the fact that whilst using the same sources, the interpreters accept and apply different interpretive methodologies: the ECJ privileges (1) a literal method, preventing enlargement of the scope of application of the legality principle, and (2) a teleological method, aimed at safeguarding EU financial interests; the *Consulta*, on the other hand, is driven by an evaluative, individual-based methodology according to which if some individual-rights goal is at stake (at least in criminal law), and if this can be promoted by one interpretation, then the source ought to be interpreted in that way (MacCormick-Summers 1991: 514).

It is worth noting that both of them also employ an authoritative argument, quoting those judges that share their view. However, depending on the Court you choose to quote, this argument seems to be available for both interpretations,[XLIII] and it seems to be unable to denote the specific features of each Courts' argumentation.[XLIV]

Finally, all of this is grounded on different ethical premises (*lato sensu*), that lie at the last level of disagreement. As one can imagine, the literal-teleological interpretation employed by the ECJ seems to be linked to a certain commitment to a "europhile" ideology, where the supreme value to be pursued is the respect for the will of EU legislator (and here

especially the drafters of the Treaties) and for the EU's aims and interests. Fundamental rights themselves are interpreted so that they do not collide with these values. In contrast, the CC seems to be more committed to an individual-based ideology, where the supreme value to be pursued is the limitation – to the greatest possible extent – of the use of criminal punishment towards citizens, even if this means a potential threat to public interests, such as financial ones. This way, by highlighting different arguments, privileging certain interpretive methodologies, and showing a certain "ideology", the two courts reveal – in a way – their own "concepts" of law. In other words, by disclosing their views on how a good judicial decision should be made, the courts are revealing their views on how – by means of certain interpretive directives – the argumentative "game" called law shall be made (La Torre 2002: 396-397).

6. Conclusion

This essay was aimed at scrutinizing the concept of conflict by convergence and the jurisprudence that lies behind it.

It has been argued that in order to adequately conceptualise constitutional conflicts in Europe it is actually fundamental to underline the interlaced structure of antinomies, namely the belonging of conflicting rules to more than one legal system. It has also been pointed out that the concept of "complex antinomy" is only able to describe this phenomenon in some specific cases in which interpretive disagreement is very low, so that two norms can be "twins" at the supranational and national level.

In order to describe the scenario in a more general way the concept of "levels of agreement/disagreement" in the law has been sketched. It has been pointed out that interpretive competition is mirrored by conflicts between interpretive methodologies held by officials and that these conflicts depend on even deeper disagreements on the meta-interpretative and ultimately ideological reasons that guide the interpreters. As a result, the intermediate agreement on low-level principles or legal sources is not enough to prevent the emergence of superficial disagreement on detailed outcomes. Moreover, the fact that no ultimate criterion to solve interpretive and meta-interpretative disputes is available, since no ultimate authority is recognised in Europe, determines an ultimately irresolvable and never-ending constitutional conflict.

Put simply, the idea that constitutional conflict are central to the European context must become shared: these are probably inevitable, and maybe even "healthy", and in any case anyone who denies them is likely to be doomed not to catch the structure of the European legal system. The best way to conceptualise them, anyway, is to deepen and refine the promising notion of "disagreement caused by different interpretations". Here some broad lines of this task have been drawn by means of the concept of "levels of disagreement". Yet an interesting line of future research would be to go further and identify which kind of interpretive methodologies European and national judges prefer to use and why. The very brief analysis of the *Taricco* saga exemplifies this kind of task. This enterprise would be quite useful in order to understand why CBCs occur and why European scholarship should face these themes immediately, for very good reasons.

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I The classical Kelsenian model is based on the idea that every rule, both concrete and general, such as courts' decisions and general statutes, shall be enacted by legitimate authorities. In turn, in order for an authority to be legitimate it shall be empowered by another norm. Of course this norm has been produced by another authority, which in order to be legitimate requires another norm, and so on. The never-ending process stops at the level of the Basic Norm, beyond the First Historical Constitution. Quite clearly this interpretation of the structure of legal systems is thought to describe modern States: it is no coincidence that Kelsen considers States to be simply legal systems. See Kelsen (1967: especially chapter V and VI), see also Paulson (1992) and Hart (1983).

II As a milestone on pluralism see MacCormick (1999: 102-116); see also Walker (2002: 27) and Krisch (2008: 184). Generally speaking, pluralist theories share the view that different authorities can share supreme power although being empowered by different ultimate rules. As a result, several supreme authorities can coexist, which is denied by classical Kelsenian approaches.

III On antinomies see Guastini (2014: 283-290).

IV See article 6.2 TEU: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties".

V ECJ, Opinion of the Court, A-2/13, *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties,* 2015, ECLI 2454. For a brief comment on the case see Lambrecht (2015).

VI See Torres Perez (2009: 14): "the process of European integration was market driven, and, in this context, fundamental rights protection was not a main concern".

VII For the distinction between "human" and "fundamental" rights, see Palombella (2001: 299-304).

VIII BVerfGE 37, 271; 1974 2 CMLR 540 (*Solange I*) and BvR 2, 197/83; 1987 3 CMLR 225 (*Solange II*).

IX Corte costituzionale, *sentenze* nn. 98/1965, 183/1973, 170/1984.

X Art. 6.1 TEU: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions".

XI ECJ, Case C-144/04, *Mangold v Helm,* 2005 ECR I-09981 and the reaction by Herzog – Gerken (2008).

XII ECJ, Case C-81/05, *Anacleto Cordero Alonso v. Fondo de Garantia Salarial (Fogasa),* 2006, ECR I-7585.

XIII For the norm/source distinction see *inter alia* Wroblewski (1992: 85) and Schecaira (2015: 17).

[xiv] Quoting Schecaira (2015, 17): "Indeed, the purpose of the paper is to stress that sources of law should not be confused with legal norms, i.e., the normative propositions (or meaning-contents) which can be derived from sources like statutes and precedents, and by which judges are guided in arriving at their final decisions (or at least which they use in order to justify—cynics might prefer to say "rationalize"– their decisions)".

[xv] To be fair, in a sense the criterion can "exist" if a legal institution, such as the ECJ, endorses it. Accordingly, many C-criteria can exist in this sense in interlaced contexts. Nevertheless, what is meant here by "lack" of a criterion is that this rule is not shared and generally accepted and applied.

[xvi] In another work this interlock is interestingly compared to a flow of "blood" that makes the new legal system a living entity. This metaphor is somehow illuminating in underlining the importance of this overlap and circulation of rules to understand the European system. See Martinico (2013: 44-45).

[xvii] Martinico (2014: 1358): "The Cordero Alonso case is emblematic of the disagreement caused by the different interpretations given to a shared principle by two different interpreters. It confirms that the mere sharing of principles that are, from a literal point of view, common, does not mean that the interpreters will agree on the interpretation to accord it".

[xviii] On this concept see Kelsen (1967: 230) who uses the wording "individualization" or "concretization" of a general norm.

[xix] This notion of "legal source" is derived from Ross (1974: 78), whose notion of legal sources as mainly written raw materials enacted by means of specific procedures and interpreted by legal practictioners is considered essential here. See also Raz (2009: 48).

[xx] More precisely, in contexts like the European one what is often shared is the *same wording* of different sources.

[xxi] On the connection between interpretive methodologies and the "ultimate grounds" of legal systems see Alexander – Schauer (2009: 181-187).

[xxii] Waldron (1999: 11-12) talks about "ferocious disagreement" about "detailed application" of rights.

[xxiii] "Vagueness" and "ambiguity" are sometimes employed as synonyms, but they are actually different. "Vagueness" is employed to clarify that general terms in the law and in ordinary language in general denote objects with different degrees of precision. While, for example, a car is for sure a 'vehicle' – employing the classical Hartian example – and a toy is *not* a 'vehicle', it is not sure whether a tricycle is a 'vehicle'. In other words, the problem is that due to certain features of language, it is quite common that the reference of a general term to its so called "extension" is not fully determinate. As a result, when we do not know whether a certain term applies to a certain object, then that term is "vague". On the other hand, words usually and simply have different meanings, such as in the case of "bachelor". Here it is the very concept that is unclear and we will say that the word is "ambiguous". Widely on these issues see Poscher (2011: 1-7).

[xxiv] The idea that a "fundamental right" can be already "operative" when it works as "substantial directive about subsequent normative acts" for the legislator, and not only when it is used by a court to trump other norms, is drawn again from Palombella (2001: 306).

[xxv] Disagreement is necessary, but not sufficient to produce conflict: adversarial circumstances are needed too. See Zucca (2007: 49-50).

[xxvi] As for this concept, I am deeply beholden to Giorgio Pino and to his presentation "On Legal Disagreements: Typology, Scope, and Jurisprudential Implications" at the European University Institute in November 2015.

[xxvii] Dworkin (1986: 13). This point made by Dworkin is today interestingly shared also by scholars often disagreeing with him, e.g. Patterson (2016: 206).

[xxviii] I.e. namely sets of premises employed to justify a certain conclusion plus the conclusion itself, see Groarke (1999).

[xxix] Note that this account holds for the specific case of CBCs, but this is contingent. In other cases, disagreement can arise at the level of legal sources too. I.e. in some cases disagreement on whether something counts as a legal source can occur, similarly to what Dworkin (1986: 5) calls the "theoretical disagreement".

[xxx] Chiassoni (2003: 63) defines an interpretive code as "a discrete and unitary set of hermeneutic directives" (my own translation from Italian). See his essay for a detailed analysis of this concept.

[xxxi] MacCormick (1979: 234): "Law certainly embodies values and these values are characteristically expressed in statements of the principles of a given legal system".

[xxxii] Alexander – Schauer (2009: 181-182): "not only will each of these officials assign different meanings to the Constitution; in a very real sense, each official is interpreting a different constitution. And this is because,

in part, the interpretive methodology of each of these officials requires her to interpret different raw material".

[XXXIII] It is no coincidence that Alexander and Schauer (2009: 185), when underlying deep conflicts in the US legal system, ultimately look at the Supreme Court and at its decisions as the decisive tool to solve disagreements. The fact that this cannot happen in the European context is a crucial feature.

[XXXIV] Note that there is no reason to assume that the C-criterion has always to be the same: criterion C^1 could be overruled by C^2 and then become C^3 and so on and so forth. Moreover, the ultimate authority itself could change. What is relevant is that *in every moment* a legal system is featured by an ultimate criterion that can be determined by the authority recognised as supreme at that time.

[XXXV] Some scholars have actually seen this scenario as desirable. See Luciani (2017: 87). *Contra* see Faraguna (2017: 373).

[XXXVI] For a wide catalogue of perspectives among Italian lawyers see the work edited by Bernardi (2017). As for foreign lawyers see at least Billis (2016) and Timmerman (2016).

[XXXVII] ECJ, Case C-105/14, *Taricco and others,* 2015 ECLI 555.

[XXXVIII] Here the taxonomy on interpretation developed by MacCormick and Summers is employed. See MacCormick-Summers (1991: 512-516).

[XXXIX] MacCormick and Summers (*ivi*: 513) prefer the wording "argument from precedent". In my view, since here we are describing a "precedent" deriving from an "external" Court, this would be partly misleading. Therefore, I prefer the wording "authoritative". For a detailed analysis of the notion of "authority" in law and of the practice of citing authorities, in particular foreign ones, see Schauer (2008: 1935-1940 and 1954).

[XL] Relying on the Strasbourg Court rather than on national courts is, however, quite typical of the ECJ, in particular when elaborating general principles. See Conway (2008: 796-797).

[XLI] See C-105/14, §57: "The case-law of the European Court of Human Rights in relation to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which enshrines rights corresponding to those guaranteed by Article 49 of the Charter, support that conclusion. Thus, according to that case-law, the extension of the limitation period and its immediate application do not entail an infringement of the rights guaranteed by Article 7 of that convention, since that provision cannot be interpreted as prohibiting an extension of limitation periods where the relevant offences have never become subject to limitation (see, to that effect, *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 149, ECHR 2000-VI; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 110 and the case-law cited, 17 September 2009, and *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, §§ 563, 564 and 570 and the case-law cited, 20 September 2011)".

[XLII] Corte costituzionale, *ordinanza* n. 24/2017.

[XLIII] Accordingly, note that scholars have underlined how the Court of Justice picked the interpretation of legality it considered more suitable (ECtHR) and ignored others (*Corte costituzionale*). See Luciani (2017: 81).

[XLIV] This seems to be somehow an ordinary feature when authoritative reasoning is at stake, at least when optional authorities are employed. Quoting Schauer (2008: 1949-1950): "The cited authority is often not one that supports the allegedly supported proposition more than some other authority might negate it. 63 And this makes the use of an authority as "support" a peculiar sense of authority, because the set of authorities does not point inone direction rather than another. Nevertheless, the conventions of legal citation do not appear to require only strong (authoritative) support. Rather, the conventions seem to require that a proposition be supported by a reference to some court (or other source) that has previously reached that conclusion, even if of other courts or other sources have reached a different and mutually exclusive conclusion, and even if there are more of the latter than the former. Thus, to support a legal proposition with a citation is often only to do no more than say that at least one person or court has said the same thing on some previous occasion".

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