CONCLUSION: ARTICLE 267 TFEU AND EU FEDERALISM

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Is the relationship between the EU judiciary and the Member State judiciaries a federal one; and if so, is it 'dual' or 'cooperative'? Federalism generally means *duplex regimen*: within a Union of States, the tasks of government are divided between two levels of government each of which endowed with its own institutions.[1] This institutional duplication will, in its most extensive form, apply to all three branches of government: the legislature, the executive, and the judiciary. With regard to the judicial function, two institutional judiciaries may thus simultaneously coexist. A Union judiciary and a State judiciary each interpreting and applying the law within their respective jurisdiction; and depending on how these jurisdictions are divided, two federal models can be distinguished.

Within a dual federal arrangement, the judicial powers of the Union judiciary and the State judiciary are divided into blocks of exclusive power. The federal judiciary and the State judiciary are co-equals and operate independently in their separate spheres. Union courts interpret (and apply) Union law, whereas State courts interpret (and apply) State law. Such a dual federal system can, with some modifications,[2] be found in the history of the United States. For the latter has established a complete – federal – court system designed for the adjudication of federal law, and which runs, as a

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[1] For a general overview of the idea of federalism, see: Robert Schütze, 'Political Philosophy of Federalism', in Rüdiger Wolfrum, Rainer Grote, & Frauke Lachenmann (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2023).

[2] For a good analysis of US American judicial federalism, see: Thomas Baker, 'A Catalogue of Judicial Federalism in the United States' (1995) 46 South Carolina Law Review 835.

second set of judicial institutions, in parallel to the State court system of each of Member States. The US federal court system is thereby elaborate and extensive: for in addition to the Supreme Court at its apex, there exist 'inferior' federal courts in 94 geographic districts and above them 13 federal appellate courts.[3]

What about Europe's 'judicial federalism'?[4] The EU has traditionally relied on only one single court: the Court of Justice of the European Union (CJEU).[5] What explains this institutional minimalism? When the European Communities were founded, the existence of a single court may have seemed natural in light of their 'international' origins and their limited 'sectorial' scope. In *Humblet*, the Court, in a dualist spirit, thus still insisted that 'the Treaties are based on the principle of the strict separation between the powers of the Court on the one hand and of the national courts on the other' as 'there is no overlapping of the jurisdiction assigned to the different

[3] The US Constitution had granted Congress the express competence to establish these inferior courts in Article III, section 1 (emphasis added): 'The judicial Power of the United States, shall be vested in one supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish*.'

[4] On the idea of judicial federalism in the context of the European Union, see: Jeffrey C Cohen, 'The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism' (1996) 44 American Journal of Comparative Law 421; Jan Komárek, 'Federal Elements in the Community Legal System: Building Coherence in the Community Legal Order' (2005) 42 Common Market Law Review 9; Michael Wells, 'Judicial Federalism in the European Union' (2017) 54 Houston Law Review 697; and most recently: Jan Zglinski, 'The new judicial federalism: the evolving relationship between EU and Member State courts' (2023) 2 European Law Open 345.

[5] The CJEU has, however, since the Single European Act, been internally divided into two separate courts: the Court of Justice and the General Court. Article 19 (1) TEU states today that '[t]he Court of Justice of the European Union shall include the Court of Justice, the general Court and specialised courts.' There currently exist no specialised EU courts.

courts'.[6] Yet with the greater widening and deepening of the EU Treaties, this vision quickly proved untenable; and the Union legal order soon recruited the national courts in the interpretation and application of EU law.

Through the principles of direct effect, indirect effect, and Union primacy, national courts are obliged to be involved in (almost) all 'European' judicial activities – and transformed every single national court into a 'European' court.[7]

This *functional* integration of national courts into the European judiciary has, with the Lisbon Treaty, been textually endorsed in Article 19 TEU.[8] However, the lack of an *institutional* integration has, at the same time, also revealed major weaknesses.[9] For in the absence of Union harmonisation, the Union must essentially 'piggyback' on the national judicial systems.[10] For it must generally 'take' national courts as it 'finds' them. The Union legal order

[6] Case 6/60 *Jean-E Humblet* v *Belgian State* EU:C:1960:48, 572.

[7] But see: Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* EU:C:1987:452, paras 15-17: '[National] courts do not have the power to declare acts of the [Union] institutions invalid. (…) Divergences between courts in the Member States as to the validity of [Union] acts would be liable to place in jeopardy the very unity of the [Union] legal order and detract from the fundamental requirement of legal certainty. (…) Since Article [263] gives the Court exclusive jurisdiction to declare void an act of a [Union] institution, the coherence of the system requires that where the validity of a [Union] act is challenged before a national court the power to declare that act invalid must also be reserved to the Court of Justice.'

[8] Article 19(1) TEU states: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' See also: Case C-619/18 *Commission* v *Poland* EU:C:2019:531, where the Court found that Article 19 TEU 'entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice' (ibid., para 47).

[9] For this point, see especially Wells (n 4), 699: 'The EU's approach to judicial federalism, with its heavy reliance on member state courts, will retard the political integration envisaged by the Treaty.'

[10] Koen Lenaerts *et al*., *EU Procedural Law* (Oxford University Press 2014), 107.

has nonetheless emphasised that although 'the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law';[11] and it has, therefore, specifically insisted on the need to institutionally guarantee national judicial independence.[12] Yet such institutional (or procedural) requirements have remained piecemeal; and the absence of a formal appeal or review procedure connecting the European Court with the national judiciaries has further limited potential judicial control mechanisms exercised by the centre.

The main road to collaboration and control remains today the preliminary reference procedure set out in Article 267 TFEU. This procedure establishes a voluntary and horizontal constitutional nexus between the central and the decentralised adjudication of European law. Where national courts encounter problems relating to the interpretation of Union law, they could ask 'preliminary questions' to the European Court. The interpretative questions are 'preliminary', since they *precede* the final application of European law by the national court. Importantly, then: the European Court will not 'decide' the case. It is only *indirectly* involved in the judgment delivered by a national court. The decision to refer to the European Court of Justice (ECJ) thereby lies entirely with the national court – not the parties

[11] *Commission* v *Poland* (n 8) para 52.

[12] Case C-64/16 *Associação Sindical dos Juízes Portugueses* v *Tribunal de Contas* EU:C:2018:117, paras 42-44 (emphasis added): 'The guarantee of independence, which is inherent in the task of adjudication is required *not only at EU level (…) but also at the level of the Member States as regards national courts.* The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU[.]'

to the dispute;[13] and the European Court's rulings are therefore, in turn, formally addressed to the national court requesting the reference: 'that ruling is binding on the national court as to the interpretation of the [Union] provisions and acts in question'.[14] This preliminary reference procedure constitutes today, as in the past, the cornerstone of the Union's judicial federalism. This federalism is decidedly *cooperative* in nature, because the European Court and the referring national court here actively collaborate in the adjudication of a single case.[15]

The various articles in this special issue have dealt with some of the more controversial problems and questions that this procedure has generated over the past decades. For example: should there always be at least one court within each national system to refer to the ECJ, and if not, under what conditions can the obligation in Article 267(3) be suspended (François-Xavier Millet)? What, in fact, are the *de jure* and *de facto* effects of a preliminary ruling beyond the national court that asked the question (Giuseppe Martinico); and will these effects be *ex nunc* or *ex tunc* (Lorenzo Cecchetti)? What happens if the Court subsequently changes its mind on an important point of interpretation (Daniel Sarmiento); and why is it that Article 267(1) has doctrinal troubles with the European Court declaring

[13] Case C-2/06 *Kempter* v *Hauptzollamt Hamburg-Jonas* EU:C:2008:78, para 41: '[T]he system established by Article [267 TFEU] with a view to ensuring that [Union] law is interpreted uniformly in the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties'.

[14] Case 52/76 *Benedetti* v *Munari* EU:C:1977:16, para 26: 'that ruling is binding on the national court as to the interpretation of the [Union] provisions and acts in question'.

[15] Already in 1965, the ECJ spoke of the 'judicial cooperation under [Article 267] which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision', see: Case 16/65 *Firma G Schwarze* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1965:117, 886.

national laws incompatible with European Union law (Fernanda G. Nicola, Cristina Fasone and Daniele Gallo)?

The rise of human rights related issues in preliminary references (Eleni Frantziou) here poses a particularly urgent challenge: for once EU fundamental rights become a general standard of review for most national law,[16] the number of preliminary rulings may further, and dramatically, increase and with it the pressure on the ECJ as the sole European Court at the other end.

What can be done here? One solution might modestly point to the General Court.[17] But with the latter having recently broken into the four-digit mark of registered cases,[18] some more radical solution might ultimately have to be found for the future European judicial federalism. One possibility is, of course, to *restrict* the number of preliminary references by transforming the Article 267 procedure into an appeal procedure.[19] Yet if one wanted to keep – if not even increase – the judicial cooperation between the European and the national level, a broader institutional base for the European judiciary may prove unavoidable.

The two oft-discussed options in this context are that of 'regional' European courts and that of 'specialised' European courts. The former solution would, *mutatis mutandis*, import the US American model of 'inferior' federal courts into the EU legal order and has been said to suffer, in the European context,

[16] On the EU doctrine of incorporation, see: Robert Schütze, 'European Fundamental Rights and the Member States: From 'Selective' to 'Total' Incorporation?" (2012) 14 Cambridge Yearbook of European Legal Studies 337.

[17] See: Article 256(3) TFEU. On this prospect, see recently: Davor Petrić, 'The preliminary Ruling procedure 2.0' (2023) 8 European Papers 25.

[18] At the time of writing, the General Court has registered 1100 cases for 2023, see: Case T-1100/23 *IN tIME Express Logistik* v *EUIPO (inTime Agile Logistics)*.

[19] For a discussion of the pros and cons here, see: Kieran Bradley, 'Judicial Reform and the European Court: Not a Numbers Game', in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021), 156 at 182-184.

from a number of shortcomings.[20] By contrast, the creation of specialised European courts, when endowed with the power to give preliminary rulings,[21] could here kill two (very) big birds with one stone. For it could not only relieve the ECJ of its quantitative burden (mainly caused by preliminary references!), the creation of specialised jurisdictions may also help improve the argumentative and forward-looking quality of European judgments, especially in such demanding technical areas as intellectual property or corporate taxation. But these are matters that themselves deserve a special conference and a special EJLS issue in the future. They would open a new chapter in the judicial federalism of the EU.

[20] Ibid., 182.

[21] That move would however require an amendment to the EU Treaties. For while Article 257 TFEU allows the Union, under the ordinary legislative procedure, to 'establish specialised courts attached to the General Court to hear and determine at first instance certain classes of actions or proceedings brought in specific areas', a transfer of Article 267-jurisdiction to such specialised courts is unlikely to be covered by the provision.