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First and Last Word:
Can Constitutional Courts and the Court of Justice of the EU Speak Common Words?

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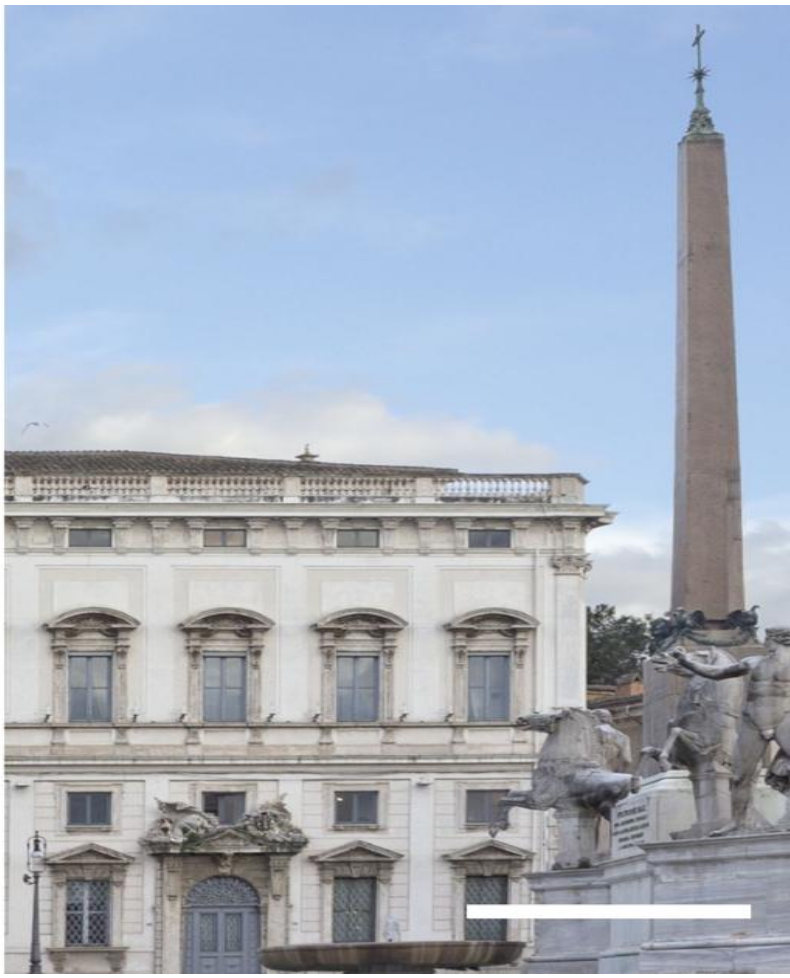

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1. The search for common words

Linguistic metaphors are recurrent in the analysis of legal scholars, especially when dealing with the case law of international and supranational courts. The interdependence of languages mirrors the search for coherence and cooperation among courts. Hence, the exchange of messages may have implications well beyond the immediate meaning of words. Words can be predictive of courts' behaviour in establishing priorities and setting the borders of competences; they can indicate the intention to mark a step forward and innovate or, on the contrary, to confirm previous decisions. Words can be deferential or even confrontational, since the attitudes of courts speaking to each other vary over time and are the spectrum of specific historical phases.

To have the 'first' or 'last' word may imply to acquire a position of power, although it is not always clear who becomes the most powerful: the one setting the frame of the conversation, speaking first, or the one drawing the conclusions and speaking last, while taking into account all that has been said?

In a 'cooperative conversation', such as the one I intend to describe, power should not be at stake. There should rather be ways of seeking constant interactions, heading towards a common goal. Hence, the suggestion is to speak common words, building up a common legal language, which should be the outcome of enhanced integration and be respectful of national identities (art. 4(2) TEU).

This is the case in which the "balance between uniformity and the recognition of diversities" is an essential tool in order to preserve the rule of law and also "to lower national hostilities against the outside world and first of all the European Union".[1] Speaking common words is the necessary outcome of an endless exercise in setting aside idiosyncrasies and letting European values supersede.

The notion of cooperation is momentous in the overall structure of preliminary reference procedures, enshrined in art. 267 TFEU.[2] In its recent case-law the CJEU has emphasised such centrality even further, in the attempt to strengthen the principle underlying art. 19(1) TEU, namely its own task in ensuring "that in the interpretation and application of the Treaties the law is observed".

The CJEU confirmed this connection between art. 267 and art. 19(1) in a renowned decision dealing with an association of Portuguese judges, which sets the beginning of a long

1 G. AMATO, *Introduction*, in G. AMATO, B. BARBISAN, C. PINELLI (eds), *Rule of Law vs Majoritarian Democracy*, Oxford, 2021, p. 6.

2 A recent analysis in J. ADAMS-PRASSL, S. BOGOJEVIC, *Great debates in EU Law*, London, 2021. The double loyalty of national judges, promotors of European integration and of national legal orders' internal coherence, is put forward in F. FERRARO, C. IANNONE (eds.), *Il rinvio pregiudiziale*, Torino, 2020.

chain of decisions. Ruling on the independence of judges and its compatibility with temporary wage reductions, due to constraints in the state budget, the Court stated that art. 19(1) TEU "which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals". [3] The link established among such articles is new and of extreme relevance, linked, as it is in a systematic interpretation with art 47 CFREU. Collaboration with the CJEU is for national courts the fulfilment of a duty, functional to a system of effective legal remedies.

Unlike in the Portuguese case, further developments in the case-law dealing with judicial independence had to do with serious threats to the rule of law and developed into an intense exchange among the Court in Luxembourg and constitutional courts in Poland and Hungary.[4]

In a separate and, to some extent, parallel stream of cases, other examples of judicial exchanges came to the fora, whereby constitutional courts promoted preliminary references, seeking synergies in guaranteeing national constitutional values while enforcing European law.

Although no precise interconnection can be established between such different streams of CJEU's case law – the one on the rule of law and the independence of the judiciary and the one on judicial cooperation with national constitutional courts – it is noteworthy that the two should be kept together by similar coherent interpretative criteria. The acknowledgment of deep-rooted principles, such as the primacy of EU law and the uniformity of its interpretation, as guaranteed in art. 267 TFEU, is the cornerstone of current discussions, fruitful and encouraging in the attempt to speak a common language.

The search for common words should be pondered in all scenarios for the future of Europe.

In this contribution I emphasise this constant search for synergies, which also implies the pursuit of more advanced institutional balances. I argue that the duty of collaboration, when constitutional courts are involved, calls into question the deep meaning of European values "common to the Member states" as identified in art. 2 TEU. [5] This may indicate that constitutional courts should magnify their role as 'institutions of pluralism', when they refer cases to the CJEU as well as when they apply EU law in their own decisions.[6]

Following the case of the Portuguese judges, the CJEU had to face complex situations, whereby threats to the independence of the judiciary were serious and incumbent.

For reasons of brevity, I shall only mention that the Polish Constitutional Tribunal's judgment, delivered on 7 October 2021,[7] was at the origin of institutional controversies. The Tribunal declared that the interim measures adopted by the CJEU, in order to preserve the independent functioning of the judiciary,[8] were inconsistent with the Polish Constitution.

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3 ECJ, 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2017:395, para. 32.

4 F. DONATI, *Rule of Law, Independence of the Judiciary and Primacy of EU law*, in *Italian Journal of Public Law* (2021), p. 324 ff.

5 L.S. ROSSI, *2,4,6 (TUE) ... L'interpretazione della "Identity clause" alla luce dei principi fondamentali,* in *Liber Amicorum Antonio Tizzano*, Torino, 2018, p. 859 ff. and *Il valore giuridico dei valori. L'art. 2 TUE: le relazioni con altre disposizioni primarie del diritto dell'UE e rimedi giurisdizionali*', in *Federalismi*, no. 19/2020.

6 S. SCIARRA, *Rule of Law and Mutual Trust: a Short Note on Constitutional Courts as 'Institutions of Pluralism'*, in *Il diritto dell'Unione europea*, 2018, p. 431 ff.

7 Polish Constitutional Tribunal, Ref. No. K 3/21.

8 ECJ, 15 July 2021, case C-791/19, *Commission v Republic of Poland*, ECLI:EU:C:2021:596. This judgment was delivered in an action brought by the Commission for failure to fulfil obligations under art. 258 TFEU. On 17 July

The CJEU had unequivocally ruled on the primacy of EU law in case of violation of art. 19(1) second subparagraph and on the duty of the referring judge to disapply national provisions in contrast with EU law, in cases in which – as it happened in Poland – there was serious interference with the independence of the judiciary.

In the English version of the press release issued after the Constitutional Tribunal's judgment, we read that, pursuant to art. 87(1) of the Constitution, the Polish legal system is built on a hierarchy of sources in which the TEU "occupies a position which is lower than that of the Constitution, and just as any ratified international agreement […] the TEU must be consistent with the Constitution". This description is complemented by the disputable assertion that judgments delivered by the CJEU are "hybrid in character" and are not necessarily to be deemed as binding sources of law. Hence, the criticism addressed to the "CJEU's progressive activism", which ends up interfering with the competence of state authorities and undermining the Polish constitution. [9]

In addition to this decision, which may threaten the whole edifice of the European legal order, the Constitutional Tribunal delivered another judgment, questioning compliance with the ECHR. The specific reference is to art. 6 paragraph 1 and to the notion of "tribunal established by law".[10]

One can argue that the hierarchical perspective adopted by the Polish Tribunal is counterintuitive, if viewed through the lenses of historical developments.

Not only the notion of a hierarchy contrasts the opposite image of a diffused overarching legal order of the EU; it also denies the ongoing project of integration through law, which inspired the founding Member States and later on favoured enlargement to new countries.

In such a project we can picture art. 267 TFEU as a cornerstone supporting the whole system of European courts. Its solidity is substantiated by the principle of equality among Member States when EU law is applied and by the uniform interpretation of the Treaties guaranteed by the CJEU.[11] Furthermore, the identity clause, that the Lisbon Treaty enunciates in art. 4(2) TEU, is meant to link together national constitutional law and EU law and "forms a building block of the composite constitutional structure of the EU".[12] Art. 4(3) TEU recalls the "principle of sincere cooperation" and the, "full mutual respect", assisting the Union and Member States "in carrying out tasks which flow from the Treaties".

2019 the Commission had issued a reasoned opinion, stating that the new measures on disciplinary actions for judges, adopted by Poland, were not in compliance with art 19(1) TEU and the second and third paragraphs of art. 267 TFEU, despite the letter of formal notice sent by the Commission on 3 April 2019. Poland replied to this letter denying infringements of EU law.

9 Press Release After the Hearing, Polish Constitutional Tribunal, Ref. No. K 3/21, point 22, https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11664-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej.

10 K 7/21 of 10 March 2022.

11 On equality among Member States see the forward-looking comments by F. FABBRINI, *After the OMT Case: The Supremacy of EU law as the Guarantee of the Equality of the Member States*, in *German Law Journal*, 2015, p. 1016 ff. and, for references to Italy, S. SCIARRA, G. NICASTRO, *'Speech acts' and judicial conversations. Preliminary references from the Italian Constitutional Court to the Court of justice of the European Union*, CSF-SSSUP Working Papers Series 1/2016.

12 A. VON BOGDANDY, S. SCHILL, *Overcoming Absolute Primacy: Respect for National Identities under the Lisbon Treaty*, in *Common Market Law Review*, 2011, p. 1431 ff. The authors seem to imply, though, that there may be derogations in order to protect national identities.

Architectural metaphors, recurrent in the jargon of European courts, can be valued as complementary to linguistic descriptions: a solid building positioned on several pillars and a language understandable to all people living in that building are two focal points in the current political agenda, which should shape the future of Europe.

Constitutional courts are in the position to create unforeseen threads of integration: they can summarize both metaphors as courts of last instance and as guardians of national constitutional identities. They are themselves pillars supporting the building and they should, because of this responsibility, speak the same European words. The 'identity clause' assigns to national constitutional courts the highest responsibility to concretize the spirit of mutual cooperation.

It is worth noting that this is an urgent – and not merely theoretical – discussion since in the Polish case both metaphors have been challenged.

Breaches of the rule of law in Hungary and Poland were at the core of two CJEU's judgements dealing with access to European funds as provided for in Regulation 2020/2092. The latter, according to the Court with regard to Hungary, satisfies the principle of legal certainty, since the Commission bases its assessments on objective opinions. Breaches of the rule of law are not raised as such, but to protect the Union budget, when those breaches affect the sound financial budget of the Union "in a sufficiently direct way". The rule of law is one of the values indicated in art. 2 TEU; art. 49 TFEU stipulates that respect for those values is a prerequisite to become a Member of the EU.[13]

Arguing on similar grounds and addressing the Polish case, the Court underlined those measures taken to protect financial interests, to be "strictly proportionate to the effect of the breaches which have been determined of the principles of the rule of law on the Union budget".[14]

In linking together respect for the rule of law and access to financial support, the Court directs a message to Member States, underlying the many facets of membership of the Union. The Court, however, is not alone in playing this role; it is part of an interinstitutional strategy, whereby all other actors have been focussing on the same issues and trying to reach reluctant governments.

On 2 March 2022 the Commission adopted the guidelines on the application of the Regulation, which take into account the two judgments of the CJEU.[15]

In this troublesome scenario, the CJEU's case-law on the rule of law is consistent and deep in the arguments adopted.

For example, in *Repubblika* the Court, in response to a preliminary reference lodged by a Maltese court acting as a constitutional court, recalls art. 2 TEU and mentions trust among

13 ECJ, 16 February 2022, case C-156/21 *Hungary v European Parliament and the Council of the European Union*, ECLI:EU:C:2022:97, paras. 110-111 and 124. On the functioning of conditionalities see B. NASCIMBENE, *Il rispetto della* rule of law *e lo strumento finanziario. La condizionalità*, in *Eurojus*, 2021, p. 172 ff.; C. BUZZACCHI, *Le condizionalità finanziarie a salvaguardia dello stato di diritto, o il rule of law a protezione del bilancio?*, in *Diritto e conti*, 4 April 2022. On 28 August 2022 four organizations of European judges filed a complaint to the CJEU (art. 263 TFEU) against the Council's decision to release recovery and resilience funds to Poland.

14 ECJ, 16 February 2022, case C-157/21, *Poland v European Parliament and the Council of the European Union*, ECLI:EU:C:2022:98, para: 359.

15 https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/c_2022_1382_3_en_act_part1_v7.pdf.

Member States and among their judges as a product of shared values, in particular the rule of law, as it concretises in art. 19(1). Whenever changes are foreseen, the Court adds, national legislatures are bound by a clause of non-regression, [16] which, in the end, aims at guaranteeing a balance between effective judicial protection, as in art. 47 of the CFREU, and the independence of the judiciary.

There can be no-regression from the founding values written in art. 2 TEU.

In *RS* the CJEU clarified even further the connection that keeps together the preliminary ruling procedure and the second subparagraph of art. 19(1) TEU, with regard to judicial independence, whenever the principle of primacy of EU law is at stake. Ordinary courts should not enforce national rules or national practices under which a national judge may incur disciplinary liability, for having applied EU law, as interpreted by the Court, and having left aside the case-law of the Constitutional Court, the one of Romania in the specific case.[17]

The latter, in judgment No. 390/2021 of 8 June 2021, had rejected as unfounded a plea of unconstitutionality raised in respect of several provisions dealt with in the 'Section for the investigation of offences committed within the judicial system', arguing that primacy of EU law is limited in the Romanian territory by respect for national constitutional identity.[18]

The question referred for a preliminary ruling dealt with criminal proceedings and conviction inflicted on the complainant, for having applied EU law. The CJEU specifies that EU law does not impose a particular constitutional model on Member states, but requires that they should comply with judicial independence. Hence, art. 2 TEU and the second subparagraph of art. 19(1) TEU must be read in such a way that respect for judicial independence becomes an essential condition for remaining within the EU legal order.

In this judgment the CJEU goes back to some of its seminal precedents in a new search for its solid roots. Such a search is made necessary by the specificity of the case, in which primacy of EU law is challenged and priority is given to the Constitution.

Van Gend & Loos is mentioned to recollect that "unlike standard international treaties, the Community Treaties established a new legal order, integrated into the legal systems of the Member States on the entry into force of the Treaties and which is binding on their courts".[19] *Costa* and the "Community's own legal system" is also quoted, to remind all of us that reciprocity among Member states "means, as a corollary, that they cannot accord precedence to

16 ECJ, 20 April 2021, case C-896/19 *Repubblika*, ECLI:EU:C:2021:311, paras. 62-63. Comments in: G. BATTAGLIA, *La nomina dei giudici maltesi e il principio di non regressione nella tutela dello Stato di diritto: l''onda lunga' del caso Repubblika*, in *Giustizia insieme*, 5 November 2021; V. PICCONE, *Indipendenza della magistratura e clausola di non regresso*, in *Labour Law Community*, 23 April 2021.

17 ECJ, 22 February 2022, case C-430/21, *RS*, ECLI:EU:C:2022:99. See: L.S. ROSSI, *Un dialogo da giudice a giudice. Rinvio pregiudiziale e ruolo dei giudici nazionali nella recente giurisprudenza della Corte di giustizia*, in *I Post di AISDUE*, 2022, at p. 79 ff.; D. GALLO, *Primato, identità nazionale e stato di diritto in Romania*, in *Quaderni Costituzionali*, 2022, p. 374 ff.

18 In joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion*, of 21 December 2021 (ECLI:EU:C:2021:1034) the CJEU had already stigmatized as contrary to EU law the application of case-law of the Constitutional Court in so far as that case-law, in conjunction with the national provisions on limitation, creates a systemic risk of impunity. Primacy of EU law requires that national courts should have the power to disapply a decision of a constitutional court which is contrary to EU law, without bearing a risk of incurring disciplinary liability.

19 *RS*, cit., at para. 47, where mention is made of recent cases in this line of reasoning.

a unilateral and subsequent measure over that legal system or rely on rules of national law of any kind against the law stemming from the EEC Treaty".[20]

From such famous quotes we should not receive the impression of a nostalgic mood, neither an attitude of exaggerated self-esteem. There is a need to fortify the architecture of the legal system and to establish a conversation with constitutional courts. Art. 267 TFEU is purposefully described as the "keystone of the judicial system established by the Treaties": the Romanian Constitutional Court is, in such a way, reminded to lodge a reference to the CJEU, should a provision of EU law, as interpreted by the Court, infringe the obligation to respect national identity.[21]

In this limpid reasoning, which goes back to the origins of the EU legal order, ordinary courts continue to be fully empowered in their capacity as European judges. The search for coherence goes into all directions, with the intention to respond to all judicial actors, including constitutional courts, regardless of a hypothetical hierarchy on which national systems are founded.

2. The Italian Constitutional Court: centripetal or centrifugal?

With regard to the Italian Constitutional Court, recent developments in its case law have attracted the attention of commentators, because of potential implications in a wider context than the national one. The present writer does not intend to indicate such developments – and in particular the reference to specific judgments – as models.

The examples chosen are both meant to be indicative of the role played by the Constitutional court at the intersection of European law and CJEU's decisions. In the first case a preliminary ruling procedure is lodged by the Court itself; in the second case the route to Luxembourg had previously been taken by the Court of Cassation, which decided afterwards to raise questions of constitutionality. Both examples fall within the area of social security and are indicative of still unsolved interpretative dilemmas, especially when the addressees of benefits are third-country nationals. This is an issue to be put forward in discussions on the future of Europe, in order to substantiate the principle of equal treatment.

In a well-known *obiter dictum,* part of a Constitutional Court's judgment, the point was made that when provisions of the Charter of fundamental rights intersect constitutional rights, the former should be interpreted in a way consistent with constitutional traditions mentioned in art. 6 TEU.[22]

The Constitutional Court – it is maintained – "does not intend to pre-empt the Court of Justice's competence in taking all most important steps towards direct enforceability" of the Charter and is therefore deferential to the words spoken in Luxembourg. On the other hand, the Court, rather than referring to 'common' traditions, quotes a specific judgment delivered by the Austrian Constitutional Court, in which similar arguments had been put in place.[23]

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20 *Ivi*, at para. 48.

21 *Ivi*, at para. 73.

22 *Corte costituzionale,* judgment no. 269/2017 of 7 November 2017, point of law 5.2.

23 S. SCIARRA, A. JR GOLIA, *Italy: New Frontiers and Further Developments*, in M. BOBEK, J. ADAMS-PRASSL (eds.), *The EU Charter of Fundamental Rights in the Member States*, Oxford, 2020, pp. 256 and 248. Reference to the Austrian case is: Judgment U 466/11-18, U 1836/11-13, of 14 March 2012; B. NASCIMBENE, *Carta dei diritti*

The language, in this perspective, is attentive to internal developments, in order to guarantee uniform and *erga omnes* enforceability of the Court's verdicts and articulate its own discourse, the one to be heard primarily by ordinary courts. The latter, however, should remain in full control of their own prerogatives as European judges, since primacy and direct effect should in no way be jeopardised.

In subsequent decisions this approach has been clarified.[24] Communication with ordinary courts kept its flow, albeit with some peculiarities. The Court of Cassation, in particular, displayed several options and followed different paths. In recapitulating them both chronologically and thematically, it has been argued that the onus, with regard to the choice to be made – the road to the Constitutional Court or the one to the CJEU – should stay with ordinary courts, according to the prevailing parameter to be invoked. However, the specificity of the single case imposes a pragmatic approach, which should be combined with the technicalities involved in each of them. Hence, a criterion based on the prevalent source should not become too rigid, since patterns of cooperation constantly evolve.[25]

Let us take the example of the Court of Cassation, called to rule on the appeals filed against courts' judgments which declared discriminatory the refusal of childbirth and maternity allowances to third-country nationals, who did not hold a long-term residence permit in the EU. The National Institute for Social Security (INPS) had, in fact, rejected all such applications.

The relevant EU directives – 2003/109/EC and 2011/98/EU, the former dealing with long-term residents, the latter with a single application procedure for a single work permit – impose equal treatment between member state's own nationals and third country nationals. Nevertheless, it had to be ascertained whether the branches of social security in question were comprised in Regulation (EC) no. 883/2004 and whether excluding from such allowances those who did not hold a long-residence permit could be left to the discretion of the Member State.

The Court of Cassation raised questions of constitutionality with regard to national provisions making the award of the allowances subject to holding a long-term residence permit. The Constitutional Court, rather than responding to such questions, chose to seek first a preliminary ruling from the CJEU, as to whether childbirth and maternity allowances fell within the scope of the protection enshrined in art. 34 CFREU and the related principle of equal treatment in the field of social security.

The point was made that there was "an inseparable link between the constitutional principles and the rights invoked by the Court of Cassation and those recognised by the Charter, as enriched by secondary law". To underline this connection and, at the same time, acknowledge differences in the exercise of the respective competences, the Constitutional Court

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fondamentali e rapporti fra giudici. La necessità di una tutela integrata, in C. AMALFITANO, M. D'AMICO, S. LEONE (eds), *La Carta dei diritti fondamentali dell'Unione europea nel sistema integrato di tutela*, Torino, 2022, p. 52 ff.

24 S. SCIARRA, A.GOLIA, cit., at p. 248 for references to this case law. In particular, Judgment no. 117/2019, point of law 2, specifies the duty of ordinary courts not to apply "where the prerequisites are met any national provisions inconsistent with the rights laid down in the Charter".

25 A. COSENTINO, *La sentenza della Corte costituzionale n. 269/2017 ed i suoi seguiti nella giurisprudenza del giudice comune*, in C. AMALFITANO, M. D'AMICO, S. LEONE (eds), *La Carta dei diritti fondamentali dell'Unione europea nel sistema integrato di tutela*, cit., p. 213 ff.

referred to art 19(1) TEU, in order to recognise the CJEU's exclusive role in the interpretation and application of the Treaties.[26]

Let us return to the image chosen in the opening remarks of this paper and to the 'common words' to be spoken, in the frame of a peculiar conversation, namely the one enshrined in art. 267 TFEU. In this specific procedural frame, the Constitutional Court is seeking the correct interpretation of EU law on childbirth and maternity allowances and expects to combine it with its own interpretation of constitutional principles: the principle of equality (art. 3) and the promotion of the family (art. 31). Mutual respect and mutual obligations are at the origin of judicial cooperation aiming at establishing the acquisition of common results in two separate – and yet interconnected – spheres of competences. Common words my become means to an end, namely to achieving common results via common interpretations.

In the CJEU's response to this reference, the spirit of mutual respect is exemplified in the 'presumption of relevance' endorsed to the referring constitutional court, when the latter "is not the court called upon to rule directly in the disputes in the main proceedings, but rather a constitutional court to which a question of pure law has been referred".[27] Furthermore, the CJEU affirms that by the reference to regulation no. 883/2004, art. 12(1) and Directive 2011/98 "gives specific expression to the entitlement to social security benefits provided for in art. 34(1) and (2) of the Charter".[28]

After receiving the requested clarifications from Luxembourg, the Constitutional Court returned to its own case and ruled unconstitutional the provisions of national legislation which the CJEU had held incompatible with EU law. In confirming the necessary synergy with the CFREU, in order to establish 'a systemic and unfragmented protection', the Court recalls that art. 34 CFREU expressly refers to "national laws and practices", when recognising the right of access to social security benefits. Hence, it cannot fail to take into account the guarantees enshrined in constitutions.[29]

Making entitlement to childbirth and maternity allowances conditional upon holding a long-term residence permit, Italian legislation arbitrarily discriminates against both mothers and the new-born, bearing no reasonable relation to the purpose of the benefits in question.

In this judgment, which concludes the conversation with the CJEU, common words are spoken when addressing the principle of equality (art. 3) and providing support for families (art. 31). Art. 34 of the CFREU is interpreted in close connection with European secondary law,

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26 Order no. 182/2020 of 8 July 2020, Point of law 3.2, https://www.cortecostituzionale.it/documenti/downloadno/doc/recent_judgments/EN_Ordinanza_182_2020_Sciarra.pdf. See A. KOMPATSCHER, *Family allowances only for long-term residents? CJEU and Italian Constitutional Court rule that childbirth and maternity allowances cannot depend on discriminative criteria of long-term residence*, in *Blog DUE*, 12 April 2022.

27 ECJ, 2 September 2021, case C-350/20, *INPS*, ECLI :EU:C:2021:659, para. 39.

28 *Ivi*, at para. 46. In order no. 182/2020, point of law 7.1, the Constitutional Court asked the Court of Justice "whether art. 34 of the Charter must be interpreted as meaning that its scope includes" the allowances.

29 Judgment no. 54/2022 of 11 January 2022, *Corte costituzionale,* point of law 10 https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/SENTENZA%20n.%2054%20del%202022%20-%20red.%20Sciarra%20EN.pdf. Comments in F. FERRARO, V. CAPUANO, *Bonus bebè e assegno di maternità: convergenza tra corti e Carte in nome della solidarietà*, in *Lavoro Diritti Europa*, no. 1/2022.

functioning as a guide in ascertaining who the beneficiaries of social security allowances are, when all requirements of legal residence are met.[30]

Let us now enter a different frame of the conversation.

The Court of Cassation raised questions of constitutionality, after having first lodged two preliminary references to Luxembourg and having received answers to both of them. [31] The main issue at stake was the eligibility of third country nationals, holding a long-term residence permit, for the family unit allowance, even when some members of the unit are temporarily residing in the country of origin. The CJEU had held Italian legislation on such an allowance incompatible with EU law, in particular with Directives 2003/109 and 2011/98, respectively on long-term residents and on the issue of single work permits, the same secondary law sources mentioned earlier.

Before entering the core of the judgment – which declares the two questions inadmissible for lack of relevance – the Constitutional Court contextualises the referring court's choice to take the route to Luxembourg first, and it does so by references to its own recent case-law dealing with art. 267 TFEU.[32] This special channel of communication, sought by national courts to solve interpretative doubts, is meant to strengthen the primacy of EU law and to develop in a line of continuity with pivotal CJEU's judgments. Had the Constitutional Court decided to scrutinize the cases and enter the merits of the questions, it would have had to face the unequivocable answers given by the CJEU on direct applicability of the principle of equal treatment, for its clarity, precision and unconditionality. Hence, the choice made to acknowledge the Luxembourg's rulings coincides with speaking common words. Returning both cases to the Court of Cassation meant that the latter could disapply legislation in contrast with EU law.

Common words can favour common interpretative schemes, leading to similar conclusions on direct effect. Converging interpretations also serve the purpose to empower the referring court – the Court of Cassation in the present case – and to close the circle within a discursive community of courts.

One can argue that there is nothing new under the Constitutional Court's sun and this is correct, since the option of inadmissibility, when the circumstances are such to allow this choice, has never disappeared from the Court's tool-kit. However, references to CJEU's case law on the duty of national courts to disapply – ranging from an early decision such as *Simmenthal*, to *Global Starnet Ltd*, *XC et al*, *Deutsche Umwelthilfe, RS* – are meant to show current implications of the doctrine of direct effect.

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30 B. SBORO, *Definendo il concorso di rimedi: le recenti vicende del "dialogo" tra Corti in materia di diritti fondamentali*, in *Forum di Quaderni costituzionali*, 31 March 2021, p. 689 underlines that the Constitutional Court describes secondary law as an additional source to the fundamental right to social security, thus justifying its own *erga omnes* decision.

31 Judgment no. 67/2022 of 11 March 2022, *Corte costituzionale*, https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:2022:67.
The CJEU's decisions referred to are: case C-302/2019, case C-303/2019. A comment to both decisions delivered by the Constitutional Court in B. NASCIMBENE, I. ANRÒ, *Primato del diritto dell'Unione europea e disapplicazione. Un confronto fra Corte costituzionale, Corte di Cassazione e Corte di giustizia in materia di sicurezza sociale*, in *Giustizia insieme*, 2022.

32 Orders no. 216 e 217/2021, *Corte costituzionale,* respectively points of law 7.3 and 8; Order 182/2020 quoted *supra*.

To enforce the right under scrutiny – namely access to benefits for family units in less well-off conditions even when members of the unit leave temporarily abroad – implies, first of all, that the CJEU's judgments must be considered binding, notably for the referring courts, as well as in a broader context. The Constitutional Court speaks of the principle of primacy of EU law, in conjunction with art. 4(2) and (3) TEU, as 'the keystone on which the community of national courts is based'. This notion brings about uniform rights and obligations and strengthens the edifice of the EU legal order, ascertaining the *effet utile* of art. 267 TFEU. Furthermore, primacy of EU law does not collide, neither is an alternative to centralized constitutional review as provided for under Article 134 of the Constitution, "but rather merges with them to build an increasingly well integrated system of protections". [33] In light of all this, the Court concludes that 'it is appropriate for the referring court to disapply the challenged provisions, which the Court of Justice has held to be incompatible with EU law'.[34] The point is made that, although the legislator is the only one entitled to choose how to eradicate discrimination, it is for the courts to eliminate the discriminatory effects that have occurred.

The Constitutional Court stresses, in this way, a double loyalty for the referring court. Not only the Court of Cassation was confronted with a clear and unconditional principle of EU law; it also had to enforce binding decisions delivered by the CJEU, in reply to preliminary references.

In the attempt to combine constitutional and European standards, the Constitutional Court's responsibility – in this case and in similar ones – materializes in lightening new pathways of equality among Member States. In the field of social security such a responsibility implies that third country nationals be fully included and receive respect for their fruitful participation in the society in which they live.

3. Common words in the future of Europe for universal principles on the rule of law

In the opening of this paper, I argued that although no precise parallel can be established between different streams of CJEU's case law – the one on the rule of law and the independence of the judiciary and the one on judicial cooperation established with national constitutional courts – we should look coherently at such decisions and draw conclusions for the enhancement of the system as a whole. Common words should be spoken in all scenarios for the future of Europe.[35]

Coherence is not a synonym for acritical acquiescence to the judgments delivered in Luxembourg. It is rather an exercise in building institutional trust and fortifying the common meaning of values, as they are stipulated in art. 2 TEU. Pluralism, among other values, indicates the dynamism of contemporary society and the attempts to capture new emerging aspirations. In the field of social security – as the two examples here proposed show – the principle of equal treatment between EU citizens and third-country nationals legally residing, regardless of the

33 Judgment no. 67/2022 of 8 February 2022, *Corte costituzionale*, point of law 11. A. RUGGERI, *Alla Cassazione restia a far luogo all'applicazione diretta del diritto eurounitario la Consulta replica alimentando il fecondo 'dialogo' tra le Corti (a prima lettura della sentenza n. 67/2022)*, in *Consulta on-line*, 14 March 2022, https://www.giurcost.org/post/ANTONIO%20RUGGERI/21955.

34 At para. 12.2.

35 European Commission, *2022 Report on the rule of law*, COM(2022) 500 final of 13 July 2022.

permit they hold, pluralism, corresponds to the effective enforcement of rights, in a close combination of European and constitutional parameters. Pluralism is, by all means, an essential part of democracy.

Constitutional courts, which have not experienced immediate threats to democracy and the rule of law, have the opportunity to act as privileged protagonists, when they lodge preliminary references. Not only they can be responsive to the evolution of EU law; they can also evaluate it in combination with internal constitutional rights and principles.[36] The goal pursued by all such courts, acting within their competences, is common and corresponds to building consistent interpretations of the foundational common values of the EU. In their own capacities, they are authoritative, as long as they provide clear examples of independence, which also implies being active participants of integration within the EU. Independence of the judiciary must be fostered as an essential pre-condition in establishing judicial cooperation with the CJEU.[37]

Constitutional courts, as 'institutions of pluralism', monitor changes and, at the same time, consolidate constitutional traditions; they feed individual and collective conscience; they take account of the less privileged and operate for social inclusion; they construct their accountability enforcing democracy as a normative principle. Democracy implies respect for the rule of law and consequently makes the independence of the judiciary a preliminary condition to enjoy membership of the EU. The delicate issue of regulating conditionalities on membership and establishing sanctions for those not obeying to the rule of law is, in the current situation, more than crucial and the object of political arguments. It must be confronted with the binding force of EU law and of CJEU's judgments, which are in themselves elements of democracy.

The rule of law, as we should now understand it, "is not a matter of all or nothing, but of more or less". Each single step adds to a more complete standard. Making European law binding on states represents a progress compared to arbitrariness.[38] It is remarkable, at this regard, that the two courts – in Luxembourg and in Strasbourg – should be connected in the joint effort to protect the rule of law, and develop common criteria in listing its necessary components. This too is an element to consider for the future of Europe, following the interpretation that sees the rule of law inherent in all article of the ECHR.[39]

It is in such a broad picture that constitutional courts should enhance the 'principle of sincere cooperation' echoed in art 4(3), which is intrinsic to the notion of 'full mutual respect', namely assisting the Union and the Member states in carrying out tasks which flow from the Treaties. This appears to be the main road to follow, with a view to establishing universal principles on the rule of law, grounded on EU and conventional standards. Projects that foster

36 L.S. ROSSI, *Un dialogo da giudice a giudice*, *supra* n. 17, at p. 84, arguing for the 'physiology' of the relationship among constitutional courts and the CJEU, which brings together compliance for constitutional principles and the founding principles of EU law.

37 K. LENAERTS, *On judicial independence and the quest for national, supranational and transnational justice*, in G. SELVIK ET AL. (eds), *The art of judicial reasoning. Festschrift in Honour of Carl Baudenbacher*, Cham, 2019, p. 173, arguing that independence is "a prerequisite for any 'court' that wishes to engage in a dialogue with the ECJ and with sister courts in other member states".

38 D. GRIMM, *Rule of Law and Democracy*, in G. AMATO, B. BARBISAN, C. PINELLI (eds.), cit., p. 60.

39 R. SPANO, *The rule of law as the lodestar of the European Convention on Human Rights: the Strasbourg court and the independence of the judiciary*, in *European Law Journal*, 2021 (Italian translation in *Giustizia insieme*, 10 March 2021).

the future of Europe should feel the urgency to strengthen democracy, letting it prevail on 'ideologies' of languages, which may end up being confused with the jargon of power, fighting for hegemony and inciting rivalry.[40]

40 R. BARTHES, *The pleasure of the text*, New York, 1975, p. 28, discussing the 'ideologies' of languages, when spoken by specific categories of people. An example: G.F. MANCINI, *Language, Culture and Politics in the Life of the European Court of Justice*, in ID., *Democracy & Constitutionalism in the European Union*, Oxford, 2000, p. 177 ff.