



Volume 67

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2014

# The National Judge as EU Judge: Some Constitutional Observations

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## Recommended Citation

Allan Rosas, *The National Judge as EU Judge: Some Constitutional Observations*, 67 SMU L. Rev. 717 (2014)  
<http://scholar.smu.edu/smulr/vol67/iss4/5>

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# THE NATIONAL JUDGE AS EU JUDGE; SOME CONSTITUTIONAL OBSERVATIONS

*Allan Rosas\**

## I. INTRODUCTION

THE constitutional structure of the European Union (EU) differs in some respects from that of federal states. Especially the relationship between the EU and its Member States presents some particularities that are not to be found in most federal state contexts. The Member States are still in the driving seat as far as constitutional amendments are concerned,<sup>1</sup> and an individual Member State may, according to Article 50 of the Treaty on European Union (TEU), decide to withdraw from the Union.<sup>2</sup> Union legislation, however, may, as a general rule, be adopted by the European Parliament and the Council jointly, the latter acting by qualified majority.<sup>3</sup> As is well known, Union law enjoys primacy over the laws of Member States and may, under certain conditions, not only be directly applicable but also have direct effect in their legal orders; in other words Union Law may be directly invoked by individuals before courts and authorities.<sup>4</sup>

At the same time, the EU may be seen as an example of “multilevel governance,” where both Union institutions and bodies and Member States’ national authorities take part in the application and implementation of Union law.<sup>5</sup> Union law is, to a large extent, applied and implemented at national level;<sup>6</sup> in some cases, Union law not only assigns tasks

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1. As a rule, amendments to the basic Treaties, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), with Protocols, require ratification, or at least unanimous approval, by all the Member States. See Consolidated Revision of the Treaty on European Union art. 48, Oct. 26, 2012, 2012 O.J. (C 326) 13, 41-42 [hereinafter TEU]; see also ALLAN ROSAS & LORNA ARMATI, *EU CONSTITUTIONAL LAW: AN INTRODUCTION* 34-41 (2d ed. 2012).

2. TEU art. 50.

3. TEU art. 48.

4. ROSAS & ARMATI, *supra* note 1, at 66-85.

5. *Id.* at 86-87.

6. *See id.* at 108-09.

to particular organs of Member States, such as their national parliaments,<sup>7</sup> but also requires the designation of special national bodies for the execution of Union law and may regulate some aspects of their status and functions, such as their independence from the national government.<sup>8</sup> Whilst Union institutions and bodies are not, in principle, authorized to apply and interpret purely national law, the European Central Bank has, in a recent legislative act (a regulation) relating to the so-called Banking Union, been granted powers also to apply national legislation transposing Union directives or national legislation exercising options granted by Union regulations.<sup>9</sup>

This intertwinement between Union and national bodies, and Union and national law, may be seen in the EU judicial system as well. While the Union Courts in the narrow sense are composed of the three judicial bodies currently making up the “Court of Justice of the European Union” (which includes the [European] Court of Justice (ECJ), the General Court, and a Civil Service Tribunal as a specialized court),<sup>10</sup> with their seat in Luxembourg,<sup>11</sup> the national courts of the Member States, too, form part of the EU judicial system.<sup>12</sup> Even if they do not belong to the Court of Justice of the European Union as a Union institution,<sup>13</sup> they can be conceived as “EU courts” as they are called upon to apply not only national (state) law but also Union (federal) law, sometimes on quite a regular basis.<sup>14</sup> Moreover, if the matter concerns an act or an omission not of a Union institution or body, but those of a national authority, including the national parliament or the national government, the litigation has to be brought before a national judge, not a Union judge in Luxembourg, even if Union law rather than national law is at stake.<sup>15</sup>

TEU Article 19(1), while referring first to the Union courts in Luxembourg, also instructs the Member States to “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”<sup>16</sup> In the same vein, Article 47 of the EU Charter of Fundamental Rights, which is also applicable at the national level in a situation falling under Union law,<sup>17</sup> provides for the “[r]ight to an effective remedy and to a fair

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7. See Consolidated Version of the Treaty on the Functioning of the European Union arts. 70, 85, 88, Oct. 26, 2012, 2012 O.J. (C 236) 47, 74, 81-82, 84 [hereinafter TFEU] (discussing the role of national parliaments in the EU constitutional structure); see also TEU arts. 12, 48.

8. See ROSAS & ARMATI, *supra* note 1, at 109-110.

9. Council Regulation 1024/2013, art. 4(3), 2013 O.J. (L 287) 63, 74.

10. TEU art. 19.

11. Protocol No. 6, Oct. 26, 2012, 2012 O.J. (C 326) 265.

12. See *infra* notes 13-14 and accompanying text.

13. The Union's institutions are the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors. See TEU art. 13.

14. See ROSAS & ARMATI, *supra* note 1, at 105-10.

15. See TFEU art. 267; see also TEU art. 19.

16. TEU art. 19.

17. See *infra*, note 27.

trial.”<sup>18</sup>

In the following, I shall, mainly from a constitutional angle, take a closer look at the role performed by national courts in their capacity as EU courts, in the light of recent ECJ case law. The mechanism of preliminary rulings is here of crucial importance. It is to the general tenets of this mechanism that I shall first turn.

## II. THE PRELIMINARY RULING PROCEDURE

According to Article 267 of the Treaty on the Functioning of the European Union (TFEU), where a question concerning the interpretation of the basic Treaties, such as the TEU and the TFEU, or the validity and interpretation of legislative or other acts of the institutions, bodies, offices or agencies of the Union, “is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the [ECJ] to give a ruling thereon.”<sup>19</sup> Whilst such a request is, in principle, an option based on the use of the word “may,” that option becomes an obligation, subject to certain qualifications,<sup>20</sup> if the national court is an instance of last resort, due to the “a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law” language.<sup>21</sup> A lower court, too, must make a reference if it has serious doubts about the validity of a Union act, since national courts, according to ECJ case law, are barred from declaring Union legal acts invalid.<sup>22</sup> According to well-established case law, the ECJ is, in principle, obliged to answer the questions raised by the national judge (although there are some grounds for declaring a request inadmissible or concluding that the ECJ is not competent to give a ruling, as discussed below); this obligation does not depend on the issuance of a discretionary *certiorari*.<sup>23</sup>

Although the national court may still order protective measures, particularly in connection with a reference relating to the validity of Union acts, the lodging of a request for a preliminary ruling nevertheless calls

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18. Charter of Fundamental Rights of the European Union, Dec. 12, 2007, 2010 O.J. (c83/02) 389.

19. TFEU art. 267.

20. The ECJ observed that even a national court of last resort need not make a referral to the ECJ (1) where the question to be referred is identical to a question on which the ECJ has already ruled, (2) where the reply to such a question may be clearly deduced from existing case law or (3) where the answer to the question admits of no reasonable doubt. See Case 283/81, *Clifit v. Ministry of Health*, 1982 E.C.R. 3415. This wording is not a verbatim citation of the judgment in *Clifit* but borrows from art. 99 of the ECJ Rules of Procedure which authorizes the Court to reply by reasoned order instead of a judgment in one of the three circumstances mentioned. See Rules of Procedure of the Court of Justice, art. 99, 2012 O.J. (L 265) 1, 25.

21. See TFEU art. 267.

22. Case 314/85, *Foto-Frost v. Hauptzollaamt Lübeck-Ost*, 1987 E.C.R. 4225; see also Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings, para. 17, 29, 2012 O.J. (C 338) 1, 3-4.

23. The Reference for a Preliminary Hearing, EUROPA, [http://europea.eu/legislation-summaries/institutional\\_affairs/decisionmaking\\_process/L14552\\_en.htm](http://europea.eu/legislation-summaries/institutional_affairs/decisionmaking_process/L14552_en.htm) (last updated Feb. 20, 2013).

for the national procedure to be stayed until the ECJ has given its ruling.<sup>24</sup> This ruling is binding on the national court, which, in application of the ruling, decides the final outcome of the case before it.<sup>25</sup>

The question of the admissibility of requests for preliminary rulings and the scope of the competence of the ECJ to answer the questions raised has given rise to an extensive case law and literature which cannot be analyzed in any greater detail here.<sup>26</sup> Important issues include the concept of “court or tribunal” appearing in TFEU Article 267<sup>27</sup> and the borderline between Union law and national law, the ECJ’s competence being limited to the former.<sup>28</sup>

When the ECJ undertook to recast its Rules of Procedure a few years ago, it was decided to include a provision laying down some basic requirements on the content of a request for a preliminary ruling. Article 94 of the new Rules of Procedure, adopted and entered into force in 2012, contains requirements relating to the subject-matter of the dispute and the findings of fact as determined by the referring court, the national law applicable in the case, and the reasons that prompted the referring court to inquire about the interpretation or validity of certain provisions of Union law.<sup>29</sup> This new provision should enable the ECJ to become somewhat more restrictive with respect to the admissibility of requests for preliminary rulings, which could, in the long run, help in keeping the number of such requests within reasonable limits.<sup>30</sup>

The number of requests for preliminary rulings has, in fact, been steadily on the rise.<sup>31</sup> While in 1963 the ECJ received six requests, the corresponding figures are 61 for 1973, 98 for 1983, 204 for 1993, 210 for 2003, and as many as 450 for 2013.<sup>32</sup> This development reflects not only the enlargement of the European Communities and, since 1992, of the EU

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24. See Recommendations, *supra* note 9, 21, para. 29.

25. EUROPA, *supra* note 22.

26. See, e.g., CAROLINE NAOMÉ, LE RENVOI PREJUDICIEL EN DROIT EUROPÉEN (2d ed. 2010); MORTEN BROBERG & NIELS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE (2d ed. 2014).

27. TFEU art. 267.

28. The need to differentiate between Union law and national law has become particularly acute to the applicability of the Charter of Fundamental Rights of the European Union, which shall have the same legal value as the Treaties. See TEU art. 6(1). Article 51 of this charter prescribes that its provisions “are addressed . . . to the Member States only when they are implementing Union law.” See, e.g., Allan Rosas, *The Applicability of the EU Charter of Fundamental Rights at National Level*, 13 EUROPEAN YEARBOOK ON HUMAN RIGHTS 97 (2013).

29. Rules of Procedure of the Court of Justice, art. 94, 2012 O.J. (L 265) 1, 24. According to TFEU art. 253(6), the Rules of Procedure are to be “established” by the Court of Justice, but they require the “approval” of the Council, which consists of representatives of the national governments. See TEU art. 7(3).

30. Allan Rosas, *The Content of Requests for Preliminary Rulings to the European Court of Justice and the EFTA Court: What Are the Minimum Requirements?*, EEA AND THE EFTA COURT: DECENTERED INTEGRATION (forthcoming 2014).

31. See *Court of Justice of the European Union: Annual Report 2013*, at 103-04, (2014), available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf>.

32. *Id.*

from six Member States before 1973 to the 28 Member States of today and the broadening of the reach of Union law, but also a greater inclination of national judges to turn to the ECJ for advice. The greater acceptance among national judges of the preliminary ruling mechanism is also reflected in the ever-increasing number of national constitutional courts that have started to use the mechanism.<sup>33</sup> In this way, national judges have also increasingly come to endorse the general tenets and principles of Union law, including the principles of primacy and direct effect.<sup>34</sup> There are certainly variations between the Member States as to the number of references made by their courts but these variations seem to be based, at least partly, on structural factors such as population size and national litigation proneness.<sup>35</sup>

### III. THE NATIONAL COURT DECIDES

It follows from TFEU Article 267 that it is the national court or tribunal that, “if it considers that a [ruling on Union law] is necessary to enable it to give judgment” in the case before it, decides whether to request a preliminary ruling from the ECJ.<sup>36</sup> The Recommendations issued by the ECJ to national courts and tribunals spell out that “[w]hether or not the parties to the main proceedings have expressed the wish that it do so, it is for the national court or tribunal alone to decide whether to refer a question to the Court of Justice for a preliminary ruling.”<sup>37</sup> “Although [the national] court is at liberty to request the parties to the dispute before it to suggest wording suitable for the question to be referred, the fact remains that it is for it alone ultimately to decide both its form and content.”<sup>38</sup> “National rules which have the effect of undermining that jurisdiction must be disapplied.”<sup>39</sup>

The ECJ has emphasized that the rights of a national court to request a

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33. The constitutional courts that have referred cases to the ECJ are the constitutional courts of Austria, Belgium, France, Germany, Italy, Lithuania, and Spain. *See id.* at 107-09. The most recent referral, a request made by the German Constitutional Court relates to the legality of an announcement by the European Central Bank that it was ready, if need be, to buy an unlimited number of government bonds on the secondary market and of the Bank’s decision providing technical guidance if action would become necessary. *See* Case C-62/14, *Gauweiler v. German Bundestag*, 2014 O.J. (129) 15; *see generally* Ingolf Pernice, *A Difficult Partnership Between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU*, 21 MAASTRICHT J. EUR. & COMP. L. 3 (2014).

34. On the exceptional right some constitutional and other courts have reserved for themselves to challenge Union acts that the national courts consider as *ultra vires*, *see* ROSAS & ARMATI, *supra* note 1, at 70-71.

35. *See generally* Martin Broberg & Niels Fenger, *Variations in Member States’ Preliminary References to the Court of Justice: Are Structural Factors (Part of) the Explanation?* 19 EUROPEAN L.J. 488 (2013).

36. TFEU art. 267.

37. Recommendations, *supra* note 21, para. 10; *see also* Case C-136/12, *Consiglio para. Nazionale dei Geologi v. Autorità Garante della Concorrenza e del Mercato*, 2013 EUECJ C-136/12, para. 28, (citing Case C-210/06, *Cartesio*, 2008 E.C.R. I-9641, para. 90 (“[The preliminary ruling procedure] is completely independent of any initiative by the parties.”)).

38. *See Consiglio*, 2013 EUECJ C-136/12, para. 30.

39. *Id.* at para. 36.

preliminary ruling follows directly from TFEU Article 267.<sup>40</sup> This right cannot thus be restricted or hindered by national legal provisions.<sup>41</sup> The ECJ remains seized of a reference “so long as it has not been revoked or amended by the referring [national] court.”<sup>42</sup> This principle applies even if, under national law, a separate appeal may be brought “against a decision making a reference for a preliminary ruling: to the ECJ, and the appellate court has set aside this decision, as long as the case remains pending before the lower court.<sup>43</sup> In *Cartesio*, the ECJ held that it was under an obligation to “abide by the decision to make a reference for a preliminary ruling, which must have its full effect so long as it has not been revoked or amended by the referring court, such revocation or amendment being matters on which that court alone is able to take a decision.”<sup>44</sup> “[I]t is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for preliminary ruling, or to amend it or to withdraw it.”<sup>45</sup>

The EU constitutional order, by granting each national court or tribunal (including courts at first instance) an autonomous right to turn to the ECJ, thus encroaches upon the national judicial systems and, in a way, upon the hierarchy of these systems. It, as it were, elevates each national judge to the status of EU judge, who, concerning the preliminary ruling procedure, derives his competence and powers from EU law rather than from national constitutional and procedural law.

In *Melki and Abdeli*, the ECJ was confronted with a particular situation arising from the relationship between national general courts and the constitutional court.<sup>46</sup> Under an interpretation presented to the ECJ by the French Supreme Court (Cour de Cassation), French law gave priority to an interlocutory procedure for the review of the constitutionality of national law and thus to the seizure of the Constitutional Court (Conseil Constitutionnel) even in case EU law was at stake.<sup>47</sup> The Supreme Court enquired whether TFEU Article 267 precludes such a system, in so far as it requires courts “to rule as a matter of priority” on the submission to the Conseil Constitutionnel of the question on constitutionality, inasmuch as that question relates to whether domestic legislation is in breach of the

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40. *See id.* at paras. 25-27.

41. *See id.* at paras. 28-36.

42. *Cartesio*, 2008 E.C.R. I-9641, para. 97; *see also* Rules of Procedure of the Court of Justice, art. 100(1), 2012 O.J. (L 265) 1, 25 (“The Court shall remain seized of a request for a preliminary ruling for as long as it is not withdrawn by the court or tribunal which made that request to the Court.”); *see also* Case 166/73 *Rheinmühlen-Düsseldorf v. Einfuhr*, 1974 E.C.R. 33, ¶¶ 3-5.

43. *Cartesio*, 2008 E.C.R. I-9641, paras. 97-98.

44. *Id.* at para. 97.

45. *Id.* at para. 96.

46. *See generally* Joined Cases C-188/10 & C-189/10, *Melki and Abdeli*, 2010 E.C.R. I-05667.

47. *See Melki and Abdeli*, 2010 E.C.R. I-05667, paras. 32-35.

national Constitution for the reason that it is considered contrary to European law.<sup>48</sup>

The ECJ answered in the affirmative; in other words, such a procedure is not compatible with Article 267, “in so far as the priority nature of that procedure prevents . . . all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling.”<sup>49</sup> But such incompatibility with Article 267 would not arise if the other courts and tribunals remain free to refer to the ECJ “at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary” and “to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.”<sup>50</sup>

National courts are thus free not only to decide whether to refer the case to the ECJ but also when such a referral should be made and what consequences should be drawn from the ruling given by the ECJ. In Opinion 1/09, relating to the compatibility of a new unitary patent litigation system with the Treaties, the ECJ, basing itself on earlier case law, dealt with a more general question concerning the role of national courts and tribunals in the EU judicial system in general.<sup>51</sup> It is to this Opinion that I shall now turn.

#### IV. “A DUTY ENTRUSTED TO THEM BOTH”

Whilst there is a Union trademark law, and national trademark law and national copyright law have been harmonized, EU patent law is still at its infancy.<sup>52</sup> After lengthy and difficult discussions on a Union patent system, it was agreed not to copy the Union trademark system, with a Union agency (the Office for the Harmonisation in the Internal Market in Alicante, Spain) dealing with applications for Union trademarks, but to draw upon the intergovernmental system established by the European Patent Convention, signed on 5 October 1973, administered by the European Patent Office in Munich, which is not an EU institution or organ.<sup>53</sup>

It was accordingly proposed to complement the European patent system, which, as the ECJ has pointed out, “breaks down into a bundle of national patents,”<sup>54</sup> with a patent with unitary effects in the EU area.<sup>55</sup> The “European patent with unitary effect” would be registered by the European Patent Office on the condition that the patent already constitutes a European patent granted by this Office under the provisions of

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48. *Id.* at para. 31.

49. *Id.* at para. 57.

50. *Id.*

51. Opinion 1/09, 2011 E.C.R. I-01137 (creating a unified patent litigation system).

52. *See, e.g.,* CATHERINE SEVILLE, *EU INTELLECTUAL PROPERTY LAW & POLICY* (2009).

53. *See* Opinion 1/09, 2011 E.C.R. I-01137, ¶¶ 3-8.

54. *Id.*

55. *Id.* at paras. 3-8.



the European Patent Convention and that it consists of the same sets of claims with respect to all the participating Member States.<sup>56</sup> The “unitary effect” of such a European patent (which, before its registration as such a patent with unitary patent, is not an EU legal concept *stricto sensu*) would be brought about by an EU regulation coupled with an agreement on a unitary patent litigation system.<sup>57</sup>

The draft agreement on such a unitary patent litigation system was submitted to the ECJ for an opinion as to its compatibility with the Treaties.<sup>58</sup> The draft considered in Opinion 1/09 would have envisaged an international court system, including also non-EU States as contracting parties.<sup>59</sup> The international court thus established would have been situated “outside the institutional and judicial framework of the European Union” and would, moreover, have had “exclusive jurisdiction [to hear] a significant number of actions brought by individuals in the field of [Union] patents” and “to interpret and apply European Union law” in that field.<sup>60</sup> The Court held that such a litigation system was not in conformity with the Treaties.<sup>61</sup> It observed that the draft agreement “would [have] deprived courts of Member States of their powers in relation to the interpretation and application of European Union law and the [ECJ] of its powers to reply, by preliminary ruling, to questions referred by those courts.”<sup>62</sup>

This conclusion was based on an overall assessment of the role of the national courts of Member States in the EU judicial system.<sup>63</sup> The draft agreement was incompatible with the TEU and the TFEU as it “would [have] alter[ed] the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law.”<sup>64</sup> Among the essential characteristics of the EU legal order, “a new legal order . . . for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals,”<sup>65</sup> the Court mentioned not only the principles of primacy and direct effect but also the fact that “the guardians of that legal order and the judicial system of the European Union are the Court of Justice and the courts and tribu-

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56. *Id.*

57. *Id.*

58. *See id.* at paras. 16-45; *see also* TFEU art. 218(11) (“A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.”).

59. *See* Opinion 1/09, 2011 E.C.R. I-01137, para. 14.

60. *Id.* at paras. 71-73.

61. *See generally id.*

62. *Id.* at para. 89.

63. *See generally id.*

64. *Id.* at para. 89.

65. *Id.* para. 65.

nals of the Member States.”<sup>66</sup> The Court added that “[t]he national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed.”<sup>67</sup> An “outsourcing” of judicial functions to an international tribunal, by depriving the national courts of their mandate under Union law,<sup>68</sup> was not possible.<sup>69</sup>

It had been argued before the Court that this opinion could be in contradiction with its earlier ruling to accept the Benelux Court of Justice (Belgium, Netherlands, Luxembourg) as a court that can assume the functions of an EU national court.<sup>70</sup> In response to this argument, the ECJ pointed out that the patent litigation system envisaged would have differed from that of the Benelux Court, which “is a court common to a number of Member States, situated, consequently, within the judicial system of the European Union” and whose “decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union.”<sup>71</sup>

It is obvious that Opinion 1/09, rendered by the Full Court (consisting of all the judges of the ECJ), is of considerable constitutional significance.<sup>72</sup> It reaffirms and develops earlier case law on the role of national courts in highlighting the fact that, as far as the application of Union law is concerned, they derive their mandate from Union law.<sup>73</sup> One concrete consequence of this is that Member States are not allowed to “out-source[ ]” the EU law tasks of their national courts to bodies which are outside the EU constitutional structure and judicial system.<sup>74</sup> The two components of this judicial system, the Union Courts and the national courts, “fulfil a ‘duty entrusted to them both’ of ensuring that in the interpretation and application of the Treaties the law is observed.”<sup>75</sup>

It can be added in this context that, because of the negative opinion of the ECJ, the draft agreement envisaged had to be abandoned. Instead, the Agreement on a Unified Patent Court, signed by 25 of the then 27 EU Member States on 19 February 2013, is based on the “Benelux model,” in other words, a court common to Member States and Member States alone.<sup>76</sup> “The Unified Patent Court shall be a court common to the

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66. *Id.* paras. 65-66.

67. *Id.* para. 69.

68. See generally MONICA CLAES, *THE NATIONAL COURTS’ MANDATE IN THE EUROPEAN CONSTITUTION* (2006).

69. See Opinion 1/09, 2011 E.C.R. I-01137, paras. 80-81.

70. See *id.* at para. 82.

71. *Id.*

72. See Allan Rosas, *The National Judge as EU Judge: Opinion 1/09*, in *CONSTITUTIONALISING THE EU JUDICIAL SYSTEM: ESSAYS IN HONOUR OF PERNILLA LINDH* 105-21 (Pascal Cardonnel et al. eds., 2012).

73. *Id.* at 120-121.

74. *Id.* at 121.

75. *Id.* (quoting Joined Cases C-422/93, C-423/93 & C-424/93, *Erason v. Instituto Nacional de Empleo*, 1995 E.C.R. I-1577).

76. See Council Agreement on a Unified Patent Court, Feb. 19, 2013, 2013 O.J. (C 175) 1, 2.

Contracting Member States and thus subject to the same obligations under Union law as any national court of the Contracting Member States.”<sup>77</sup> The Agreement refers, *inter alia*, to the primacy of Union law over the laws of the Member States,<sup>78</sup> to the obligation of the Unified Patent Court to “cooperate with the [ECJ] to ensure the correct application and uniform interpretation of Union law,<sup>79</sup> to the joint and several liability of the Contracting Member States “for damage resulting from an infringement of Union law by the Court of Appeal”<sup>80</sup> of the Unified Patent Court<sup>81</sup> and to the individual and collective responsibility of the Contracting Member States,<sup>82</sup> including for the purposes of infringement actions which can be brought against Member States under TFEU Articles 258, 259, and 260.<sup>83</sup>

Already before the signature of the Agreement on a Unified Patent Court, the European Parliament and the Council had adopted Regulation 1257/2012 “implementing enhanced cooperation in the area of the creation of unitary patent protection.”<sup>84</sup> This Regulation was adopted in the context of “enhanced cooperation,” which means that a group of EU Member States<sup>85</sup> may, “as a last resort,” be authorized by the EU Council to resort to such cooperation “when it has established that the objectives [sought] cannot be attained within a reasonable period by the Union as a whole”<sup>86</sup> because the necessary majority, or in the patent case, unanimity, cannot be attained.<sup>87</sup>

In Joined Cases C-274/11 and C-295/11,<sup>88</sup> Italy and Spain brought an action for annulment of the Council Decision of 2011, which authorized “enhanced cooperation in the area of the creation of unitary patent protection.”<sup>89</sup> The actions were dismissed by judgment of the ECJ on 16 April 2013.<sup>90</sup> Subsequently, Spain has brought two new cases,<sup>91</sup> one against the European Parliament and the Council requesting the annulment of Regulation 1257/2012 referred to above and the other against the

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77. *Id.* art. 2(1).

78. *Id.* art. 20.

79. *Id.* art. 21.

80. *Id.* art. 22(1).

81. The liability of EU Member States for violations of Union law was first established by the ECJ. *See* Joined Cases C-6 & 9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357.

82. Agreement art. 22, 2013 O.J. (C 175) 1, 7.

83. *Id.* art. 27; *see also* TFEU arts. 258-60.

84. Council Regulation 1257/2012 art. 18, 2012 O.J. (L 361) 1; *see also* Council Regulation 1260/2012, 2012 O.J. (L 361) 89 (“implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements”).

85. In this case, the group has 25 of the then 27 member states. *See* Regulation 1257/2012, 2012 O.J. (L 361) 1.

86. TEU art. 20(2).

87. *See* arts. 326-334.

88. *Spain v. Council of the European Union*, 2013 E.C.R.

89. Council Decision 2011/167, 2011 O.J. (L 76) 53.

90. Joined Cases C-274/11 & C-295/11, *Spain v. Council*, 2012 E.C.R.

91. Case C-146/13, *Spain v. European Parliament*; Case C-147/13, *Spain v. Council of the European Union*. The oral hearing was held on July 1, 2014.

Council for the annulment of a regulation concerning the applicable translation arrangements.<sup>92</sup> These legal actions, which call into question the very system envisaged for the granting and registering of European patents with unitary effect, are at the time of writing still pending before the ECJ.

## V. CONCLUDING REMARKS

As argued in the introductory part of this contribution, the EU may be seen as an example of “multilevel governance,” where both Union institutions and bodies and Member States’ national authorities take part in the application and implementation of Union law. Union law is, to a large extent, applied and implemented at the national level and, in some cases, Union law assigns specific tasks to existing national organs and sometimes even requires the designation of special national bodies for the execution of Union law and regulates certain aspects of their status and functions.

The status and role of national courts is a paramount example of this phenomenon. Recent case law has confirmed that they form an integral part of the EU judicial system, and Union law restricts in many ways the powers of the Member States to regulate matters relating to the jurisdiction of their national courts, as far as the application of Union law is concerned. Whilst the competence of the Union is based on the principle of conferral, which, according to TEU Article 5(2), implies that “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein,”<sup>93</sup> that does not prevent those Treaties, and the legal acts based on them, from attributing specific powers to Member States’ bodies and thus, in conformity with the principle of primacy of Union law, from limiting the powers of the Member States in a corresponding way.

The EU legal order thus goes beyond the traditional dichotomy, still prevalent in public international law, between international organizations and rules, on the one hand, and States and their domestic law, on the other, not only in having, as the ECJ has said, as its subjects “not only Member States but also their nationals,”<sup>94</sup> but also in assigning powers and tasks to different organs within the Member State, rather than simply addressing itself to the Member State as such. This is one of the reasons why it is a constitutional rather than an international order.

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92. For references to these Regulations, see *supra* note 83.

93. TEU art. 5(2).

94. Opinion 1/09, 2011 E.C.R. I-01137, ¶ 65; *see also* TEU art. 1, (“This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe.”).