



University College Dublin
Université Montesquieu-Bordeaux IV

School of Law, University College Dublin
École doctorale de droit, Université Montesquieu-Bordeaux IV

Doctorate of Philosophy, University College Dublin
Doctorat en droit, Université Montesquieu-Bordeaux IV

Julien Sterck

**The Constitutional Identity of Member States and the Primacy of European
Union Law: A Comparative Study of Ireland and France**
*Identité constitutionnelle des États membres et primauté du droit de l'Union
européenne : Étude comparée de l'Irlande et de la France*

Under the supervisions of:

Dr Gavin Barrett, University College Dublin, Senior Lecturer
M. Emmanuel Sur, Université Montesquieu-Bordeaux IV, Maître de conférences

Examiners:

Dr Gavin Barrett, Senior Lecturer at University College Dublin

M. Pascal Jan, Professeur at Sciences Po Bordeaux

Dr Diarmuid Rossa Phelan, Assistant Professor at Trinity College Dublin

M. Emmanuel Sur, Maître de conférences at Université Montesquieu-Bordeaux IV

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Abstract

Abstract in English

Comparing the Irish and French legal orders leads to describe the appraisal of the primacy of European Union law by the notion constitutional identity. In contrast to the claims of the European Court of Justice, the constitutional regime regarding European rules, both in Irish and French law, only provides for immunity and ultimately affirms the supremacy of the Constitution as the norm expressing national sovereignty. Still, Irish and French courts display a conciliatory attitude focused on aligning the material content of domestic and European norms. Rather than essentialism, the notion of constitutional identity represents a discourse on the Constitution whereby the identity status qualifies those constitutional norms which can defeat constitutional provisions dedicated to the prevalence of European rules as a result of an interpretative balancing process.

While manifesting different affirmations of national sovereignty, the common objective of Irish and French courts is attaining increased control of the application of European Union rules. The institutional dynamics distinguishing the notion of constitutional identity as an interpretative process involve both an empowerment of the judiciary and a specific form of dialogue with the European Court of Justice regarding the conciliation between the primacy of European Union law and the supremacy of the Constitution. Judicial monologues protecting constitutional identity mean possible exclusions of the domestic application of European law and constitute an invitation to the European Court of Justice to agree to a peaceful co-existence of the two legal orders defined as a unity of words with a diversity of meanings.

Abstract in French

La notion d'identité constitutionnelle permet de qualifier le positionnement respectif des ordres juridiques irlandais et français face à la primauté du droit de l'Union européenne. Comparé à la jurisprudence européenne, leurs régimes constitutionnels relatifs à ce droit

externe n'offrent qu'une immunité et affirme *in fine* la suprématie de la Constitution en tant qu'expression de la souveraineté nationale. Pourtant, les juridictions des deux pays montrent une attitude conciliante fondée sur une relation de contenu entre normes constitutionnelles et européennes. Plutôt qu'un essentialisme, la notion d'identité constitutionnelle représente un discours portant sur la Constitution suivant lequel une qualité identitaire est reconnue aux normes constitutionnelles susceptibles de mettre en échec les dispositions dédiées à la primauté des normes européennes au terme d'une interprétation les mettant en balance.

Malgré des affirmations différentes de leur souveraineté nationale, l'accroissement du contrôle de l'application du droit européen est un objectif commun dans la jurisprudence des deux pays. La dynamique institutionnelle qui caractérise le processus interprétatif qu'implique la notion d'identité constitutionnelle privilégie les juridictions et mène à une forme singulière de dialogue avec la Cour européenne de justice conciliant primauté du droit européen et suprématie de la Constitution. Les monologues menant à une exclusion de l'application du droit européen au nom de l'identité constitutionnelle sont une invitation faite à la juridiction européenne pour établir une coexistence pacifique entre les ordres juridiques définie par une union de mots dans une diversité de sens.

Keywords (*in English*)

Constitutional identity, Constitutional law, European Union law, France, Hierarchy of norms, Interpretation, Ireland, Primacy, Separation of powers, Sovereignty

Keywords (*in French*)

Droit constitutionnel, Droit de l'Union européenne, France, Hiérarchie des normes, Identité constitutionnelle, Interprétation, Irlande, Primauté, Séparation des pouvoirs, Souveraineté

Statement of Original Authorship

I hereby certify that the submitted work is my own work, was completed while registered as a candidate for the degrees stated on the Title Page, and I have not obtained a degree elsewhere on the basis of the research presented in this submitted work.

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List of Abbreviations

A.C.	Appeal Cases
Ass.	<i>Assemblée du contentieux</i> of the <i>Conseil d'État</i>
Ass. plén.	<i>Assemblée plénière</i> of the <i>Cour de cassation</i>
<i>Bull.</i>	<i>Bulletin</i> of the decisions of the <i>Cour de cassation</i>
C. cass.	<i>Cour de cassation</i>
Ch. mixte	<i>Chambre mixte</i> of the <i>Cour de cassation</i>
Civ.	<i>Chambre civile</i> of the <i>Cour de cassation</i>
C.M.L.R.	Common Market Law Reports
E.C.	European Community
E.C.R.	European Court Reports
E.Ct.H.R.	European Court of Human Rights
E.E.C.	European Economic Community
E.L.R.	Employment Law Reports
I.E.H.C.	Irish High Court Judgments
I.E.S.C.	Irish Supreme Court Judgments
<i>I.J.E.L.</i>	<i>Irish Journal of European Law</i>
I.R.	Irish Reports
I.R.L.M.	Irish Law Reports Monthly
<i>J.I.S.E.L.</i>	<i>Journal of the Irish Society for European Law</i>
J.O.R.F.	<i>Journal officiel de la République française</i>
O.J.	Official Journal of the European Union
P.C.I.J.	Permanent Court of International Justice
Q.B.	Queen's Bench Reports
<i>Rec.</i>	<i>Recueil</i> of the decisions of the <i>Conseil constitutionnel</i>
<i>Rec. Lebon</i>	<i>Receuil Lebon</i> of the decisions of the <i>Conseil d'État</i>
S.I.	Irish statutory instrument
vol.	volume

Table of Treaty Provisions, Protocols and Declarations Referred to in This Thesis

Treaty establishing the European Economic Community, later the European Community (E.E.C. or E.C. Treaty)

Article 48
Article 56
Article 59
Article 60
Article 95
Article 177
Article 189
Article 227-1

Treaty establishing a Constitution for Europe (Constitutional Treaty)

Article I-1
Article I-6
Article I-5
Article I-11
Article II-70

Protocol (No 1) on the Role of National Parliaments in the European Union

Article 3

Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality

Article 6

Article 7

Article 7 (4)

European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 10

Single European Act

Title II

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Article 30

Treaty establishing the European Stability Mechanism

Treaty on European Union

Preamble

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Article 4.2

Article 5.1

Article 5.2

Article 6

Article 8 B (ex)

Article 14.2

Article 16.4

Article 31.3

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Article 48.7

Treaty on the Functioning of the European Union

Preamble

Article 81.3

Article 267

Article 288

Treaty on Stability, Coordination and Governance in the Economic and Monetary Union

Protocols

Treaty of Maastricht

Protocol (No 17) annexed to the Treaty on European Union and to the Treaties establishing the European Communities

Treaty of Lisbon

Protocol (No 1) on the Role of National Parliaments in the European Union

Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality

Article 7

Article 7.3

Article 7.3 (b)

Protocol (No 35) on Article 40.3.3 of the Constitution of Ireland

Declarations

Treaty of Maastricht

Declaration of the High Contracting Parties to the Treaty on European Union (signed at Maastricht on the seventh day of February 1992) 29 July 1992 [1992] O.J. C 191/109

Treaty of Lisbon

Declaration 17 concerning Primacy

Opinion of the Council Legal Service on the primacy of EC law of 22 June 2007, Council Document 11197/07 (JUR 260)

Presidency Conclusions of the Brussels European Council of 18-19 June 2009 on the Concerns of the Irish People on the Treaty of Lisbon, 11225/8/09 Rev. 2

Table of Secondary Legislation of the European Union, the European Community or the European Economic Community Referred to in This Thesis

Regulations

Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] O.J. Spec. Ed. 475

Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector [1992] O.J. L 405/1

Commission Regulation (EEC) No 536/93 of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products [1993] O.J. L 57/12

Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy [1993] O.J. L 261/1

Council Regulation (EC) No 894/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources [1997] O.J. L 132/1

Council Regulation (EC) No 1239/98 of 8 June 1998 amending Regulation (EC) No 894/97 laying down certain technical measures for the conservation of fishery resources [1998] O.J. L 171/1

Council Regulation (EC) No 2846/98 of 17 December 1998 amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy [1998] O.J. L 358/5

Directives

Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1963-1964] O.J. Spec. Ed. 117

Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] O.J. L 172/14

Council Directive 81/602/EEC of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action [1981] O.J. L 222/32

Council Directive 85/358/EEC of 16 July 1985 supplementing Directive 81/602/EEC concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action [1985] O.J. L 191/46

Council Directive 85/433/EEC of 16 September 1985 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy [1985] O.J. L 253/37

Council Directive 86/469/EEC of 16 September 1986 concerning the examination of animals and fresh meat for the presence of residues [1986] O.J. L 275/36

Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms [1990] O.J. L 117/1

Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] O.J. L 213/13

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market [2000] O.J. L 178/1

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] O.J. L 303/16

Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] O.J. L 106/1

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] O.J. L 167/1

Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] O.J. L 41/26

Directive 2003/54/EC of the European Parliament and Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] O.J. L 176/37

Directive 2003/55/EC of the European Parliament and Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] O.J. L 176/57

Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] L 275/32

Decisions

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] O.J. L 190/1

European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] O.J. L 91/1

Table of Provisions of National Law Referred to in This Thesis

France

Constitutions¹

Declaration of Human and Civic Rights of 1789

Article 3

Article 6

Article 11

Article 66

Constitution of 1791

Article 1 of Title III

Article 2 of Title III

Article 3 of Title III

Constitution of the First Republic of 1793

Article 7

Article 29

Constitution of the Fourth Republic of 1946

Preamble

Paragraph 15

¹ Translations of the French constitutional instruments are available on the website of the *Constitutionnel, Conseil constitutionnel* are available on its website, <<http://www.conseil-constitutionnel.fr/>> [Last accessed 29 December 2012].

Constitution of the Fifth Republic of 1958

Preamble

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Article 51-1

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Article 62

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Article 88-6

Article 89

Constitutional Act n° 2000-64 of 2 October 2000 pertaining to the term of office of the
Président de la République

Constitutional Act n° 2008-724 of 23 July 2008 modernising the institutions of the Fifth
Republic

Legislation

Statutes

Act n° 62-1292 of 6 November 1962 pertaining to the election of the *Président de la République* by direct universal suffrage, J.O.R.F. p. 10762

Act n° 88-1028 of 9 November 1988 carrying statutory and preparatory dispositions for the self-determination of New Caledonia in 1998, J.O.R.F. p. 14087

Institutional Act n° 98-404 of 25 May 1998 determining the conditions for the application of Article 88-3 of the Constitution relating to the exercise by citizens of the European Union residing in France, not being French nationals, of the right to vote and to stand as candidates at municipal elections and transposing Directive 94/80/EC of 19 December 1994, J.O.R.F. p. 7975

Act n° 2004-575 of 21 June 2004 to support confidence in the digital economy, J.O.R.F. 11168

Act n° 2004-800 of 6 August 2004 pertaining to bioethics, J.O.R.F. p. 14040

Act n° 2006-961 of 1 August 2006 pertaining to copyright and related rights in the information society, J.O.R.F. p. 11529

Act n° 2006-1537 of 7 December 2006 pertaining to the energy sector, J.O.R.F. p. 18531

Act n° 2008-595 of 25 June 2008 pertaining to genetically modified organisms, J.O.R.F. p. 10218

Institutional Act n° 2009-1523 of 10 December 2009 pertaining to the application of Article 61-1 of the Constitution, J.O.R.F. p. 21379

Criminal Procedure Code

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Decree n° 2004-832 of 19 August 2004 enacted in application of Articles L. 229-5 to L. 229-19 of the Environment Code and pertaining to the scheme for greenhouse gas emission allowance trading, J.O.R.F. p. 14979

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Article 29.4.4°

Article 29.4.5°

Article 29.4.6°

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Article 34.4.5°

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Article 40.3.2°

Article 40.3.3°

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Article 46.2

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Legislation

Acts of the Oireachtas

Petty Sessions (Ireland) Act 1851 (Petty Sessions (Ireland) Act 1851, Adaptation Order 1938,
S.I. No 300 of 1938)

Section 10 (4)

Fisheries (Consolidation) Act 1959 (No 14 of 1959)

Pharmacy Act 1962 (No 14 of 1962)

European Communities Act 1972 (as amended)

Section 2

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Section 4

Section 4 (1)

European Communities Act 1972 (No 27 of 1972)

European Communities (Amendment) Act 1973 (No 20 of 1973)

European Communities (Amendment) Act 1986 (No 37 of 1986)

European Arrest Warrant Act 2003 (as amended)

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Equality Act 2004 (No 24 of 2004)

Interpretation Act 2005 (No 23 of 2005)

Section 4

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European Communities Act 2007 (No 18 of 2007)

Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28 of 2009)

European Union Act 2009 (No 33 of 2009)

Section 3

Secondary Legislation

European Communities (Control of Oestrogenic, Androgenic, Gestagenic and Thyrostatic Substances) Regulations 1988 (S.I. No 218 of 1988)

European Communities (Control of Veterinary Medicinal Products and their Residues) Regulations 1990 (S.I. No 171 of 1990)

European Community (Milk Quota) Regulations 2000 (S.I. No 94 of 2000)

Fuels (Control of Supplies) Order 1982. (S.I. No 280 of 1982)

Mackerel (Licensing) Order 1999 (S.I. No 311 of 1999)

European Communities (Recognition of Qualifications in Pharmacy) Regulations 1991 (S.I. No 330 of 1991)

Sea Fisheries (Driftnets) Order 1998 (S.I. No 267 of 1998)

Garda Síochána (Admission and Appointments) (Amendments) Regulations 2004 (S.I. No 749 of 2004)

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Introduction

*one is what one is, partly at least*¹

The adoption of written constitutions in both Ireland and France - an act which derived in each case from a process of revolution - effectively proclaimed the sovereignty of the *demos* and its ability to shape the legal system in accordance with its own specific features, in other words its identity. The act of constitution of a democratic polity brings with it the fundamental obligation on the part of those in charge of expressing the common will to protect and to uphold the distinctive elements which give this polity its specific character.² As Lindahl puts it, “a people determines itself - is sovereign - if legal norms express its identity”.³

The fact that the legal order had to reflect the identity of the Irish people was a key assumption in the adoption of the 1937 Constitution. Its very first article proclaims that:

“the Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions.”

The relationship this constitutional provision establishes between Irish sovereignty and its “own genius” indicates that the normative content of the domestic legal order is not neutral in

¹ S. Beckett, *Molloy*, translated from French by P. Bowles in collaboration with the author in P. Auster (ed.), *Samuel Beckett: The Grove Centenary Edition. Volume II, Novels* (New York: Grove Press, 2006) at 49.

² On this “identity spirit of sovereignty”, see A. Jakab, “Neutralizing the Sovereignty Question: Compromise Strategies in Constitutional Argumentation before European Integration and since” (2006) 2 *European Constitutional Law Review* 375-397 at 390-397.

³ H. Lindahl, “European Integration: Popular Sovereignty and a Politics of Boundaries” (2000) 6 *European Law Journal* 239-256 at 241.

relation to the ultimate authority to which it is imputed. Article 1 of the Irish Constitution makes clear that domestic rules ought to reflect values and principles which are constitutive of an Irish identity.

The same concern, even though less obviously stated, is noticeable in the French legal order. It is contained in Article 16 of the Declaration of Human and Civic Rights of 26 August 1789 which states that:

“any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.”

As in the Irish case, the novation of 1789 and the end of the institutions of the *Ancien Régime* also required the act of constitution of a new society based on the sovereignty of the French Nation expressed in Article 6 of the same Declaration. The understanding of Article 16 requires adopting a descriptive, almost mechanical, perspective on the notion of constitution. According to this view, a society's constitution sets out its legal architecture in a way rather similar to that in which a diagrammatic design of a machine sets out its structure.⁴ Designing a constitution is tantamount to giving a singular shape to society. The choice of the rights it guarantees and the separation of powers it determines “form the essential characteristics of society itself”.⁵ In other words, it is through the establishment of a constitution that a given society receives a singular identity. In this sense, it can be said that a society is rather than has a constitution.⁶

As essential as the notion of constitutional identity might be, it apparently plays little importance in legal reality. The processes of showing respect for normative procedures and ensuring the compatibility of content between inferior and superior rules seem remote from the question of what is crucial to the identity of a legal order - and, indeed, the notion of constitutional identity has rarely been formalised in positive law. The paradoxical nature of

⁴ In this sense, see M. Troper, *Pour une théorie juridique de l'État* (Paris: Presses universitaires de France, coll. Léviathan, 1994) at 203-221 or, by the same author, *La théorie du droit, le droit, l'État* (Paris: Presses universitaires de France, coll. Léviathan, 2001) at 147-162 where the author opposes the machine and the norm as two models for understanding constitutions. Troper explains that the French constitutionalist of 1789 understood the Constitution as a mechanism, being inspired by the Newtonian model. The creation of the Constitution was understood as giving a structure to society in the same way as the universe has a specific constitution. This almost physical understanding, similar to the constitution of an individual body, is also noticeable in the anthropomorphic conceptions of the powers where the legislation is the will, the executive the arm and the judiciary the mouth of the law. Under this mechanical perspective, the Constitution is not so much a norm (the Constitution as a norm, Troper argues, appeared in the 19th century). It is not respected out of obligation but out of necessity (which explains for example the absence of judicial review).

⁵ M. Troper, *Pour une théorie juridique de l'État*, *op. cit.*, at fn. 4 above, at 221 (translation by the author).

⁶ For a similar analysis, see G. J. Jacobsen, “The Formation of Constitutional Identities” in T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011) 129-142 at 131.

constitutional identity lies in the inconsistency between its argued for paramount importance and its actual relative lack of profile in positive law.

1. Constitutional Identity of Ireland and France as a Common Reaction to the Primacy of European Union Law

1.1. European Union Law as the *Locus* of a Meaningful Comparison of the Constitutional Identity of Ireland and France

Constitutional Identity as the Result of a Comparative Process

The elusive nature of the notion of constitutional identity echoes concerns which are inherent in comparative studies⁷ and which, at first sight, put the comparison between Ireland and France according to this criterion out of reach. As de Montbrial puts it:

“The notion of identity is one of the most indefinable and actually one of the most mysterious. (...) The identity of a thing, it is the thing itself, indesignatable and indiscernible.”⁸

Pointing out similarities and differences between different legal systems confronted with a similar problem is the core of comparative studies.⁹ However, while the purpose of this approach is clearly defined, there are many difficulties involved in finding a methodology suitable to fulfil this objective – something which has led one to talk of comparative experience rather than comparative methodology.¹⁰

⁷ On this specific concern of comparative law for its methodology, see for example K. Zweigert and T. Kötz, *Introduction to Comparative Law* (Third edition, Oxford: Clarendon Press, 1998) at 32-47.

⁸ T. de Montbrial, “Le concept d’identité” in T. de Montbrial and S. Jansen (eds.), *L’identité de la France et l’Europe* (Brussels: Bruylant, 2005) 11-25 at 18 (translation by the author). See also A. Levade, “Identité constitutionnelle et exigence existentielle : Comment concilier l’inconciliable ?” in J.-C. Masclet, H. Ruiz Fabri, C. Boutayeb and *al.* (eds.), *L’Union européenne : Union de droit, union des droits : Mélanges en l’honneur du Professeur Philippe Manin* (Paris: Pedone, 2010) 109-128 at 114 where it is argued that “national constitutional identity can appear impossible to determine, it depends so much on the consciousness each individual, each people, each nation have of the intrinsic specificities of the state they belong to” (translation by the author).

⁹ For such a definition of comparative law, see N. Jansen, “Comparative Law and Comparative Knowledge” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 305-338 at 308-309.

¹⁰ See for example, M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)* (Paris: Economica, 2010) at vi.

First, the possibility to determine criteria which can be common to any comparative analysis is doubtful. Pointing out the difference between the description of different legal orders and their comparison, Zweigert and Kötz observe that:

“the actual comparison which then begins is the most difficult part of any work in comparative law, and the process is so much affected by the peculiarities of the particular problem and of its solutions in the different systems that it is impossible to lay down any firm rules about it.”¹¹

Comparing two legal orders implies at least three elements. Putting into perspective two set of rules necessarily requires a reference point from which the comparison is carried out and the similarities and differences assessed.¹² The determination of the *tertium comparationis* is not objective but results from what is considered as relevant in the comparison. The adequacy of criteria of comparison depends on what they can reveal about the legal orders being compared. The decision as to what the criteria of comparison should be cannot therefore be objective.¹³ Moreover, it cannot be common to every comparative study. What is of importance in putting into parallel two legal systems is directly dependent on the particular topic of research. In consequence:

“comparison is concretely built according to the question raised which, itself, depends on the purpose followed by the one who compares.”¹⁴

Secondly, the comparative approach is particularly exposed to the risk of cultural centrism. If “one is what one is, at least partly”, then one also remains what one is, at least in part. In other words, a comparison should ideally be carried out from a third standing point which is neutral as regards the different elements being assessed. However, each legal discourse is constructed in and emanates from a specific legal order. A comparative research always faces the risk of ascribing a meaning to the legal rules of one legal system according to categories

¹¹ K. Zweigert and T. Kötz, *Introduction to Comparative Law*, *op. cit.*, at fn. 7 above, at 43.

¹² On the question of the role of similarities and differences in comparative law, see G. Dannemann, “Comparative law: Study of Similarities or Differences?” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 383-419.

¹³ On this point, see N. Jansen, “Comparative Law and Comparative Knowledge”, *op. cit.*, at fn. 9 above, at 314-315.

¹⁴ M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, *op. cit.*, at fn. 10 above, at 61 (translation by the author).

belonging to the other and which are either inappropriate or irrelevant.¹⁵ This is a difficulty which cannot be circumvented, however. A comparative perspective brings to the fore a factor that is often assumed and left unnoticed in legal studies, namely that relationship between rules and the meaning they have in a particular society.¹⁶ It cannot escape understanding these rules within the context of a particular legal culture. As Jansen puts it: “the comparative lawyer (...) must be ‘culturally fluent’ in another culture”.¹⁷

While this concern is common to any comparative studies, it is pregnant with more significance in certain branches of law than others. The importance of the cultural aspect in comparative studies varies according to the intensity of the link between legal rules and the cultural context where they operate.¹⁸ This is especially true of public law in general, and of constitutional law in particular, due to the importance of historical and political contexts in understanding them. Constitutional law is “on a ridge line the sides of which are constituted, on one side, by the political field, and on the other side, by the legal field”.¹⁹ Recognising its “heterogeneous nature”,²⁰ where dynamics others than legal dynamics are at stake, the analysis of constitutional law requires giving a central role to cultural aspects. The study of constitutional law is thus confined to each society’s own legal culture, which prevents the comparison between different legal orders.

The methodological difficulties faced by comparative law in general, and comparative constitutional law in particular, seem to reach their apotheosis when the notion of constitutional identity is concerned. Comparative criteria used depend on the topic of comparison itself. However, the notion of constitutional identity refers to certain features which are intrinsic and

¹⁵ On this difficulty which is inherent in comparative studies, see R. Cotterrell, “Comparative Law and Legal Culture” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 709-737 at 722-723.

¹⁶ On this specificity of comparative law which requires going beyond the legal field to understand legal rules, see K. Zweigert and T. Kötz, *Introduction to Comparative Law*, *op. cit.*, at fn. 7 above, at 36-40.

¹⁷ N. Jansen, “Comparative Law and Comparative Knowledge”, *op. cit.*, at fn. 9 above, at 306.

¹⁸ On this point, see K. Zweigert and T. Kötz, *Introduction to Comparative Law*, *op. cit.*, at fn. 7 above, at 40 where the authors argue that the comparison is easier in the field of private law as it is often more disconnected from “moral views and values” and is “relatively ‘unpolitical’”.

¹⁹ P.-Y. Monjal, “Le projet de traité établissant une Constitution pour l’Europe : quels fondements théoriques pour le droit constitutionnel européen ?” (2004) 40 *Revue trimestrielle de droit européen* 443-475 at 462 (translation by the author). In a similar way, Walker argues that “the notions of constitution and constitutionalism, however else we may dispute their meaning, are unarguably bound up with, indeed provide the normative vocabulary for, the mutual articulation of law and politics”, see N. Walker, “The Idea of Constitutional Pluralism” (2002) 65 *Modern Law Review* 317-359 at 340.

²⁰ M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, *op. cit.*, at fn. 10 above, at 236. On this specific aspect and its influence on comparative constitutional law, see for example *ibid.* at 43-50 or G. J. Jacobssohn, *Constitutional Identity* (Cambridge, Massachusetts: Harvard University Press, 2010) at 206.

specific to the culture of each normative order.²¹ One would expect it to be an issue where the relevance of the cultural element is at its utmost, the notion of constitutional identity being what makes a legal culture irreducible to any other. Comparing constitutional identities has the character of reaching for the unreachable, looking for a common ground which is always eluding.²²

It would be impossible at first sight to define *tertium comparationis* suitable to compare Irish and French constitutional identities. The purpose of these criteria of comparison is to establish a relationship where both similarities and differences can be assessed. Insofar as constitutional identity is concerned, any such criterion, rather than establishing a relationship between Ireland and France, would present the specific features of their legal order as mutually exclusive.²³ In consequence, it is possible to note and describe the respective Irish and French identities as existing side by side, but not to compare them.

Notwithstanding these difficulties, it could be argued that the notion of identity necessarily requires a comparative approach. If identity is the affirmation of one's uniqueness, it is an affirmation which is reached *via* a comparative process. Put another way, identity seems to be a notion that excludes "others" as an expression of one's uniqueness. However, this affirmation can only result from a difference with the others. In other words, it is the result of a comparative process. If identity refers to what one is, it is also, at least partly, located outside what one is. The affirmation of one's identity is always addressed to some other person,²⁴ it is always in search for recognition. As a singularity, it supposes a "plurality in the very constitution of the self".²⁵ The notion of identity involves in itself a relationship to others.²⁶ What holds for individuals is also true for law, in particular in the European context. This is the conclusion reached by Lindahl when he states that there is "*a necessary alterity in ipseity*".²⁷ Identity is thus as much what characterises a self as what distinguishes it from others. It is at the same time a

²¹ On the strong relationship between culture and identity, see for example R. Cotterrell, "Comparative Law and Legal Culture", *op. cit.*, at fn. 15 above, at 711.

²² On these dynamics attached to the cultural perspective which is reinforced when the question of constitutional identity is considered, see M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, *op. cit.*, at fn. 10 above, at 25-26.

²³ On the importance of the balance between similarities and differences in the comparative perspective, see G. Dannemann, "Comparative law: Study of Similarities or Differences?", *op. cit.*, at fn. 12 above, at 399.

²⁴ This conception of identity as a relationship to others is an essential part of the analysis of identity by Ricœur, see P. Ricœur, *Soi-même comme un autre* (Paris: Éditions du Seuil, coll. Points. Essais, 1996) and in particular at 59 for identity as being addressed. As the author points out, an enunciation "simultaneously implies a 'I' who says and a 'you' to whom the first one speaks to" (translation by the author).

²⁵ *Ibid.* at 344.

²⁶ As Charles Taylor puts it: "my own identity depends on the dialogical relation with others", quoted in G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 20 above, at 108.

²⁷ H. Lindahl, "Sovereignty and Representation in the European Union" in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 87-114 at 113.

relation and a reaction.²⁸ In other words, identity is the result of a comparison. As Glenn puts it in his analysis of legal traditions and identity:

“concern with identity arises from external contact, identity is then constructed by explicit or implicit opposition. The other becomes essential in the process of self-understanding.”²⁹

This conception of identity as a relation with and a reaction to another entity is present in the case of both Irish and French law. The constitutional affirmation by Ireland of its “sovereign right (...) to develop its life (...) in accordance with its own genius and traditions” was also a claim to differentiation from the United Kingdom from which it had gained its independence.³⁰ In the same way, the necessity to create a French Constitution contained in Article 16 of the Declaration of Human and Civic Rights referred to the fresh new start the Revolution of 1789 introduced in comparison with the *Ancien Régime* and to the willingness to structure French society in accordance with the characteristics of the new national sovereign.

This shows that the notion of constitutional identity is of a dual nature. Of course, it covers a certain content and is composed by the features characteristic of one constitutional order. However, these distinctive traits result from a comparison and constitute a claim based on the fact that certain values differ from other legal orders, that they are not shared. Constitutional identity is thus also a discourse made about one’s Constitution. In consequence, due to the reaction which is at its very basis, the notion of constitutional identity covers as much an issue of content as it is the product of a reflexive process in comparison to others.³¹ It consists both of a signification and of a reflexive enunciation. This conclusion justifies the relevance of contrasting the positions of Irish and French legal actors in the definition of the notion of constitutional identity, beyond the text of their respective Constitution.

²⁸ For the importance of reaction in the notion of identity, see for example N. Walker, “The Idea of Constitutional Pluralism”, *op. cit.*, at fn. 19 above, at 328 where the author equates “identity politics” and “politics of difference”. In the same way, see G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 20 above, at 296-297 where the author mentions the relevance of enemies in the definition of oneself and M. Tushnet, “How do constitutions constitute constitutional identity?” (2010) 8 *International Journal of Constitutional Law* 671-676 at 672 where the author affirms that identity is based on an act of negation.

²⁹ H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Fourth edition, Oxford: Oxford University Press, 2010) at 34. For a similar point of view, see T. de Montbrial, “Le concept d’identité”, *op. cit.*, at fn. 8 above, at 19 where the author argues that the concern for French identity arises from the fear of its dissolution through the participation in the European Union.

³⁰ In this sense, see G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 20 above, at 114-115.

³¹ On this importance of reflexivity for the question of identity, see B. van Roermund, “Sovereignty: Unpopular and Popular” in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 33-54 at 42-45.

Undoubtedly, it is with the Constitution as a starting point that the constitutional identity of a legal order is to be found. As Tushnet points it out, it is notably the case of preambles.³² In this regard, giving a particular attention to Ireland, he affirms that the Preamble of the Constitution of 1937 results in “linking the nation’s identity as tightly as possible to its Roman Catholic heritage.”³³ Jacobsohn adopts a similar perspective on the constitutional identity of Ireland. Stressing “the Trinitarian cast to Irish constitutional identity”,³⁴ he makes of religion the decisive factor as to the special value of certain constitutional provisions, notably Article 41 dedicated to the family, which he qualifies as “the paradigmatic institution of Irish constitutional identity”.³⁵ Similar academic attempts have been made to specify, on the basis of the text of the French Constitution, provisions which would be part of the constitutional identity of France. In this regard, Articles 1 to 3 providing *inter alia* for the indivisible, democratic, secular or decentralised nature of the Republic, French as its official language and the principle of national sovereignty as well as Article 89 protecting the republican form of government can be regarded as the identity provisions of the French Constitution.³⁶

However, due to its dual nature, constitutional identity does not only consist of values present in the text of the Constitution and which would impose themselves on legal actors and the judiciary in particular. The notion of identity requiring to be regarded also as an enunciation, it is important to consider the text of the Constitution as an event, as the produce of the reflexive discourse of its drafters as to what they conceived as distinctive, a statement which is dependent on the specific historical context of its creation.³⁷ Favouring the enunciation over the signification and taking into account the reflexive nature of constitutional identity, it seems more difficult to oppose the text of the Constitution to the interpretative activity of legal actors.

³² See for example M. Tushnet, “Comparative Constitutional Law” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 1225-1257 at 1253-1254.

³³ *Ibid.* at 1254. By the same author, see also “How do constitutions constitute constitutional identity?”, *op. cit.*, at fn. 28 above, in particular at 671-672.

³⁴ G. J. Jacobsohn, “Constitutional Identity” (2006) 68 *The Review of Politics* 361-397 at 385.

³⁵ *Ibid.* at 387. In the same sense and by the same author, see *Constitutional Identity*, *op. cit.*, at fn. 20 above, in particular at 41-49 and 252-259.

³⁶ For such an analysis, see for example A.-M. Le Pourhiet, “Les symboles identitaires dans la Constitution de 1958” in B. Mathieu (ed.), *Cinquantième anniversaire de la Constitution française : 1958-2008* (Paris: Dalloz, 2008) 135-145, F. Chaltiel, “Nouvelle précision sur les rapports entre le droit constitutionnel et droit communautaire : La décision du Conseil constitutionnel du 27 juillet 2006 sur la loi relative aux droits d’auteurs” (2006) n° 68 *Revue française de droit constitutionnel* 837-847 at 843-844 or É. Dubout, “« Les règles ou principes inhérents à l’identité constitutionnelle de la France » : une supra-constitutionnalité ?” (2010) n° 83 *Revue française de droit constitutionnel* 451-482 at 474-476.

³⁷ On the importance of the historical context with regard to the identity features in the drafting of Constitutions; see for example M. Tushnet, “Comparative Constitutional Law”, *op. cit.*, at fn. 32 above, at 1254.

As regards the issue of constitutional identity, drafting and interpreting the Constitution consist of the same activity which involves developing a meta-discourse³⁸ as regards what in the constitutional document distinguishes the legal order. The difference is the object upon which this activity is exercised. Facing a document which already exists, this discourse on the Constitution represents judicial interpretation itself and the concern for the notion of constitutional identity is thus more explicit. In contrast, in the process of creating a new Constitution, the reflexive attitude of the drafters is merged with the constitutional text itself and the identity claims remain implicit. However, for the issue at stake, the position of contemporary legal actors, and courts in particular, is only the echo and the continuation of the initial identity claim but expressed in a different context.³⁹ Overall, this indicates that the notion of constitutional identity is not so much given than constructed.⁴⁰ Therefore, the notion of constitutional identity cannot be fixed in the text of the Constitution alone.⁴¹ It requires taking into account the dynamics involved by the renewed practices of this document as regards what represents its distinctive features.

The notion of identity necessarily involves a temporal dimension. However, the meaning of time in the construction of identity can vary and the latter concept does not necessarily mean the continuation of unchanged features. Indeed, identity can be considered either as sameness or as selfhood.⁴² As sameness, it refers to the perpetuation of immutable and distinctive features. As selfhood, identity can be understood as a narrative⁴³ where the temporal dimension inherent in it is not merely thought in terms of continuity of the past. It is rather the ability, having regard to this past, of one to define the features which are constitutive of one's identity. As selfhood, identity lies in the possibility to continuously define oneself. By understanding it as a narrative:

³⁸ On this point, see M. Troper, "Identité constitutionnelle" in B. Mathieu (ed.), *Cinquantième anniversaire de la Constitution française : 1958-2008* (Paris: Dalloz, 2008) 123-131 at 123 where the author notes that the notion of identity is absent from the Constitutions themselves and is rather to be found in constitutional interpretations, either academic or judicial, i.e. in discourses on the Constitutions.

³⁹ In this sense, and in an Irish context, see G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 20 above, at 259-266.

⁴⁰ In this sense, see M. Tushnet, "How do constitutions constitute constitutional identity?", *op. cit.*, at fn. 28 above, at 675.

⁴¹ As Jacobsohn puts it: "a nation's constitutional document is not coterminous with its constitutional identity", G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 20 above, at 27.

⁴² On this distinction, see P. Ricœur, *Soi-même comme un autre*, *op. cit.*, at fn. 24 above, for example, at 140. For a similar opinion in the legal context, see B. van Roermund, "Sovereignty: Unpopular and Popular", *op. cit.*, at fn. 31 above, at 43 where the author points out that "identity is two things; sameness and selfhood, similarity and reflexivity."

⁴³ On this importance of the narrative dimension of identity, see P. Ricœur, *Soi-même comme un autre*, *op. cit.*, at fn. 24 above, at 167-199.

“identity emerges dialogically and represents a mix of political aspirations and commitments that is expressive of a nation’s past, as well as the determination of those within the society who seek, in some ways, to transcend that past.”⁴⁴

Constitutional identity is thus the result of the selection by legal actors, and notably the courts, of certain provisions in the text of the Constitution regarded as distinctive – without them being necessarily consistent over time. In a more radical way it even involves the alteration of this identity through the modification of the constitutional text.⁴⁵ In this regards, it could be possible to see identity as sameness, the permanence of certain values, as the result of constantly renewed repetitions of these features by legal actors.⁴⁶ In contrast to an intuitive understanding of constitutional identity in terms of an immutability inscribed in the constitutional document, its understanding as selfhood rejects essentialism. This is one of the main tenets of Ricoeur’s analysis of identity, when he affirms that:

“our constant thesis will be that identity in the meaning of *ipse* implies no assertion regarding an alleged unchanging core of the personality.”⁴⁷

Effecting a preliminary definition of constitutional identity on the basis of the text of the Constitution alone in order to compare the activity of the domestic organs with it seems to fix a definition of constitutional identity in terms of sameness rather than selfhood. However, the relative importance of these two possible ways of considering identity is in fact the result of a choice made by the domestic organs themselves, and in this regard, the renewed possibility to define oneself is of a particular importance both in the Irish and French legal orders. In particular, it will be seen that some textual provisions which can be regarded *prima facie* as forming part of the Irish and French respective constitutional identity were not raised in the face of the disruptive consequences of the primacy of European Union law. Therefore, this thesis will not attempt to assess how the identity expressed in the Irish and French Constitutions determines the discourses of the domestic organs. In contrast, taking into account that “constitutional identity will be fashioned – and refashioned – through the struggle over

⁴⁴ G. J. Jacobsohn, “Constitutional Identity”, *op. cit.*, at fn. 34 above, at 363.

⁴⁵ On the fact that constitutional identity can not so much be lost but is rather transformed, see *ibid.* at 325.

⁴⁶ As Ricoeur points out, sameness does not exist *per se* but consists of a reflexive understanding of an identity constantly defining itself according to the same criteria, see P. Ricoeur, *Soi-même comme un autre*, *op. cit.*, at fn. 24 above, at 146.

⁴⁷ *Ibid.* at 13.

constitutional identity”,⁴⁸ it is on the basis of the authentic discourses⁴⁹ of the legal actors on their respective Constitution that a definition of this notion will be attempted. The analysis will not be focused on what the Irish and French Constitutions tell about the identity of their legal orders but on what the Irish and French legal orders tell about themselves through their constitutional practices.

The European Level as a Common Stage Where to Relate Irish and French Constitutional Identity to Each Other

The comparative process which structures the issue of constitutional identity as a relation with and a reaction to another entity is not only of importance for the modalities of analysis of Irish and French constitutional identity but also for the relevance of contrasting these two legal orders. Understood as a claim, the notion of constitutional identity necessarily raises the question of its addressee and both legal orders direct their identity claims towards a common entity.

Inherent in the birth of the Irish and French people, the formulation of each country’s constitutional identity has been revised over time. It could be argued that the modalities of their affirmation have also changed and have become more independent of the history particular to each country as well as more connected to a narrative they have in common. Joining the European Communities (as they was then) raised concerns as to the possibility for Ireland to safeguard its constitutional identity.⁵⁰ It is notably the opinion of Henchy J. expressed in an extra-judicial context when he argued that:

“Ireland’s entry into the E.E.C. has involved the abrogation of some of the most basic and entrenched assumptions of the Irish Constitution as originally enacted. The right of the Irish people to control the institutions of government and to develop the life of

⁴⁸ G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 20 above, at 135.

⁴⁹ To use the distinction made by Kelsen between authentic and non-authentic interpretations, only the former having the ability to involve legal consequences, see H. Kelsen, *Théorie pure du droit* (Trans. C. Eisenmann, Brussels; Paris: Bruylant; Librairie Générale de Droit et de Jurisprudence, coll. La pensée juridique, 1999) at 349-342 and *infra* at 306.

⁵⁰ In this sense, see B. Laffan, “Sovereignty and national identity” in P. Keatinge (ed.), *Ireland and EC Membership Evaluated* (London: Pinter Publishers, 1991) 187-189 or G. J. Jacobsohn, “Constitutional Identity”, *op. cit.*, at fn. 34 above, at 388.

the nation along the lines of ‘its own genius and traditions’, which was declared by the Constitution to be alienable, has now in fact been alienated, at least in part”.⁵¹

Even if not explicitly expressed in terms of constitutional identity, it is possible to notice in decisions of the Irish Supreme Court a willingness to protect certain specific features of the Irish legal order in the face of rules drafted in common with other member states. For example, in *Crotty v. An Taoiseach*,⁵² great attention was paid to the protection of the independence of Irish foreign policy within the context of European integration.⁵³ This also, and more stringently, can be seen in the decision of Walsh J. in *Society for the Protection of Unborn Children (Ireland) v. Grogan*⁵⁴ where Walsh J. held that:

“the 8th Amendment of the Constitution is subsequent in time, by several years, to the amendment of Article 29. That fact may give rise to the consideration of the question of whether or not the 8th Amendment itself qualifies the amendment to Article 29.”⁵⁵

In 1972, Article 29 was modified, in the third amendment to the Constitution effected by the Third Amendment of the Constitution Act 1972. This facilitated Ireland becoming a member of the European Communities and enabled the reception of European law in the Irish legal order (a reception which was effected by the European Communities Act 1972). The eighth amendment of 1983 inscribed in the Constitution the right to life of the unborn. It is possible to read in the opinion of Walsh J. the willingness to see certain fundamental values expressed in the Constitution by the Irish people - and which constitute their identity - prevail. The possibility that the eighth amendment qualifies Article 29 can thus be regarded as a claim as to the preservation of features relating to constitutional identity over and above provisions common to all the partner states in the process of European integration.

⁵¹ S. Henchy, “The Irish Constitution and the E.E.C.” (1977) 1 *Dublin University Law Journal* 20-25 at 25. In a similar fashion, Whelan argues that “in the case of a total merger, the people would lose their distinct political and legal identity”, see A. Whelan, “National Sovereignty in the European Union” in T. Murphy and P. Twomey (eds.), *Ireland’s Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998) 277-292 at 290.

⁵² [1987] I.R. 713.

⁵³ See for example the opinion expressed by Walsh J., according to which “in enacting the Constitution the people conferred full freedom of action upon the Government to decide matters of foreign policy and to act as it thinks fit on any particular issue so far as policy is concerned and as, in the opinion of the Government, the occasion requires. In my view, this freedom does not carry with it the power to abdicate that freedom or to enter into binding agreements with other States to exercise that power in a particular way or to refrain from exercising it save by particular procedures, and so to bind the State in its freedom of action in its foreign policy. The freedom to formulate foreign policy is just as much a mark of sovereignty as the freedom to form economic policy and the freedom to legislate”, *ibid.* at 783.

⁵⁴ [1989] I.R. 753.

⁵⁵ *Ibid.* at 768.

In France, 2004 saw the adoption of a new stance by the *Conseil constitutionnel*, the French constitutional court, towards European law. It echoes the concern expressed in Ireland by Henchy J. in an extra-judicial context⁵⁶ as to the threat posed by the participation in the process of European integration for domestic constitutional identity.⁵⁷ To a certain extent, the *Conseil constitutionnel* displayed a conciliatory attitude in that it involved reliance on Article 88-1 of the French Constitution so as to consider European law from a specific perspective. The constitutional court nonetheless made clear that its doing so did not alter the paramount force of the values contained in the Constitution. In its *Treaty establishing a Constitution for Europe* decision, the *Conseil constitutionnel* stated that:

“the title of said treaty has no effect upon the existence of the French Constitution and the place of the latter at the summit of the domestic legal order”.⁵⁸

In consequence, obligations stemming from the European legal order had to yield to constitutional provisions. In particular, while the *Conseil constitutionnel* deduced from Article 88-1 a “constitutional requirement” to implement European directives in the French legal order, it also affirmed that this could not apply when an “express conflicting provision of the Constitution” was concerned.⁵⁹

However, this logic initiated in 2004 was just a first step in the new positioning of the *Conseil constitutionnel*. The constitutional court refined its test as to the impact of European Union law in the domestic legal order. Two years later it was explicitly in terms of constitutional identity that the French constitutional court defined the balance to be reached between the willingness to participate in European integration and the necessary protection of certain values contained in the Constitution when it stated that:

“the transposition of a Directive cannot run counter to a rule or principle inherent in the constitutional identity of France”.⁶⁰

⁵⁶ See S. Henchy, “The Irish Constitution and the E.E.C.”, *op. cit.*, at fn. 51 above.

⁵⁷ On this dialectic of French identity and its participation in the process of European integration, see T. de Montbrial, “Le concept d’identité”, *op. cit.*, at fn. 8 above, at 12-16.

⁵⁸ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 10.

⁵⁹ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7.

⁶⁰ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19.

Initially, both in Ireland and in France, the claim to constitutional identity (conceived as involving both the features of the legal order and the characteristics of the democratic sovereign) represented a reaction in the face of an alter ego, *viz.*, respectively the United Kingdom and the *Ancien Régime*. However, the participation in a common European integrated legal order changed the addressee of these identity claims.⁶¹ Arguably, participating in European integration represented the continuation of the “sovereign right (...) to develop its life (...) in accordance with its own genius and traditions” enunciated in the 1937 Constitution.⁶² At the same time, as been seen above, it results in conceiving the definition and protection of the Irish constitutional identity in relation to the European legal order, *i.e.*, what is shared, “at least in part”, with other member states.⁶³ Similarly, in the French legal order, it is as a result of considerations given to European law that the concern for constitutional identity was renewed and formally appeared in the case-law of the *Conseil constitutionnel*.

This shows that Irish and French constitutional identity is not anymore thought in terms of a reaction to another singularity, *i.e.*, an alter ego, but is defined within an intersubjective relationship according to what Ireland and France agreed to have in common.⁶⁴ Insisting on the dialectic between constitutional law and European integration, Ponthoreau affirms that:

“in the European context, it is precisely within the tension with the common constitutional principles that the interest for national constitutional cultures takes its full value.”⁶⁵

Conceived in terms of the values intrinsic to their legal order, Irish and French constitutional identities are not capable of being compared. Observing how they perform the same function vis-à-vis a legal order they have in common circumvents this

⁶¹ On the importance granted to the notion of constitutional identity by domestic courts as a response to the constitutionalisation of the European Union, see A. Levade, “Identité constitutionnelle et exigence existentielle : Comment concilier l’inconciliable ?”, *op. cit.*, at fn. 8 above, at 119.

⁶² In this sense, see B. Laffan and J. O’Mahony, *Ireland and the European Union* (Basingstoke: Palgrave Macmillan, 2008) at 8-13.

⁶³ On the construction of identity according to what is shared with others in Europe, see G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 20 above, at 112-116. More generally, see E. Simion, “L’identité de la France vue du côté oriental de l’Europe” in T. de Montbrial and S. Jansen (eds.), *L’identité de la France et l’Europe* (Brussels: Bruylant, 2005) 77-105 at 77 where, on the idea of identity defined as specific features, it is argued that “what appears to be *specific* is not always *unique, irreducible*” (translation by the author).

⁶⁴ This evolution echoes the analysis of identity by Ricoeur where he affirms that identity is not so much a relationship to an alter ego as a relationship within intersubjectivity, see P. Ricoeur, *Soi-même comme un autre*, *op. cit.*, at fn. 24 above, at 367-369.

⁶⁵ See M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, *op. cit.*, at fn. 10 above, at 249 (translation by the author).

incommensurability.⁶⁶ If identity is the result of a relation with and a reaction to another entity, Ireland and France have what is now the European Union as a common *locus* where their constitutional identity is being built.⁶⁷ European Union law can thus be considered as the *tertium comparationis*, the point of reference, according to which the similarities and differences between the two domestic legal orders can be assessed in their claim to the protection of their constitutional identity.⁶⁸

The fact that the notion of an identity is to be found in domestic constitutions is not an idea which derives from the states themselves but is the consequence of a dialogue constitutive of European integration. The first explicit reference to this notion was made when the process of European integration evolved towards a political, rather than primarily economic, entity. The Treaty of Maastricht establishing the European Union was the first European instrument referring to the necessary protection of state identity in its Article F. Since then, this guarantee has been mentioned at every stage of the developments of European integration. It is included in Article 4.2 of the current Treaty on European Union which states that:

“the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

The inclusion in the European treaties of the necessity for European law to respect the identity of its member states can be regarded as a reaction on their part in the face of the

⁶⁶ It is a similar opinion that Zweigert and Kötz express when they affirm that “the basic methodological principle of all comparative law is that of *functionality*. (...). Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function”, K. Zweigert and T. Kötz, *Introduction to Comparative Law*, *op. cit.*, at fn. 7 above, at 34.

⁶⁷ On the importance of the place where constitutional identity is constructed, its “topography”, see G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 20 above, at 13. As regards the justification the European Union legal order provides for the comparison between the legal orders of members states due to their belonging to a common integrated legal order, see M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, *op. cit.*, at fn. 10 above, at 78.

⁶⁸ In this regard, the specific comparison of the Irish and French legal orders already carried out by Phelan is made from the perspective of their respective consideration of the European legal order, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Round Hall Sweet & Maxwell: Dublin, 1997).

development of the process of European integration.⁶⁹ This confirms that it is in the context of the relationship they conduct in what is now the European Union and in reaction to this common reference that Ireland and France assess and assert their respective constitutional identities. Moreover, consequent on the development of European law, the notion of identity has a certain degree of autonomy as regards the constitutional law of member states. It is the confirmation that it is not a notion entrenched in positive law but rather consists of a discourse, in this instance common between the member states, on their Constitutions. Therefore, considering the comparison between the Irish and French legal orders from a European Union perspective also provides the means to overcome certain methodological difficulties inherent in the comparative approach. First, rather than considering the Irish legal order from the French legal standpoint or vice versa, this common reference constitutes a way to soften the risk of cultural centrism and to foster the neutrality of the analysis.⁷⁰

Secondly, European Union law as a *tertium comparationis* makes possible the identification of meaningful similarities and differences both in terms of relation and reaction the Irish and French legal orders express towards this set of external rules. In other words, in contrast to the direct assessment of Ireland and France with one another, it is through the consideration of their attitude towards the European legal order they have in common that Irish and French constitutional identities can be understood and their comparison carried out.

Aside from the traditional criteria of distinction between the Irish and French legal orders, such as their belonging to the common law or the civil law traditions⁷¹ as well as their dualist or monist position vis-à-vis international law, the question of constitutional identity understood in the European context presents more specific criteria of comparison.⁷² First, their comparison can be considered from a static point of view. Ireland is often described as being on

⁶⁹ In this sense, see B. de Witte, "The Lisbon Treaty and National Constitutions: More or Less Europeanisation?" in C. Closa (ed.), *The Lisbon Treaty and National Constitutions: Europeanisation and Democratic Implications, ARENA Report No 3/09* (ARENA: Oslo, 2009) 26-48 at 33. See also M.-C. Ponthoreau, "Constitution européenne et identités constitutionnelles nationales", Contribution to the 7th World Congress of the International Association of International Law, Athens 11-15 June 2007, available at <<http://www.enelsyn.gr/papers/w4/Paper%20by%20Prof.%20Marie-Claire%20Ponthoreau.pdf>> at 2 [Last accessed 29 December 2012].

⁷⁰ However, if cultural determinants can be reduced, they cannot however be discarded. The French standpoint of this comparison between the Irish and French legal orders may explain certain differences with the analysis carried out by Phelan from the opposite perspective, notably as regards the respective importance given to positivism and natural law theory. Indeed, for Phelan, natural law plays a central role in the normative conflicts between the national and European legal orders, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 68 above, for example, at 14-15 or more extensively at 371-391.

⁷¹ For a presentation of these legal families, see for example H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, *op. cit.*, at fn. 29 above, J. H. Merryman and R. Pérez-Perdomo, *The Civil Law Tradition. An Introduction to the Legal Systems of Europe and Latin America* (Third edition, Stanford: Stanford University Press, 2007) and K. Zweigert and T. Kötz, *Introduction to Comparative Law*, *op. cit.*, at fn. 7 above.

⁷² On the distinction between macro-comparisons and micro-comparisons and the criteria they involve, see G. Dannemann, "Comparative law: Study of Similarities or Differences?", *op. cit.*, at fn. 12 above, at 386-387 and K. Zweigert and T. Kötz, *Introduction to Comparative Law*, *op. cit.*, at fn. 7 above, at 4-5.

the periphery of Europe while France is regarded as being closer to its centre. This goes, of course, beyond a mere geographical observation and also concerns their relative political weights. The unanimity required for the adoption of new European treaties is the sign of the formal and political equality which exists between member states. However, it could be argued that *de facto* European practices display some infringements of this principle. The rejection of the Treaty establishing a Constitution for Europe in France in referendum in 2005, alongside with the Netherlands, put an end to the ratification process. After new negotiations, the Treaty of Lisbon of 2007 repeated most of the achievements contained in the Constitutional Treaty. The Treaty of Lisbon was first rejected by Irish voters in 2008 before being agreed to after another referendum in 2009, repeating thereby the fate of the Treaty of Nice in 2001 and 2002. It is of course possible for a nation to change its opinion and legally such a second vote does not go to the matter of the equality between member states. However a political analysis may come to a different conclusion.

This difference in the political weights of Ireland and France is more explicit when European secondary law is concerned. The deepening of political integration saw a decline of the rule of unanimity and the development of qualified majority voting.⁷³ In this regard, differences in population size between Ireland and France results in a major difference in their voting weights where qualified majority is concerned. In consequence, they are not on an equal footing in getting their position adopted, and more importantly, in preventing the adoption of European rules which they consider as contrary to essential principles of their national legal order. In consequence, while the desire to protect their constitutional identity is a concern common to member states (something the inclusion of an obligation to respect the states' identity in the European treaties bears witness to) comparison of the degrees of such concern as between Ireland and France respectively can reveal how different positions within the European Union entail particular strategies regarding the construction of constitutional identity and its affirmation in front of European Union law.

Secondly, it is also from a dynamic point of view that the comparison between the Irish and French legal orders can reveal its relevance. The protection of their constitutional identities is tightly linked to the narrative of European integration and the meaning of the European Union in their own narratives.⁷⁴ Ireland joining the Community in 1973, together with the

⁷³ On this essential part taken by qualified majority voting in the development of supranationalism in the process of European integration and the ability to avoid the states' veto characteristic of unanimity, see J. H. H. Weiler, "The Transformation of Europe" (1991) 100 *The Yale Law Journal* 2403-2483 at 2458-2463.

⁷⁴ In this sense, see P. Craig, "The Constitutional Treaty and Sovereignty" in C. Kaddous and A. Auer, *Les principes fondamentaux de la Constitution européenne* (Geneva; Brussels; Paris: Hédling & Lichtenhahn; Bruylant; Librairie Générale de Droit et de Jurisprudence, 2006) 117-134 at 126 where the author, stressing the

United Kingdom and Denmark, was the consequence of profound modifications having taken place in Irish society in comparison with the picture the 1937 constitutional text offers. Becoming a participant in the process of European integration meant for Ireland the recognition of such changes and the promise to foster the development of Irish identity according to the rules governing what is now the European Union.⁷⁵

In contrast, France is part of the six countries that initiated in 1957, with the Treaty of Rome, what is now the European Union. Its consideration of European law as regards the values described in its Constitution is different from the dynamics which underlined Ireland's adhesion. From the French point of view, what is now the European Union has often been considered to echo the national at continental level. This logic is, for example, noticeable in the Luxembourg compromise which resulted from the "empty chair crisis" initiated by de Gaulle in 1965. The requirement of unanimity in the Council of Ministers on issues a member state considered to be of vital importance was a way of ensuring that European rules would be adopted in accordance with French will.⁷⁶ In consequence, due to the chronology of their participation in the process of European integration, the comparison between Ireland and France is one way to highlight the different roles ascribed to European Union law in the definition of constitutional identity.

If identity is a reaction as well as a relation, the chronology of Irish and French participation in the process of European integration also permits to specify the element of European Union law which is decisive in the construction of the notion of constitutional identity. If Ireland could change its features through European law and if in the meantime France felt threatened by the same set of rules when its constitutional architecture was concerned, this is because Ireland joined after 1964 while France was already a member at this stage. Both the Irish and French strategies are explained by the ability of European norms to prevail over norms belonging to the domestic legal orders, even if they are supreme, and to take effect therein embedded with the virtues of the doctrine of primacy enunciated by the European Court of Justice in *Costa v. E.N.E.L.*⁷⁷

particular position of countries which joined an already existing European legal order, argues that "for those Member States other than the original six, it can be argued that they joined the European Union knowing full well the terms of membership, including the *acquis communautaire*, a central component of which is the supremacy doctrine." See also, B. de Witte, "Direct Effect, Supremacy, and the Nature of the Legal Order" in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) 177-210 at 196-198.

⁷⁵ On this point, see B. Laffan and J. O'Mahony, *Ireland and the European Union*, *op. cit.*, at fn. 62 above, at 6-8.

⁷⁶ For an interpretation in this sense, see for example J. Kokott, "Report on Germany" in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 77-131 at 126.

⁷⁷ Case 6/64 *Costa v. E.N.E.L.* [1964] E.C.R. 585.

1.2. The Constitutional Identity of Ireland and France as a Common Reaction to the Primacy of European Union law

The European Doctrine of Primacy as a Disruption of the Domestic Legal Orders

The doctrine of primacy was never mentioned in European primary law and still rests on the decisions of the European Court of Justice. The Treaty establishing a Constitution for Europe would have altered this situation but it never came into force. Notwithstanding this, the relevant provision indicates the intrinsic link between the notion of constitutional identity and the doctrine of primacy of European law. As it was stated in its Article I-6:

“the Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.”

This provision was immediately preceded by Article I-5 which guaranteed respect for the national identities of the member states. It could be inferred from this proximity that the notion of constitutional identity and the doctrine of primacy come within a systemic interpretation. Considering the relationship between these two principles, Cassia comes to the conclusion that:

“while putting forward the principle of the primacy of European Union law over domestic laws, Article I-6 of the treaty contains within itself its antidote or its venom, according to one’s particular point of view.”⁷⁸

It is indeed upon this “the close proximity of Articles I-5 and I-6”⁷⁹ that the *Conseil constitutionnel* based its argument in its the *Treaty establishing a Constitution for Europe* decision where the reductionist recognition of the doctrine of primacy coincided with the emphasis put by the *Conseil constitutionnel* on the European protection of national identities.⁸⁰ This more specific relationship between the doctrine of primacy and the *Conseil*

⁷⁸ P. Cassia, “L’article I-6 du traité établissant une Constitution pour l’Europe et la hiérarchie des normes” (2004) n° 12 *Europe* 6-10 at 7.

⁷⁹ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 13.

⁸⁰ *Ibid.* at para. 9-13.

constitutionnel's concern for constitutional identity is also noticeable in Ireland. While “the Constitution (...) was cast in an indigenous mould”, according to Henchy’s opinion:⁸¹

“it is inherent in the scheme of the E.E.C. that Community law shall have primacy over national law. To that extent, member States merge their national legal identities in a new common law.”⁸²

In order to compare Irish and French identities it is crucial to contrast their respective stance towards the doctrine of primacy.

Arguably, the process of constitutionalisation of what is now the European Union finds its roots in a disagreement over an electricity bill. Mr Costa argued - in order to avoid paying it - that the creation of E.N.E.L., the Italian national electricity company, through a statute contravened the E.E.C. Treaty. This plea would lead to the decision *Costa v. E.N.E.L.*,⁸³ the case where, confirming the logic underpinning the decision in *Van Gend en Loos* which developed the doctrine of direct effect,⁸⁴ the European Court of Justice enunciated the doctrine of primacy of what is now European Union law by stating:

“it follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.”⁸⁵

The absence of textual recognition of the primacy doctrine, and therefore of explicit agreement by the member states to this principle, did not deter the European Court of Justice from developing its full consequences in its subsequent case-law. The doctrine of primacy affirms the superiority of the European legal order over the domestic legal orders. The ambit of this doctrine encompasses any binding European rule. The force attached in *Costa* to the

⁸¹ S. Henchy, “The Irish Constitution and the E.E.C.”, *op. cit.*, at fn. 51 above, at 20.

⁸² *Ibid.* at 22.

⁸³ Case 6/64 *Costa v. E.N.E.L.* [1964] E.C.R. 585.

⁸⁴ Case 26/62 *NV Algemene Transporten Expendite Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] E.C.R. 1.

⁸⁵ [1964] E.C.R. 585 at 594.

treaties' provisions was extended in subsequent decisions to regulations,⁸⁶ directives,⁸⁷ decisions,⁸⁸ and external agreements.⁸⁹

In the same manner, the European Court Justice made clear that the principle contained in *Costa* applied to any domestic rule. Aside from the irrelevance of the principle *lex posterior derogat legi prior* in case of normative conflict between national and European rules,⁹⁰ the nature of domestic provisions to which the primacy principle is to be applied is of a particular interest for the question of Irish and French constitutional identities. The European Court of Justice did not modulate the doctrine of primacy and its ambit with regard to the status of the national norms at stake. In particular, it refused to submit constitutional rules to a specific regime on the basis of the fundamental character they have in the legal system of member states. According to the ruling of the European Court of Justice in *Internationale Handelsgesellschaft*,⁹¹ the conclusion reached in *Costa* required the doctrine of primacy to be applied to constitutional provisions. A different outcome would have been a threat to the European legal order, the Court affirming *ab initio* that:

“recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.”⁹²

⁸⁶ Case 43/71 *Politi s.a.s. v. Ministry for Finance of the Italian Republic* [1971] E.C.R. 1039.

⁸⁷ Case 8/81 *Becker v. Finanzamt Münster-Innenstadt* [1982] E.C.R. 53.

⁸⁸ Case 130/78 *Salumificio di Cornuda SpA v. Amministrazione delle Finanze dello Stato* [1979] E.C.R. 867.

⁸⁹ Joined Cases 267-269/81 *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)* [1983] E.C.R. 801.

⁹⁰ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] E.C.R. 629 at para. 21.

⁹¹ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] E.C.R. 1125.

⁹² *Ibid.* at para. 3.

Aside from establishing the scope of the primacy of European law, the European Court of Justice also specified the consequences to be drawn from it. It is this aspect of the doctrine developed by the European Court which constitutes its singularity.⁹³

The notion of the primacy of an external legal order over domestic legal orders is not new. It has long been established as a principle of international law.⁹⁴ The original feature of the European primacy doctrine - its identifying character - consists of the consequences deduced from it. In international law, infringements of the principle of primacy lead to the operation of the doctrine of state responsibility. In contrast, the primacy of European Union law is manifested in its being “binding not only on but also in states”.⁹⁵ The characteristic of its applicability in European Union law is the “duty to disapply”⁹⁶ which it imposes on domestic organs, and in particular on courts. As was established in *Simmenthal*, the European Court of Justice takes the view that national courts are under the obligation to set aside conflicting domestic rules which conflict with what is now European Union law.⁹⁷

In consequence, the definition of the doctrine of primacy given by the European Court of Justice crosses the Rubicon between the European and domestic legal orders. It justifies saying, as de Witte argues, that:

“to the mere international primacy, the decision in *Costa* adds what could be called the primacy in the domestic application or *domestic primacy*.”⁹⁸

An analysis of the distinction between monism and dualism exceeds the purpose of this thesis. Nonetheless, a functional perspective on these notions can shed light on the logic

⁹³ For a similar opinion, see for example J. P. Jacqué, *Droit institutionnel de l'Union européenne* (Fifth edition, Paris: Dalloz, 2009) at 569.

⁹⁴ On the existence of the doctrine of primacy in international law, see for example B. de Witte, “Retour à « Costa » : La primauté du droit communautaire à la lumière du droit international” (1984) 20 *Revue trimestrielle de droit européen* 425-454 at 428-433.

⁹⁵ J. H. H. Weiler, “The Transformation of Europe”, *op. cit.*, at fn. 73 above, at 2426.

⁹⁶ On this “duty to disapply” and its comparison with the “duty to apply”, and more generally the similarities and differences between the direct effect and the primacy principles, see M. Dougan, “When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy” (2007) 44 *Common Market Law Review* 931-963, in particular at 932-937. See also B. de Witte, “Direct Effect, Supremacy, and the Nature of the Legal Order”, *op. cit.*, at fn. 74 above, in particular at 183-193. On a similar issue, see K. Lenaerts and T. Cortaout, “Of birds and hedges: the role of primacy in invoking norms of EU law” (2006) 31 *European Law Review* 287-315.

⁹⁷ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] E.C.R. 629 at para. 21-22.

⁹⁸ B. de Witte, “Retour à « Costa » : La primauté du droit communautaire à la lumière du droit international”, *op. cit.*, at fn. 94 above, at 427. For a similar argument pointing out that the distinctive nature of the European doctrine of primacy consists of its domestic dimension, see D. Simon, “Les fondements de l'autonomie du droit communautaire” in Société Française pour le Droit International - S.F.D.I., *Droit international et droit communautaire, perspectives actuelles: Colloque de Bordeaux* (Paris: Pedone, 2000) 207-249 at 240-241.

animating the case-law of the European Court of Justice. As expressed by Cassese, the dualist perspective is that:

“international law and municipal legal systems constitute two distinct and formally separate categories of legal orders. It follows among other things, that international law cannot directly address itself to individuals. To become binding on domestic authorities and individuals, it must be ‘transformed’ into national law through the various mechanisms for the national implementation of international rules freely decided upon by each sovereign State.”⁹⁹

In contrast, and for the same author, a monist perspective takes the position:

“there exists a unitary legal system, embracing all the various legal orders operating at various levels. (...) A further corollary is that the ‘transformation’ of international law into domestic law ‘is not necessary from the point of view of international law’. (...) As a result, international rules can be applied *as such* by domestic courts”.¹⁰⁰

In consequence, by deducing from the doctrine of primacy (as it exists in European law) obligations bearing on national courts to enforce European rules in their domestic legal orders, it can be said that the case-law of the European Court of Justice emanates from a monist perspective.¹⁰¹

⁹⁹ A Cassese, *International Law* (Second edition, Oxford: Oxford University Press, 2005) at 214.

¹⁰⁰ *Ibid.* at 215.

¹⁰¹ For a similar interpretation of the reasoning of the European Court of Justice, see A. Stone Sweet, “Constitutional Dialogues in the European Community” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 305-330 at 306-307 or S. Monteillet, “Une étude théorique des rapports entre droit communautaire et droits nationaux est-elle d’actualité ?” (2004) *Revue de la recherche juridique - Droit prospectif* 1937-1953 at 1949-1952.

Domestic Sovereignty as the Basis of Irish and French Oppositions to the European Doctrine of Primacy

The Irish and French legal orders have not accepted the doctrine of primacy on the European Court of Justice's "own very demanding terms".¹⁰² According to Article 29.6 of the Irish Constitution:

"no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

Ireland did not depart from this strictly stated dualist stance insofar as European Union law was concerned. The validity of European Union law in the domestic legal order depends on its reception through section 2 (1) of the European Communities Act 1972 (as amended). In consequence, the ambit of doctrine of primacy is limited to rules of a legislative status in Irish hierarchy of norms. The resolution of normative conflicts between constitutional provisions and European law is, in contrast, provided for by Article 29.4.6° of the Constitution. The reflection of the doctrine of primacy on the domestic looking-glass effects a domestication of its nature¹⁰³ whereby it appears as a regime of constitutional immunity. From the European perspective the doctrine of primacy entails the positive empowerment of domestic courts to disapply national rules regardless of their nature. From the Irish perspective, it is defined negatively as the impossibility for the judiciary to assess the normative relationship between constitutional provisions and European Union law.¹⁰⁴

Even though the matter can be disputed,¹⁰⁵ the position of France towards international law is generally qualified as monist. However, it is not one in which international rules can prevail over constitutional provisions. The relationship between international and municipal law is defined by Article 55 of the French Constitution which states that:

¹⁰² G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary* (London: Sweet & Maxwell, 1995) at 7.

¹⁰³ On the domestication of the primacy principle in the legal orders of member states, see for example M.-C. Ponthoreau, "Constitution européenne et identités constitutionnelles nationales", *op. cit.*, at fn. 69 above, at 9.

¹⁰⁴ In this sense, see G. Barrett, "The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution" (2012) 48 *Irish Jurist* 132-172 at 133.

¹⁰⁵ See for example A. Pellet, "Vous avez dit « monisme » ? Quelques banalités de bon sens sur l'impossibilité du prétendu monisme constitutionnel à la française" in D. de Béchillon, P. Brunet, V. Champeil-Desplats and *al.* (eds.), *L'architecture du droit: Mélanges en l'honneur du Professeur Michel Troper* (Paris: Economica, 2006) 827-857.

“treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.”

This constitutional provision has been interpreted by domestic courts from a hierarchical perspective, ensuring the enforcement of the normative superiority of external rules over French statutes.¹⁰⁶ However, both the *Conseil d’État*¹⁰⁷ and the *Cour de cassation*¹⁰⁸ have made clear that the hierarchical logic contained in Article 55 also entails the prevalence of constitutional norms over international and European rules. Since the decision of the *Conseil constitutionnel* in 2004, the relationship between European law and domestic rules is specifically governed by Article 88-1. However, the doctrine of primacy is still rooted in the Constitution, and European obligations are enforced as the result of a “constitutional requirement”.¹⁰⁹ As in Ireland, the European principle is transformed through a process of domestication and exists, in principle, as a form of jurisdictional immunity. If the French legal order is monist, it is a monism that differs from the argument developed by the European Court of Justice whereby European rules prevail over French ones. For the constitutional court, it is still the Constitution which is vested with supremacy “at the summit of the domestic legal order”.¹¹⁰

The discrepancies between the claims of the European Court of Justice and the realisation of the doctrine of primacy in the Irish and French legal orders is not an issue related to the ambit of this principle. A consideration of the justification of their opposition shows that it is a divergence of *rationale* that lies at the core of the disagreement.

Both in Ireland and France, the opposition to a full recognition of the doctrine of primacy is grounded in national sovereignty. It is sovereignty which is the reason for normative prevalence. In consequence, the doctrine of primacy has to yield to the expression of the sovereign contained in the provisions of the Constitution.

¹⁰⁶ See CC, decision n° 74-54 DC on the *Act pertaining to the voluntary interruption of pregnancy* of 15 January 1975, *Rec.* 19 regarding this principle and C. cass., Ch. mixte, 24 May 1975, *Administration des Douanes c. Sociétés ‘Calés Jacques Vabre’*, *Bull. Ch. mixte*, n° 4, p.6 by the *Cour de cassation* as well as in CE, Ass., 20 October 1989, *Nicolo*, *Rec. Lebon* 190 by the *Conseil d’État* concerning its application by French ordinary courts.

¹⁰⁷ See, CE, Ass., 30 October 1998, *Sarran, Levacher et autres* for international law at large and CE, 3 December 2001, *SNIP (Syndicat national de l’industrie pharmaceutique)* for European law in particular.

¹⁰⁸ See, C. cass., Ass. plén., 2 June 2000, *Fraisie*, *Bull. Ass. plén.*, n° 4, p. 7.

¹⁰⁹ See for example, CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7.

¹¹⁰ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 10.

At first, the doctrine of primacy received a generous approach in the Irish legal order. The date of adhesion of Ireland to the European Communities can be regarded as a decisive factor of this attitude. Ireland joined the European Communities with full knowledge of the doctrine of primacy developed by the European Court of Justice. One could argue that the full enforcement of this European principle was the consequence of the willingness expressed by the Irish sovereign to join the process of European integration.¹¹¹

The dialectic between the process of European integration and Irish sovereignty was made explicit during the developments of European law. It was for example decided in *Crotty v. An Taoiseach*¹¹² that an increase of European competences would require an approval of the Irish people if it exceeded the licence provided for by the previous expression of its will. In other words, the agreement of the national sovereign is a prerequisite to the subsequent prevalence of European rules. As Walsh J. concluded:

“in the last analysis it is the people themselves who are the guardians of the Constitution. In my view, the assent of the people is a necessary prerequisite to the ratification of so much of the Single European Act as consists of Title III thereof.”¹¹³

It is also on the basis of an understanding of the Constitution as the expression of the Irish sovereign that the Supreme Court justified a possible limit to the doctrine of primacy in the application of European law in the domestic legal order. *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*¹¹⁴ revolved around the potential conflict between the doctrine of primacy and Article 40.3.3° of the Constitution protecting the right to life of the unborn. It is by reference to the sovereignty of the people that the supremacy of this constitutional provision over European obligations was justified. For example, McCarthy J. opined that:

“the sole authority for the construction of the Constitution lies in the Irish courts, the final authority being this Court. Article 29, s. 4, sub-s. 3 may exclude from constitutional invalidation some provision of the Treaty of Rome the enforcement of

¹¹¹ For a similar interpretation, see P. McCutcheon, “The legal system” in P. Keatinge (ed.), *Ireland and EC Membership Evaluated* (London: Pinter Publishers, 1991) 209-229 at 210.

¹¹² [1987] I.R. 713.

¹¹³ *Ibid.* at 783-784. As such, Title III of the Single European Act was not related to European Community as it then was. However, it will be seen that it is a broad conception of European integration which structures this decision, see *infra* at 255-262.

¹¹⁴ [1989] I.R. 753.

which is necessitated by the obligations of membership of the European Communities; it may be that in enacting the 8th Amendment to the Constitution as explained by this Court in the *Open Door Counselling* case, the People of Ireland did so in breach of the Treaty to which Ireland had acceded in 1973.”¹¹⁵

In France as well, the distorted interpretation given to the doctrine of primacy as expressed by the European Court of Justice is due to its understanding by domestic courts through the prism of sovereignty. Being one of the founding members of what is now the European Union, France regarded the European legal order as an artefact derived from the exercise of its sovereignty. As in the Irish legal order, the ratification of new European treaties requires the constituent power’s approval through amendments to the Constitution if certain European provisions “adversely affect the fundamental conditions of the exercising of national sovereignty”.¹¹⁶

After a long period of denial, the European doctrine of primacy was recognised by the *Conseil constitutionnel* in 2004. However, this was accomplished through a sovereigntist interpretation of the case-law of the European Court of Justice.¹¹⁷ The French constitutional court almost paraphrased the decision in *Costa* but rooted the specific nature of the European legal order in the will of the French constituent power rather than in its autonomous nature when it affirmed that:

“pursuant to Article 88-1 of the Constitution: ‘The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the Treaties that established them, to exercise some of their powers in common’; the constituent power thus formally acknowledged the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order”.¹¹⁸

As in the Irish legal order, the possibility for European rules prevailing does not stem from an autonomous nature of the European legal order itself but is a consequence of the

¹¹⁵ *Ibid.* at 770.

¹¹⁶ See for example CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 9.

¹¹⁷ For such an interpretation of the position the French constitutional court, see for example D. Ritleng, “Le principe de primauté du droit de l’Union” (2005) 41 *Revue trimestrielle de droit européen* 285-303 at 292.

¹¹⁸ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 11.

constitutional expression of the sovereign to participate in the process of European integration. The similarity of positions between the two countries is also noticeable in the application of European law. According to the new stance of the *Conseil constitutionnel*, the enforcement of European obligations in the domestic legal order can only be limited by a provision related to the constitutional identity of France. Nonetheless, this obstacle is not absolute and the expression of the French sovereign is the arbiter of the normative conflict. As the *Conseil constitutionnel* put it, European obligations “cannot run counter to a rule or principle inherent in the constitutional identity of France, except when the constituent power consents thereto”.¹¹⁹

The opposition between the stances of the Irish and French legal orders on the doctrine of primacy, on the one hand, and the case-law of the European Court of Justice on the other is not only concerned with the ambit of this European principle. Its constitutionalisation in the domestic legal orders betrays a disagreement as to the type of discourses justifying normative prevalence. Unlike for the European Court of Justice, from the Irish and French perspective, legal superiority is the result of a political fact, *viz.*, sovereignty. However, it can be argued that it is the very reasoning developed by the European Court of Justice which enables domestic courts to oppose the doctrine of primacy on the ground of national sovereignty.

2. The Constitutional Identity of Ireland and France as Singular Dialogue Regarding the Primacy of European Union Law

2.1. The Doctrine of Primacy as the Result of a Dialogue between the European Union and the Member States

The Dependence of the Doctrine of Primacy as Enunciated by the European Court of Justice on the Recognition of Member States for Its Actual Existence

In order to ground the doctrine of primacy in *Costa*, the European Court of Justice relied on several arguments,¹²⁰ in particular the transfer of competences from member states to

¹¹⁹ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19, CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120 at para. 6, CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 18 and CC, decision n° 2011-631 DC on the *Act pertaining to immigration, integration and citizenship* of 9 June 2011 (unreported) at para. 45.

¹²⁰ On this point, see for example, B. de Witte, “Retour à « Costa » : La primauté du droit communautaire à la lumière du droit international”, at fn. 94 above, at 436-442.

European institutions,¹²¹ the direct effect of European law¹²² and its uniformity.¹²³ These elements converge towards what constitutes the bedrock of the justification of the doctrine of primacy. This European principle is tightly linked to the specific nature and the autonomy of the European legal order.¹²⁴ Its specificity in contrast to international law was made clear at the outset of the decision when the European Court of Justice affirmed that:

“by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.”¹²⁵

The arguments suggested in the reasoning of the European Court of Justice lead to the affirmation of the autonomous nature of the European legal order, from which the doctrine of primacy is deduced. As it is stated in *Costa*:

“it follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions”.¹²⁶

However, the argument developed by the European Court of Justice appears unconvincing since it added symmetrically that the European legal order could not spare the doctrine of primacy without losing its autonomy; or, as it put it:

“without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”¹²⁷

¹²¹ As the Court of Justice put it: “a limitation of sovereignty or a transfer of powers from the States to the Community”, [1964] E.C.R. 585 at 594.

¹²² As it was argued, in accordance with Article 189 of the Treaty, “a regulation ‘shall be binding’ and ‘directly applicable in all Member States’”, *ibid.* at 594.

¹²³ From the perspective of the European Court of Justice, “the executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7”, *ibid.* at 594.

¹²⁴ On this deduction of the primacy of European law from the autonomy of the European legal order, see P. Pescatore, “International Law and Community Law - A Comparative Analysis” (1970) 7 *Common Market Law Review* 167-183 at 167.

¹²⁵ [1964] E.C.R. 585 at 593.

¹²⁶ *Ibid.* at 594.

¹²⁷ *Ibid.* at 593.

In consequence, while being deduced from the autonomy of the European legal order, the doctrine of primacy is at the same time a condition for it being autonomous. It is thus a circular argument, “a perfect example of tautology”¹²⁸ that is the foundation of the decision in *Costa*.¹²⁹ As de Witte explains it:

“therefore there would be in a way a double logic in the decision in *Costa*: an apparent logic, which deduces the primacy of Community law from its own particular nature and an inner logic, exactly opposite, which deduces the specific nature of Community law from the necessity to ensure its primacy at domestic level.”¹³⁰

Of course, one could conclude from this circularity that the European Court of Justice’s claim to the existence of the doctrine of primacy has a fictive character. However, it could also be argued that this circularity represents another step towards the definition of the doctrine of primacy. Hence, for Lindahl, “the Court’s tautology is not simply an example of flawed reasoning, but of the performative force involved in the representation of unity.”¹³¹ The reference to the performative element present in *Costa* depends on the consideration of the discourse adopted by the European Court of Justice as a speech act. The conclusion in *Costa* is not the result of a description of the European legal order as it existed at the time of the decision but rather aims both to create the doctrine of primacy and the legal reality justifying its existence.¹³²

It is in this sense that the reasoning in *Costa* constitutes a genuine novation.¹³³ While the European Court of Justice argued that doctrine of primacy depended on “the terms and the spirit of the Treaty”, it could be argued that it is the latter element which is prevalent in the

¹²⁸ G. Guillermin, “La construction européenne et le droit : L’Union européenne face au défi de la hiérarchie des normes” in B. Bruneteau and Y. Cassis (eds.), *L’Europe communautaire au défi de la hiérarchie* (Bruxelles: P.I.E. Peter Lang, 2007) 125-140 at 128.

¹²⁹ On the circularity of the reasoning of the European Court of Justice, see H. Lindahl, “Sovereignty and Representation in the European Union”, *op. cit.*, at fn. 27 above, at 109.

¹³⁰ B. de Witte, “Retour à « Costa » : La primauté du droit communautaire à la lumière du droit international”, at fn. 94 above, at 445 (translation by the author). For a similar interpretation, noticing that the arguments made in *Costa* cannot support the conclusion reached by the European Court of Justice as to the autonomy of the European legal order, see D. Simon, “Les fondements de l’autonomie du droit communautaire”, *op. cit.*, at fn. 98 above, at 220-221.

¹³¹ H. Lindahl, “Sovereignty and Representation in the European Union”, *op. cit.*, at fn. 27 above, at 110.

¹³² On the dynamics of speech acts, in particular in the context of sovereignty and representation, see B. van Roermund, “Sovereignty: Unpopular and Popular”, *op. cit.*, at fn. 31 above, at 41-50.

¹³³ Compared to the textual provisions of European primary law, Hervouët qualifies the doctrine of primacy as a “surplus”, see F. Hervouët, “Les relations entre ordre juridique communautaire et ordres juridiques nationaux : De la primauté à la sphère de compétence” in *Le droit administratif : Permanences et convergences : Mélanges en l’honneur de Jean-François Lachaume* (Paris: Dalloz, 2007) 649-665 at 656-657.

teleological interpretation made by the European Court of Justice.¹³⁴ By declining a literal interpretation, it disjoined the European legal order from the initial will of the member states. It is in this sense that it can be qualified as participating in the constitutionalisation of European law.¹³⁵ Underlying the doctrine of primacy, the European Court of Justice creates a source of validity on its own for the European legal order,¹³⁶ granting to the Treaty the same function as the one played by constitution in the domestic legal orders.¹³⁷

As any speech act, the validity of the claim made by the European Court of Justice, what it “*imagines*”,¹³⁸ requires recognition.¹³⁹ However, by refraining from giving a textual existence to the doctrine of primacy, it can be argued that the member states refused to recognise the case-law of the European Court of Justice (which still remains the only basis of the primacy principle). This highlights that the authoritative interpretation of European law by the European Court of Justice suffers from the incomplete integration of the legal orders in the European Union. As Ritleng explains it:

“the absence of hierarchical power [on the part of the European Court of Justice] over courts of member states is the decisive obstacle to a solution of conflicts between Community law and national constitutions.”¹⁴⁰

The decisions of the European Court of Justice do not benefit from an absolute performative force. They cannot be imposed on domestic courts but requires their approval,¹⁴¹

¹³⁴ On the importance of this teleological interpretation for the constitutionalisation of what is now the European Union and its autonomy from member states’ will, see J. H. H. Weiler, “The Transformation of Europe”, *op. cit.*, at fn. 73 above, at 2416 or P. Pescatore, “International Law and Community Law - A Comparative Analysis”, *op. cit.*, at fn. 124 above, at 173-174.

¹³⁵ On this “constitutionalisation of the Treaties”, see for example H. Lindahl, “Sovereignty and Representation in the European Union”, *op. cit.*, at fn. 27 above, at 110.

¹³⁶ On the claim made in *Costa* regarding the own source of validity of European law, see R. Bellamy, “Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights within the EU” in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 167-189 at 187.

¹³⁷ As Kakouris puts it: “the Treaty does not derive its validity from the Constitutions of the member states, it is not valid because it has become domestic law of member states, with or without ‘reception’. It enters into force by itself, in an autonomous manner, exactly as Constitutions of member states constitute the primary source of their legal orders”, C. N. Kakouris, “La relation de l’ordre juridique communautaire avec les ordres juridiques des États membres (Quelques réflexions parfois peu conformistes)” in F. Capotorti, C.-D. Ehlermann, J. Frowein and *al.* (eds.), *Du droit international au droit de l’intégration : Liber Amicorum Pierre Pescatore* (Baden-Baden: Nomos Verlag, 1987) 319-345 at 331 (translation by the author).

¹³⁸ A. Stone Sweet, “Constitutional Dialogues in the European Community”, *op. cit.*, at fn. 101 above, at 308.

¹³⁹ In this sense, see for example N. Walker, “Late Sovereignty in the European Union” in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 3-32 at 6-9.

¹⁴⁰ D. Ritleng, “Le principe de primauté du droit de l’Union”, *op. cit.*, at fn. 117 above, at 296 (translation by the author). In the same sense, see G. Canivet, “Constitution nationales et Europe : La dialectique du Un et du Deux” in M. Ameller, P. Avril, J.-P. Camby and *al.* (eds.), *Constitutions et pouvoirs : Mélanges en l’honneur de Jean Gicquel* (Paris: Montchrestien, 2008) 73-96 at 94 or C. Costello, “European Community Judicial Review in the Irish courts - Scope, Standards and Separation of Powers” in M. C. Lucey and C. Keville (eds.), *Irish Perspectives on EC Law* (Dublin: Round Hall, 2003) 17-49 at 18.

which entail that the doctrine of primacy is “conditional and reversible”.¹⁴² This is the very reason why it is possible for Irish and French courts to refuse such a recognition and to oppose the doctrine of primacy on the basis of national sovereignty. Therefore, the reality of the doctrine of primacy in the European Union is that it cannot rely on the case-law of the European Court of Justice alone, but rather consists of the dialogue which is entertained with member states.¹⁴³ It is this dual nature that Weiler argues when he states that:

“the evolutionary nature of the doctrine of supremacy is necessarily bi-dimensional. One dimension is the elaboration of the parameters of the doctrine by the European Court. But its full reception, the second dimension, depends on its incorporation into the constitutional orders of the Member States and its affirmation by their supreme courts. (...)”

As regards the second dimension, the evolutionary character of the process is more complicated.”¹⁴⁴

The definition and operation of the doctrine of primacy are therefore also structured by the discourses of domestic courts, discourses constrained by the legal concepts structuring domestic legal orders.¹⁴⁵ In particular, it is through the disruptive effects of the primacy principle on the hierarchy of norms that the European doctrine is perceived from the national perspective.¹⁴⁶

¹⁴¹ As de Witte points out, the European Court of Justice “cannot *force* national authorities to accept its interpretation, although authentic, of the Treaty, it will have to *persuade* them”, B. de Witte, “Retour à « Costa » : La primauté du droit communautaire à la lumière du droit international”, at fn. 94 above, at 443 (translation by the author). For a similar opinion stressing the necessary collaboration of domestic courts regarding the implementation of the doctrine of primacy, see J. H. H. Weiler, “The Community System: the Dual Character of Supranationalism” (1981) 1 *Yearbook of European Law* 267-306 at 300-301.

¹⁴² T. Tridimas, “Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure” (2003) 40 *Common Market Law Review* 9-50 at 48.

¹⁴³ For a similar opinion, see D. Ritleng, “De l'utilité du principe de primauté du droit de l'Union” (2009) 45 *Revue trimestrielle de droit européen* 677-696 at 678.

¹⁴⁴ J. H. H. Weiler, “The Community System: the Dual Character of Supranationalism”, *op. cit.*, at fn. 141 above, at 275.

¹⁴⁵ In this sense, see H. Gaudin, “Primauté « absolue » ou primauté « relative » ?” in H. Gaudin (ed.), *Droit constitutionnel, droit communautaire : Vers un respect constitutionnel réciproque ?* (Paris; Aix-en-Provence: Economica; Presses universitaires d'Aix-Marseille, 2001) 97-120 at 108.

¹⁴⁶ For a similar analysis, see M.-C. Ponthoreau, “Constitution européenne et identités constitutionnelles nationales”, *op. cit.*, at fn. 69 above, at 3. See also M. Poiars Maduro, “Contrapunctual Law: Europe's Constitutional Pluralism in Action” in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 501-537 at 502-503 and 512 where the author also argues that the representation of legal orders and their relationship in terms of hierarchy is also the one adopted by the European Court of Justice.

Irish and French Denial of European Sovereignty: A Conflict of Constitutionalisms

The issue of the legal nature of the European Union represents the context of the dialogue constitutive of the doctrine of primacy.¹⁴⁷ The opinions expressed by Irish and French domestic courts according to which normative superiority is grounded in sovereignty and thus granted to constitutional provisions display the conflict of constitutionalisms¹⁴⁸ which is at the core of European integration,¹⁴⁹ a conflict which opposes the primacy of European Union law to the supremacy of domestic constitutions.¹⁵⁰

The Irish and French positions are declensions of the debate relating to the definition of constitutional norms.¹⁵¹ Of course, the present thesis cannot provide a full analysis of this issue. Nonetheless, it is necessary to identify the parameters shaping the discursive space in which this dialogue – which is constitutive of the reality of the doctrine of primacy – occurs.¹⁵²

As has been seen above,¹⁵³ the arguments made by the European Court of Justice are purely of a legal nature. The issue of normative prevalence is only envisaged under the juridical prism and has to be found in the “terms and spirit of the Treaty” themselves.¹⁵⁴ It is possible to draw a parallel between this position of the European Court of Justice and the definition of constitutional norms made by Kelsen and to regard the claim to primacy as being expressed in normativist terms.¹⁵⁵ According to him, the validity of norms can only be derived from other

¹⁴⁷ In this sense, see D. Ritleng, “Le principe de primauté du droit de l’Union”, *op. cit.*, at fn. 117 above, at 291-293. In a similar way, Dougan argues, in relation to the doctrine of primacy, that “clearly, the threat of intergovernmentalism resurgent, or constitutionalism moribund, concerns not only the *zeitgeist* of the Union institutions themselves, but also the attitude of those national actors whose input also helps shape the character of the integration process”, M. Dougan, “The Treaty of Lisbon 2007: Winning Minds, not Hearts” (2008) 45 *Common Market Law Review* 617-703 at 700.

¹⁴⁸ On the opposition between European and national constitutionalisms, see J. H. H. Weiler, “Epilogue - The European Courts of Justice: Beyond ‘Beyond Doctrine’ or the Legitimacy Crisis of European Constitutionalism” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 365-391 at 366.

¹⁴⁹ On this conflict as to the basis of normative autonomy, see R. Barents, “The Precedence of EU Law from the Perspective of Constitutional Pluralism” (2009) 5 *European Constitutional Law Review* 421-446 at 430-434.

¹⁵⁰ In this thesis the distinction between the European Court of Justice’s claims and the common position of member states regarding normative prevalence is expressed, as a convenient shorthand, by references to the “primacy” of European law but to the “supremacy” of the relevant national Constitution.

¹⁵¹ On this issue in the European context, see P. Craig, “Constitutions, Constitutionalism and the European Union” (2001) 7 *European Law Journal* 125-150.

¹⁵² On this distinction between a legal or political definition of the notion of constitutionalisation that divides the European and member states’ perspectives, see T. C. Hartley, “The Constitutional Foundations of the European Union” (2001) 117 *Law Quarterly Review* 225-246 at 226-233.

¹⁵³ See *supra* at 28-29.

¹⁵⁴ [1964] E.C.R. 585 at 593.

¹⁵⁵ In this sense, see M. Kumm, “Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice” (1999) 36 *Common Market Law Review* 351-386 at 374 for who “the ECJ, (...) aware of the destructive passions national statism has fostered, is making use of a formalist and monist conception of the Rule of Law in the tradition of Hans Kelsen to justify its position”. See also, E. Cannizzaro, “« Commun » et « communautaire » en droit... communautaire (Le point de vue d’un internationaliste)” in P.-Y. Monjal and E. Neframi (eds.), *Le commun dans l’Union européenne* (Brussels: Bruylant, 2009) 97-118 at 111 where the author argues that “the ‘normativism’ of the Court constitutes the main weakness of its position” (translation by the author).

norms, to the exclusion of facts.¹⁵⁶ Constitutional rules are the norms which guarantee the validity of every norm attached to the legal system while not having their validity derived from another positive norm.¹⁵⁷ In making the prevalence of European norms dependent on legal competences transferred by member states, and the autonomy deduced from these transfers, a normativist conception is being offered by the European Court of Justice.

In contrast, Irish and French legal orders justify the superiority of constitutional provisions over certain European rules due to the specific origin of this type of norms. This approach relies on a constitutionalist definition at the confluence of legal and political phenomena.¹⁵⁸ The constitution is the translation of a political fact and represents the act whereby the sovereign determines the valid conditions of the exercise of its sovereignty by the constituted powers.¹⁵⁹ From this constitutionalist perspective, sovereignty:

“is a central element of the constitutional doctrine of most, if not all, European states which could loosely be defined as the *ultimate source of legal authority within the state*.”¹⁶⁰

Therefore, the dialogue concerning the doctrine of primacy is based on a divergence regarding the “existential requirement”¹⁶¹ of each legal order. It opposes, as a justification of normative superiority, a doctrine of primacy relying on juridical arguments and upholding the prevalence of the European legal order to a doctrine of supremacy¹⁶² which encompasses a

¹⁵⁶ See H. Kelsen, *Théorie pure du droit*, *op. cit.*, at fn. 49 above, at 13-18.

¹⁵⁷ See *ibid.*, in particular at 197-200.

¹⁵⁸ On the different meanings which can be ascribed to constitutionalism, see P. Craig, “Constitutions, Constitutionalism and the European Union”, *op. cit.*, at fn. 151 above, at 127-128.

¹⁵⁹ For this reason, rather than opposing legal and political conceptions of sovereignty, this notion will be understood “as a quintessentially political concept”, see M. Loughlin, “Ten Tenets of Sovereignty” in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 55-86 at 56. The question of normative prevalence or legal sovereignty will be referred to as primacy or supremacy. The same author supports this idea when he affirms that “authority (competence) is directly linked to power (capacity), and legal sovereignty connected with ‘real’ sovereignty”, *ibid.* at 71.

¹⁶⁰ B. de Witte, “Sovereignty and European Integration: the Weight of Legal Tradition” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 277-304 at 278.

¹⁶¹ As Pescatore qualified the doctrine of primacy, see P. Pescatore, *L'ordre juridique des Communautés Européennes : Études des sources du droit communautaire* (Second edition, Liege: Presses universitaires de Liège, 1973) at 227 (translation by the author). This expression was referred to in the European Court of Justice, notably by Advocate General Pöiares Maduro in *Arcelor*, Case C-127/07 *Société Arcelor Atlantique et Lorraine and others v. Premier ministre and others* [2008] E.C.R. I-9895 at para. 16 (the English translation mentions “primordial requirement”, but in French, the official language of the decision, the Advocate General referred to an “*exigence existentielle*”).

¹⁶² For this position common to all member states, see W. Mattli and A.M. Slaughter, “The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 253-276.

political perspective and considers that, since it derives from sovereignty, the Constitution is the supreme norm.

In reverse, the Irish and French positions stress a lack in the European legal order if grasped from the constitutionalist perspective, despite elements along these lines which appear sometimes, in soft tone, in European law. In consequence, the constitutionalisation of European law is ineluctably incomplete:

“even if the Community, like a precious metal, has some of the characteristics of a constitutional legal order, it lacks the most fundamental property: legitimation through a popular constituent power which in this case can only be the European people(s).”¹⁶³

First, the sovereign and the constitution can be conceived as separated entities, the constitution being the expression of a pre-existent *demos* defined by its cultural unity.¹⁶⁴ According to this paradigm, the Constitution is the expression of a concrete sovereign which constitutes itself as a state.¹⁶⁵ As Grimm puts it: “without people, no Constitution.”¹⁶⁶ It has thus been argued that, considering the current development of European integration, the inexistence of a European *demos*, defined concretely, precludes the European Union from being endowed with a Constitution.¹⁶⁷

Secondly, it can be doubted that the acknowledgement of a *demos* can exist outside a legal mechanism.¹⁶⁸ In this sense, and contrary to the former understanding, sovereignty is never a natural fact and a *demos* endowed with an identity is always the result of a juridical process.¹⁶⁹ For an entity to constitute itself as sovereign, it is necessary that a representative claims to act on its behalf.¹⁷⁰ It is through a Constitution being imputed to it that the *demos* is instituted. In other

¹⁶³ J. H. H. Weiler and U. R. Haltern, “Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 331-364 at 341.

¹⁶⁴ On this thesis, see for example P. Craig, “Constitutions, Constitutionalism and the European Union”, *op. cit.*, at fn. 151 above, at 136-139.

¹⁶⁵ On this point, see O. Jouanjan, “Ce que « donner une constitution à l’Europe » veut dire” (2003) n°13 *Cités* 21-25 at 27-29.

¹⁶⁶ Quoted in *ibid.* at 28.

¹⁶⁷ See D. Grimm, “Le moment est-il venu d’élaborer une Constitution européenne ?” in R. Dehousse, *Une Constitution pour l’Europe* (Paris: Presses de Sciences Po, 2002) 69-78 at 77-78.

¹⁶⁸ On this issue in the European context, see N. Walker, “European Constitutionalism and European Integration” (1996) *Public Law* 266-290 at 279.

¹⁶⁹ In this sense, see M. Troper and L. Jaume, “Le projet de Constitution européenne et la question du pouvoir constituant” (2003) 13 *Cités* 101-111 at 103-104.

¹⁷⁰ See, for example, H. Lindahl, “Sovereignty and Representation in the European Union”, *op. cit.*, at fn. 27 above, 96-98 where the author refuses an “originalist” definition of the sovereign and stresses the importance of representation at the core of sovereignty.

words, and contrary to the previous conception, it is “*first the constitution, then a people*”.¹⁷¹ This logic of representation inherent in any claim to sovereignty under this second understanding is also absent from the European discourse on the doctrine of primacy. The textual recognition in the Treaties governing what is now the European Union of a sovereign in the political sense is notably still lacking. In particular, the Treaty establishing a Constitution for Europe, which was supposed to be a significant step in the European constitutional process, lacked in its Preamble a provision such as “We, the People...”¹⁷²

However, it has been argued that European primary law as well as decisions of the European Court of Justice provide for a European sovereignty, and subsequently for a legitimacy on its own, under the surface of the mainly normativist position of the European Court. It is particularly true of the decision in *Van Gend en Loos* where the doctrine of direct effect which participates in the autonomy of the European legal order relied on the fact that “the preamble to the Treaty (...) refers not only to governments but to peoples.”¹⁷³ This would give a political justification to the normative prevalence of European rules on the same ground as that relied on by Ireland and France to establish the supremacy of their Constitutions.¹⁷⁴ However, this reference to “the peoples of Europe”, which is now made in the Preambles of both the Treaty on European Union and the Treaty on the Functioning of the European Union as well as in Article 1 of the former instrument, by its plural, falls short of the indivisibility characteristic of sovereignty in the political sense.¹⁷⁵ In other words, the European legal order lacks the reference essential to the existence of a genuine constitutional discourse.¹⁷⁶

¹⁷¹ H. Lindahl, “European Integration: Popular Sovereignty and a Politics of Boundaries”, *op. cit.*, at fn. 3 above, at 252.

¹⁷² On the fact that the “High Contracting Parties”, rather than a European people, are the authors of the Constitutional Treaty, see M. Kumm, “The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty” (2005) 11 *European Law Journal* 262-307 at 276.

¹⁷³ Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] E.C.R. 1 at 12.

¹⁷⁴ In this sense, see M. Poiares Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, *op. cit.*, at fn. 146 above, at 504-505 where, considering *Van Gend en Loos*, the author argues that “the treaty is presented as much more than an agreement between States; it is an agreement between the peoples of Europe that established a direct relationship between EC law and those people. That source of direct legitimacy established a political link authorising a claim of independent normative authority. (...) the reality is that such claim of independent political and legal authority has been made by the European legal order.” For similar considerations of the case-law of the European Court of Justice pointing towards the existence of a political European sovereign, see G. de Búrca, “Sovereignty and the Supremacy Doctrine of the European Court of Justice” in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 449-460 at 452-454.

¹⁷⁵ On this requirement, see for example R. Bellamy, “Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights within the EU”, *op. cit.*, at fn. 136 above, at 171.

¹⁷⁶ In this sense, see N. Walker, “The Idea of Constitutional Pluralism”, *op. cit.*, at fn. 19 above, at 343 where the author argues that “just as there can be no constitutional discourse in the absence of a referent polity or political process – achieved or aspired to, so there can be no polity or other constitutional process in the absence of a referent constitutional discourse”.

Ireland and France share in this regard a common point of view with other member states whereby the legitimacy of the process of European integration relies on a sovereignty located in the states.¹⁷⁷ As de Witte explains it:

“nothing has changed in the basic rule that *sovereignty itself continues to reside in the people* and may therefore not be *alienated*, either wholly or in part, by the institutions of the State.”¹⁷⁸

European law being “a constitutional order without constitutionalism”,¹⁷⁹ it only benefits from legitimacy through capillarity, derived from its constituent members.¹⁸⁰ Of course, Ireland and France are not the only member states to take this stance vis-à-vis the doctrine of primacy expressed by the European Court of Justice. This argument has been central in the case-law of the German Federal Constitutional Court¹⁸¹ which has been regarded as the template of the dialogue between the European and domestic levels on the notion of primacy. According to the *Bundesverfassungsgericht*, the approval of the German people of European integration is essential for the developments of European law, “the common authority of which is derived from the member-States”.¹⁸² In consequence, assessed from the constitutionalist perspective, the claim to the autonomy of the European legal order, which is intrinsically linked to the doctrine of primacy, is denied. From the German perspective in particular, and for the member states in general, the member states are the “Masters of the Treaties”.¹⁸³ Being its constituent powers, the existence of the European legal order is dependent upon their wills and the existence of the

¹⁷⁷ An opinion which was recently reaffirmed by the German Federal Constitutional Court in its *Treaty of Lisbon* decision, see *Gauweiler v. The Treaty of Lisbon (Lisbon decision)*, BVerfG, decision of 30 June 2009, 2 BvE 2/08 at para. 334 where it is argued that “the continuing sovereignty of the people (...) is anchored in the Member States”.

Available at <http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html> [Last accessed 29 December 2012],

¹⁷⁸ B. de Witte, “Sovereignty and European Integration: the Weight of Legal Tradition”, *op. cit.*, at fn. 160 above, at 285.

¹⁷⁹ J. H. H. Weiler and U. R. Haltern, “Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz”, *op. cit.*, at fn. 163 above, at 342.

¹⁸⁰ In this sense, see for example M. Kumm, “The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty”, *op. cit.*, at fn. 172 above, at 275.

¹⁸¹ On this central nature of democracy and political sovereignty in the German opposition to the doctrine of primacy, see for example J. Kokott, “Report on Germany”, *op. cit.*, at fn. 76 above, at 81-82 or M. Loughlin, “Ten Tenets of Sovereignty”, *op. cit.*, at fn. 159 above, at 82.

¹⁸² *Brunner and others v. The European Union Treaty (Maastricht decision)*, BVerfG, decision of 12 October 1993, 2 BvR 2134/92 & 2159/92, [1994] 1 C.M.L.R. 57 at 91.

¹⁸³ *Ibid.* at 91.

European legal order in their domestic legal systems is grounded in their national constitution.¹⁸⁴ Denying the autonomous existence of the European legal order, the validity of European rules relies *in fine* on the domestic legal orders of the member states.

Affirming that the member states are the “Masters of the Treaties” is tantamount to refusing the constitutionalisation of the European legal order. Since the decision in *Costa*, it has been possible to notice developments in the European constitutional discourse in the case-law of the European Court of Justice. In the decision in *Parti écologiste “Les Verts”*,¹⁸⁵ the Treaty was referred to as the “basic constitutional charter”¹⁸⁶ of European legal order. This process culminated with the drafting of the Treaty establishing a Constitution for Europe. However, from the perspective of the member states, such semantics are dependent on the polysemy inherent in the notion of sovereignty. In particular,¹⁸⁷ sovereignty can be understood as the competences exercised by the state as a sovereign entity or, from a political perspective, as the “the quality of the being, either real or fictitious, on behalf of which the power of the sovereign organ is exercised. In this sense, it can be said that only the nation or the people is sovereign”.¹⁸⁸ The constitutional claims expressed that the European Court of Justice rely on a definition of sovereignty in terms of legal powers. Based on the transfer of competences agreed by the member states, the constitutional nature of the European legal order derives, as it is expressed in *Costa*, from the “permanent limitations of [the member states’] sovereign rights”.¹⁸⁹ It must be emphasised that, from the perspective of the member states, it is not possible to deduce from this transfers of competences any consequences in terms of transfers of sovereignty, with sovereignty being understood in the political sense.¹⁹⁰

¹⁸⁴ On this foundation of the doctrine of primacy in national Constitutions from the state perspective, see for example B. de Witte, “Community Law and National Constitutional Values” (1991) 18 *Legal Issues of European Integration* 1-22 at 4.

¹⁸⁵ Case 294/83 *Parti écologiste “Les Verts” v. European Parliament* [1986] E.C.R. 1339.

¹⁸⁶ *Ibid.* at para. 23.

¹⁸⁷ On these different meanings of sovereignty, see for example M. Troper, “En guise d’introduction : La théorie constitutionnelle et le droit constitutionnel positif” (2001) n° 9 *Les Cahiers du Conseil constitutionnel*, available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-9/en-guise-d-introduction-la-theorie-constitutionnelle-et-le-droit-constitutionnel-positif.52472.html>> at 2-3 [Last accessed 29 December 2012].

¹⁸⁸ F. Hamon and M. Troper, *Droit constitutionnel* (Thirty-second edition, Paris: Librairie Générale de Droit et de Jurisprudence, 2011) at 192-193 (translation by the author).

¹⁸⁹ [1964] E.C.R. 585 at 594.

¹⁹⁰ In the distinction between transfer of competences and transfer of sovereignty from the states’ perspective, see B. de Witte, “Sovereignty and European Integration: the Weight of Legal Tradition”, *op. cit.*, at fn. 160 above, at 282. In the same sense, see M. Loughlin, “Ten Tenets of Sovereignty”, *op. cit.*, at fn. 159 above, at 81-82. For a contrary opinion arguing that the states have abandoned part of their sovereignty, see for example C. N. Kakouris, “La relation de l’ordre juridique communautaire avec les ordres juridiques des États membres (Quelques réflexions parfois peu conformistes)”, *op. cit.*, at fn. 137 above, at 337-338.

While it could be argued that the notion of constitution is not necessarily attached to states,¹⁹¹ it could not free itself from an essential condition that exists and remains within the state, *viz.*, sovereignty understood in its political dimension.¹⁹² As Rittleng put it, under the constitutionalist paradigm:

“the notions of state, sovereignty and constitution form the three sections of a same triptych: the state is characterised by sovereignty; and yet, the constitution is the manifestation of will of the constituent power, that is to say of the sovereign which, within the logic of democratic can only be the people; therefore the constitution presupposes a state and a people.”¹⁹³

From the perspective adopted by member states regarding the doctrine of primacy, by relying on legal arguments and being deprived of political dimension, the claim to sovereignty expressed at European level¹⁹⁴ is deficient. It can be said that the development of a European constitutional discourse is thus merely regarded as rhetorical and bearing only symbolic consequences.¹⁹⁵ The institutionalisation of what is now the European Union can thus echo the consequences of sovereignty but not the principle itself. Considered from a functional perspective as the organisation of an institution and the distribution of powers between organs therein,¹⁹⁶ the notion of a European constitution would lose the specificity attached to this type of norm when considered under the constitutionalist paradigm.¹⁹⁷ As the *Conseil constitutionnel*

¹⁹¹ In this sense, see A. Auer, “*E pur si muove*: Le caractère constitutionnel de la Constitution pour l’Europe” (2005) *Revue du Droit de l’Union Européenne* 65-90, in particular at 72-74 or D. Simon, “Les fondements de l’autonomie du droit communautaire”, *op. cit.*, at fn. 98 above, at 225.

¹⁹² On this position common to member states, see A. Jakab, “Neutralizing the Sovereignty Question: Compromise Strategies in Constitutional Argumentation before European Integration and since”, *op. cit.*, at fn. 2 above, at 387-390.

¹⁹³ D. Rittleng, “Le principe de primauté du droit de l’Union”, *op. cit.*, at fn. 117 above, at 291 (translation by the author).

¹⁹⁴ See for example the opinion of Advocate General Pöiares Maduro in Case C-127/07 *Société Arcelor Atlantique et Lorraine and others v. Premier ministre and others* where, regarding the opposition between European primacy and European supremacy, he affirmed that “those concurrent claims to legal sovereignty are the very manifestation of the legal pluralism that makes the European integration process unique”, [2008] E.C.R. I-9895 at para. 10.

¹⁹⁵ In this sense, see O. Jouanjan, “Ce que « donner une constitution à l’Europe » veut dire”, *op. cit.*, at fn. 165 above, at 33.

¹⁹⁶ For such understanding of constitutions, see N. Walker, “European Constitutionalism and European Integration”, *op. cit.*, at fn. 168 above, at 270-271.

¹⁹⁷ In this sense, see T. C. Hartley, “The Constitutional Foundations of the European Union”, *op. cit.*, at fn. 152 above, at 226 where the author points out that “in English legal usage, more humble bodies may also have constitutions: a political party, a trade union or even a cricket club may have a constitution.”

decided, the name given to the Treaty establishing a Constitution for Europe does not by itself entail specific legal consequences.¹⁹⁸

Considering the Irish and French legal orders in the European context makes it possible to grasp the initially elusive notion of constitutional identity. More particularly, its existence is to be found in a relation and a reaction to the doctrine of primacy developed by the European Court of Justice. Therefore, within the European context, this principle constitutes a more precise criterion facilitating the analysis of the notion of constitutional identity. Stemming from a speech act uttered by the European Court of Justice, the reality of this doctrine in the European Union is the result of the dialogue entered into by the European Court of Justice and the member states, in particular their domestic courts. From this discursive exchange, the modality of existence of the primacy of European law appears as the tension between normative prevalence and sovereignty. This is where the notion of constitutional identity can be refined.

2.2. The Affirmation of Irish and French Constitutional Identity as an Ongoing Balance between the Common and the Self in the Application of European Union Law

The Primacy of European Law Traditionally Limited by Essential State Competences

Consideration of the case-law of the European Court of Justice by domestic courts is not monolithic. While the Irish and French oppositions to the doctrine of primacy in terms of sovereignty are shared with other member states, it can be argued that the notion of constitutional identity these two countries put forward represents a particular declension of this common justification.

For long the opposition to the doctrine of supremacy on the basis of a democratic sovereignty located in the states was framed in a constitutional discourse focused on the issue of competences.¹⁹⁹ It is this type of reasoning which structures the case-law of the German Federal Constitutional Court and which has often be considered as a position common to member

¹⁹⁸ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 10.

¹⁹⁹ This central concern for democracy in the relationship between European Union law and the domestic legal order was reaffirmed in its *Treaty of Lisbon* decision, *Gauweiler v. The Treaty of Lisbon (Lisbon decision)*, BVerfG, decision of 30 June 2009, 2 BvE 2/08 at para. 340, available at <http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html> [Last accessed 29 December 2012]. On this point, see for example J. Ziller, “The German Constitutional Court’s Friendliness towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon” (2010) 16 *European Public Law* 53-73 at 64-66.

states.²⁰⁰ Since European integration depends on the sovereignty of the member states, the deepening of this integration and the development of European competences require a prior democratic approval. In other words, as “Masters of the Treaties”, member states hold the *Kompetenz-Kompetenz*, the ability to determine the competences enjoyed by European institutions.²⁰¹ Should they act beyond this approval, domestic courts could declare the European rules as being *ultra vires* and deprive them from the qualities derived from the doctrine of primacy.²⁰²

The Irish and French case-law bear witness to similar features. This is the position that has been adopted in the Irish legal system, in particular when the validity of the ratification of the Single European Act arose. In *Crotty v. An Taoiseach*,²⁰³ it was established that the development of the competences of European institutions was submitted to the approval of the Irish people. In this instance, it was found that the increase of competences of Community law contained in the Single European Act fell within the licence to join included in Article 29.4.3° (as it was then) of the Irish Constitution.²⁰⁴ However, it was also held regarding these competences and their exercise that some modifications might require the agreement of the Irish people *via* referendum. As Finlay C.J. put it:

“as far as Ireland is concerned, it does not follow that all other decisions of the Council which now require unanimity could, without a further amendment of the Constitution, be changed to decisions requiring less than unanimity.”²⁰⁵

A similar reasoning is noticeable in the French position. The *Conseil constitutionnel* can control the compatibility between the French Constitution, on the one hand, and a treaty prior to its ratification, on the other, under Article 54 of the Constitution. The test used for its control consists of determining whether the provisions of the new treaty “adversely affect the fundamental conditions of the exercising of national sovereignty”.²⁰⁶ In particular, this would be

²⁰⁰ See for example the importance given to the notion of *Kompetenz-Kompetenz* in the different national reports in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998).

²⁰¹ On this connection between democracy and *Kompetenz-Kompetenz* in the case-law of the German Federal Constitutional Court, see J. Kokott, “Report on Germany”, at fn. 76 above, at 96-98.

²⁰² *Brunner and others v. The European Union Treaty* (Maastricht decision), BVerfG, decision of 12 October 1993, 2 BvR 2134/92 & 2159/92, [1994] 1 C.M.L.R. 57 at 89.

²⁰³ [1987] I.R. 713.

²⁰⁴ *Ibid.* at 770.

²⁰⁵ *Ibid.* at 770.

²⁰⁶ See for example CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 9.

the case when the competences transferred to the European Union are “inherent in the exercising of national sovereignty”²⁰⁷ or in case of modifications of the modalities of exercise of competences already transferred, such as the change from unanimity to qualified majority voting in the Council.²⁰⁸ The ratification of the European instrument would require the intervention of the constituent power in order to modify the Constitution and ensure the sovereign’s approval to the developments of European integration.

The opposition of the member states to the doctrine of primacy in terms of competences enjoyed by European institutions and the necessary prior national approval is often found side by side with a principle of constitutional immutability. This is for example the case in the case-law of the German Federal Constitutional Court. Aside from the doctrine of *Kompetenz-Kompetenz* which was developed in its *Maastricht* decision,²⁰⁹ the German Court first expressed its opposition to the primacy principle in a decision known as *Solange I*.²¹⁰ It was established that, while Article 24 of the German Constitution allowed the transfer of competences to the European Communities, it could not be tantamount to modifying the Constitution in matters which were beyond the scope of the power of amendment.²¹¹ This exclusion applies to the principles encapsulated in Article 79 (3) of the German Constitution (also known as the “eternity clause”²¹²). In consequence, the limit to the doctrine of primacy expressed in terms of competences being enjoyed by the European institutions is the consequence, in part, of certain immutable values of the German legal order. A similar position is noticeable in the Italian case-law. In *Frontini v. Ministero delle Finanze*,²¹³ it was decided that transfers of competences to European institutions were limited by “fundamental principles of our constitutional order or the inalienable rights of man.”²¹⁴ The European claim to primacy would have to yield to these. The justification for these core principles which are attached to the constitutional order and which cannot be transferred to European institutions parallels the German perspective. For the Italian Constitutional Court, these principles involve some sort of

²⁰⁷ *Ibid.* at para. 18.

²⁰⁸ See, for example, CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 29.

²⁰⁹ *Brunner and others v. The European Union Treaty (Maastricht decision)*, BVerfG, decision of 12 October 1993, 2 BvR 2134/92 & 2159/92, [1994] 1 C.M.L.R. 57.

²¹⁰ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*, BVerfG, decision of 29 May 1974, 2 BvL 52/71, [1974] 2 C.M.L.R. 540.

²¹¹ *Ibid.* at 550-551. On this reasoning central in the *Solange* decisions, see J. Kokott, “Report on Germany”, *op. cit.*, at fn. 76 above, at 86-92.

²¹² This constitutional provision makes certain amendments to the German Basic Law inadmissible, notably to Article 1 concerning human rights, justifying that it is qualified as the “eternity clause”.

²¹³ [1974] 2 C.M.L.R. 372. It has to be noted that the German Federal Constitutional Court expressly referred to this decision of its Italian counterpart in *Solange I*, [1974] 2 C.M.L.R. 540 at 544.

²¹⁴ *Ibid.* at 384.

immutability in the domestic constitutional order. In particular, they have to be understood as the principles evading the reach of the power of amendment.²¹⁵ In conclusion, a similar argument is noticeable in the position of the German and Italian constitutional courts. The limit to the doctrine of primacy is traditionally to be found in competences which cannot be transferred to European institutions since such a transfer would challenge perpetual elements of their respective constitutional order.

The Notion of Constitutional Identity in Ireland and France as an Interpretative Balance between the Common and the Self of the Constitution

In this immutability lies an essential element of the distinctive nature of the constitutional discourse with which the Irish and French legal orders confront the doctrine of primacy. In both countries, the domestic courts affirm that no limit can be put to the power to amend the Constitution. This was notably established by the Irish Supreme Court in *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill*.²¹⁶ In response to the argument that amendments to the Constitution could be limited by principles of natural law, it was held that:

“the courts (...) at no stage recognised the provisions of natural law as superior to the Constitution.

The People were entitled to amend the Constitution in accordance with the provision of Article 46 of the Constitution and the Constitution as so amended is the fundamental and supreme law of the State representing as it does the will of the People.”²¹⁷

It is important to note that this case dealt with the amendment to Article 40.3.3° of the Constitution. The affirmation of the full sovereignty expressed by the Irish people in amending the Constitution concerned the right to life of the unborn,²¹⁸ *i.e.*, the very same right which was

²¹⁵ For an analysis of this argument in the Italian legal order and its implication for the doctrine of primacy, see M. R. Donnarumma, “Intégration européenne et sauvegarde de l’identité nationale dans la jurisprudence de la Cour de justice et des cours constitutionnelles” (2010) n° 84 *Revue française de droit constitutionnel* 719-750 at 727-734.

²¹⁶ [1995] 1 I.R. 1.

²¹⁷ *Ibid.* at 43.

²¹⁸ In this sense, see for example G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 20 above, at 46.

opposed to the doctrine of primacy in *Grogan* and which can be regarded as participating in Irish constitutional identity.

In France, the limit put on the recognition of the doctrine of primacy deduced from Article 88-1 of the Constitution was originally defined as an “express conflicting provision of the Constitution”. In 2006, however, the *Conseil constitutionnel* modified the formulation of this test and it is now explicitly in terms of constitutional identity that the limit to the enforcement of European obligations in the domestic legal order is expressed. In comparison with the former formulation, the reference to the notion of something “inherent in the constitutional identity of France” could connote principles the immutability of which guarantees the continuation of the French constitutional architecture as such.²¹⁹ However, it could be argued that this reading is a distorted image of the position of the *Conseil constitutionnel*. The appearance of this notion of constitutional identity in French positive law was immediately followed by the affirmation that this limit would hold “except when the constituent power consents thereto”. The notion of constitutional identity as seen in the case-law of the *Conseil constitutionnel* seems directly opposed to the hypothesis of immutable features in the constitutional order.

Both in Ireland and France, the parameters of the constitutional discourse opposed to the doctrine of primacy on the basis of national sovereignty rest on the very possibility of amending the Constitution. The comparison between Irish and French oppositions to the doctrine of primacy shows that in the definition both legal orders provide for the notion of constitutional identity selfhood prevails over sameness. In other words, what is said of what one is may be, at least partly, less important than reflexively saying what one is. Rather than safeguarding certain pre-existing and everlasting principles, the protection of Irish and French constitutional identities relies on the possibility of affirming what each legal order regards as characterising its singularity at a particular time. In comparison to the protection of certain specific values, the concept of constitutional identity in the forms which it takes in France and in Ireland bears witness to the importance of having the last word on the ongoing balance to be found between what is commonly European and what is singularly national. What matters is the power to decide which changing features are considered as participating in identity. As Mary Robinson, then President of Ireland, put it:

²¹⁹ For such an interpretation of this notion in the case-law of the *Conseil constitutionnel*, see for example É. Dubout, “« Les règles ou principes inhérents à l'identité constitutionnelle de la France » : une supra-constitutionnalité ?”, *op. cit.*, at fn. 36 above, at 473.

“our identity must be constantly rediscovered, or recreated, if we are to come to terms with (...) changing circumstances”.²²⁰

Arising as a speech act in *Costa*, the doctrine of primacy established the discursive conditions necessary for it to bear future legal effects. Reflecting on the consequences of the doctrine of primacy and the constitutionalisation of the European Union which it implies, de Búrca takes the view that:

“if the notion of ‘national sovereignty’ is to retain meaning in the context of such significant, potentially all-embracing and cross-cutting constraints, our understanding of the term sovereignty must itself necessarily be changed and diluted.”²²¹

Faced with the evolution of European integration, the notion of constitutional identity could be regarded as the new name given to sovereignty. This is the opinion of Ponthoreau when she considers the increase in concerns about constitutional identity in the European context and comes to the conclusion that:

“sovereignty remains the criterion of the state and it is probably why constitutional identity nowadays takes a place in the debate related to the deepening of European integration: it is the auxiliary of sovereignty.”²²²

Hence, discussing constitutional identity could be a new instance of the dialogue constitutive of the reality of the primacy of European Union law in the integrated legal order. The topic of this study is more limited than the analysis of the affirmation of the supremacy of the Constitution of member states in the face of the doctrine of primacy. It is more specifically concerned with the particular form of this opposition as expressed in terms of constitutional

²²⁰ Quoted in G. J. Jacobs, *Constitutional Identity*, *op. cit.*, at fn. 20 above, at 258.

²²¹ G. de Búrca, “Sovereignty and the Supremacy Doctrine of the European Court of Justice”, *op. cit.*, at fn. 174 above, at 458.

²²² M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, *op. cit.*, at fn. 10 above, at 321 (translation by the author). In the same sense, see J. Foyer, “Union, États membres et souveraineté” in T. de Montbrial and S. Jansen (eds.), *L’identité de la France et l’Europe* (Brussels: Bruylant, 2005) 65-76 at 66 where, in the context of French participation in European integration, the author affirms that “I will therefore speak above all of what the identity of the French Republic is becoming in this set [European Union law]. And, in this field, the notion of sovereignty continues to have some importance” (translation by the author) or B. de Witte, “Sovereignty and European Integration: the Weight of Legal Tradition”, *op. cit.*, at fn. 160 above, at 300 where it is affirmed that “another name for that [identity] is state sovereignty”.

identity as it appears in the French and Irish legal orders. In consequence, other paradigms of the opposition to the primacy principle noticeable in the case-law of different member states will only be referred to when their comparison with the position of Irish and French courts highlights the singularities of the constitutional discourse on the doctrine of primacy in these two countries.²²³ The case-law of the German Federal Constitutional Court will receive a special attention since the principles it developed are often regarded as having become a common position among member states.

The occurrence of the word “identity” is of course not limited to the Irish and French legal orders. As already seen,²²⁴ it takes its roots in European law itself. Also, it has always been included in the case-law of the German Federal Constitutional Court which focused on the distribution of competences between European and national institutions and immutable features of the constitutional order. Present in *Solange I*,²²⁵ the first decision questioning the primacy principle, what amount in effect to references to the identity of the Constitution were repeated in the Federal Constitutional Court’s *Treaty of Lisbon* decision.²²⁶ However, the notion of legal identity goes beyond a mere semantic occurrence in positive law.²²⁷ As has been seen,²²⁸ the notion of constitutional identity corresponds above all to a discourse about the Constitution. Rather than the words used by domestic courts, it is what it is achieved through this use that is matters.²²⁹

In this regard, the Irish and French decisions on European Union law, and its doctrine of primacy in particular, display their own logic, different to what can be deduced from the case-law of their German counterpart. It is this specific form of reasoning which can be qualified as

²²³ For an overview of the member states’ positions as regards the doctrine of primacy, see for example P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (Fourth edition, Oxford: Oxford University Press, 2008) at 353-374.

²²⁴ See *supra* at 15-16.

²²⁵ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*, BVerfG, decision of 29 May 1974, 2 BvL 52/71, [1974] 2 C.M.L.R. 540 at 550 where the *Bundesverfassungsgericht* referred to “the basic structure of the Constitution, which forms the basis of its identity” or to “the identity of the valid Constitution of the Federal Republic of Germany”.

²²⁶ *Gauweiler v. The Treaty of Lisbon (Lisbon decision)*, BVerfG, decision of 30 June 2009, 2 BvE 2/08 at para. 340 where, considering the control of European instruments, the German Federal Constitutional Court expressed the view that “the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79 (3) of the Basic Law is respected”.

Available at <http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html> [Last accessed 29 December 2012]. However, in this decision, one could argue that the reasoning based on this notion of identity changed compared to previous decisions, see *infra* at 444-446.

²²⁷ On the relevance of the notion of constitutional identity, whether expressed or implied, see A. Levade, “Identité constitutionnelle et exigence existentielle : Comment concilier l’inconciliable ?”, *op. cit.*, at fn. 8 above, at 112-113.

²²⁸ See *supra* at 8-11.

²²⁹ For a similar argument regarding the reference to “natural law” in the Irish case-law, see D. M. Clarke, “The Role of Natural Law in Irish Constitutional Law” (1982) 17 *Irish Jurist* 187-220 at 196-197.

constitutional identity, irrespective of the actual occurrence of this expression. The question of what competences have been transferred to European institutions is not an issue unknown to the process of review of the doctrine of primacy by Irish and French domestic courts. However, it has not been given the same importance as in other jurisdictions such as Germany for example. The “essential scope or objectives” test used in *Crotty*, and the teleological dynamics it implies, allow the development of European competences even if they have not previously been explicitly transferred to European institutions by treaty. The development of the European Union is conceived as an ongoing process from the Irish perspective. Even though the political decision has been taken to amend the Constitution *via* referendum in respect of each new treaty, it could equally have been argued that, from a legal point of view, the expansion of European competences could fall inside the licence to join what is now the European Union defined in what is now Article 29.4.5° of the Constitution²³⁰ as long as it corresponded with the journey towards European integration initially agreed by the Irish people.

In the same way, the notion of the competences transferred by the different treaties to European institutions is central in the test developed by the *Conseil constitutionnel* regarding the “fundamental conditions of the exercising of national sovereignty”. This test was not substituted by the notion of constitutional identity which, in contrast, was developed in parallel to it. The apparition of the new test in the case-law of the French constitutional court corresponds to the development of a new understanding of the relationship between constitutional and European norms.

In consequence, it can be argued that the discourse developed by reference to the concept of constitutional identity is not primarily focused on the distribution of competences *ab initio* between European and domestic institutions. In a way, the notion of constitutional identity represents a journey from Maastricht to Lisbon. This notion can be regarded as a new *Kompetenz-Kompetenz*, a new paradigm about normative conflicts between constitutional provisions and the primacy of European Union law taking into account the growing intertwined nature of the domestic and European legal orders, which is confirmed by the recent use of this new test by the German Federal Constitutional Court.²³¹ In his analysis of the comparison between the Irish and French legal orders, on the one hand, and the European legal order, on the other, in the aftermath of the Treaty of Maastricht, Phelan concluded that the legal situation

²³⁰ It has to be noted that, since the amendment to the Constitution required by the Treaty of Lisbon, membership to the European Atomic Energy Community is now made possible by Article 29.4.3° of the Irish Constitution.

²³¹ *Gauweiler v. The Treaty of Lisbon (Lisbon decision)*, BVerfG, decision of 30 June 2009, 2 BvE 2/08 at para. 240-241. Available at <http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html> [Last accessed 29 December 2012].

in what is now the European Union pointed towards a revolt or a revolution. Domestic courts would either reject European claims or, in the opposite case, their acceptance would lead to a change in the basis of validity and legitimacy of national legal orders.²³² However, it can be argued that the notion of constitutional identity represents a more peaceful conciliation of the opposition between the supremacy of constitutional law and the primacy of what is now European Union law.²³³ In this sense, the comparison between the Irish and French legal orders as regards their opposition to the doctrine of primacy in terms of constitutional identity goes beyond the legal situation of these two countries. This justifies the presentation of this thesis where the similarities and the differences between Irish and French legal orders are analysed jointly according to the different issue considered in order to define the notion of constitutional identity as a limit to the primacy of European Union law.²³⁴ The analysis will show that this concept, rather than consisting of a certain normative content, is better understood as a meta-norm. The notion of constitutional identity corresponds to a discourse on the Constitution and qualifies an interpretative method. A rule can be deemed as forming part of the constitutional identity of Ireland or France when, as a result of a balancing between a purely domestic constitutional provision and the constitutional recognition of the primacy of European Union law, the former is granting normative prevalence. From this perspective, the constitutional provisions opposed to the European Union law are not so much objective and absolute limits to the doctrine of primacy but these constitutional values are better seen as the particular and contingent occurrences where the form of discourse constitutive of the notion of constitutional identity is instantiated.

The notion of *Kompetenz-Kompetenz* consists of opposing national sovereignty to the European legal order which is deprived of sovereignty on its own. It represents the control of the member states on every step of the development of what is now the European Union, requiring a prior sovereign approval of the competences exercised by European institutions. In contrast, the notion of constitutional identity (which has recently been formalised in the case-law of the *Conseil constitutionnel* but which principles are also present in the decisions of Irish courts) reflects the ineluctability of the process of European integration. The interpretative

²³² See D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 68 above, for example at 413-414.

²³³ However, it has to be noted that a similar solution, although developed in different terms, was envisaged by Phelan, see *ibid.* at 417-418. Rather than a formal recognition of certain constitutional provisions as an exemption to the doctrine of primacy explicitly recognised in European primary law, the dialogue established by the notion of constitutional immunity is structured by jurisdictional policies which preserve the apparent uniformity of European law. For further developments on this point, see *infra* at 477-480 and 488-490.

²³⁴ For a different perspective more respectful of each country's legal idiosyncrasies, see *ibid.* at 5.

activity which is at the core of this notion consists of a balance between two sovereign expressions of equal value. In consequence, the notion of constitutional identity is not centred on the distribution of competences between the member states and the European Union but it rather considers the doctrine of primacy, and its potential limits, according to the actual exercise of these competences. In other words, the notion of constitutional identity displays a focus being put on the consequences of European integration rather than the principle of European integration itself. Rather than being focused on the condition of the valid creation of European rules, it is a concern for the modalities of application of European rules in the Irish and French legal orders that the notion of constitutional identity reveals.

This notion does not rely on a static image of a relationship between domestic and European rules based on the normative context established by each new step in European integration. Rather, taking account of the fact that the European Union is still a “developing organism”,²³⁵ it understands the constitutionalisation of the European Union legal order, and of the doctrine of primacy, as a process.²³⁶ Even though sovereignty and the formal normative hierarchy it entails still constitute the basis of the control exercised by domestic courts on European norms and their primacy, it can be argued that the content of this control differs. The notion of constitutional identity is the result of a conciliatory attitude in the case-law of Irish and French courts whereby the nature of their legal order depends on purely domestic principles of particular importance contained in their respective constitutional order as well as on their participation in the European Union. Therefore, the notion of constitutional identity bears a substantive perspective on the normative relationship between domestic and European norms where a constant balancing is made between the primacy of European Union law and the supremacy of the Constitution. Depending, as it does, on interpretative mechanisms, the notion of constitutional identity is as much meaningful for the normative relationship it establishes as for the institutional dynamics leading to it. In this regard, it is a concept which requires going beyond the opposition between the European Union and the member states. Understanding it involves an analysis of the organs taking part in the dialogue on the doctrine of primacy, both within Ireland and France and in their relationship to the European Union.

However, while the Irish and French legal orders display a similar pattern, their positions are not identical. In addition to their differentiated attitude towards the integrated European legal order which is the consequence of their belonging to the dualist or monist traditions as well as their political weight in the process of European integration, the formulation

²³⁵ To use the expression of Finlay C.J. in *Crotty v. An Taoiseach* [1987] I.R. 713 at 770.

²³⁶ In this sense, see for example D. Ritleng, “Le principe de primauté du droit de l’Union”, *op. cit.*, at fn. 117 above, at 294.

of what may be termed their approach to constitutional identity is also influenced by characteristics more intrinsic to their particular legal order. In this regard, as has already been seen,²³⁷ legal culture is primordial in the understanding of legal rules. However, one could argue that it is not only the former that shed light on the latter. One advantage in comparing the differences in the implementation of similar principles in the Irish and French legal orders in relation to the European doctrine of primacy consists of gaining, on the basis of legal rules, an insight into the legal culture of each country.²³⁸ In particular, two sets of factors primarily constrain their discourse.

First, based on a sovereignty located in the states, the notion of constitutional identity in Ireland and France depends on how each represents the concept of their domestic sovereign. In particular, French abstract and juridical definition contrasts with Irish concrete and political conception. As presented in Article 3 of the Declaration of Human and Civic Rights of 1789 or in Article 3 of the Constitution, the French legal order favours the concept of national sovereignty whereby the Nation is conceived as a legal fiction. This explains that there is no difference in value between the expression of the voters in a referendum and the mechanisms of representative democracy. For example, according to its Article 89, the French Constitution can be equally amended by referendum or by Parliament. Similarly, in a European context, the Treaty establishing a Constitution for Europe was rejected in a referendum but the modification of the Constitution necessary to ratify the Treaty of Lisbon, “its ‘scrambled’ version”,²³⁹ was effected by Parliament.²⁴⁰ Unlike the French model, the Irish legal order presents a concrete and political conception of sovereignty which belongs, as can be deduced from Article 6 of the Irish Constitution, to the people. It is on the basis of this concrete understanding that domestic courts regard the Irish people, the only authority being able to amend the Constitution by referendum according to Article 46, as the “guardians of the Constitution”.²⁴¹ Therefore, in contrast to the French legal order, the Irish judiciary opposes representative democracy and the

²³⁷ See *supra* at 4-5.

²³⁸ In this sense, see M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, *op. cit.*, at fn. 10 above, at 124 where the author points out that culture is not only something that has to be taken into account to understand law but also can be viewed as what is to be explained through legal comparison. See also R. Cotterrell, “Comparative Law and Legal Culture”, *op. cit.*, at fn. 15 above, at 734 or M. Tushnet, “Comparative Constitutional Law”, *op. cit.*, at fn. 32 above, at 1254 where the author argues that “studies of the way in which specific subjects are dealt with in different constitutional systems can also reveal aspects of national identity.”

²³⁹ B. de Witte, “The Lisbon Treaty and National Constitutions: More or Less Europeanisation?”, *op. cit.*, at fn. 69 above, at 26.

²⁴⁰ However, it has to be noted that the referendum on the Treaty establishing a Constitution for Europe did not deal with the constitutional amendments themselves but was related to the authorisation to ratify this European instrument. Nonetheless, from a more political perspective, it can be said that, in the French legal order, the representatives can implement what was rejected by popular expression.

²⁴¹ *Crotty v. An Taoiseach* [1987] I.R. 713 at 783.

direct expression of the people, the latter being defined as the “true democracy”.²⁴² On this basis, domestic courts develop different legal strategies in their expression of constitutional identity when confronted with the doctrine of primacy.

Secondly, the enforcement of the notion of constitutional identity also depends on the court system specific to each country. In particular, the *Conseil constitutionnel* which initiated the new stance towards European Union law faces more difficulties than the Irish Supreme Court in imposing its interpretation of the relationship between the primacy of European Union law and the supremacy of the Constitution. The Irish court system is unified, ensuring the prevalence of the Supreme Court as authentic interpreter of the Constitution. While Article 62 of the French Constitution affirms the binding nature of the decisions of the *Conseil constitutionnel* on other courts, the French system is not associated with the same jurisdictional hierarchy. Rather, France is characterised by a dual system of courts. Aside from the *Conseil constitutionnel*, “ordinary courts” are divided between the *ordre judiciaire* and the *ordre administratif*. The former deals primarily with civil and criminal law while the latter applies public law, and in particular administrative law. The *Cour de cassation* is the supreme court of the *ordre judiciaire* and the *Conseil d’État* is the supreme court of the *ordre administratif*.²⁴³ Therefore, there are ultimately three instances of authentic interpretation of the relationship between the domestic legal order and the doctrine of primacy. This necessarily constrains the arguments of the *Conseil constitutionnel* as it seeks to persuade its counterparts to echo its case-law.

Structured by the notion of constitutional identity, the Irish and French constitutional discourses reflect the sovereign willingness to participate in the process of European integration and, in consequence, display a conciliatory attitude as regards the doctrine of primacy. In this regards, Irish and French case-law concerning this European “existential requirement” often relies on a “dodging” strategy.²⁴⁴ The number of decisions where the supremacy of certain constitutional provisions is explicitly affirmed in the face of the primacy of European Union law

²⁴² According to the opinion of Denham J. (as she was then) in *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10 at 51. She reiterated this understanding, for example, in *Hanafin v. Minister for the Environment* [1996] 2 I.R. 321 at 400 and *Coughlan v. Broadcasting Complaints Commission and RTE* [2000] 3 I.R. 1 at 30-31. For a similar conception, see the opinions of Hamilton C.J. in *McKenna (No. 2)* and *Coughlan* respectively at 41-42 and 56.

²⁴³ For a presentation of the French court system, see for example J. Bell, S. Boyron and S. Whittaker, *Principles of French Law* (Second edition, Oxford: Oxford University Press, 2008) at 37-50.

²⁴⁴ In this sense, see G. Canivet, “Constitution nationales et Europe : La dialectique du Un et du Deux”, *op. cit.*, at fn. 140 above, at 94-96.

is therefore limited. Nonetheless, they raise a number of important issues. Therefore, while the arguments developed often concern the same decisions, the analyses they provide are carried out from different perspectives.

In this enquiring into the constitutional identity of Ireland and France, the first part of this thesis will be dedicated to the definition of the notion of constitutional identity. It is argued that the existence of this notion is autonomous from its formal recognition in positive law. From the perspective of legal science, it qualifies a certain type of domestic legal discourse, which is common to Ireland and France, as concern the normative relationship between the supremacy of the Constitution and the primacy of what is now European Union law. The opposition between national and European levels on the doctrine of primacy has existed since its formulation by the European Court of Justice in *Costa*. The notion of constitutional identity being one of the forms of this opposition, it is necessary to take into account the genealogy of this concept. The doctrine of primacy can be regarded as a departure on the part of the European Court of Justice from the original intention of the founding members of what is now the European Union. Accordingly, the contrast between the *ab initio* generous Irish attitude towards the doctrine of primacy and its late French recognition can be explained by the timing of their membership. However, in both countries, the European principle is not accepted on its own terms. As it exists in the Irish and French legal orders, the primacy of European law is defined in terms of immunity, either constitutional or jurisdictional (Chapter I). This partial recognition of the demands expressed by the European Court of Justice stems from the Irish and French refusal to consider the European law as an autonomous legal order, which is the very basis of the decision in *Costa*. The prevalence granted to European rules is grounded in domestic law and, in consequence, this prevalence necessarily yields to the supremacy of the Irish and French Constitutions (Chapter II). However, the opposition between the position of Ireland and France, on the one hand, and the position of the European Court of Justice, on the other, exceeds the mere issue of normative prevalence. Both in the Irish and the French legal orders, this question is conceived under the constitutionalist paradigm. Even though the Irish and French legal orders define this entity differently, in case of normative conflicts, rules which are the expression of the sovereign prevail. It is therefore domestic sovereignty which is the filter for the primacy of European Union law (Chapter III). These points are common with other modalities of enforcement of the prevalence of constitutional provisions over European law, notably as displayed in the *Kompetenz-Kompetenz* case-law of the German Federal Constitutional Court. However, one can see that this formal perspective leading to the supremacy of the Constitution in the face of the primacy of what is now European Union law is

played down in the Irish and French judicial decisions. In other words, while sovereignty is the basis of legitimacy of the activity of control made by domestic courts on the primacy of European rules, this control is exercised according to different modalities. Priority is given to a material perspective put on the normative relationship between domestic and European norms. Irish and French courts display a conciliatory attitude towards European law whereby their main focus is related to the relationship of substantive content between domestic and European rules. In this sense, the notion of constitutional identity stems from the recognition by Irish and French courts of the sovereign willingness to participate in the process of European integration. It is therefore only a limited number of constitutional principles which can be opposed to the doctrine of primacy rather than the full formal supremacy of the Constitution. Norms participating in the constitutional identity of Ireland and France are not determined *ab initio*. Conceived in relation to the doctrine of primacy, they are the result of an interpretative balance between two sovereign expressions of equal value, between constitutional provisions of a purely domestic nature and constitutional provisions dedicated to European Union law, *i.e.*, to the doctrine of primacy as domestically defined. In the Irish and French legal orders, a provision does not prevail over the doctrine of primacy because it participates in their respective constitutional identity. Rather, it is because it prevails over the European principle as a result of a balancing process that it receives the identity pedigree. In this sense, the notion of constitutional identity does not refer to certain predetermined values but rather qualifies a meta-norm, a certain form of interpretative discourse on the relationship between the supremacy of the Constitution and the primacy of European Union law. It is this form of discourse which is characteristic of the notion of constitutional identity, notwithstanding the specific constitutional provisions to which it is applied according to the different courts' decisions (Chapter IV).

Better understood as an interpretative mechanism rather than seen from an essentialist perspective, the notion of constitutional identity is characterised by the dynamics it introduces. Therefore, the second part of the thesis will consider how the implementation of this notion is actually effected in the Irish and French legal orders. This implementation reflects the parameters specific to each legal order, parameters which include issues specific to the European context, in particular their respective political weight in the European system, but also elements of domestic legal culture such as the definition of the sovereign, the court structure or the understanding of the separation of powers. Therefore, the upholding of constitutional identity displays different jurisdictional strategies in Ireland and France. In particular, due to their respective legal culture, it is possible to see differences as to the relative weight granted to political and legal factors in the analysis of the relationship between the domestic and European

legal orders (Chapter V). Nonetheless, these different legal strategies aim to the same purpose. Assuming the sovereign willingness to take part in the process of European integration, the notion of constitutional identity does not aim to regulate the creation of European law on the basis of a sovereignty of which the European legal order is deprived. In contrast, this concept rather denotes the willingness of Irish and French courts to control the application of European rules in their domestic legal order, even though they are not empowered with the same competences to achieve this purpose (Chapter VI). However, being primarily an interpretative device, the notion of constitutional identity also reveals the preeminent position of courts in the conciliation between constitutional and European requirements, both at national and European levels. Due to the increased empowerment of national governments in the institutional architecture of the European Union and the difficulties faced by domestic parliaments to control them, either by lack of means or due to their solidarity with the executive branch, the control of the prevalence of European rules in the domestic legal order have involved an empowerment of the judiciary in the Irish and French vis-à-vis other branches of government. Conversely, the notion of constitutional identity also displays a competition between domestic courts for the appraisal of the relationship between domestic and European rules (Chapter VII). However, the central role of the judiciary at domestic level is also reflected at European level. In this regard, the notion of constitutional identity shapes a new type of collaboration between the Irish and French courts, on the one hand, and the European Court of Justice, on the other, a collaboration which is essential to the realisation of the doctrine of primacy due to its dual nature. In contrast to the *Kompetenz-Kompetenz* paradigm which introduces a dialogical dimension in the relationship between domestic and European judicial levels, the upholding of a constitutional provision forming part of the constitutional identity of Ireland and France would constitute a retreat in a purely domestic monologue. However, these Irish and French monologues of resistance, respectively constitutive of a right of veto or of a jurisdictional opt-out, are best seen as constraints for the European Court of Justice to enter into a certain type of inter-jurisdictional dialogue. Defined in terms of jurisdictional policy rather than normative relationship, this dialogue would enable each court to preserve the structures of its own discourse as defined by their respective “existential requirement” while achieving a congruence of result. This inter-jurisdictional dialogue instituted by the notion of constitutional identity can thus be qualified as a unity of words with a diversity of meanings (Chapter VIII).

Title I The Notion of Constitutional Identity versus the Doctrine of Primacy: A Sovereign Interpretative Discourse on European Union Law vis-à-vis the Supremacy of the Irish and French Constitutions

The Treaty establishing a Constitution for Europe was a milestone in the constitutionalisation of the European Union. The opposition to its ratification *via* referendum on 29 May 2005 in France, and in the Netherlands three days after, can thus have been interpreted as a refusal to deepen this process. However, , this refusal by the French electorate of a new European Treaty occurred more or less simultaneously with a recognition by the French courts of European law requirements which had previously, and for long, been withheld in the French legal order. From the time of the new approach of the *Conseil constitutionnel* in 2004, France has joined Ireland in its formal recognition of the primacy of European Union law, a doctrine the Irish legal system embraced since 1973, when Ireland joined the European Communities.

However, it would be misleading to think that the European doctrine of primacy is accepted under its own terms in either the French or the Irish legal orders. As translated into their respective constitutional architecture, the primacy principle receives a domestic definition according to which the European Court of Justice can see the consequences of its case-law accommodated with - rather than its nature abided by. It is in the name of a sovereignty which remains located within the member states - and of which their Constitution is the expression - that Ireland and France legitimate both their departure from European tenets and the limits they place on the primacy principle, which has to yield before the supremacy of their respective Constitutions.

However, both Irish and French courts alike refrain from presenting their versions of supremacy in formal terms in a way that conflicts with the European doctrine. Conceiving the Constitution as the expression of an unfettered sovereign, the domestic courts of both legal orders engage in an interpretative process whereby provisions dedicated to the participation in the European Union are balanced with other ones of a purely domestic nature. This reasoning displays a conciliatory attitude which favours a material perspective being taken to the relationship between the domestic and European legal orders. A concept underlying the Irish Constitution, and notably its Article 1, and which has been formally used in recent decisions of the *Conseil constitutionnel* can be used to describe this common pattern which is noticeable in

the case-law of both legal orders, *viz.*, the notion of constitutional identity. This is a description which can be applied to those particular provisions which are regarded as defeating the domestic recognition of the primacy principle as a result of the interpretative process carried out by domestic courts.

Section I The Doctrine of Primacy Translated as Immunity: European Union Law Confronted with the Supremacy of the Irish and French Constitutions

As regards the doctrine of primacy, it is possible to contrast the positions of Ireland and France. While Ireland implemented this doctrine, which had already been developed by the European Court of Justice,¹ when it adhered to the European Communities in 1973, France refused to recognise the conclusions the European Court derived from the treaties on the grounds that it is was contrary to what had been its intention as a founding state of the Communities.

Since 2004, and the adoption of a new approach towards European Union law on the part of the *Conseil constitutionnel*, Ireland and France have shared a similar form of recognition of the European doctrine of primacy. This recognition involves a transformation of this principle when crossing the domestic looking-glass. Its definition in terms of immunity² bears witness to its constitutional - rather than European - nature in the Irish and French legal systems, which leads unavoidably to its submission to constitutional provisions.

¹ In particular, in its decisions Case 6/64 *Costa v. E.N.E.L.* [1964] E.C.R. 585, Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] E.C.R. 1125 and Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] E.C.R. 629.

² It will be argued in the second part of this chapter that both France and Ireland have refused the hierarchical claim made by the European Court of Justice and instead have transformed the doctrine of primacy in a doctrine of immunity - even if the Irish doctrine of immunity is better understood as a constitutional immunity while the French one is rather a jurisdictional immunity, see *infra* at 83-104.

Chapter I The Convergence of the Irish and French Narratives of Membership towards a Similar Transformative Reaction to the Primacy of European Union Law

At first sight, everything seems to put Ireland and France in different camps insofar as concerns the European project. They come from different legal traditions, *viz.*, respectively, common law and civil law. Furthermore, the narrative of their involvement appears also singular. Ireland joined an already existing entity, France, in contrast, is one the founding members of what is now the European Union.

These factors may explain their different attitudes towards the primacy of European Union law. Ireland has been willing to integrate this European requirement as defined at European level whereas France somehow took the view that the European approach contravened the original intention it had in engaging in the continental project. However, if this justifies the different routes used to the recognition of the doctrine of primacy, the two countries have in common a distorted conception of primacy when it is looked out from their domestic perspective.

A. Joining Which Europe? The Specific Irish and French Narratives Concerning the Recognition of the Primacy of European Union Law

One could argue that France did not join what is now the European Union but rather took part in its creation. Like other founding members, it had a difficult relationship with a jurisdictional concept which was regarded as going beyond its initial commitment. After a long-standing blindness to the specific nature of the European legal order, it was only in 2004 that the primacy principle was recognised in the French legal system as a requirement of membership of the European Union.

In contrast, in joining what was at the time the European Communities in 1973, the Irish legal order always showed a willingness to incorporate the distinctive elements of the European legal order and showed a respect for the case-law of the European Court of Justice that can actually be regarded as having gone beyond the literal demands of the Treaties.

1. *The Initial Endorsement of the Doctrine of Primacy: The Irish Willingness to Embark Unreservedly on the Process of European Integration*

The time at which Ireland joined the then European Communities is of great significance insofar as concerns the manner in which the primacy principle is dealt with in its domestic legal order. This results from two factors. On the one hand, it had already been almost ten years since the European Court of Justice had developed the doctrine of primacy in its decision in *Costa v. E.N.E.L.*¹ by the time that Ireland joined European integration along with the United Kingdom and Denmark on 1 January 1973. In view of the obligation on new member states to implement the *acquis communautaire* prior to their accession, the issue of primacy could not be ignored. In the event, the least that can be said is that Ireland showed a willingness to join the process of European integration fully, as it then stood and to the extent to which it had been developed. As Walsh J. recognised in an extra-judicial context:

“at that stage Ireland had already acceded to the European Communities and we had no intention to alter any legal development which had taken place before our arrival. We joined with full acceptance of the established jurisprudence already developed.”²

Joining the European project also met specific domestic needs in Ireland which can partly explain the generous attitude characteristic of Ireland towards what is now the European Union, in particular the primacy of its legal order,³ and the willingness of the judiciary to enforce it. As Hogan and Whyte put it, the willingness of Irish courts to give a full effect to this European doctrine seems unquestionable:

¹ [1964] E.C.R. 585.

² B. Walsh, “Reflections on the Effects of Membership of the European Communities in Irish Law” in F. Capotorti, C.-D. Ehlermann, J. Frowein and *al.* (eds.), *Du droit international au droit de l'intégration : Liber Amicorum Pierre Pescatore* (Baden-Baden: Nomos Verlag, 1987) 805-820 at 805. On the implication of the timing of membership with regard to the primacy issue in Ireland, see also for example P. McCutcheon, “The legal system” in P. Keatinge (ed.), *Ireland and EC Membership Evaluated* (London: Pinter Publishers, 1991) 209-229 at 210 or E. Fahey, *EU Law in Ireland* (Dublin: Clarus Press, 2010) at 16.

³ On this distinctive stance of the Irish legal order in favour of the doctrine of primacy, see H. Fox, P. Gardner and C. Wickremasinghe, “The Reception of European Community Law into Domestic Law” in P. M. Eisemann (ed.), *The Integration of International Law and European Community Law into the National Legal Order: A Study of the Practice in Europe* (The Hague: Kluwer Law International, 1996) 27-38 at 32 where the authors affirm, while questioning the enforcement of the primacy of European law by member states, that “in most States it is the rules of national law which give Community law its supremacy in the internal legal order, rather than the decisions of the ECJ which establish the principle of supremacy of community law. This, in all the jurisdictions save Ireland, leaves open, to some extent, the question of the precise position in the legal hierarchy which different type of Community law occupy.”

“save for one isolated and inconclusive instance dealing with abortion, the Irish courts have unhesitatingly acknowledged the supremacy of Community law.”⁴

These specific factors, forming the context of reception of European law in Ireland and therefore giving meaning to it, comprised two main elements. Externally, membership of the European Communities reflected a logic that had been ongoing since Irish independence from the United Kingdom. Internally, it confirmed and developed societal mutations that had occurred in the years preceding accession.

First, since gaining its independence in 1922, the international stage represented a theatre for the affirmation and recognition of Irish sovereignty. This justified the significant involvement by Ireland in the League of Nations and subsequently in the United Nations as well as in the Organisation for European Economic Co-operation and in the Council of Europe.⁵ Joining what is now the European Union formed part of the same dynamics. In consequence and paradoxically, the transfer of competences to a supranational entity, rather than involving a diminution in Irish sovereignty, could be regarded as an affirmation of it and provided a way for Ireland to have its independence confirmed. It is this interpretation of membership that Laffan suggests, explaining that:

“this notion that Ireland may in fact have greater control over its destiny inside rather than outside the Community was persuasive, given Ireland’s continues dependence on Britain despite formal independence.”⁶

This perception of Europe as a stage in which Irish identity could be asserted against its “dominant neighbour”⁷ is therefore part of the context which explains the benevolent approach of the Irish legal order to the European set of norms and the primacy principle.

Secondly, another - more reflexive - trait seems also to justify the appeal of what is now European Union law. The Ireland which joined the European Communities in 1973 was

⁴ G. W. Hogan and G. F. Whyte, *J M Kelly: The Irish Constitution* (Fourth edition, Dublin: Lexis Nexis Butterworths, 2003) at 533. For a similar point of view on the receptive attitude of the Irish courts towards the primacy principle, see D. R. Phelan and A. Whelan, “National constitutional law and European integration: FIDE Report” (1997) 6 *Irish Journal of European Law* 26-64 at 44.

⁵ Concerning this affirmation of Ireland through the international scene, see B. Laffan and J. O’Mahony, *Ireland and the European Union* (Basingstoke: Palgrave Macmillan, 2008) at 9-14.

⁶ B. Laffan, “Sovereignty and national identity” in P. Keatinge (ed.), *Ireland and EC Membership Evaluated* (London: Pinter Publishers, 1991) 187-189 at 188.

⁷ B. M. E. McMahon and F. Murphy, *European Community Law in Ireland* (Dublin: Butterworth (Ireland), 1989) at 282.

different from the Ireland that emerged after gaining its full independence. De Valera's vision, as embodied in the 1937 Constitution, represented an Ireland characterised by its rurality, Catholicism and the prevalence of spirituality over economic values. The Ireland that joined the process of European integration three decades later was a changed society. Under Sean Lemass, Taoiseach from 1959 to 1966, Ireland experienced considerable economic development.⁸ Joining an international organisation which at the time was devoted to economic issues therefore seemed a natural way to foster and continue such changes in Irish society⁹ *via* "new developments in Irish law"¹⁰ under the influence of European law.

In themselves, these factors are not decisive in explaining the favourable approach of the Irish legal structure to the primacy principle. They nonetheless testify to a context in which, out of self-interest, European law was held in high regard.

The legal structure which ensures the presence of the primacy principle in the Irish domestic order depends on a complex machinery which intertwines legislative and constitutional provisions. In this respect, as Barrett describes it:

"the entire European Union *acquis* finds a place in the national legal order only by passing through the narrow – but nonetheless gradually widening – constitutional door found in Art.29.4 of Bunreacht na hÉireann."¹¹

Since the time of the Treaty of Lisbon and the effecting of the necessary amendments to the Irish legal system in connection to this, this machinery consists of, respectively, the European Communities Act 1972 (as amended) together with Articles 29.4.5° and 29.4.6° of the Irish Constitution. Due to this multi-layered mechanism, some ambiguities arise unavoidably as to the respective role of these provisions with regard to the doctrine of primacy. Both judicial decisions and academic commentary offer different explanations regarding the foundation of

⁸ Concerning this mutation of Ireland prior to its accession to what is now the European Union, see for example B. Laffan and J. O'Mahony, *Ireland and the European Union*, *op. cit.*, at fn. 7 above, at 8 where the authors affirm that "Jack Lynch's departure to sign the Rome Treaties in 1972 represented the final nail in the coffin of Ireland that de Valera would have had". See also *ibid.* at 22-23.

⁹ As an example of the impact of European law in the field of gender equality, in particular from an economic point of view, see M. Reid, *The Impact of Community Law on the Irish Constitution* (Dublin: Irish Centre for European Law, 1990), in particular at 58-63.

¹⁰ F. Murphy, "The European Community and the Irish Legal System" in D. Coombes, *Ireland and the European Communities: Ten Years of Membership* (Dublin: Gill and Macmillan, 1983) 29-42 at 41-42.

¹¹ G. Barrett, "The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution" (2012) 48 *Irish Jurist* 132-172 at 132.

the primacy principle in the Irish legal system, rooting it either in the Constitution itself or making it dependent on legislative provisions.

The constitutional option relies on the combination of Article 29.4.5° and Article 29.4.6°. The former paragraph provides that:

“the State may ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th day of December 2007 (“Treaty of Lisbon”), and may be a member of the European Union established by virtue of that Treaty.”¹²

The latter states that:

“no provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—

(i) the said European Union or the European Atomic Energy Community, or institutions thereof,

(ii) the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or

(iii) bodies competent under the treaties referred to in this section, from having the force of law in the State.”

Some judicial decisions tend to a recognition of the primacy principle in the Irish legal system on the ground of these constitutional provisions. One could, for example, quote the opinion of Walsh J. who held in *Campus Oil Limited v. Minister for Industry*:¹³

¹² It has to be noted that, since the amendment to the Constitution required by the Treaty of Lisbon, membership to the European Atomic Energy Community is now made possible by Article 29.4.3° of the Irish Constitution.

¹³ [1983] I.R. 82.

“by virtue of the provisions of Article 29.4.3 [as it was then] of the Constitution, the right of appeal to this Court from such a decision must yield to the primacy of article 177 of the Treaty [now Article 267 of the Treaty on the Functioning of the European Union].”¹⁴

This route is also echoed by academic commentators, some authors linking the recognition of the primacy of the European Union law with the Irish constitutional provisions. For Gallagher, for instance:

“the second sentence of Article 29.4.3° [as it was then] provides in Irish law for the primacy of EEC law”.¹⁵

In consequence, the legislative rules concerning European Union law tend to be accorded only a marginal role insofar as concerns the existence of the doctrine of primacy in the Irish legal order. Thus, McCutcheon, who implicitly agrees with the idea of the incorporation of the primacy principle through the Constitution, suggests that the European Communities Act 1972 was merely a prudent, and therefore not necessary, measure:

“given the dualist approach adopted by Irish law and, in particular the provisions of Article 29.6 of the Constitution outlined above, it was felt prudent to complete the incorporation process by legislative enactment.”¹⁶

However, a closer consideration of these constitutional provisions inclines one to question their capacity to provide for a positive implementation of the primacy principle in the Irish legal system.¹⁷ First, the wording of Article 29.4.5°, at first sight, has mere permissive effect. It enables Ireland to join the European Union but, in consequence, cannot be deemed to

¹⁴ *Ibid.* at 87.

¹⁵ P. Gallagher, “The Constitution and the Community” (1993) 2 *Irish Journal of European Law* 129-145 at 130. In the same way, see M. Forde, *Constitutional Law* (Second edition, Dublin: First Law, 2004) at 362.

¹⁶ P. McCutcheon, “The legal system”, *op. cit.*, at fn. 4 above, at 212-213. The same argument stressing a cautious use of a statute is hinted by McMahon and Murphy, see B. M. E. McMahon and F. Murphy, *European Community Law in Ireland*, *op. cit.*, at fn. 9 above, at 272.

¹⁷ For a similar analysis, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Dublin: Round Hall Sweet & Maxwell, 1997) at 334-338 and W. Phelan, *Can Ireland Legislate Contrary to European Community Law? IIIS Discussion Paper No. 237* (Dublin: Institute for International Integration Studies, 2007) at 23-24.

positively incorporate the primacy principle in the domestic legal order.¹⁸ For its part, Article 29.4.6° provides for constitutional immunity for norms directly or indirectly related to European Union law. This Article is therefore merely negative in effect and appears similarly ill-suited to constitute the positive ground for the enforcement of European Union law and its primacy in the national legal order. It prevents domestic courts from opposing European rules to constitutional provisions and, in any event, does not consider the primacy principle in relation to other domestic rules.¹⁹

In conclusion, even though these provisions are of significance insofar as concerns the doctrine of primacy,²⁰ it can not be said that they represent its foundation.²¹ In other words, another normative instrument was needed and this is a central purpose for the European Communities Act 1972 (as amended)²² – an enactment which, incidentally, demonstrates the Irish willingness to regulate the relationship between Ireland’s legal order and the European legal system through its traditional prism of dualism.²³

Unlike France, Ireland adheres to the dualist tradition regarding international law.²⁴ The international legal order is deemed to exist independently of and distinctly from the domestic legal system. In consequence, European Union norms, like any other form of international law, can not have a place in the national legal system without being incorporated into it by act of the legislature.²⁵ This results from Article 29.6 of the Irish Constitution, which states that:

¹⁸ As Barrett puts it, it “did *not* effect Irish entry to the Communities, but merely rendered it constitutionally possible. It did *not* incorporate the law of the then Communities into Irish law”, G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution”, *op. cit.*, at fn. 13 above, at 133. This constitutional provision is thus “enabling only”, D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 19 above, at 335.

¹⁹ See G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution”, *op. cit.*, at fn. 13 above, at 133.

²⁰ For a consideration of the impact of these constitutional provisions on the primacy issue, see *infra* at both 89-93 and 130-141 respectively for Article 29.4.6° and Article 29.4.5°.

²¹ Therefore, a positive construction of the constitutional provisions, making of them an exception to the Irish dualist approach, seems ill-suited and is not supported by subsequent decisions of the Irish courts. However, for such a positive interpretation, see for example, T. F. O’Higgins, “The Constitution and the Communities - Scope for Stress?” in J. O’Reilly (ed.), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Dublin: Round Hall Press, 1992) 227-241 at 234 and G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary* (London: Sweet & Maxwell, 1995) at 15.

²² Barrett notes that “the supremacy doctrine made its entry into domestic law – at least insofar as concerns sub-constitutional norms – through the agency of s.2 of the 1972 Act”, see G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution”, *op. cit.*, at fn. 13 above, at 133.

²³ To support this argument, see N. Fennelly and A. M. Collins, “Irlande” in J. Rideau (ed.), *Les États membres de l’Union européenne : Adaptations - Mutations - Résistances* (Paris: Librairie Générale de Droit et de Jurisprudence, 1997) at 268 and by B. M. E. McMahon and F. Murphy in *European Community Law in Ireland*, *op. cit.*, at fn. 9 above, at 272.

²⁴ For a brief presentation of the dualist and monist doctrine, see *supra* at 22-23.

²⁵ Such a dualist position has been reaffirmed by the Irish courts, see for example, as regards the European Convention on Human Rights, the statement of Maguire C.J. in *Re O’Laighléis* [1960] I.R. 93 at 124-125 or the opinion of Barrington J. in *Doyle v. Commissioner of An Garda* [1999] 1 I.R. 249 at 268.

“no international agreement shall be part of the domestic law of the Sates save as may be determined by the Oireachtas.”

When Ireland joined the European Communities, the Oireachtas (the Irish legislature) brought about the reception of this foreign body of laws into the domestic legal order by means of the European Communities Act 1972. Now, in the wake of several amendments due to the ongoing development of the process of European integration and from the time of the Treaty of Lisbon, the reception of European Union law in Ireland is ensured by the European Communities Act 1972 (as amended). According to section 2 (1) (as inserted by section 3 of the European Union Act 2009):

“the following shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in the treaties governing the European Union:

- (a) the treaties governing the European Union;
- (b) acts adopted by the institutions of the European Union (other than acts to which the first paragraph of Article 275 of the Treaty on the Functioning of the European Union applies);
- (c) acts adopted by the institutions of the European Communities in force immediately before the entry into force of the Lisbon Treaty; and
- (d) acts adopted by bodies competent under those treaties (other than acts to which the first paragraph of the said Article 275 applies).”

In consequence, it may be argued that it is by virtue of this legislative instrument that European Union law forms part of the Irish legal order. To use the words of Carroll J. in *Tate v. Minister for Social Welfare Ireland*:²⁶

“this section [section 2 (1) of the European Communities Act 1972 (as amended)] is the conduit pipe through which Community law become part of domestic law.”²⁷

²⁶ [1995] 1 I.R. 418.

²⁷ *Ibid.* at 437.

This point of view repeated one expressed by Barrington J. in *Crotty v. An Taoiseach*,²⁸ when he held in the High Court that:

“the immunity from constitutional challenge conferred by the second sentence of the Third Amendment on laws enacted, acts done, or measures adopted by the Community or its institutions would therefore have been meaningless as these laws, acts or measures would not have been part of the domestic law of this country.

To make them part of the domestic law of this country the European Communities Act, 1972, was necessary.”²⁹

Because of the endorsement of the doctrine of dualism by the Irish legal system, one could argue that the presence of European Union law in the domestic legal order necessarily requires a specific recognition. Implemented by the European Communities Act 1972 (as amended), this recognition of the European body of law does not appear different from that which would be granted to any international instrument. Nonetheless, the approach to European Union law by the Irish legal order seems to have some characteristics which distinguish it from the approach which is adopted by it to most other international instruments. The relevant piece of legislation ensuring the reception under the dualist approach not only allows European treaties to validly exist in the national legal order but also, and importantly, grants validity in the domestic legal order to existing and - more significantly - to future norms adopted by European institutions without the consent of the Oireachtas.³⁰ In this regard, European Union law can be deemed to be different from international law since it is applied in Ireland through a form of prospective dualism.³¹

²⁸ [1987] I.R. 713.

²⁹ *Ibid.* at 757.

³⁰ On this specificity of European Union law compared to international law both in monist and dualist states, see A. Pécheul, “La souveraineté et le Traité de Lisbonne” (2008) *Politeia* 170-191 at 185.

³¹ On this notion of prospective dualism, see A. Whelan, “Article 29.4.3 and the Meaning of ‘Necessity’” (1992) 2 *The Irish Student Law Review* 60-83 at 78 and J. Casey, *Constitutional Law in Ireland* (Third edition, Dublin: Round Hall Sweet & Maxwell, 2000) at 206. Henchy J. also stressed, in an extra-judicial context, this particularity consisting of giving in advance legal effects to future acts of the European Union when he stated that “the adoption, as binding on this State and as part of the domestic law, of *all future* acts adopted by the institutions of the E.E.C. is a form of carte blanche the implications of which cannot be measured in advance, for the possible range of those acts is limited only by the Treaties” in S. Henchy, “The Irish Constitution and the E.E.C.” (1977) 1 *Dublin University Law Journal* 20-25 at 23. In this regard, it is possible to compare the Irish position to European Union law with the Italian initial one where secondary legislations were transposed as a strict application of the dualist doctrine would require, see M. R. Donnarumma, “Intégration européenne et sauvegarde de l’identité nationale dans la jurisprudence de la Cour de justice et des cours constitutionnelles” (2010) n° 84 *Revue française de droit constitutionnel* 719-750 at 729.

Another sign both of this receptive approach and of the specific treatment which is accorded to European Union law lies in the wording of the European Communities Act 1972 (as amended) in relation to the modalities of the reception of European Union law in the domestic legal order. The 1972 Act (as amended) makes the mode of existence of European Union law within the Irish legal system dependent on “the conditions laid down in the treaties governing the European Union”. This apparently generous formulation raises a question which is at the core of the divergence in approaches by the European Court of Justice and by the member state legal orders as to both the existence of and the extent of the primacy principle.

It is the modalities of the commitment of the different countries to the principle of primacy rather than the commitment itself which have been the main focus of the differences between domestic and European levels. In this regard, it is the question of which authorities are competent to interpret European law which constitutes the line of demarcation between the national courts and their European counterpart.³² It is because of national courts’ claim to the ability to interpret what is involved in European provisions – any reference to primacy having remained absent from the European Treaties due to the French and Dutch rejection of the Treaty Establishing a Constitution for Europe – and therefore national courts’ right to turn a deaf ear to the European Court of Justice, that the member states can consider themselves the “Masters of the Treaties”.³³

The European Communities Act 1972 (as amended) arguably thus constitutes the entry point of European Union law into the Irish legal system. However, it is the ambit of this entry point – as determined by the Irish courts³⁴ – that gives the Irish position its singularity. The doctrine of primacy can be argued to have a dual character. It results from the recognition by member states of claims made by the European Court of Justice.³⁵ A specificity of what is now European Union law in the Irish legal system is that it can rely, not only on “the conditions laid down in the treaties governing the European Union”, but also on the willingness shown by the national courts to accept whatever interpretation of the treaties is decided upon by their

³² For a summary of the reluctance of the national courts to fully endorse the doctrine of primacy as developed by the European Court of Justice, see P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (Fourth edition, Oxford: Oxford University Press, 2008) at 353-374 or, more extensively, A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998).

³³ To use the expression of the German Federal Constitutional Court, the *Bundesverfassungsgericht*, in its decision *Brunner and others v. The European Union Treaty (Maastricht decision)*, BVerfG, decision of 12 October 1993, 2 BvR 2134/92 & 2159/92, [1994] 1 C.M.L.R. 57 at 91.

³⁴ On the fact that Irish courts are competent to interpret “the conditions laid down in the treaties governing the European Union” since this provision of the European Communities Act (as amended) is formally of a domestic nature, see *infra* at 117-129.

³⁵ For further developments on this dual character of the doctrine of primacy, see *supra* at 29-32.

European counterpart.³⁶ This distinguishes Ireland from most of its partners, and in particular France. Even though this point is not explicitly enunciated in Irish case-law, it seems that the existence of the primacy principle before Ireland's accession explains why national courts took the view that the people's approval to join what is now the European Union also involved its adhesion to the superiority of European law over domestic law under the conditions defined by the European Court of Justice. In this respect, given that the United Kingdom joined what was then the European Communities at the same time as Ireland, the ruling of the House of Lords in *Factortame Ltd. v. Secretary of State for Transport (No. 2)*³⁷ may perhaps be enlightening. In this case, Lord Bridge stated that:

“if the supremacy doctrine within the European Community of Community law was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.”³⁸

In consequence, the willingness to follow the case-law of the European Court of Justice relative to the doctrine of primacy was expressed as early as 1978 in a case heard by the High Court, *viz., Pigs and Bacon Commission v. McCarren & Co. Ltd.*³⁹ where Costello J. made the following point:

“the effect of this section [section 2 of the European Communities Act 1972 (as amended)] is that Community law takes effect in the Irish legal system in the manner in which Community law itself provides. Thus, if, according to Community law, a provision of the Treaty is directly applicable so that rights are conferred on individuals which national courts must enforce, an Irish court must give effect to such a rule. And if, according to Community law, the provisions of Community law take precedence

³⁶ For a similar opinion, see for example A. Whelan, “Constitutional Law - *Meagher v. Minister for Agriculture*” (1993) 15 *Dublin University Law Review* 152-173 at 153. However, this acceptance may only be nominal. While Irish courts referred to the primacy principle as interpreted at European level in a distinctive manner, the recognition of the European Court of Justice's case-law can be, to some extent, regarded as being de façade. The use of this European doctrine is often made according to a domestic understanding of it, the reference to the interpretation of the European Court of Justice being the result of a choice made by Irish courts. This is, for example, explicit in *Campus Oil Limited v. Minister for Industry* [1983] I.R. 82. For further considerations on this point, see *infra* at 119-122.

³⁷ [1991] A.C. 603.

³⁸ *Ibid.* at 658.

³⁹ (1978) 2 *J.L.S.E.L.* 77.

over a provision of a national law in conflict with it an Irish Court must give effect to this rule. That Community law enjoys precedence over a conflicting national law of a Member State has been made clear in a number of the decisions of the European Court and most recently in Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.P.A.*⁴⁰

Since then, the receptive attitude towards to the doctrine of primacy on the basis the European Communities Act (as amended) has been a characteristic of the case-law of Irish courts, as for example in *Meagher v. Minister for Agriculture*,⁴¹ or more recently as expressed by Herbert J. in the High Court's ruling in *Kearns and Irish Bartering Services Limited v. European Commission*,⁴² stressing the existence of this European principle in the Irish legal order was dependent on the interpretation of the European Court of Justice:

“by s. 2 of the European Communities Act 1972, as amended by the European Communities (Amendment) Acts 1973 to 2003, as enabled by the several Acts amending Article 29 of the Constitution, it is provided that:

(...)

In the event of any conflict between European Union law, particularly directly effective law, and national law, even national constitutional law, the effect of Article 10 (formerly 5) and Article 249 (formerly 189) [now Article 288 of the Treaty on the Functioning of the European Union] of the Treaty is that domestic law must give way to the European Union law provisions. This is clearly established by the Court of Justice in a series of well known cases such as *Costa v. E.N.E.L. (Case 6/64)* [1964] E.C.R. 585; *International Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] E.C.R. 1125; *Commission v. Italy (Case 48/71)* [1972] E.C.R. 527; *Simmenthal SpA v. Amministrazione delle Finanze dello Stato (Case 106/77)* [1978] E.C.R. 629 and, *R. v. Secretary of State for Transport, ex parte Factortame (Case 213/89)* [1990] E.C.R. I-2433.”⁴³

⁴⁰ *Ibid.* at 109.

⁴¹ [1994] 1 I.R. 329, in particular the opinion of Finlay C.J. at 351-2 in relation to the reception of the doctrine of primacy *via* the European Communities Act (as amended).

⁴² [2006] 2 I.R. 1.

⁴³ *Ibid.* at 8.

In conclusion, due to the dualist nature of the relationship between the domestic and European legal orders, it is thus arguably the European Communities Act 1972 (as amended) that constitutes the foundation of European Union law in Ireland. Further, it has been through the deliberate and generous construction of this national provision by the Irish courts that the doctrine of primacy has benefitted from a specific form of recognition and exists “on its own very demanding terms in Irish law.”⁴⁴

⁴⁴ G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 23 above, at 7.

2. *The Recent Recognition of the Doctrine of Primacy in the French Legal Order: The End of the Traditional Blindness to the Specificities of European Union Law*

Although - and perhaps because - France was a founding member of what is now the European Union, its domestic jurisdictions traditionally turned a blind eye to particular requirements of the European legal order.⁴⁵ Because of this status enjoyed by France, it was possible for it to contrast the original intention of the drafters of Treaty of Rome to the subsequent construction by the European Court of Justice of the text of the Treaty of Rome.⁴⁶ In consequence, recognition of the primacy principle was for long withheld⁴⁷ (it is, incidentally, noticeable that the fiercest opposition to the doctrine of primacy as developed by the European Court of Justice stemmed from three of the founding members of the European project, *viz.*, France, Germany and Italy⁴⁸). It was only recently, in summer 2004 - while the legal world wrestled with the consequences of the Treaty establishing a Constitution for Europe - that the *Conseil constitutionnel* considered the questions raised by European Union law in a somewhat specific manner.⁴⁹

Originally, the refusal by French law to grant any specific recognition to European Union law was based on issues of jurisdictional competence. Paradoxically - and after many developments - it was due to similar considerations that the primacy principle finally made its appearance in the French legal system. It is worthwhile explaining the dynamics underlying the change in the attitude of the French legal order towards European Union law.

⁴⁵ As is noted in the introduction to this thesis (see *supra* at 51), France is characterised by its dual system of courts. Aside from the *Conseil constitutionnel*, “ordinary courts” are divided between the *ordre judiciaire* and the *ordre administratif*. The former deals primarily with civil and criminal law while the latter applies administrative law. The *Cour de cassation* is the supreme court of the *ordre judiciaire* and the *Conseil d’État* is the supreme court of the of the *ordre administratif*. For a presentation of the French court system, see for example J. Bell, S. Boyron and S. Whittaker, *Principles of French Law* (Second edition, Oxford: Oxford University Press, 2008) at 37-50.

⁴⁶ In this sense, see B. Genevois, “Le Conseil constitutionnel et le droit communautaire dérivé : À propos de la décision n° 2004-496 DC du 10 juin 2004” (2004) *Revue française de droit administratif* 651-661 at 654.

⁴⁷ As C. Blumann and L. Dubouis put it: “to keep to the French situation, the recognition of Community law and its primacy turned out to be difficult and late”, in C. Blumann and L. Dubouis, *Droit institutionnel de l’Union européenne* (Third edition, Paris: Litec, 2007) at 593 (translation by the author).

⁴⁸ See A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context*, *op. cit.*, at fn. 34 above.

⁴⁹ Summer 2004 was marked by four important and coherent decisions dealing with European issues, *viz.*, CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101, CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication* of 1 July 2004, *Rec.* 107, CC, decision n° 2004-498 DC on the *Act on bioethics* of 29 July 2004, *Rec.* 122 and CC, decision n° 2004-499 DC on the *Act relating to the protection of physical persons regarding the treatment of personal data* of 29 July 2004, *Rec.* 126. The logic at play in these decisions has been followed a few months later by the *Conseil constitutionnel* when dealing explicitly with the doctrine of primacy in CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 9-13.

The first stage of the relationship between the domestic and European Union legal orders is in a way anterior to the European integration project itself. It is grounded in the French understanding of the separation of powers and an important deference to the general will as expressed by the representatives of the sovereign since, according to Article 6 of the Declaration of Human and Civic Rights of 26 August 1789, “the Law is the expression of the general will.”

Accordingly, the relationship between international and domestic norms was governed by the Matter doctrine, named after the conclusions of *procureur général* Matter in a decision of the *Cour de cassation* of 22 December 1931.⁵⁰ In addressing the task of courts, he stated that:

“lastly, even assuming that there was a conflict between the Act of 30 June 1926 and the Franco-Spanish Convention of 1862 – I have just pointed out to you that it is nothing of the sort – but assuming this, what would be the duty of the judge? Here, without doubt, you do not know or you can not know any other will than that expressed in the statute. It is the very principle on which our judicial institutions rest.”⁵¹

Thus, according to this doctrine, the status of international law in the domestic legal order was dependent on the parliamentary ratification of the international law instrument in question and was similar to any other statutes as the expression of the same general will. The conflict between international law and domestic statutes, two norms of equal value in the hierarchy of norms was thus temporally resolved by the application of the principle *lex posterior derogat legi priori*, a principle which is protective of the general will as expressed by the legislative power.

The position of the *Conseil d'État* was similar. The *Conseil d'État* has affirmed for a long time its lack of competence to assess the validity of statutes, a position expressed in its *Arrighi* decision of 6 November 1936.⁵² The condemnation of a statute contravening pre-existing international norms would necessarily have led to such a scrutiny of the legislative function. Respectful of the general will expressed by the parliament, the *Conseil d'État*, like its counterpart of the *ordre judiciaire*, accorded prevalence to international instruments over prior statutes but the reverse approach being taken in relation to posterior ones. Without any

⁵⁰ C. cass., Civ., 22 December 1931, *Sanchez c. Consorts Gozland*, (1932) 1 *Recueil Dalloz* 131.

⁵¹ P. Matter, “Conclusions sur Cour de cassation, Civ., 22 décembre 1931, *Sanchez c. consorts Gozland*” (1932) 1 *Recueil Dalloz* 134-140 at 140 (translation by the author).

⁵² CE, 6 novembre 1936, *Arrighi*, *Rec. Lebon* 966.

distinction being made between international law and Community law (as it was then), the same principle was deemed to apply to European norms as was affirmed in the subsequent *Semoules* decision.⁵³

The second stage governing the relationship between the French and European legal orders resulted from the case-law of the *Conseil constitutionnel*. The relative position of international law within the French normative hierarchy was influenced by the Constitution of the Fifth Republic of 1958, Article 55 of which states that:

“treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.”

However, no jurisdictional consequences had been drawn from this provision when the *Conseil constitutionnel* delivered its *Act pertaining to the voluntary interruption of pregnancy* decision of 1975.⁵⁴ On this occasion, the French constitutional court drew two conclusions regarding the approach taken by the French legal order to international law. On the one hand, it affirmed the normative rather than merely declaratory nature of Article 55 and made clear that, according to the French Constitution, international law prevailed over statutes, either anterior or posterior.⁵⁵ On the other hand, switching from a normative to a jurisdictional argument, due to the relative and contingent relationship between international law and statutory law according to Article 55,⁵⁶ it held it was not for itself to enforce this constitutional provision, its competence being strictly defined by Article 61 of the French Constitution to the control of constitutionality, *i.e.*, the control for conformity of legislative norms with constitutional provisions.⁵⁷ In consequence, this decision could easily be read as an implicit empowerment of the courts of the *ordre judiciaire* and of the *ordre administratif*, inviting them to renounce their former positions expressed in terms of jurisdictional competence and to enforce the will of the sovereign acting as constituent power⁵⁸ by assessing the relationship between international law and domestic rules in normative terms, *i.e.*, by exercising the control of conventionality.⁵⁹

⁵³ CE, 1 March 1968, *Syndicat général des fabricants de semoules de France*, *Rec. Lebon* 149.

⁵⁴ CC, decision n° 74-54 DC on the *Act pertaining to the voluntary interruption of pregnancy* of 15 January 1975, *Rec.* 19.

⁵⁵ *Ibid.* at para. 3.

⁵⁶ *Ibid.* at para. 4.

⁵⁷ *Ibid.* at para. 7.

⁵⁸ On this issue, see O. Cayla, “Lire l’article 55 : Comment comprendre le texte établissant une hiérarchie des normes comme étant lui-même le texte d’une norme ?” (1999) n° 7 *Cahiers du Conseil constitutionnel*, available at

It was this very approach which the *Cour de cassation* adopted a few months later in its *Jacques Vabre* decision⁶⁰ where, on the question of the compatibility between Article 265 of the Customs Code and Article 95 (as it was then) of the Treaty of Rome, the *Cour de cassation* put aside the Matter doctrine and reached its decision on the basis of Article 55 of the French Constitution. On the one hand, and to the benefit of European Union law, this involved a switch from a logic based on temporality to a normative one. This *revirement de jurisprudence* (a decision where a court departs from a principle it previously applied) expanded the primacy of European Union law over any French legislative provisions. On the other hand, and to the detriment of the European logic, the precise status of primacy in the domestic legal order can only be fully understood in the light of the opinion of *procureur général* Touffait in this case. Stressing the importance of clarifying the basis of the primacy of European law, he advised the *Cour de cassation* that:

“it would be possible for you, in order to have the application of Article 95 of the Treaty of Rome prevail over the posterior law, to rely on Article 55 of our Constitution, but personally I ask you not to mention it in order to base your reasoning only on the very nature of the legal order instituted by the Treaty of Rome. Indeed, in so far as you would content yourselves with deducing from Article 55 of our Constitution the primacy in the French domestic order of the Community law over national law, you would explain and justify it, as far as our country is concerned, but this reasoning would imply that it is from our Constitution and from it only that the rank of Community law in our domestic legal order depends. Henceforth, implicitly, you would provide the national jurisdictions of the member states with a non negligible argument which, due to the lack of the affirmation in their constitutions of the primacy of the treaties, would be tempted to deduce the opposite solution.”⁶¹

<<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-7/lire-l-article-55-comment-comprendre-un-texte-etablisant-une-hierarchie-des-normes-comme-etant-lui-meme-le-texte-d-une-norme.52745.html>> at 3-5 [Last accessed 29 December 2012].

⁵⁹ For a similar opinion, see J. Plötnner, “Report on France” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 41-75 at 43-44.

⁶⁰ C. cass., Ch. Mixte, 24 May 1975, *Administration des Douanes c. Sociétés ‘Cafés Jacques Vabre’*, *Bull. Ch. mixte*, n° 4, p.6.

⁶¹ A. Touffait, “Conclusions sur Cour de cassation, Chambre mixte, 24 mai 1975, *Administration des Douanes c. Sociétés ‘Cafés Jacques Vabre’*” (1975) *Recueil Dalloz* 497-505 at 504 (translation by the author).

However, the *Cour de cassation* - while deploying a specific form of logic in relation to the European legal order - founded its decision on Article 55 of the Constitution:

“but whereas the Treaty of 25 March 1957, which, pursuant to the aforementioned Article of the Constitution [Article 55] has a superior authority to that of the laws, institutes a proper legal order integrated with the one of the member states; that owing to this specificity, the legal order that it created is directly applicable to the nationals of these states and imposes itself on their courts.”⁶²

In consequence, although the *Cour de cassation* introduced a European dimension which was absent from the case-law of its administrative counterpart, the primacy of European Union law over legislative norms could not be conceived outside the French constitutional framework. In the reliance on Article 55, its status in the domestic legal order was not different from that accorded to international law at large. A few months later, another decision of the *Cour de cassation* suggested exclusive use of the nature of the European legal order.⁶³ However, this ruling remained an exception and subsequently, it seems that Article 55 of the Constitution has remained the decisive prism through which European law is dealt with.⁶⁴ Hence, even though the *Cour de cassation* lent a careful ear to the European Court of Justice, it is difficult to affirm that its position relies only on the existential claims made by the European Court of Justice as to the consequences of the specificities of what is now European Union law as compared with international law, and upon which its conception of primacy relies. Nonetheless, the case-law of the *Cour de cassation* presents a certain ambiguity as regards the legal basis of the doctrine of primacy in the domestic legal order, in particular when compared to the position of its administrative counterpart, which characterises the receptive attitude of the *Cour de cassation*.⁶⁵ As Dord puts it:

“one could also maintain that the *Cour de cassation* uses in reality a double basis to fully account for the primacy of Community law in the domestic order: Article 55 of

⁶² C. cass., Ch. Mixte, 24 May 1975, *Administration des Douanes c. Sociétés ‘Cafés Jacques Vabre’*, (1975) *Bull. Ch. mixte*, n° 4, p.6 (translation by the author).

⁶³ C. cass., Civ. 3, 15 December 1975, *Von Kempis c. Époux Geldof*, *Bull. Civ. 3*, n° 373, p. 282.

⁶⁴ See, for example, C. cass., Ass. plén. 2 June 2000, *Fraisie*, *Bull. Ass. plén.*, n° 4, p. 7.

⁶⁵ This generous though ambivalent attitude is characteristic of the courts belonging to the *ordre judiciaire*. For example, this attitude can be seen in the recent development of the notion of constitutional identity by the *Conseil constitutionnel* and its appraisal for *Cour de cassation*, see *infra* at 416-422.

the Constitution, often in an implicit way, and a reference, more present in the case-law, to the specificity of the law stemming from the treaties.”⁶⁶

The position of the administrative counterpart of the *Cour de cassation*, the *Conseil d'État*, is less equivocal and clearly establishes the relationship of the domestic and European legal orders on the basis of the French Constitution. At first, the *Conseil d'État* refused to follow the position of the *Conseil constitutionnel* and quickly followed by its counterpart of the *ordre judiciaire*. In contrast, it displayed an unwilling attitude towards the case-law of the European Court of Justice. Its decision in *Ministre de l'Intérieur c. Cohn-Bendit* of 1978 is the symbol of this opposition.⁶⁷ This case concerned an expulsion order challenged on the basis of an infringement of a European Directive.⁶⁸ The *Conseil d'État* relied on its own interpretation of Article 56 and 189 of the Treaty establishing the European Economic Community, challenging therefore the jurisdiction of the European Court of Justice. It concluded that directives were binding on national authorities which had sole competence for their implementation and that, therefore, directives could not be relied on by nationals to challenge the validity of an individual administrative act. In doing so, the *Conseil d'État* explicitly departed from the case-law of the European Court of Justice which, in *van Duyn v. Home Office*,⁶⁹ recognised that, despite the required implementation by member states, directives could still have direct effect. In consequence, the European Court of Justice concluded that the Directive concerned in *Cohn-Bendit* “confers on individuals rights which are enforceable by them in the courts of a member state and which the national courts must protect.”⁷⁰

Therefore, the *Conseil d'État* only answered tardily to the invitation issued by the *Conseil constitutionnel* in 1975. Arguably, it was the consequences of the repeated encouragements made by the *Conseil constitutionnel*⁷¹ which itself, as the court competent

⁶⁶ O. Dord, “Ni absolue, ni relative, la primauté du droit communautaire procède de la Constitution” in H. Gaudin, (ed.), *Droit constitutionnel, droit communautaire : Vers un respect constitutionnel réciproque ?* (Paris; Aix-en-Provence: Economica; Presses universitaires d'Aix-Marseille, 2001) 121-140 at 131 (translation by the author). See also É. Bruce, “La primauté du droit communautaire (Retour sur la portée de l'article 88-1 de la Constitution dans la jurisprudence récente du Conseil constitutionnel)” (2005) n° 192 *Les petites affiches* 3-10 at 8.

⁶⁷ CE, Ass., 22 December 1978, *Ministre de l'Intérieur c. Cohn-Bendit*, *Rec. Lebon* 524.

⁶⁸ Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1963-1964] O.J. Spec. Ed. 117.

⁶⁹ Case 41/74 *Van Duyn v. Home Office* [1974] E.C.R. 1337.

⁷⁰ *Ibid.* at para. 15.

⁷¹ See CC, decision n° 86-213 DC on the *Act pertaining to the conditions of entry and residence for foreigners in France* of 3 September 1986, *Rec.* 122 where the *Conseil constitutionnel* reiterated the opinion that “it is incumbent upon the different organs of state to ensure the enforcement of international conventions within the framework of their respective competences” at para. 6 (translation by the author).

regarding disputes related to the election of the members of the Parliament,⁷² assessed the relationship between statutes and international law from the normative perspective of Article 55 rather than the chronological relationship established by the Matter doctrine.⁷³ Unlike in the case of the *Cour de cassation*, it was not until 1989 that court of the Palais-Royal decided to put aside the Matter doctrine in its *Nicolo* decision.⁷⁴ In his conclusion, *commissaire du gouvernement* Frydman invited the *Conseil d'État* to follow the *Conseil constitutionnel* by stating that:

“Article 55 entails necessarily, by itself, an authorisation given implicitly to the courts in order to control the conformity of the statutes with the treaties.”⁷⁵

The *Conseil d'État* concluded, pointing to Article 55, that the French provisions dealing with the election to the European Parliament were not contrary to Article 227-1 of the Treaty of Rome. It later extended this argument to European regulations⁷⁶ and to European directives.⁷⁷ The *revirement de jurisprudence* of 1989 can be seen as a radical shift in the reasoning of the *Conseil d'État*. It was radical in the sense that it put an end to long-standing resistance on the part of the administrative court in comparison with the positions of both the *Conseil constitutionnel* and the *Cour de cassation*. It was also radical in the sense that Article 55 has become the unique prism through which the *Conseil d'État* analyses the relationship between the domestic legal order and supranational norms. In this respect, the decisions in *Koné*⁷⁸ and in *Sarran, Levacher et autres*⁷⁹ are the most representative of the use made by the *Conseil d'État* of Article 55 when dealing with international norms to conclude to their hierarchical superiority over domestic rules up to the legislative rank in the pyramid of norms but also to their submission to the Constitution.⁸⁰ The sole - and sophisticated - application of this constitutional provision is the conclusion reached by Bonnet when he analyses the case-law of the *Conseil d'État*:

⁷² According to Article 59 of the Constitution.

⁷³ See CC, decision n° 88-1082/1117 AN *Val d'Oise* (5th const.) of 21 October 1988, *Rec.* 183 where the *Conseil constitutionnel* controlled the conformity of a legislative instrument with Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁷⁴ CE, Ass., 20 October 1989, *Nicolo*, *Rec. Lebon* 190.

⁷⁵ (1989) *Revue Générale de Droit International* 1043-1072 at 1053.

⁷⁶ CE, 24 September 1990, *Boisdet*, *Rec. Lebon* 251.

⁷⁷ CE, Ass., 28 February 1992, *S.A. Rothmans International France and SA Philip Morris France*, *Rec. Lebon* 80.

⁷⁸ CE, Ass., 3 July 1996, *Koné*, *Rec. Lebon* 255.

⁷⁹ CE, Ass., 30 October 1998, *Sarran, Levacher et autres*, *Rec. Lebon* 368.

⁸⁰ See *infra* at 144-146.

“a careful reading of the administrative case-law shows in fact that Article 55 of the Constitution constitutes the archetypal reading grid of systemic relationships called on by the court. It [the Conseil d’État] takes the view that the place and the effectiveness of the international norm in the domestic order depend on the constitutional option offered by Article 55 of the Constitution. Article 55 resembles the substratum of administrative case-law relating to the application of international norms in domestic law.”⁸¹

In a third way, this position is radical when compared to the ambiguities of the case-law of the *Cour de cassation*. The position of the *Conseil d’État* is much more clear-cut and therefore oblivious to any specific European dimension. European norms are indeed regarded as superior to some domestic norms, but the primacy of European Union law as defined by the European Court of Justice is irrelevant to this superiority – a superiority which is only deduced from the Constitution. In this context, it is not difficult to see some degree of disdain towards the European Court of Justice, enforcing in this way the national resistance hinted by the *procureur général* Touffait.⁸² As Alter puts it:

“while Frydman recommended that the *Conseil d’État* change its jurisprudence, he did not recommend that it should adopt the ECJ’s interpretation of the legal basis for European law supremacy. Indeed, he asserted that the ECJ’s supremacy jurisprudence had ‘no legal foundation whatever’. Article 55 of the French constitution was the *only* legal basis for national judges to enforce European law supremacy. His total repudiation of the ECJ’s ‘supranational way of thinking’ was designed to show that national courts remain independent from it.”⁸³

To some extent, the opposition to the European principles expressed by the *Conseil d’État* in *Cohn-Bendit* could be interpreted as an endeavour to influence the European Court of Justice and its constructive interpretation of European law.⁸⁴ The decision in *Nicolo*, rather than endorsing the requirements of the European legal order, followed the same logic in a

⁸¹ B. Bonnet, “Le Conseil d’État, la Constitution et la norme internationale” (2005) *Revue française de droit administrative* 56-68 at 57 (translation by the author).

⁸² See *supra* at 73.

⁸³ K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001) at 165.

⁸⁴ In this sense, see *ibid.* at 155.

different context. Notably due to its isolated position vis-à-vis the *Conseil constitutionnel* and the *Cour de cassation* and the deepening of the process of European integration, it seems that influencing European law would be better achieved by increasing the interaction with the European legal order.⁸⁵

Up until 2004, the principle of primacy of European Union law, were one to consider it from a European perspective, was thus astonishingly absent from the French legal order. Either barred on the ground of jurisdictional competence or denied any specific feature through a constitutional provision establishing the normative relationship of French norms and international law and limiting the principle's effect to provisions below constitutional rank, little place was left for the recognition of a specific European dimension in this matter, the existence of which was only hinted at.

However, France may have seen another revolution⁸⁶ on 10 June 2004 when the *Conseil constitutionnel* gave its *Act to support confidence in the digital economy* decision.⁸⁷ The French legal order seemed to have been turned upside down. Paradoxically, this decision was unexceptional. Three subsequent decisions⁸⁸ in the space of two months confirmed that the new logic adopted by the *Conseil constitutionnel* was not a jurisprudential accident but rather had to be regarded as a new approach on the relationship with European Union law. This is all the more so given that the reference to a European law was not necessary to the assessment of the constitutionality of the Act to support confidence in the digital economy.⁸⁹ This reference to a European perspective bore witness to the willingness of the French constitutional court to develop a new doctrine concerning the recognition of European Union law in France.⁹⁰

⁸⁵ In this sense, see D. Pollard, "European Community Law and the French *Conseil d'État*" (1993-1995) 28-30 *Irish Jurist* 79-120 at 109-111. This purpose still seems to justify the most recent case-law of the *Conseil d'État* as regards the doctrine of primacy, see M. Guyomar, "Conclusions sur Conseil d'État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*" (2007) 43 *Revue trimestrielle de droit européen* 378-402 at 388-389.

⁸⁶ As described by Mathieu, B. Mathieu, "Le droit communautaire fait son entrée au Conseil constitutionnel" (2006) n° 167 *Les petites affiches* 3-4 at 4. See also M. Verpeaux, "Révolution, constat et verrou" (2004) *L'Actualité juridique. Droit administratif* 1497.

⁸⁷ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101.

⁸⁸ CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication* of 1 July 2004, *Rec.* 107, CC, decision n° 2004-498 DC on the *Act on bioethics* of 29 July 2004, *Rec.* 122 and CC, decision n° 2004-499 DC on the *Act relating to the protection of physical persons regarding the treatment of personal data* of 29 July 2004, *Rec.* 126.

⁸⁹ Act n° 2004-575 of 21 June 2004 to support confidence in the digital economy, J.O.R.F. 11168.

⁹⁰ For a similar opinion, see J. Dutheil de la Rochère, "*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, *Loi pour la confiance dans l'économie numérique (e-commerce)*" (2005) 42 *Common Market Law Review* 859-869 at 860.

If there was any doubt that this was a legal revolution, the *Conseil constitutionnel* in its decision of 10 June 2004 dealing with the implementation of Directive 2000/31/EC⁹¹ made clear that the lens to be used in considering European Union law had changed. It observed, in this case, that:

“whereas according to the terms of Article 88-1 of the Constitution: ‘The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the Treaties that established them, to exercise some of their powers in common’”.⁹²

Article 88-1 was introduced through the constitutional amendment necessary for the ratification of the Treaty of Maastricht in 1992. However, it was deemed to express a political declaration and to lack any normative force.⁹³ What is striking in this decision is both the absence of any reference to Article 55 of the Constitution and the willingness expressed by the constitutional court to make Article 88-1 the new paragon of the normative relationship between domestic law and European Union law.⁹⁴ As Camby puts it:

“the Conseil constitutionnel, by founding its decision exclusively on Article 88-1 of the Constitution, refuses the trivialisation of Community law: no reference is made to Article 55 of the Constitution”.⁹⁵

Thus, since 2004, international law and European Union law are regarded as two different legal orders, the latter having its specificity recognised in the French legal order.⁹⁶ In particular, on the basis of Article 88-1, the presence of European Union law in the domestic

⁹¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market [2000] O.J. L 178/1.

⁹² CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7.

⁹³ See M. Verpeaux, “Contrôle de la loi transposant une directive communautaire” (2004) n° 8-9 *Droit administratif* 27-29 at 28 and P. Cassia and E. Saulnier-Cassia, “Le Conseil constitutionnel vérifie qu’une directive communautaire dont le loi déferée assure la transposition ne méconnaît pas de règles ou principes inhérents à l’identité constitutionnelle de la France” (2006) n° 10 *Droit administratif* 31-33 at 31.

⁹⁴ For a contrary opinion stressing the continuing relevance of Article 55 of the Constitution, see for example P. Cassia, “Le juge administratif, la primauté du droit de l’Union européenne et la Constitution française” (2005) *Revue française de droit administratif* 465-472 at 468.

⁹⁵ J.-P. Camby, “Le droit communautaire est-il soluble dans la Constitution ?” (2004) *Revue du droit public et de la science politique en France et à l’étranger* 878-888 at 883.

⁹⁶ In this sense, see for example G. Canivet, “Constitution nationales et Europe : La dialectique du Un et du Deux” in M. Ameller, P. Avril, J.-P. Camby and *al.* (eds.), *Constitutions et pouvoirs : Mélanges en l’honneur de Jean Gicquel* (Paris: Montchrestien, 2008) 73-96 at 85.

legal order is not dependent on a condition of reciprocity, as is the case in the regime created by Article 55. This emphasises the particular logic of the process of European integration compared to that of traditional international law.⁹⁷

If the reasoning which shaped the decisions of June and July 2004 seemed to go beyond the mere issue of the implementation of directives,⁹⁸ it was not until the *Treaty establishing a Constitution for Europe* decision⁹⁹ that the link between the primacy of European Union law and Article 88-1 of the Constitution was made explicit.¹⁰⁰ For the first time, the European doctrine of primacy was incorporated into a Treaty provision, in this instance Article I-6, and the *Conseil constitutionnel* had to assess its compatibility with the Constitution under the mechanism contained in Article 54 of the Constitution, dealing with the ratification of international commitments.

In its ruling, the *Conseil constitutionnel* first took the opportunity to affirm the specific nature of the European legal order, even though from perspective of the French Constitution, by stating that:

“the constituent power thus formally acknowledged the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order”.¹⁰¹

Secondly, on the specific issue of primacy, the *Conseil constitutionnel* relied on its former 2004 decisions dealing with the impact of Article 88-1 of the Constitution, which are (rather exceptionally for a ruling of a French jurisdiction) cited in its decision, in order to conclude that the relevant provisions of the Constitutional Treaty were compatible with the French Constitution by stating that:

⁹⁷ See É. Bruce, “La primauté du droit communautaire (Retour sur la portée de l’article 88-1 de la Constitution dans la jurisprudence récente du Conseil constitutionnel)”, *op. cit.*, at fn. 68 above, at 9.

⁹⁸ In this sense, see P.-Y. Monjal, “La Constitution, toute la Constitution, rien que le droit communautaire... (Remarques à vif à propos de la décision du Conseil constitutionnel du 10 juin 2004 n° 2004-496)” (2004) n° 161 *Les petites affiches* 16-22 at 17.

⁹⁹ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173.

¹⁰⁰ For some authors, the decisions of June and July 2004 concerned only the direct effect of European Union law and was disconnected from the issue of primacy. On this point see for example A. Levade, “Le Conseil constitutionnel aux prises avec le droit communautaire dérivé” (2004) *Revue du droit public et de la science politique en France et à l’étranger* 889-911 at 902-904.

¹⁰¹ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 11.

“the provisions of this Treaty, particularly the close proximity of Articles I-5 and I-6 thereof, show that it in no way modifies the nature of the European Union, nor the scope of the principle of the primacy of Union law as duly acknowledged by Article 88-1 of the Constitution, and confirmed by the *Conseil constitutionnel* in its decisions referred to hereinabove; that hence Article I-6 submitted for review by the *Conseil constitutionnel* does not entail any revision of the Constitution”.¹⁰²

In conclusion, reading in parallel the 2004 decisions and the ruling on the Constitutional Treaty, it is possible to attach to the primacy of the European Union law the same consequences as those stemming from the duty to implement directives. Beginning from a blindness to the primacy principle expressed in terms of lack of jurisdictional competence to a normative and hierarchical logic in favour of the supremacy of the Constitution, which contradicts the European doctrine, it is therefore and paradoxically in terms of jurisdictional competence, as will be seen,¹⁰³ that France has, more than forty years after its creation by the European Court of Justice, recognised the primacy of European Union in its domestic legal order. In this respect, Article 88-1 of the Constitution has become the new and specific “cornerstone”¹⁰⁴ of the link between the domestic and European orders from the perspective of French law.¹⁰⁵

If the operation of the primacy principle in Ireland and France involves the use of different legal mechanisms, it can be said that, beginning very recently, the Irish and French legal orders have shown a similar willingness to consider this doctrine as the consequence of the specific nature of the European Union legal order. However, it is not certain that this is the same specificity as the one heralded by the European Court of Justice.

¹⁰² *Ibid.* at para. 13.

¹⁰³ See for example CC, decision n° 2004-496 on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7. For an in depth analysis of the definition of the primacy principle from the French perspective, see *infra* at 94-104.

¹⁰⁴ For a similar opinion, see A. Levade, “Le Palais-Royal aux prises avec la constitutionnalité des actes de transposition des directives communautaires : À propos de la décision du Conseil constitutionnel n° 2006-543 du 30 novembre 2006, *Loi relative au secteur de l’énergie* et de l’arrêt du Conseil d’Etat, Assemblée, du 8 février 2007, *Société Arcelor Atlantique et Lorraine et autres*” (2007) *Revue française de droit administrative* 564-577 at 566.

¹⁰⁵ It has to be noted that the *Conseil constitutionnel* based again its reasoning on Article 55 in its later case-law related to the doctrine of primacy, see CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78. However, it will be seen, that the reference to this constitutional provision concerned a question of division of competences between domestic courts to enforce the European principle rather than the basis of its recognition in the French legal order, see *infra* at 418-421.

In consequence, if the primacy of European Union law receives a singular understanding, the content of this principle is transformed by crossing into national legal orders and departs from the positive hierarchical superiority which was developed in the case-law of the European Court of Justice.

B. Primacy as Immunity: The Distorted Image of the European Requirement of Primacy from the Perspectives of Irish and French Law

Received in Ireland *via* a legislative instrument and considered in France on the ground of a constitutional provision, the doctrine of primacy can not benefit in either the Irish or the French legal orders from the absoluteness with which it is expressed in the case-law of the European Court of Justice. In particular, the modalities of this domestic recognition do not establish the prevalence of European rules over constitutional provisions. On this issue, in contrast to the positive requirements of European law, Ireland and France offer a negative image of the doctrine of primacy as developed by the European Court of Justice. Seen through the domestic glass, the primacy of European Union law is distorted and expressed in terms of immunity.¹⁰⁶ If Ireland favours a normative logic in this respect where the presence of the principle of primacy in the domestic legal order is ensured through a concomitant constitutional immunity, the focus put by the French legal order on jurisdictional competence issues makes the primacy tantamount to a regime of jurisdictional immunity.

1. *The Irish Perspective: The Primacy of European Union Law Transformed into Constitutional Immunity*

Arguably, the Irish legal order intended to receive European law into the Irish legal system *as* European law.¹⁰⁷ In *Tate v. Minister for Social Welfare Ireland*,¹⁰⁸ Carroll J. made clear that this reception did not entail a transformation of Community law into norms of an Irish nature by stating that:

“this section [section 2 of the European Communities Act (as amended)] is the conduit pipe through which community law became part of domestic law. The Constitution

¹⁰⁶ This is due to the possibility for the member states to refuse the case-law of the European Court of Justice and to decide the issue of primacy on a different basis. As Craig justifies it: “it is equally clear that there is nothing to *compel* a national court to adopt the *communautaire* explanation for supremacy”, P. Craig, “The Constitutional Treaty and Sovereignty” in C. Kaddous and A. Auer, *Les principes fondamentaux de la Constitution européenne* (Geneva; Brussels; Paris: Helbing & Lichtenhahn; Bruylant; Librairie Générale de Droit et de Jurisprudence, 2006) 117-134 at 121.

¹⁰⁷ The matter is not entirely free of doubt. Hence, for example, Walsh J. in *Campus Oil* considered the preliminary mechanism as “a matter of Irish law”, *Campus Oil Limited v. Minister for Industry* [1983] I.R. 82 at 87. For further developments on the question of the nature of European principles once received in the Irish legal order, see *infra* at 117-129.

¹⁰⁸ [1995] 1 I.R. 418.

was amended to enable accession to the Community, the European Communities Act 1972 was passed and the Treaty of Accession was agreed, and thereby the whole body of Community law, past, present and future was incorporated into domestic law. But Community law did not thereby become constitutional law or statute law. It is still Community law governed by Community law but with domestic effect.”¹⁰⁹

However, such a reception necessarily leads to the incomplete acceptance of the doctrine of primacy as developed by the European Court of Justice. Even if one assumes that European Union law has merely been “brought home”¹¹⁰ by section 2 of the European Communities Act 1972 (as amended) the alleged irrelevance of the nature of European norms in the Irish legal system does not preclude the question of their standing in the Irish hierarchy of norms. From this point of view, it is obvious that European Union law cannot have a different status from the instrument required in order for it to come into existence in the domestic legal order.¹¹¹ The primacy principle has therefore, if not the same nature, at least an identical position to legislative rules in the Irish pyramid of norms. According to Phelan:

“European law has a similar status in the Irish hierarchy of norms as a statute, the status being conferred by a statute which benefits from a jurisdictional immunity of debated extent.”¹¹²

In consequence, this legislative rank attached to the doctrine of primacy brings legal obstacles that can impair the effectiveness of the European principle in the Irish legal system both at legislative and constitutional levels. The doctrine of primacy was not received as such in Ireland. The compliance with the consequences attached to the European principle results from an intricate legal mechanism where European law benefit from a regime of constitutional immunity.

First, it is clear that such a recognition ensures that European Union rules prevail over any rules below legislative instruments in the hierarchy of norms.¹¹³ However, the lack of a

¹⁰⁹ *Ibid.* at 437.

¹¹⁰ B. M. E. McMahon and F. Murphy, *European Community Law in Ireland*, *op. cit.*, at fn. 9 above, at 272.

¹¹¹ For an analysis of the impact of the legislative nature of the reception of the primacy principle and the subsequent ability of Ireland to escape the European law constraints, see W. Phelan, *Can Ireland Legislate Contrary to European Community Law?*, *IIIS Discussion Paper No. 237*, *op. cit.*, at fn. 19 above.

¹¹² D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 19 above, at 333-334.

positive constitutional enforcement of the primacy of European Union law leaves it contingent to subsequent and contradictory statutes according to the principle *lex posterior derogat legi priori*¹¹⁴ in a fashion that is similar to the Matter doctrine as it has been used in France.¹¹⁵

Even though this difficulty is not otiose, it is not unavoidable either, and different legal techniques may permit to circumvent this obstacle. Irish courts could, as they often do with international law, reach, by interpretational means,¹¹⁶ a construction of domestic norms which is consistent with the European rules in accordance with the *Marleasing* principle.¹¹⁷ Even if this solution turns out to be impossible, other interpretative principles would be available to suppress a contradiction between a subsequent statute and the requirements of primacy. For example, priority given to a subsequent expression of the legislative power could be superseded by the principle *lex specialis derogat generalibus*. In this circumstance, the application of principle *lex posterior derogat legi priori* would be excluded by the doctrine of primacy,¹¹⁸ as the European Court of Justice made it clear.¹¹⁹ More generally, the European Communities Act 1972 (as amended) could be regarded, due to its importance, as enjoying a special status, qualified by some as “semi-constitutional”,¹²⁰ which would justify an exception to a possible implied repeal by an act of the Oireachtas.¹²¹

However, even though the issues arising from the legislative rank of the primacy principle can be to a certain extent overcome, nothing prevents, from a purely legal perspective, a manifest opposition to the effectiveness of the European doctrine in the Oireachtas. The principle *lex specialis derogat generalibus* would thus yield to the express repeal of the European Communities Act 1972 (as amended). As Phelan explains the matter:

¹¹³ *Ibid.* at 333.

¹¹⁴ Temple Lang seems to reach the same assessment, see J. Temple Lang, “Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty” (1972) 9 *Common Market Law Review* 167-178 at 171.

¹¹⁵ See *supra* at 71-72.

¹¹⁶ In this sense, see J. Temple Lang, “Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty”, *op. cit.*, at fn. 116 above, at 175.

¹¹⁷ According to the principle established by the European Court of Justice in Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] E.C.R. I-4135. On the application of this principle in an Irish legal context, see G. W. Hogan and G. F. Whyte, *JM Kelly: The Irish Constitution*, *op. cit.*, at fn. 6 above, at 533-534 or M. F. Geoghegan, “The Status of Non Implemented Directed before Irish Courts Post *Marleasing*” in D. Curtin and T. F. O’Higgins (eds.), *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T. F. O’Higgins* (Dublin: Butterworth, 1992) 247-255.

¹¹⁸ This possibility of granting of a special status to the legislative instrument receiving European Union law in the domestic legal order thwarting the implied repeal doctrine governed by the principle *lex posterior derogat legi priori* has been developed in the United Kingdom, even if expressed in different terms due to the absence of a written constitution. On this point, see *Thoburn v. Sunderland City Council* [2003] Q.B. 151, in particular at para. 62-63 where the European Communities Act 1972 (as amended) was regarded as one of the “constitutional statutes” justifying an exception to the doctrine of implied repeal. See also P. Craig, and G. de Búrca, *EU Law: Text, Cases and Materials*, *op. cit.*, at fn. 34 above, at 365-371.

¹¹⁹ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] E.C.R. 629 at para. 21.

¹²⁰ D. Morris, “The Road to Brussels - Two Routes Compared” (1988) *Statute Law Review* 33-61 at 52.

¹²¹ For such an interpretation, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 19 above, at 349.

“in summary then, the application of European Community law in Ireland is derivative of an Irish statute, the European Communities Act, which is not subject to implicit amendment or repeal by subsequent Irish statutes, but remains potentially subject to explicit amendment or repeal by subsequent Irish statutes.”¹²²

Some authors have tried to deny such a potentiality. It is true that such an outcome seems at odds with the willingness displayed by Ireland to conform with European tenets.¹²³ However, one has to consider the nature of the arguments which are opposed to a potential rejection of the primacy principle by the Irish legislative power. On the one hand, Hogan and Whelan play down the legal possibility of the repeal the primacy principle by adopting a practical point of view when they affirm that:

“first, the Act cannot prevent its later repeal by another Act of the Oireachtas; this of course is true (...) but it is not in practical terms very important.”¹²⁴

On the other hand, others stress the political importance of becoming a member of the European project, as does Temple Lang who, in trying to deny the contingent nature of the primacy principle, makes the following point:

“if Ireland’s entry into the Communities was important enough to necessitate a referendum and a special amendment to the Constitution, and if the people approved the amendment, it would follow that the Irish legislature should honour the obligations of the State under those Treaties, once undertaken.”¹²⁵

It is hard to deny the importance of the political factors on the normative relationships between domestic and European levels, in particular in the light of this factor in judicial interpretation.¹²⁶ However, none of these arguments takes away from the juridical point that the

¹²² W. Phelan, *Can Ireland Legislate Contrary to European Community Law? IIS Discussion Paper No. 237*, *op. cit.*, at fn. 19 above at 35. In the same sense, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 19 above, at 333-334.

¹²³ See *supra* at 58-69.

¹²⁴ G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 23 above, at 13.

¹²⁵ J. Temple Lang, “Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty”, *op. cit.*, at fn. 116 above, at 173.

¹²⁶ See *infra* at 275-289.

legislature is ultimately competent to repeal the European Communities Act 1972 (as amended). The arguments are of a different nature. In dealing with how the Oireachtas should use its legislative function in European matters, they cannot exclude the possibility for this organ to oppose European Union law. Quite the contrary, by arguing that the Irish parliament should not act so, they assume the existence of this very possibility to repeal the European Communities Act 1972 (as amended).

If *in fine* the reception of the primacy principle depends on the willingness of the Oireachtas, the legal mechanism chosen by Ireland reveals another greater difficulty in the sense that it is an objective one. Indeed, the main obstacle to the primacy of European Union law lies in the relationship between its legislative rank and Irish constitutional requirements. It is in this context that Article 29.4.6° intervenes by providing a form of constitutional immunity to norms related to the European Union, either European or domestic ones.¹²⁷ According to this constitutional provision:

“no provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—

(i) the said European Union or the European Atomic Energy Community, or institutions thereof,

(ii) the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or

(iii) bodies competent under the treaties referred to in this section,

from having the force of law in the State.”

¹²⁷ The purpose of the licence to join the process of European integration provided for by Article 25.4.5° seems to be concerned with purely domestic issues, *viz.*, the validity of the European Communities Act 1972 (as amended) itself, and will be considered *infra* at 130-141.

First, it concerns European norms themselves. Stated bluntly, due to the second part of Article 29.4.6°, what has been Europeanly done cannot be constitutionally undone.¹²⁸ In accordance with what Carroll J. pointed in *Tate v. Minister for Social Welfare Ireland*¹²⁹ and what had already been stated by Curtin,¹³⁰ viz., the reception but preservation of European Union law as such in the Irish legal system, it ensures that valid norms from the European perspective are not deprived of their existence due to constitutional reasons.¹³¹

On the one hand, the phrase “prevents laws enacted, acts done or measures (...) from having the force of law in the State” means that the validity of secondary European Union law is left governed by the Treaty framework. As McMahon and Murphy point out, the only limitations to this constitutional immunity depend on the European Union itself:

“the only limitation on this would seem to be the requirement that the Communities (or the institutions) act within their own terms of reference and, in particular, within the establishing Community Treaties. Provided the Communities (or the institutions) do so, however, their actions cannot be declared unconstitutional in an Irish Court.”¹³²

On the other hand, the assessment of the validity of European norms is qualified by the extent of the willingness of the Irish courts to adopt a “co-operative attitude”¹³³ towards European institutions, and in particular the European Court of Justice. Given their traditional stance on this issue, this guarantees an important role for the European perspective in the domestic legal order.¹³⁴ It is this logic that was displayed, for example, in *Lawlor v. Minister for Agriculture*¹³⁵ where, in the High Court, Murphy J. came to the conclusion that:

“whilst it has been recognised by both parties that it is no part of the function of this court to determine whether or not any part of the EEC regulations were invalid it would be open to this court to refer the matter to the Court of Justice of the European Communities under Article 177 of the Treaty of Rome [what is now Article 267 of the

¹²⁸ For a literal analysis of the second part of Article 29.4.6°, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 19 above, at 349-352.

¹²⁹ [1995] 1 I.R. 418.

¹³⁰ See D. Curtin, “Some Reflections on European Community Law in Ireland” (1989) 11 *Dublin University Law Journal* 207-229 at 216.

¹³¹ See O. Doyle, *Constitutional Law: Text, Cases and Materials* (Dublin: Clarus Press, 2008) at 386.

¹³² B. McMahon and F. Murphy, *European Community Law in Ireland*, *op. cit.*, at fn. 9 above, at 266.

¹³³ *Ibid.* at 279.

¹³⁴ However, for further developments on the national perspective of the Irish judiciary, see *infra* at 117-129.

¹³⁵ [1990] 1 I.R. 356.

Treaty on the Functioning of the European Union] if I considered that a decision of that court was necessary to enable me to give my judgment to these proceedings.”¹³⁶

The purpose of the phrase “prevents laws enacted, acts done or measures (...) from having the force of law in the State” consists therefore of “sweeping”¹³⁷ away any question of constitutionality as to the valid existence of European Union secondary law in the domestic legal order.

Secondly, the question of domestic measures related to European Union law, to which the first part of Article 29.4.6° is dedicated, is more complex. They do not benefit from the same absoluteness as their European counterparts. The purpose of the constitutional provision is the same. It ensures that domestic norms linked to the European legal order benefit from the same constitutional ignorance. However, in contrast to European Union rules, the validity of domestic norms relies *in fine* on their conformity with the Constitution. Constitutional amendments have enabled Ireland to join the European project and every step of its development. Since the ratification of the Treaty of Lisbon, Article 29.4.5° states that:

“the State may ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th day of December 2007 (“Treaty of Lisbon”), and may be a member of the European Union established by virtue of that Treaty.”

It was therefore necessary to conciliate the willingness to open the production of Irish domestic rules to European influence on one side and their constitutionally constrained validity on the other side. In consequence, the immunity granted by Article 29.4.6° is limited to what is “necessitated by the obligations of membership”. The extent of this limitation has been discussed at length and received various interpretations since the accession of Ireland to the European Union. However, this conflict of interpretations¹³⁸ is *per se* not directly relevant to the issue at stake, *viz.*, the nature of the primacy principle from the domestic perspective.

The expression is in itself ambiguous. Phelan introduces two possible readings of this constitutional provision, one legal and the other more political, and distinguishes between what

¹³⁶ *Ibid* at 278.

¹³⁷ To use the expression of Henchy J. made in an extra-judicial context, S. Henchy, “The Irish Constitution and the E.E.C.”, *op. cit.*, at fn. 33 above, at 21.

¹³⁸ This question will be analysed later, see *infra* at 206-216.

is “necessitated by the *European Community law* [as it was then] and what is necessitated by *European Community membership*”.¹³⁹ The latter favours a generous domestic perspective in the sense that it would allow to avoid constitutional requirements for question indirectly related to European issues.¹⁴⁰ This could therefore affect purely internal legal issues as for example the domestic normative production and its distribution between the Oireachtas and the Government. The former would, in contrast, favour a stricter European perspective, discarding constitutional obstacles for explicit European legal obligations only.

This indeterminacy echoes the difficulties that were raised during the drafting of this provision. The initial version introduced pointed domestic rules “consequent on” membership, favouring therefore the European perspective by enabling an extensive and political reading of the constitutional immunity. The modification to the current phrasing tends to show a willingness to adopt a narrow exemption of constitutional constraints, *viz.*, limited to what is legally required from the European perspective. It was with this concern in mind that Garret Fitzgerald justified this change when, proposing it in the Dáil, he declared that:

“this amendment does no more than the minimum necessary to secure membership. It ensures any law passed here which can be shown to be necessitated by the obligations of Community membership, to be required by membership, will, to that extent, take precedence over the Constitution, but unless that can be shown and if the law is simply consequential on membership but not necessitated by it, it does not override the Constitution.”¹⁴¹

*Crotty v. An Taoiseach*¹⁴² can be regarded as the reference decision as to the interpretation of what is “necessitated by the obligations of membership”. In this decision concerning the Single European Act, Finlay C.J., in the Supreme Court, ruled out the application of Article 29.4.3° (as it was then). The validity of the Single European Act, a measure the entry into force of which depended on ratification by the member states, could not be considered to constitute a European requirement.¹⁴³ One can therefore argue that it is the

¹³⁹ D. R. Phelan, “‘Necessitated’ by the obligations of membership? Article 29.4.5° of the Constitution” (1993) 11 *Irish Law Times* 272-275 at 273 or, by the same author, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 19 above, at 345.

¹⁴⁰ See J. Temple Lang, “Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty”, *op. cit.*, at fn. 116 above, at 169-70.

¹⁴¹ G. Fitzgerald, Session of 25 January 1972, 258 *Dáil Debates*, Col. 402, available at <<http://historical-debates.oireachtas.ie/D/0258/D.0258.197201250023.html>> [Last accessed 29 December 2012].

¹⁴² [1987] I.R. 713.

¹⁴³ *Ibid.* at 767.

narrow and strict construction which prevails and that, answering to a “legal obligation” test,¹⁴⁴ the constitutional immunity granted to domestic rules depends on “whether the measure in question is a legal obligation of membership”.¹⁴⁵ Rather than concerning an issue which is intrinsically domestic, Article 29.4.6° involves a requirement to interpret this constitutional provision from a European Union law perspective.¹⁴⁶

A subsequent decision of the Supreme Court dealing with the implementation of directives, *Meagher v. Minister for Agriculture*,¹⁴⁷ seems to have departed from this initial interpretation and to have favoured the other option. If this extensive reading of the necessity clause can be criticised in many respects,¹⁴⁸ one has to note that it is still grounded in the European obligation to give full effect to directives in the domestic legal order.¹⁴⁹

Therefore, domestic instruments are immunised from constitutional invalidation as long as they can give proof of their European dimension, the point of disagreement being the extent of this condition rather than its principle.

In conclusion one can however be doubtful as to which primacy of European Union law has been received in the Irish legal order. Or, to be put it differently, it is certainly not the doctrine of primacy as developed by the European Court of Justice that Ireland recognises. As O’Leary stresses it:

“the object of the Third amendment to the Constitution, which added a new sub-section 3 to Article 29.4, and, subsequently, the insertion of sub-sections 4, 5 and 6 [as they then were], was variously to permit accession to the EC, to accommodate the

¹⁴⁴ For such a understanding of the “necessitated” clause in *Crotty*, see G. F. Whyte, *J M Kelly: The Irish Constitution*, *op. cit.*, at fn. 6 above, at 521-522, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 23 above, at 30-31 or G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution”, *op. cit.*, at fn. 13 above, at 142-143.

¹⁴⁵ G. W. Hogan, “The Supreme Court and the Single European Act” (1987) 22 *Irish Jurist* 55-70 at 60. For a similar opinion, see for example A. Whelan, “Article 29.4.3 and the Meaning of ‘Necessity’”, *op. cit.*, at fn. 33 above, at 60.

¹⁴⁶ This European perspective, required to grasp the implications of Article 29.4.6°, is stressed by many authors, for example B. McMahon and F. Murphy, *European Community Law in Ireland*, *op. cit.*, at fn. 9 above, at 31, G. W. Hogan, “The Supreme Court and the Single European Act”, *op. cit.*, at fn. 147 above, at 60 or B. Walsh, “Reflections on the Effects of Membership of the European Communities in Irish Law”, *op. cit.*, at fn. 4 above, at 813.

¹⁴⁷ [1994] 1 I.R. 329.

¹⁴⁸ For a more detailed analysis of this decision, see *infra* at 122-124 and 206-210.

¹⁴⁹ [1994] 1 I.R. 329 at 352. Hogan and Whelan seem to reach a similar conclusion when they recognise that *Meagher* “qualifies rather than overrules *Crotty*”, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 23 above, 67.

principle of supremacy and to provide a means generally to receive European Community law into Irish law.”¹⁵⁰

Even if this point disregards the past and ongoing political context, the primacy of European Union law in the Irish legal system is not the same principle as the one existing in the European legal order. From the Irish perspective, it is not based on the spirit of the Treaties and the specific nature of the European legal order. Rather, from a strictly legal point of view, the existence and extent of this doctrine in the domestic legal system is left *in fine* at the mercy of the Oireachtas, and depends on its goodwill.

This state of affairs is the direct consequence of a negative definition of the primacy of European Union law from a constitutional point of view. When this doctrine is considered as the link between the European Communities Act 1972 (as amended) and the concomitant constitutional immunity granted by Article 29.4.6° of the Irish Constitution, it can be concluded that the Constitution is actually discarded when it comes to European Union law issues. Walsh J. did not put the matter in any different terms when he affirmed in a non-judicial context that:

“for all practical purposes it [now Article 29.4.6°] abrogated the Constitution to the extent to which any provisions the Constitutions might be in conflict or inconsistent with Community law [as it was then].”¹⁵¹

From the Irish perspective, the primacy of European Union law, insofar as considered by the Constitution, is defined as a constitutional immunity enjoyed by both domestic and European instruments. It is thus doubtful that a normative superiority of European law can be inferred from the constitutional absence.¹⁵² The primacy principle as defined by the European Court of Justice is in contrast a positive principle allowing national courts to assess the

¹⁵⁰ S. O’Leary, “The Reciprocal Relationship Between Irish Constitutional Law and the Law of the European Communities” in T. Murphy and P. Twomey (eds.), *Ireland’s Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998) 293-306 at 293.

¹⁵¹ B. Walsh, “Reflections on the Effects of Membership of the European Communities in Irish Law”, *op. cit.*, at fn. 4 above, at 806. For a similar point of view, see S. Henchy, “The Irish Constitution and the E.E.C.”, *op. cit.*, at fn. 33 above, at 22.

¹⁵² For a contrary opinion deducing the positive primacy of European law over the Irish Constitution from the irrelevance of constitutional provisions, see C. R. Symmons, “Ireland” in P. M. Eisemann, *The Integration of International Law and European Community Law into the National Legal Order: A Study of the Practice in Europe* (The Hague: Kluwer Law International, 1996) 317-363 at 338 where it is argued that “EC law does, however, have a special and superior position under now Article 29.4.5 of the Constitution [as it was then] as it is expressly exempted from constitutional challenge.” Symmons shares this opinion with Forde who argues that “Article 29.4.10 of the Constitution grants the EC regime [according to the terminology of the relationship between domestic and European law as it was then] precedence over Irish law and even over the Constitution itself”, M. Forde, *Constitutional Law*, *op. cit.*, at fn. 17 above, at 262.

conformity of domestic rules, including constitutional provisions, with European ones and to put aside the latter if they contravene the former. It is this very possibility that is excluded in the Irish legal order insofar as provisions of the Constitution are concerned.¹⁵³

Therefore, from the Irish point of view, the primacy principle is accepted in its weaker form.¹⁵⁴ This favours its assessment in terms of the actual efficiency of European Union law in the domestic legal system. To put it differently, only the consequences of this doctrine are received in Ireland. If it enables Ireland to comply with its European commitments in most instances, it can nonetheless be said to constitute a denial of the principle as such.¹⁵⁵ Hogan and Whelan use the metaphor of the “mirror image” to qualify the implementation of the doctrine of primacy in the Irish legal order.¹⁵⁶ However, the reflection of the European Union law in the Irish legal order is not neutral and, for the primacy principle, the journey towards the national stage resembles taking a step through a distorting glass.

¹⁵³ On this point, see A. M. Collins, and J. O'Reilly, “The application of Community Law in Ireland 1973-1989” (1992) 1 *Irish Journal of European Law* 38-59 at 41 and J. Temple Lang, “Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty”, *op. cit.*, at fn. 116 above, at 169.

¹⁵⁴ Even if some decisions may hint at a hierarchical definition of primacy, it seems that the constitutional mechanism created by Article 29.4.6° does not correspond to this logic, see Carroll J. in *Fennelly v. The Midland Health Board* [1998] E.L.R. 28 at 36 where it is argued that “in the hierarchy of legislation the Directive takes precedence over domestic law”.

¹⁵⁵ As Barrett puts it: “rather than resolve the issue of which legal order would prevail in the event of a collision between the national and the supranational, [what is now Article 29.4.6° of the Irish Constitution] simply made sure that, insofar as national constitutional norms were concerned, such collisions would not take place in the first place”, see G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution”, *op. cit.*, at fn. 13 above, at 133.

¹⁵⁶ G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 23 above, at 11-12.

2. *The French Perspective: The Primacy of European Union Law Interpreted as Jurisdictional Immunity*

The situation of the primacy principle in the French legal system is different from its definition in the Irish domestic order. In the Irish domestic legal order, the doctrine is introduced at a legislative level and is then protected by a constitutional immunity clause. In France, in contrast, Article 88-1 of the Constitution establishes a positive participation in the European Union by stating, since the Treaty of Lisbon, that:

“the Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.”

It was directly from this Article that the *Conseil constitutionnel* deduced the duty to comply with specific European Union law requirements, including the doctrine of primacy.¹⁵⁷ However, as it is the case in Ireland, the constitutional screen is not neutral with regard to the nature of this doctrine. In France as well, the domestic consideration of the primacy of European Union Law is caught in a “mirror game” with the same refraction as in Ireland.¹⁵⁸

However, if the Irish provisions explicitly grant a constitutional immunity both to European Union law and to domestic acts directly connected with its requirements, Article 88-1 of the French constitution does not define as clearly the modalities under which the primacy principle is enforced in the domestic legal order. It is therefore only from the interpretation of the provision by the *Conseil constitutionnel* that the content of the primacy principle from the French perspective can be assessed.

The position of the *Conseil constitutionnel* on the interpretation of Article 88-1 is in itself ambiguous, dealing with normative and hierarchical elements, on the one hand, as well as competence issues, on the other hand. As it stated in 2004:

¹⁵⁷ See *supra* at 78-82.

¹⁵⁸ For example, Levade uses the image of a “mirror game”, in the same way as G. W. Hogan and A. Whelan in *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 23 above, at 11-12, to explain the decision of the *Conseil constitutionnel* n° 2004-505 DC on the *Treaty establishing of Constitution for Europe*, see A. Levade, “Le Conseil constitutionnel aux prises avec la Constitution européenne” (2005) *Revue du droit public et de la science politique en France et à l'étranger* 19-50.

“whereas according to the terms of Article 88-1 of the Constitution: ‘The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the Treaties that established them, to exercise some of their powers in common’; the transposition of a Community Directive into domestic law thus complies with a constitutional requirement to which it could only be obstructed by reason of an express conflicting provision of the Constitution; in the absence of such a provision, it is for the Community court, if need be by referring a matter for a preliminary ruling, to check that Community Directive respects both the competences defined in the Treaties and the fundamental rights guaranteed by Article 6 of the Treaty on the European Union”.¹⁵⁹

These intertwined legal perspectives explain for the most part the fact that the interpretations of this decision were “diametrically opposite”.¹⁶⁰ For some, the recognition of the primacy principle by the *Conseil constitutionnel* has to be understood in terms of normative hierarchy while, for others, the decision pertains to a matter of jurisdictional competence.

The understanding of the decision of the *Conseil constitutionnel* in hierarchical terms seems at first sight the more intuitive. Considered on the basis of Article 55 of the French Constitution, the former French case-law displayed a relationship between the domestic and European legal orders in hierarchical terms whereby European rules prevailed other domestic norms below legislative rank but had to yield to constitutional provisions.¹⁶¹ In consequence, if the decisions of June and July 2004 constituted a *revirement de jurisprudence* recognising explicitly and specifically the European doctrine of primacy, it seemed logical to assume that the ranking of the different norms constitutive of the French legal pyramid had been changed. The recognition of the doctrine of primacy by the French constitutional court would mean that, as regards European Union law, the Constitution had vacated its position on top of the French legal order for it to be filled by European provisions. This is for example the position of Mathieu when he argues that:

¹⁵⁹ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7 (translation by the author). This position has been repeated, for example, in CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication* of 1 July 2004, *Rec.* 107 at para. 18, CC, decision n° 2004-498 DC on the *Act on bioethics* of 29 July 2004, *Rec.* 122 at para. 4 and CC, decision n° 2004-499 DC on the *Act relating to the protection of physical persons regarding the treatment of personal data* of 29 July 2004, *Rec.* 126 at para. 7. More recently, it also appeared, for example, in CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 17.

¹⁶⁰ B. Genevois, “Le Conseil constitutionnel et la primauté du droit communautaire” (2005) *Revue française de droit administratif* 239-241 at 240.

¹⁶¹ For further developments on this point, see *infra* at 144-146.

“the constitutional court ensures with this jurisprudence the prevalence of Community law over national law, including constitutional law, following the example of the stances adopted by most of the European constitutional jurisdictions.”¹⁶²

This would therefore be a full recognition of the constitutional claims expressed by the European Union.¹⁶³ With this perspective, one could rightfully argue that “it is therefore a defeat of French law and courts.”¹⁶⁴

However, it is not certain that the decision of the constitutional court refers to a hierarchical issue. For example, Mouton stresses the incoherence inherent in such a reading. While he seems to agree with a hierarchical understanding of the position taken by the *Conseil constitutionnel*,¹⁶⁵ he quickly comes to the conclusion that this reading implies an illogical statement, stressing that:

“it is impossible to admit the existence of a supremacy of Community law over the Constitution without lapsing in a very surprising syllogism: 1) The Constitution would indeed be the supreme legal norm of the state; 2) However the Constitution would set out that Community law prevails over the Constitution; 3) In the name of the supremacy of the Constitution, Community law is superior to the Constitution.”¹⁶⁶

Even if such reflections as to the hierarchy between Constitutional provisions and European norms require further analysis,¹⁶⁷ for the present matter; this incoherence is a sign that the *Conseil constitutionnel* did not necessarily favour a normative perspective in its new case-law on the doctrine of primacy.

First, a hierarchical explanation cannot fully describe the relationship between the two legal orders. The alleged superiority of the European norms is not absolute in the case-law of the *Conseil constitutionnel* but is limited by what has been qualified as a “national constitutional

¹⁶² B. Mathieu, “Le Conseil constitutionnel conforte la construction européenne en s’appuyant sur les exigences constitutionnelles nationales” (2004) *Recueil Dalloz* 1739-1740 at 1740 (translation by the author).

¹⁶³ This recognition of a true European Constitution, expressed in hierarchical terms, by the French constitutional court is the perspective chosen by Chaltiel, see F. Chaltiel, “Nouvelles variations sur la constitutionnalisation de l’Europe : À propos de la décision du Conseil constitutionnel sur l’économie numérique” (2004) n° 480 *Revue du Marché commun et de l’Union européenne* 450-454.

¹⁶⁴ M. Verpeaux, “Révolution, constat et verrou”, *op. cit.*, at fn. 38 above, at 1497 (translation by the author).

¹⁶⁵ See S. Mouton, “Une jurisprudence pour attendre...” (2005) *Recueil Dalloz* 199-204 at 201.

¹⁶⁶ *Ibid.* at 202.

¹⁶⁷ On the necessary supremacy of the Constitution over the doctrine of primacy from the Irish and French perspectives, see *infra* at 130-152.

sovereignty lock”,¹⁶⁸ either defined as an “express conflicting provision of the Constitution”¹⁶⁹ or, more recently, as “a rule or principle inherent in the constitutional identity of France”.¹⁷⁰ Thought in terms of hierarchy, this solution leads to surprising results, in this instance the existence of two normative pyramids. European Union law would, as a rule, be superior to the Constitution in the French legal order but when the aforementioned limitation was relevant, their relative position would be reversed.¹⁷¹ This incoherence makes one wonder if a conditional primacy is a primacy at all, if one has to conceive it in hierarchical terms. This is the conclusion that Bruce reaches when she states that “a rule of hierarchy from which one derogates is not really such anymore.”¹⁷²

Secondly, some elements call for a departure from the traditional analysis in terms of hierarchy and revolve around the innovative use of Article 88-1 of the Constitution by the *Conseil constitutionnel*. The traditional stance of France, as expressed by the *Cour de cassation* and even more explicitly by the *Conseil d'État*, relied on Article 55 of the Constitution and therefore conceived European Union law through a hierarchical prism, since this provision states that:

“treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.”

¹⁶⁸ F. Chaltiel, “Nouvelles variations sur la constitutionnalisation de l’Europe : À propos de la décision du Conseil constitutionnel sur l’économie numérique”, *op. cit.*, at fn. 167 above, at 450 and, for the same metaphor, see M. Verpeaux, “Révolution, constat et verrou”, *op. cit.*, at fn. 38 above, at 1497.

¹⁶⁹ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7, CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication*, *Rec.* 107 at para. 18, CC, decision n° 2004-498 DC on the *Act on bioethics* of 29 July 2004, *Rec.* 122 at para. 4 and CC, decision n° 2004-499 DC on the *Act relating to the protection of physical persons regarding the treatment of personal data* of 29 July 2004, *Rec.* 126 at para. 7 (translation by the author).

¹⁷⁰ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19. This formulation has been reiterated in subsequent decisions, see CC, decision n° 2006-543 DC on the *Act pertaining the energy sector* of 30 November 2006, *Rec.* 120 at para. 6 or CC, decision n° 2008-564 DC on the *Act pertaining to genetically modified organisms* of 19 June 2008, *Rec.* 313 at para. 44 and more recently, CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 18 or CC, decision n° 2011-631 DC on the *Act pertaining to immigration, integration and citizenship* of 9 June 2011 (unreported) at para. 45. On the consequences of the substitution of a test expressed in terms of an “express conflicting provision of the Constitution” by a control based on a “rule or principle inherent in the constitutional identity of France”, see *infra* at 243-247.

¹⁷¹ On this conclusion deduced from a normative interpretation of the case-law of the *Conseil constitutionnel*, see C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information” (2007) n° 69 *Revue française de droit constitutionnel* 100-120 at 114.

¹⁷² É. Bruce, “La primauté du droit communautaire (Retour sur la portée de l’article 88-1 de la Constitution dans la jurisprudence récente du Conseil constitutionnel)”, *op. cit.*, at fn. 68 above, (translation by the author).

In contrast, Article 88-1 lacks any such perspective ¹⁷³ and only affirms the participation of France in the European Union.

Another indication consists of the discrepancy between Article 88-1 and European Union law, in particular the tenets of the doctrine of primacy. Article 88-1 offers a state-based definition of the Union.¹⁷⁴ In this respect, it echoes Article I-1 of the Treaty establishing a Constitution for Europe which states that:

“reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it.”

The choice for a “Community basis” excluding the notion of federation is similar to the notion of competences exercised in common, rather than transferred, which is mentioned in Article 88-1.¹⁷⁵ They both tend to undermine the supranational logic that is at the core of the doctrine of primacy as developed by the European Court of Justice ¹⁷⁶ and to stress that the member states are the “Masters of the Treaties”.¹⁷⁷ The logic underpinning Article I-1 of the Treaty establishing a Constitution for Europe and Article 88-1 of the French Constitution differs from that animating the European case-law. In consequence, this makes doubtful that the recognition of the doctrine of primacy was a recognition of the position of the European Court

¹⁷³ For a similar opinion, see C. Maugüé, “La décision n° 2004-505 DC du 19 novembre 2004 du Conseil constitutionnel” (2005) *Revue française de droit administratif* 30-33 at 31 or É. Bruce, “La primauté du droit communautaire (Retour sur la portée de l’article 88-1 de la Constitution dans la jurisprudence récente du Conseil constitutionnel)”, *op. cit.*, at fn. 68 above, at 7.

¹⁷⁴ In this sense, see H. Gaudin, “L’exercice en commun des compétences comme fondement d’un ordre constitutionnel commun” in P.-Y. Monjal and E. Neframi (eds.), *Le commun dans l’Union européenne* (Brussels: Bruylant, 2009) 203-218 at 205 where the author notes that Article 88-1, while insisting on the co-operation between member states, makes no reference to European own institutions.

¹⁷⁵ In this sense, see for example, V. Constantinesco, “Des racines et des ailes : Essai sur les rapports entre droit communautaire et droit constitutionnel” in *Au carrefour des droits : Mélanges en l’honneur de Louis Dubouis* (Paris: Dalloz, 2002) 309-323 at 317.

¹⁷⁶ On this point, see H. Labayle and J.-L. Sauron, “La Constitution française à l’épreuve de la Constitution pour l’Europe” (2005) *Revue française de droit administrative* 1-29 at 7. See also E. Cannizzaro, “« Commun » et « communautaire » en droit... communautaire (Le point de vue d’un internationaliste)” in P.-Y. Monjal and E. Neframi (eds.), *Le commun dans l’Union européenne* (Brussels: Bruylant, 2009) 97-118 at 100 where the author affirms that “on one side, there is the path by which states pursue a common goal, protect a common interest or exercise powers in common. On the other side, there is the establishment of a new legal order which strives for a *communautaire* goal, which manages collective interests and which exercise competences on its own behalf” (translation by the author). It seems that the recent case-law of the *Conseil constitutionnel* favours understanding the European Union according to this first option.

¹⁷⁷ According to the expression used by the German Federal Constitutional Court, the *Bundesverfassungsgericht*, in its decision *Brunner and others v. The European Union Treaty* (Maastricht decision), BVerfG, decision of 12 October 1993, 2 BvR 2134/92 & 2159/92, [1994] 1 C.M.L.R. 57 at 91.

of Justice itself, and in particular of the hierarchical consequences the European Court deduced from this principle

It seems, indeed, that the question of primacy as it exists in the French legal order pertains to a matter of jurisdictional competence rather than a hierarchical issue. The *Conseil constitutionnel* has always shown an acute awareness of the content of its mission, strictly defined by Article 61, which states that:

“Institutional Acts, before their promulgation, Private Members’ Bills mentioned in article 11 before they are submitted to referendum, and the rules of procedure of the Houses of Parliament shall, before coming into force, be referred to the *Conseil constitutionnel*, which shall rule on their conformity with the Constitution.

To the same end, Acts of Parliament may be referred to the *Conseil constitutionnel*, before their promulgation, by the *Président de la République*, the *Premier ministre*, the President of the *Assemblée nationale*, the President of the *Sénat*, sixty Members of the *Assemblée nationale* or sixty Senators.”

It was on this ground that, while acknowledging the hierarchical superiority of international law over national legislative provisions, the *Conseil constitutionnel* declined to exercise a competence to review the conformity of an Act on this ground as its function consisted only of assessing their respect for constitutional provisions.¹⁷⁸ In the same vein, it affirmed its incompetence with regard to Acts passed through referendum, its functions being limited to the appraisal of provisions adopted in the Parliament.¹⁷⁹

It is the same type of reasoning which underlies the constitutional court’s interpretation of Article 88-1 and the relationship between the domestic and European legal orders. The decisions of summer 2004, as reaffirmed in its *Treaty establishing a Constitution for Europe* decision related directly to the primacy principle, dealt above all with the role of the

¹⁷⁸ CC, decision n° 74-54 DC on the *Act pertaining to the voluntary interruption of pregnancy Act* of 15 January 1975, *Rec.* 19. For an analysis of the position of the French constitutional court on this competence issue and the consequences of this decision for ordinary courts, see *supra* at 72-78.

¹⁷⁹ CC, decision n° 62-20 DC on the *Act pertaining to the election of the President of the Republic by direct universal suffrage, passed by the referendum of 28 October 1962* of 6 November 1962, *Rec.* 27 and CC, decision n° 2003-469 on the *Act pertaining to the decentralised organisation of the Republic* of 26 mars 2003, *Rec.* 293 or, in a European context, CC, decision n° 92-313 DC on the *Act authorising the ratification of the Treaty of Maastricht* of 23 September 1992, *Rec.* 94.

constitutional court as defined by the Constitution,¹⁸⁰ and *a contrario* with the competence of the European Court of Justice.¹⁸¹ As Gautier and Melleray say explicitly:

“in other words what is involved here is a question of jurisdictional competence and not of hierarchy of norms *stricto sensu*.”¹⁸²

The purpose of Article 88-1 is to affirm the participation of France in the European Union and its consequential duty to comply with European obligations. The role of the *Conseil constitutionnel* is thus to ensure that France complies with those obligations, in particular when the legislative implementation of European directive is at issue. Understood in this way, the role of the French constitutional court is limited to the assessment of the conformity between a statute and the constitutional provisions. It is thus a reaffirmation of its interpretation of its role in the framework defined by Article 61 of the Constitution. Its decisions of summer 2004 answered the claims submitted to it in terms of its own competence - which is limited to issues of constitutionality.¹⁸³ Limited to the appraisal of the constitutionality of statutes, the *Conseil constitutionnel* refused to find in Article 88-1 a competence to assess the validity of European Union acts. In this respect, the main concern of these decisions can be analysed as consisting of a limitation by the *Conseil constitutionnel* on its own role and its refusal to acquire a competence in relation to European law.¹⁸⁴

Being deprived of such a competence, the *Conseil constitutionnel* recognise *a contrario* the monopoly of competence of the European Court of Justice, if needed, with the collaboration of ordinary courts under the preliminary reference mechanism that is now

¹⁸⁰ On this point, see J. Dutheil de la Rochère, “*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi pour la confiance dans l’économie numérique (e-commerce)”, *op. cit.*, at fn. 92 above, at 859. For a similar argument on the jurisdictional perspective put on this matter, see for example D. Chamussy, “Le Conseil constitutionnel, le droit communautaire et la sécurité juridique” (2004) *L’Actualité juridique. Droit administratif* 1937-1941 at 1939 or A. Levade, “Le Conseil constitutionnel aux prises avec le droit communautaire dérivé”, *op. cit.*, at fn. 102 above, at 893.

¹⁸¹ For a similar opinion, see D. Biroste, “Précisions sur les rapports entre droit constitutionnel et droit communautaire : Note sous Cons. const., déc. n° 2004-496 DC du 10 juin 2004 (Économie numérique), n° 2004-497 DC du 1er juillet 2004 (Paquet télécom), n° 2004-498 DC (Bioéthique) et n° 2004-499 DC (Protection des données personnelles) du 29 juillet 2004” (2004) *Revue de la recherche juridique - Droit prospectif* 1829-1847 at 1829.

¹⁸² M. Gautier, and F. Melleray, “Le refus par le Conseil constitutionnel d’apprécier la constitutionnalité de dispositions législatives transposant une directive communautaire” (2004) *L’Actualité juridique. Droit administratif* 1537-1541 at 1538.

¹⁸³ On this point, see D. Biroste, “Précisions sur les rapports entre droit constitutionnel et droit communautaire : Note sous Cons. const., déc. n° 2004-496 DC du 10 juin 2004 (Économie numérique), n° 2004-497 DC du 1er juillet 2004 (Paquet télécom), n° 2004-498 DC (Bioéthique) et n° 2004-499 DC (Protection des données personnelles) du 29 juillet 2004”, *op. cit.*, at fn. 183 above, at 1838.

¹⁸⁴ For a similar analysis on this point, see C. Richards, “The supremacy of Community law before the French Constitutional Court” (2006) 31 *European Law Review* 499-517 at 504.

provided for by Article 267 of the Treaty on the Functioning of the European Union. The consequence of the recognition of the primacy principle in the French legal order is thus to distinguish the different norms at stake according to their origin and to reserve each set to the competence of only one adjudicating forum. Hence, as Schoettl puts it, far from recognising the primacy principle *stricto sensu*:

“it [the Conseil constitutionnel] accepts thereby the primacy of the Community court, the only one in charge of having common principles applied by the member states.”¹⁸⁵

In consequence, from a European point of view, this decision of the *Conseil constitutionnel* ensures that the European Court of Justice enjoys a monopoly on the assessment of the validity of European norms. If one maintains the mirror metaphor, this means, from the French legal perspective, that the primacy principle is recognised as a jurisdictional immunity granted to European Union law.

Some observations need to be made in relation to this notion of immunity, in particular insofar as concerns the comparison between the Irish and French positions. Academic writers have laid great emphasis on the constitutional immunity which results from the case-law decided by the *Conseil constitutionnel* in 2004. It could thus be deemed similar to the inability of Irish courts to question the constitutionality of European measures.¹⁸⁶ While analysing the consequence of the decisions of the *Conseil constitutionnel*, Maugué comes to the following conclusion:

“these decisions confer a constitutional immunity on Community norms for everything to which the constituent power has not expressly manifested its opposition.”¹⁸⁷

¹⁸⁵ J.-É. Schoettl, “Le nouveau régime juridique de la communication en ligne devant le Conseil constitutionnel” (2004) n° 122 *Les petites affiches* 10-21 at 18 (translation by the author). For a similar opinion, see J.-P. Camby, “Le droit communautaire est-il soluble dans la Constitution ?”, *op. cit.*, at fn. 97 above, at 886.

¹⁸⁶ See for example, A. M. Collins and J. O’Reilly, “The application of Community Law in Ireland 1973-1989”, *op. cit.*, at fn. 155 above, at 41 and F. Murphy, “The European Community and the Irish Legal System”, *op. cit.*, at fn. 12 above, at 31.

¹⁸⁷ C. Maugué, “Le Conseil constitutionnel se prononce sur la conformité du traité établissant une Constitution pour l’Europe” (2005) n° 31 *Courrier juridique des finances et de l’industrie* 2-8 at 4 (translation by the author). For a similar opinion, see for example, J. Roux, “Le Conseil constitutionnel, le droit communautaire dérivé et la Constitution” (2004) *Revue du droit public et de la science politique en France et à l’étranger* 912-933 at 916.

It seems however, that the logic deployed in the two countries takes opposing forms.¹⁸⁸ In Ireland, the Constitution itself excludes its application to norms related directly to European Union law and the competence of the domestic courts is only the consequence of this constitutional provision. In contrast, in France, the Constitution does not provide for its own exclusion but deals with the positive participation in the European Union.¹⁸⁹ The immunity enjoyed by European Union law is not the result of the absence of a normative relationship with the supreme domestic norm but finds its *raison d'être* in the competence of the courts. Therefore, the Irish legal system specifically reserves a constitutional immunity to European Union law. In France, in contrast,¹⁹⁰ the choice to exclude Article 55 and its normative dynamics leads one to consider the provisions of Article 88-1 as resulting in what is more appropriately defined as a jurisdictional immunity.¹⁹¹

In practice, French courts have a similar role to their Irish counterparts, ensuring that the immunity regime designed for European Union law is not enjoyed wrongfully by domestic rules which lack a European connection. Hence, the *Conseil constitutionnel* is responsible for ensuring that domestic norms fulfil the requirement defined by Article 88-1 and do not escape other constitutional obligations by claiming an unjustified connection with the European level.¹⁹² In other words, it is competent in controlling if a domestic measure actually reproduces the unconditional and precise content of the directive it purports to transpose.¹⁹³ An implementation measure that contravened the directive would be deemed contrary to Article 88-1.¹⁹⁴ A domestic measure that added provisions to those required by a European instrument would not benefit from the jurisdictional immunity consequent on Article 88-1. For such provisions of a purely domestic nature, the *Conseil constitutionnel* would regain its competence to assess the

¹⁸⁸ Even though this distinction seems irrelevant in practice, it will be seen later on (see *infra* at 139-141 and 149-152) that it bears consequences on the justification of the limits put to primacy as enjoyed in the domestic legal systems.

¹⁸⁹ For a distinction between constitutional and jurisdictional immunities and the consequences of the recent case-law of the *Conseil constitutionnel* on this issue, see J.-P. Kovar, "Commentaire des décisions du Conseil constitutionnel du 10 juin et du 1^{er} juillet 2004 : rapport entre le droit communautaire et le droit national" (2004) 40 *Revue trimestrielle de droit européen* 587-597 at 588-93.

¹⁹⁰ For the definition of the position of the *Conseil constitutionnel* in these terms, see J. P. Jacqué, "Droit constitutionnel national, Droit communautaire, CEDH, Charte des Nations Unies : L'instabilité des rapports de système entre ordres juridiques" (2007) n° 69 *Revue française de droit constitutionnel* 3-37 at 13.

¹⁹¹ It could even be argued that the new case-law of the *Conseil constitutionnel* resulted in the end of a *de facto* constitutional immunity of European Union law due to the restricted competence of the French constitutional court. For an analysis of the empowerment of the *Conseil constitutionnel* as a result of its new interpretation of Article 88-1 of the Constitution, see *infra* at 339-346.

¹⁹² On this point, see J. Roux, "Le Conseil constitutionnel, le droit communautaire dérivé et la Constitution", *op. cit.*, at fn. 189 above, at 921.

¹⁹³ CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication* of 1 July 2004, *Rec.* 107 at para. 18-19 and CC, decision n° 2004-499 DC on the *Act relating to the protection of physical persons regarding the treatment of personal data* of 29 July 2004, *Rec.* 126 at para. 7-8.

¹⁹⁴ CC, decision n° 2006-543 DC on the *Act pertaining the energy sector* of 30 November 2006, *Rec.* 120 at para. 8-9.

conformity of these provisions with the Constitution,¹⁹⁵ following the logic that each set of norms has its own court.¹⁹⁶

To conclude, it seems that, as in Ireland, the domestic screen through which the doctrine of primacy passes in being implemented at national level is not neutral. It is far from certain that the Irish and French conceptions correspond to the doctrine developed by the European Court of Justice. If in Ireland the question of primacy was dealt with by making the Constitution irrelevant for European legal issues, in France the recognition of primacy is made “*in absentia*”.¹⁹⁷ While from the European perspective this doctrine implies a positive superiority on the part of European norms over the domestic ones, France deviates from this logic by defining it in terms of jurisdictional competence rather than tackling it from a hierarchical point of view.¹⁹⁸ In this respect, the interpretation of Article 88-1 in terms of requirement rather than obligation is a symptom of the willingness to empty the primacy issue of any synallagmatic dimension and to depart from the European perspective.¹⁹⁹

The fresh and more respectful look taken at the European Union legal order since 2004 is not tantamount to a full recognition of the primacy principle. As defined from the perspective of Article 88-1, this recognition of a “subdued primacy”²⁰⁰ consists of adapting the domestic legal system to the consequences attached to this doctrine and defining their extent as well as avoiding the issue of primacy itself. In this sense, the understanding on the part of the French legal system of European obligations is mainly instrumental and consists of a mere congruence of results. As Azoulai and Agerbeek note it, it is impossible to avoid this discordant conclusion:

¹⁹⁵ CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication* of 1 July 2004, *Rec.* 107 at para. 20.

¹⁹⁶ For a similar point of view, see L. Dubouis, “Le juge français et le conflit entre norme constitutionnelle et norme européenne” in *L’Europe et le droit : Mélanges en l’honneur de Jean Boulouis* (Paris: Dalloz, 1991) 205-219 at 214 or S. Pina, “La révision du Titre XV de la Constitution et le Traité établissant une Constitution pour l’Europe : Une application partielle de la loi constitutionnelle du 1^{er} mars 2005” (2006) *Revue de la recherche juridique - Droit prospectif* 2153-2178 at 2158.

¹⁹⁷ P.-Y. Monjal, “Le Conseil constitutionnel et les directives communautaires : l’incompétence du juge suprême comme garantie de l’inopposabilité de la Constitution au droit communautaire ?” (2004) *Revue du Droit de l’Union Européenne* 509-522 at 522 fn. 40 (translation by the author).

¹⁹⁸ For such an explanation of the position of the *Conseil constitutionnel*, see for example T. Georgopoulos, “Le Conseil constitutionnel face à la directive communautaire : trois destinataires pour un message ambivalent” (2004) n° 227 *Les petites affiches* 3-8 at 4.

¹⁹⁹ For this semantic analysis, see P.-Y. Monjal, “La Constitution, toute la Constitution, rien que le droit communautaire... (Remarques à vif à propos de la décision du Conseil constitutionnel du 10 juin 2004 n° 2004-496)”, *op. cit.*, at fn. 100 above, at 17. The term “*exigence*” translated here by requirement is deprived from the synallagmatic dimension that the notion of obligation connotes.

²⁰⁰ D. Simon, “L’examen par le Conseil constitutionnel du traité portant établissement d’une Constitution pour l’Europe : fausses surprises et vraies confirmations” (2004) n° 2 *Europe* 6-9 at 7 (translation by the author).

“it is important to consider that the Conseil does not aim to describing the essence of the principle of primacy as such, but only to specify its extent and meaning in the domestic legal order. The Conseil states the consequences of the principle of primacy and declares what the effects, in terms of French constitutional law, of the ‘existence d’un ordre juridique communautaire intégré à l’ordre juridique interne’²⁰¹.”²⁰²

²⁰¹ According to the expression used by the *Conseil constitutionnel*: “the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order”, CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 11.

²⁰² L. Azoulai and F. Ronkes Agerbeek, “*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe” (2005) 42 *Common Market Law Review* 871-886 at 877. For a similar opinion, see E. Bruce, “La primauté du droit communautaire (Retour sur la portée de l’article 88-1 de la Constitution dans la jurisprudence récente du Conseil constitutionnel)”, *op. cit.*, at fn. 68 above, at 5.

Chapter II The Domestic Regime Regarding the Doctrine of Primacy: The Submission of European Union Law to the Supremacy of the Irish and French Constitutions

Both in Ireland and France, the recognition of the primacy of European Union law has two specific features. On the one hand, the European legal order and its requirements are recognised as distinct from international law. On the other hand, defined as it is in terms of immunity, the primacy principle differs from the doctrine as defined by the European Court of Justice.

When the reasons for this partial recognition of the doctrine of primacy are examined, one cannot but note that the situation stems from the constitutional nature of the primacy principle in the two national legal orders. Rather than taking the absolute form it enjoys in the case-law of the European Court of Justice, potential prevalence of European rules in the Irish and French legal orders is determined by constitutional provisions. Therefore, the primacy of European Union law can not but be subject to the supremacy of the two states' Constitutions.

A. The Domestic Nature of the Regime Concerning the Doctrine of Primacy in the Irish and French Legal Orders

In the case-law of the European Court of Justice, the doctrine of primacy is directly linked to the characteristics of the European legal order, and in particular its autonomous nature. However, the claims made at European level have received only incomplete recognition in Irish and French law and, as will be seen in what follows, the autonomy of the European legal order is denied.

From the perspective of French law, the recent recognition of the specificity of European Union law and its primacy has coincided in time with the reassertion of the constitutional nature of the principles governing the relationship between domestic and European norms. The generous approach of the Irish legal system to the primacy of European Union law may lead one to believe that this doctrine was received into Irish law under its own European terms. However, it is as a domestic principle that Irish courts give effect to it in their legal order.

1. *A Constitutional Requirement: The Refusal of French Law to Acknowledge an Autonomous Foundation for the Primacy of European Union Law*

As reflected in the French legal order, the primacy of the European Union law is defined as a jurisdictional immunity conferred on European Union law by domestic courts.¹ As in the case of Ireland, this distortion of the doctrine of primacy as developed by the European Court of Justice stems from a denial of the autonomous character of European Union law and a “nationalisation of Community law” [as it was then].² The understanding of primacy as a domestic concept explains the modification of its content in the French legal order. The mirror image of the primacy principle is formed on constitutional glass and therefore its nature is constitutional, from the perspective of French law.

Prior to 2004, the confluence between the primacy principle and the case-law of the French courts happened almost inadvertently. From the time of the *Jacques Vabre* decision by the *Cour de cassation*³ and the *Nicolo* decision by the *Conseil d'État*,⁴ European norms were deemed to prevail over French statutes and over inferior domestic rules, whether prior or subsequent. In this sense, the solution developed by the French courts complied with the consequences required of the primacy principle as set out in *Simmenthal*.⁵ However, this compliance was based on Article 55 of the Constitution, which provides that:

“treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.”

It is obvious that this prevalence, as defined in the French legal order before 2004, did not correspond with the full extent of the primacy principle as enunciated in the case-law of the European of Justice. In the French normative pyramid, the position of external norms and their potential prevalence over domestic rules depended on the Constitution and the Constitution

¹ See *supra* at 94-104.

² J. Rossetto, “Ordre constitutionnel interne et droit communautaire : L'impossible hiérarchie” in *Le droit administratif : Permanences et convergences : Mélanges en l'honneur de Jean-François Lachaume* (Paris: Dalloz, 2007) 889-910 at 898.

³ C. cass., Ch. mixte, *Administration des Douanes c. Sociétés 'Cafés Jacques Vabre'*, 24 May 1975, *Bull. Ch. mixte*, n° 4, p.6.

⁴ CE, Ass., 20 October 1989, *Nicolo*, *Rec. Lebon* 190.

⁵ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] E.C.R. 629, in particular at para. 21.

alone.⁶ In consequence, the prevalence of international instruments did not apply to constitutional provisions which remained supreme from the domestic perspective.⁷ This point was repeated many times by the *Conseil d'État* in relation to international law in its decisions in *Koné*⁸ and in *Sarran, Levacher et autres*.⁹ This was also the case where European law was concerned due to the undifferentiating nature of the principle contained in Article 55. In consequence, the autonomy and specificity of the European legal order were denied. This hierarchical submission of European rules to constitutional provisions following the constitutional logic which applied to international law at large was made specifically clear by the *Conseil d'État* in its *SNIP* decision.¹⁰ Even if expressed in a more moderate fashion, the decisions of the *Cour de cassation* pointed towards the same conclusion.¹¹ Therefore, the prevalence of European rules in the French legal order was not attached to the primacy principle as this had been defined by the European Court of Justice on the basis on the specific and autonomous nature of the European legal order. In contrast, deducing the position of European rules in the French hierarchy of norms from a constitutional provision, *viz.*, Article 55, involved was the very denial of these European claims. It also accounted for the fact that the consequences attached to primacy by the European Court of Justice were only partially met.

It would appear logical, at first sight, that the specific recognition of the primacy principle in the case-law of the *Conseil constitutionnel* in June and July 2004 and in its *Treaty establishing a Constitution for Europe* decision would involve the simultaneous acknowledgment of the other existential feature of the European Union legal order, *viz.*, its autonomy. Certainly, with the new drive towards European integration, the former absolute protection given by French law to constitutional provisions against any form of primacy of external norms has been in decline.¹² However, it cannot be doubted that it is still purely on constitutional grounds that the issue of primacy is dealt with, explaining thereby the modification of its content into a rule of jurisdictional immunity. This is the result of two sets of factors - on the one hand, the modalities under which the primacy principle exists in the French

⁶ On this purely internal perspective, see for example B. Mathieu and M. Verpeaux, "À propos de l'arrêt du Conseil d'État du 30 octobre 1998, *Sarran et autres* : le point de vue du constitutionnaliste" (1999) *Revue française de droit administratif* 67-76 at 75 or C. Richards, "*Sarran et Levacher*: ranking legal norms in the French Republic" (2000) 25 *European Law Review* 192-199 at 194.

⁷ For further developments on this point, see *infra* at 142-149.

⁸ CE, Ass., 3 July 1996, *Koné*, *Rec. Lebon* 255.

⁹ CE, Ass., 30 October 1998, *Sarran, Levacher et autres*, *Rec. Lebon* 368.

¹⁰ CE, 3 December 2001, *SNIP (Syndicat national de l'industrie pharmaceutique)*, *Rec. Lebon* 624.

¹¹ See *infra* at 145-146.

¹² See *infra* at 218-233.

legal system according to Article 88-1 of the Constitution, on the other hand, the use which the *Conseil constitutionnel* makes of this constitutional provision.

The first observation to be made here is semantic. As Monjal points out,¹³ the *Conseil constitutionnel* chose to deduce from French participation in the European Union expressed in Article 88-1 a “constitutional requirement”, rather than an “obligation”, to implement European directives.¹⁴ The refusal by the *Conseil constitutionnel* to use the term “obligation”, if thought of from the point of view of etymology, can be interpreted as demonstrating a willingness to see its ruling free of any idea of a bond between the domestic and European legal orders. The implementation of directives being defined as a domestic “requirement”, it is from the constitutional perspective alone that the issue is considered.¹⁵ In other words, in these decisions, which were deemed to open the route for reception of the doctrine of primacy in the domestic legal order, the *Conseil constitutionnel* applied the Constitution and the Constitution alone, just as the *Conseil d’État* had previously done on the basis of Article 55. If this new case-law is a sign of a specificity of European Union law compared to international law, it also nonetheless simultaneously suggests a denial of the autonomous nature of the European legal order.

Assuming care in the choice of its words in the case-law of *Conseil constitutionnel* is a dangerous exercise. In this respect, the case-law on the primacy principle is paradoxically an obvious example of the semantic indeterminacy of the concepts used by the other court in the Palais-Royal. The limit put on the primacy of the European Union law *ab initio* consisted of “an express provision of the Constitution”.¹⁶ This was to be understood as meaning an express provision specific to the French Constitution¹⁷ before losing this textual element by being

¹³ See P.-Y. Monjal, “La Constitution, toute la Constitution, rien que le droit communautaire... (Remarques à vif à propos de la décision du Conseil constitutionnel du 10 juin 2004 n° 2004-496)” (2004) n° 161 *Les petites affiches* 16-22 at 17.

¹⁴ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7, CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication* of 1 July 2004, *Rec.* 107 at para. 18, CC, decision n° 2004-498 DC on the *Act on bioethics* of 29 July 2004, *Rec.* 122 at para. 4 and CC, decision n° 2004-499 DC on the *Act relating to the protection of physical persons regarding the treatment of personal data* of 29 July 2004, *Rec.* 126 at para. 7.

¹⁵ Levade seems to come to a similar conclusion when, noticing the substitution of “requirement” by “obligation” in the subsequent *Arcelor* decision of the *Conseil d’État* (CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56), she explains this difference by the willingness shown by the administrative court not to infringe the competence of the *Conseil constitutionnel* to interpret the Constitution. *A contrario*, it indicates that the *Conseil constitutionnel* upheld a purely constitutional perspective in its interpretation of Article 88-1, see A. Levade, “Le Palais-Royal aux prises avec la constitutionnalité des actes de transposition des directives communautaires : À propos de la décision du Conseil constitutionnel n° 2006-543 du 30 novembre 2006, *Loi relative au secteur de l’énergie* et de l’arrêt du Conseil d’État, Assemblée, du 8 février 2007, *Société Arcelor Atlantique et Lorraine et autres*” (2007) *Revue française de droit administrative* 564-577 at 570.

¹⁶ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7, CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication* of 1 July 2004, *Rec.* 107 at para. 18, CC, decision n° 2004-498 DC on the *Act on bioethics* of 29 July 2004, *Rec.* 122 at para. 4 and CC, decision n° 2004-499 DC on the *Act relating to the protection of physical persons regarding the treatment of personal data* of 29 July 2004, *Rec.* 126 at para. 7.

¹⁷ Regarding this precision, see J.-É. Schoettl, “La brevetabilité des gènes, le droit communautaire et la Constitution” (2004) n° 164 *Les petites affiches* 3-11 at 10.

broadened out to mean a “rule or principle inherent in the constitutional identity of France” in 2006.¹⁸ However, in this instance, it seems that the choice to characterise the European obligations as a requirement is genuinely a sign of a willingness to encapsulate the question in a purely constitutional dimension. It is consistent with the different contentious consequences derived from the recognition of the primacy principle in the French legal order under Article 88-1 of the Constitution.

A first observation is that the constitutional nature of the primacy principle stems from the circumstances of its presence in the French legal order on the basis of Article 88-1 of the Constitution. In *Treaty establishing a Constitution for Europe* decision, the *Conseil constitutionnel* took the view that:

“if Article 1-1 of the Treaty replaces the bodies established by previous treaties by a single institution, the European Union, upon which Article I-7 confers legal personality, the provisions of this Treaty, particularly the close proximity of Articles I-5 and I-6 thereof, show that it in no way modifies the nature of the European Union, nor the scope of the principle of the primacy of Union law as duly acknowledged by Article 88-1 of the Constitution, and confirmed by the *Conseil constitutionnel* in its decisions referred to hereinabove; that hence Article I-6 submitted for review by the *Conseil constitutionnel* does not entail any revision of the Constitution”.¹⁹

Quite apart from the intricate reasoning leading to this conclusion,²⁰ this decision has to be considered in the framework of Article 54 of the Constitution dealing with the ratification of international agreements which states that:

“if the *Conseil constitutionnel*, on a referral from the *Président de la République*, from the *Premier ministre*, from the President of one or the other Houses, or from sixty Members of the *Assemblée nationale* or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorisation to ratify or

¹⁸ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88. For further analysis of this limit and the meaning of its changing formulations of the *Conseil constitutionnel*, see *infra* 243-247.

¹⁹ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 13.

²⁰ See *infra* at 220-222.

approve the international undertaking involved may be given only after amending the Constitution.”

Unlike its control under Article 61 of the French Constitution - which implies an assessment of the validity of a legislative rule which is known as a control of conformity - control under Article 54 is a control of compatibility. It is a control of compatibility since the Treaty is not yet a norm. This control (exercised by the *Conseil constitutionnel*) is not focused on an issue of validity but consists of the assessment of possible contradictions between the substantive content of the Constitution and international instruments.²¹ Therefore, the conclusion of the *Conseil constitutionnel* on the Treaty establishing a Constitution for Europe was that there was no incompatibility between the primacy principle as defined by the European Court of Justice and the constitutional provisions, in particular Article 88-1 of the Constitution as interpreted in the decisions of the *Conseil constitutionnel* a few months earlier.

It may also be noted that the decision of the constitutional court is not focused on the primacy principle itself but on its scope. In other words, the European doctrine of primacy has the same scope as the provision making membership to the European Union a constitutional principle, even though two different conceptions of primacy are involved.²² In this sense, it can be affirmed that, in these 2004 decisions, the *Conseil constitutionnel* actually constitutionalised the primacy principle or, to put it differently, in these decisions, it “interprets the principle of primacy in the “‘language’ of its own constitutional discourse.”²³ Rather than anchoring it in the autonomous character of the European Union legal order, it defines it as a French constitutional principle.²⁴

A second observation is that this constitutional nature of the primacy principle is not only dependent on the interpretation of Article 88-1 of the *Conseil constitutionnel* in terms of the normative relationship between the domestic and European legal orders. It also depends on the nature and the extent of the power of review that the French constitutional court view as

²¹ See C. Blaizot-Hazard, “Les contradictions des articles 54 et 55 de la Constitution face à la hiérarchie des normes” (1992) *Revue du droit public et de la science politique en France et à l'étranger* 1293-1319 at 1304-1306.

²² On this point, see É. Bruce, “La primauté du droit communautaire (Retour sur la portée de l'article 88-1 de la Constitution dans la jurisprudence récente du Conseil constitutionnel)” (2005) n° 192 *Les petites affiches* 3-10 at 5 and J.-É. Schoettl, “La ratification du « Traité établissant une Constitution pour l'Europe » appelle-t-elle une révision de la Constitution française ?” (2004) n° 238 *Les petites affiches* 3-25 at 11.

²³ L. Azoulai and F. Ronkes Agerbeek, “*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe” (2005) 42 *Common Market Law Review* 871-886 at 877-878.

²⁴ For this transformation of a conventional obligation into a constitutional requirement, see B. Genevois, “Le Conseil constitutionnel et le droit communautaire dérivé : À propos de la décision n° 2004-496 DC du 10 juin 2004” (2004) *Revue française de droit administratif* 651-661 at 653.

necessary to the enforcement of Article 88-1. To fully grasp this aspect of matters, it is necessary to consider the development of the jurisdictional function of the French constitutional court. Introduced in 1958 with the Constitution of the Fifth Republic, it was not at that time exercised on its current scale. Due to the instability that plagued the Fourth Republic, the purpose of its successor was to deepen the parliamentary tradition of France ²⁵ by reconciling it with governmental stability in a rationalised form of regime where the Executive was reinforced and supported by a parliamentary majority which transcended the traditional opposition between the constitutional powers.²⁶ At this time, the *Conseil constitutionnel* was conceived as a “weapon against the deviation of the parliamentary regime (...) [the aim of which was] to subordinate the law, that is to say the will of the Parliament, to the superior rule laid down by the Constitution.”²⁷ The primary purpose of this new organ was to protect the Government against Parliament, in particular by enforcing respect for the competence of attribution of the legislative function as defined by Article 34 of the Constitution - but not to ensure constitutional review.²⁸

It was only in 1971, in its *Freedom of association* decision ²⁹ that the *Conseil constitutionnel* declared itself competent to review statute for constitutionality.³⁰ At this time - contrary to what had originally been intended ³¹ - the French constitutional court gave a normative content to the Preamble of the Constitution.³² Unwinding the text of the Constitution, the *bloc de constitutionnalité*, the body of constitutional norms the *Conseil constitutionnel* refers to in its jurisdictional activity, includes the Declaration of Human and Civic Rights of 1789, the Preamble of the Constitution of 1946 - which refers also to the principles essentially

²⁵ See M. Debré, “Discours devant le Conseil d’État, 27 août 1958”, available at <http://www.assemblee-nationale.fr/histoire/michel-debre/micheldebr%C3%A9_discoursconseild%270859.asp> [Last accessed 29 December 2012].

²⁶ See P. Avril, “Le parlementarisme rationalisé” (1998) *Revue du droit public et de la science politique en France et à l’étranger* 1507-1515 at 1515.

²⁷ M. Debré, “Discours devant le Conseil d’État, 27 août 1958”, *op. cit.* (translation by the author).

²⁸ On the original purpose of the *Conseil constitutionnel*, see D. Rousseau, *Droit du contentieux constitutionnel* (Sixth edition, Paris: Montchrestien, 2001) at 23-29 or G. Drago, *Contentieux constitutionnel français* (Third edition, Paris: Presses universitaires de France, coll. Thémis, 2011) at 167-171.

²⁹ CC, decision n° 71-44 DC on the *Act complementing the provisions of the Articles 5 and 7 of the Act of 1 July 1971 pertaining to the contract of association* of 16 July 1971, *Rec.* 29.

³⁰ On this jurisprudential development, see for example D. Rousseau, *Droit du contentieux constitutionnel*, *op. cit.*, at fn. 28 above, at 63-69 and more generally on the ability of the courts to determine their own competence, see M. Troper, *Pour une théorie juridique de l’État* (Paris: Presses universitaires de France, coll. Léviathan, 1994) at 93.

³¹ See D. Rousseau, *Droit du contentieux constitutionnel*, *op. cit.*, at fn. 28 above, at 28.

³² On the possibility for the interpreter to determine the status, normative or not, of a legal text, see and M. Troper, *Pour une théorie juridique de l’État*, *op. cit.*, at fn. 30 above, at 318-319 and O. Cayla, “Lire l’article 55 : Comment comprendre le texte établissant une hiérarchie des normes comme étant lui-même le texte d’une norme ?” (1999) n° 7 *Cahiers du Conseil constitutionnel*, available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-7/lire-l-article-55-comment-comprendre-un-texte-etablissant-une-hierarchie-des-normes-comme-etant-lui-meme-le-texte-d-une-norme.52745.html>> at 2-3 [Last accessed 29 December 2012]

necessary to our times and the fundamental principles acknowledged in the laws of the Republic - and the Charter for the Environment.

This connection between the norms used by the *Conseil constitutionnel* and the text of the Constitution is essential to its legitimacy.³³ It also justifies the view being taken that, according to its *Act pertaining to the voluntary interruption of pregnancy* decision of 1975,³⁴ international rules are excluded from the *bloc de constitutionnalité* which consists of “the Constitution, all the Constitution, and nothing but the Constitution”.³⁵

For many, the decision of the June and July of 2004 would unavoidably lead the *Conseil constitutionnel* to renounce its refusal to take into account external rules in its assessment of the validity of statutes,³⁶ at least insofar as European Union law was concerned.³⁷ Indeed, if Article 88-1 of the Constitution imposed on domestic powers the duty to respect European obligations, this would necessarily imply a comparison between the statutes and this specific body of European norms.³⁸ In this instance, legislative norms would have to respect the content of the directives it implements. The potential which was created by this reasoning for a statute which disregarded the content of a directive it implemented being quashed³⁹ was demonstrated in 2006. In its *Act pertaining to the energy sector* decision,⁴⁰ the constitutional court held that, by imposing regulated prices on the historical operators, the provisions of the Act “obviously do not comply with the requirement of the achievement of a competitive market for electricity and natural gas as laid down by the abovementioned Directives, which Title I of the statute is intended to transpose”.⁴¹

³³ To support this argument, see B. Genevois, “Normes de références du contrôle de constitutionnalité et respect de la hiérarchie en leur sein” in *L'État de droit : Mélanges en l'honneur de Guy Braibant* (Paris: Dalloz, 1996) 323-340 at 335-336.

³⁴ CC, decision n° 74-54 DC on the *Act pertaining to the voluntary interruption of pregnancy* of 15 January 1975, *Rec.* 19 at para. 7. For further developments on this decision, see *supra* at 72.

³⁵ B. Genevois, “Normes de références du contrôle de constitutionnalité et respect de la hiérarchie en leur sein”, *op. cit.*, at fn. 33 above, at 335.

³⁶ See for example, X. Magnon, “La loi relative au secteur de l'énergie face au droit communautaire et aux exigences constitutionnelles nationales” (2007) n° 70 *Revue française de Droit constitutionnel* 313-331 at 315-316.

³⁷ On the potential consequences of the new case-law of the *Conseil constitutionnel* in relation to the *bloc de constitutionnalité*, see for example, C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d'auteur et aux droits voisins dans la société de l'information” (2007) n° 69 *Revue française de Droit constitutionnel* 100-120 at 104-106.

³⁸ Camby analyses the *Treaty establishing a Constitution for Europe* decision as a departure from the principle set in the *Act pertaining to the voluntary interruption of pregnancy* decision, even if not yet materialised, see J.-P. Camby, “Le droit communautaire est-il soluble dans la Constitution ?” (2004) *Revue du droit public et de la science politique en France et à l'étranger* 878-888 at 883. This is also the opinion of Simon, see D. Simon, “L'obscurité de la jurisprudence du Conseil constitutionnel relative à la transposition des directives communautaires” (2006) n° 10 *Europe* 2-3 at 3.

³⁹ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 and J.-É. Schoettl, “Le nouveau régime juridique de la communication en ligne devant le Conseil constitutionnel” (2004) n° 122 *Les petites affiches* 10-21 at 18.

⁴⁰ CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120.

⁴¹ *Ibid.* at para. 8-9. A few months earlier, the *Conseil constitutionnel* analysed in depth the conformity of the Act of implementation of the relevant Directives but concluded to the constitutionality of the legislative instrument, see

At first sight, it might appear from this that European Union secondary law is indeed part of the *bloc de constitutionnalité* transforming the traditional control of constitutionality into a control of conventionality.⁴² This is not however the first time that the *Conseil constitutionnel* has referred to external norms, either international or European, in carrying out its functions. In its *Treaty of Maastricht* decision, the *Conseil constitutionnel* acknowledged the principle of international law *pacta sunt servanda* – but deduced its relevance in the French legal order from paragraph 14 of the Preamble to the Constitution of 1946.⁴³ In the same way, in 1998 when dealing with the Institutional Act pertaining to the vote in France of the citizens of the European Union,⁴⁴ the *Conseil constitutionnel* assessed the validity of this domestic norm by comparing it to Article 8 B of the Treaty on European Union.⁴⁵ Yet, it would be misleading to consider that European rules as such were part of the *bloc de constitutionnalité*. The reference to the European instrument was made due to its explicit mention in Article 88-3 of the Constitution. In consequence, European Union norms are not unknown to the constitutional court when it reviews the validity of domestic statutes. However, it includes them because the Constitution itself invites such references. As for the rest of the *bloc de constitutionnalité*, it is only the connecting thread which is constituted by the text of the Constitution that makes these rules relevant to the constitutional review and therefore it is still the Constitution that is applied in reviewing for compatibility with the *bloc of constitutionnalité*. As Genevois put it, when he considered the impact of the reference to the Treaty on European Union in the review of the Institutional Act pertaining to the vote in France of the citizens of the European Union:

CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88.

⁴² This is the point of view advocated by Azoulai, ascribing to the *Conseil constitutionnel* the task of exercising a control of conventionality as a Community jurisdiction (as it was then) but “*by constitutional designation and assignment*” (translation by the author), see L. Azoulai, “Note sous CC, 30 novembre 2006, décision n° 2006-543 DC, *Loi relative au secteur de l’énergie* [Conseil constitutionnel – Statut des lois de transposition des directives communautaires – Contrôle de conventionnalité]” (2007) 111 *Revue Générale de Droit International Public* 961-963 at 962.

⁴³ CC, decision n° 92-308 DC on the *Treaty on European Union* of 9 April 1992, *Rec.* 55 at para. 7.

⁴⁴ Institutional Act n° 98-404 of 25 May 1998 determining the conditions for the application of Article 88-3 of the Constitution relating to the exercise by citizens of the European Union residing in France, not being French nationals, of the right to vote and to stand as candidates at municipal elections and transposing Directive 94/80/EC of 19 December 1994, J.O.R.F. p. 7975.

⁴⁵ CC, decision n° 98-400 DC *Institutional Act determining the conditions for the application of Article 88-3 of the Constitution relating to the exercise by citizens of the European Union residing in France, not being French nationals, of the right to vote and stand as candidates at municipal elections and transposing Directive 94/80/EC of 19 December 1994* of 20 May 1998, *Rec.* 251.

“thus, there would be less an extension of the norms of reference of the control of constitutionality of the Institutional Act than a pure and simple application of a constitutional provision.”⁴⁶

It is not certain that the *Conseil constitutionnel* did anything different in its decision of 2006. The reference to European Directives is not made *per se* but in order to give effect to Article 88-1 of the Constitution. It is this constitutional provision that is enforced and which constitutes the norm of reference.⁴⁷ European Union law therefore cannot be said to have been incorporated in the *bloc de constitutionnalité* and to have received the constitutional value which that provides.⁴⁸ The control exercised by the *Conseil constitutionnel* therefore remains of a constitutional nature.⁴⁹

Such a conclusion is confirmed by the intensity of this control. Since it was compelled by Article 61 to give a ruling within one month, the French constitutional court took the view that it was unable to make a preliminary reference to the European Court of Justice. In consequence, its review could only lead to sanctioning a statutory provision “obviously incompatible with the Directive which it is intended to transpose”.⁵⁰ It could be held that this reference to its time-constrained office is an opportunistic argument.⁵¹ For instance, in its *Treaty establishing a Constitution for Europe* decision, it could have argued that the full effectiveness of the primacy principle from the European perspective would have required an extension of this allotted time when European matters were concerned. However, strategic considerations aside, the intensity of the control by the *Conseil constitutionnel* leads to two conclusions.

⁴⁶ B. Genevois, “Normes de références du contrôle de constitutionnalité et respect de la hiérarchie en leur sein”, *op. cit.*, at fn. 33 above, at 328. For a similar opinion, even if more moderate, see D. Rousseau, *Droit du contentieux constitutionnel*, *op. cit.*, at fn. 28 above, at 118.

⁴⁷ For a similar point of view, see C. Maugüé, “La décision du Conseil constitutionnel sur la loi pour la confiance dans l’économie numérique ou la consécration par le Conseil constitutionnel de la théorie de la directive-écran” (2004) n° 28 *Courrier juridique des finances et de l’industrie* 2-6 at 4 and J. Roux, “Le Conseil constitutionnel, le droit communautaire dérivé et la Constitution” (2004) *Revue du droit public et de la science politique en France et à l’étranger* 912-933 at 922.

⁴⁸ In contrast with what have been argued by some authors, see for example F. Chaltiel, “Nouvelles variations sur la constitutionnalisation de l’Europe : À propos de la décision du Conseil constitutionnel sur l’économie numérique” (2004) n° 480 *Revue du Marché commun et de l’Union européenne* 450-454 at 452.

⁴⁹ For a similar conclusion, see C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information”, *op. cit.*, at fn. 37 above, at 104-106.

⁵⁰ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 20. A conclusion which has been reaffirmed in CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120 at para. 7 or CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 18.

⁵¹ For a similar interpretation of the case-law of the *Conseil constitutionnel*, see J. Rossetto, “L’Union européenne face à l’identité constitutionnelle de la France” in M. Ameller, P. Avril, J.-P. Camby and *al.* (eds.), *Constitutions et pouvoirs : Mélanges en l’honneur de Jean Gicquel* (Paris: Montchrestien, 2008) 447-464 at 456-457.

First, as the *Conseil constitutionnel* can only sanction the manifest disregard of directives, it is first and foremost the compliance of the legislator with its constitutional duty that is assessed and it is only the Constitution that is enforced.⁵² In this control, it is not so much respect for European Union law but rather the operation of implementation itself that is concerned. The *Conseil constitutionnel* is only the court of the “derivative nature”⁵³ of the implementing statute. By limiting its review to the manifest disregard of the directives, the *Conseil constitutionnel* indicates that it does not intend to get involved in a “minimum control of conventionality”⁵⁴ and reverse the principle enunciated in its *Act pertaining to the voluntary interruption of pregnancy* decision of 1975. In contrast, the constitutional court stresses the constitutional nature of its review⁵⁵ in accordance with Article 61 of the Constitution.⁵⁶ Following this logic, it declined to exercise its review powers to check the compliance of a statute with a directive that the domestic measure does not intend to implement.⁵⁷

Secondly, by concluding that collaboration with its European counterpart is impossible, the *Conseil constitutionnel* explicitly left this jurisdictional dialogue in the hands of the ordinary courts.⁵⁸ Therefore, these courts rather than the *Conseil constitutionnel* are able to act as Community courts (to use this now-dated term), with the *Conseil constitutionnel* being only a constitutional court. As Cassia and Saulnier-Cassia have concluded on the basis of the

⁵² Genevois had already doubted of the opportunity to include European Union law in the *bloc de constitutionnalité* on the basis of Article 88-1 in 1996, even though its argument relies on practical reasons, see B. Genevois, “Normes de références du contrôle de constitutionnalité et respect de la hiérarchie en leur sein”, *op. cit.*, at fn. 33 above, at 338.

⁵³ P.-Y. Monjal, “Le Conseil constitutionnel et les directives communautaires : l’incompétence du juge suprême comme garantie de l’opposabilité de la Constitution au droit communautaire ?” (2004) *Revue du Droit de l’Union Européenne* 509-522 at 516-519.

⁵⁴ As Roblot-Troizier defines it, A. Roblot-Troizier, “Note sous CC, décision n° 2006-543 DC du 30 novembre 2006, Loi relative au secteur de l’énergie” (2007) *Revue française de droit administrative* 596-598 at 597.

⁵⁵ For a similar opinion, A. Levade, “La constitutionnalité des lois de transposition entre conformité et compatibilité : Esquisse d’un bilan de la jurisprudence « européenne » récente du Conseil constitutionnel” in *Renouveau du droit constitutionnel : Mélanges en l’honneur de Louis Favoreu* (Paris: Dalloz, 2007) 1291-1306 at 1304-1305.

⁵⁶ Kovar, while pointing out that this decision is in accordance with the *Act pertaining to the voluntary interruption of pregnancy* decision of 1975, concludes that the *Conseil constitutionnel* proceeded to an “indirect control of conventionality”, see J.-P. Kovar, “Vers un statut du droit d’exécution du droit communautaire dans la jurisprudence du Conseil constitutionnel (Cons. const., déc. n° 2006-543 DC, 30 nov. 2006, loi relative au secteur de l’énergie)” (2007) n° 2 *Europe* 4-6 at 6. It seems though that this control of conventionality is only indirect because it is first and foremost a direct control of constitutionality.

⁵⁷ CC, decision n° 2006-535 DC of 30 mars 2006 on the *Act for the equality of chances* of 30 March 2006, *Rec.* 50 at para. 28.

⁵⁸ This conclusion is common place since its decisions of June and July 2004 (see for example CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7). It was subsequently reaffirmed both in CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 20 and CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120 at para. 7 as well as, more recently, in CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 18 and CC, decision n° 2011-631 DC on the *Act pertaining to immigration, integration and citizenship* of 9 June 2011 (unreported) at para. 45. For further considerations of CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 which was focused on the issue of distribution of jurisdictional competences between French domestic courts in relation to European Union law, see *infra* at 418-421.

constraints put upon the use of Article 88-1 by the *Conseil constitutionnel*, “the *Conseil constitutionnel* can in no way be qualified as a Community judge.”⁵⁹

Per se, these jurisdictional consequences are not directly related to the nature of the primacy of European Union law in the French legal order. However, it confirms the willingness of the *Conseil constitutionnel* to encapsulate the interpretation of Article 88-1, and therefore the potential prevalence of European rules deduced from it, in a strict constitutional perspective.

In conclusion, if according to the *Treaty establishing a Constitution for Europe* decision, the primacy principle is in conformity with the Constitution under the interpretation of Article 88-1 given in 2004, one conclusion becomes obvious. The primacy principle as it exists in the French legal system depends on the French Constitution and, *a contrario*, the autonomous nature of the European legal order - which constitutes the basis of the reasoning of the European Court of Justice - is denied.⁶⁰ In this respect, the change of constitutional basis from Article 55 to Article 88-1 is also the continuation of the grounding of the status of European rules in the French normative hierarchy on the Constitution.⁶¹ This explains the possible definition of primacy as jurisdictional immunity rather than a positive hierarchical rule once the domestic looking-glass is traversed.

⁵⁹ P. Cassia and E. Saulnier-Cassia, “Le Conseil constitutionnel vérifie qu’une directive communautaire dont le loi déferée assure la transposition ne méconnaît pas de règles ou principes inhérents à l’identité constitutionnelle de la France” (2006) n° 10 *Droit administratif* 31-33 at 33. For a similar opinion, see F. Chaltiel, “Nouvelle précision sur les rapports entre le droit constitutionnel et droit communautaire : La décision du Conseil constitutionnel du 27 juillet 2006 sur la loi relative aux droits d’auteurs” (2006) n° 68 *Revue française de Droit constitutionnel* 837-847 at 845.

⁶⁰ In the same sense, see H. Gaudin, “Primauté « absolue » ou primauté « relative » ?” in H. Gaudin (ed.), *Droit constitutionnel, droit communautaire : Vers un respect constitutionnel réciproque ?* (Paris; Aix-en-Provence: Economic; Presses universitaires d’Aix-Marseille, 2001) 97-120 at 99 where it is argued that “theoretically, by making the primacy of Community law relative, constitutional law denies it in its essence” (translation by the author).

⁶¹ For a similar analysis, see P. Gaïa, “Le Conseil constitutionnel et l’Europe” in *Renouveau du droit constitutionnel : Mélanges en l’honneur de Louis Favoreu* (Paris: Dalloz, 2007) 1279-1290 at 1287.

2. *The Process of Reception of the Doctrine of Primacy into the Domestic Legal Order as Interpreted by the Irish Courts*

One of the main difficulties that the Irish legal system presents when European Union law issues are at stake consists of the cross-references between domestic norms and European concepts.⁶² This is noticeable both at legislative and constitutional levels. Section 2 (1) of the European Communities Act 1972 (as amended) specifies that European Union law is received in the domestic legal order “under the conditions laid down in the treaties governing the European Union”. Similarly, Article 29.4.6°, the immunity clause, is fully effective when it comes to European Union law itself and has conditioned the enjoyment of this specific regime to “laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union”.

In consequence, a question is raised as to the extent of the submission of the Irish legal system to the European Union legal order. In France, the primacy principle defined in terms of jurisdictional immunity is the result of the interpretation by the *Conseil constitutionnel* of Article 88-1 of the Constitution, which merely provides for the participation of France in the European Union. It is thus the jurisdictional issue that entails normative consequences.⁶³ The problem is slightly different in Ireland. Due to the inscription of the European concepts in domestic instruments themselves, their nature depends to a great extent on the attitude of the courts towards them. From this perspective, it is in the interpretation made by Irish courts that the nature of the mechanism ensuring the conformity of the Irish legal system with European obligations, among which the primacy principle stands out, can be determined. In other words, the assessment of the submission of the Irish legal order is to be found in the jurisdictional competence either of Irish courts or of the European Court of Justice to be the authentic interpreters of the European elements mirrored in the domestic legal order.⁶⁴ From this, it will

⁶² On this difficulty, see J. Temple Lang in “The Widening Scope of Constitutional Law” in D. Curtin and D. O’Keefe (eds.), *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T. F. O’Higgins* (Dublin: Butterworth 1992) 229-245 at 229-230.

⁶³ On this logic in French law, see for example D. Biroste, “Précisions sur les rapports entre droit constitutionnel et droit communautaire : Note sous Cons. const., déc. n° 2004-496 DC du 10 juin 2004 (Économie numérique), n° 2004-497 DC du 1er juillet 2004 (Paquet télécom), n° 2004-498 DC (Bioéthique) et n° 2004-499 DC (Protection des données personnelles) du 29 juillet 2004” (2004) *Revue de la recherche juridique - Droit prospectif* 1829-1847 at 1842.

⁶⁴ In this sense, see J. Casey, *Constitutional Law in Ireland* (Third edition, Dublin: Round Hall Sweet & Maxwell, 2000) at 213.

be possible to infer if the “renvoi”⁶⁵ refers to European considerations of a domestic nature or to the European Union legal order itself.

Temple Lang presents this issue as an opposition between an objective and a subjective interpretation of the Irish norms referring to European Union law when he states that:

“Article 29.4.3 [as it was then] authorises Irish measures which would otherwise be unconstitutional if they are necessitated by the obligations of membership of the Communities. This must mean (and was certainly intended to mean) ‘necessitated objectively by the obligations of membership as determined by Community law’. In other words, it enabled the Irish authorities to do everything which Community law, correctly interpreted, might oblige them to do, but did not otherwise exempt them from the duty to respect the 1937 Constitution. It cannot be interpreted as meaning ‘necessitated by the obligations of membership as ultimately judged subjectively by the Irish courts’.”⁶⁶

Some cases and authors point, as Temple Lang does, towards an objective interpretation of these features, *viz.*, an interpretation made by the European Court of Justice and the subsequent submission of the Irish legal order to this European perspective.⁶⁷ However, describing the Irish courts as having the last word when it comes to these legal factors seems to be a more appropriate characterisation of the position, and if this is correct, would justify describing the primacy principle as it is received in the Irish legal order as strictly domestic in nature.

As has been seen in the text above,⁶⁸ it appeared, at least initially, that Irish courts favoured the objective approach, submitting the content of the relevant domestic provisions to the European Union interpretation of the different concepts involved. Insofar as concerns the primacy issue, its presence in the Irish legal system depends on the European Communities Act 1972 (as amended), section 2 (1) of which refers to “the conditions laid down in the treaties

⁶⁵ J. Temple Lang, “The Widening Scope of Constitutional Law”, *op. cit.*, at fn. 62 above, at 231.

⁶⁶ *Ibid.* at 231.

⁶⁷ Even though it is not expressed in terms of objective interpretation, see, for a similar assessment, P. Gallagher, “The Constitution and the Community” (1993) 2 *Irish Journal of European Law* 129-145 at 131-133. See also A. Whelan, “Constitutional Law - *Meagher v. Minister for Agriculture*” (1993) 15 *Dublin University Law Journal* 152-173, in particular at 153 where it is argued, regarding the interpretation of section 2 of the European Communities Act 1972 (as amended), that “the section requires those elements of E.C. law which are directly applicable (*e.g.* E.C. regulations, some treaty provisions) or directly effective (as can transpire in the case of directives) to be enforced in Irish courts on terms dictated by the Treaties as interpreted by the Court of Justice.”

⁶⁸ See *supra* at 67-68.

governing the European Union”. In *Pigs and Bacon Commission v. McCarren & Co. Limited*,⁶⁹ Costello J. understood this expression as referring to the Treaties as interpreted by the European Court of Justice, thereby receiving into Irish law the doctrine of primacy as developed in the case-law of the European Court of Justice.⁷⁰

However, due to the legislative nature of the Act of reception, primacy cannot exist without Article 29.4.6° of the Constitution ensuring immunity both for European rules themselves and for “laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union”. When confronted with the need for a definition of “necessitated”, the Supreme Court in *Crotty v. An Taoiseach*⁷¹ came to the conclusion that it refers to a legal obligation existing in European Union law (or Community law as it was then).⁷²

In both cases, one can assume that the position of the courts is to give a European Union law meaning to the content of domestic norms involving a European dimension, through the use of a preliminary reference if required.⁷³ In this sense, it seems that they have recourse to an objective interpretation as defined above.⁷⁴ However, this assessment appears to be at odds with other landmark decisions, in particular, *Campus Oil Limited v. Minister for Industry and Energy*,⁷⁵ *Meagher v. Minister for Agriculture*⁷⁶ and *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*.⁷⁷ With regard to these decisions, it seems that the hypothesis of a subjective interpretation of the European Communities Act 1972 (as amended) and of Article 29.4.6°, *i.e.*, an interpretation of the concepts included in these provisions as of an Irish law nature, is more appropriate in describing the behaviour of the domestic courts - even though they might subjectively choose to adopt a European perspective.

*Campus Oil Limited v. Minister for Industry and Energy*⁷⁸ concerned the regulation of the oil market by the Fuels (Control of Supplies) Order 1982.⁷⁹ Some oil companies challenged

⁶⁹ (1978) 2 *J.L.S.E.L.* 77.

⁷⁰ *Ibid.* at 109.

⁷¹ [1987] I.R. 713.

⁷² *Ibid.* at 767.

⁷³ To support this point, see J. Temple Lang, “The Widening Scope of Constitutional Law”, *op. cit.*, at fn. 62 above, at 231.

⁷⁴ See for example, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary* (London: Sweet & Maxwell, 1995) at 52.

⁷⁵ [1983] I.R. 82.

⁷⁶ [1994] 1 I.R. 329.

⁷⁷ [1989] I.R. 753.

⁷⁸ [1983] I.R. 82.

⁷⁹ S.I. No 280 of 1982.

this Order and in the High Court, Murphy J. decided to make a preliminary reference to the European Court of Justice for interpretation of the E.E.C. provisions under Article 177 (now Article 267 of the Treaty on the Functioning of the European Union).⁸⁰ It was this decision to refer which was appealed to the Supreme Court. The case was mainly decided on constitutional law grounds. Walsh J. held that a preliminary reference was not a decision in the sense of Article 34.4.3° of the Irish Constitution and that therefore the Supreme Court could not hear an appeal on it.⁸¹ However, for present purposes, the Supreme Court's understanding of the preliminary reference mechanism, as analysed by Walsh J. in an *obiter dictum*, is more interesting.

Having taken the view that under Article 177 the “national judge has an untrammelled discretion as to whether he will or will not refer questions for a preliminary ruling”,⁸² Walsh J. held that even if this reference was a decision in the sense of Article 34.4.3° of the Irish Constitution, it would have to yield to the primacy of European Union law when he stated that:

“however, even if the reference of questions to the Court of Justice were a decision within the meaning of Article 34 of the Constitution, I would hold that, by virtue of the provisions of Article 29, s. 4, sub-s. 3, of the Constitution, the right of appeal to this Court from such a decision must yield to the primacy of Article 177 of the Treaty. That article, as a part of Irish law, qualifies Article 34 of the Constitution in the matter in question.

It is as a matter of Irish law that Article 177 of the Treaty confers upon an Irish national judge an unfettered discretion to make a preliminary reference to the Court of Justice for an interpretation of the Treaty, (...). To fetter that right, by making it subject to review on appeal, would be contrary to both the spirit and the letter of Article 177 of the Treaty.”⁸³

In a way, the reasoning adopted by Walsh J. was, as he himself underlined it,⁸⁴ in conformity with the purpose of the preliminary reference mechanism, a mechanism which is essential to the collaboration between domestic and European courts and therefore the pivot of

⁸⁰ [1983] I.R.L.M. 258.

⁸¹ [1983] I.R. 82 at 86-87.

⁸² *Ibid.* at 86.

⁸³ *Ibid.* at 87.

⁸⁴ *Ibid.* at 87.

the primacy of European law.⁸⁵ However, the content ascribed by the Supreme Court to what was then Article 177 (now Article 267 of the Treaty on the Functioning of the European Union) went beyond the case-law of the European Court of Justice - which did not preclude the right to appeal a decision to make a preliminary reference⁸⁶ - showing a willingness on the part of the Supreme Court to be “*plus royaliste que le roi*.”⁸⁷

If the Supreme Court was able to differ from the European Court of Justice on the content of the preliminary reference mechanism, it was due to the perceived Irish law nature of Article 177 when received into the domestic legal order. Walsh J. relied a number of times on this domestic nature of the provisions concerned, justifying as such his disregard for the case-law of the European Court of Justice and his ability to give an Irish meaning to these provisions by stating that:

“these cases are of interest as showing the views that were expressed by the Court of Justice in examining the question as a question of Community law. I do not seek to rely upon any of the statements in those cases because, for the reason I have already given, this matter must be decided as a question of Irish law.”⁸⁸

Walsh J. also recognised in his judgment the monopoly of the European Court of Justice over the interpretation of the Treaties.⁸⁹ This necessarily leads, if one wants to consider the decision as coherent, to the conclusion that “Treaty provisions have a dual existence, as part of Community law and as part of national law, and that they are capable of different interpretations within the two legal orders.”⁹⁰ This reinforces the domestic nature of European concepts as existing in the domestic legal order.

⁸⁵ For the conformity of Walsh J.’s position with the European logic of the Treaties, see D. O’Keefe, “Appeals Against an Order to Refer under Article 177 of the EEC Treaty” (1984) 9 *European Law Review* 87-104. McMahon and Murphy even qualify the decision of the Supreme Court as a “co-operative attitude”, B. M. E. McMahon and F. Murphy, *European Community Law in Ireland* (Dublin: Butterworth (Ireland), 1989) at 279.

⁸⁶ This was notably stated in Case 146/73 *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] E.C.R. 139. On this point, see for example, M. P. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press, 2010) at 325-329 and, more particularly in the context of the *Campus Oil* decision, F. Murphy, “*Campus Oil Ltd., Estuary Fuel Ltd., McMullan Bros. Ltd., Ola Teoranta, P.M.P.A. Oil Company Ltd., Tedcastle McCormick and Company Ltd. v. The Minister for Industry and Energy, The Attorney General and The Irish National Petroleum Corporation Ltd.* (1982-1983) J.I.S.E.L. 43; (1984) 1 C.M.L.R. 479” (1984) 21 *Common Market Law Review* 741-755 at 749-752.

⁸⁷ D. O’Keefe, “Appeals Against an Order to Refer under Article 177 of the EEC Treaty”, *op. cit.*, at fn. 85 above, at 97 or “*plus communautaire que les Communautés*” in D. R. Phelan, and A. Whelan, “National constitutional law and European integration: FIDE Report” (1997) 6 *Irish Journal of European Law* 24-64 at 37.

⁸⁸ [1983] I.R. 82 at 87.

⁸⁹ *Ibid.* at 87.

⁹⁰ See G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 19.

In conclusion and contrary to the objective point of view, the Supreme Court stressed the subjective interpretation by the Irish courts as authentic interpreters of the rules governing the primacy of European Union law in the domestic legal order and their concomitant domestic nature.

*Meagher v. Minister for Agriculture*⁹¹ concerned the implementation of European directives in the domestic legal order. This issue raises a number of questions which will be analysed later on,⁹² however, this part will be focused on the constitutionality of the mechanism ensuring the implementation of these directives, *viz.*, the first part of the judgement. Since their modification by the European Union Act 2009 at the time of the ratification of the Treaty of Lisbon, sections 3 and 4 of the European Communities Act 1972 (as amended) state that:

“3.—(1) A Minister of State may make regulations for enabling section 2 of this Act to have full effect.

(2) Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act).

(...)

4.—(1) (a) Regulations under this Act shall have statutory effect.”⁹³

The facts in *Meagher v. Minister for Agriculture* concerned the implementation of European Directives⁹⁴ by statutory instruments⁹⁵ with the purpose of banning certain substances in livestock farming. Mr. Meagher was prosecuted for using one of these illegal substances, *viz.*, clenbuterol, also known as “angel dust”. Aside from criticising the statutory instruments, the plaintiff questioned the constitutionality of section 3 of the European Communities Act 1972

⁹¹ [1994] 1 I.R. 329.

⁹² See *infra* at 206-210.

⁹³ Due to the ambiguity between the regulations made by a Minister and European Regulations, the term statutory instrument will refer to the formers.

⁹⁴ In particular, Council Directive 81/602/EEC of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action [1981] O.J. L 222/32, Council Directive 85/358/EEC of 16 July 1985 supplementing Directive 81/602/EEC concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action 1985] O.J. L 191/46 and Council Directive 86/469/EEC of 16 September 1986 concerning the examination of animals and fresh meat for the presence of residues [1986] O.J. L 275/36.

⁹⁵ European Communities (Control of Oestrogenic, Androgenic, Gestagenic and Thyrostatic Substances) Regulations 1988 (S.I. No 218 of 1988) and European Communities (Control of Veterinary Medicinal Products and their Residues) Regulations 1990 (S.I. No 171 of 1990).

(as amended), *viz.*, the very scheme allowing implementation through statutory instruments.⁹⁶ In the High Court, Johnson J. argued that, if a duty to implement the content of directives existed in European law, the member states were left free to decide the method of implementation. In consequence, section 3 of the European Communities Act 1972 (as amended) allowing a minister to amend primary legislation through statutory instruments could not be deemed “necessitated by the obligations of membership”. He found this section unconstitutional as contrary to Article 15.2.1° of the Constitution, which states that:

“the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.”⁹⁷

The decision was appealed by the Government to the Supreme Court and the constitutionally-required single judgment concerning the constitutionality of section 3 of the European Communities Act 1972 (as amended) was given by Finlay C.J., according to Article 34.4.5° of the Constitution. Unlike the High Court, the Supreme Court found the provisions to be constitutional. Stressing the importance of the doctrine of primacy in the interpretation of what is “necessitated by the obligations of membership”, it held that:

“the power to make regulations contained in section 3, sub-s. 1 of the Act of 1972 is exclusively confined to the making of regulations for one purpose, and one purpose only, that of enabling s. 2 of the Act to have full effect. Section 2 of the Act which provides for the application of the Community law and acts as binding on the State and as part of the domestic law subject to conditions laid down in the Treaty which, of course, include its primacy, is the major or fundamental obligation necessitated by membership of the Community. The power of regulation-making, therefore, contained in s. 3 is *prima facie* a power which is part of the necessary machinery which became a duty of the State upon its joining the Community and therefore necessitated by that membership.

(...)

The Court is accordingly satisfied that the power to make regulations in the form in which it is contained in s. 3, sub-s. 2 of the Act of 1972 is necessitated by the

⁹⁶ Similar criticisms had already risen in the doctrine, see for example A. Whelan, “Article 29.4.3 and the Meaning of ‘Necessity’” (1992) 2 *The Irish Student Law Review* 60-83 at 73.

⁹⁷ [1994] 1 I.R. 329 at 344.

obligations of membership by the State of the Communities and now of the Union and is therefore by virtue of Article 29, s. 4, sub-ss. 3, 4 and 5 immune from constitutional challenge.”⁹⁸

Of course, as Hogan and Whelan put it, the “patent necessity of *some* machinery for applying and implementing Community law in Ireland can hardly mean that *any* machinery will do”.⁹⁹ This decision, however, is significant for the nature of the norms considered. In this instance, the method of implementation cannot be the result of a European Union obligation as European law explicitly considers that the member states are free in this respect as long as the objectives of the directives are received in their legal orders. In consequence, despite the reference to the doctrine of primacy, the decision as to the constitutionality of section 3 of the European Communities Act 1972 (as amended) refers to purely domestic legal issues necessary to fulfil the European commitments undertaken by Ireland.¹⁰⁰ This leads to two conclusions. On the one hand, the objective interpretation that some require cannot encompass the full extent of Article 29.4.6° as some of its implications are disconnected from European Union law.¹⁰¹ On the other hand, and *a contrario*, this ruling underlines, as in *Campus Oil Limited v. Minister for Industry and Energy*, the Irish law nature of the rules receiving the primacy principle in the domestic legal order and their subsequent domestic law meaning as determined by Irish courts, even if they show a deference for European Union law that the European Union does not require.¹⁰² The very possibility for Irish courts to give a meaning to the necessity condition that differed from the content of European Union law reasserted the formal Irish law nature of the norms at stake, whether these be the European Communities Act 1972 (as amended) or Article 29.4.6° of the Constitution, and their monopoly on the interpretation of these provisions.¹⁰³

⁹⁸ *Ibid.* at 351-252.

⁹⁹ G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 60.

¹⁰⁰ In this sense, see G. W. Hogan, “The implementation of European Union law in Ireland: the *Meagher* case and the democratic deficit” (1994) 2 *Irish Journal of European Law* 190-202 at 193.

¹⁰¹ Hogan and Whelan seem to reach a similar conclusion when they recognise that *Meagher* “qualifies rather than overrules *Crotty*”, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, 67.

¹⁰² See for example D. R. Phelan, “‘Necessitated’ by the obligations of membership? Article 29.4.5° of the Constitution” (1993) 11 *Irish Law Times* 272-275 at 273 or A. Whelan, “Constitutional Law - *Meagher v. Minister for Agriculture*”, *op. cit.*, at fn. 67 above, at 163 and 173.

¹⁰³ On this conclusion, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Dublin: Round Hall Sweet & Maxwell, 1997) at 333-4 for the European Communities Act 1972 (as amended) and at 340-49 for the constitutional immunity clause, in particular at 344 for its interpretation in *Meagher v. Minister for Agriculture*.

It is this very ability that is at stake in *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*.¹⁰⁴ This case¹⁰⁵ concerned the possible incompatibility between the European freedom to provide services and the right to life of the unborn, protected by Article 40.3.3° of the Constitution. In the decision of the Supreme Court, the judges made clear that the provisions related to the primacy of European Union law were only for domestic courts to interpret. According to Walsh J.:

“in the last analysis only this Court can decide finally what are the effects of the interaction of the 8th Amendment of the Constitution [related to the right to life of the unborn] and the 3rd Amendment of the Constitution [related to Community law as it was then].”¹⁰⁶

McCarthy J. was of a similar opinion, stressing that:

“the sole authority for the construction of the Constitution lies in the Irish courts, the final authority being this Court.”¹⁰⁷

These affirmations that Irish courts are the only jurisdictions competent to interpret the constitutional provisions dedicated to European law¹⁰⁸ is another proof that the provisions defining the primacy of the European Union law in the domestic legal order are of a domestic nature. This point has been repeated in subsequent decisions, for example, as regards the European Communities Act 1972 (as amended), by Fennelly J. in *Maher v. Minister for Agriculture*.¹⁰⁹

Of course, some subsequent decisions tend to favour an objective interpretation relying on the European nature of the concepts at stake. For example, in *Tate v. Minister for Social*

¹⁰⁴ [1989] I.R. 753.

¹⁰⁵ On the issue of its particular significance for the notion of Irish constitutional identity, see *infra* at 265-269.

¹⁰⁶ [1989] I.R. 753 at 768-9. He reaffirmed his position in an extra-judicial context, see B. Walsh, “Reflections on the Effects of Membership of the European Communities in Irish Law” in F. Capotorti, C.-D. Ehlermann, J. Frowein and *al.* (eds.), *Du droit international au droit de l'intégration : Liber Amicorum Pierre Pescatore* (Baden-Baden: Nomos Verlag, 1987) 805-820 at 809.

¹⁰⁷ [1989] I.R. 753 at 770.

¹⁰⁸ Writing in an extra-judicial context, O'Higgins J. defended the same point of view, see T. F. O'Higgins, “The Constitution and the Communities - Scope for Stress?” in J. O'Reilly (ed.), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Dublin: Round Hall Press, 1992) 227-241 at 229.

¹⁰⁹ [2001] 2 I.R. 139 at 251 where using the expression “machinery” to qualify the European Communities Act 1972 (as amended) as Finlay C.J. in *Meagher*, he specified that it was “essential (...) as a matter of Irish law”.

Welfare Ireland,¹¹⁰ Carroll J. affirmed that the relevant Irish provisions were only a “conduit pipe”,¹¹¹ whose purpose was not to convert European Union law into constitutional or legislative norms but merely to ensure that it had effects in the domestic legal order. However, the three decisions analysed show that the “conduit pipe” is not neutral. Contrary to Temple Lang’s opinion, Ireland is still a dualist state with regard to European Union law¹¹² and this dualist lens can not but affects the nature of the European concepts when mirrored in the Irish legal order.

The above-discussed decisions do not all directly concern the doctrine of primacy. *Crotty* and *Meagher* primarily deal with the interpretation of the “necessitated” clause. However, the existence of the European principle in the Irish legal system depends on the constitutional immunity defined in Article 29.4.6° of the Irish Constitution.¹¹³ It is in this sense that the case-law of Irish courts concerning the definition of “necessitated” is relevant to the issue of primacy since it is the condition for domestic rules related to European law to enjoy constitutional immunity.¹¹⁴

Determining the nature of the primacy principle in the Irish legal order amounts to assessing whether the concepts contained in Article 29.4.6° constitute an objective “renvoi” to European law as interpreted by the European Court of Justice. The above-mentioned decisions show that, in contrast, this principle cannot escape the formal domestic nature of the norms in which it is inscribed and the subsequent status of Irish courts as their authentic interpreter. Behind their apparent submission to the European doctrine of primacy, it is important to make a distinction between what courts do and what they say they do. It is because the primacy principle as received in the Irish legal order is not of a European nature but of a domestic one that the courts can, at will,¹¹⁵ either subjectively favour a European perspective as in *Crotty v. An Taoiseach*,¹¹⁶ subjectively follow a European logic beyond what is conceived by the European Union itself as in *Campus Oil Limited v. Minister for Industry and Energy*,¹¹⁷ subjectively oppose the primacy of the European Union law as in *Society for the Protection of Unborn*

¹¹⁰ [1995] 1 I.R. 418.

¹¹¹ *Ibid.* at 437.

¹¹² See J. Temple Lang, “The Widening Scope of Constitutional Law”, *op. cit.*, at fn. 62 above, at 230.

¹¹³ See *supra* at 87-91.

¹¹⁴ As Barrett argues: “the question of when laws, acts or measures will be regarded as ‘necessitated’ is obviously a significant one - the more stringent the approach taken by the Irish courts to the concept, the more tightly drawn is this particular potential choke chain on the reception of European Union law into the Irish legal system”, G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution” (2012) 48 *Irish Jurist* 132-172 at 142.

¹¹⁵ For a similar argument, see D. R. Phelan, and A. Whelan, “National constitutional law and European integration: FIDE Report”, *op. cit.*, at fn. 87 above, at 38.

¹¹⁶ [1987] I.R. 713.

¹¹⁷ [1983] I.R. 82.

*Children (Ireland) Limited v. Grogan*¹¹⁸ or subjectively give a meaning to the necessity clause from a pure constitutional perspective disconnected from European obligations as in *Meagher v. Minister for Agriculture*.¹¹⁹

A closer look at the advocates of an objective interpretation shows that they do not so much contest the domestic law meaning of these provisions but rather promote a certain content to be given to them that they express in a prescriptive manner rather than a descriptive one.¹²⁰ For example, their criticisms of the decision in *Meagher v. Minister for Agriculture*¹²¹ refer to the merits of the interpretation of “necessitated” chosen by the Supreme Court¹²² rather than its competence to make that choice.¹²³

For the same reasons, the “renvoi” to European law in section 2 (1) of the European Communities Act 1972 (as amended) is dependent on the subjective and authentic interpretation of Irish courts due to the domestic nature of this argument. Arguably, the reference in section 2 (1) of the European Communities Act 1972 (as amended) to the acts done by European institutions ensures the reception in the Irish legal orders of the decisions of the European Court of Justice, and therefore the doctrine of primacy as defined in the European case-law. However, one can doubt of the submission of this legislative provisions to an objective interpretation of the European Court of Justice. First, the very necessity of the European Communities Act 1972 (as amended) for the existence of European law in the Irish legal order seems to contradict the European case-law itself. By maintaining its traditional dualism towards European Union law, Ireland actually denies its autonomous character. As Whelan argues:

¹¹⁸ [1989] I.R. 753.

¹¹⁹ [1994] 1 I.R. 329.

¹²⁰ See for example G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 14 where the authors come to the conclusion that “it would be contrary to the object of section 2 of the 1972 Act (...) to read it as permitting national interpretations of the Community Treaties other than those adopted by the Court of Justice, even though the section itself is otiose from the point of view of Community law” or J. Temple Lang in “The Widening Scope of Constitutional Law”, *op. cit.*, at fn. 62 above, at 231 where it is argued that “this must mean (and was certainly intended to mean) ‘necessitated objectively by the obligations of membership as determined by Community law’.”

¹²¹ [1994] 1 I.R. 329.

¹²² In this regard, for Hogan and Whelan, the interpretation of what is now Article 29.4.6° “must be informed by the objective requirements of Community law”. They qualify the different interpretation given by the Supreme Court in the *Meagher* case as being “disingenuous” while not questioning the competence of the domestic court to give it. See G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 63. For a similar opinion, see G. W. Hogan, “The implementation of European Union law in Ireland: the *Meagher* case and the democratic deficit”, *op. cit.*, at fn. 100 above, at 199-202.

¹²³ The arguments suggested by Travers, who is in favour of the decision in *Meagher*, to support the interpretation of the Supreme Court against the critics questioning the content of the interpretation point toward the ability of the Irish courts to give a domestic meaning to these provisions, see N. J. Travers, “The Reception of Community Legislation into Irish Law and Related Issues Revisited (2003) 38 *Irish Jurist* 58-91 at 72 or, by the same author, “Community Directives: Effects, Efficiency, Justiciability” (1998) 7 *Irish Journal of European Law* 165-230 at 175-177.

“the existence of such national acts of reception appears implicitly to belie Community law’s claims to give rise to autonomous principles of supremacy and direct effect.”¹²⁴

The comparison of the legal mechanism chosen by Ireland with the European Communities Act 1972 (as amended) adopted in the United Kingdom confirms the Irish refusal to submit European law as present in the domestic legal order to the interpretation of the European Court of Justice. In the United Kingdom, the statute ensuring the reception of European law includes a section 3 (1) which states that “for the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).” Such an explicit reference to the case-law of the European Court of Justice in relation to the meaning to be ascribed to European rules has no equivalent in the Irish legislative instrument.¹²⁵ In consequence, one can argue that “the conditions laid down in the treaties governing the European Union” mentioned in section 2 (1) of the Irish European Communities Act 1972 (as amended) is left to the subjective interpretation of Irish courts as a rule of a formal domestic nature.¹²⁶

In conclusion, this bears witness to the consequences of the lack of a jurisdictional integration between domestic and European levels.¹²⁷ It justifies both the necessary collaboration of the Supreme Court which “has not abdicated its duty to interpret autonomously”¹²⁸ the domestic provisions dealing with the primacy principle as well as the dual nature of the doctrine of primacy either as a matter of European Union law or of national law depending on the

¹²⁴ A. Whelan, “National Sovereignty in the European Union” in T. Murphy and P. Twomey (eds.), *Ireland’s Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998) 277-292 at 284. For a similar opinion, see also D. O’Keefe, “Appeals Against an Order to Refer under Article 177 of the EEC Treaty”, *op. cit.*, at fn. 85 above, at 97.

¹²⁵ For a comparison of the Irish and British European Communities Acts 1972 (as amended) on this point, see D. Morris, “The Road to Brussels - Two Routes Compared” (1988) *Statute Law Review* 33-61 at 49-50. See also D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 103 above, at 334.

¹²⁶ In this sense, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 103 above, at 333-334.

¹²⁷ For such a consideration and its impact on the doctrine of primacy, see D. Ritleng, “Le principe de primauté du droit de l’Union” (2005) 41 *Revue trimestrielle de droit européen* 285-303 at 296.

¹²⁸ N. J. Travers, “The Constitutionality of the Implementation of EC Directives into Irish Law Revisited” (1994) 88 *Gazette of the Incorporated Law Society of Ireland* 99-101 at 100.

perspective chosen.¹²⁹ Its domestic nature in the Irish legal system founded on the supremacy of the Constitution explains *in fine* why it is understood as a constitutional immunity and not as a positive hierarchical superiority.

The domestic nature of the doctrine of primacy in the Irish and French legal orders is the reason why this doctrine is distorted when it traversed the national screen. The other essential consequence is its incorporation in a domestic legal architecture governed by the supremacy of the Constitution. Deprived of the absoluteness required from the European perspective, it is submitted to the Constitution of the member states. However, while the effectiveness of this doctrine relies on the negation of the Irish Constitution for European issues, it is constitutionally and positively defined in the French legal order. In consequence, the modalities of this submission are different in France and in Ireland.

¹²⁹ For the importance of the necessary awareness of the perspective chosen, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 103 above, at 339-340.

B. European Union Law Submitted to the Supremacy of the Irish and French Constitutions: Justifying the Limited Reach of the Doctrine of Primacy

From a domestic perspective, the doctrine of primacy is considered in accordance with the hierarchical logic of member states' legal orders – and the ineluctable supremacy of the Constitution.¹³⁰ In Ireland, the European principle of primacy is received *via* the European Communities Act 1972 (as amended) and *via* the exclusion of the Constitution from the normative relationship between European and national rules provided for by Article 29.4.6° of the Constitution. However, the validity of the 1972 Act itself is guaranteed by Article 29.4.5°. *In fine*, the doctrine of primacy is submitted to this constitutional licence to join what is now the European Union.

In the French legal order, the doctrine of primacy depends on the positive recognition of participation in European integration provided for in Article 88-1 of the Constitution. Deprived of a foundation in the autonomous nature of the European legal order, the primacy principle is submitted to the logic inherent in the French *bloc de constitutionnalité*. In consequence, it can yield to other constitutional provisions.

1. *The Doctrine of Primacy under Constitutional Licence: The Affirmation of the Supremacy of the Irish Constitution*

The difference seen between the European definition of the primacy principle and the understanding of the same doctrine in the Irish legal system as a constitutional immunity is due to its domestic nature once the national bridge is crossed.¹³¹ Received by the European Communities Act 1972 (as amended), European Union law is of the same legislative status in the Irish hierarchy of norms while, as a result of Article 29.4.6°, the Constitution is “abrogated”¹³² when the European dimension is concerned.

However, it seems that concluding that constitutional issues have been completely relinquished in the face of European Union law, and in particular its primacy principle, would

¹³⁰ On the constitutional limits of the doctrine of primacy due to its constitutional basis, see P. Craig, “The Constitutional Treaty and Sovereignty” in C. Kaddous and A. Auer, *Les principes fondamentaux de la Constitution européenne* (Geneva; Brussels; Paris: Helbing & Lichtenhahn; Bruylant; Librairie Générale de Droit et de Jurisprudence, 2006) 117-134 at 120-122.

¹³¹ See *supra* at 117-129.

¹³² B. Walsh, “Reflections on the Effects of Membership of the European Communities in Irish Law”, *op. cit.*, at fn. 106 above, at 806.

be misleading. In contrast, it is thanks to a constitutional licence to join what is now the European Union that this doctrine can exist in the Irish legal system. This is the consequence that can be drawn from Article 29.4.5° which, since its modification to facilitate the ratification of the Treaty of Lisbon, states that:

“the State may ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th day of December 2007 (“Treaty of Lisbon”), and may be a member of the European Union established by virtue of that Treaty.”

When compared to what is now Article 29.4.6°, this constitutional provision has received less attention in the case-law of Irish courts, in particular insofar as concerns its relationship with other domestic provisions related to European law. However, if the textual logic is taken into account rather than its normative value, *viz.*, if the potentialities opened by the text of the Irish Constitution are examined rather than its subsequent interpretation by Irish courts, one could argue that a full recognition of the consequences attached to this licence to join the European Union leads to the conclusion that the doctrine of primacy from the Irish legal perspective is subject to the supremacy of the Constitution. In order to reach this conclusion, it is first necessary to consider the purpose of Article 29.4.5°, compared with other constitutional and legislative provisions dealing with European Union law.

Joining the European Communities, as they were in 1973, involved many constitutional issues. From the point of view of principle, the European requirement that norms created at European level be enforced and prevail in the Irish legal system arguably collided with Article 5 which stated that “Ireland is a sovereign, independent, democratic state” and Article 6 of the Constitution which provides for a popular origin for the functions exercised by the state by declaring that:

- “1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.
2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.”

Membership of the Communities also arguably encroached on Article 15.2 of the Irish Constitution, which entrusts the legislative function solely to the Oireachtas.¹³³ In the same fashion, the European architecture infringed the privileged position of the Irish government in the exercise of executive role under Article 28.2 of the Constitution. The role of decisions of the European Court of Justice would arguably infringe the monopoly of Irish courts in the judicial function provided for by Article 34 of the Irish Constitution.

Membership to the European Union could therefore not be proceeded with without constitutional amendments. Ireland, rather than amending all the discrepancies between the Constitution and the European legal framework as they existed prior to accession, decided to grant a general licence to join the process of European integration by means of what is now Article 29.4.5° of the Constitution.¹³⁴ However, when compared to France where a constitutional provision, *viz.*, Article 88-1, provides directly and positively for the participation of France in the European Union, the Irish legal mechanism has for long been merely an enabling one, ensuring that Ireland “may” join what is now the European Union.¹³⁵ Arguably, the constitutional amendments carried out for the ratification of the Treaty of Lisbon may have changed the relationship between the Irish legal order and European Union since Article 29.4.4° now states that:

“Ireland affirms its commitment to the European Union within which the member states of that Union work together to promote peace, shared values and the well-being of their peoples.”

Nonetheless, one may doubt that this constitutional provision is sufficient to ensure the positive participation of Ireland in the European Union. Unlike in Article 88-1 of the French Constitution, there is no reference to the current European Treaties. This explains the explicit normative licence to ratify the Treaty of Lisbon provided for by Article 29.4.5°. Interpreting the two constitutional provisions in accordance with the principle of *effet utile*, which is “a principle of interpretation of a legal act aiming to give a meaning and an effect to provisions of this one

¹³³ According to Article 15.1.2°, the Oireachtas is composed of the Dáil, *viz.*, the lower house, the Seanad, *viz.*, the upper house and the President of Ireland.

¹³⁴ On the general nature of the authorisation, see J. Casey, *Constitutional Law in Ireland*, *op. cit.*, at fn. 64 above, at 205. In the same sense, see J. Temple Lang, “Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty” (1972) 9 *Common Market Law Review* 167-178 at 168 or P. McCutcheon, “The legal system” in P. Keatinge, (ed.), *Ireland and EC Membership Evaluated* (London: Pinter Publishers, 1991) 209-229 at 211.

¹³⁵ In this sense, see A. Whelan, “National Sovereignty in the European Union”, *op. cit.*, at fn. 124 above, at 283.

that does not make them useless”,¹³⁶ Article 29.4.4° might be best seen as having a political dimension and Article 29.4.5° as having a legal one. This new constitutional provision dedicated to the Irish commitment to the European Union would have a similar value to the principles contained in Articles 29.1 and 29.2 concerning international law and with which Article 29.4.4° shares an analogous wording.¹³⁷ Following this parallel, Article 29.4.4° would concern more specifically the action of the state at European level, a scope which, under the dualist doctrine to which Ireland adheres, would fall short of the requirements derived from the doctrine of primacy.¹³⁸

It can be therefore concluded that the principle which is contained in Article 29.4.5° is still pivotal after the ratification of the Treaty of Lisbon, just as it was before, in the presence of the primacy principle in the domestic legal order. The purpose of this constitutional provision is to eradicate the constitutional obstacles that would otherwise bar the reception of European Union law in the Irish legal system. In other words and in accordance with the dualist prism that Ireland kept on its relationship with the European legal order,¹³⁹ membership is positively provided for by the European Communities Act 1972 (as amended), the constitutionality of which is guaranteed by what is now Article 29.4.5° of the Constitution.¹⁴⁰

The interaction between Article 29.4.5° of the Constitution and the legislation ensuring the reception of European Union law in the Irish legal order was at the centre of the decision *Crotty v. An Taoiseach*.¹⁴¹ Due to the outcome of this case, subsequent major treaty developments of the process of European integration have been approved through referendum. This case concerned the ratification by Ireland of the Single European Act. Mr. Crotty challenged, *inter alia*, the constitutionality of the European Communities (Amendment) Act 1986, the purpose of which was to amend the European Communities Act 1972 (as amended) in such a way as to receive in the domestic legal system the new European Treaty - in the same manner as that in which the European Communities Act 1972 had done so for the three original Community Treaties.

¹³⁶ S. Guinchard and G. Montagnier (eds.), *Lexique des termes juridiques* (Thirteenth edition, Paris: Dalloz, 2001) at 230.

¹³⁷ On the analysis of Articles 29.1 and 29.2 of the Irish Constitution, see G. W. Hogan and G. F. Whyte, *J M Kelly: The Irish Constitution* (Fourth edition, Dublin: Lexis Nexis Butterworths, 2003) at 491-502.

¹³⁸ For a similar argument pointing towards the distinction between the European commitment of the state and the necessity of the reception of European law in the domestic legal order in order for Ireland to be “an effective member”, see the opinion of Barrington J. in *Crotty v. An Taoiseach* [1987] I.R. 713 at 753.

¹³⁹ See *supra* at 63-66.

¹⁴⁰ For a similar opinion, see O. Doyle, *Constitutional Law: Text, Cases and Materials* (Dublin: Clarus Press, 2008) at 387, A. Sherlock, “Sovereignty, the Constitution and the Single European Act” (1987) 6 *Dublin University Law Journal* 101-113 at 105 and J. Casey, *Constitutional Law in Ireland, op. cit.*, at fn. 64 above, at 206.

¹⁴¹ [1987] I.R. 713.

In the High Court, Barrington J. held that neither the European Communities Act 1972 (as amended) nor the European Communities (Amendment) Act 1986 could be deemed to have been necessitated by the obligations of membership. The immunity provided for by what is now Article 29.4.6° only applied “to legislative and administrative measures taken in the day-to-day running of the Community”¹⁴² and these measures only formed part of the Irish legal order due the European Communities Act 1972 (as amended). In other words, the European Communities Act 1972 (as amended) could not be “necessitated by the obligations of membership” but was rather necessary for the existence of these obligations in the Irish legal order. In consequence, in his opinion, the constitutionality of these acts could not rely on the immunity clause but only on the licence to join the process of European integration provided for by what is now Article 29.4.5°. He made this clear by stating that:

“to make them [European rules] part of the domestic law of this country the European Communities Act, 1972, was necessary. This Act cannot therefore have been passed by virtue of the second sentence of the Third Amendment but by virtue of the licence to join the European Community contained in the first sentence of the Third Amendment.

(...)

If the second sentence of the Third Amendment [the immunity clause] is the canopy over their heads, the Act of 1972 is the perch on which they stand.”¹⁴³

This decision was appealed and the judgement of the Supreme Court differs on this point, focusing on the relationship between what is now Article 29.4.5° and European Treaties rather than the role of this constitutional provision in relation to the European Communities Act (as amended). For Finlay C.J., delivering the judgment of the whole Supreme Court on the issue of the constitutionality of the European Communities (Amendment) Act 1986, according to Article 34.4.5° of the Constitution, the Act could not be considered as necessitated because, submitted to the approval of the member states, the Single European Act could not be could not create European obligations prior to the end of the ratification process.¹⁴⁴ Yet, the lack of

¹⁴² [1987] I.R. 713 at 758.

¹⁴³ *Ibid.* at 757-758. At the time, the principles contained in what are now Articles 29.4.5° and 29.4.6° of the Constitution were part of the same constitutional provision, *viz.*, Article 29.4.3°.

¹⁴⁴ *Ibid.* at 767. *A contrario*, the Supreme Court judge did not rule out the possibility to regard the legislative instruments as immunised from constitutional challenge once the European Treaties acquire force of law through ratification as was decided in *Meagher*. It seems that this is the opinion of Hogan and Whelan when they argue that

immunity from constitutional challenge under an interpretation of the “necessitated” condition according to a “legal obligation” test was not the end of the matter.¹⁴⁵ The possible constitutional challenge to the European Communities (Amendment) Act 1986 was not to lead unavoidably to the quashing of the legislative instrument. In contrast, it was held that the ground for a possible constitutional attack had to be appreciated against what is now Article 29.4.5°. In the Supreme Court’s ruling, it was held in effect that the licence to join what is now the European Union implied that the Irish people had agreed to board what has been qualified as a “moving train”¹⁴⁶ and that the derogating constitutional regime governing European issues could still ensure the validity of Irish legislative instruments as long as they intend to receive European amendments which were encapsulated in the “essential scope or objectives of the Treaties”.¹⁴⁷ In this instance, it was found that various changes provided for in the Single European Act¹⁴⁸ still fitted within the initial purpose of the Treaties. Their reception into the domestic legal order through the European Communities (Amendment) Act 1986 was therefore held to be in conformity with the Constitution and within the licence to join the European Communities provided for by what is now Article 29.4.5°. In conclusion, irrespective of the obligations European Union law puts on the Irish legal order, it seems that the validity of the European Communities Act 1972 (as amended) relies *in fine* on Article 29.4.5° of the Constitution rather than enjoying a constitutional immunity under Article 29.4.6° once the Treaties have been ratified.¹⁴⁹

However and in contrast to this analysis, one could argue that “it is so completely accepted that section 2 of the European Communities Act 1972 is necessitated by the

Meagher “qualifies rather than overrules *Crotty*”, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, 67.

¹⁴⁵ For such an understanding of the “necessitated” clause in *Crotty*, see G. F. Whyte, *J M Kelly: The Irish Constitution*, *op. cit.*, at fn. 137 above, at 521-522, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 30-31 or G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution”, *op. cit.*, at fn. 114 above, at 142-143.

¹⁴⁶ G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence” (2009) 5 *European Constitutional Law Review* 32-70 at 42 and B. M. E. McMahon and F. Murphy, *European Community Law in Ireland*, *op. cit.*, at fn. 85 above, at 267.

¹⁴⁷ [1987] I.R. 713 at 767. For a more detailed analysis of this limit, see *infra* at 203-206.

¹⁴⁸ The Single European Act involved a change from unanimity to qualified majority voting in the Council of Ministers in six fields and made explicit reference to the Community competence in different areas such as the provision of services, the working environment, the health of workers, the co-operation on economic and monetary policy or the environment. It also provided for the possibility to attach a Court of First instance to the European Court of Justice.

¹⁴⁹ In this sense, see G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution”, *op. cit.*, at fn. 114 above, at 143.

obligations of membership”¹⁵⁰ and therefore this acts of reception enjoy constitutional immunity, in particular since the decision in *Meagher v. Minister for Agriculture*.¹⁵¹ Nonetheless, holding that the validity of the European Communities Act 1972 (as amended) relies on Article 29.4.5° of the Constitution rather than Article 29.4.6° may offer a clearer presentation of the textual relationship between the legislative and constitutional instruments ensuring the existence of the primacy of European Union law in the Irish legal system.

This deserves further analysis. First and focusing on the domestic perspective,¹⁵² the issue of the validity of the European Communities Act (as amended) leads to a puzzling temporal dimension. According to the decision in *Crotty* the validity of this legislative instrument relies on the licence to join the process of European integration which is now provided for by Article 29.4.5°. In contrast, in *Meagher*, the Supreme Court took the view that the reception of European law in the Irish legal order by section 2 of the European Communities Act (as amended) was necessitated by the obligation of membership, as were the ministerial powers included in section 3 of the same Act the validity of which therefore derived from the constitutional immunity defined in what is now Article 29.4.6° of the Irish Constitution.¹⁵³ It has to be noted that such an interpretation was expressly excluded by Barrington J. in the High Court in *Crotty*.¹⁵⁴ As Hogan and Whyte have argued, the occurrence or otherwise of a relevant Treaty ratification is the decisive element which one needs to reconcile the *Crotty* and *Meagher* decisions and to explain the different attitudes of the Supreme Court regarding the relationship between the domestic and European legal orders. This explains, in *Crotty*, prior to ratification, the European Communities (Amendment) Act 1986 could not be held as necessitated while, in *Meagher*, after ratification, it is the “necessitated” character of the ministerial power to

¹⁵⁰ D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 103 above, at 347.

¹⁵¹ [1994] 1 I.R. 329, see *supra* at 122-124 for the analysis of this decision on the validity of section 3 of the European Communities Act 1972 (as amended).

¹⁵² From a European angle, it is not certain that the reception of European Union law in the legal order of the member states is the result of an obligation stemming from the European level. Quite the contrary, it could be held that it actually contravenes to the immediacy and direct effect of European Union law. See for example, D. R. Phelan and A. Whelan, “National constitutional law and European integration: FIDE Report”, *op. cit.*, at fn. 87 above, at 47. For a similar opinion, see D. Curtin, “Some Reflections on European Community Law in Ireland” (1989) 11 *Dublin University Law Journal* 207-229 at 216 or G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 14 where the authors argue that section 2 of the European Communities Act (as amended) “is otiose from the point of view of Community law [as it was then]”.

¹⁵³ [1994] 1 I.R. 329 at 351-352.

¹⁵⁴ [1987] I.R. 713 at 758-759. For a critical comment of this position, see G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 31-33.

implement European rules by statutory instrument which saved the validity of section 3 of the European Communities Act 1972 (as amended).¹⁵⁵

However, if this is correct, not only the basis of validity of this legislative instrument would change depending on the point in time were it is assessed, but moreover this validity would alternatively rely on constitutional provisions having diametrically opposite logics. Prior to ratification and as with any other domestic norm, the European Communities Act 1972 (as amended) would be positively grounded on the Constitution, the supreme rule of the domestic legal system, for its validity. Once the constitutional amendment entered into force, its validity would be due to an exclusion of the Constitution according to the negative principle contained in Article 29.4.6°, *viz.*, due to an exclusion of what constitutes its very basis of validity in the first place. In other words, being based on no other norm, the validity of the European Communities Act 1972 (as amended) would rely on a form of sovereignty of the Oireachtas.

This solution is not without difficulty for the sovereignty of the Irish people. Holding that the instruments of reception of European Union law can be deemed necessitated by the obligations of membership would challenge the normative value of the words of the Irish people. As has been seen, the immunity clause is divided in two parts, one ascribed to immunised “laws enacted, acts done or measures adopted by the State” while the other protects European law from being prevented from “having the force of law in the State”. Taking the view that the immunity clause applies to the act of reception of European Union law in the domestic legal system, rather than being limited to the “measures taken in the day-to-day running of the Community”,¹⁵⁶ means that the second part of Article 29.4.6° becomes unnecessary. Indeed, if the European Communities Act 1972 (as amended) is considered as necessitated by the obligations of membership it means that the reception of the existing and future acts of the European Union are themselves necessitated. In consequence, the second part of Article 29.4.6° would be irrelevant.¹⁵⁷

Moreover, it would also render irrelevant what one can regard as an important distinction in the wording of this constitutional provision. Insofar as it deals with the acts done by the European institutions it seems that Article 29.4.6° grants only a constitutional immunity

¹⁵⁵ See G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 66-67. For a similar opinion making of the ratification a turning-point in the attitude of the Courts, see J. Temple Lang, “The Irish Court Case Which Delayed the Single European Act: *Crotty v. An Taoiseach and Others*” (1987) 24 *Common Market Law Review* 709-718 at 710.

¹⁵⁶ [1987] I.R. 713 at 758.

¹⁵⁷ In this sense, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 103 above, at 351.

for European Union secondary law to the exclusion of the Treaties themselves.¹⁵⁸ This difference with section 2 (1) of the European Communities Act (as amended) has to be noted whereby both European primary and secondary law are mentioned. Holding that the European Communities Act 1972 (as amended) is necessitated after ratification would therefore be tantamount to extending constitutional immunity to European Union primary law which is beyond the wording of Article 29.4.6°, its incorporation in the Irish legal system being rather devolved to the European Communities Act 1972 (as amended) alone.

Finally, it can be held, using the same logic, that the licence to join the European Union defined at Article 29.4.5° of the Constitution is really only a licence to ratify the different European Treaties and that, once this process completed, it loses its purpose. In other words, Article 29.4.5° has only a short-term normative life, being deprived of any binding purpose once the European Union Treaties have come into force. From this perspective, holding that the European Communities Act 1972 (as amended) is necessitated by the obligations of membership does not only render the second part of Article 29.4.6° irrelevant, it also reserves the same political declaratory value to Article 29.4.5° itself.

In contrast, by considering that Article 29.4.5° has a normative purpose, *viz.*, ensuring the validity under the Irish Constitution of the statutes which received European Union law in the domestic legal order while not being necessitated by the obligations of membership, can provide for a more coherent explanation of the textual relationship at stake. On the one hand, it would allow a reconciliation of the different positions adopted by the Irish courts as to the interpretation of Article 29.4.6°. It has been seen that providing a definition for the “necessitated” requirement has caused difficulty in the miscellaneous decisions that resorted to this notion.¹⁵⁹ The courts resorted in the first place to a European perspective making “necessitated” equivalent to the existence of actual legal obligations in European Union law in *Crotty v. An Taoiseach*.¹⁶⁰ However, in *Meagher v. Minister for Agriculture*,¹⁶¹ the Supreme Court interpreted the necessity condition from a purely domestic point of view in order to solve constitutional issues indirectly linked to membership. The latter and wide interpretation was

¹⁵⁸ Walsh J. pointed out in an extra-judicial context that “only matters which can be made the subject of a regulation or a directive, apart from the express provisions of the Treaties, can be regarded as laws, acts or measures necessitated by membership of the Communities” in “Reflections on the Effects of Membership of the European Communities in Irish Law”, *op. cit.*, at fn. 106 above, at 813. However, it seems that this interpretation runs contrary to the wording of the constitutional provision and that the same result could be achieved by considering that the Treaty provisions bind Ireland under the European Communities Act 1972 (as amended), which is itself valid with regard to the Constitution due to Article 29.4.5°.

¹⁵⁹ See *supra* at 89-91 and 122-124 and *infra* at 206-214.

¹⁶⁰ [1987] I.R. 713.

¹⁶¹ [1994] 1 I.R. 329.

however doubted in subsequent decisions and in particular in *Maher v. Minister for Agriculture*¹⁶² where Keane C.J. took the view that:

“ultimately, however, it is immaterial which of these alternative approaches is adopted, because it is almost beyond argument that the choice of a statutory instrument as a vehicle for the detailed rules rather than an Act was not in any sense necessitated by the obligations of Community membership.”¹⁶³

However, and without disagreeing with the outcome of each decision (*viz.*, *Crotty*, *Meagher* and *Maher*), Article 29.4.6° as it has been interpreted in *Crotty* is only relevant when the Irish legal system is disrupted by a direct obligation emanating from the European level. In contrast, purely constitutional issues arising from membership seem to come within the ambit of Article 29.4.5°. If one considers that this constitutional provision is required in order, among other things, to allow the exercise of the legislative function by other organs than the Oireachtas at European level, it can also be argued that this provision may have allowed ministers to amend statutes and thereby may qualify Article 15.2.1° of the Constitution insofar as concerns matters linked to European integration. Of course, it could be retorted that, were it possible to question the constitutionality of the act of reception, if such an act was found to infringe a constitutional provision Ireland could find itself unable to fulfil its European obligations. However due to the vagueness of the test developed in *Crotty*, each amendment to the Treaties has been validated in Ireland through referendum amending Article 29.4.5° of the Constitution. In consequence, the previous hypothesis has no practical bearings and the validity of the European Communities Act 1972 (as amended) can always rely on the licence to join the process of European integration.

The other advantage of construing Article 29.4.5° as ensuring the validity of the European Communities Act 1972 (as amended) would be to provide an interpretation in accordance with the principle of the *effet utile*. This goes beyond the strict legal consideration of which interpretative principle should be favoured. Depriving constitutional provisions of a normative scope has consequences for the issue of sovereignty, which is the cornerstone of the

¹⁶² [2001] 2 I.R. 139 at 251.

¹⁶³ *Ibid.* at 181-182. Denham J. (as she was then) and Fennelly J. made similar points respectively at 207 and 252. The latter even explicitly switched to an interpretation of “necessitated” clause as an obligation under European Union law, the same test which was applied in *Crotty*, at 254. For an analysis of this criticism of the decision in *Meagher*, see B. Doherty, “Land, Milk and Freedom - Implementing Community Law in Ireland” (2004) 11 *Irish Journal of European Law* 141-175 at 171-173.

tension between the primacy of European Union law and the resistance of the member states.¹⁶⁴ It is right to say that the authentic interpreter of legal texts is empowered to determine both the meaning of the concepts they contain and their normative or declaratory status.¹⁶⁵ However, reaching the conclusion that the European Communities Act 1972 (as amended) is necessitated by the obligations of membership is tantamount to making Article 29.4.5° and the second part of Article 29.4.6° unnecessary. In terms of sovereignty, it means that the expression through referendum of the Irish people in order to enact these constitutional amendments would be deprived of any normative purpose.¹⁶⁶ In other words, understanding the European Communities Act 1972 (as amended) as “necessitated” is tantamount to making the expression of the sovereign unnecessary.¹⁶⁷ It is this very hindrance that can be avoided if one considers that the validity of the European Communities Act 1972 (as amended) relies on the licence to join the process of European integration.

Therefore, it seems more appropriate to hold that, as Barrington J. pointed out in the High Court in the *Crotty* case, the European Communities Act 1972 (as amended) could not be considered as immune from constitutional challenge after ratification. In contrast, this immunity is only enjoyed by European Union secondary instruments and implementing national acts¹⁶⁸. The validity of the European Communities Act 1972 (as amended) is always dependent on its positive relationship with Article 29.4.5° of the Constitution, which cannot therefore be equalled to a regime of immunity.¹⁶⁹ In other words, as any domestic rules, the existence of this act of reception of European Union law in the Irish legal order is conditioned by its conformity with a hierarchically superior rule – in this case a constitutional provision.

In conclusion, with Ireland maintaining its dualist stance towards European Union law, the existence of the doctrine of primacy in the domestic legal not only relies indirectly on the

¹⁶⁴ For the importance of this notion in the relationship between the Irish and European legal orders, see *infra* at 190-200.

¹⁶⁵ For such an explanation of the process of interpretation according to the speech act theory, see for example O. Cayla, “Lire l’article 55 : Comment comprendre le texte établissant une hiérarchie des normes comme étant lui-même le texte d’une norme ?”, *op. cit.*, at fn. 32 above, at 2-3. See also M. Troper, *La théorie du droit, le droit, l’État* (Paris: Presses universitaires de France, coll. Léviathan, 2001) at 75-77.

¹⁶⁶ If the Constitution is considered as the expression of the sovereign, a Court cannot deprive constitutional provisions of legal effects without discarding the expression of the sovereign, even if this sovereignty can be expressed in other ways on other occasions.

¹⁶⁷ On this link between an interpretation according to the *effet utile* and the issue of sovereignty, see O. Cayla, “Lire l’article 55 : Comment comprendre le texte établissant une hiérarchie des normes comme étant lui-même le texte d’une norme ?”, *op. cit.*, at fn. 32 above, at 5.

¹⁶⁸ Or, as Barrington J. put it in *Crotty* before the High Court, “to legislative and administrative measures taken in the day-to-day running of the Community”, [1987] I.R. 713 at 758.

¹⁶⁹ Even though Barrington J. held in the *Crotty* decision that the act of reception “has immunity but only if it does not go outside the terms of the licence granted”, [1987] I.R. 713 at 759.

conformity of the European Communities Act (as amended) with Article 29.4.5° of the Constitution but also on the submission of this “conduit pipe”¹⁷⁰ to the Irish constitutional architecture. The prevalence of European rules in the Irish legal order is conditioned by the extent of the licence to join the process of European integration as the basis of the valid reception of the European doctrine. In other words, the primacy principle depends indirectly on the position of Article 29.4.5° in the global constitutional framework and in particular the relationship it entertains with other constitutional provisions.

A positive foundation of the doctrine of primacy in constitutional provisions, notably through the immunity clause provided for in Article 29.4.6° (as can sometimes be inferred from the case-law of Irish courts) would still lead to the submission of the European principle to the supremacy of the Constitution. In this respect, the normative logic at play in France would be relevant in the Irish legal order.¹⁷¹ However, the submission of European rules to the Constitution as a result of the relationship between the European Communities Act (as amended) and the licence to join the European Union provided for by Article 29.4.5° is arguably a more consistent description of the Irish legal order and of its dualism. Based on this dualism, it can be argued that, making this submission the indirect consequence of a relationship between domestic rules, the supremacy of the Constitution in the face of the doctrine of primacy is more pronounced in the Irish legal order than in the French legal order.

This formal supremacy of the Constitution, before which the primacy of European law must yield, constituted the basis of this “one isolated and inconclusive instance”¹⁷² which nonetheless represents the cornerstone of the Irish opposition to the doctrine of primacy. As Walsh J. expressed the matter in *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*,¹⁷³ the implementation of the doctrine in the Irish legal system is *in fine* indirectly submitted to a balance between constitutional provisions.

¹⁷⁰ According to the expression used by Carroll J. in *Tate v. Minister for Social Welfare Ireland* [1995] 1 I.R. 418 at 437.

¹⁷¹ See *infra* at 142-152.

¹⁷² G. W. Hogan and G. F. Whyte, *JM Kelly: The Irish Constitution*, *op. cit.*, at fn. 137 above, at 533

¹⁷³ [1989] I.R. 753 at 768-769 where Walsh J. held that “the 8th Amendment of the Constitution is subsequent in time, by several years, to the amendment of Article 29. That fact may give rise to the consideration of the question of whether or not the 8th Amendment itself qualifies the amendment to Article 29. Be that as it may any answer to the reference received from the Court of Justice of the European Communities will have to be considered in the light of our own constitutional provisions. In the last analysis only this Court can decide finally what are the effects of the interaction of the 8th Amendment of the Constitution and the 3rd Amendment of the Constitution”. The implications of this decision in terms of assessing the narrative of constitutional amendments are analysed below, see *infra* at 284-286.

2. *European Union Law in the Architecture of the French Constitution: The Doctrine of Primacy Weighed against the Supremacy of the Constitution*

As it stood prior to the introduction of its new approach by the *Conseil constitutionnel* in 2004, the relationship between the European and French legal systems, constitutionally defined, was governed by Article 55 of the Constitution and therefore expressed in terms of legal hierarchy. It will be recalled that Article 55 states that:

“treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.”

Although this constitutional provision accorded a limited prevalence to external norms over legislative norms, it could not ensure primacy of international law, and therefore European Union law, over the Constitution itself. In consequence, the elaboration of the normative relationship between the two legal orders was dealt with in hierarchical terms in favour of the constitutional rules - in the “*Koné-Sarran-SNIP* triptych of cases”¹⁷⁴ for the *ordre administratif* and in the *Fraisse* decision¹⁷⁵ for the *ordre judiciaire*.

Until 2004 and the introduction of its new perspective on European Union law introduced by the *Conseil constitutionnel*, the French courts disregarded the implications of primacy stressed in the *Internationale Handelsgesellschaft* decision¹⁷⁶ where it was clearly asserted by the European Court of Justice that the primacy principle related to the entire domestic legal systems, their constitutional provisions included.

Paradoxically, the recognition of a specific European claim to primacy by the *Conseil constitutionnel* in 2004 did not modify the architecture of the French legal order and it can be affirmed that, due to the constitutional nature of the doctrine of primacy,¹⁷⁷ the Constitution still rests atop the French legal pyramid. Indeed, the constitutional court could not have been more

¹⁷⁴ B. Bonnet, “Le Conseil d’État, la Constitution et la norme internationale” (2005) *Revue française de droit administratif* 56-66 at 58. CE, Ass., 3 July 1996, *Koné*, *Rec. Lebon* 255, CE, Ass., 30 October 1998, *Sarran, Levacher et autres*, *Rec. Lebon* 368 and CE, 3 December 2001, *SNIP* (*Syndicat national de l’industrie pharmaceutique*), *Rec. Lebon* 624.

¹⁷⁵ C. cass., Ass. plén., 2 June 2000, *Fraisse*, *Bull. Ass. plén.*, n° 4, p. 7.

¹⁷⁶ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] E.C.R. 1125, in particular at para. 3.

¹⁷⁷ See *supra* at 106-116.

explicit when, at the same time it denied the constitutional nature of the Treaty establishing a Constitution for Europe, it affirmed that:

“the name given to this new Treaty does not require as such any ruling as to its constitutionality; Article I-5 thereof, pertaining to the relations between the European Union and the Member States thereof, shows that the title of said treaty has no effect upon the existence of the French Constitution and the place of the latter at the summit of the domestic legal order”.¹⁷⁸

This position appears to constitute a frontal opposition to the primacy principle incorporated in Article I-6 of the Treaty and which the *Conseil constitutionnel* held as being compatible with the Constitution three paragraphs later. Its refusal to acknowledge the European definition of this “existential requirement”¹⁷⁹ and its willingness to affirm the supremacy of the domestic constitutional charter is somehow even more pregnant in its *Treaty of Lisbon* decision. The purpose of this European instrument was to effect most of the changes contained in the Constitutional Treaty, after the rejection of that instrument by referendum in France and in the Netherlands.¹⁸⁰ However, one of the most significant grounds for contention between the domestic and European constitutional orders was discarded in the Treaty of Lisbon since no reference was made in this Treaty to the primacy of European Union law.¹⁸¹ Nevertheless, the *Conseil constitutionnel* which had to review the compatibility of the Treaty of Lisbon with the Constitution seized this opportunity, although doing so was not strictly necessary, to reaffirm the supremacy of the Constitution in the domestic legal order when it held that:

¹⁷⁸ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 10.

¹⁷⁹ As Pescatore qualified the doctrine of primacy, see P. Pescatore, *L'ordre juridique des Communautés Européennes : Études des sources du droit communautaire* (Second edition, Liege: Presses universitaires de Liège, 1973) at 227 (translation by the author).

¹⁸⁰ This point is echoed in the title of the analyses related to the *Treaty of Lisbon* decision, see for example X. Magnon, “Le Traité de Lisbonne devant le Conseil constitutionnel : *non bis in idem*” (2008) n° 74 *Revue française de droit constitutionnel* 310-336, J. Roux, “Le Conseil constitutionnel et le contrôle de constitutionnalité du Traité de Lisbonne : *bis repetita* ? À propos de la décision n° 2007-560 DC du 20 décembre 2007” (2008) 44 *Revue trimestrielle de droit européen* 5-27 or J.-C. Gautron, “Le traité de Lisbonne, mort et transfiguration de la Constitution européenne” (2008) *Politeia* 143-167.

¹⁸¹ The primacy of European Union law is recalled in Declaration 17 to which is attached the Opinion of the Council Legal Service on the primacy of EC law of 22 June 2007, Council Document 11197/07 (JUR 260) but none of these has a binding force.

“while confirming the place of the Constitution at the summit of the domestic legal order, these constitutional provisions enable France to participate in the creation and development of a permanent European organisation vested with a separate legal personality and decision-taking powers by reason of the transfer of powers agreed to by the Member States.”¹⁸²

Given the absence of hierarchical considerations in Article 88-1 of the Constitution,¹⁸³ one has to wonder what reasons there are to explain such a position on the part of the *Conseil constitutionnel*. Considering the earlier case-law of the ordinary courts, it could be argued that, rather than introducing a revolution in the French perception of European Union law, the decisions of the *Conseil constitutionnel* merely conceal an implicit reassertion of the hierarchical logic present in Article 55 of the Constitution. In this sense, the emphasis put on the semantic issue of the title of the Treaty establishing a Constitution for Europe should arguably be read as a willingness to encapsulate the new European instrument in the traditional prism focusing on the relationship between domestic law and international engagements and that, in consequence, the decision of the constitutional court can not be understood without adopting a systemic view regarding the classic reliance, even though implicit, on Article 55 and the new reference to Article 88-1.¹⁸⁴ In this respect, European Union law would have only a specific status within, and not parallel to, the general relationship between domestic and external norms from the French perspective. The relationship between the different case-law of the constitutional court and of the ordinary courts thus needs to be assessed.

The *Sarran, Levacher et autres* decision is the archetype of the relationship between domestic and external norms prior to 2004. It was held in this case, on the basis of Article 55 of the French Constitution, that “the supremacy thus conferred on international commitments does not apply, in the domestic legal order, to provisions of a constitutional nature.”¹⁸⁵ This statement deals both with hierarchical and jurisdictional competence issues¹⁸⁶ and can be

¹⁸² CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 8.

¹⁸³ For a similar consideration, see for example C. Maugué, “La décision n° 2004-505 DC du 19 novembre 2004 du Conseil constitutionnel” (2005) *Revue française de droit administratif* 30-33 at 31.

¹⁸⁴ In this sense, see P. Cassia, “Le juge administratif, la primauté du droit de l’Union européenne et la Constitution française” (2005) *Revue française de droit administratif* 465-472 at 468.

¹⁸⁵ CE, Ass., 30 October 1998, *Sarran, Levacher et autres*, *Rec. Lebon* 368 (translation by the author).

¹⁸⁶ In this sense, see for example, C. Maugué, “L’arrêt *Sarran*, entre apparence et réalité” (1999) n° 7 *Cahiers du Conseil constitutionnel*.

Available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-7/l-arret-sarran-entre-apparence-et-realite.52746.html>> in particular at 2 and 4 [Last accessed 29 December 2012].

understood in two ways. On the one hand, it could be argued that the *Conseil d'État* took the view that principle embodied in Article 55 of the Constitution was limited to the issue of the primacy of international treaties over domestic statutes and that, *a contrario*, it remained silent on the situation involving the Constitution.¹⁸⁷ In consequence, it meant that the conflict between European Union law and constitutional provisions could not be resolved on the basis of Article 55 and thus that the *Conseil d'État* was deprived of a competence in that matter.¹⁸⁸ On the other hand, the solution most commonly admitted, and confirmed by its subsequent decisions, consisted of the recognition by the *Conseil d'État* of the hierarchical superiority of the Constitution over international law.¹⁸⁹

This interpretation of Article 55 of the French Constitution in terms of normative hierarchy rather than jurisdictional competence paradoxically depends from the absence of reference to this provision in the resolution of conflicts between external rules and the French Constitution by domestic courts. Notably, quite surprisingly, the *Conseil d'État* did not make its traditional reference to Article 55 when it recalled in the *SNIP* ruling that the “primacy principle (...) could not lead, in the domestic order, to undermining the supremacy of the Constitution”.¹⁹⁰ In the same way, without making reference to Article 55, the *Cour de cassation* held that “the supremacy conferred on international commitments [does not apply] in the domestic legal order to provisions of constitutional value”¹⁹¹ and concluded in its *Fraisse* decision¹⁹² that the litigant could rely neither on the International Covenant on Civil and Political Rights nor on the European Convention on Human Rights to challenge of rule of constitutional value. Noticing that Community law (as it was then) was irrelevant for the matter concerned, the *Cour de cassation* left the question of its submission to the supremacy of the Constitution unanswered. In consequence, it is once again possible to notice the generous attitude of the *Cour de cassation* towards the European legal order and to see in this decision

¹⁸⁷ In this sense, see L. Dubouis, “Les trois logiques de la jurisprudence *Sarran*” (1999) *Revue française de droit administratif* 57-67 at 58.

¹⁸⁸ For such an interpretation, see D. Simon, “L’arrêt *Sarran* : dualisme incompressible ou monisme inversé ?” (1999) n° 3 *Europe* 4-6 at 5 and C. Maugué, “L’arrêt *Sarran*, entre apparence et réalité”, *op. cit.*, at fn. 186 above, at 2-3.

¹⁸⁹ See, for example, D. Alland, “Consécration d’un paradoxe: primauté du droit interne sur le droit international (Réflexions sur le vif à propos de l’arrêt du Conseil d’État, *Sarran, Levacher et autres* du 30 octobre 2004)” (1998) *Revue française de droit administratif* 1094-1104 at 1095 or H. Gaudin, “Primauté « absolue » ou primauté « relative » ?”, *op. cit.*, at fn. 60 above, at 117-118.

¹⁹⁰ CE, 3 December 2001, *SNIP* (*Syndicat national de l’industrie pharmaceutique*), *Rec. Lebon* 624 (translation by the author).

¹⁹¹ Translation by the author.

¹⁹² C. cass., Ass. plén., 2 June 2000, *Fraisse*, *Bull. Ass. plén.*, n° 4, p. 7.

the outline of a specific regime being applied to European law in comparison international law.¹⁹³

Nonetheless, these two decisions denied an understanding of the relationship between constitutional and external rules in terms of jurisdictional competence, which a certain interpretation of Article 55 makes possible.¹⁹⁴ In contrast, it is the normative supremacy of the Constitution over external rules in the French legal order which is upheld. In addition, in the absence of any reference to Article 55, one could also divine from these rulings a supremacy of the Constitution which does not depend on its normative affirmation by positive law but exists as a necessity derived from the structure of the French legal order.

This hypothesis had already been mentioned by Alland on the *Sarran* decision when he held that behind the interpretation of Article 55, it was in fact “mechanically”¹⁹⁵ (as opposed to normatively) that the superiority of the Constitution in the French legal order had to be deduced. The implicit reference to Article 55, in addition to the explicit reliance on Article 88-1, by the *Conseil constitutionnel* could then be regarded as an unsatisfactory explanation of its case-law, at least for two reasons.

First, in the decision of the *Conseil constitutionnel* on the *Treaty establishing a Constitution for Europe* as in its subsequent decisions, the supremacy of the Constitution has been affirmed while continuously omitting to refer to Article 55.¹⁹⁶ In consequence, the hypothesis according to which the *Conseil constitutionnel* substituted Article 88-1 for Article 55 of the Constitution is more coherent with its new case-law and underlines a willingness to introduce novelty and specificity in the relationship between the domestic legal order and European Union law as well as to tackle their relationship in terms of jurisdictional competence rather than normative hierarchy.¹⁹⁷

¹⁹³ In this sense, see A. Rigaux, and D. Simon, “Droit communautaire et Constitution française : une avancée significative de la Cour de cassation. À propos de l’arrêt Fraisse du 2 juin 2000” (2000) n° 8-9 *Europe* 3-6 at 4 and 6. This however does not imply that the relationship between the Constitution and European Union law would be dealt in a different manner from the regime dedicated to international rules.

¹⁹⁴ In relation to this consequence of the decisions in *Fraisse* and *SNIP*, see respectively *ibid.* at 4 and B. Bonnet, “Le Conseil d’État, la Constitution et la norme internationale”, *op. cit.*, at fn. 174 above, at 64.

¹⁹⁵ D. Alland, “Consécration d’un paradoxe: primauté du droit interne sur le droit international (Réflexions sur le vif à propos de l’arrêt du Conseil d’État, *Sarran, Levacher et autres* du 30 octobre 2004)”, *op. cit.*, at fn. 189 above, at 1095.

¹⁹⁶ The later reference made by the *Conseil constitutionnel* to Article 55 in CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec. 78* concerned a question of division of competences between domestic courts to enforce the doctrine of primacy rather than the basis of the recognition of the European principle in the French legal order, see *infra* at 418-421.

¹⁹⁷ See *supra* at 94-104.

Secondly, the position of the Constitution as the supreme norm of the French legal order is derived from the legal architecture itself and this affirmation in positive law is superfluous. As the *Conseil constitutionnel* put it in its *Treaty establishing a Constitution for Europe* decision, it is the European legal order that is integrated in the domestic one and not the opposite.¹⁹⁸ In consequence, the rank of European Union law is defined by the Constitution and necessarily conditioned by it.¹⁹⁹ Similarly, in the Irish legal order, the European Communities Act 1972 (as amended), due to its legislative nature, could be argued not to give a higher value to the primacy principle it integrated. For the same reason, the position of European Union law in the French legal system cannot outrank the Constitution itself. This was explicitly recognised by the *Conseil constitutionnel* when it affirmed that, on the basis of Article 88-1, the enforcement of European obligations was a “constitutional requirement”.²⁰⁰ One could argue that the Constitution could itself specify that international rules have to be located at the top of the national legal pyramid.²⁰¹ However, the constitutional nature of this affirmation leads unavoidably to a submission of this primacy to constitutional limits. As Alland explains it:

“affirming a subordination supposes the superiority of what one is submitted to, which could not then depend on what is subordinated. And yet, all the ingenuity of the world could not allow the means to be found for a Constitution or one of its constituted organs to place international law above itself. From where would the power of levitation come to them; that permitted the value of whatever norm, outside their own scope, to be hoisted?”²⁰²

¹⁹⁸ CC, decision n° 2004-5505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 11.

¹⁹⁹ For similar opinions in this sense, see O. Gohin, “La Constitution française et le droit d’origine externe” (1999) *Revue française de droit administratif* 77-87 at 82 and C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information”, *op. cit.*, at fn. 37 above, at 113.

²⁰⁰ On this statement which characterises the case-law of the *Conseil constitutionnel* based on Article 88-1 of the French Constitution, see for example CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7, CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society*, *Rec.* 88 at para. 17 or CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 17.

²⁰¹ For such a possibility, see L. Dubouis, “Les trois logiques de la jurisprudence *Sarran*”, *op. cit.*, at fn. 187, at 59.

²⁰² D. Alland, “Consécration d’un paradoxe: primauté du droit interne sur le droit international (Réflexions sur le vif à propos de l’arrêt du Conseil d’État, *Sarran, Levacher et autres* du 30 octobre 2004)”, *op. cit.*, at fn. 189 above, at 1101 (translation by the author). For a similar opinion where holding that the supremacy of international law in the domestic legal order on the ground of the Constitution leads to a logical aporia, see D. Simon, “L’arrêt *Sarran*: dualisme incompressible ou monisme inversé?”, *op. cit.*, at fn. 188 above, at 6.

Thus, deducing the recognition of the primacy of European Union law from a constitutional provision, it can be argued that the *Conseil constitutionnel* relies upon the concomitant superiority of the Constitution on the basis of Article 88-1 alone.²⁰³ Subscribing to the monist theory but with primacy of domestic law,²⁰⁴ the primacy of European Union law cannot but be limited in the French legal system²⁰⁵ and must yield to the formal supremacy of the Constitution.²⁰⁶ This is where the decision by the *Conseil constitutionnel* that primacy principle was compatible with the French Constitution takes on its full meaning.²⁰⁷ The French constitutional court did not recognise as such the European doctrine of primacy but rather held that its consequences, the “scope of the principle of the primacy of Union law”,²⁰⁸ was congruent with the prevalence attached to European rules in the French legal order by Article 88-1 of the Constitution. From the domestic perspective, granting primacy to European Union law is another way to enforce the supremacy of the Constitution.

In conclusion, due to its constitutional nature, the primacy of European Union law in the French legal system is submitted to the Constitution. As Abraham puts it:

“in the domestic legal order, everything proceeds from the Constitution. All the public authorities – either legislative, administrative or jurisdictional – hold their competence, and their very existence, directly or indirectly from the Constitution. All the enforceable legal rules on the territory of the state, either that they explicitly or implicitly appear in this one, or that they are contained in the acts enacted according to

²⁰³ This limitation of the primacy of European Union law on the ground of Article 88-1 alone was already envisaged by Mathieu and Verpeaux at the time of the decision *Sarran, Levacher et autres*, see B. Mathieu and M. Verpeaux, “À propos de l’arrêt du Conseil d’État du 30 octobre 1998, *Sarran et autres*: le point de vue du constitutionnaliste”, *op. cit.*, at fn. 6 above, at 75.

²⁰⁴ For this French understanding of the relationship between the international and domestic legal orders, see D. Alland, “Le droit international « sous » la Constitution de la V^e République” (1998) *Revue du droit public et de la science politique en France et à l’étranger* 1649-1670 at 1663.

²⁰⁵ Without tackling the debate of monism and dualism, it is however important to note that the critics against the alleged monist nature of the French legal order revolve primarily around the issue of determining which legal order receives primacy, see A. Pellet, “Vous avez dit « monisme » ? Quelques banalités de bon sens sur l’impossibilité du prétendu monisme constitutionnel à la française” in D. de Béchillon, P. Brunet, V. Champeil-Desplats and *al.* (eds.), *L’architecture du droit : Mélanges en l’honneur du Professeur Michel Troper* (Paris: Economica, 2006) 827-857 at 828.

²⁰⁶ In this sense, see O. Gohin, “La Constitution française et le droit d’origine externe”, *op. cit.*, at fn. 199 above, at 85 or O. Dord, “Ni absolue, ni relative, la primauté du droit communautaire procède de la Constitution” in H. Gaudin, (ed.), *Droit constitutionnel, droit communautaire : Vers un respect constitutionnel réciproque ?* (Paris: Aix-en-Provence: Economica; Presses universitaires d’Aix-Marseille, 2001) 121-140 at 129-135.

²⁰⁷ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 9-13.

²⁰⁸ *Ibid.* at para. 13.

the procedures and in accordance with the rules of competence provided for by the Constitution: international conventions, statutes and regulations.”²⁰⁹

It is thus only logical to find that the primacy of European Union law has a relative effect depending on the balance between Article 88-1 and other constitutional provisions, leading to the consequence that it has to withdraw before either “express conflicting provision of the Constitution”,²¹⁰ a specific and “express conflicting provision of the Constitution”²¹¹ or “a rule or principle inherent in the constitutional identity of France”,²¹² according to the various expressions of this constitutional limit.²¹³

However, the position of this principle stemming from the European sphere does not answer to the same logic as in Irish law. It can be argued that in the Irish legal order the relationship between the doctrine of primacy and the Constitution is avoided. Indeed, the prevalence of European rules depends on the immunity clause provided for in Article 29.4.6° of the Irish Constitution and, if the validity of the Act of reception of European Union law depends on its conformity with Article 29.4.5°, this only indirectly concerns the primacy principle. In France, it is the Constitution itself that constitutes the positive foundation of this doctrine in the domestic legal system. This involves that the constitutional balance on which the primacy of European rules depends raises particular issues.

The reach of the French constitutional norms depends on the relationship which can be established with the text of the Constitution.²¹⁴ Having therefore the same formal value, constitutional principles do not answer to a hierarchical logic. As Genevois puts it:

“by making the different constitutional principles guaranteeing the fundamental rights dependent on the same source, it is possible to affirm that there is no material hierarchy between these principles.”²¹⁵

²⁰⁹ R. Abraham, *Droit international, droit communautaire et droit français* (Paris: Hachette supérieur, 1989) at 35.

²¹⁰ For example, CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7.

²¹¹ CC, decision n° 2004-498 DC on the *Act on bioethics* of 29 July 2004, *Rec.* 122 at para. 4 and 6.

²¹² For example, CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19.

²¹³ On the fact that European Union law receives through the Constitution its prevalence over domestic norms, and therefore also finds in the Constitution the limits to this prevalence, see J. Rossetto, “Ordre constitutionnel interne et droit communautaire : L'impossible hiérarchie”, *op. cit.*, at fn. 2 above, at 899.

²¹⁴ For further developments on the *bloc de constitutionnalité*, see *supra* at 111-112 and *infra* at 294-295.

²¹⁵ B. Genevois, “Normes de références du contrôle de constitutionnalité et respect de la hiérarchie en leur sein”, *op. cit.*, at fn. 33 above, at 336. In the same sense, see G. Vedel, “The Conseil constitutionnel: Problems of

Each and every constitutional provision is therefore deprived of a claim to absoluteness. The potential conflicts between constitutional provisions are resolved through a case-by-case process of balancing.²¹⁶ In this respect, one can consider that the limits put by the *Conseil constitutionnel* on the consequences to be drawn from Article 88-1 of the Constitution are in fact the interpretative principle according to which this European-orientated constitutional provision has to be weighed against the other competing constitutional requirements.

However, one could question if the *Conseil constitutionnel* has not changed its traditional way of assessing the relationship between the different constitutional requirements in its interpretation of Article 88-1 and the limits attached to it. Indeed, the recent case-law of the *Conseil constitutionnel* on European issues, and the doctrine of primacy in particular, have provoked a debate on supra-constitutionality in French academic writing.²¹⁷ According to this doctrine, and in contrast to the previously held view as to the equal value of constitutional principles, a hierarchy among the *bloc de constitutionnalité* would exist. In French constitutional law, this is mainly anchored in Article 89 of the Constitution which states that “the republican form of government shall not be the object of any amendment”. The idea of supra-constitutionality implies that the constituent power is limited in its power to amend the Constitution. In consequence, different values have to be ascribed to the constitutional provisions and a hierarchy can be observed between those that can be modified by the constituent power and those which escape its reach.

Defined since 2006 as a “rule or principle inherent in the constitutional identity of France”,²¹⁸ the limit put on the primacy of European Union law in the domestic legal order echoes the same idea of permanence and immutability.²¹⁹ Therefore it is possible to draw a functional connection with the notion of supra-constitutionality, by referring to French constitutional norms that are protected from any modification.²²⁰ In conclusion, the *bloc de*

Legitimization and Interpretation” in E. Smith (ed.), *Constitutional Justice under Old Constitutions* (The Hague: Kluwer Law International, 1995) 331-360 at 350-352.

²¹⁶ On this point, see D. Rousseau, *Droit du contentieux constitutionnel*, *op. cit.*, at fn. 28 above, at 127-129. See also G. Drago, *Contentieux constitutionnel français*, *op. cit.*, at fn. 28 above, at 275 where the author stresses that the balance varies depending on the case at hand and the appraisal made *in concreto* by the *Conseil constitutionnel*.

²¹⁷ For a critical presentation of this notion, see for example M. Troper, *La théorie du droit, le droit, l'État*, *op. cit.*, at fn. 165 above, at 195-214.

²¹⁸ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19.

²¹⁹ On this parallel between the two notions, see S. Marasco, “Du contrôle de la transposition des directives par le Conseil constitutionnel et de « l'identité constitutionnelle de la France »” (2006) n° 41 *Courrier juridique des finances et de l'industrie* 2-5 at 5 or É. Dubout, “« Les règles ou principes inhérents à l'identité constitutionnelle de la France » : une supra-constitutionnalité ?” (2010) n° 83 *Revue française de Droit constitutionnel* 451-482 at 471.

²²⁰ See for example, É. Dubout, “« Les règles ou principes inhérents à l'identité constitutionnelle de la France » : une supra-constitutionnalité ?”, *op. cit.*, at fn. 219 above, at 459-460. For a similar analysis putting in parallel the positions of France, Italy and Germany, see M. R. Donnarumma, “Intégration européenne et sauvegarde de

constitutionnalité would be best described as a hierarchy of provisions where constitutional rules that cannot be amended stand above European Union law - which is itself superior to ordinary constitutional provisions.²²¹ However, there are many reasons for distinguishing between the doctrine of supra-constitutionality and the notion of constitutional identity of France, even while acknowledging the commonalities between the two notions.

First, as will be dealt with in more detail later,²²² it is far from clear that the constitutional court decided in its case-law regarding European Union law to give a specific value to certain provisions of the Constitution that would immunise them from the constituent power. More particularly, the *Conseil constitutionnel* held that, if norms inherent in the constitutional identity of France could be opposed to European requirements, this limit would hold “except when the constituent power consents thereto”,²²³ a statement that runs contrary to the possibility of these constitutional provisions limiting the constituent power.

Secondly, it is not European principles that supersede constitutional provisions but rather a constitutional requirement to obey European Union law that can, in case of conflict, justify putting aside other constitutional provisions. Since it is not the European principle as such that the *Conseil constitutionnel* recognised, it cannot constitute the basis of a differentiation between constitutional provisions. In this respect, it is not certain that the limit of Article 88-1 introduces a hierarchical revolution in the way the different constitutional norms are considered. In contrast, one could take the view that, in affirming that requirements stemming from Article 88-1 can yield before certain other constitutional provisions, the *Conseil constitutionnel* was referring only to the relative nature of any principle contained in the Constitution²²⁴ rather than qualifying certain constitutional provisions as being more essential than others.

Above all, it opposed the absolute claim made by the European Court of Justice. In other words, it is only the constitutional nature of the primacy principle in the French legal

l'identité nationale dans la jurisprudence de la Cour de justice et des cours constitutionnelles” (2010) n° 84 *Revue française de droit constitutionnel* 719-750 in particular at 734-741.

²²¹ For such a description, even though critically considered, see C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information”, *op. cit.*, at fn. 37 above, at 116.

²²² See *infra* at 236-249.

²²³ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19.

²²⁴ It could be said that being defined *a priori* the rules inherent in the constitutional identity of France hide beneath an apparent balance what is in fact a hierarchy between the different constitutional provisions. However, as it will be analysed later (see *infra* at 338-340), the consequences of the case-law of the *Conseil constitutionnel* point towards an appraisal of this balance *in concreto* during the application of European Union law. It is therefore doubtful that this balance is definitive. For a contrary opinion, see É. Dubout, “« Les règles ou principes inhérents à l’identité constitutionnelle de la France » : une supra-constitutionnalité ?”, *op. cit.*, at fn. 219 above, at 458.

order and the supremacy of the Constitution which are again revived.²²⁵ In this regard, it seems more coherent to consider the content of this limit and its various definitions as an insight into the interpretative task of the constitutional court. Because of the European dimension introduced by Article 88-1, the transposing statutes answer to specific obligations.²²⁶ It is thus only normal that the balancing of the different constitutional provisions cannot be effected under the principles governing purely domestic aspects.²²⁷ The limit to the constitutional requirement stemming from Article 88-1 of the Constitution is thus only the traditional affirmation of the balance existing in French law between the different principles constituting the *bloc de constitutionnalité*. The identity of France is not so much a constitutional provision itself as it is the guideline chosen by the *Conseil constitutionnel* in its interpretative task.

In conclusion, in the French legal order as in the Irish legal order, due to its domestic nature, the primacy of European rules not only receives a different definition from that developed by the European Court of Justice but also loses its absolute scope. Being submitted to the supremacy of the Constitution, its enforcement is dependent, either indirectly in the case of Ireland or directly as regards France, on a balance between constitutional provisions and can yield to certain of them. This method of interpretation is not specific to matters related to European Union law. However, it can be argued that when applied to the doctrine of primacy, it is carried out by domestic courts under particular modalities which are constitutive of the notion of constitutional identity and which go beyond the mere issue of normative prevalence.

²²⁵ For such an understanding of the case-law of the *Conseil constitutionnel*, see C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information”, *op. cit.*, at fn. 37 above, at 114.

²²⁶ As the *Conseil constitutionnel* made it clear in its decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006.

²²⁷ This point was explicitly mentioned by the *Conseil d’État* in its interpretation of Article 88-1, see CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56. For further considerations of the position of the *Conseil d’État*, see *infra* at 410-412.

Section II The Notion of Constitutional Identity in Ireland and France as an Interpretative Limit Imposed on the Primacy of European Union Law in the Name of Sovereignty

The conflict between the primacy of European law and the supremacy of the Constitution is not limited to a normative struggle for the summit of the legal order. The discrepancies running through the dialogue on primacy is not only a conflict of norms but also a conflict of constitutionalisations, an opposition of theories as regards what is a Constitution. Against the position of the European Court of Justice based on normativist arguments, Ireland and France shared the same constitutionalist position according to which normative prevalence depends on the sovereignty of a *demos* which remains located in the states.¹ They share the opinion of Canivet, former *Premier président* of the *Cour de cassation*, when he argues, in an extra-judicial context, that:

“supreme act of the domestic order, the Constitution represents the most eminent expression of national sovereignty.”²

However, while the constitutionalist paradigm entitles domestic courts to put limits to the primacy of European Union law, the positions of the Irish and French judiciary does not consist of enforcing the formal supremacy of constitutional provisions. Assessing the normative relationship between domestic and European rules from a material perspective, where the focus is put on the substantive content of norms at stake, their decisions show a conciliatory attitude towards the primacy principle. In this context, the notion of constitutional identity is best seen as an interpretative device relating to a constant balancing between the two sets of rules. Due to this material perspective on normative conflicts the constitutional identity issue is postponed. Provisions forming part of Irish and French constitutional identities are not defined *ab initio* and then opposed to the doctrine of primacy. Being a reaction to European law, the notion of constitutional identity is rather the result of the comparison between the respective

¹ For a presentation of this notion grounding the supremacy of the Constitution from the member states' perspective, and its opposition to the normativism on which the European Court of Justice relies to develop the doctrine of primacy, see *supra* at 33-35.

² G. Canivet, “Constitution nationales et Europe : La dialectique du Un et du Deux” in M. Ameller, P. Avril, J.-P. Camby and *al.* (eds.), *Constitutions et pouvoirs : Mélanges en l'honneur de Jean Gicquel* (Paris: Montchrestien, 2008) 73-96 at 76 (translation by the author).

Constitutions and European rules. It is a status awarded to constitutional provisions which defeat the doctrine of primacy as a conclusion of the interpretative process. In consequence, the notion of constitutional identity is better defined as a certain type of interpretative discourse on the Constitution – or a meta-norm – than as qualifying a set of immutable values.

Chapter III Normative Prevalence as a Mark of Sovereignty: The Submission of European Union Law to the Will of the Irish and French Demoi

The case-law relative to European law in the Irish and French legal orders is the occasion to affirm that the participation in European integration finds its principle and its limit in the extent of the *demos*' approval. It is this principle that structures the domestic courts' understanding of the relationship between European and domestic norms. In this regard, Irish and French courts display the same interest in upholding the constitutionalist paradigm.

Nonetheless, this common basis takes different forms according to the singular legal culture of each legal order. In particular, the reasoning of Irish and French domestic courts is structured by different conceptions of the *demos*.

A. Constitutions and Constitutionalism: Normative Supremacy in Ireland and France as the Expression of Different Sovereigns

In contrast to what has sometimes been argued, both in the Irish and French legal orders, the sovereign emerges from the decisions of domestic courts as an unfettered entity. However, Ireland and France present two different conceptions of this common basis. Irish law displays a concrete definition of the people as domestic sovereign. It exists as a political fact and the architecture of the Irish constitutional order is shaped by its direct and external expression. In contrast, it is within the legal realm that the nature of the French sovereign lies. Understood as an abstract entity in French legal theory, its expression depends on legal mechanism and always involves a certain degree of representation.

1. *The Words of the Irish People: Deriving Sovereignty from Outside the Constitution*

The conflict between the supremacy of the Constitution and the primacy of European Union law in the Irish legal order is not merely a normative contest for superiority. Standing against the alleged constitutionalisation of European Union law, Ireland puts another definition of what a constitution is. If primacy from a European perspective is always expressed in normativist terms,¹ the position of the Irish Constitution at the summit of the domestic legal system is justified under the constitutionalist theory as the expression of the sovereign, the Irish people.²

At first sight, the relation between the people and sovereignty is ambiguous in the text of the Constitution. The Preamble affirms in the first place that “We, the people of Éire (...), Do hereby adopt, enact, and give to ourselves this Constitution.” This sovereignty located in the people can also be inferred from Article 6 on the Constitution in which it is recognised that the powers of the state are derived from the people, and that the people designate the rulers of the state and decide the national policies. This provision can thus be seen as the affirmation of popular sovereignty according to the constitutionalist paradigm where the people establish in the Constitution the modalities under which their representatives can act.³ However, the Constitution also introduces competing concepts. The first of them is the “Nation”, to which Articles 1 to 3 are dedicated. These articles begin by stating that “Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government” in a manner very similar to Article 6. More importantly, the state also plays play insofar as concerns the issue of sovereignty. It will be recalled that the section of the Constitution headed “The State” comprises Articles 4 to 11. Even though some other Articles of the Constitution lean towards assimilating the notions of the “Nation” and the “State”, overall the text of the

¹ The affirmation of the primacy of European law, notably in *Costa v. E.N.E.L.* (Case 6/64 [1964] E.C.R. 585), relies on purely legal arguments and *in fine* on the “terms and spirit of the Treaty” (*ibid.* at 583). Closely linked to the autonomy of the European law, the constitutionalisation introduced by the doctrine of primacy is the result of the auto-foundation of the validity of the European legal order. It is thus possible to draw a parallel between the case-law of the European Court of Justice and the representation of legal systems, and of constitutional norms in particular, developed by Kelsen in his normativist theory, see for example M. Kumm, “Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice” (1999) 36 *Common Market Law Review* 351-386 at 374. For further development on this point, see *supra* at 33-34.

² This development is therefore not so much concerned with an in-depth study of the notion of sovereignty in the Irish legal system as a presentation of its main features in order to throw light on the framework which opposes the domestic and European perspectives on the question of normative prevalence.

³ For a short presentation of this theory, see P. Raynaud, “Constitutionalisme” in D. Alland and S. Rials (eds.), *Dictionnaire de la culture juridique* (Paris: Lamy; Presses universitaires de France, coll. Quadrige, 2003) 266-271.

Constitution nonetheless favours a disjunctive reading.⁴ Perhaps diverging from the approach adopted in Article 6 (with its recognition that the powers of the state derived from the *people*, and that it is the *people* who designate the rules of the state and who decide the national policies), it is in the state that Article 5 locates sovereignty since it states that “Ireland is a sovereign, independent, democratic state.”

The ambiguities have been clearly resolved *via* judicial interpretation in favour of a view of sovereignty being held by the Irish people. In *Byrne v. Ireland*,⁵ where a plaintiff sued the state for being injured on a public footpath, it was argued that the state - since Article 5 affirms that it is sovereign - was immune from lawsuits. Recalling the decisions *Comyn v. Attorney General*⁶ and *Commissioners of Public Works v. Kavanagh*⁷ which established a distinction between the state as a legal person and the body of citizens, this argument was rejected. Walsh and Budd JJ. affirmed the internal sovereignty of the people. The latter judge concluded that:

“Article 1 of the Constitution itself underlines that it is the nation, which can only be a reference to the People, which has the sovereign right to choose its form of government; it has in fact done this by the enactment of the Constitution. Article 6 shows that the powers of government, which are all provided for in the Constitution, also derive from the People. Both Articles indicate that it is recognised in the Constitution itself that there is a higher authority than the State”.⁸

Walsh J. was also very explicit in saying that the state was an artefact, affirming that:

“the State is the creation of the People and is to be governed in accordance with the provisions of the Constitution which was enacted by the People and which can be amended by the People only, and that in the last analysis the sovereign authority is the People.”⁹

⁴ On this point, see G. W. Hogan and G. F. Whyte, *J M Kelly: The Irish Constitution* (Fourth edition, Dublin: Lexis Nexis Butterworths, 2003). at 71-72.

⁵ [1972] I.R. 241.

⁶ [1950] I.R. 142.

⁷ [1962] I.R. 216.

⁸ [1972] I.R. 241 at 296.

⁹ *Ibid.* at 262.

Therefore, as regards the opposition between the people and the state, since this decision, it became clear that the internal sovereignty belongs to the Irish people, the sovereignty of the state, its emanation, defined in Article 5 of the Constitution being only external, *i.e.*, when Ireland is dealing with other nations.¹⁰ In consequence, it is rather the democratic nature of Ireland that is to be read in Article 5 of the Constitution, what confirms the sovereignty of the people.

Moreover, one could argue that the concept of nation has a cultural and historical connotation, involving “a large aggregate of people associated with each other by factors such as common descent, language, culture and history”¹¹ and refers to the sovereign as a singular entity. The “people” hints of a more political approach and may be defined in its plurality as the citizens of Ireland.¹² However, these differences are semantic in nature and seem to carry no legal consequences. It is clear from the opinion of Budd J. that he regarded them as synonyms.¹³

This conclusion was somewhat blurred in *Webb v. Ireland*,¹⁴ where the Supreme Court relied on the sovereignty of the state in order to acknowledge the existence of a treasure trove to its benefit. Sovereignty is however a concept bearing different meanings.¹⁵ Aside from the distinction between internal and external sovereignty, it encompasses the idea of the superiority of the state over any other institution, a mode of legitimisation of the power and of its exercise¹⁶ and finally a body of prerogatives or the attributes of sovereignty.¹⁷ *Webb v. Ireland* is not therefore a reappraisal of the internal sovereignty of the Irish people and the ambiguity on this issue is dependent on the fact that this decision “was unaccompanied by any explanation of the concept, let alone any attempt to accommodate the earlier remarks in *Byrne*.”¹⁸ Subsequent decisions¹⁹ have made clear that sovereignty in Ireland had to be understood as “the sovereign authority of the people (not the state)”.²⁰

¹⁰ [1972] I.R. 241 at 264 and 295 respectively *per* Walsh and Budd JJ.

¹¹ G. W. Hogan and G. F. Whyte, *J M Kelly: The Irish Constitution*, *op. cit.*, at fn. 6 above, at 72.

¹² In this sense, see M. Forde, *Constitutional Law* (Second edition, Dublin: First Law, 2004) at 65.

¹³ *Byrne v. Ireland* [1972] I.R. 241 at 296. For a similar opinion, see for example, J. Casey, *Constitutional Law in Ireland* (Third edition, Dublin: Round Hall Sweet & Maxwell, 2000) at 29.

¹⁴ [1988] I.R. 353.

¹⁵ See, for example, F. Hamon and M. Troper, *Droit constitutionnel* (Thirty-second edition, Paris: Librairie Générale de Droit et de Jurisprudence, 2011) at 192-194.

¹⁶ It is in this sense that one can speak of popular sovereignty.

¹⁷ The prerogative of treasure trove belongs to this last category.

¹⁸ G. W. Hogan and G. F. Whyte, *J M Kelly: The Irish Constitution*, *op. cit.*, at fn. 6 above, at 96.

¹⁹ See for example, *Hanafin v. Minister for Environment* [1996] 2 I.R. 321 and the distinction between the different meanings of sovereignty made by Denham J. (as she was then) before concluding to the Irish popular sovereignty at 446-448.

²⁰ B. McMahon, “Constitutional adjustments necessitated by Community membership” (1976) 1 *European Law Review* 86-90 at 86.

However, the scope of the sovereignty of the Irish people has been questioned on the basis of natural law arguments which would structure the Irish legal order. This is particularly true in relation to human rights. A point made, for example, by Walsh J. in *McGee v. Attorney General*²¹ and which he later emphasised in an extra-judicial context by stating that:

“Irish constitutional jurisprudence on these provisions [*i.e.*, human rights provisions] is firmly rooted in the natural law or natural rights character of these constitutionally guaranteed rights and totally rejects the philosophy of legal positivism.”²²

Such a rejection of positivism in favour of natural law would obviously have an impact on the sovereignty of the Irish people. While it has not been enforced in courts, it has given rise to academic debates regarding the possible limitations on the power to amend the Constitution. When democracy and popular sovereignty are concerned, the importance granted by the Irish legal order to natural law would entail, as one academic commentator puts it, that:

“this ‘natural law of democracy’ which the judges have derived from the constitutional text has little connection with democracy properly so called”.²³

The potential existence in the Irish legal system of rules distinct from positive law is known as the unenumerated rights doctrine, which emerged in the decision *Ryan v. Attorney General*.²⁴ In this case, assessing the claim of the plaintiff to a right to bodily integrity, Kenny J. affirmed that personal rights individuals could enjoy “are not confined to those specified in Article 40”.²⁵ He gave three arguments to support this view. First, Article 40.3.2° of the Constitution specifies that “the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.” Therefore, the expression “in particular” suggested that some of these rights existed outside the emporium of the constitutional text.²⁶ Secondly, he referred to

²¹ [1974] I.R. 284 at 318.

²² B. Walsh, “Reflections on the Effects of Membership of the European Communities in Irish Law” in F. Capotorti, C.-D. Ehlermann, J. Frowein and *al.* (eds.), *Du droit international au droit de l'intégration : Liber Amicorum Pierre Pescatore* (Baden-Baden: Nomos Verlag, 1987) 805-820 at 817.

²³ A. Whelan, “Constitutional Amendments in Ireland: The Competing Claims of Democracy” in G. Quinn, A. Ingram and S. Livingstone (eds.), *Justice and Legal Theory in Ireland* (Dublin: Oak Tree Press, 1995) 45-71 at 46.

²⁴ [1965] I.R. 294.

²⁵ *Ibid.* at 313.

²⁶ *Ibid.* at 313.

the “Christian and democratic nature of the State.”²⁷ Lastly, he deduced the right to bodily integrity from Catholic principles, relying in his decision on the Papal Encyclical, *Pacem in Terris*.²⁸

This unenumerated rights doctrine has assumed different forms. Grounded in the Christian and democratic nature of the state in this initial case, it was also justified by Henchy J. in terms of human personality in *McGee v. Attorney General*²⁹ or explicitly by reference to natural law by Walsh J. in the same decision as he already did in *State (Nicolaou) v. An Bord Uchtála*.³⁰ However, they can all be understood as a form of natural law since, according to the very words of Article 41 of the Constitution, they tend to uphold “rights, antecedent and superior to all positive law.”³¹

According to the most venerable tradition of the unremunerated rights doctrine expressed in the above mentioned decisions, the basis of validity of the Irish legal order is not to be found in positive law, and in the Constitution in particular, but in natural law.³² In consequence, it would be possible to limit the popular sovereignty proclaimed by the miscellaneous constitutional provisions on the grounds of these higher principles which supersede positive law. In practical terms, this would justify a substantive limitation of the amending power, which could be reviewed by Irish Courts.³³ As O’Hanlon J. argued in an extra-judicial context:

“no law could be enacted, no amendment of the Constitution could lawfully be adopted and no judicial decision could lawfully be given, which conflicted with the Natural Law (which we recognise as being of divine origin).”³⁴

²⁷ *Ibid.* at 313.

²⁸ *Ibid.* at 314.

²⁹ [1974] I.R. 284.

³⁰ [1966] I.R. 567.

³¹ Walsh J. made a similar statement in *McGee v. Attorney General* [1974] I.R. 284 at 318. In this regard, Doyle also affirms the common natural law characteristic of the declensions of this doctrine, making then a distinction between the Thomistic version defended by Walsh J. and the Enlightenment interpretation of Henchy J., see O. Doyle, “Legal Positivism, Natural Law and the Constitution” (2009) 31 *Dublin University Law Journal* 206-227 at 209.

³² It is what Phelan points towards when arguing that the rejection of legal positivism “indicates the limitation of the idea of sovereignty in Irish constitutional law to that of ultimate originator of positive rules and political authority, but not the ultimate check on their validity or application as law”, D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Round Hall Sweet & Maxwell: Dublin, 1997) at 364.

³³ See for example, *ibid.* at 361-367.

³⁴ R.J. O’Hanlon, “Natural Rights and the Irish Constitution” (1993) 11 *Irish Law Times* 8-11 at 10.

Under the same argument as the one concerning the notion of supra-constitutionality in France,³⁵ and if the notion of popular sovereign is to be preserved, a distinction between the original sovereign and the constitutional power to amend the Constitution has to be made.³⁶ It nonetheless emphasises the ambiguity contained in Article 6 of the Constitution, the very basis of the popular sovereignty in Ireland, where the people can “decide all questions of national policy”, which points towards its full sovereignty,³⁷ while conditioning it by stating that is has to be done “according to the requirements of the common good.”

Leaving aside the criticisms directed at natural law itself, the unenumerated rights doctrine is not without difficulties both from a theoretical perspective and due to the subsequent case-law of Irish courts. First, the development of this natural law doctrine is closely linked to the text of the Constitution. Already in *Ryan v. Attorney General*,³⁸ it was stated that the possibility for the courts to apply rights extraneous to the text of the Constitution depended on the text of the Constitution itself and more specifically on the use of the words “in particular” in Article 40.3.2°. It was also stated that the foundations of these rights could be found in the “Christian and democratic nature of the State”, which, while not being explicitly stated in the text of the Constitution,³⁹ could be deduced from the content of the Preamble but also from constitutional provisions themselves as Article 6 where it is stated that, if all powers derive from the people, it is done so “under God”. The unenumerated rights doctrine has never emancipated itself from this original textual basis. In contrast, the link between unenumerated rights and the text of the Constitution has always been reaffirmed. This is particularly obvious insofar as concerns the right to privacy. Even though, it exists as an unenumerated right, Henchy J. took the view that its understanding had to be “construed in the context of the Constitution as a whole”.⁴⁰ In the same way, Walsh J., who explicitly advocated having recourse to the natural law theory, did so by referring to its ground in the posited text of the Constitution, arguing that:

³⁵ See *infra* at 236-237.

³⁶ In this sense, see for example, R. J. O’Hanlon, “The Judiciary and the Moral Law” (1993) 11 *Irish Law Times* 129-132 at 130 where the author argues that “no one can challenge the power of the people of Ireland, should they see fit to do so, to jettison in its entirety the Constitution of 1937, and to substitute in its place a new Constitution. (...) For the time being, however, the Irish Constitution remains unique among the constitutions of the world in the manner in which it recognises that there is a law superior to all positive law, which is not capable of being altered by legislation, or even by a simple amendment of the Constitution itself.”

³⁷ See on this point A. Whelan, “Constitutional Amendments in Ireland: The Competing Claims of Democracy”, *op. cit.*, at fn. 25 above, at 71.

³⁸ [1965] I.R. 294.

³⁹ On this point, see for example, O., Doyle, *Constitutional Law: Text, Cases and Materials* (Dublin: Clarus Press, 2008) at 86.

⁴⁰ *Norris v. Attorney General* [1984] I.R. 36 at 71.

“Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law.”⁴¹

At first sight - and in particular when it comes to the “in particular” clause - it appears that the unenumerated rights doctrine is quite distant from natural law. Rather than opposing that which is natural to that which is artificial,⁴² or posited, it is focused on a distinction between the written and the unwritten. This doctrine therefore may not imply the existence of a set of norms different from positive law. Indeed, from a theoretical point of view, as opposed to methodological or ideological ones, positivism defines law as an artefact, the result of the will.⁴³ By saying that individuals enjoy some unwritten rights, the conflict between positive law and the unenumerated rights doctrine is diluted, the former also being able to comprise unwritten rules, customary law being the most obvious example. In consequence, in terms of popular sovereignty the justification for a limitation on foot of this doctrine on the people’s ability to create norms may not be self-evidently justifiable.

Of course, the unenumerated rights doctrine has not been interpreted according to a distinction between written and unwritten positive rules. However, this point leads to another difficulty when this theory is comprehended through a natural law prism. The fundamental difference between the positivist and natural law theories relies on their conception of legal phenomena. While for the former there is only one type of law - that which is created by human will - the latter, assumes an ontological dualism by affirming the autonomous existence of two categories of law.⁴⁴ In consequence, by relying on the Constitution to provide a basis for the existence of natural law in the Irish legal system, the decisions of the courts may be regarded as denying the source of validity peculiar to natural law,⁴⁵ and therefore its independent

⁴¹ *McGee v. Attorney General* [1974] I.R. 284 at 310. He reiterated this constitutional foundation of the unenumerated rights doctrine in an extra-judicial context, see B. Walsh, “The Judicial Power, Justice and the Constitution of Ireland” in D. Curtin and D. O’Keefe (eds.), *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T. F. O’Higgins* (Dublin: Butterworth 1992) 145-157 at 149 where he stated that the Constitution guarantees these rights but that they “do not spring from the Constitution itself”. However, if conceived in terms of legal validity, it still means that their existence in the Irish legal system is dependent on the Constitution.

⁴² See on this point D. M. Clarke, “The Role of Natural Law in Irish Constitutional Law” (1982) 17 *Irish Jurist* 187-220 at 192.

⁴³ On this distinction between theoretical, methodological and ideological approaches to positivism, see N. Bobbio, *Essais de théorie du droit* (Trans. M. Guéret in collaboration with C. Agostini, Louvain; Paris: Bruylant; Librairie Générale de Droit et de Jurisprudence, coll. La pensée juridique, 1998) at 26-27.

⁴⁴ See on this point, M. Troper, *Pour une théorie juridique de l’État* (Paris: Presses universitaires de France, coll. Léviathan, 1994) at 325 and N. Bobbio, *Essais de théorie du droit, op. cit.*, at fn. 45 above, at 39.

⁴⁵ In this respect, Doyle argues that “the natural law of Irish judges is perhaps best understood as a constructive misunderstanding of natural law theory”, O. Doyle, “Legal Validity: Reflections on the Irish Constitution” (2003) 25 *Dublin University Law Journal* 56-101 at 96. See also *ibid.* at 64 where it is argued that “there is an argument of positive law that natural law is the ultimate source of validity.”

existence.⁴⁶ A parallel can be drawn between these unenumerated rights and the Declaration of Human and Civic Rights. Even though, the latter proclaims “the natural, unalienable and sacred rights of man”, their validity does not result from natural law but from the inclusion of the Declaration of 1789 in the Constitution of the Fifth Republic.⁴⁷ Consequently, as Doyle puts it:

“there is nothing peculiar to the Irish legal system that counts against a legal positivist understanding of law.”⁴⁸

Thus it may be that the references in the Constitution to rights existing outside the constitutional text are best seen as a constitutional empowerment of courts to take part in the constitutional normative creation.⁴⁹ Rather than being opposed to the popular sovereignty, it could be said that it has appeared under its influence. To respond to the legitimacy issue raised by judicial activism, Irish courts have developed the unenumerated rights doctrine not so much as a use of natural law but as a “judicial invocation of the language of natural law.”⁵⁰

Secondly, this interpretation and the refusal to ground the unenumerated rights in natural law are now favoured by Irish courts. This development occurred in one of the cases dealing with the right to life of the unborn.⁵¹ A Bill purporting to regulate the right to information about the provision of abortions in other states was submitted to an *a priori* review for constitutionality by the President under of the Irish Constitution. In *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill*,⁵² the Supreme Court considered the opposition between the ability of the people to amend the Constitution and the right to life of the unborn, which could be deemed to exist as a principle of

⁴⁶ It seems that a similar reasoning is at play in the defense of natural made, in an extra-judicial context, by O’Hanlon J. when, considering that the possibility for the Irish people to replace the 1937 Constitution and to eliminate the reference to natural law, concludes that “were we to go down this secular road at some time in the future and there are certainly some among us who would wish to do so - we would not thereby shake off the constraints imposed by natural law. But we would certainly have diminished if not eliminated altogether, the scope for invoking the principles of natural law before the courts as part of the law of the land”, R. J. O’Hanlon, “The Judiciary and the Moral Law”, *op. cit.*, at fn. 38 above, at 130.

⁴⁷ For further considerations on the *bloc de constitutionnalité*, see *supra* at 111-112 and *infra* at 294-295.

⁴⁸ O. Doyle, “Legal Positivism, Natural Law and the Constitution”, *op. cit.*, at fn. 33 above, at 218.

⁴⁹ In this sense and from a critical perspective, see G. W. Hogan, “Unenumerated Personal Rights: *Ryan’s Case* Re-evaluated” (1990-1992) 25-27 *Irish Jurist* 95-116 at 114. From this perspective, a similarity with French courts, and the *Conseil d’État* in particular, can be noticed in their ability to develop what is called general principles of law. Such power is also exercised by the *Conseil constitutionnel* when it determines what are the “fundamental principles acknowledged in the laws of the Republic “. For a brief introduction to these issues see J. Bell, S. Boyron and S. Whittaker, *Principles of French Law* (Second edition, Oxford: Oxford University Press, 2008), in particular at 15-17 and 32-33.

⁵⁰ O. Doyle, *Constitutional Law: Text, Cases and Materials*, *op. cit.*, at fn. 41 above, at 100.

⁵¹ This is of particular importance since this issue is one of the great bones of contention between European Union law under the prism of Irish constitutional identity, see *infra* at 265-269.

⁵² [1995] 1 I.R. 1.

natural law,⁵³ and the possibility of the latter to circumscribe the former. In this decision the Supreme Court decided in favour of the unrestricted sovereignty of the people,⁵⁴ by affirming that:

“the courts (...) at no stage recognised the provisions of natural law as superior to the Constitution.”⁵⁵

The People were entitled to amend the Constitution in accordance with the provision of Article 46 of the Constitution and the Constitution as so amended is the fundamental and supreme law of the State representing as is does the will of the People.”⁵⁶

Subsequent decisions confirmed this unfettered, and “sacrosanct”, sovereignty of the Irish people.⁵⁷ It is true that this affirmation reveals the same inconsistency that affected the unenumerated rights doctrine by recognising - on the basis of the constitutional text - the Irish people being the author of it and therefore, by implication, themselves being antecedent and external to it. In other words, in both instances, the source of validity is established as existing outside the legal order even at the same time as other justifications are put forward within the text of the Constitution.⁵⁸ However, insofar as concerns the present issue, it can be said that the Irish Supreme Court chose the popular sovereignty circularity over the natural law one as expressed in the unenumerated rights doctrine. Subsequent decisions of the Supreme Court have confirmed the constitutional reference to unenumerated rights as a matter of judicial empowerment.⁵⁹

⁵³ This right was introduced in Article 40.3.3° of the Constitution in 1992 but could be regarded as existing prior to this positive law recognition, see *infra* at 199-200.

⁵⁴ In this sense, see G. J. Jacobsohn, *Constitutional Identity* (Cambridge, Massachusetts: Harvard University Press, 2010) at 46-49.

⁵⁵ In blunt contradiction with the opinion expressed by Walsh J. in *McGee v. Attorney General* [1974] I.R. 284 at 318.

⁵⁶ [1995] 1 I.R. 1 at 43.

⁵⁷ See for example *Hanafin v. Minister for Environment* [1996] 2 I.R. 321 at 425 where Hamilton C.J. expressed the view that “the will of the people as expressed in a referendum providing for the amendment of the Constitution is sacrosanct and if freely given, cannot be interfered with. The decision is their's and their's alone” or the opinion of Barrington J. expressed in *Riordan v. An Taoiseach (No. 2)* [1999] 4 I.R. 325 at 339.

⁵⁸ On this logical problem, see O. Doyle, “Legal Validity: Reflections on the Irish Constitution”, *op. cit.*, at fn. 47 above, in particular at 66-68.

⁵⁹ See, for example, in this sense, the opinion of Keane J. in *O'T v. B* [1998] 2 I.R. 321 at 372 where, considering the unenumerated rights doctrine, he argued “that there exists no identifiable and superior *corpus* of law to which judges may have recourse in a case such as the present, it follows that the existence of the right will depend on the opinions of individual judges as to whether, in the circumstances with which they are confronted, it would be just or unjust to deny the existence of the right.”

Nonetheless, the discrepancy pointed out in the text above between a people instituted by the Constitution and this people regarded at the same time as the maker of this very norm throws light on the nature of the concept of the “Irish people” as constructed in the Constitution and its interpretation by domestic courts. Two kinds of theories explain the construction of a people as sovereign.⁶⁰ On one hand, it can be said that the “people” exist as a historical or cultural entity that subsequently decides to give itself a Constitution. On the other hand, the people can be viewed as a legal artefact, the Constitution itself transforming a population into a people endowed with sovereignty. In many respects, both in the text of Irish norms and in the case-law of Irish courts, it is the former version that is upheld. As Clarke argues, in relation to Article 1 of the Irish Constitution:

“‘Nation’ here refers to a community of people which existed prior to and independent of the Constitution, which claimed for itself a right to form a sovereign state and, in general, to exercise the powers which are normally recognised in international law for sovereign states.”⁶¹

First, the text of the Constitution itself echoes this confusion between a concrete and an abstract understanding of the people. Every constitutional provision refers to the concrete “people” but Article 30.3 affirms, in a more abstract manner, that the Attorney General, in criminal matters, acts “in the name of the People” (with the crucial word capitalised). This typographic indeterminacy recurs in the case-law. Nonetheless, it is a historical and cultural conception of a concrete sovereign that the Irish perspective offers as seems to be possible to infer from the constitutional provisions dedicated to sovereignty.

Since 1999, following the constitutional amendment required by the Good Friday agreement,⁶² Article 2⁶³ states among other things that “the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.”

⁶⁰ On this point, see for example M. Troper and L. Jaume, “Le projet de Constitution européenne et la question du pouvoir constituant” (2003) 13 *Cités* 101-111, in particular at 101-104 or H. Lindahl, “European Integration: Popular Sovereignty and a Politics of Boundaries” (2000) 6 *European Law Journal* 239-256 at 251-253.

⁶¹ D. M. Clarke, “Nation, State and Nationality in the Irish Constitution” (1998) 16 *Irish Law Times* 252-256 at 253. By the same author, see also “Constitutional Bootstrapping: The Irish Nation” (2000) 18 *Irish Law Times* 74-77, in particular at 75 where it is argued that Article 1 of the Constitution “invokes the decision of an already-constituted people who claim a moral right to establish the basic law and fundamental political structures by which they wish to be governed.”

⁶² On the Good Friday agreement and its constitutional law implications, see for example, J. Casey, *Constitutional Law in Ireland*, *op. cit.*, at fn. 15 above, at 32-37.

⁶³ For a judicial interpretation of the former version of Articles 2 and 3 of the Constitution, see Finlay C.J. in *McGimpsey v. Ireland* [1990] 1 I.R. 110 at 119.

From this provision, and if one follows the opinion expressed by domestic courts regarding “the Nation” and “the people” as synonymous,⁶⁴ it can be inferred that the notion of an Irish people is concrete entity rooted in history and culture.

This conception of an Irish people whose existence is independent from the Constitutional order has been upheld by Irish case-law. The idea of the cultural and historical existence of the concrete Irish sovereign, existing before the creation of Ireland’s constitutional charter can be, for example, noticed in the decision *Webb v. Ireland*,⁶⁵ where Finlay C.J. stated that:

“it would, I think, now be universally accepted, certainly by the People of Ireland, and by the people of most modern states, that one of the most important national assets belonging to the people is their heritage and knowledge of its true origins and the buildings and objects which constitute keys to their ancient history. If this be so, then it would appear to me to follow that a necessary ingredient of sovereignty in a modern state and certainly in this State, having regard to the terms of the Constitution, with an emphasis on its historical origins and a constant concern for the common good is and should be an ownership by the State of objects which constitute antiquities of importance which are discovered and which have no known owner.”⁶⁶

Thus, in the mirror of its domestic legal system, the Irish people can contemplate a sovereign constituted prior to the 1937 Constitution and the existence of which remains outside the Constitution as a political, rather than juridical, entity, the law being the fruit of its expression.⁶⁷ This conception of a people being reflected rather than instituted in the Constitution conditions Irish legal life. Its concrete existence appears notably from considerations given by Denham J. (as she was then) both in *McKenna v. An Taoiseach (No 2)*⁶⁸ and *Hanafin v. Minister for Environment*⁶⁹ where she contrasted representative and direct

⁶⁴ See the opinion of Budd J. in *Byrne v. Ireland* [1972] I.R. 241 at 296.

⁶⁵ [1988] I.R. 353.

⁶⁶ *Ibid.* at 383.

⁶⁷ In this sense, see the opposition made by Whelan between the full sovereignty of the people and “the transformation of that original power into constitutional power” and his conclusion in favour of the former, A. Whelan, “Constitutional Amendments in Ireland: The Competing Claims of Democracy”, *op. cit.*, at fn. 25 above, at 70-71.

⁶⁸ [1995] 2 I.R. 10, in particular at 51.

⁶⁹ [1996] 2 I.R. 321, in particular at 448.

democracy.⁷⁰ In her opinion the referendum, characteristic technique of the latter, not only constitutes the direct expression of the citizens, of the electorate. Rather, Denham J. seems to take the view that in a referendum, the Irish sovereign is itself present. From her observation that “in a referendum, the people themselves determine national policy”⁷¹ can be deduced the conclusion that, unlike representative mechanisms, referendums consist of the direct intervention of, and therefore the presence of, the Irish sovereign.⁷² In this regard, the plurality of the people as “guardians of the Constitution”⁷³ reasserts the political and concrete nature of the Irish people.

⁷⁰ In the same sense, see the opinion of Hogan J. in the High Court in *Doherty v. The Referendum Commission and other* [2012] I.E.H.C. 211 at para. 21 where it is stated that “the Constitution envisaged a plebiscitary as well as a parliamentary democracy and, in doing so, it has created a State which can demonstrate – in both word and deed – that it is a true democracy worthy of the name.”

⁷¹ *Ibid.* at 400.

⁷² It is strikingly different from the French “representation” of the sovereign, the expression of the citizens through referendum being only a way to impute a will to a sovereign existing as a different entity (see *infra* at 173-177).

⁷³ *Crotty v. An Taoiseach* [1987] I.R. 713 at 783.

2. *The Constitution as the Boundary of the Existence of the French Sovereign*

As has been the case in the foregoing discussion of the Irish situation, what follows does not aim to provide an in-depth analysis of the question of sovereignty in France. Its purpose is to stress that the conflict between the primacy of European Union law and the supremacy of the French Constitution cannot be analysed merely as a matter of legal rules. The prevalence of Constitution involves first and foremost the upholding of the sovereignty of which it is the expression. Grounded in the constitutionalist theory, it nonetheless involves a specific conception of the French sovereign that has little in common with the concrete understanding of the Irish people.⁷⁴

The birth of democracy in France came about through the concept of national sovereignty to which Article 3 of the Declaration of Human and Civic Rights of 1789 and Article 1 of Title III the Constitution of 1791 bear witness. However, it is a popular sovereignty that prevailed in the Constitution of 1793. In the section headed “On the sovereignty of the people” Article 7 affirmed that “the sovereign people is the universality of the French citizens.”⁷⁵ If the Constitution is defined as the expression of the *demos*, since the Revolution of 1789, sovereignty in the French constitutional history has swung between the Nation and the People. The latter is defined as “a collective and indivisible entity distinct from the individuals of whom it is composed”.⁷⁶ It offers the vision of an abstract sovereign which transcends the generations and favour the prevalence of a certain general interest.⁷⁷ In contrast, the former carries a more concrete conception where sovereignty is entrusted to the citizens as a whole.⁷⁸ The regime of the Fifth Republic, repeating the expression contained in the Constitution of the Fourth Republic, offers an enigmatic and conciliatory definition of the entity holding sovereignty by stating in its Article 3 that:

“national sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum.”

⁷⁴ On the consideration, from an Irish perspective, of the little importance of the French sovereign as a political fact, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 34 above, at 212-216.

⁷⁵ Translation by the author.

⁷⁶ P. Pactet, *Institutions politiques, droit constitutionnel* (Sixteenth edition, Paris: Armand Colin, 1997) at 87 (translation by the author).

⁷⁷ In this sense, see for example F. Hamon and M. Troper, *Droit constitutionnel*, *op. cit.*, at fn. 17 above, at 194.

⁷⁸ See for example, P. Pactet, *Institutions politiques, droit constitutionnel*, *op. cit.*, at fn. 78 above, at 88.

The choice between either one form of sovereignty or the other should, in principle, be justified by the legal consequences attached to their original principle. The Nation being an abstract entity, under its sovereignty democracy is necessarily representative and the notion of an imperative mandate is precluded (as in the notion of a mandate which prevails in private law, an imperative mandate would bind the representative to the instructions given to him and *a priori* by the citizens, to whom he could be held responsible with regard to their fulfillment). Further, the capacity to vote is not a right but a function conferred on certain citizens, most commonly in a form of suffrage based on property ownership. In contrast, by vesting sovereignty in the People, a form of direct democracy does become possible. Further, the relationship between the people and their representatives can be governed by imperative mandates, with the vote existing as a right.⁷⁹

However, throughout French constitutional history, the choice between national or popular sovereignty has never entailed these assumed legal consequences. For example, the Constitution of 1793 - inspired by theories of Rousseau and upholding the strongest version of popular sovereignty - nonetheless made clear that the representative could not be bound to its voters. It did this by stating in its Article 29 that “every member of the National Assembly belongs to the whole nation.”⁸⁰ In consequence, it is not so much in the proclamation of constitutional provisions that the nature of the French sovereign can be assessed as it is in the modalities governing its expression.⁸¹ From this point of view, it can be observed that these juridical mechanisms bear witness to a very representative trait of the French constitutional tradition. If the choice between national and popular sovereignty mainly consists of ideological rhetoric, the former being deemed conservative while the latter is more democratic and progressive, both notions of sovereignty share the features of a representative inclination and the existence of the French sovereign as a legal abstraction - the latter feature being particularly noticeable when these French notions of sovereignty are compared with their Irish counterpart.⁸²

This representative tradition traces back to the very birth of the democratic regime in France and became explicit on the occasion of the drafting of the Constitution of 1791. On 10

⁷⁹ On these legal consequences attached to national and popular sovereignties, see M. Troper, *La théorie du droit, le droit, l'État* (Paris: Presses universitaires de France, coll. Léviathan, 2001) at 301-302.

⁸⁰ Translation by the author.

⁸¹ In this sense, see F. Hamon and M. Troper, *Droit constitutionnel, op. cit.*, at fn. 17 above, at 196-200, in particular at 197 where they affirm that “in other words, one has not to understand the constitution from its principles, but the principles from the constitution” (translation by the author).

⁸² See *supra* at 155-166

August 1791 an argument in the National Constituent Assembly saw Barnave and Thouret oppose Robespierre and Roederer on the question of the reasons why an official could be considered to be a representative. On one side, it was argued that only the National Assembly could be held as a representative since it was the only organ to be elected, to have a direct link with the people as a concrete entity. Barnave disagreed with the theory which makes election the basis of representation. In contrast, and in accordance with on Article 6 of the Declaration of Human and Civic Rights of 1789 which states that “the Law is the expression of the general will”, he drew the consequence of the right of veto granted to the monarch by declaring that:

“the constitutional representation consists of representing the nation: (...) what distinguishes the representative from a mere public civil servant is that he is in charge in some instances of wanting for the nation while the mere public civil servant is only ever in charge of acting for it.

The Legislative Body is representative of the nation because it wants on its behalf: 1° by making its laws; 2° by ratifying the treaties with foreign powers when they have been begun and agreed to by the king (...); the king is a constitutional representative of the nation: 1° in that he consents and wants on its behalf the new laws of the Legislative Body to be immediately enforced or to be subjected to a suspension (...).⁸³

Indeed, the Title III of Constitution of 1791 recognised in its Article 2 that “the French Constitution is representative: the representatives are the Legislative Body and the king”,⁸⁴ adding in the Article 3 of the same Title that “the legislative power is delegated to a National Assembly composed of temporary representatives, freely elected by the people, to be exercised by it, with the sanction of the king, in a manner that will be determined hereinafter.”⁸⁵ In consequence, according to the French legal tradition, the existence of a representative is disconnected from the modalities of its designation and, in contrast, depends on the exercise of the sovereign function, in this instance, the legislative one.⁸⁶

In comparison with the vision of the sovereign mirrored by the Irish legal system, representation in France can not be understood as being the result of an investiture granted by a

⁸³ A. Barnave, Session of 10 August 1791, *Archives parlementaires*, vol. 29 at 331, available at <<http://gallica.bnf.fr/ark:/12148/bpt6k49544z/f335.image.r=%22Archives+Parlementaires,+tome+XXVIII%22.lalan g>> (translation by the author) [Last accessed 29 December 2012].

⁸⁴ Translation by the author.

⁸⁵ Translation by the author.

⁸⁶ On this point, see M. Troper, *Pour une théorie juridique de l'État*, *op. cit.*, at fn. 46 above, at 339-340.

French sovereign, which in turn pre-exists the legal system. In contrast, the French *demos* can only exist as long as legal mechanisms provide for some authorities to act on its behalf.⁸⁷ In other words, it appears that:

“the represented, the people or the nation, only exists when a will is expressed on its behalf, *i.e.*, when it is represented. The represented does not create the representative. It is he, in contrast, who is constituted by the representation.”⁸⁸

In consequence, the Constitution cannot be considered as the actual creation of the people. In contrast, it is by affirming that it has to be imputed to a sovereign up until then absent, that this legal norm fathers the French *demos*.⁸⁹ Existing as a positive law concept, the French sovereign can not but be of a fictitious nature.⁹⁰ This abstract condition, self-evident when sovereignty is entrusted to the Nation, is nonetheless also true insofar as concerns the concept of the people. From the French perspective, as defined in the Constitution of 1793, it is the universality of the people as an abstract legal entity, as distinct from the material and concrete population, which is entrusted with sovereignty.⁹¹ Similarly, democracy is not the result of the expression of the people understood as having a material and concrete existence but “as the government of a general will formed partly under the influence which the people exercise by the direct or indirect choice of some of those who express it.”⁹²

This conception of sovereignty has not been without consequences for French constitutional regimes. With the legislative function being regarded as the expression of the general will according to Article 6 of the Declaration of Human and Civic Rights, the distinction between the legislative and the constitutional norms has often been blurred. The “legicentrist” nature of the regime has often overshadowed the enforcement of the constitutionalist paradigm

⁸⁷ On this intrinsic relation between representation and sovereignty, see H. Lindahl, “Sovereignty and Representation in the European Union” in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 87-114 at 96-99 or B. van Roermund, “Sovereignty: Unpopular and Popular” in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 33-54 at 47-50.

⁸⁸ F. Hamon and M. Troper, *Droit constitutionnel*, *op. cit.*, at fn. 17 above, at 185 (translation by the author).

⁸⁹ On this link between the law and the people, see H. Lindahl, “European Integration: Popular Sovereignty and a Politics of Boundaries”, *op. cit.*, at fn. 62 above, at 248 where it is argued that “to the extent that the people’s identity not only conditions, but is also conditioned by, legal power, the people is always, to a greater or lesser extent, a *pouvoir constitué*, and legal power a *pouvoir constituant*. Indeed, legal power constitutes the people by creating its identity; in this sense, the legal act exercises sovereign power. (...). A people is as much a creature of legal power as legal power is the instrument of the people.”

⁹⁰ See on this point, L. Jaume, “Représentation” in D. Alland and S. Rials (eds.), *Dictionnaire de la culture juridique* (Paris: Lamy; Presses universitaires de France, coll. Quadrige, 2003) 1335-1339 at 1338.

⁹¹ On this point, see D. M. Lavroff, *Le droit constitutionnel de la V^e République* (Second edition, Paris: Dalloz, 1997) at 243-244.

⁹² M. Troper, *Pour une théorie juridique de l’État*, *op. cit.*, at fn. 46 above, at 346 (translation by the author).

in France, making, as it does, Acts of the Parliament the supreme rules of the French legal system.⁹³ It has also impaired the attempts to establish a parliamentary system, which have often drifted towards assembly regimes where the Parliament appropriated a sovereignty that it was supposed to exercise.⁹⁴ The evolution of the Third Republic - introduced by the Constitutional Laws of 1875 is the archetypal example of this.⁹⁵

The introduction of a constitutional review of legislation (a mechanism of a democratic nature according to Kelsen⁹⁶) *via* the creation of the *Conseil constitutionnel* by the Constitution of the Fifth Republic and its subsequent case-law fostered this proclaimed constitutionalism. The judicial review of statutes enforces a distinction between legislative and constitutional normative levels⁹⁷ and imposes on the representatives, in order for them to be considered as such, the duty to exercise their powers within the boundaries defined by the sovereign in the Constitution. As the constitutional court made clear in 1985, “the voted statute (...) only expresses the general will in compliance with the Constitution”.⁹⁸ If it did not change the symbolic nature of the sovereign, since the general will is therefore the result of a concurrence between a plurality of organs, *viz.*, the Government, the Parliament and the *Conseil constitutionnel*,⁹⁹ it restored the constitutionalist paradigm where the representatives do not possess sovereignty but merely exercise it according to the modalities defined by its holder, the *demos*, in the Constitution.¹⁰⁰ In conclusion, it is the constituent function rather than the

⁹³ Considered as the expression of the general will, statutes were long considered to be unchallengeable. This explains why a constitutional court was only introduced in 1958. Its primary purpose was merely to ensure the balance between the Parliament and the Government. It is only in 1971 that the *Conseil constitutionnel* affirmed its competence to quash statutes which contravenes the Constitution, affirming therefore the effective supremacy of constitutional provisions (CC, decision n° 71-44 DC on the *Act complementing the provisions of the Articles 5 and 7 of the Act of 1 July 1971 pertaining to the contract of association* of 16 July 1971, *Rec.* 29). In this sense, see for example, G. Drago, *Contentieux constitutionnel français* (Third edition, Paris: Presses universitaires de France, coll. Thémis, 2011) at 131-161, in particular at 142-145 or É. Maulin, “Aperçu d’une histoire française de la modélisation des formes de justice constitutionnelle” in C. Grewe, O. Jouanjan, É. Maulin and *al.* (eds.), *La notion de « justice constitutionnelle »* (Paris: Dalloz, 2005) at 137-158.

⁹⁴ On these characteristics of the assembly regimes, see for example O. Gohin, *Droit constitutionnel* (Paris: Litec, 2010) at 218-221 and for a criticism of the reappearance of legiscentrist arguments against the recent jurisdictional development regarding European Union law, see D. Simon and A. Rigaux, “Drôle de drame : la Cour de cassation et la question prioritaire de constitutionnalité” (2010) n° 5 *Europe* 5-11 at 5.

⁹⁵ See, for example, F. Hamon and M. Troper, *Droit constitutionnel*, *op. cit.*, at fn. 17 above, at 400-402.

⁹⁶ See H. Kelsen, “Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution” (1942) 4 *The Journal of Politics* 183-200 at 183.

⁹⁷ On this consequence of the constitutional review of legislation, see M. Troper, *Pour une théorie juridique de l’État*, *op. cit.*, at fn. 46 above, at 209.

⁹⁸ CC, decision n° 85-197 DC on the *Act on the Evolution of New-Caledonia* of 23 August 1985, *Rec.* 70 at para. 27 (translation by the author).

⁹⁹ See, for example, D. Rousseau, *Droit du contentieux constitutionnel* (Sixth edition, Paris: Montchrestien, 2001) at 483-486.

¹⁰⁰ In this sense, see M. Troper, *Pour une théorie juridique de l’État*, *op. cit.*, at fn. 46 above, at 331.

legislative one that constitutes the expression of sovereignty¹⁰¹ and the Constitution is reaffirmed as the supreme norm in the French legal system expressing the will of the *demos*.

The abstract nature of the French sovereign can be observed both with regard to the electoral process and to referendums. In French constitutional theory, the existence of a representative consists of the exercise of a legal function and is disconnected from the particular mode of designation of that representative. In other words, an organ does not exercise the legislative function because it is a representative due to his mode of designation but is regarded as a representative because it exercises the legislative function, expressing thereby a will on behalf of the French sovereign.¹⁰² It follows that an election cannot be defined as a mandate given by the sovereign to its representative. In particular, the Constitution of the Fifth Republic also entrusts the legislative function to the *Premier ministre* by granting to him the right to initiate legislation,¹⁰³ even though this position is due not to an election but to an appointment made by the *Président de la République*.¹⁰⁴ The electoral process cannot thus be seen as a contract between a pre-existent sovereign people and its representative. Its purpose, however real, lies elsewhere.

The notion of representation as understood in the French legal system is animated by an oligarchic dynamic since the representative exists as such because it acts on behalf of the sovereign, without a necessary link with the governed society. Such a system, therefore, departs from the political ideology underlying democracy in which, even in its representative form, those who govern are supposed to mirror those who are governed,¹⁰⁵ according to the most intuitive definition of representation, *viz.*, as a mechanism consisting of making present those who are absent. It is from this political perspective, rather than from the juridical one, that the electoral process acquires its meaning in the French legal system. It is thus not so much a question of representation as one of representativity, if one understands the latter as “the ability one shows to rally political support in order to make legitimate one’s pretension to speak on

¹⁰¹ See M. Troper, “En guise d’introduction : La théorie constitutionnelle et le droit constitutionnel positif” (2001) n° 9 *Les Cahiers du Conseil constitutionnel*, available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-9/en-guise-d-introduction-la-theorie-constitutionnelle-et-le-droit-constitutionnel-positif.52472.html>> at 4-5 [Last accessed 29 December 2012] and V. Champeil-Desplats, “Commentaire de la décision du Conseil constitutionnel n° 2004-505 DC du 19 novembre 2004 relative au Traité établissant une Constitution pour l’Europe” (2005) 41 *Revue trimestrielle de droit européen* 557-580 at 574-576.

¹⁰² See *supra* at 168-170.

¹⁰³ Article 39 of the Constitution.

¹⁰⁴ Article 8 of the Constitution.

¹⁰⁵ See L. Jaume, “Représentation”, *op. cit.*, at fn. 92 above, at 1338.

behalf of someone else.”¹⁰⁶ In this regard, the electoral process, in particular with the introduction and development of direct universal suffrage, ensures that representation and the whole representative system is circumscribed within the boundaries of what is democratically legitimate in terms of representativity by ensuring a direct link between one of the representatives and the population.¹⁰⁷

This abstract nature of the French sovereign which prevents its immediate expression and requires representative mechanisms is also present in the way referendums are perceived, as some of the most recent developments in the field of European Union law have again made clear. As is well known, the act of ratification of the Treaty establishing a Constitution for Europe was submitted to referendum by the *Président de la République* under Article 11 of the Constitution. On 29 May 2005, almost 55 % of French voters rejected the Constitutional Treaty, apparently stopping the process of European integration in its tracks.¹⁰⁸ In terms of sovereignty and the expression of the French people, the ratification of the Treaty of Lisbon raised some questions. As made clear in the reasoning of the *Conseil constitutionnel* in its *Treaty of Lisbon* ruling (in which numerous references were made to its *Treaty establishing a Constitution for Europe* decision), the Treaty of Lisbon consisted largely of the resurrection of the modifications that had been included in the previous unsuccessful Treaty.¹⁰⁹ However, the necessary constitutional amendment and the ratification of the Treaty of Lisbon were both carried out by the Parliament.¹¹⁰ For some, this choice could be qualified as a “fraud on the Constitution”, *viz.*, where the respect for the text was tantamount to the subversion of its spirit.¹¹¹ Accepting through the Parliament that which had been objected to in the referendum was arguably equivalent to a negation of the democratic nature of the Fifth Republic by “obtaining a *Yes* from the representative of the people where the people had previously said *No*.”¹¹² At least this was an argument which was developed in an attempt to have the *Conseil constitutionnel*

¹⁰⁶ P. Braud, *Sociologie politique* (Fifth edition, Paris: Librairie Générale de Droit et de Jurisprudence, 2000) at 615 (translation by the author). For further developments on the notion of representativity, see *ibid.* at 444-446.

¹⁰⁷ On this analysis of the electoral process in relation to the notion of representativity, see D. Turpin, “Représentation et démocratie” (1987) n° 6 *Droits* 79-90 at 85-86.

¹⁰⁸ See for example, J. Robert, “Un gâchis référendaire (29 mai 2005)” (2005) *Revue du droit public et de la science politique en France et à l'étranger* 839-847.

¹⁰⁹ CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459.

¹¹⁰ The procedure for the amendment of the Constitution designed in its Article 89 allows the *Président de la République* to choose between a parliamentary route or a combination of representative mechanism with a subsequent referendum.

¹¹¹ M. Clapié, “La ratification du Traité de Lisbonne : « Une fraude à la Constitution »” (2008) *Politeia* 133-142 at 134-135 (translation by the author).

¹¹² *Ibid.* at 140-141 (translation by the author). Dougan also questions, in a broader European context, the legitimacy of the Treaty of Lisbon, a Treaty drafted “so as to re-impose the terms of the rejected [Constitutional Treaty] whatever the popular will”, see M. Dougan, “The Treaty of Lisbon 2007: Winning Minds, not Hearts” (2008) 45 *Common Market Law Review* 617-703 at 700-701.

censure this act of ratification.¹¹³ It was argued that the *Conseil constitutionnel* had held twice, in 1962 and in 1992, that referendum acts “adopted by the People (...) constitute the direct expression of the national sovereignty”¹¹⁴ and that, in consequence, the procedure chosen to ratify the Treaty of Lisbon would be a violation of the democratic nature of the state contained in Article 2.¹¹⁵

One could take the view, in contrast, that the possibility of ratification by Parliament of something which had been rejected in substance in referendum is the proof that the latter mechanism was not tantamount to the expression of the sovereign freed from legal constraints. Regulated either by Article 11 (in the case of legislative bills) or by Article 89 (in the case of constitutional amendments), the expression of the people through referendum is always already the result of the application of a legal rule. In this sense, it is a legal mechanism through which a will is imputed to a sovereign which remains absent, a mechanism which therefore necessarily involves a degree of representation.¹¹⁶ Referendums, in other words, are not considered as the direct intervention of the sovereign. For that matter, the impossibility of reviewing decisions arrived at in referendum – an impossibility proclaimed by the *Conseil constitutionnel* – does not rely on any special legal force being regarded as attaching to these norms due to their origin. In contrast, as it has often been the case with the *Conseil constitutionnel* – an organ very much aware of its competence – it concluded, both in 1962 and in 1992, that such review exceeded the limit of its mission as defined in particular by Article 61 of the Constitution. It saw the relevance of this constitutional provision to a referendum process through a systemic interpretation which led to a view of its role as being limited to the review of acts passed by the Parliament.¹¹⁷ Its refusal to control acts adopted by referendums is the consequence of this issue of jurisdictional competence rather than depending on the special nature of their author.¹¹⁸

¹¹³ Under Article 61 of the Constitution, an Act can be referred to the constitutional court by the *Président de la République*, the *Premier ministre*, the President of the *Assemblée nationale*, the President of the *Sénat*, sixty Members of the *Assemblée nationale* or sixty Senators. If some members of Parliament endeavoured to do so, they could not gather sufficient support. Their arguments are published in A.-M. Le Pourhiet, “L’Europe sans le peuple” (2008) *Politeia* 127-132.

¹¹⁴ CC, decision n° 62-20 DC on the *Act pertaining to the election of the Président de la République by direct universal suffrage, passed by the referendum of 28 October 1962* of 6 November 1962, *Rec.* 27 at para. 2 and CC, decision n° 92-313 DC on the *Act authorising the ratification of the Treaty on the European Union* of 23 September 1992, *Rec.* 94 at para. 2.

¹¹⁵ For such an argument, see A.-M. Le Pourhiet, “L’Europe sans le peuple”, *op. cit.*, at fn. 115 above, at 130.

¹¹⁶ See for example, E. Sur, “Le pouvoir constituant n’existe pas ! Réflexions sur les voies de la souveraineté du Peuple” in *La Constitution et les valeurs : Mélanges en l’honneur de Dmitri Georges Lavroff* (Paris: Dalloz, 2005) 569-591 at 574-575 where the author argues that “the voting people can not therefore be regarded as the holder of sovereignty, but as a formal representation of an ideal sovereign. A legal convention enables to establish ‘its’ will from a multiplicity of wills, then a legal operation enables to impute ‘its’ will to that of the ideal sovereign in compliance with constitutional rules. It is therefore only legal mechanisms of imputation from partial wills to the will of an organ and from the will of an organ to the will of the sovereign that one can speak, *in fine*, of the people’s will” (translation by the author).

¹¹⁷ See CC, decision n° 62-20 DC on the *Act pertaining to the election of the Président de la République by direct universal suffrage, passed by the referendum of 28 October 1962* of 6 November 1962, *Rec.* 27 at para. 2 and CC,

This interpretation, which leans towards making a distinction between referendums and the direct expression of the sovereign, can also be supported by the case-law of the *Conseil d'État*. Due to the representative conception of democracy in the French regime and the small number referendums, there are not many decisions dealing, even indirectly, with referendum acts. However, the decision *Sarran, Levacher et autres* can be referred to.¹¹⁹ This case put into play a complex set of norms. After the signing of an agreement at Nouméa on 5 May 1998, the Constitution was amended and a new Article 76 provided for the organisation of a referendum on the institutional evolution of New Caledonia, in particular the granting of a distinctive citizenship for New Caledonia as well as its own legislature. This constitutional provision referred to a statute passed in order to define who was entitled to participate in this ballot, this Act having been passed *via* referendum.¹²⁰ Article 76 also referred to a decree adopted in order to provide for the modalities of this ballot, which had been passed by the Government on 20 August 1998. It is this later norm that was attacked by the plaintiff. Their argument relied on the contestation of the conformity of Article 2 of the Act of 1988, which created a restricted electorate for the referendum of 1998, with various international instruments. The *Conseil d'État* did not reject this argument but held that, because of the reference to them in Article 76 of the Constitution, those provisions had gained constitutional value. This status, therefore, gave them a supremacy that could not be contested by international law.¹²¹ Implicitly and *a contrario*, the *Conseil d'État* took the view that otherwise, referendum acts would be submitted to the hierarchy displayed by Article 55 of the Constitution and their validity submitted to their respect for international norms.¹²² This hierarchy is enforced upon every legislative instrument, irrespective of whether they are passed by the Parliament or by referendums. The expression of the citizens *via* referendum could be not tantamount, in the French legal system, to creating norms vested with a special legal force due to an expression more genuine, a power more original and free from any juridical constraint.¹²³

decision n°92-313 DC on the *Act authorising the ratification of the Treaty on the European Union* of 23 September 1992, *Rec.* 94 at para. 2.

¹¹⁸ In this sense, see E. Sur, “Le pouvoir constituant n’existe pas ! Réflexions sur les voies de la souveraineté du Peuple”, *op. cit.*, at fn. 118 above, at 585.

¹¹⁹ CE, Ass., 30 October 1998, *Sarran, Levacher et autres*, *Rec. Lebon* 368.

¹²⁰ Act n° 88-1028 of 9 November 1988 carrying statutory and preparatory dispositions for the self-determination of New Caledonia in 1998, *J.O.R.F.* p. 14087.

¹²¹ See *supra* at 76-78 and 144-146.

¹²² On this point that has been “implicitly but necessarily” decided by the *Conseil d'État*, see C. Maugué, “L’arrêt *Sarran*, entre apparence et réalité” (1999) n° 7 *Cahiers du Conseil constitutionnel*, available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-7/l-arret-sarran-entre-apparence-et-realite.52746.html>> at 7 (translation by the author) [Last accessed 29 December 2012].

¹²³ On this question, see for example F. Hamon, “Vox imperatoris, vox populi ? Réflexions sur la place du referendum dans un État de droit” in *L’État de droit : Mélanges en l’honneur de Guy Braibant* (Paris: Dalloz, 1996) 389-402.

The idea of the Constitution finding its external origin in the expression of the people is essential for the political legitimacy of the regime. However, legitimacy relies on a belief¹²⁴ and this has little bearing on legal reality. Powers existing in the French Constitution are all legally constituted and their existence is encapsulated in this legal instrument.¹²⁵ It is for this reason that the *Conseil constitutionnel* established the conformity with the Constitution of the modification by an Act of Parliament of a legislative instrument previously passed *via* referendum.¹²⁶ French sovereignty can only be *exercised*.¹²⁷ In contrast with the Irish perception of sovereignty as expressed by the Supreme Court for example in *Hanafin v. Minister for Environment*,¹²⁸ the sovereign can never be present itself in the French legal order.¹²⁹ Its existence is unavoidably mediated by representation.¹³⁰ If the Constitution is grounded in the expression of the *demos*, then the relationship between the former and the latter establishes the symbolic nature of the French sovereign. As a symbol, the Constitution creates the reality of the *demos* which paradoxically remains at the same time absent in any more concrete form.

The material existence of the body of voters is not to be equated with the French sovereign.¹³¹ The French sovereign is instead defined as a fiction, the existence of which is limited to the legal world. It is always in its name that the Constitution is proclaimed and protected but its empirical existence remains elusive.¹³² In comparison with the historical and concrete Irish sovereign, if one assumes that “the myth is constituted by the loss of the historical

¹²⁴ For the importance of conceiving legitimacy as a belief rather than a fact, see for example, P. Ricœur, *L'idéologie et l'utopie* (Trans. M. Revault d'Allonnes and J. Roman, Paris: Éditions du Seuil, 1997) at 33. For a similar argument, see for example, M. Loughlin, “Ten Tenets of Sovereignty” in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 55-86 at 62-63.

¹²⁵ See for example, O. Cayla, “L’obscur théorie du pouvoir constituant originaire ou l’illusion d’une identité souveraine inaltérable” in D. de Béchillon, P. Brunet, V. Champeil-Desplats and *al.* (eds.), *L’architecture du droit : Mélanges en l’honneur du Professeur Michel Troper* (Paris: Economica, 2006) 249-265, in particular at 259-260.

¹²⁶ CC, decision n° 89-265 DC on the *Act carrying amnesty of infractions committed on the occasion of events having occurred in New Caledonia* of 9 January 1990, *Rec.* 15 at para. 8.

¹²⁷ In this sense, see M. Troper, *La théorie du droit, le droit, l’État, op. cit.*, at fn. 81 above, at 310-311.

¹²⁸ [1996] 2 I.R. 321, in particular at 448.

¹²⁹ In this sense, see D. Rousseau, “La jurisprudence constitutionnelle : quelle « nécessité démocratique » ?” in G. Drago, B. François and N. Molfessis (eds.), *La légitimité de la jurisprudence du Conseil constitutionnel* (Paris: Economica, 1999) 363-376 at 372 where it is affirmed that “the people, indeed, never seizes itself directly as sovereign; it is not transparent to itself” (translation by the author).

¹³⁰ This is the conclusion reached by Luchaire when he affirms that “sovereignty thus passes from the nation and the people to the state and from the state to the institutions of the Republic, this can be understood since the institutions have a physical reality”, F. Luchaire, “Un concept inutile : « la souveraineté »” in *Renouveau du droit constitutionnel : Mélanges en l’honneur de Louis Favoreu* (Paris: Dalloz, 2007) 789-793 at 790 (translation by the author).

¹³¹ To the difference, for example, of the opinion of Hogan J. in the High Court in *Doherty v. The Referendum Commission and other* [2012] I.E.H.C. 211 at para. 21 where the citizens, the voters are equated with the Irish people.

¹³² For an explanation under the hermeneutic paradigm of the “purely ideal and abstract” nature of the sovereign as author of the constitution that is always absent and only exists as a “name” leading to the conclusion that any constituent power is only the representative of this sovereign, see O. Cayla, “L’obscur théorie du pouvoir constituant originaire ou l’illusion d’une identité souveraine inaltérable”, *op. cit.*, at fn. 127 above, in particular at 260-264 (translation by the author).

quality of things: things lose in it the memory of their creation (...) it purifies them, it proves them innocent, it founds them in nature [in this instance the legal one] and in eternity”,¹³³ one is justified in considering that France displays a mythical sovereign.¹³⁴

Irish and French understandings of their Constitutions have a common root in the constitutionalist theory according to which the supremacy of this legal instrument derives from it being the expression of the sovereign. However, different images of what constitutes a *demos* are reflected by the two legal systems.

This is not without consequences for their respective appraisals of the claims of the European Union legal order. However, for the moment, the main point is the common willingness of the Irish and French legal systems to make their respective concept of sovereignty the filter for European pretensions.

¹³³ R. Barthes, *Mythologies* (Paris: Seuil, coll. Points. Essais, 1970) at 216-217 (translation by the author).

¹³⁴ In the same sense, relying on the abstract conception of the French sovereign, see F. Luchaire, “Un concept inutile : « la souveraineté »”, *op. cit.*, at fn. 132 above, at 789.

B. Irish and French Sovereignties as a Continuing Filter for the Primacy of European Union Law

Rather than involving a straightforward issue of normative conflicts, the relationship between respectively the Irish and French domestic legal orders, and the one hand, and the European legal order, on the other, bears witness to perceived need to protect Irish and French sovereigns. In this regard, the development of European integration, from which the primacy of a greater number of European norms follow, is made conditional on the approval on the part of the domestic *demos* in order to prevent the supremacy of the Constitution entailing subsequent responsibility on the part of the states.

Furthermore, domestic courts make sure that the application of European Union norms, and in particular secondary law, respects the boundaries of this initial approval. In Ireland, this is seen notably in the field of human rights. It seems that the recent and limited recognition of the primacy principle in the French legal system answers to the same logic.

1. *The Consent of the French Sovereign as a Necessary Mediation for the Primacy of European Union Law*

Due to the grounding of the supremacy of the French Constitution in constitutionalism, opposition to European claims, and in particular the doctrine of primacy, derives from the objective of defending a sovereignty located in the states.¹³⁵ This defence is maintained both in the case of European Union primary law in order to ensure that its subsequent primacy receives the prior approval of the French constituent power and in the case of secondary law so that it does not infringe this initial endorsement. However, it is also in the constant stress which is put on the lack of a European sovereign, which would justify the direct legitimacy of the European legal order, that the French understanding of normative prevalence in terms of constitutionalism can be first observed.

French law, in the form of Article 54 of the Constitution, provides for review of the compatibility with the Constitution of treaties before their ratification. It is by this means that the *Conseil constitutionnel* makes sure that the French sovereignty is protected. However, it is also through this mechanism that the French constitutional court affirms what the European

¹³⁵ The opposition between the supremacy of the Constitution and the primacy of European Union law as an opposition between constitutionalist and normativist reasoning is further examined in *supra* at 33-35.

construction lacks, preventing the claim of the European Union legal order to primacy from being fully recognised. This opposition to a European constitutional moment consists of a double denial, both as regards the ability of European institutions to exercise French sovereignty and in relation to the existence of a European sovereign likely to substitute for the national one. This impossibility for European institutions to be considered as representative of the French sovereign can be seen in the consistent perspective adopted by the *Conseil constitutionnel* regarding the European Parliament. As early as 1976, the constitutional court, referring to Article 3 of the Constitution, made clear that the basis for, and the exercise of, sovereignty was circumscribed by the institutional framework designed in the French Constitution and could not exist anywhere but at national level.¹³⁶ *A contrario*, it could not be exercised by the European Parliament – a view which justified the conclusion that election of the institution by direct universal suffrage was not contrary to the French Constitution.¹³⁷ The French constitutional court repeated the inability of the European Parliament to be the representative of the French sovereign when it considered the Treaty of Maastricht.¹³⁸ This opinion was also affirmed, in a new and more explicit fashion, in its decisions on the *Treaty establishing a Constitution for Europe*¹³⁹ and on the *Treaty of Lisbon*¹⁴⁰ when the *Conseil constitutionnel* stated that the European Parliament “is not an emanation of national sovereignty”

Apart from this refusal to see a connection between French sovereignty and the institutions existing at European level, the French constitutional court also denied the existence of a distinct European sovereign. This point also derives from the deliberations of the *Conseil constitutionnel* concerning the European Parliament. In the same 1976 decision just discussed, it was made clear this new mode of election could not be interpreted as reflecting a nascent European sovereign when the *Conseil constitutionnel* affirmed that:

“the election of the representatives of the peoples of the member States to the Assembly of the European Communities by direct universal suffrage does not result in

¹³⁶ CC, decision n° 76-71 DC on the *Decision of the Council of the European Communities pertaining to the election of the Assembly of the Communities by direct universal suffrage* of 30 December 1976, *Rec.* 15 at para. 6. On this point, see for example É. Sur, *Contribution à une théorie juridique de la souveraineté nationale* (Villeneuve d’Ascq: Presses universitaires du Septentrion, 2000) at 474-476.

¹³⁷ *Ibid.* at para. 7.

¹³⁸ CC, decision n° 92-308 DC on the *Treaty on European Union* of 9 April 1992, *Rec.* 55 at para. 34.

¹³⁹ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 29.

¹⁴⁰ CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 20.

creating either a sovereignty nor institutions the nature of which would be incompatible with the respect for the national sovereignty”.¹⁴¹

It can be concluded that the *Conseil constitutionnel* made sure to stress what justified, in its view, the existence of a sovereign and the conditions under which an organ could be qualified as a representative. As has been noted in the text above,¹⁴² from the French perspective, sovereignty is instituted by the legal order and the status of a representative derives from participation in the expression of that sovereignty. Both the sovereign and the representative exist when the legal order authorises the latter to express itself on behalf of the former. In this process, the status of representative disregards a specific mode of its designation. It is true that parliaments are one of the major representative organs while their designation is effected nowadays by election involving direct universal suffrage. In this regard, the development of the elected assembly is often regarded as contributing to the development of a European sovereign.¹⁴³ However, one could argue that drawing an analogy between the latter fact and the existence of a represented sovereign would consist of mistaking the consequence for the principle, a democratic technique for the principle of democracy.¹⁴⁴ Article 14.2 of the Treaty on European Union affirms that “The European Parliament shall be composed of representatives of the Union's citizens.” However, this is still different from making of the European Parliament the representative of a European sovereign. If universal suffrage increases the representativity¹⁴⁵ of the European Parliament, it can not be concluded that the election of its members by the same citizens of the member states endows it with the function of

¹⁴¹ CC, decision n° 76-71 DC on the *Decision of the Council of the European Communities pertaining to the election of the Assembly of the Communities by direct universal suffrage* of 30 December 1976, *Rec.* 15. at para. 4 (translation by the author).

¹⁴² See *supra* at 167-177.

¹⁴³ For the argument that the election of the European Parliament by direct universal suffrage constitutes the development of a European people, see for example F. Chaltiel, “La décision du Conseil constitutionnel relative au Traité de Lisbonne : autorité de la chose jugée et contribution à la définition de l’Union” (2008) n° 4 *Les petites affiches* 3-10 at 5.

¹⁴⁴ On this distinction between the issue of democratic sovereignty as the existence of a popular will and the question of the modalities of its formulation, see for example P. Braud, *Science politique. 1. La démocratie* (Paris: Éditions du Seuil, coll. Points. Essais, 1997) at 62-71. More particularly in the European context, see L. Azoulai, “La Constitution et l’intégration. Les deux sources de l’Union européenne en formation” (2003) *Revue française de droit administratif* 859-875 at 865-866 where the author points out that, despite the increase of representativity techniques, the member states remain the constituent power in the European Union. The same impossibility to infer democracy from the existence of democratic devices in the European context is suggested by Weiler when he argues that “a parliament is, on this view, an institution of democracy not only because it provides a mechanism for representation and majority voting, but because it represents the *demos*, often the nation, from which derive the authority and legitimacy of its decision”, see J. H. H. Weiler, “Epilogue - The European Courts of Justice: Beyond ‘Beyond Doctrine’ or the Legitimacy Crisis of European Constitutionalism” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 365-391 at 382.

¹⁴⁵ On the distinction between representation and representativity, see *supra* at 171-172.

representation.¹⁴⁶ In this regard, the conclusion arrived at by the *Conseil constitutionnel* as to the nature of the European Parliament appears as to be merely the result of the definition of sovereignty under the French paradigm.

This mismatch between the claims of the European legal order and the response of the French legal order concerning the question of sovereignty also intensified with recent developments of the European legal order. It seems that this is how one should read the denial of a constitutional nature on the part of a document nonetheless entitled the “Treaty establishing a Constitution for Europe”. From the point of view of the *Conseil constitutionnel* in its *Treaty establishing a Constitution for Europe* decision:

“firstly, the provisions of the ‘Treaty establishing a Constitution for Europe’, and in particular those pertaining to the entry into force and revision thereof and the possibility for signatories to withdraw therefrom, show that said instrument retains the nature of an international treaty entered into by the States signatory to the Treaty establishing the European Communities and the Treaty on European Union”.¹⁴⁷

Despite its title, this European instrument reveals an aspect or defect of the European legal order, *viz.*, its lack of a constituent power of its own and therefore a concomitant sovereignty, if one takes the view these two expressions as the legal and political formulation of the same concept.¹⁴⁸ In this regard, it is interesting to note that the Preamble is deprived of a putative European sovereign author to which this treaty establishing a constitution could be imputed. It is in contrast heads of states who appear as the authors of this new instrument. Certainly, Article I-1 specifies that the European Constitution reflects “the will of the citizens and States of Europe” but this, more than anything, bears witness to the difficulty of attributing this instrument to a foundation which is properly European. This endeavour to create a Constitution for Europe could not but suffer from the absence of a proper European sovereign.¹⁴⁹ Even if one can argue that the notion of constitution can free itself from the

¹⁴⁶ On this understanding of the peoples of Europe as still being a population and not a People, see A. Pécheul, “La souveraineté et le Traité de Lisbonne” (2008) *Politeia* 170-191 at 180.

¹⁴⁷ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 9.

¹⁴⁸ In this sense, see É. Maulin, “Le pouvoir constituant dans l’Union européenne” (2007) n° 45 *Droits* 73-88 at 75-76.

¹⁴⁹ On this discrepancy between the European pretension and the absence of its conditions of realisation, see for example O. Jouanjan, “Ce que « donner une constitution à l’Europe » veut dire” (2003) n° 13 *Cités* 21-25 at 28.

concept of a state,¹⁵⁰ it cannot do without, the concept of sovereignty contained in the state.¹⁵¹ If it exists as a constitution, it is only in the weaker sense by which one can talk of the constitution to designate the very fact that a collective, as an association, is organised.¹⁵²

Refusing to equate the nature of the Constitutional Treaty with its denomination,¹⁵³ the *Conseil constitutionnel* held that this legal instrument was the product of the will of the member states, with its entry into force and future amendments depending on them.¹⁵⁴ In consequence, the Treaty establishing a Constitution for Europe could not pretend to have the normative immediacy characteristic of constitutions¹⁵⁵ and despite its title “retains the nature of an international treaty.”¹⁵⁶ As Levade puts it:

“if, in the instance of the Treaty establishing a Constitution for Europe, the French constituent has to proceed to a revision of the Constitution, it is not therefore because it is a constitution, but because it is a treaty.”¹⁵⁷

Therefore, by underlying that the European Union could be regarded neither as participating in expressing the will of the French sovereign nor as expressing a distinct sovereignty, the *Conseil constitutionnel* made clear that the European legal order was, for the moment, deprived of a legitimacy of its own.¹⁵⁸ In a sense, its legitimacy is gained by capillarity,¹⁵⁹

¹⁵⁰ For such an opinion, see for example A. Auer, “*E pur si muove*: Le caractère constitutionnel de la Constitution pour l’Europe” (2005) *Revue du Droit de l’Union Européenne* 65-90 at 73.

¹⁵¹ On this point, see for example P.-Y. Monjal, “Le projet de traité établissant une Constitution pour l’Europe : quels fondements théoriques pour le droit constitutionnel européen ?” (2004) 40 *Revue trimestrielle de droit européen* 443-475 at 464-465.

¹⁵² See for example, M. Troper and L. Jaume, “Le projet de Constitution européenne et la question du pouvoir constituant”, *op. cit.*, at fn. 62 above, at 102. In the same way, see T. C. Hartley, “The Constitutional Foundations of the European Union” (2001) 117 *Law Quarterly Review* 225-246 at 226.

¹⁵³ In this sense, see for example O. Dord, “Le Conseil constitutionnel face à la « Constitution européenne » : contrôle des apparences ou apparence de contrôle ?” (2005) *L’Actualité juridique. Droit administratif* 211-219 at 213. On the “purely metaphorical” use the constitutional lexicon, see for example D. Simon, “Les fondements de l’autonomie du droit communautaire” in Société Française pour le Droit International - S.F.D.I., *Droit international et droit communautaire, perspectives actuelles: Colloque de Bordeaux* (Paris: Pedone, 2000) 207-249 at 224.

¹⁵⁴ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 9. On this point, see P.-Y. Monjal, “Le projet de traité établissant une Constitution pour l’Europe : quels fondements théoriques pour le droit constitutionnel européen ?”, *op. cit.*, at fn. 153 above, at 465.

¹⁵⁵ As Piris points it out: “regarding the EU Treaty, it has not itself into a *Grundnorm*, that is to say in a legal rule from which the other legal rules draw their validity, but which would not itself depend on another legal rule for its own validity”, J.-C. Piris, “L’Union européenne : vers une nouvelle forme de fédéralisme ?” (2005) 41 *Revue trimestrielle de droit européen* 243-260 at 250 (translation by the author).

¹⁵⁶ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 10.

¹⁵⁷ A. Levade, “Le Conseil constitutionnel aux prises avec le droit communautaire dérivé” (2004) *Revue du droit public et de la science politique en France et à l’étranger* 889-911 at 911.

¹⁵⁸ In this sense, see for example É. Maulin, “Le pouvoir constituant dans l’Union européenne”, *op. cit.*, at fn. 150 above, at 77.

i.e., by being derived from the legitimacy residing in the member states.¹⁶⁰ Against the claim to primacy stemming from the European legal order, the French constitutional court therefore stresses its duty to uphold and protect the sovereignty existing solely in the state.

When it comes to European Treaties, the protection of French sovereignty is positively affirmed and is effected in accordance with Article 54, which provides for a pre-ratification review for constitutionality, stating that:

“if the *Conseil constitutionnel*, on a referral from the *Président de la République*, from the *Premier ministre*, from the President of one or the other Houses, or from sixty Members of the *Assemblée nationale* or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorisation to ratify or approve the international undertaking involved may be given only after amending the Constitution.”

It is possible to see a similarity between this mechanism and the review for constitutionality of statutes (which answers to a hierarchical logic). However, particularly for present purposes, it is important to distinguish between the two. *Stricto sensu*, this operation cannot lead to an assessment which is expressed in terms of validity. The international instrument is not yet a norm since its ratification is merely pending. Therefore, the Article 54 procedure cannot be regarded as being directed at invalidation for incompatibility with a superior norm, in this instance the Constitution.¹⁶¹ The purpose of this operation is thus different from the direct affirmation of the normative superiority of the Constitution over international instruments. It is the content of the two sets of norms and their compatibility

¹⁵⁹ On the notion of capillarity, see M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)* (Paris: Economica, 2010) at 284 or F. Chaltiel, “Les bases constitutionnelles du droit communautaire” in *L’esprit des institutions, l’équilibre des pouvoirs : Mélanges en l’honneur de Pierre Pactet* (Paris: Dalloz, 2003) 551-568 at 562-563. However, Chaltiel stresses a capillarity of the exercise of the national sovereignty by European institutions. It seems however that the *Conseil constitutionnel* denied this very interpretation. Disconnected from the exercise of a sovereignty which remains located in France, the approval of the French sovereign to join what is now the European Union only creates a capillarity of legitimacy, this form of legitimacy not being exclusive of that produced by an increase of the representativity of the European institutions.

¹⁶⁰ In the same sense, commenting on the German position towards European law, see B. de Witte, “Sovereignty and European Integration: the Weight of Legal Tradition” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 277-304 at 299 where it is argued that “the Constitution requires there to be a *German democracy*; it does not allow for a truly *European democracy*.”

¹⁶¹ On the specificities of the control exercised by the *Conseil constitutionnel* under Article 54 of the French Constitution, and this point in particular, see C. Blaizot-Hazard, “Les contradictions des articles 54 et 55 de la Constitution face à la hiérarchie des normes” (1992) *Revue du droit public et de la science politique en France et à l’étranger* 1293-1319 at 1301-1302.

which is the focus of the intervention of the *Conseil constitutionnel*.¹⁶² It is important to note that - in contrast to its approach relating to the review of statutes - the *Conseil constitutionnel* does not seek, in principle,¹⁶³ to interpret the treaty in such a way as to affirm its conformity with the Constitution. Rather than involving an attempt *via* constructive interpretation to ensure normative conformity, the purpose of its control is merely to determine objectively the compatibility or otherwise of the international provisions. If an incompatibility is found, it is left to the French authorities to refuse ratification, to ask for a renegotiation of the treaty or to carry out a constitutional revision in order to establish the compatibility of its content with the external norm.

What is however important for present purposes is the test used by the constitutional court in this process. There are three different criteria that can lead to a declaration of incompatibility, *viz.*, when the treaties:

“contain a clause running counter to the Constitution, call into question constitutionally guaranteed rights and freedoms or adversely affect the fundamental conditions of the exercising of national sovereignty.”¹⁶⁴

The first two refer to a strict normative discordance between the two legal orders. The definition of the last criterion has been more problematic in the case-law of the *Conseil constitutionnel*. It was first mentioned as a criterion in 1970,¹⁶⁵ an exercise which was repeated in 1985.¹⁶⁶ However, in 1976 the constitutional court relied on a different test. The *Conseil constitutionnel* made a distinction, under Paragraph 15 of the Preamble of the Constitution of 1946, between limitations of sovereignty, which were constitutionally authorised, and transfers

¹⁶² On these points, see for example D. Rousseau, *Droit du contentieux constitutionnel*, *op. cit.*, at fn. 101 above, at 197-198 and D. Blanc, “Les incidences du « traité-constitutionnel » européen sur la Constitution européenne : une affectation minimale : Retour sur la décision de Conseil constitutionnel n° 2004-505 DC du 19 novembre 2004, Traité établissant une Constitution pour l’Europe” (2005) *Revue de la recherche juridique - Droit prospectif* 2257-2276 at 2264-2266.

¹⁶³ On the exception to this rule when European Union law is concerned in the recent case-law of the *Conseil constitutionnel*, see *infra* at 219-223.

¹⁶⁴ See for example, CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 7.

¹⁶⁵ CC, decision n° 70-39 DC on the *Treaty signed in Luxembourg on 22 April 1970 modifying certain budgetary provisions of the Treaties instituting the European Communities and of the Treaty instituting a single Council and a single Commission of the European Communities and on the decision of the Council of the European Communities dated 21 April 1970 pertaining to the replacement of the contributions of the Member States by resources peculiar to the Communities* of 19 June 1970, *Rec.* 15 at para. 9.

¹⁶⁶ CC, decision n° 85-188 DC on the *Additional Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms pertaining to the abolition of death penalty, signed by France on 28 April 1983* of 22 May 1985, *Rec.* 15 at para. 3.

of sovereignty, which were, in contrast, prohibited.¹⁶⁷ If both notions of transfer and limitation involved considering matters in terms of sovereignty rather than from a purely normative perspective, determining the location of the border between the two nonetheless involved difficulties, as can be seen in the discussions about them in academic literature.¹⁶⁸

The *Treaty of Maastricht* decision discarded the distinction between limitations and transfers of sovereignty. Since then, the case-law has involved examination of new European Union treaties through the prism of the “fundamental conditions of the exercising of national sovereignty”.¹⁶⁹ The consequence of this choice is to highlight that the development of the European legal order is now considered solely in terms of “transfers of powers”¹⁷⁰ and their exercise in common. In this sense, the newer approach underlines the point that member states preserve the principle of their sovereignty.¹⁷¹ Being “Masters of the Treaties”,¹⁷² the European Union is their creation, and one in which they still hold *Kompetenz-Kompetenz*¹⁷³ as its constituent powers.¹⁷⁴ Rather than involving a diminution of their sovereignty, their very sovereignty is exercised in treaty-making,¹⁷⁵ even if successive transfers of competence could make this sovereignty a mere question of principle.¹⁷⁶

¹⁶⁷ CC, decision n° 76-71 DC on the *Decision of the Council of the European Communities pertaining to the election of the Assembly of the Communities by direct universal suffrage* of 30 December 1976, *Rec.* 15 at para. 2.

¹⁶⁸ See for example, F. Luchaire, “Le Conseil constitutionnel et la souveraineté nationale” (1991) *Revue du droit public et de la science politique en France et à l'étranger* 1499-1513, in particular at 1503-1507.

¹⁶⁹ CC, decision n° 92-308 DC on the *Treaty on European Union* of 9 April 1992, *Rec.* 55 at para. 14.

¹⁷⁰ *Ibid.* at para. 13

¹⁷¹ On this point, see O. Gohin, “Conseil constitutionnel et Traité de Lisbonne : vite, clair et bien” (2008) n° 3 *La Semaine juridique. Administrations et collectivités territoriales* 18-23 at 22 and P.-Y. Monjal, “Le projet de traité établissant une Constitution pour l'Europe : quels fondements théoriques pour le droit constitutionnel européen ?”, *op. cit.*, at fn. 153 above, at 472 where the authors affirms that “what is collectively exercised are granted powers, the competences of the Union; certainly not sovereignty” (translation by the author). More generally, relying on a similar distinction, Loughlin considers that “such a limitation or division of legislative power does not, however, amount to a division of sovereignty: sovereignty divided is sovereignty destroyed”, concluding in the European context that “in the words of the European Court of Justice (ECJ), one of the newly-formed institutions, the Union constitutes ‘a new legal order of international law for the benefit of which the states have limited their sovereign rights’. But shared competence or transferred jurisdiction does not entail shared or transferred sovereignty, even if, with the acquiescence of the member state, European law assumes priority in any conflict with a provision of domestic law”, M. Loughlin, “Ten Tenets of Sovereignty”, *op. cit.*, at fn. 126 above, at 70 and 81-82.

¹⁷² According to the expression used by the German Federal Constitutional Court, *Brunner and others v. The European Union Treaty* (*Maastricht* decision), BVerfG, decision of 12 October 1993, 2 BvR 2134/92 & 2159/92, [1994] 1 C.M.L.R. 57 at 91.

¹⁷³ On the analysis of the case-law of the *Conseil constitutionnel* in terms of *Kompetenz-Kompetenz*, even though it is not a traditional concept in the French legal system, see J. Plötnner, “Report on France” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 41-75 at 50-54. For a similar argument, see H. Labayle and J.-L. Sauron, “La Constitution française à l'épreuve de la Constitution pour l'Europe” (2005) *Revue française de droit administratif* 1-29 at 4-5.

¹⁷⁴ On this point, see for example L. Azoulai, “La Constitution et l'intégration. Les deux sources de l'Union européenne en formation”, *op. cit.*, at fn. 146 above, at 865.

¹⁷⁵ As concluded by the Permanent Court of International Justice in the *S.S. Wimbledon (United Kingdom v. Japan)*, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17) at 25.

¹⁷⁶ See K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001) at 170 and O. Gohin, “Conseil constitutionnel et Constitution

As matters have stood since the *Treaty of Lisbon* ruling,¹⁷⁷ the occurrence of infringements of the “fundamental conditions of the exercising of national sovereignty” depends on both substantive and procedural criteria. On the one hand, from a material point of view, they concern competences transferred to the European Union in fields that are “inherent in the exercising of national sovereignty”¹⁷⁸ and where the disruption is of a certain “dimension”.¹⁷⁹

On the other hand, as was already stated in the *Treaty of Amsterdam* decision,¹⁸⁰ an infringement of the “fundamental conditions of the exercising of the national sovereignty” can be the result of a modification of the modalities of decision-making in competences already transferred. The change from unanimity to qualified majority voting was held to constitute such an infringement as it deprives France of its power to oppose a European legal instrument, as does the deprivation of a monopoly in initiating the creation of norms. The decision-making power granted to the European Parliament was also regarded as infringing the “fundamental conditions of the exercising of national sovereignty”.¹⁸¹

The approach of the *Conseil constitutionnel* regarding qualified majority voting and the loss of a monopoly of normative initiative can be explained in terms of concerns about external sovereignty, and the French will in the European sphere being potentially overcome due to the co-operation with other member states. However, it is more difficult to understand why the new powers of the European Parliament “adversely affect the fundamental conditions of the exercising of national sovereignty”. The *Conseil constitutionnel* based its decision on the fact that this European institution “is not an emanation of national sovereignty”.¹⁸² Therefore, the position of the French constitutional court can be interpreted as denying an autonomous European basis to decision-making. European rules have to be created by state organs, acting at European level, as the emanation of national sovereignty.¹⁸³ If these reflections on the European Parliament are to be reconciled with the two former points related to the qualified majority voting and the loss of a monopoly of normative initiative, it can be said that external sovereignty

européenne : les trois contradictions” (2004) n° 53 *La Semaine juridique. Administrations et Collectivités territoriales* 1707-1710 at 1710.

¹⁷⁷ CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459.

¹⁷⁸ *Ibid.* at para. 18.

¹⁷⁹ *Ibid.* at para. 16.

¹⁸⁰ CC, decision n° 97-394 DC on the *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related instruments* of 31 December 1997, *Rec.* 344 at para. 9.

¹⁸¹ CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 20.

¹⁸² *Ibid.* at para. 20.

¹⁸³ For such an interpretation, see example X. Magnon, “Le Traité de Lisbonne devant le Conseil constitutionnel : *non bis in idem*” (2008) n° 74 *Revue française de droit constitutionnel* 310-336 at 332-333.

is the projection at European level of national sovereignty.¹⁸⁴ This is a reaffirmation that, from the perspective of the *Conseil constitutionnel*, sovereignty “as a quintessentially political concept”¹⁸⁵ structures the relationship between the domestic and European legal orders. The European Union being deprived of an ultimate source of authority, sovereignty can only be grounded in the national *demos*, from which the European legal order derives its legitimacy.¹⁸⁶

This is consistent with the consequences attached by Article 54 of the Constitution to a finding of an incompatibility between the European Treaties and the Constitution since a constitutional amendment would be required prior to ratification of a Treaty held incompatible with the Constitution. Since the intervention of the constituent power is required, it is *in fine* the French sovereign which is given the last word.¹⁸⁷ To date, the constituent power has always amended the Constitution so as to fit with European requirements.¹⁸⁸ This has led some to argue that, in consequence, European Union law is superior to the Constitution.¹⁸⁹ It seems however that any such conclusion relies on a political view being taken on the process. From a legal point of view, it ensures that the national sovereign agrees to the European Union law commitments and to the primacy of its norms rather than being overcome by them.¹⁹⁰

The new position of the *Conseil constitutionnel* towards European secondary law and in particular legislative acts implementing European directives corresponds to nothing more than the continuation of the application of this sovereignty-based filter for European claims. As has

¹⁸⁴ On this point, see for example K. Béchet-Golovko, “Qu’en est-il du concept de « souveraineté » ? À l’occasion de la décision du Conseil constitutionnel sur le Traité de Lisbonne” (2008) *Politeia* 75-92 at 80 and F. Chaltiel, “Les bases constitutionnelles du droit communautaire”, *op. cit.*, at fn. 161 above, at 563.

¹⁸⁵ M. Loughlin, “Ten Tenets of Sovereignty”, *op. cit.*, at fn. 126 above, at 56

¹⁸⁶ In this sense, see V. Champeil-Desplats, “Commentaire de la décision du Conseil constitutionnel n° 2004-505 DC du 19 novembre 2004 relative au Traité établissant une Constitution pour l’Europe”, *op. cit.*, at fn. 103 above, at 574-576.

¹⁸⁷ In this sense, see C. Blaizot-Hazard, “Les contradictions des articles 54 et 55 de la Constitution face à la hiérarchie des normes”, *op. cit.*, at fn. 163 above, at 1305.

¹⁸⁸ It has to be noted that it is the Act of ratification of the Treaty establishing a Constitution for Europe that was rejected through referendum, leaving therefore the possibility for a subsequent ratification on the basis of the same constitutional provisions as amended. For that matter, pending the ratification of the Treaty establishing a Constitution for Europe, Article 88-1 of the French Constitution provided that “The Republic can participate in the European Union”. After the ratification of the Treaty of Lisbon, this constitutional provision changed to “the Republic shall participate in the European Union”.

¹⁸⁹ See for example, É. Marcovici, “À propos de la décision du Conseil constitutionnel relative au Traité de Lisbonne. Réflexion sur la procédure de l’article 54 de la Constitution” (2008) *Politeia* 39-61 at 54-55.

¹⁹⁰ On the differences between the political and legal readings of the amendments adopted in consequence of the review of international treaties carried out by the *Conseil constitutionnel* on the basis of Article 54 of the French Constitution, see C. Blaizot-Hazard, “Les contradictions des articles 54 et 55 de la Constitution face à la hiérarchie des normes”, *op. cit.*, at fn. 163 above, at 1298-1300 and at 1305 insofar as concerns the fact that “the last word always goes to the holder of sovereignty under the general theory of constitutional law, that is to say to the Nation” or D. Biroste, “Précisions sur les rapports entre droit constitutionnel et droit communautaire” (2004) *Revue de la recherche juridique - Droit prospectif* 1829-1847 at 1843-1844.

been seen in the text above,¹⁹¹ the requirements of European law and the doctrine of primacy are regarded as having been formally recognised by Article 88-1 of the Constitution. The willingness to participate in the process of European integration is however balanced with other constitutional provisions and, in consequence, can be limited by the constituent power.

As was first decided by the *Conseil constitutionnel* in 2004, any such limit had to be found in an “express conflicting provision of the Constitution”.¹⁹² Recognising a willingness to join the process of European integration as long as this was not contrary to a constitutional provision would have made the recognition of the primacy principle somehow superfluous compared to the previous position of French courts since it would have meant that any constitutional provision could be opposed to the primacy doctrine. In other words, the whole French Constitution would have had prevalence over the whole body of European rules. This partly explains the change in the case-law to an express provision which is specific to the French constitutional order.¹⁹³ The *Conseil constitutionnel*'s decisions of 2006 introduced however the most recent development in its case-law on European Union law and redefined the limit put on the recognition of the doctrine of primacy through Article 88-1 of the Constitution as being where this would lead to the infringement of a “rule or principle inherent in the constitutional identity of France”.¹⁹⁴ Two consequences can be deduced from this change.

First, the former test, defined in terms of an “express conflicting provision of the Constitution”, either specific or not, supported a reading which gave priority to a normative assessment. In contrast, constitutional identity refers to an entity¹⁹⁵ and introduces a personification which was previously absent. Rather than a mere relationship of norms, the new case-law of the *Conseil constitutionnel* emphasises regarding the Constitution as the expression of the French sovereign. Secondly, the *Conseil constitutionnel* specified that constitutional identity would stand as a limit to the requirements stemming from Article 88-1 of the Constitution “except when the constituent power consents thereto”,¹⁹⁶ a condition which was not

¹⁹¹ Article 88-1 of the French Constitution constituted the basis of the new case-law of the *Conseil constitutionnel* granting specific recognition to European law requirements and in particular to the doctrine of primacy. See *supra* at 78-82.

¹⁹² See for example, CC, Decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7.

¹⁹³ This adjunction of the specificity criterion was established in CC, decision n° 2004-498 DC on the *Act on bioethics* of 29 July 2004, *Rec.* 122.

¹⁹⁴ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19 and CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120 at para. 6.

¹⁹⁵ On the parallel understanding of the two notions, see for example G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 56 above, at 89-103.

¹⁹⁶ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19 and CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120 at para. 6.

mentioned explicitly in its decisions of 2004. This reinforces the importance which has to be given to the notion French sovereign in order to understand its case-law relative to the primacy of European Union law. Rather than being a strict normative issue, it is the Constitution as the expression of the sovereign that justifies *in fine* the scope granted to the primacy of European Union law in the French legal order, both insofar as concerned the compliance with European obligations contained in Article 88-1 of the Constitution¹⁹⁷ and also in the limits put on the legal consequences of this membership.¹⁹⁸ In this regard, the position of the *Conseil constitutionnel* towards European Union secondary law is similar to the logic applied for the purposes of review of European Union primary law.¹⁹⁹

In conclusion, as regards both the primary and secondary law of the European Union, their impact on the French legal order is determined by the willingness of the constituent power to endorse them. The French sovereign, as matters are understood in France, is the filter for European claims in the domestic legal order. As Mathieu put it, the case-law of the *Conseil constitutionnel* still affirms “the principle of national sovereignty and the primacy of the constituent’s will.”²⁰⁰

¹⁹⁷ In this sense, see P.-Y. Monjal, “Le Conseil constitutionnel et les directives communautaires : l’incompétence du juge suprême comme garantie de l’opposabilité de la Constitution au droit communautaire ?” (2004) *Revue du Droit de l’Union Européenne* 509-522 at 514.

¹⁹⁸ In this sense, see C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information” (2007) n° 69 *Revue française de droit constitutionnel* 100-120 at 115.

¹⁹⁹ For this parallel between the procedure provided for by Article 54 of the Constitution and the developments of the case-law of the *Conseil constitutionnel* in 2006, see for example A. Levade, “Le Palais-Royal aux prises avec la constitutionnalité des actes de transposition des directives communautaires : À propos de la décision du Conseil constitutionnel n° 2006-543 du 30 novembre 2006, *Loi relative au secteur de l’énergie* et de l’arrêt du Conseil d’Etat, Assemblée, du 8 février 2007, *Société Arcelor Atlantique et Lorraine et autres*” (2007) *Revue française de droit administratif* 564-577 at 569-570 and B. Genevois, “Le Conseil constitutionnel et le droit communautaire dérivé : À propos de la décision n° 2004-496 DC du 10 juin 2004” (2004) *Revue française de droit administratif* 651-661 at 656.

²⁰⁰ B. Mathieu, “Les rapports normatifs entre le droit communautaire et le droit national. Bilan et incertitudes relatifs aux évolutions récentes des juges constitutionnel et administratif français” (2007) n° 72 *Revue française de droit constitutionnel* 675-693 at 677.

2. *The Scope of the Primacy of European Union Law Delimited by the Will of the Irish People*

The conflict between the European and Irish definitions of the primacy principle is due to the transformation of this doctrine once it is received into the domestic legal order. This is the reason why, from an Irish perspective, this principle is understood not as a hierarchical rule to the benefit of European Union norms but as a constitutional immunity that depends on and has to yield to the supremacy of the Irish Constitution which remains the supreme rule of the domestic legal order.²⁰¹ However, since the Irish Constitution is perceived as the expression of the Irish sovereign, it results in the necessary approval of the Irish sovereign for the strengthening of European integration. This process requires not so much a revolution in the Irish legal system as the continuation of popular assent *via* referendum to the development of the process of European integration and protection of this popular assent in case of a subsequent attack on its sovereignty arising from European secondary law.

Given that the people are fully sovereign in the Irish legal system and have not been substituted by a European sovereign, one may take the view that the development of European Union law does not lead to the juridical architecture of Ireland being overturned. However, due to the possible inclination of the Irish legal system towards natural law, both on the basis of the wording of the constitutional provisions and on their subsequent interpretations by Irish courts, in particular in the cases related to the unenumerated rights doctrine,²⁰² it has been argued, notably by Phelan,²⁰³ that membership of the European Union could lead to a revolution in the Irish legal system. However, it may be suggested that an analysis of this claim leads rather to the conclusion that the opposition between the Irish legal system and European Union law is – still – constructed in terms of sovereignty.

Denying the fact that the unenumerated rights doctrine can be regarded as an interpretative device to justify judicial decisions, Phelan argues that “Irish constitutional natural law is not an interpretive approach but rather a source which contains its own principles of specific rules”.²⁰⁴ When compared with the notion of sovereignty, the validity of the will of the people is materially restrained to what is respectful of natural law principles “based on a

²⁰¹ See *supra* at 130-141.

²⁰² In particular *Ryan v. Attorney General* [1965] I.R. 294, *State (Nicoloau) v. An Bord Uchtála* [1966] I.R. 567 and *McGee v. Attorney General* [1974] I.R. 284 as analysed *supra* at 158-162.

²⁰³ D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 34 above.

²⁰⁴ *Ibid.* at 275.

Thomistic conception which involves the application of the principles of practical reason”.²⁰⁵ In conclusion, even though the constitution is indeed the expression of the people, this does not constitute the basis of the validity of the Irish legal system. As he puts it:

“the popular sovereign is the ultimate legislator, but the validity of law depends on its compatibility with Irish constitutional natural law.”²⁰⁶

This bears important consequences regarding the consent the people can accord with respect to participation in the European Union, and in particular to the extent that the Irish legal system can be accommodated to the primacy principle. As has been seen,²⁰⁷ Ireland subscribes to a weaker version of this doctrine, focused on its consequences rather than its foundations. As defined in the Irish legal order, its existence depends on its reception by the European Communities Act 1972 (as amended) – the validity of which relies on the licence to join the European Union provided for by Article 29.4.5° of the Constitution – and a regime of constitutional immunity ensuring (through Article 29.4.6° of the Constitution) that no constitutional provisions can invalidate necessitated domestic norms or prevent European Union rules from having the force of law. However, if one argues that the validity of the Irish legal system relies on natural law, this legal mechanism can only be partial. It would be limited to the people’s own power and, in consequence, while this ensures the prevalence of European rules over positive law, they would nonetheless have to yield to Irish natural law.²⁰⁸ Unlike Irish law, which is based on natural law and rejects legal positivism,²⁰⁹ European Union law is only based on legal positivism.²¹⁰ In consequence, had Ireland to fully acknowledge the European claim to primacy, this would lead to a legal revolution.²¹¹ Recognising the European doctrine

²⁰⁵ *Ibid.* at 297.

²⁰⁶ *Ibid.* at 368. However, it is not always clear if the reference to natural law is a question of validity or of legitimacy of Irish positive law, see for example *ibid.* at 273, 287, 355 or 378.

²⁰⁷ See *supra* at 87-93.

²⁰⁸ On this Irish natural law limit put on the doctrine of primacy, see D. R. Phelan, “Two Hats, One Wig, No Halo” (1995) 45 *Doctrine & Life* 130-134 at 131.

²⁰⁹ See for example B. Walsh, “Reflections on the Effects of Membership of the European Communities in Irish Law”, *op. cit.*, at fn. 24 above, at 817 where it is affirmed that “Irish constitutional jurisprudence (...) is firmly rooted in the natural law or natural rights character of these constitutionally guaranteed rights and totally rejects the philosophy of legal positivism”. See also D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 34 above, at 364.

²¹⁰ In this sense, see Phelan, D. R. Phelan, “Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of European Union” (1992) 55 *The Modern Law Review* 670-689. However, this point is not stated expressly and the opposition between the two legal systems seems to revolve around the content and the values protected in each of them rather than a strict question of different basis of validity.

²¹¹ If a revolution in the legal sense is understood as a shift of the rule of recognition in the legal system as H. L. A. Hart described it in *The Concept of Law* (Second edition, Oxford: Oxford University Press, coll. Clarendon Law

would require granting an unfettered sovereignty to the people which, according to Phelan, would be tantamount to “a discontinuity in the validation of laws”²¹² and would “establish a new basis”²¹³ for the Irish legal order.

However, this analysis seems to have been contradicted by *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill*.²¹⁴ Phelan argues that “Court expressly accepted its role in determining ‘the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable.’”²¹⁵ However, the decision reached by Hamilton C.J. seems to contradict this interpretation when he concluded a few paragraphs later that:

“the courts (...) at no stage recognised the provisions of natural law as superior to the Constitution.

The People were entitled to amend the Constitution in accordance with the provisions of Article 46 of the Constitution and the Constitution as so amended by the Fourteenth Amendment is the fundamental and supreme law of the State representing as is does the will of the People.”²¹⁶

Moreover, this case - which could have been regarded as having “a limited authority”²¹⁷ - has since been confirmed by subsequent decisions of the Supreme Court.²¹⁸ Accordingly, the conflict between Irish constitutional law and the primacy of European Union law cannot be assessed in terms of an opposition of legal theories.²¹⁹ It is rather in terms of sovereignty and positive law that it has to be analysed.²²⁰ In this respect, but for different reasons, it is still true

Series, 1997) at 118-120 or of the *Grundnorm* to use Kelsen’s terminology, H. Kelsen, *Théorie pure du droit* (Trans. C. Eisenmann, Brussels; Paris: Bruylant; Librairie Générale de Droit et de Jurisprudence, coll. La pensée juridique, 1999) at 209-211.

²¹² D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 34 above, at 355.

²¹³ *Ibid.* at 366.

²¹⁴ [1995] 1 I.R. 1.

²¹⁵ D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 34 above, at 295, quoting the decision of the Supreme Court at 42. .

²¹⁶ [1995] 1 I.R. 1 at 43.

²¹⁷ D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 34 above, at 362.

²¹⁸ See for example, in this sense, the opinion of Denham J. (as she was then) in *Hanafin v. Minister for Environment* [1996] 2 I.R. 321 at 425 or of Keane J. in *O’T v. B* [1998] 2 I.R. 321 at 372.

²¹⁹ In this sense, see G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary* (London: Sweet & Maxwell, 1995) at 141.

²²⁰ This option is also raised by Phelan, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 34 above, at 368.

that the “revolution has not yet taken place.”²²¹ If the notion of revolution is understood in terms of a shift in the basis of the validity of the Irish legal system rather than on the extent of its modifications due to European influence,²²² then no revolution occurred in 1972.²²³ Step towards ever-closer integration has been submitted to the approval of the people through referendum and their sovereignty has been protected against possible infringements by subsequent European Union secondary law.

As to European Union primary law, the leading case is *Crotty v. An Taoiseach*²²⁴ in which the ratification of the Single European Act was at stake. If this decision is essential for the definition of the necessity clause defined in what is now Article 29.4.6° of the Constitution, it also bears important consequences for the defence of sovereignty in the face of European norms.²²⁵ Mr Crotty (a) contested the constitutionality of the European Communities (Amendment) Act 1986, which intended to ensure the reception of part of the European instrument in the Irish legal system and (b) sought an injunction preventing the Government from ratifying Title III of the Single European Act. According to him, ratification could only be effected after a necessary amendment of the Constitution since the increase of powers enjoyed by European institutions required further approval on the part of the people. Finlay C.J., pronouncing the judgement on behalf of the whole Supreme Court²²⁶ on the constitutionality of the European Communities (Amendment) Act 1986, agreed that the issue at stake was one of sovereignty.²²⁷ He considered the shift from unanimity to qualified majority voting in the Council, and concluded that:

“the capacity of the Council to take decisions with legislative effect is a diminution of the sovereignty of Member States, including Ireland, and this was one of the reasons

²²¹ *Ibid.* at 355.

²²² The question is not to deny the extensive and decisive impact of European Union law on the Irish legal system. Indeed, membership entailed constitutional modifications that some may consider even “more far-reaching than the changes brought by the 1937 Constitution itself”, see O. Doyle, *Constitutional Law: Text, Cases and Materials*, *op. cit.*, at fn. 41 above, at 385.

²²³ For a contrary opinion, but expressed in terms of the substantive influence of European law on the domestic legal order rather than in terms of validity, see G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 221 above, at 142.

²²⁴ [1987] I.R. 713.

²²⁵ On the consequence of this decision for the definition of the concept of sovereignty in the Irish legal system and the direct link with the expression of the citizens in this regard, see for example A. Sherlock, “Sovereignty, the Constitution and the Single European Act” (1987) 6 *Dublin University Law Journal* 101-113 at 104.

²²⁶ In accordance with Article 34.4.5° of the Constitution dealing with review of the constitutionality of statutes.

²²⁷ The judges also considered Title III of the Single European Act in terms of sovereignty, see *infra* at 196-198.

why the Third Amendment to the Constitution was necessary. Sovereignty in this context is the unfettered right to decide: to say yes or no.”²²⁸

If the formula “the unfettered right to decide: to say yes or no” encapsulates the ideological content of sovereignty, many regretted that the Supreme Court did not elaborate on this notion more analytically.²²⁹ In particular, the decision made no distinction between internal and external sovereignty. More importantly and considering the diverse meanings sovereignty can be vested with,²³⁰ the Supreme Court did not draw any distinction between sovereignty as referring to the political entity on behalf of which power is legitimately exercised and sovereignty as a set of competences exercised by the state. According to the former, one can consider that Irish sovereignty, as in a dynamic of connected vessels, diminishes and fuels the development of a different and competing European sovereignty.²³¹ The latter only concerns the exercise in common of competences, the basis of which remains in the member states.²³²

One could argue that membership does not require the states to relinquish their independence and sovereignty but rather can be seen as the very exercise of sovereignty.²³³ The participation on what is now the European Union rather consists of a transfer of some competences. It is true that the definition of the European legal order in the decision of the

²²⁸ [1987] I.R. 713 at 769. Walsh J. used the same definition of sovereignty, see *ibid.* at 781.

²²⁹ Many authors underlined the lack of definition of the concept of sovereignty, in particular considering the very strict attitude taken in the second part of the judgment related to foreign policy, see for example A. Sherlock, “Sovereignty, the Constitution and the Single European Act”, *op. cit.*, at fn. 227 above, at 108-109, G. W. Hogan, “The Supreme Court and the Single European Act” (1987) 22 *Irish Jurist* 55-70 at 65 or G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 221 above, at 43 where the authors argue that the decision relied on “a barely articulated conception of State sovereignty”. Nonetheless, it is still this understanding of sovereignty which structures the decision of the Supreme Court, see for example *Pringle v. The Government of Ireland and others* [2012] I.E.S.C. 47. For further analyses of this latter decision, see *infra* at 281-284.

²³⁰ On this plurality of meanings, see for example M. Troper, “En guise d’introduction : La théorie constitutionnelle et le droit constitutionnel positif”, *op. cit.*, at fn. 103 above, at 3.

²³¹ For an interpretation in that sense, see A. Whelan, “National Sovereignty in the European Union” in T. Murphy and P. Twomey, *Ireland’s Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998) 277-292 at 291, G. W. Hogan and N. Hyland, “The Legal and Constitutional Implications” in P. Keatinge (ed.), *Maastricht and Ireland: What the Treaty means* (Dublin: The Institute of European Affairs, 1992) 96-108 at 101 or N. Fennelly and A. M. Collins, “Irlande” in J. Rideau (ed.), *Les États membres de l’Union européenne : Adaptations - Mutations - Résistances* (Paris: Librairie Générale de Droit et de Jurisprudence, 1997) 263-300 at 268 where the authors affirm that joining the European Community involved a “conflict of sovereignties” (translation by the author).

²³² In this sense, and making a distinction between transfer of competences and transfer of sovereignty, see B. de Witte, “Sovereignty and European Integration: the Weight of Legal Tradition”, *op. cit.*, at fn. 162 above, at 282 or M. Loughlin, “Ten Tenets of Sovereignty”, *op. cit.*, at fn. 126 above, at 81-82.

²³³ As Hogan points out: “all treaties restrict the sovereignty of the contracting states (in the sense the state’s freedom to act is thereby curtailed); yet the right to enter treaties is the very attribute of sovereignty”, G. W. Hogan, “The Supreme Court and the Single European Act”, *op. cit.*, at fn. 231 above, at 65. A point which is expressly stressed by the judges of the majority in the decision on the Treaty establishing the European Stability Mechanism, see *Pringle v. The Government of Ireland and others* [2012] I.E.S.C. 47 *per* Denham C.J., O’Donnell, McKechnie and Clarke JJ. respectively at para. 17. xii, 20, 18 and 8.13.

European Court of Justice in *Costa v. E.N.E.L.*²³⁴ results from an ambiguous formula according to which from a “limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights”.²³⁵ However, the Italian version of the ruling (which is the authentic one) merely refers to “a limitation of competence or a transfer of attributions”.²³⁶ This latter formulation tends to make the European claims more relative. It is not so much an abandonment of sovereignty²³⁷ which is at stake in European integration but the exercise of certain competences in common.²³⁸ The way in which Irish courts considered the issue in *Crotty* presented the issue at stake in a more radical manner, however, which led to implications going beyond European requirements. This could explain the Supreme Court’s stringent attitude towards new European developments.²³⁹

Notwithstanding the ambiguities which surrounded the notion of sovereignty in this decision, the Court also affirmed that any encroachment on Irish sovereignty would require the approval of the people. If in the first part of the ruling, the Court concluded that a further constitutional amendment was not required since Ireland had joined a “developing organism”,²⁴⁰ this was based only on the initial approval expressed through referendum in 1972 giving a licence to join what was at the time the European Communities and which encompassed the developments contained in the Single European Act. As Finlay C.J. put it:

“in discharging its duty to interpret and uphold the Constitution the Court must consider the essential nature of the scope and objectives of the Communities as they must be deemed to have been envisaged by the people in enacting Article 29, s. 4, subsection 3.”²⁴¹

²³⁴ Case 6/64 *Costa v. E.N.E.L.* [1964] E.C.R. 585.

²³⁵ *Ibid.* at 593.

²³⁶ [1964] E.C.R. 1129 for the Italian version.

²³⁷ On the softening of the sovereignty issue in the Italian version of the decision and the focus on the question of competences, see B. de Witte, “Sovereignty and European Integration: the Weight of Legal Tradition”, *op. cit.*, at fn. 162 above, at 28.

²³⁸ The ambiguity between the transfer of sovereignty as an abstraction and the transfer of the exercise of certain competences can, for example, be seen in F. Murphy, “Irish Participation in European Integration: The Casual Abandonment of Sovereignty?” (1996) 31 *Irish Jurist* 22-34 at 22-24. The author then concludes to “the need to define sovereignty” in order to better understand the relationship between the Irish and European legal systems, *ibid.* at 32-33.

²³⁹ In this respect, Barrett contrasts the generous and teleological approach in the first part of the decision (dealing with constitutionality) with regard to developments of existing European features with the attitude of the majority judges in the second part on Title III where, relying on a very literal approach to new European elements, they proceeded as if they were engaged in “the interpretation of a commercial contract”, G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence” (2009) 5 *European Constitutional Law Review* 32-70 at 41.

²⁴⁰ [1987] I.R. 713 at 770. See *infra* at 203-206 for a more detailed analysis of this test.

²⁴¹ *Ibid.* at 768.

It may be concluded that the primacy of a developing European Union law in the Irish legal system depends on a prior constitutional licence that reflects the approval of the Irish sovereign, *viz.*, the people.

In addition to contesting the constitutionality of the European Communities (Amendment) Act 1986, Crotty also sought to prevent the Government from ratifying the Single European Act on the grounds that the provisions contained in its Title III, and which were not included in the scope of the 1986 Act, were contrary to the Constitution. This Title, while involving member states, fell outside the scope of Community law. Being a separate treaty, “although not so in form”,²⁴² the judges in both the majority and the minority, pointed out that the constitutional provisions dedicated to Community law were not relevant for the purpose of assessing the lawfulness of ratification of Title III by the Government.²⁴³ Given the very strict views of the Supreme Court on the issue of Title III, it can scarcely be denied that the European dimension to this case played a decisive role in the conclusions of the judges²⁴⁴ and provides evidence of their awareness of the necessity of conditioning the developments of European integration to the approval of the Irish sovereign.

Providing as it did for European Political Co-operation, Title III represented the emergence of European integration onto the foreign policy field. Article 30 set out what could be considered to be a very loose obligation for member states (and indeed merely a codification of existing practices).²⁴⁵ It asked the states to “endeavour jointly to formulate and implement a European foreign policy” and in order to do so to “inform and consult each other on any foreign policy matters of general interest so as to ensure that their combined influence is exercised as effectively as possible through coordination, the convergence of their positions and the implementation of joint action.” Three judges took the view that the ratification of Title III of the Single European Act was repugnant to the Constitution while two dissented. In reaching this conclusion, the sovereignty of the people as protected by the Constitution played a decisive role, with Walsh J. insisting more particularly on this issue. First, he held that the Government, under Article 29.4 of the Constitution, enjoyed unfettered prerogatives in the field of internal

²⁴² *Ibid.* at 776 *per* Walsh J.

²⁴³ *Ibid.* at 771 and 789 respectively *per* Finlay C.J. and Griffin J. for the minority. *Ibid.* at 780 and 784 respectively *per* Walsh (*a contrario*) and *per* Henchy J. for the majority, Hederman J. concurring. A point that the Supreme Court later repeated in relation to the Treaty establishing the European Stability Mechanism, see *Pringle v. The Government of Ireland and others* [2012] I.E.S.C. 47 for example *per* Hardiman and Clarke JJ., respectively at para. 84 and 3.2.

²⁴⁴ *Ibid.* at 771 and 786 respectively where both Finlay C.J. and Henchy J. evoked the possibility of a “European political union”. For further developments on this unity of logic in the *Crotty* decision, see *infra* at 255-259.

²⁴⁵ See for example, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary op. cit.*, at fn. 221 above, at 25.

relations.²⁴⁶ Then drawing a parallel with the membership of the European Communities, he deduced that any form of integration of this power required the approval of the people,²⁴⁷ an approval already given by them in the economic field through the amendment of the Constitution in 1972. Therefore, relying on Article 6 of the Constitution, he deduced that:

“in the last analysis it is the people themselves who are the guardians of the Constitution. In my view, the assent of the people is a necessary prerequisite to the ratification of so much of the Single European Act as consists of Title III thereof.”²⁴⁸

Thus, from his point of view, the modalities of exercise by the Government of the external sovereignty of the state²⁴⁹ were submitted *in fine* to the internal sovereignty of the people.

Even if they stated the point in less explicit terms, the other judges also stressed this sovereign dimension. This was in the first place true of those with the majority view.²⁵⁰ However, more interestingly, the minority did not disagree with the theoretical analysis of the majority - but rather merely on the extent of the binding nature of Title III.²⁵¹ For example, Finlay C.J. recognised a “possible ultimate objective of a form of European political union” that would require a constitutional amendment but that was not realised yet due to the non-binding content of Article 30.²⁵² However, were this to happen in the future, it would engage “the responsibility of the Government to the people who must be consulted by way of referendum where any change of the Constitution is contemplated.”²⁵³

The *Crotty* decision, due both to the vagueness of the “essential scope or objectives” test invoked in interpreting what is now Article 29.4.5° of the Constitution and the stringent attitude

²⁴⁶ [1987] I.R. 713 at 782.

²⁴⁷ Similarly, Hederman J. took the view that it was not possible for the government to “fetter powers bestowed unfettered by the Constitution” without amending the Constitution, *ibid.* at 794.

²⁴⁸ [1987] I.R. 713 at 783-784.

²⁴⁹ *Ibid.* at 778.

²⁵⁰ See for example the opinion of Henchy J., *ibid.* at 786.

²⁵¹ For such an interpretation, see for example, J. P. McCutcheon, “The Irish Constitution and the Ratification of the Single European Act” (1992) n° 4 *L'Irlande politique et sociale* 19-41 at 29. As O'Donnell J. put it in *Pringle*, “what divided the court itself was a narrower issue and essentially one of timing”, *Pringle v. The Government of Ireland and others* [2012] I.E.S.C. 47 at para. 11.

²⁵² [1987] I.R. 713 at 771-772.

²⁵³ *Ibid.* at 775. In this respect, Hogan points out that, while the decision is highly questionable and remains an “unique case”, it leads to a result “arguably consistent with the concept of popular sovereignty which underlie the Constitution”, G. W. Hogan, “The Supreme Court and the Single European Act”, *op. cit.*, at fn. 231 above, at 69-70.

of Supreme Court towards the strengthening of the process of European integration,²⁵⁴ led the state to proceed by way of constitutional amendments on the occasion of each subsequent step towards closer integration.²⁵⁵ Thus, continuing membership to the European Union has been intertwined, *via* Article 46 (the constitutional provision which provides for the amendment of the Constitution), with the expression of the will of the people through referendum. Any expansion in the scope of European Union law can only take place after a prior approval of the Irish sovereign and mirroring an attitude very respectful of the constitutionalist paradigm.²⁵⁶ Apart from the decision to join the European Communities in 1972, the Single European Act, the Treaty of Maastricht, the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon that have been submitted to popular referendum, on two occasions for the last two Treaties. In the same way, in May 2012, another referendum was held to introduce a new Article 29.4.10° in the Constitution in order to enable the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, also referred to as the Fiscal Treaty.²⁵⁷

It may well be partly because of this guarantee of legitimacy that “save for one isolated and inconclusive instance dealing with abortion, the Irish courts have unhesitatingly and unswervingly acknowledged the supremacy of Community law.”²⁵⁸ However, the decision in *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*²⁵⁹ is the proof that the implementation of European Union secondary law can also be made subject to the approval of the Irish people. This case concerned contact information about abortion clinics outside Ireland contained in student guides. In the face of the refusal from the Student Unions to withdraw these details, the Society for the Protection of Unborn Children (S.P.U.C.) sought an injunction aiming to prevent the publication or distribution of the guides. In the High Court,

²⁵⁴ However, this has to be nuanced considering the recent decision of the Supreme Court in *Pringle* regarding the Treaty establishing the European Stability Mechanism which, as Title III of the Single European Act, concerns member states of the European Union rather than European Union law as such.

²⁵⁵ See G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence”, *op. cit.*, at fn. 241 above, at 43, affirming that a referendum has become “*de rigueur*” where the European Union is concerned.

²⁵⁶ In this sense, see the statement of Hederman J. according to whom: “the State’s organs cannot contract to exercise in a particular way or by a particular procedure, their policymaking roles or in any way to fetter powers bestowed unfettered in the Constitution. They are the guardians of these powers – not the disposers of them”, [1987] I.R. 713 at 794. For Hogan and Whelan, Walsh J. considered implicitly that any modification of the Treaties contrary to the Irish Constitution would require a referendum, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 221 above, at 35.

²⁵⁷ Although the referendums on the Single European Act and on the Fiscal Treaty do not concern what is now European Union law strictly speaking, the importance of their European dimension justifies including them in this category. On this point, see *infra* at 255-262 and at 281-284.

²⁵⁸ G. W. Hogan and G. F. Whyte, *JM Kelly: The Irish Constitution*, *op. cit.*, at fn. 6 above, at 533.

²⁵⁹ [1989] I.R. 753.

Carroll J. took the view that, if granted, the injunction might be an infringement of the freedom of services protected at European level and decided to make a preliminary reference to the European Court of Justice.²⁶⁰ S.P.U.C. decided to appeal the decision to refuse to grant the requested injunction (not the decision to make a preliminary reference²⁶¹). This appeal was allowed by the Supreme Court but it was the *obiter dicta* of McCarthy J. and Walsh J. relating to the consequences of the interpretation of the Treaties by the European Court of Justice - and therefore of European Union secondary law to which decisions of the European Court belong - which are most relevant in order to understand the attitude of Irish courts towards the primacy principle.

Recalling that Irish courts are “the sole authority” on the interpretation of the Constitution, McCarthy J. implicitly recognised that the regime of constitutional immunity to the benefit of European rules may have to yield to the constitutional right to life of the unborn proclaimed in Article 40.3.3°.²⁶² *In fine*, a decision expressed by the sovereign would have to prevail even if even if “the People of Ireland did so in breach of the Treaty to which Ireland had acceded in 1973.”²⁶³

Walsh J. made a similar statement when he held that the consequences of the decision of the European Court of Justice had to be decided in accordance with the Irish Constitution. Refusing to interpret constitutional provisions related to European law as providing for its absolute primacy, he stated that these provisions may be qualified by the eighth amendment, which introduced the right to life of the unborn in the Irish supreme norm, and therefore by the will expressed by the Irish people *via* referendum in inserting Article 40.3.3° of the Constitution in 1983.²⁶⁴ Hence, the will of the Irish sovereign is both the condition and conditions the prevalence European secondary law can enjoy in the domestic legal order.

As a conclusive remark, one has to consider the basis of these *dicta*. Even though Article 40.3.3° was introduced in the Constitution in 1983, there are authorities pointing towards the existence of a right to life on the part of the unborn previously to this amendment. In particular, it can be read in the opinion of Walsh J. in *G. v. An Bord Uchtála*²⁶⁵ that such a

²⁶⁰ *Ibid.* at 758.

²⁶¹ This possibility was excluded in *Campus Oil Limited v. Minister for Industry and Energy* [1983] I.R. 82.

²⁶² [1989] I.R. 753 at 770.

²⁶³ *Ibid.* at 770.

²⁶⁴ *Ibid.* at 768.

²⁶⁵ [1980] I.R. 32 at 69.

right existed as natural right under the unenumerated rights doctrine. This existence of the right to life of the unborn outside its formal recognition by the eighth amendment of the Constitution was also underlined in *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill*.²⁶⁶ However, this natural law existence is absent from the opinion of McCarthy and Walsh JJ. in *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*²⁶⁷ and it is only constitutional positive law that is opposed to European norms. The conflict between the primacy principle and the rights protected by the Irish legal system is not an issue confronting two different bases of validity. It is rather the content of two different constitutional provisions which is at stake, *i.e.*, two different expressions of the people. This importance of the sovereignty of the people is even reinforced in the decision of Walsh J. since it referred to the amendment rather than provision it introduced, to the enunciation rather than the proposition. In other words, taking into account the importance of referendums for the definition of the Irish people as a concrete sovereign, his judgement went beyond an issue of normative conflict. The opposition to the doctrine of primacy is thus considered as a question of the legitimacy of a particular rule. It consists of ensuring, through the supremacy of the Constitution, that both the enforcement and the limitation of European law in the domestic legal order reflect the will of the Irish people.

²⁶⁶ [1995] 1 I.R. 1 at 28.

²⁶⁷ [1989] I.R. 753.

Chapter IV Weighing Normative Content: The Interpretative Discourse Construing the Identity Nature of Constitutional Norms as a Limit to the Doctrine of Primacy

The doctrine of primacy in the manner in which this is understood in the Irish and French legal orders can not but yield to the supremacy of the respective Constitutions. The question of which norm shall prevail is determined by the sovereign, of which constitutional provisions are the expression. Grounded in domestic law, rather than depending on the autonomy of the European legal order as expressed by the European Court of Justice, the doctrine of primacy is submitted to the formal hierarchy structuring the Irish and French legal orders.

However, this formal perspective remains for the most part hidden in the Irish and French case-law. While it justifies the right to curb European pretensions to primacy, it is noticeable that the control of Irish and French courts differs from the enforcement of the normative hierarchy and the opposition of the supremacy of the Constitution to the primacy of European law. In contrast, Irish and French decisions on the relationship between domestic and European rules are structured by a material perspective constitutive of a conciliatory attitude towards the European legal order.

In consequence, as regards the analysis of the notion of constitutional identity, it appears that it does not consist of an interpretation *ab initio* of constitutional provisions as being essential to the domestic legal order which is then opposed to the doctrine of primacy. In contrast, the material perspective displayed by Irish and French courts postpones the identity issue. The notion of constitutional identity results from the interpretative balancing between the Constitution and the European legal order as this is “integrated into domestic law”.¹ In other words, the notion of constitutional identity, as a form of interpretative discourse on the Constitution, results from European Union law and the consideration given to the share of the Irish and French legal orders which include, partly at least, a common dimension.

¹ See CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, Rec. 173 at para. 11 or CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, Rec. 459 at para. 7.

A. Adopting a Material Approach to the Relationship between Constitutional and European Provisions: The Conciliatory Manner of Expression of the Irish and French Sovereignities

The generous attitude of the Irish courts as regards the doctrine of primacy has long been characterised by a focus being put on ensuring that the substantive content of national rules fits with the European obligations, and minimising formal requirements derived from the constitutional framework dedicated to European law. Although recent cases show a stronger concern for formal domestic considerations in the face of European law, it is still this material perspective which predominantly governs judicial interpretations in the sense that the substantive relationship between the two sets of rule predominates as an issue in the decisions of the domestic courts over questions of their nature or their position in the normative hierarchy.

In contrast, the analysis of European law in the French legal system has traditionally been dealt with in formal terms to the advantage of the supremacy of the Constitution. Nonetheless, the new dynamics introduced by the *Conseil constitutionnel* creates common ground with Irish courts. Formal considerations are softened in order to give priority to a conciliatory view of the relationship between the French and European legal orders on the basis of a material perspective.

1. *Different Expressions of an Inherently Material Perspective on the Constitutionality of the Integration of European Union Law into the Irish Legal Order*

The sections above examined how the modalities of the reception of European law in the Irish legal order ineluctably lead to the affirmation of the supremacy of the Constitution - and the sovereignty it expresses - over the doctrine of primacy as developed in the case-law of the European Court of Justice. This explains both the domestic character and the immunity-based nature of the doctrine of primacy in the Irish legal system. In consequence, the ability of the Irish legal order to accommodate the European principle depends on the interpretation given by domestic courts to domestic provisions related to it. In this respect, Irish case-law is characterised by its willingness to avoid the direct opposition of legal bases on the question of the prevalence of European law between the domestic and European perspectives.

To illustrate the generous attitude of Irish courts, it is possible to draw a parallel with the representation of law provided by Kelsen. As a normative system, law is characterised by the types of relationship between its constitutive elements. The validity of legal norms depends both on a static and a dynamic principle. In other words, a legal norm will exist if it complies with both the content and the modalities of production defined by the superior norm.² For Kelsen, “the systems of norms which present themselves as legal orders have essentially a dynamic character.”³ In contrast, Irish case-law has manifested a willingness to join the process of European integration rather than focusing on the modalities of the reception of European law in the domestic legal order. Rather than the Courts focusing on enforcing the formal supremacy of the Constitution, domestic rules related to European law have often been held as being valid as long as their content fulfilled European requirements.

This material perspective put on the relationship between the European and Irish legal orders is symbolised by the metaphorical qualification of the act of reception of European Union law in the Irish legal system as a “conduit pipe”.⁴ It explains the generous reception of the primacy principle and applies both to European Union primary and secondary law whereby priority is given to the European perspective. In contrast to the attitude of French courts,⁵ the Irish point of view has been mostly heteronomous in the sense that it has considered the validity of domestic norms having a European dimension by reference to respect for criteria defined in the European legal order. However, recent decisions point towards an increase of the formal consideration put on the relationship between the two legal orders where the primacy doctrine necessarily recedes before an increased awareness of the constitutional supremacy.

Once again, when it comes to European Union primary law, *Crotty v. An Taoiseach*⁶ is the decisive case. The Supreme Court upheld that the validity of the European Communities (Amendment) Act 1986, which was intended to receive into the domestic legal order the provisions of the Single European Act related to the development of what was then Community law, had not been conditioned to a further constitutional amendment. It was held to have been covered by the licence to join the European Communities (as they were then), under what was then Article 29.4.3°, passed by referendum in 1972.

² See H. Kelsen, *Théorie pure du droit* (Trans. C. Eisenmann, Brussels; Paris: Bruylant; Librairie Générale de Droit et de Jurisprudence, coll. La pensée juridique, 1999) at 195-197.

³ *Ibid.* at 197 (translation by the author).

⁴ *Tate v. Minister for Social Welfare Ireland* [1995] 1 I.R. 418.

⁵ See *infra* at 218-230.

⁶ [1987] I.R. 713.

For present purposes, it is the test used by Finlay C.J., delivering the judgment of the whole Supreme Court according to Article 34.4.5°, which is meaningful. Qualifying the Community as a “developing organism”,⁷ he asserted that:

“it is the opinion of the Court that the first sentence in Article 29, s. 4, sub-s. 3 of the Constitution must be construed as an authorisation given to the State not only to join the Communities as they stood in 1973, but also to join in amendments of the Treaties so long as such amendments do not alter the essential scope or objectives of the Communities. To hold that the first sentence of Article 29, s. 4, sub-s. 3 does not authorise any form of amendment to the Treaties after 1973 without a further amendment of the Constitution would be too narrow a construction; to construe it as an open-ended authority to agree, without further amendment of the Constitution, to any amendment of the Treaties would be too broad. The issue then arises as to whether the effect of the amendments to the Treaties proposed by the SEA is such as would bring the introduction of them into the domestic law by the Act of 1986 outside the authorisation of Article 29, s. 4, sub-s. 3 as above construed.”⁸

One could argue that the refusal of a construction of what is now Article 29.4.5° that would be either “too broad” or “too narrow” is tantamount to putting aside the formal hierarchical logic when the European dimension is at stake in the domestic legal order. Under the narrow approach, one could read that the validity of any new developments of the process of European integration requires its formal approval by the Irish people. In contrast, the broad perspective would lead one to take the view that any European developments would concomitantly amend the Irish Constitution. Either one or the other would tend to result in the relationship between the two sets of norms being looked at through a hierarchical prism and in fact can be viewed as an opposition between the full supremacy of the Constitution in the former instance and the full primacy of European Union law in the latter one.

It is precisely this formal perspective which is rejected in favour of an “essential scope or objectives” test. In contrast, under this teleological approach, the validity of the acts of reception is appraised by the Supreme Court in a substantive manner. This material dimension brings therefore a conciliatory perspective into the relationship between the two legal orders since new

⁷ *Ibid.* at 770. He agreed on this point with the opinion of Barrington J. in the High Court who referred to a “growing dynamic Community”, *ibid.* at 739.

⁸ *Ibid.* at 767.

steps in the process of European integration do not necessarily need to be constitutionally authorised. This led the Supreme Court to conclude that:

“it is the opinion of the Court that neither the proposed changes from unanimity to qualified majority, nor the identification of topics which while now separately stated, are within the original aims and objectives of the EEC, bring these proposed amendments outside the scope of the authorisation contained in Article 29, s. 4, sub-s. 3 of the Constitution.”⁹

This conclusion has to be compared with the much more formal analysis of the European treaties made by the *Conseil constitutionnel* where it required constitutional amendments for every step towards European integration.¹⁰ Although the Single European Act was not actually submitted to review by the *Conseil constitutionnel*, little doubt exists that it would have been held as being contrary to the “fundamental conditions of the exercising of national sovereignty”, in particular insofar as the change from unanimity to qualified majority is concerned. The necessary constitutional amendment that would have been required would have made more explicit the hierarchical supremacy of the Constitution in the French constitutional order. In contrast, it is this very perspective that was softened through the use of a material “essential scope or objectives” test in Ireland. In consequence, the reception of new European obligations and their subsequent primacy was eased by virtue of the Irish perspective.

Another point bears witness to the generous attitude of Irish courts, *viz.*, the perspective according to which they proceed to this material consideration of European Union law. For the Supreme Court, the correct interpretation of the licence to join the process of European integration is that it must be submitted to a teleological interpretation¹¹ where it is first the realisation of the potentialities contained in the European instruments as they existed when Ireland became a member state that is assessed rather than the compatibility of Title II of the Single European Act with constitutional provisions.¹² In consequence, Article 29.4.5° is construed in such a way that the content of the sovereign approval is illustrated and made clear

⁹ *Ibid.* at 770.

¹⁰ See *supra* at 183-187.

¹¹ See for example, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary* (London: Sweet & Maxwell, 1995) at 27.

¹² See for example D. R. Phelan and A. Whelan, “National constitutional law and European integration: FIDE Report” (1997) 6 *Irish Journal of European Law* 24-64 at 31-32.

by the content of European developments.¹³ In other words, by having stepped aboard “a moving train, [the] Irish people might not have known where exactly the journey would terminate”.¹⁴ From this heteronomous logic, one could argue that the European legal developments give a material substance to the will of the Irish people.

This material perspective put on the relationship between the Irish and European legal orders is even more noticeable as regards European secondary law, *i.e.*, when the doctrine of primacy has to be applied rather than envisaged. It is characteristic of the reasoning of the Supreme Court in *Meagher v. Minister for Agriculture*,¹⁵ which can be regarded as the continuation of the perspective set down with the “essential scope or objectives” test. This case concerned the implementation of Directives prohibiting the use of certain substances in farming¹⁶ by the Minister of Agriculture *via* the European Communities (Control of Oestrogenic, Androgenic, Gestagenic and Thyrostatic Substances) Regulations¹⁷ and the European Communities (Control of Veterinary Medicinal Products and their Residues) Regulations.¹⁸ This case concerned the application of the “necessitated” clause contained in what is now Article 29.4.6° of the Constitution to the form of domestic instruments implementing European rules.¹⁹

The first point of contention concerned the validity of section 3 of the European Communities Act 1972 (as amended) empowering ministers to amend primary legislation through statutory instruments. The Supreme Court concluded that this section was necessitated by the obligations of membership and therefore enjoyed the immunity regime provided for by the Irish Constitution. As regards the reasoning justifying such a conclusion, it can be argued that the Supreme Court favoured political expediency over considerations of constitutional

¹³ In this sense, see A. Sherlock, “Sovereignty, the Constitution and the Single European Act” (1987) 6 *Dublin University Law Journal* 101-113 at 106.

¹⁴ B. M. E. McMahon and F. Murphy, *European Community Law in Ireland* (Dublin: Butterworth (Ireland), 1989) at 267.

¹⁵ [1994] 1 I.R. 329.

¹⁶ In particular, Council Directive 81/602/EEC of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action [1981] O.J. L 222/32, Council Directive 85/358/EEC of 16 July 1985 supplementing Directive 81/602/EEC concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action 1985] O.J. L 191/46 and Council Directive 86/469/EEC of 16 September 1986 concerning the examination of animals and fresh meat for the presence of residues [1986] O.J. L 275/36.

¹⁷ S. I. No 218 of 1988.

¹⁸ S. I. No 171 of 1990.

¹⁹ See, for example, [1994] 1 I.R. 329 at 365 *per* Denham J. (as she was then) who argued that “the term ‘necessitated’ is relevant to the choice of method, however membership has not itself obligated a special form and method of implementation”. See also the opinion of Blayney J., *ibid.* at 360.

requirements.²⁰ In consequence, it is because the substance of section 3 of the European Communities Act 1972 (as amended) fulfilled European requirements that it was held valid.²¹ This material perspective whereby congruence of content determined from a European perspective is the prevailing consideration seems to be the conclusion reached by Hogan and Whelan when, criticising the *Meagher* decision, they affirm that “patent necessity of *some* machinery for applying and implementing Community law in Ireland can hardly mean that *any* machinery will do”.²² In consequence, the question of the implementation of European norms and the difficult balance between the European obligation of primacy and the constitutional monopoly of the legislative function granted to the Oireachtas by Article 15.2.1° of the Constitution was displaced to the appraisal of the validity of the statutory instruments themselves,²³ an issue which is assessed under the same material perspective.

This question was considered in *Meagher* itself. In particular, the statutory instruments introduced a power to issue search warrants and a limit of two years to bring prosecutions whereas under section 10 (4) of the Petty Sessions (Ireland) Act 1851 this limit is only of six months for summary offences.²⁴ Mr Meagher contested the validity of these statutory instruments arguing that these elements were in fact a choice of policy not necessitated by the Directives and that therefore an Act of the Oireachtas would have been required. Blayney and Denham JJ. (as she was then) considered the issue of the validity of the statutory instruments.

The former first noted the duty imposed on Ireland by the Directives to create “effective sanctions”. He then compared the content of the statutory instruments with the content of the objectives set out by the European instruments and concluded that:

“the method it chooses is appropriate for the purpose of satisfying the obligation of the State and the measures it incorporates do not go beyond what is required to implement the directive, it is correctly categorised as being necessitated by the directive.”²⁵

²⁰ For further considerations on this point which also applies to the assessment of the validity of the statutory instruments themselves, see *infra* at 286-287.

²¹ For further considerations of this part of the decision in *Meagher*, see *supra* at 122-124.

²² G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 11 above, at 60.

²³ See B. Doherty, “Land, Milk and Freedom - Implementing Community Law in Ireland” (2004) 11 *Irish Journal of European Law* 141-175 at 149 and N. Travers, “The Reception of Community Legislation into Irish Law and Related Issues Revisited (2003) 38 *Irish Jurist* 58-91 at 71.

²⁴ The use of substances prohibited by the European Directives being such a summary offence.

²⁵ [1994] 1 I.R. 329 at 360.

Under this test of appropriateness where the “necessitated” condition encompasses both the content of the European obligations to be implemented and the choice of the method of implementation,²⁶ the question as to the latter is made irrelevant. The statutory instrument is constitutionally immune, in particular with regard to Article 15.2.1° of the Constitution, as long as it ensures the reception of the content of the directives. Leaving aside any formal considerations, this material understanding of the relationship between the two legal orders conditions the validity of the statutory instruments, which is “in substance a measure of Community law” to a heteronomous logic grounded in European law²⁷ and therefore expands the span of the consequences of the primacy doctrine. As Whelan puts it:

“this approach puts a new and interesting ‘spin’ on the doctrine of primacy of Community law. It treats measures which implement or facilitate the application of E.C. law as relying for their validity and binding effect, not on the national rules about legislation and so on, but on the inherent force of the parent E.C. measure.”²⁸

However, this case can be regarded as the apotheosis of the “very *communautaire*”²⁹ attitude displayed by Irish courts as it paradoxically marked also a turning point towards greater consideration given to formal constitutional requirements as regards the relationship between the two legal orders, a perspective which was to prevail in subsequent decisions. Denham J. distinguished the content of the obligations to be implemented and the form of implementation. In this regard, she pointed out that “the mere fact that the substance in laws enacted, acts done or measures adopted, is necessary to be incorporated into domestic Irish law, is not the end of the matter.”³⁰ The choice left by what was then Article 189 of the

²⁶ In this sense, see B. Doherty, “Land, Milk and Freedom - Implementing Community Law in Ireland”, *op. cit.*, at fn. 23 above, at 150.

²⁷ Blayney J. favours a test as a matter of European law rather than as a matter of Irish law, where little consideration is given to the formal domestic dimension. This is obvious when he affirms that “the State was bound to introduce effective sanctions, and if this necessitated adopting a measure which impliedly amended an existing statute, that measure would prevail over the statute because it was in substance a measure of Community law. It is only in form that it is part of the domestic law. It derives its force from the directive which is binding on the State as to the results to be achieved” [1994] 1 I.R. 329 at 360. On this point, see G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 11 above, at 63 where the authors, stressing the formal dimension of the relationship between the two legal orders, criticise the decision reached by affirming that “it is nonetheless disingenuous to suggest that a domestic measure which is contented to be appropriate as a matter of Community law to implement a directive is therefore necessitated as a matter of Irish law”.

²⁸ A. Whelan, “Constitutional Law - *Meagher v. Minister for Agriculture*” (1993) 15 *Dublin University Law Journal* 152-173 at 168.

²⁹ G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 11 above, at 61.

³⁰ [1994] 1 I.R. 329 at 364-365.

European Economic Community Treaty as to the form and method of implementation implied that this issue required taking into account constitutional requirements.³¹ In particular, it involved balancing Article 15.2.1° whereby legislative power is reserved for the Oireachtas and what is now Article 29.4.6°.³² The implementation of directives by statutory instruments would be valid if no choice was left to the state, a question that had to be decided under the “principles and policy” test³³ developed in *Cityview Press Limited v. An Comhairle Oiliúna*³⁴ and dedicated to the valid use of delegated legislation. The norms created by the Executive would be valid as long as their purpose was “a mere giving effect to principles and policies which are contained in the statute itself.”³⁵

However, while the “principles and policy” test springs from a formal concern, its essence is material since it consists of assessing if the content of the statutory instrument is determined by the superior legal instrument. This appraisal in the subsequent part of Denham J.’s judgment reveals a reduction of the importance of the formal dimension³⁶ since the domestic perspective which justified having recourse to this test is diminished while European law becomes the benchmark of the test. In a sense, the domestic parent statute is reduced to a formal nutshell wherein the material relationship between the two sets of norms prevails.

Due to the dualist nature of the Irish legal system with regard to international law, the parent statute of the statutory instruments required to implement European directives is the European Communities Act 1972 (as amended). Although Denham J. mentioned this once in conjunction with the Directives themselves,³⁷ it appears from the rest of her decision that she considered the European rules alone as the parent statute of the challenged statutory instruments at stake, for example when she affirmed that:

“there are no policies and principles enunciated in the regulations that are not within the directives. There are no policies and principles in the regulations additional to the directive.”³⁸

³¹ On this point, see for example, A. Whelan, “Constitutional Law - *Meagher v. Minister for Agriculture*”, *op. cit.*, at fn. 28 above, at 167 where the author notes that the opinion of Denham J. “ostensibly takes greater account of national constitutional sensibilities.”

³² [1994] 1 I.R. 329 at 365.

³³ *Ibid.* at 365-366.

³⁴ [1980] I.R. 381.

³⁵ *Ibid.* at 399.

³⁶ For a similar argument, see D. R. Phelan and A. Whelan, “National constitutional law and European integration: FIDE Report”, *op. cit.*, at fn. 12 above, at 37.

³⁷ [1994] 1 I.R. 329 at 366.

³⁸ *Ibid.* at 367.

Thus, her decision relies on a material perspective whereby the European point of view is *in fine* favoured.³⁹ Even though the relevant Directives did not impose a specific time-limit for prosecution, Denham J. concluded that the extension to two years chosen by Ireland was necessary to fulfil the requirements of the European Directives and that therefore the extension was not a decision but constituted the implementation of principles and policies contained in the European instruments.⁴⁰

While, in contrast to the opinion of Blayney J., the “principles and policies” test used by Denham J. to interpret the “necessitated” clause seems more respectful of formal domestic requirements, it can be argued that, due to the manner she applied this test, “she ultimately rejoins [Blayney J.] by a more circuitous route.”⁴¹ Both their decisions mirror a very material and European perspective put on the relations between the domestic and European norms,⁴² even though the test introduced by Denham J. is in itself less wide and of a different nature than the “appropriateness” test used by Blayney J.

*Maher v. Minister for Agriculture*⁴³ confirmed the relevance of the “principles and policies” test and represented a step further for the affirmation by the Supreme Court of the necessary balance between European and constitutional requirements by distinguishing the content of what has to be implemented and the formal method of this implementation. This is noticeable in the reinterpretation of the meaning attributed to the “necessitated” clause in the *Meagher* case. The understanding of what is now Article 29.4.6° according to the decision in *Maher* is a return to the “legal obligation” test of *Crotty*. It departed from the former attitude which, considering domestic rules as valid if they were appropriate to fulfil European obligations, aimed to facilitate the implementation of European rules for reasons of practical convenience.⁴⁴ In contrast, Keane C.J. made clear that:

³⁹ In this sense, see A. Whelan, “Constitutional Law - *Meagher v. Minister for Agriculture*”, *op. cit.*, at fn. 28 above, at 167-168.

⁴⁰ [1994] 1 I.R. 329 at 367-368.

⁴¹ A. Whelan, “Constitutional Law - *Meagher v. Minister for Agriculture*”, *op. cit.*, at fn. 28 above, at 167.

⁴² In this sense, see G. W. Hogan, “The implementation of European Union law in Ireland: the *Meagher* case and the democratic deficit” (1994) 2 *Irish Journal of European Law* 190-202 at 195.

⁴³ [2001] 2 I.R. 139.

⁴⁴ See [2001] 2 I.R. 139 at 181-182 where Keane C.J. insisted that the decision in *Meagher* could not be interpreted as considering that measures are to be regarded as “necessitated” if they are “convenient”.

“while the member state is obliged to implement the directive or the specified part of the regulation, the choice of form and method for implementation is clearly a matter for the member state.”⁴⁵

Implicitly, it is thus a criticism of the decision on the validity of section 3 of the European Communities Act 1972 (as amended).⁴⁶ Secondly, the method of reasoning of the judges confirmed the departure from the very generous approach displayed in previous decisions on the question of the validity of statutory instruments implementing European obligations.⁴⁷ Their validity of a statutory instrument could first be assessed according to the “necessitated” criterion. If the statutory instrument was found necessitated by the obligations of membership, questioning its potential conflict with Article 15 of the Constitution related to the exclusive legislative power of the Oireachtas would be unnecessary. However, the judges favoured a formal domestic perspective and decided to consider first the validity of the statutory instrument in relation to constitutional provisions of a purely domestic nature. In this case, if it was compatible with notably Article 15 as interpreted according to the “principles and policies” test, it is the “necessitated” issue which would be unnecessary.⁴⁸

However, a material perspective favouring European law still emerges from the decision of the Supreme Court in the way the “principles and policies” test was applied. This case dealt with European Regulations about milk quotas⁴⁹ that were implemented in the Irish legal order by the European Community (Milk Quota) Regulations 2000.⁵⁰ In this complex matter, the statutory instrument chose to break the link between land and quota - as Article 8a of the Commission Regulation (EEC) No 536/93 allowed - by not applying its Article 7 (1). The plaintiffs argued that this resulted in a choice being left to the member states and that in consequence an Act was required.

As regards the material perspective put on the normative relationship, the same generous interpretation of the formal consequences of the dualist nature of the Irish legal

⁴⁵ *Ibid.* at 182. This was also the opinion of Fennelly J. who argued that “the issue of ‘necessity’ is appropriately considered by reference to the content, not the form, of the instrument”, *ibid.* at 252

⁴⁶ See B. Doherty, “Land, Milk and Freedom - Implementing Community Law in Ireland”, *op. cit.*, at fn. 23 above, at 171.

⁴⁷ On this point, see for example G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution” (2012) 48 *Irish Jurist* 132-172 at 147-151.

⁴⁸ On this priority given to the domestic perspective, see [2001] 2 I.R. 139 *per* Keane C.J., Denham and Fennelly JJ. respectively at 181, 203 and 241.

⁴⁹ Council Regulation (EEC) No 3950/92, of 28 December 1992, establishing an additional levy in the milk and milk products sector [1992] O.J. L 405/1 and Commission Regulation (EEC) No 536/93 of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products [1993] O.J. L 57/12.

⁵⁰ S.I. No 94 of 2000.

system is present when the question of the determination of the parent statute was raised. Although the role of the European Communities Act 1972 (as amended) was not discarded by the Supreme Court, the decision tended to play down the importance of the formal relationship between the domestic norms in favour of a reflecting on the material relationship between the statutory instrument and European regulations to be implemented. As Keane C.J. put it:

“it must be borne in mind that while the parent statute is the Act of 1972, the relevant principles and policies cannot be derived from that Act, having regard to the very general terms in which it is couched. In each case, it is necessary to look to the directive or regulation and, it may be, the treaties in order to reach a conclusion as to whether the statutory instrument does no more than fill in the details of principles and policies contained in the European Community or European Union legislation (...).
(...)

As he points out, the scheme which has given rise to these proceedings was essentially the creation of the European Union and, if one seeks to determine the principles and policies which underlie it, one must look, not to any parent legislation in Ireland, but to the treaties of the European Union and the regulations and directives which have established the complex machinery of the Common Agricultural Policy and the common market in milk.”⁵¹

This conciliatory attitude consisting of considering European law as the parent statute of the statutory instrument is confirmed by the willingness to consider this material perspective with European law as a standing point. The European norms left the member states with a choice as to the schemes they deemed most appropriate in order to fulfil the objectives defined at European level.⁵² However, Keane C.J. concluded that “in the case of the operation of the super-levy scheme, the choices as to policy available to the member states have in truth, been reduced almost to vanishing point”.⁵³ From the material perspective put by the Supreme Court on the relationship between domestic and European norms, it is a European point of reference

⁵¹ [2001] 2 I.R. 139 at 183 and 185-186. He repeated this opinion in *Browne v. Attorney General* [2003] 3 I.R. 205 at 219.

⁵² [2001] 2 I.R. 139 at 184 or 242 respectively by Keane C.J. and Fennelly J.

⁵³ [2001] 2 I.R. 139 at 185. For the same opinion, see Fennelly J. [2001] 2 I.R. 139 at 263. In this regard, their interpretation is similar to the opinion expressed by Murphy J. in *Greene v. Minister for Agriculture* [1990] 2 I.R. 17 at 25 where he stated: “I have no doubt but that laws enacted, acts done and measures adopted by the State are necessitated within the meaning of the Third Amendment aforesaid by obligations of membership of the Communities even where the particular actions of the State involve a measure of choice, selection or discretion”. Their difference is however located in what is interpreted. In the current decision it is the “principles and policies” test when in *Greene* the opinion of Murphy J. was dedicated to the meaning of “necessitated” itself.

that is adopted by the Irish judiciary.⁵⁴ What seemed to count in their eyes both in *Meagher* and *Maher* was not so much that Ireland had a choice but rather the fact that it is deprived of its own normative initiative.⁵⁵ One could argue that this application of the “principles and policies” test “is to muddy the waters”.⁵⁶ Considered by the Supreme Court from a European perspective, the “principles and policies” test is fulfilled as long as Ireland is left with an “either or” option,⁵⁷ even though one may argue that this still leaves the state with a “*real choice*”⁵⁸ to be made.

Nonetheless, the change of perspective favouring Article 15.2.1° of the Constitution rather than the “necessitated” clause must not be underestimated. It can be explained by the difficulties in defining precisely the meaning to be given to the “necessitated” condition of the constitutional immunity defined in Article 29.4.6° of the Constitution.⁵⁹ The introduction of this new test can also be regarded as a greater concern of the judiciary for the protection of Irish constitutional architecture and in particular Article 15.2.1° of the Irish Constitution relating to the legislative function of the Oireachtas.⁶⁰ Putting aside the “necessitated” issue is therefore the refusal of the very generous approach to European Union law and its primacy where, blind to formal considerations, the validity of domestic norms is determined by what would materially satisfy European law - this logic being expressed under the “consequent upon membership” test,⁶¹ the “reasonableness” test⁶² or the “appropriateness” test.⁶³ Even though the interpretation of the “principles and policies” test on the basis of Article 15.2.1° in *Maher* still displays a conciliatory attitude towards European Union law based on a material understanding of the relationship between the domestic and European legal orders, recent cases do not reflect the same inclination in favour of the primacy principle. In contrast, they show a furthered

⁵⁴ What Barrett qualifies an “elasticity” in the use of the *Cityview* test, see G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution”, *op. cit.*, at fn. 47 above, at 151.

⁵⁵ For a similar argument on the reasoning of the judges playing down the choice left to member states, see G. W. Hogan, “The implementation of European Union law in Ireland: the *Meagher* case and the democratic deficit”, *op. cit.*, at fn. 42 above, at 197.

⁵⁶ C. Costello, “European Community Judicial Review in the Irish courts - Scope, Standards and Separation of Powers” in M. C. Lucey and C. Keville (eds.), *Irish Perspectives on EC Law* (Dublin: Round Hall, 2003) 17-49 at 38-39.

⁵⁷ In this respect Fennelly J. took the view that “the State is acting as a delegate of the Community in making the choice to separate land and milk quota” [2001] 2 I.R. 139 at 257-258. See, for a similar argument, Denham J. (as she was then) and Murray J. *ibid.* respectively at 208 and 227. This reasoning was later put into practice by McCracken J. in the High Court in *McCauley Chemists (Blackpool) Limited and another v. Pharmaceutical Society of Ireland and another* [2008] 1 I.R. 16 at 22.

⁵⁸ A. Whelan, “Article 29.4.3 and the Meaning of ‘Necessity’” (1992) 2 *The Irish Student Law Review* 60-83 at 70.

⁵⁹ See, in this sense, B. Doherty, “Land, Milk and Freedom - Implementing Community Law in Ireland”, *op. cit.*, at fn. 23 above, 170-175.

⁶⁰ See for example, E. Fahey, *EU Law in Ireland* (Dublin: Clarus Press, 2010) at 58.

⁶¹ *Lawlor v. Minister for Agriculture* [1990] 1 I.R. 356 at 377.

⁶² *Condon v. Minister for Agriculture* (1993) 2 *I.J.E.L.* 151 at 156.

⁶³ *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 at 360.

willingness to restore formal considerations and to consider to a greater extent the implementation of European norms within the constitutional framework.⁶⁴

This increased awareness of domestic constitutional requirements is noticeable in the decision *Browne v. Attorney General*.⁶⁵ This case concerned the Sea Fisheries (Driftnets) Order 1998.⁶⁶ Although it was intended to implement Council Regulations,⁶⁷ this statutory instrument was not based on section 3 of the European Communities Act 1972 (as amended) but relied on section 223A of the Fisheries (Consolidation) Act 1959 empowering a Minister in relation to “measures of conservation of fish stock and measures of rational exploitation of fisheries.” The Supreme Court took the view that the Minister did so in order to circumvent the monopoly enjoyed by the Oireachtas over the creation of indictable offences for the implementation of European rules, as provided for in section 3 (3) of the European Communities Act 1972 (as amended) provided at the time.⁶⁸ Indeed, such a bar on the creation of indictable offences by statutory instruments was not explicitly stated in section 223A of the Fisheries (Consolidation) Act 1959. Both Keane C.J. and Denham J. found the statutory instrument *ultra vires*. For the former, primarily, section 223A was designed only to implement principles and policies designed by the Oireachtas and could not therefore be used to implement European rules.⁶⁹ For the latter on the basis that, due to the bar on the creation of indictable offences in section 3 (3) of the European Communities Act 1972 (as amended), the ability to do so under another statutory provision should be explicit, which was not the case.⁷⁰

Therefore, the decision of the Supreme Court can be seen as the willingness to enforce a formal dimension as regards the implementation of European rules. This stress put on the domestic nature of the arguments was made explicit by Keane C.J when he stated that the question whether these measures were “necessitated”, and therefore involving the doctrine of primacy, was irrelevant by stating that:

⁶⁴ See B. Doherty, “Land, Milk and Freedom – Implementing Community Law in Ireland”, *op. cit.*, at fn. 23 above, at 170-171.

⁶⁵ [2003] 3 I.R. 205.

⁶⁶ S.I. No 267 of 1998.

⁶⁷ Council Regulation (EC) No 894/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources [1997] O.J. L 132/1 and Council Regulation (EC) No 1239/98 of 8 June 1998 amending Regulation (EC) No 894/97 laying down certain technical measures for the conservation of fishery resources [1998] O.J. L 171/1.

⁶⁸ See the opinion of Keane C.J. and Denham J., [2003] 3 I.R. 205 respectively at 220 and 243.

⁶⁹ [2003] 3 I.R. 205 at 219-220.

⁷⁰ *Ibid.* at 243.

“Either the Order of 1993 was *intra vires* s. 223A of the Act of 1959 or it was not. If it was within the power of the second respondent to make such a regulation for the reasons advanced on his behalf in the High Court and this court, it is not material whether the making of the regulation in that form was ‘necessitated’ by the obligations of the State as a member of the communities. If, on the other hand, the order was *ultra vires* s. 223A and could only have been validly made by the second respondent under s. 3 of the Act of 1972, it follows that it was of no effect and it is again unnecessary to consider the issue as to whether it was ‘necessitated’ in constitutional terms by our membership of the communities.”⁷¹

As the reasoning displayed in *Maher*, the Supreme Court favoured an appraisal of the statutory instrument on the basis of purely domestic requirements and did not take into account the substantive European dimension introduced by the “necessitated” clause contained in what is now Article 29.4.6° of the Constitution.⁷² Rather than assessing the validity of the statutory instrument according to its appropriateness with regard to the European rule as may have been the case in former decisions, and notably *Meagher*, the Supreme Court considered the issue from a formal perspective in order to uphold, notably, the prohibition of creation of indictable offences through statutory instruments which is characteristic of the Irish legal order, in particular when compared to the European Communities Act 1972 (as amended) in the United Kingdom.⁷³

The same preservation of the role of the Oireachtas and indirectly the relevance of Article 15.2.1° of the Constitution⁷⁴ was repeated in *Kennedy v. Attorney General*⁷⁵ also related to fishing issues and defended in a very similar manner. This case concerned a statutory instrument, the Mackerel (Licensing) Order 1999,⁷⁶ passed on the basis of section 223A of the Fisheries (Consolidation) Act 1959. Even though it was not stated explicitly in the statutory instrument, the Supreme Court took the view that it intended to implement European

⁷¹ *Ibid.* at 221. In this sense, see also the opinion of Denham J., *ibid.* at 245.

⁷² It is the opinion expressed by Barrett when he states that “Keane C.J.’s judgment in particular in this case is of interest in that it seems to indicate that *whether or not* the substance of a measure is necessitated, full compliance with all Irish constitutional procedural rules will be required”, see G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution”, *op. cit.*, at fn. 47 above, at 156.

⁷³ On the difference between the powers enjoyed by ministers as to the creation indictable offences in Ireland and in the United Kingdom, see D. Morris, “The Road to Brussels - Two Routes Compared” (1988) *Statute Law Review* 33-61 at 44.

⁷⁴ In this sense, see E. Fahey, “*Browne v Attorney General* and *Kennedy v Attorney General* - The Current State of the *Ultra Vires* doctrine and the ‘necessitated’ clause” (2005) 23 *Irish Law Times* 258-261 at 258.

⁷⁵ [2007] 2 I.R. 45.

⁷⁶ S.I. No 311 of 1999.

regulations⁷⁷ while avoiding the bar on the creation of indictable offences provided for by section 3 (3) of the European Communities Act 1972 (as amended).⁷⁸

While Denham J. argued that *Browne* was not distinguishable, she decided the case, for the majority, on a different basis. She compared section 223A with section 224B which is dedicated to the implementation of European rules to conclude that the Minister intended to circumvent the latter provision and decided that therefore the statutory instrument was *ultra vires*.⁷⁹ Even though this difference of *rationale* is not without difficulties,⁸⁰ *Kennedy* is meaningful in another way insofar as regards the present matter. As in *Browne*, the “necessitated” clause, and the consideration of the doctrine of primacy attached to it, is avoided. It could be argued that leaving aside considerations for section 3 (3) of the European Communities Act 1972 (as amended), prohibiting the creation of indictable offences by statutory instruments, reduces even more the European perspective and, *a contrario*, makes more explicit the willingness of the Supreme Court to consider the issue under a purely domestic prism. Therefore, the dynamics initiated by *Maher* insofar as concerns the method of implementation of European instruments entailed a case-law similar to that of the *Conseil constitutionnel* developed on the basis of its traditional formal perspective on the relationship between the European and domestic legal orders.

In conclusion, if the position and transformation of the primacy principle in the Irish legal system comes about through its submission to the supremacy of the Constitution, Irish courts display a conciliatory attitude based on a material understanding of the normative relationship between the domestic and European norms, where the European Union law is often the benchmark. Due to the specifics of *Browne* and *Kennedy*, and in particular the issue of the creation of indictable offences, it would arguably be going too far to conclude that the relationship between the European and Irish legal orders is understood solely from a formal domestic perspective. In this regard, the decisions on the European Arrest Warrant display a mixed attitude of Irish courts when it comes to the prevalence of either the European logic or

⁷⁷ Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy [1993] O.J. L 261/1 and Council Regulation (EC) No 2846/98 of 17 December 1998 amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy [1998] O.J. L 358/5.

⁷⁸ [2007] 2 I.R. 45 at 59. The *Conseil constitutionnel* also proceeds in a similar way as is noticeable in its decision CC, decision n° 2008-564 of 19 June 2008 on the *Act pertaining to genetically modified organisms*, *Rec.* 313, see *infra* at 225-226.

⁷⁹ *Ibid.* at 59.

⁸⁰ This can lead to difficulties in reconciling *Browne* and *Kennedy*. On this point, see for example, E. Fahey, *EU Law in Ireland*, *op. cit.*, at fn. 60 above, at 61.

the domestic perspective.⁸¹ However, in comparison with the initial stance of Irish courts whereby the validity of domestic norms was only assessed according to their substantive suitability to European obligations, recent decisions display a different attitude where greater consideration is given to the respect for constitutional requirements.⁸² In its current form, this formal analysis is reminiscent in some respects of the position of the *Conseil constitutionnel*. It is as if, from opposite positions, Irish and French courts have moved towards common ground.

⁸¹ For further analysis of these decisions, see *infra* at 374-379.

⁸² In this sense, see C. Costello, "European Community Judicial Review in the Irish courts - Scope, Standards and Separation of Powers", *op. cit.*, at fn. 56 above, at 29 where the author argues that "for some time it appeared as though Irish judges were employing the constitutional immunity provisions of Article 29.4.7 [as it was then] in a profligate manner, abnegating their constitutional role" before arguing that one could note "a change in judicial approach whereby national and Community grounds of review were pursued with equal vigour."

2. *The Development of a Material Perspective on the Relationship between the French and European Union Legal Orders as a Characteristic of the Recent Recognition of the Doctrine of Primacy by the Conseil constitutionnel*

Irish courts have traditionally favoured adopting a material perspective on the relationship between domestic and European norms, even if recently a greater emphasis on formal constitutional requirements has emerged. In contrast, the French perspective on European Union law has always been defined from a formal point of view, as the emphasis placed on the supremacy of the Constitution bears witness.⁸³ Nonetheless, it seems that recent developments regarding the approval to European Union law have permitted a more conciliatory attitude to be seen, by means of the favouring of a more material understanding of the relationship between the European and domestic legal orders.⁸⁴ In this respect, it is certainly true that the interpretative endeavours of the *Conseil constitutionnel* have involved some divergences from a faithful reading of European obligations.⁸⁵ However, if it comes to deciding between the half-full or the half-empty fulfilment of European requirements, one could also see in this approach the willingness to conciliate domestic and European requirements.⁸⁶ Even though the supremacy of the Constitution justifies its control, the substance of this control made by the *Conseil constitutionnel* answers a different logic.⁸⁷ However, in comparison with the approach of the Irish courts, the appraisal of European Union primary and secondary law by French courts remains circumscribed to a domestic logic, revealing in this sense what can be qualified as an autonomous perspective.

As has been seen, the test used by the *Conseil constitutionnel* when it reviews the compatibility of new European Treaties with the Constitution under Article 54 consists of ensuring the protection of the “fundamental conditions of the exercising of national

⁸³ See *supra* at 142-149.

⁸⁴ Magnon even mentions a “substantial allegiance to Community law”, see X. Magnon, “Le chemin communautaire du Conseil constitutionnel : entre ombre et lumière, principe et conséquence de la spécificité du droit communautaire” (2004) n° 8-9 *Europe* 6-12 at 7.

⁸⁵ For an explanation of this logic in terms of “mirror game” where the European obligations are distorted, see A. Levade, “Le Conseil constitutionnel aux prises avec la Constitution européenne” (2005) *Revue du droit public et de la science politique en France et à l'étranger* 19-50, in particular at 25-42.

⁸⁶ See for example, D. Blanc, “Les incidences du « traité-constitutionnel » européen sur la Constitution européenne : une affectation minimale : Retour sur la décision de Conseil constitutionnel n° 2004-505 DC du 19 novembre 2004, Traité établissant une Constitution pour l'Europe” (2005) *Revue de la recherche juridique - Droit prospectif* 2257-2276 at 2268.

⁸⁷ In this sense, Canivet qualifies the position of the *Conseil constitutionnel* as displaying a “dodging” strategy, stressing the difference between the justification and the substance of the control carried out by the *Conseil constitutionnel*, see G. Canivet, “Constitution nationales et Europe : La dialectique du Un et du Deux ” in M. Ameller, P. Avril, J.-P. Camby and *al.* (eds.), *Constitutions et pouvoirs : Mélanges en l'honneur de Jean Gicquel* (Paris: Montchrestien, 2008) 73-96 at 94-96.

sovereignty". The constitutional provision relative to the participation in the process of European integration that, since the Treaty of Maastricht, is contained in Title XV of the Constitution headed "On the European Union" never benefitted from an interpretative indulgence similar to that displayed in relation to the "essential scope or objectives" test used in *Crotty v. An Taoiseach*.⁸⁸ Rather than a teleological appraisal based on the "natural" transformations of what has now become European Union conceived as a "developing organism",⁸⁹ it is in contrast a literal interpretation which guides the *Conseil constitutionnel*. It is the reason why many have stressed that, in comparison with its Irish counterpart, the constitutionality of the Single European Act (and not merely Title III thereof) would probably have been denied if the French constitutional court had had to consider the matter.⁹⁰ This strict review of new developments in the European Union was seen when the Treaty establishing a Constitution for Europe was scrutinised.⁹¹ This control was even more meticulous for the Treaty of Lisbon.⁹² However, in these decisions a willingness to ease the path of European integration is at the same time noticeable.

The control of treaties under Article 54 of the Constitution answers to a specific logic. The activity of the *Conseil constitutionnel* consists of assessing the objective compatibility between the Constitution and the external instrument. In particular, it cannot endeavour to reconcile the content of the norms at stake through interpretative techniques. In its control of legislative instruments under Article 61 of the Constitution, the *Conseil constitutionnel* has to consider domestic norms for which it is the authentic interpreter. It is not the case for international law and European law in particular. The *Conseil constitutionnel* cannot impose its interpretations on the European Court of Justice, which remains the authentic interpreter of the European law. This justifies the cautious interpretative attitude governing the control effected under Article 54.⁹³ In particular, the *Conseil constitutionnel* does not have recourse to an

⁸⁸ [1987] I.R. 713.

⁸⁹ *Ibid.* at 770 per Finlay C.J. He agreed on this point with the opinion of Barrington J. in the High Court who referred to a "growing dynamic Community", *ibid.* at 739.

⁹⁰ On this point, see J. Casey, "Crotty v. An Taoiseach: A Comparative Perspective" in J. O'Reilly (ed.), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Dublin: Round Hall Press, 1992) 189-200 at 193 and G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 11 above, at 27.

⁹¹ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173.

⁹² CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459. On this point, see for example J. Roux, "Le Conseil constitutionnel et le contrôle de constitutionnalité du Traité de Lisbonne : *bis repetita* ? A propos de la décision n° 2007-560 DC du 20 décembre 2007" (2008) 44 *Revue trimestrielle de droit européen* 5-27 at 9.

⁹³ In this sense, see D. Blanc, "Les incidences du « traité-constitutionnel » européen sur la Constitution européenne : une affectation minimale : Retour sur la décision de Conseil constitutionnel n° 2004-505 DC du 19 novembre 2004, Traité établissant une Constitution pour l'Europe", *op. cit.*, at fn. 86 above, at 2266 or D. Rousseau, *Droit du contentieux constitutionnel* (Sixth edition, Paris: Montchrestien, 2001) at 197-198.

interpretative technique known as “reservations of interpretation”. These reservations of interpretation allow the French constitutional court to modify the content of a bill either by neutralising certain legislative provisions (neutralising reservations of interpretation), constructing some absent meaning (constructive reservations of interpretation) or directing the future application of the bill (directive reservations of interpretation) so as to save it from being declared unconstitutional.⁹⁴

Nonetheless, in recent decisions, the *Conseil constitutionnel* has displayed a surprising willingness to reconcile the Constitution with European primary law by having recourse to a creative material perspective. This is particularly true for the Constitutional Treaty.⁹⁵ Endeavours to reach a substantive compatibility between the European Treaty and the Constitution are particularly noticeable as regards the issue of primacy itself and on the question of the secular nature of the state as defined in Article 1 of the Constitution.

Bearing in mind the strong opposition between the supremacy of the Constitution and the primacy principle as defined by the European Court of Justice which is noticeable in the case-law of French courts, one can not but be astonished by the declaration that the formal recognition of this existential European principle in Article I-6 of the Treaty establishing a Constitution for Europe was compatible with the supremacy of the French Constitution.⁹⁶ In order to reach this surprising conclusion,⁹⁷ the *Conseil constitutionnel* delivered a systemic interpretation of the Constitutional Treaty provisions, and one which was not free of difficulties.⁹⁸ The *Conseil constitutionnel* included in particular in its consideration Article I-1, which emphasised the “Community basis” rather than the federal nature of the European

⁹⁴ On this interpretative technique, see for example, D. Rousseau, *Droit du contentieux constitutionnel*, *op. cit.*, at fn. 93 above, at 155-161 or G. Drago, *Contentieux constitutionnel français* (Third edition, Paris: Presses universitaires de France, coll. Thémis, 2011) at 604-612.

⁹⁵ To a large extent, the provisions of the Treaty establishing a Constitution for Europe were repeated in the Treaty of Lisbon. In consequence, the main points of contention which required a material perspective on the relationship between European and constitutional provisions and the use of reservations of interpretation had already been considered by the *Conseil constitutionnel* in its *Treaty establishing a Constitution for Europe* decision. When it had to assess the Treaty of Lisbon, the French constitutional court rather referred to this previous decision.

⁹⁶ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 9-13.

⁹⁷ For a more detailed analysis of the reasoning of the *Conseil constitutionnel* on this point as well as its interpretation of the Charter of Fundamental Rights of the Union, especially regarding the secular nature of the state and the possible recognition of collective rights, and their consequences in terms of European integration, see *infra* at 308-309.

⁹⁸ On this point, see for example V. Champeil-Desplats, “Commentaire de la décision du Conseil constitutionnel n° 2004-505 DC du 19 novembre 2004 relative au Traité établissant une Constitution pour l’Europe” (2005) 41 *Revue trimestrielle de droit européen* 557-580 at 566, J. Roux, “Le traité établissant une Constitution pour l’Europe à l’épreuve de la Constitution française” (2005) *Revue du droit public et de la science politique en France et à l’étranger* 59-103 at 71-74 or O. Gohin, “Conseil constitutionnel et Constitution européenne : les trois contradictions” (2004) n° 53 *La Semaine juridique. Administrations et Collectivités territoriales* 1707-1710 at 1708 where the author underlines the impossibility of considering Articles I-5 and I-6 on the same level, the former being of a political nature while the latter is of a legal one.

Union⁹⁹ and Article I-5, which affirmed the respect by the Union for member states' "national identities, inherent in their fundamental structures, political and constitutional".¹⁰⁰ On the basis of this systemic interpretation, the *Conseil constitutionnel* circumscribed the absoluteness of the European definition of the doctrine of primacy. While for the European Court of Justice any European rule prevails over any domestic one, even constitutional provisions, the *Conseil constitutionnel* interpreted Article I-6 of the Treaty establishing a Constitution for Europe as providing for exceptions to the doctrine of primacy when certain domestic constitutional provisions are endangered by the application of European Union law.¹⁰¹ If this entailed a neutralisation¹⁰² of the primacy principle,¹⁰³ this substantive distortion was also the basis that enabled the *Conseil constitutionnel* to conclude to the compatibility between the primacy principle and the supremacy of the Constitution.¹⁰⁴

Thus, in contrast with the earlier case-law of its administrative counterpart,¹⁰⁵ the *Conseil constitutionnel* managed to uncouple¹⁰⁶ the question of the primacy principle and the relationship between the two legal orders considered at paragraphs 11-13 of the decision, on the one hand, from the affirmation of the formal supremacy of the French Constitution at paragraphs 9-10, on the other. Putting aside the hierarchically construed Article 55 of the Constitution,¹⁰⁷ the *Conseil constitutionnel* minimised the formal perspective on the relationship

⁹⁹ On the importance of the notion of exercise in common of certain competences rather than their transfer, diminishing therefore the supranational dynamics of European Union law, see F. Chatiel, "Les bases constitutionnelles du droit communautaire" in *L'esprit des institutions, l'équilibre des pouvoirs : Mélanges en l'honneur de Pierre Pactet* (Paris: Dalloz, 2003) 551-568 at 557-558.

¹⁰⁰ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 12.

¹⁰¹ See for example, H. Labayle and J.-L. Sauron, "La Constitution française à l'épreuve de la Constitution pour l'Europe" (2005) *Revue française de droit administratif* 1-29 at 7-9.

¹⁰² See M. Verpeaux, "La voie de la ratification de la « Constitution » européenne est ouverte" (2004) n° 52-53 *La Semaine juridique. Édition générale* 2248-2251 at 2349 or B. Mathieu, "Les rapports normatifs entre le droit communautaire et le droit national. Bilan et incertitudes relatifs aux évolutions récentes des juges constitutionnel et administratif français" (2007) n° 72 *Revue française de droit constitutionnel* 675-693 at 680.

¹⁰³ This systemic interpretation offering the possibility to the *Conseil constitutionnel* of conciliating the primacy principle and the supremacy of the Constitution was already invoked by Cassia previously to the *Treaty establishing a Constitution for Europe* decision of the French constitutional court, see P. Cassia, "L'article I-6 du traité établissant une Constitution pour l'Europe et la hiérarchie des normes" (2004) n° 12 *Europe* 6-10.

¹⁰⁴ More generally, this ability of domestic courts to conciliate through their interpretation these opposite requirements was already mentioned by Dubouis before the Treaty of Maastricht, even though this strategy can only "unfold on the constitutional 'keyboard', and not on the European one", see L. Dubouis, "Le juge français et le conflit entre norme constitutionnelle et norme européenne" in *L'Europe et le droit : Mélanges en l'honneur de Jean Boulouis* (Paris: Dalloz, 1991) 205-219 at 215 (translation by the author).

¹⁰⁵ See *supra* at 144-146.

¹⁰⁶ In this sense, see D. Blanc, "Les incidences du « traité-constitutionnel » européen sur la Constitution européenne : une affectation minimale : Retour sur la décision de Conseil constitutionnel n° 2004-505 DC du 19 novembre 2004, Traité établissant une Constitution pour l'Europe", *op. cit.*, at fn. 86 above, at 2268 where the author argues that "the *Conseil constitutionnel* gives the feeling to create a space between the primacy of Community law and the constitutional supremacy" (translation by the author).

¹⁰⁷ See for example É. Bruce, "La primauté du droit communautaire (Retour sur la portée de l'article 88-1 de la Constitution dans la jurisprudence récente du Conseil constitutionnel)" (2005) n° 192 *Les petites affiches* 3-10 at 9-10.

between the European and domestic legal orders. Relying on the participation in the process of European integration provided for in Article 88-1 and the recognition of the respect by European law for national constitutional values, the doctrine of primacy is rather conceived from a material perspective. In consequence, the *Conseil constitutionnel* could decide in favour of the compatibility of Article I-6 of the Treaty establishing a Constitution for Europe with the Constitution,¹⁰⁸ arguing that the doctrine of primacy had the same scope as its earlier interpretation of Article 88-1 in terms of jurisdictional immunity.¹⁰⁹ This undermined the formal difference of legal basis between the two perspectives, between the autonomous nature of the European legal order and the grounding of European requirements in the supremacy of the Constitution.¹¹⁰

However, in contrast to its Irish counterpart, it can be said that the benchmark of this new perspective is national. Indeed, whereas in Ireland the interpretation of constitutional provisions dedicated to the licence to join what is now the European Union has often been determined by the developments of the process of European integration,¹¹¹ one could argue that in France it is the European obligations constitutionally-defined which are mirrored in the interpretation of the European treaty, and in particular the provision dealing with the primacy principle. In other words, the French commitment to European Union law is not determined by the developments of the process of European integration but in contrast the *Conseil constitutionnel* affirms that this development remains within what is constitutionally defined. As Azoulai and Ronkes Agerbeek put it:

“it [the Conseil constitutionnel] interprets the principle of primacy in the ‘language’ of its own constitutional discourse.”¹¹²

¹⁰⁸ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 13.

¹⁰⁹ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101, CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication* of 1 July 2004, *Rec.* 107; CC, decision n° 2004-498 DC on the *Act on bioethics* of 29 July 2004, *Rec.* 122 and CC, decision n° 2004-499 DC on the *Act relating to the protection of physical persons regarding the treatment of personal data* of 29 July 2004, *Rec.* 126.

¹¹⁰ On this new material perspective introduced by the shift from Article 55 to Article 88-1 as the basis of the relationship between the European and domestic legal orders, see P. Gaïa, “Le Conseil constitutionnel et l’Europe” in *Renouveau du droit constitutionnel : Mélanges en l’honneur de Louis Favoreu* (Paris: Dalloz, 2007) 1279-1290 at 1283-1284.

¹¹¹ See *supra* at 205-206.

¹¹² L. Azoulai and F. Ronkes Agerbeek, “*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe” (2005) 42 *Common Market Law Review* 871-886 at 877-878.

The same material logic leading to the conclusion of compatibility between the Constitution and European primary law can be seen in the interpretation of the Charter of Fundamental Rights of the Union. One could argue that obvious discrepancies exist between the freedom of religion defined in Article II-70, part of the Charter of Fundamental Rights of the Union, and the secularism proclaimed by Article 1 of the Constitution of which the *Treaty establishing a Constitution for Europe* decision once again stressed the radical nature.¹¹³ The French constitutional court nonetheless distorted the potentially incompatible substantive content of the European norm in order to find it congruent with the content of the Constitution. Even more surprisingly, in order to do so, the *Conseil constitutionnel* referred to a decision of the Fourth Section of the European Court of Human Rights¹¹⁴ in order to interpret the European Union provisions and decided, on the basis of this reservation of interpretation,¹¹⁵ to its congruence with freedom of religion as defined in the French Constitution through the prism of the secular nature of France due to the leeway left to the states in that balance.¹¹⁶ Displaying *via* this “exercise of legal acrobatics”¹¹⁷ a conciliatory attitude towards European Union law on the basis of a material perspective in the relationship between the domestic and European legal orders, it is however once again France that is defined as a standing point, the content of the European Union legal order being scheduled to the French one.¹¹⁸

¹¹³ As the *Conseil constitutionnel* put it: “the provisions of Article 1 of the Constitution whereby ‘France is a secular republic’ (...) forbid anyone to profess religious beliefs for the purpose of non compliance with the common rules governing the relations between public communities and private individuals”, CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 18. On this radical conception of the secular nature of France, F. Sudre, “Les approximations de la décision 2004-505 DC du Conseil constitutionnel « sur la Charte des droits fondamentaux de l’Union ». Réflexions critiques” (2005) *Revue française de droit administratif* 34-39 at 36-37 and J. Roux, “Le traité établissant une Constitution pour l’Europe à l’épreuve de la Constitution française”, *op. cit.*, at fn. 98 above, at 83.

¹¹⁴ *Leyla Şahin v. Turkey*, no. 44774/98, 29 June 2004, E.Ct.H.R. (unreported).

¹¹⁵ On this reservation of interpretation, see A. Levade, “Le Conseil constitutionnel aux prises avec la Constitution européenne”, *op. cit.*, at fn. 85 above, at 39 and D. Blanc, “Les incidences du « traité-constitutionnel » européen sur la Constitution européenne : une affectation minimale : Retour sur la décision de Conseil constitutionnel n° 2004-505 DC du 19 novembre 2004, Traité établissant une Constitution pour l’Europe”, *op. cit.*, at fn. 86 above, at 2269.

¹¹⁶ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 18. At para. 16, the *Conseil constitutionnel* used the same reasoning on the issue of collective rights.

¹¹⁷ O. Gohin, “Conseil constitutionnel et Constitution européenne : les trois contradictions”, *op. cit.*, at fn. 98 above, at 1710.

¹¹⁸ As it stands now, the constitutionality of the Charter of Fundamental Rights of the Union referred to in Article 6 of the Treaty on European Union is also submitted to these reservations of interpretation due to the reference made by the *Conseil constitutionnel* to its *Treaty establishing a Constitution for Europe* decision when it appreciated the Treaty of Lisbon, see CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 11-12 and X. Magnon, “Le Traité de Lisbonne devant le Conseil constitutionnel : *non bis in idem*” (2008) n° 74 *Revue française de droit constitutionnel* 310-336 at 324-325 and 328-330.

This material perspective put on the drafting of European Union primary law, and therefore the envisaged primacy of European norms, is also at play when the application of European Union law is considered, *i.e.*, when European rules are embedded with an actual primacy. Escaping the impassable difficulties which follow from the submission of European Union law to the formal supremacy of constitutional provisions, the conciliatory attitude of *Conseil constitutionnel* is first noticeable in the definition of primacy as a question of jurisdictional competence where the respective roles of the domestic and European courts is comprehended in a substantive manner. As regards the implementation of European secondary law, the *Conseil constitutionnel* stated that:

“whereas according to the terms of Article 88-1 of the Constitution (...); the transposition of a Community Directive into domestic law thus results from a constitutional requirement, a requirement which it could only be obstructed by reason of an express conflicting provision of the Constitution; in the absence of such a provision, it is for the Community court, if need be by referring a matter for a preliminary ruling, to check that a Community Directive respects both the competences defined in the Treaties and the fundamental rights guaranteed by Article 6 of the Treaty on the European Union”¹¹⁹

In order to determine if it is competent to carry out a review for constitutionality of an act of implementation, the *Conseil constitutionnel* plays down its formal domestic nature. The basis of its reasoning consists of assessing if the content of the domestic and European norms are similar.¹²⁰ In such a case, the European Court of Justice would enjoy a monopoly of jurisdictional competence, *viz.*, primacy as understood from the French perspective. Positively decisions of the *Conseil constitutionnel* consist of the enforcing of a constitutional requirement. However, *a contrario*, had the *Conseil constitutionnel* been focused on the formal nature of the acts of implementation which remain domestic norms rather than taking into account the

¹¹⁹ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7 (translation by the author). This principle has been repeated, for example, in CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication* of 1 July 2004, *Rec.* 107 at para. 18, CC, decision n° 2004-498 DC on the *Act pertaining to bioethics* of 29 July 2004, *Rec.* 122 at para. 4 and CC, decision n° 2004-499 DC on the *Act relating to the protection of physical persons regarding the treatment of personal data* of 29 July 2004, *Rec.* 126 at para. 7. The same principle was repeated in CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 18.

¹²⁰ In this sense, see P.-Y Monjal, “Le Conseil constitutionnel et les directives communautaires : l’incompétence du juge suprême comme garantie de l’opposabilité de la Constitution au droit communautaire ?” (2004) *Revue du Droit de l’Union Européenne* 509-522 at 518-519.

symmetry it entertains with the European instrument, the constitutional court would have indirectly proceeded to a review of the European instrument,¹²¹ due to the “double nature of the directive”,¹²² and undermine the primacy principle.¹²³ It is this very possibility which the constitutional court declines. By adopting a material perspective, it loosens, in contrast, the consequences of the supremacy of the constitutional provisions on European Union law and, in a conciliatory manner, enables the European doctrine to have a greater bearing on the French legal system.

The initial formal perspective of the *Conseil constitutionnel* was not fully suppressed by its new approach on the relationship between the European and domestic legal orders. In particular, the new material perspective adopted by the *Conseil constitutionnel* does not extend to the method of implementation of European directives. In contrast to the more ambiguous position of Irish courts,¹²⁴ the French constitutional court affirmed that this issue had to be considered according to the division of the normative making-power between the Parliament and the Executive governed by Articles 34 and 37 of the French Constitution.¹²⁵ Similarly, declining the exercise of a control of conventionality, the *Conseil constitutionnel* refused to include European rules in the *bloc de constitutionnalité*. This explains that it has refused to control a statute with a directive that the domestic measure does not intend to implement.¹²⁶ However, in its assessment of what constitutes an act of implementation, the *Conseil constitutionnel* does not limit itself to the formal consideration of the title of the domestic instrument and the explicit reference to an implementation but adopts a material perspective.¹²⁷ In this sense, its position is very similar to that adopted by the Irish Supreme Court in *Kennedy*

¹²¹ On this point, see for example F. Hervouët, “Les relations entre ordre juridique communautaire et ordres juridiques nationaux : De la primauté à la sphère de compétence” in *Le droit administratif : Permanences et convergences : Mélanges en l’honneur de Jean-François Lachaume* (Paris: Dalloz, 2007) 649-665 at 661, A. Levade, “Le Conseil constitutionnel aux prises avec le droit communautaire dérivé” (2004) *Revue du droit public et de la science politique en France et à l’étranger* 889-911 at 894 or B. Mathieu, “Le Conseil constitutionnel conforte la construction européenne en s’appuyant sur les exigences constitutionnelles nationales” (2004) *Recueil Dalloz* 1739-1740 at 1739.

¹²² B. Genevois, “Le Conseil constitutionnel et la primauté du droit communautaire” (2005) *Revue française de droit administratif* 239-241 at 240.

¹²³ In this sense, see for example, J. Dutheil de la Rochère, “*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi pour la confiance dans l’économie numérique (e-commerce)” (2005) 42 *Common Market Law Review* 859-869 at 863-865 and C. Richards, “The supremacy of Community law before the French Constitutional Court” (2006) 31 *European Law Review* 499-517 at 500.

¹²⁴ Most notably in *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 but also in *Maher v. Minister for Agriculture* [2001] 2 I.R. 139, even though this latter decision bears witness to an increase of the formal dimension in the case-law of the Supreme Court. For further considerations on this point, see *supra* at 206-214.

¹²⁵ CC, decision n° 2008-564 of 19 June 2008 on the *Act pertaining to genetically modified organisms*, *Rec.* 313 at para. 53. For further analysis of this element of the decision, see *infra* at 300-303.

¹²⁶ CC, decision n° 2006-535 DC of 30 mars 2006 on the *Act for the equality of chances* of 30 March 2006, *Rec.* 50 at para. 28.

¹²⁷ On this point, see A. Roblot-Troizier, “L’environnement au cœur des évolutions du contentieux constitutionnel” (2008) *Revue française de droit administratif* 1237-1240 at 1239 and A. Levade, “La décision OGM ou les implicites d’une décision à lire dans son environnement” (2008) n° 30 *La Semaine juridique. Édition générale* 37-42 at 40.

v. Attorney General.¹²⁸ If a statute is challenged on the basis of an infringement of a directive, the *Conseil constitutionnel* will compare the content of the domestic and European rules in order to qualify the statute, or some of its Articles, as an act of implementation or not, and the subsequent relevance of Article 88-1 of the Constitution for its control.¹²⁹

This material logic to the benefit of European law is also noticeable in the limit put on the doctrine of primacy. Either defined as an “express conflicting provision of the Constitution” or, later, as a “rule or principle inherent in the constitutional identity of France”,¹³⁰ this limit represents the residual consequence of the formal supremacy of the Constitution in the decisions of the *Conseil constitutionnel* on European law.¹³¹ However, it can be said that even this limit is interpreted in accordance with a conciliatory material perspective. Defined as an “express conflicting provision of the Constitution”, this limit could, at first sight, encompass the totality of the constitutional text and could be interpreted as the mere reaffirmation of the formal supremacy of the Constitution.

However, it did not take long for the *Conseil constitutionnel* to make clear that a material understanding would be favoured. Less than two months after its breakthrough decision, the constitutional court had to review the implementation of a European Directive dealing with biotechnology.¹³² The Act pertaining to bioethics¹³³ was contested on the ground that the provisions transposing the Directive were contrary to the freedom of communication provided for by Article 11 of the Declaration of Human and Civic Rights, *viz.*, contrary to an express constitutional provision due to the incorporation of this Declaration in the *bloc de constitutionnalité*, and which is the basis of the constitutional protection of pluralism by the *Conseil constitutionnel*.¹³⁴ However, the *Conseil constitutionnel* disagreed with this interpretation and relied on European Union law to maintain the jurisdictional immunity enjoyed by domestic rules related to European law in accordance with its interpretation of Article 88-1 of the Constitution. The basis of its reasoning was the acknowledgement of the

¹²⁸ [2007] 2 I.R. 45.

¹²⁹ CC, decision n° 2008-564 of 19 June 2008 on the *Act pertaining to genetically modified organisms*, *Rec.* 313.

¹³⁰ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19, CC, decision n° 2006-543 DC of 30 November 2006 on the Act pertaining to the energy sector, *Rec.* 120 at para. 6, CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 18 or CC, decision n° 2011-631 DC on the *Act pertaining to immigration, integration and citizenship* of 9 June 2011 (unreported) at para. 45.

¹³¹ As the *Conseil constitutionnel* put it in its *Treaty establishing a Constitution for Europe* decision, the Constitution is “at the summit of the domestic legal order”, CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 10.

¹³² Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] O.J. L 213/13.

¹³³ Act n° 2004-800 of 6 August 2004 pertaining to bioethics, J.O.R.F. p. 14040.

¹³⁴ CC, decision n° 2004-498 DC on the *Act pertaining to bioethics* of 29 July 2004, *Rec.* 122 at para. 3.

existence of a similar right in Article 10 of the European Convention of Human Rights. In consequence, due to the case-law of the European Court of Justice, the protection of pluralism was ensured at Union level as a general principle of Community law.¹³⁵ The *Conseil constitutionnel* thus entrusted the European Court of Justice with the protection of the material principles which both legal systems have in common.¹³⁶ In comparison with the former limit to the primacy principle as an express constitutional provision, it appears in this decision that it is a certain specificity of the French constitutional order which justifies derogation from European obligations France undertook *via* Article 88-1 of the Constitution. In consequence, rather than the formal understanding that the initial test provided for, it is rather a question of material perspective that constitutes the dynamic of the normative relationship between domestic and European levels.¹³⁷

The evolution of the test used by the *Conseil constitutionnel* and its definition in terms of a “rule or principle inherent in the constitutional identity of France” reinforces this material logic, which now, not only concerns the relationship between the Constitution and European Union law, but also constitutional provisions themselves. The constitutional provisions able to prevail over the doctrine of primacy are not only those specific to the French legal order but they also need to be of a crucial nature.¹³⁸

This material perspective favouring the substantive content of norms does not only concern the nature of the principle deduced from Article 88-1 of the Constitution by the *Conseil constitutionnel*. It also structures the interpretative techniques used to enforce it. Arguably, the specific modalities of the control effected by the *Conseil constitutionnel* under Article 54 of the Constitution are justified by the fact that it involves norms for which the French constitutional court is not the authentic interpreter. Since, the definition of the doctrine of primacy in terms of jurisdictional immunity leads towards a comparison between the content of an act of implementation and the directive it purports to implement, the recourse to reservations of interpretation should also be disregarded when the validity of a legislative instrument related to European law is assessed under Article 61 of the Constitution. In contrast,

¹³⁵ *Ibid.* at para. 6.

¹³⁶ In this sense, see J.-É. Schoettl, “La brevetabilité des gènes, le droit communautaire et la Constitution” (2004) n° 164 *Les petites affiches* 3-11 at 10.

¹³⁷ For a similar opinion, see for example S. Mouton, “Une jurisprudence pour attendre...” (2005) *Recueil Dalloz* 199-204 at 202.

¹³⁸ As it was affirmed by Mazeaud, the then President of the *Conseil constitutionnel*, P. Mazeaud, “Vœux du président du Conseil constitutionnel, M. Pierre Mazeaud, au président de la République”, 3 January 2005, available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/relations-externes/agenda/le-conseil-en-2004/voeux-a-l-elysee.5147.html#prcc>>. For further considerations on this point, see *infra* at 245-247.

however, it was through the use of this interpretative technique that the *Conseil constitutionnel* ensured the compatibility between European and domestic norms,¹³⁹ and *in fine* curb the supremacy of the Constitution in favour of the primacy principle as domestically defined.¹⁴⁰

In its decision of 10 June 2004,¹⁴¹ the *Conseil constitutionnel* was faced with the assessment of the implementation of a Directive on electronic commerce¹⁴² through the Act to support confidence in the digital economy.¹⁴³ Article 6 of this statute, dealing with the liability of Internet hosting service providers, could have been declared to violate Article 11 of the Declaration of Human and Civic Rights on the freedom of communication as well as Article 66 of the Constitution making courts belonging to the *ordre judiciaire* - the guardian of individual freedoms. However, the constitutional court resorted to a reservation of interpretation to declare that:

“these provisions could have the effect of creating liability on the part of a service provider which has not removed information denounced as illegal by a third party if this information does not obviously display such a character or if its withdrawal has not been ordered by a court; that, subject to this reservation, section 1 (2) and section 1 (3) of Article 6 are confined to implementing unconditional and precise provisions of section 1 of Article 14 of the Directive concerning which it is not the task of the *Conseil constitutionnel* to make a ruling”.¹⁴⁴

At first sight, it seemed that this reservation of interpretation transformed the Act in order to ensure its conformity with the European instrument. However, Article 6 of the domestic instrument merely repeated the wording of the Directive. It was therefore the content of the latter that was modified by this reservation of interpretation in order to ensure its

¹³⁹ See for example A. Levade, “Le Conseil constitutionnel aux prises avec le droit communautaire dérivé”, *op. cit.*, at fn. 121 above, at 905-906.

¹⁴⁰ On this importance of interpretative techniques to play down the formal perspective and to uphold a conciliatory attitude based on material consideration, to “look into the material content and thus to avoid the affirmation of a primacy actually formal”, see H. Gaudin, “Primauté, la fin d’un mythe ? Autour de la jurisprudence de la Cour de justice” in J.-C. Masclet, H. Ruiz Fabri, C. Boutayeb and *al.* (eds.), *L’Union européenne : Union de droit, union des droits : Mélanges en l’honneur du Professeur Philippe Manin* (Paris: Pedone, 2010) 639-656 at 643-646 (at 643 for the quote) (translation by the author).

¹⁴¹ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101.

¹⁴² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] O.J. L 178/1.

¹⁴³ Act n° 2004-575 of 21 June 2004 to support confidence in the digital economy, J.O.R.F. 11168.

¹⁴⁴ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 9 (translation by the author).

constitutional validity.¹⁴⁵ This solution presents some difficulties in case of future potential discrepancies between European and French interpretations of the same rule. However, suffice it to say for the moment¹⁴⁶ that the *Conseil constitutionnel* favoured focusing on the congruence of the (distorted) content of the European Directive and the substance of constitutional rules¹⁴⁷ in order to ease the implementation of the former in the French legal system.¹⁴⁸ The *Conseil constitutionnel* increased the primacy of the European rule¹⁴⁹ by avoiding formally quashing the act of implementation due to the indirect inconsistencies between the Constitution and European law.

However, this concern of the *Conseil constitutionnel* for the content of the norms submitted to its control is not only to the detriment of European Union law. The constitutional requirement to see acts of implementation conform with European obligations has also provided justification for the pronouncement of reservations of interpretation in order to ensure that the acts of implementation do not obviously contravene the directives they are supposed to implement. This was for example seen in the decision of the French constitutional court on the *Act pertaining to copyright and related rights in the information society*.¹⁵⁰ As in the decision previously discussed, this aimed to avoid the act of implementation being quashed on constitutional grounds, leaving the question of its validity with regard to European law to be determined by the European Court of Justice.¹⁵¹ *In fine*, while the *Conseil constitutionnel* could have declared the legislative instrument repugnant to the Constitution, it instead ensured the application of European law, and its primacy, in the domestic legal order, refusing to postpone an already late implementation for which France had already been sanctioned.¹⁵²

¹⁴⁵ See for example, J.-P. Camby, “Le droit communautaire est-il soluble dans la Constitution ?” (2004) *Revue du droit public et de la science politique en France et à l'étranger* 878-888 at 887.

¹⁴⁶ On the implications of this reasoning for the judicial dialogue between the domestic and European courts, see *infra* at 491-492.

¹⁴⁷ In this sense, see P. Blachère and G. Protière, “Le Conseil constitutionnel, gardien de la Constitution face aux directives communautaires” (2007) n° 69 *Revue française de droit constitutionnel* 123-144 at 142.

¹⁴⁸ See for example, X. Magnon, “Le chemin communautaire du Conseil constitutionnel : entre ombre et lumière, principe et conséquence de la spécificité du droit communautaire”, *op. cit.*, at fn. 84 above, at 10.

¹⁴⁹ In this point, see for example J. Roux, “Le Conseil constitutionnel, le droit communautaire dérivé et la Constitution” (2004) *Revue du droit public et de la science politique en France et à l'étranger* 912-933 at 930-931.

¹⁵⁰ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 37, 40 and 50, as regards Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] O.J. L 167/1 implemented by the Act n° 2006-961 of 1 August 2006 pertaining to copyright and related rights in the information society, J.O.R.F. p. 11529.

¹⁵¹ For such an opinion, see S. Marasco, “Du contrôle de la transposition des directives par le Conseil constitutionnel et de « l'identité constitutionnelle de la France »” (2006) n° 41 *Courrier juridique des finances et de l'industrie* 2-5 at 4.

¹⁵² In this sense, see J.-É. Schoettl, “La propriété intellectuelle est-elle constitutionnellement soluble dans l'univers numérique ? (1^{ère} partie)” (2006) n° 161 *Les petites affiches* 4-22 at 5.

In fine, this conciliatory attitude of the *Conseil constitutionnel* can also be noted in the growing similarity of its case-law with the position of the Irish courts which have traditionally been generous towards European law requirements. Its new position towards European law since 2004 introduced arguments which are familiar in the Irish legal order. In its *Act pertaining to the energy sector* decision,¹⁵³ the *Conseil constitutionnel* condemned Article 17 of the Act ensuring the implementation¹⁵⁴ of European Directives¹⁵⁵ on the grounds that they “do not comply with the requirement of the achievement of a competitive market for electricity and natural gas as laid down by the abovementioned Directives”.¹⁵⁶ This Article introduced regulated prices, what was not explicitly prohibited by the European Directives. It is thus a teleological interpretation which was favoured by the *Conseil constitutionnel*.¹⁵⁷ This method of interpretation, in the same manner as when used by its Irish counterpart,¹⁵⁸ is the sign of a co-operative approach to the relationship between the two legal orders. Rather than a minimal compatibility between the domestic and European rules, the *Conseil constitutionnel* promotes their full material congruence to the benefit of the European content.¹⁵⁹

The material perspective introduced by the constitutional court in 2004 attracted the approval of the *Conseil d'État*, which is usually more reticent to take European considerations into account.¹⁶⁰ In its *Arcelor* decision,¹⁶¹ the *Conseil d'État* reaffirmed its competence regarding European Union law on the basis of Article 55 of the Constitution. However, citing Article 88-1, the *Conseil d'État* concluded that the control of constitutionality of executive regulations¹⁶² “is

¹⁵³ CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120.

¹⁵⁴ Act n° 2006-1537 of 7 December 2006 pertaining to the energy sector, J.O.R.F. p. 18531.

¹⁵⁵ Directive 2003/54/EC of the European Parliament and Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] O.J. L 176/37 and Directive 2003/55/EC of the European Parliament and Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] O.J. L 176/57.

¹⁵⁶ *Ibid.* at para. 9.

¹⁵⁷ In this sense, see J.-É. Schoettl, “Les problèmes constitutionnels soulevés par la loi relative au secteur de l'énergie (1^{re} partie)” (2006) n° 244 *Les petites affiches* 3-23 at 11-12.

¹⁵⁸ For the analysis of the decision of the Irish Supreme Court in *Crotty*, see *supra* at 193-198 and *infra* at 254-261.

¹⁵⁹ In this sense, see N. Charbit, “Censure partielle de la loi relative au secteur de l'énergie : le Conseil constitutionnel, juge communautaire de la concurrence” (2006) *L'Actualité juridique. Droit administratif* 2438-2440 at 2439.

¹⁶⁰ However, the new case-law of the *Conseil d'État* is not without presenting difficulties to be reconciled with what seems a more generous approach developed by its constitutional counterpart, especially as regards the consequences drawn by the *Conseil constitutionnel* from this material perspective in term of constitutional identity. For a more detailed analysis of these discrepancies, see *infra* at 410-416.

¹⁶¹ CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56.

¹⁶² Decree n° 2004-832 of 19 August 2004 enacted in application of Articles L. 229-5 to L. 229-19 of the Environment Code and pertaining to the scheme for greenhouse gas emission allowance trading and relative to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] L 275/32. In the French legal system, the production of primary legislation is divided between Acts of Parliament and Regulations of the Executive in accordance with Articles 34 and 37 of the Constitution. On this point, see for example J. Bell, S. Boyron and S. Whittaker, *Principles of French Law* (Second edition, Oxford: Oxford University Press, 2008) at 21-22.

called to be exercised according to specific modalities”.¹⁶³ In the instant case, the *Conseil d’État* decided, that it was the duty of the administrative court, if the constitutionality of such a measure of implementation was questioned, to determine whether a rule of European Union law had the same content as the invoked constitutional provision. If this was the case, and in conformity with the primacy principle as understood since the decisions of the *Conseil constitutionnel*, the *Conseil d’État* had to refer the matter to the European Court of Justice under the preliminary reference mechanism defined by Article 267 of the Treaty on the Functioning of the European Union. It was only if the disregarded constitutional principle was materially specific to the French legal order that the national court regained its competence.¹⁶⁴

Therefore, the material perspective recently used seems to involve an unquestionable evolution of the French perspective regarding European Union law. The new dynamics introduced by the *Conseil constitutionnel* in 2004 and constantly used since then have however also been interpreted in hierarchical terms. More specifically, the jurisdictional immunity enjoyed by European Union law was for some not so much the consequence of a material assessment of the respective content of the constitutional and European legal orders but rather the application of the hierarchy of norms to the issue of jurisdictional competence. One could however argue that this explanation cannot present adequately the current case-law. It is therefore, *a contrario*, a confirmation of the material approach.

This description relies on the theory of the “*loi-écran*” or “statute screen” that is applied by courts belonging to the *ordre administratif* since the *Arrighi* decision.¹⁶⁵ This doctrine applies in the situation where a regulation, passed in order to implement a statute, could be challenged as being repugnant to the Constitution. In this instance, the *Conseil d’État* takes the view that assessing the constitutionality of the administrative act would indirectly consist of controlling the activity of the legislature. On the basis of the separation of powers, the administrative court considers that its role is to control the administration but not to intervene in the exercise of the legislative function. In consequence, the purpose of its control is to invalidate a decree contravening with legislative provisions it is deemed to implement, even though the legislative

¹⁶³ CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56.

¹⁶⁴ On this point, see for example A. Levade, “Le Palais-Royal aux prises avec la constitutionnalité des actes de transposition des directives communautaires : À propos de la décision du Conseil constitutionnel n° 2006-543 du 30 novembre 2006, *Loi relative au secteur de l’énergie* et de l’arrêt du Conseil d’État, Assemblée, du 8 février 2007, *Société Arcelor Atlantique et Lorraine et autres*” (2007) *Revue française de droit administratif* 564-577 at 574.

¹⁶⁵ CE, 6 November 1936, *Arrighi*, *Rec. Lebon* 966.

provision may be in breach of a constitutional provision. The statute acts as a screen between the administrative rule and the Constitution.

It is possible to see the same mechanism at play in the case-law of the *Conseil constitutionnel*. In the case of acts of implementation, it can be said that the European measures are inserted between the domestic rule of implementation and the Constitution. For many authors, the new case-law of the *Conseil constitutionnel* could be read as the creation of the “*directive-écran*” or “directive screen”.¹⁶⁶ The incompetence of national courts towards domestic acts of implementation would therefore be the consequence of the domestic hierarchy of norms.

One might however doubt that this reflects the decision of the *Conseil constitutionnel*.¹⁶⁷ In the case of the administrative court, the theory of the “statute screen” acts as an absolute bar on their competence. As has been seen,¹⁶⁸ this lack of jurisdictional competence as regards European Union norms is only conditional and limited. The alleged “directive screen” is merely a smoke screen or, in other words, not a screen at all.¹⁶⁹ Rather than a jurisdictional incompetence imposed on the national courts, the consequences deduced from Article 88-1 represent a self-restraint on the part of the *Conseil constitutionnel*. In the case-law of the *Conseil d'État* the theory of the “statute screen” proceeds from normative considerations to a jurisdictional bar. Quite differently, it is the interpretation of Article 88-1 of the Constitution in terms of jurisdictional immunity which entails normative consequences.¹⁷⁰ In consequence, the “directive screen” rather stands as a metaphor showing the willingness of the *Conseil d'État* to adopt a conciliatory attitude towards the European claim to primacy and to accommodate the relationship between the two legal systems from a material perspective.

¹⁶⁶ For an interpretation of the decisions of the *Conseil constitutionnel* in this sense, see for example C. Maugué, “La décision du Conseil constitutionnel sur la loi pour la confiance dans l'économie numérique ou la consécration par le Conseil constitutionnel de la théorie de la directive-écran” (2004) n° 28 *Courrier juridique des finances et de l'industrie* 2-6, in particular at 4, B. Mathieu, “Le Conseil constitutionnel conforte la construction européenne en s'appuyant sur les exigences constitutionnelles nationales”, *op. cit.*, at fn. 121 above, at 1739, H. Alcaraz, “Décision n° 2004-499 DC du 29 juillet 2004, Loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel” (2004) n° 60 *Revue française de droit constitutionnel* 822-830 at 829-830 or also C. Charpy, “The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil constitutionnel* and the *Conseil d'État*” (2007) 3 *European Constitutional Law Review* 436-462 at 442-444.

¹⁶⁷ On the inadequacy of the “directive screen” theory, see for example D. Chagnollaude, “La Constitution française ne peut être révisée par voie de directives... (après la décision n° 2004-505 DC du 19 novembre 2004, *Traité établissant une Constitution pour l'Europe*)” (2005) *Recueil Dalloz* 100-102 at 101.

¹⁶⁸ See *supra* at 146-152.

¹⁶⁹ For a similar criticism of the relevance of the “directive screen” theory, see for example A. Levade, “Le Conseil constitutionnel aux prises avec le droit communautaire dérivé”, *op. cit.*, at fn. 121 above, at 910 and M.-P. Granger, “France is ‘Already’ Back in Europe: The Europeanization French Courts and the Influence of France in the EU” (2008) 14 *European Public Law* 335-375 at 372.

¹⁷⁰ In this sense, see D. Biroste, “Précisions sur les rapports entre droit constitutionnel et droit communautaire” (2004) *Revue de la recherche juridique - Droit prospectif* 1829-1847 at 1842.

In conclusion, in comparison with its previous formal stance, the position of French courts towards the primacy of European Union law is evolving closer to the traditional material attitude displayed by Irish courts. However, while recent concerns regarding formal constitutional requirements emerged in the Irish case-law after the initial generous material perspective of domestic courts, symmetrical dynamics are at play in the French case-law. If Ireland often has and still favours a European perspective, France still regards the domestic norms as the benchmark of its material assessment. In contrast to the position of Irish court, the case-law of the *Conseil constitutionnel* displays an autonomous logic, a difference which bears witness to the consequences of their distinctive understanding of the holder of sovereignty.¹⁷¹ If it is possible to notice a common ground between formal and material considerations in the relationship between the European and domestic legal orders, the case-law of each country bears the sign of its own evolution. One could conclude that the French legal system is governed by centripetal forces when Ireland tends to favour a centrifugal route in their relationships with European law. However, in both countries, the same balance between constitutional provisions is effected and the density of their domestic nature varies according to the openness to the European legal order. The doctrine of primacy gains greater influence in the Irish and French legal orders when the relationship between domestic and European rules is conceived from a material perspective. This is this interpretative balance between the formal and material perspectives which is at the core of the notion of constitutional identity.

This interpretation of the relationship between domestic and European obligations through a substantive prism prevents a direct conflict between the claims to supremacy issued by each legal order. The justification for the review by national courts has to be found in the Constitution as the expression of the sovereign but the content of this review avoids the full consequences of this formal understanding. Departing from the strict architectural constraints of the hierarchy of norms, recourse to the supremacy of constitutional provisions is only raised at the end of the assessment of the content of the conflicting rules. In this context, the notion of constitutional identity is the result of this interpretative process and qualifies a form of discourse that Irish and French courts commonly adopt about their respective Constitution.

¹⁷¹ Insofar as concerns the different conceptions of the sovereign in Ireland and France, see *supra* at 154-177. As regard, the consequences of these different conceptions on the reasoning of the Irish and French courts regarding the relationship between constitutional and European rules, see *infra* at 273-323.

B. The Notion of Constitutional Identity as an Interpretative Discourse Resulting in Crucial Constitutional Features Prevailing over the Primacy of European Union Law

The notion of constitutional identity - unusual in the constitutional discourse - appeared in the recent case-law of the *Conseil constitutionnel* dedicated to European Union law. Nonetheless, one could argue that this notion is not circumscribed by the boundaries of French positive law. First, it seems that this concept is European in its inspiration. Secondly, due to the unlimited nature of the French concept of a constituent power, the notion of constitutional identity does not correspond to an essentialist definition involving of immutable values. Rather than a legal ontology, this concept appears as an interpretative mechanism,¹⁷² a meta-discourse having the Constitution for topic.

Irish case-law, mirroring a similar conception of the sovereign, can be analysed as implementing the same type of interpretation where European Union law conflicts with constitutional values which appear as of particular importance. In consequence, the protection of the constitutional identity of their respective legal systems in the face of the primacy of European norms seems to be a common interpretative concern in Ireland and France, where the identity issue is postponed by the material perspective put on the relationship between the European and domestic legal orders. While the domestic definition of the doctrine of primacy in terms of immunity involves that European Union law usually escapes the application of constitutional provisions; the notion of constitutional identity corresponds to the escape of constitutional provisions from the common hold in that the application of the Constitution would suspend the enforcement of European Union law.¹⁷³

1. *Gaining Identity Status: The Potential for Crucial French Constitutional Norms to Prevail in a Confrontation with the Primacy of European Union Law*

The conflict between the European Court of Justice and national courts on the issue of primacy involves mainly opposing a normatively construed legal superiority on the European side to the prevalence of the will of the sovereign as expressed in the Constitution on the

¹⁷² For a similar interpretation, see for example L. Eck, “Réflexions sur « les règles ou principes inhérents à l'identité constitutionnelle de la France » à la lumière de la pensée de Ronald Dworkin” (2008) *Revue de la recherche juridique - Droit prospectif* 1061-1077, in particular at 1077 where the author affirms that “the notion of constitutional identity does not have a pre-established definition (...) [but] is part of an interpretive process”.

¹⁷³ In this sense, see M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)* (Paris: Economica, 2010) at 116.

domestic side. It is in the constitutionalist point of view which characterises the member states that it is possible to take a glimpse at the connection between the Constitution and the notion of identity. In this regard, Article 16 of the Declaration of Human and Civic Rights is representative of the dynamics at stake when it states that:

“any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.”

Troper points out that, in comparison with constitutional law theory as this exists nowadays, the understanding of the constitution in the 18th century was not concerned by the organisation of the state and of the various public authorities. In contrast, it is actually society that, by the giving of a constitution, structures itself in a distinctive manner.¹⁷⁴ The author then concludes that, even though the constitution is nowadays conceived through the normative paradigm rather than understood through a mechanistic model,¹⁷⁵ the same dynamics are noticeable in the consequences attached to a constitutional review of statutes. Under the influence constitutional courts, constitutional law irrigates the whole legal order:

“and these features [the constitutional principle imposed on the legislative power by the constitutional courts] are just precisely those that form the essential characters of society itself. It is in this sense that one can say that the constitution is nowadays, as in the 18th century, a constitution of society.”¹⁷⁶

It is easy to note the similarity between this notion of “essential characters of society itself” and the idea of an identity created by the Constitution. Considering the emphasis put by the *Conseil constitutionnel* on the constitutionalist paradigm in its opposition to European Union law, it is not surprising that it introduced in 2006 the notion of a “rule or principle inherent in the constitutional identity of France”¹⁷⁷ as a limit to the doctrine of primacy in the

¹⁷⁴ See M. Troper, *Pour une théorie juridique de l'État* (Paris: Presses universitaires de France, coll. Léviathan, 1994) at 217. In the same sense, B. de Witte, “Community Law and National Constitutional Values” (1991) 18 *Legal Issues of European Integration* 1-22 at 1.

¹⁷⁵ For the normative and mechanistic definitions of what is a constitution, see M. Troper, *La théorie du droit, le droit, l'État* (Paris: Presses universitaires de France, coll. Léviathan, 2001) at 147-162.

¹⁷⁶ M. Troper, *Pour une théorie juridique de l'État*, *op. cit.*, at fn. 174 above, at 221 (translation by the author).

¹⁷⁷ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19, CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120 at para. 6. Since then repeated in, for example, CC, decision n° 2010-605 DC on the

French legal system. The appearance of this new concept in French constitutional law was however regarded as entailing important disruptions in the domestic legal order by introducing a hierarchy in the *bloc de constitutionnalité*, either in a strong or weak form.

The strong form is based on the theory of supra-constitutionality, which presents a great similarity to natural law,¹⁷⁸ and relies on the idea according to which the will of the sovereign would be limited by some legal rules out of its reach. To be more precise, a distinction has to be introduced between the original constituent power which could create the constitution in a legal *ex nihilo* and the derived constituent power which is merely entrusted with the power to amend the constitution.¹⁷⁹ The amending power is subjected to limits set out by the original constituent power. In the case of France, it has been argued that Article 89 of the Constitution is a supra-constitutional principle¹⁸⁰ as it forbids alterations to the republican form of government.¹⁸¹

For some, the notion of constitutional identity presents very similar features to that of supra-constitutionality. It is indeed possible to see in the concept of constitutional identity an idea of permanence and continuity¹⁸² which endows the rules and principles participating in this identity with an irrevocable status. As Dubout, drawing a parallel between the two notions, puts it:

“this is the intrinsic difficulty with the concept of constitutional identity, understood here as the body of the essential and inalterable features of a constitutional order. The criterion of importance is for that matter reinforced by the reference made by the judges to the theory of inherence, which for being in large part rhetorical is nonetheless meaningful. The expression of rules or principles ‘inherent’ in the

Act pertaining to the opening up to competition and the regulation of online betting and gambling of 12 May 2010, *Rec.* 78 at para. 18 or CC, decision n° 2010-79 QPC, *M. Kamel D.* of 17 December 2010, *Rec.* 406 at para. 3.

¹⁷⁸ On this point, see for example M. Troper, *La théorie du droit, le droit, l'État*, *op. cit.*, at fn. 175 above, at 204-211.

¹⁷⁹ On these points, see for example, É. Maulin, “Souveraineté” in Alland, D. and Rials, S. (eds.), *Dictionnaire de la culture juridique* (Paris: Lamy; Presses universitaires de France, coll. Quadrige, 2003) at 1437.

¹⁸⁰ See for example É. Dubout, “« Les règles ou principes inhérents à l'identité constitutionnelle de la France » : une supra-constitutionnalité ?” (2010) n° 83 *Revue française de Droit constitutionnel* 451-482 at 456-458.

¹⁸¹ In this sense, see CC, decision n° 92-312 DC on the *Treaty on European Union* of 2 September 1992, *Rec.* 76 where the *Conseil constitutionnel* hinted towards this direction when it states at para. 19: “subject to the provisions governing the periods in which the Constitution cannot be revised (Articles 7 and 16 and the fourth paragraph of Article 89) and to compliance with the fifth paragraph of Article 89 (“The republican form of government shall not be the object of an amendment”), the constituent authority is sovereign”. However, its refusal to control constitutional amendment leads to the conclusion that the supra-constitutional theory has no bearing in the French legal system. See for example, CC, decision, n° 2003-469 DC on the *Constitutional amendment pertaining to the decentralised organisation of the Republic* of 26 March 2003.

¹⁸² See for example, S. Marasco, “Du contrôle de la transposition des directives par le Conseil constitutionnel et de « l'identité constitutionnelle de la France »”, *op. cit.*, at fn. 151 above, at 5, even though the author does not argue for an immutable nature of this identity.

constitutional identity of France intends thus to mean that the norms at stake are consubstantial to the constitutional order and therefore inseparable from this one.”¹⁸³

In a weak form, the notion of constitutional identity as a limit to the primacy of European Union law could still lead to the existence of a hierarchy within the *bloc de constitutionnalité*, even though it is not outside the reach of the constituent power.¹⁸⁴ If the European rules enjoy a jurisdictional immunity except vis-à-vis norms forming part of the identity of France, one could conclude that European Union law is inserted between two sets of constitutional provisions of different legal value. Instead of a Constitution at the summit of the domestic legal system, it can be argued that more steps have been added to the pyramid of norms. As it would now stand, the *bloc de constitutionnalité* would be best described as a hierarchy of provisions where constitutional rules of identity stand above European Union law which is itself superior to ordinary constitutional provisions.¹⁸⁵

These understandings of the notion of constitutional identity rely on an essentialist perspective being laid on rules which can be deemed of particular importance for the constitutional recognition of France as itself. In this regard, the analysis of the different constitutional provisions should reveal the pre-existent core values of the French constitutional order which might then be opposed to the primacy of European Union law. At the apex of this perspective stands Article 1 of the Constitution, which can be regarded as giving the essential, constitutive features of France and, as such, may constitute a definition of its constitutional identity when it states among other things:¹⁸⁶

¹⁸³ É. Dubout, “« Les règles ou principes inhérents à l'identité constitutionnelle de la France » : une supra-constitutionnalité ?”, *op. cit.*, at fn. 180 above, at 473 (translation by the author).

¹⁸⁴ This possibility was already evoked when to limit put on the principle deduced from Article 88-1 of the French Constitution was defined as an “express conflicting provision of the Constitution”, see for example, F. Chaltiel, “Nouvelles variations sur la constitutionnalisation de l'Europe : À propos de la décision du Conseil constitutionnel sur l'économie numérique” (2004) n° 480 *Revue du Marché commun et de l'Union européenne* 450-454 at 453 or M. Gautier and F. Melleray, “Le refus par le Conseil constitutionnel d'apprécier la constitutionnalité de dispositions législatives transposant une directive communautaire” (2004) *L'Actualité juridique. Droit administratif* 1537-1541 at 1540.

¹⁸⁵ For a possible interpretation of the case-law of the *Conseil constitutionnel* in this sense, see C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d'auteur et aux droits voisins dans la société de l'information” (2007) n° 69 *Revue française de Droit constitutionnel* 100-120 at 116.

¹⁸⁶ See for example, A.-M. Le Pourhiet, “Les symboles identitaires dans la Constitution de 1958” in B. Mathieu (ed.), *Cinquantième anniversaire de la Constitution française : 1958-2008* (Paris: Dalloz, 2008) 135-145. For other attempts to list the features forming part of the constitutional identity of France, see also F. Chaltiel, “Nouvelle précision sur les rapports entre le droit constitutionnel et droit communautaire : La décision du Conseil constitutionnel du 27 juillet 2006 sur la loi relative aux droits d'auteurs” (2006) n° 68 *Revue française de droit constitutionnel* 837-847 at 842-843 at 844 or D. Chagnollaud, “La Constitution française ne peut être révisée par voie de directives... (après la décision n° 2004-505 DC du 19 novembre 2004, *Traité établissant une Constitution pour l'Europe*)”, *op. cit.*, at fn. 167 above, at 101. Articles 2, 3 and 89 could also be regarded as constitutive of the constitutional of France under this essentialist paradigm, providing *inter alia* for the French as the language of the Republic, the principle of national sovereignty and the republican form of government.

“France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis.”

However, it is doubtful if this gives a proper understanding of the case-law of the *Conseil constitutionnel* in relation to the notion of constitutional identity.¹⁸⁷ It could be argued that this notion is not an autonomous construction which is opposed to the doctrine of primacy but rather, that this notion is the very result of the comparison between the Constitution and European law. In order to reach such conclusion, reflections on the notion of constitutional identity alone are not sufficient. It is necessary to take into account the genealogy of this notion in the case-law of the *Conseil constitutionnel*.

The notion of constitutional identity is intrinsically linked to the decisions of the *Conseil constitutionnel* related to European law. More particularly, in its first interpretation of Article 88-1 of the Constitution, the *Conseil constitutionnel* took the view that “the transposition of a Community Directive into domestic law thus results from a constitutional requirement, a requirement which it could only be obstructed by reason of an express conflicting provision of the Constitution”.¹⁸⁸ The reference to the notion of constitutional identity is related to the same issue. In 2006, the *Conseil constitutionnel* reaffirmed that “the implementation of a Community Directive into domestic law thus complies with a constitutional requirement” and argued that “the implementation of a Directive cannot run counter to a rule or principle inherent in the constitutional identity of France”.¹⁸⁹ The notion of constitutional identity is the latest stage of a process initiated in 2004 by the *Conseil constitutionnel*, the latest formulation of the limit put on the primacy principle at the end of many attempts.¹⁹⁰ Understanding the notion of constitutional identity thus requires considering it in its continuity with the notion of “an express conflicting provision of the Constitution” and determining to what extent it perpetuates and develops this former test used by the *Conseil constitutionnel*.

¹⁸⁷ On the difficulties related to an essentialist interpretation of the case-law of the *Conseil constitutionnel*, see P. Blachère and G. Protière, “Le Conseil constitutionnel, gardien de la Constitution face aux directives communautaires”, *op.cit.*, at fn. 147 above, at 134.

¹⁸⁸ For example, CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7.

¹⁸⁹ For example, CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 17 and 19.

¹⁹⁰ In this sense, see C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information”, *op. cit.*, at fn. 185 above, at 107.

The logic justifying a limit to the primacy of European law expressed in terms of constitutional identity does not radically differ from the former test referring to an “express conflicting provision of the Constitution”. Rather it bears witness to the same material and conciliatory perspective.¹⁹¹ Indeed, it can be argued that the reasoning of the *Conseil constitutionnel* does not consist of first determining whether constitutional provisions which are opposed to an act of implementation, and thus indirectly to a European directive itself, form part of the constitutional identity of France. Rather, in the same manner as when the limit to the doctrine of primacy was defined as consisting of an “express conflicting provision of the Constitution”, it is first the potential divergence between European law and the Constitution which is assessed, without special consideration being given to the status of certain constitutional provisions.

The first occurrence of the notion of constitutional identity in the case-law of the *Conseil constitutionnel* regarded the implementation¹⁹² of a European directive pertaining to copyright.¹⁹³ *Inter alia*, the legislative instrument was challenged as contravening “the principle of the legality of offences and punishments, the right of redress, the rights of the defence, the right to a fair trial, the principle of equality and the right to property”.¹⁹⁴ Arguably, any of these principles, mostly based on the Declaration of Human and Civic Rights of 1789, could be regarded as forming part of the constitutional identity of France.¹⁹⁵ The *Conseil constitutionnel* concluded that “the foregoing provisions [of the European directive] thus show, firstly, that the abovementioned Directive of 22 May 2001, which does not run counter to any rule or principle inherent in the constitutional identity of France, contains unconditional and precise provisions, in particular as regards indent 5 of Article 5”.¹⁹⁶ However, the reasoning of the *Conseil constitutionnel* did not consist of determining if the principles invoked formed part of the constitutional identity of France before assessing the compatibility between the Constitution and the European Directive. In contrast, it was because the European Directive is compatible with the Constitution that *a fortiori* it did not run counter French constitutional identity. In

¹⁹¹ See for example É. Dubout, “« Les règles ou principes inhérents à l'identité constitutionnelle de la France » : une supra-constitutionnalité ?”, *op. cit.*, at fn. 180 above, at 455-456 and 466.

¹⁹² Act n° 2006-961 of 1 August 2006 pertaining to copyright and related rights in the information society, J.O.R.F. p. 11529.

¹⁹³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] O.J. L 167/1.

¹⁹⁴ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 8.

¹⁹⁵ In a broad sense, the Constitution giving a shape to society, any constitutional provisions could be deemed as an identity clause, see *supra* at both 2 and 235.

¹⁹⁶ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 28 (translation by the author).

subsequent decisions referring to the notion of constitutional identity, one can note the same lack of any actual determination as to which provisions are forming part of it.¹⁹⁷

One could conclude that the initial step the *Conseil constitutionnel* in the assessment of the relationship between the European and domestic legal orders is more concerned with ensuring substantive congruence between domestic and European rules, if necessary by having recourse to reservations of interpretation,¹⁹⁸ rather than determining which constitutional provisions deserve a special status due to their participation in the constitutional identity of France. This seems to be a general concern which goes beyond the strict issue of the primacy of European rules as well as the different formulations related to its limit. In particular, even though it is not directly linked to the issue of primacy of European law since ratification is still pending, the control of compatibility of European treaties with the Constitution under Article 54 is still revealing regarding the meaning of constitutional identity.

According to an essentialist definition of the constitutional identity of France, one can argue that the affirmation of secularism and the refusal to recognise collective rights are the two main features of French constitutional peculiarity.¹⁹⁹ However, when the *Conseil constitutionnel* had to assess the compatibility with the Constitution of the Treaty establishing a Constitution for Europe, it referred to paragraph 4 of Article II-112 of the Constitutional Treaty which stated that fundamental rights should be interpreted in harmony with the “constitutional traditions common to Member States”. The *Conseil constitutionnel* seemed to understand the notion of common traditions as a protection of the singularities of member states²⁰⁰ in order to conclude that the Charter of Fundamental Rights of the Union was compatible with Article 1 to 3 of the Constitution.²⁰¹ On this basis, thanks to a major interpretative leap related the content of the norms at stake in the case in question, the French constitutional court concluded that the freedom of religion as defined by the Charter was compatible with the secular nature of the state which is included in Article 1 of the French Constitution.²⁰² Similarly, the recognition of the

¹⁹⁷ See for example, CC, decision n° 2006-543 DC of 30 November 2006 on the *Act pertaining to the energy sector*, *Rec.* 120 or CC, decision n° 2008-564 of 19 June 2008 on the *Act pertaining to genetically modified organisms*, *Rec.* 313.

¹⁹⁸ See *supra* at 219-229.

¹⁹⁹ In this sense, see M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, *op. cit.*, at fn. 173 above, at 335.

²⁰⁰ On this distortion of the Constitutional Treaty provision, see for example, A. Levade, “Le Conseil constitutionnel aux prises avec la Constitution européenne”, *op. cit.*, at fn. 85 above, at 36, V. Champeil-Desplats, “Commentaire de la décision du Conseil constitutionnel n° 2004-505 DC du 19 novembre 2004 relative au Traité établissant une Constitution pour l’Europe”, *op. cit.*, at fn. 98 above, at 570-571 or O. Gohin, “Conseil constitutionnel et Constitution européenne : les trois contradictions”, *op. cit.*, at fn. 98 above, at 1709. See also *infra* at 308-309.

²⁰¹ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 16.

²⁰² *Ibid.* at para. 18.

existence of collective rights by European Union law²⁰³ could contravene the indivisibility of the Republic protected by Article 1 of the Constitution.²⁰⁴ On the basis of the same reasoning it used as regards the secular nature of the state, the *Conseil constitutionnel* held that the Constitutional Treaty and this constitutional principle were compatible.²⁰⁵ Its efforts to reconcile the constitutional and European discourses can be regarded as being intended to allow European integration while avoiding constitutional amendments which, due to the sensitive nature of the constitutional provisions concerned, might be considered as being doomed.²⁰⁶ Indeed, the interpretative endeavours of the *Conseil constitutionnel* are particularly noticeable on issues which could be regarded as forming of the constitutional identity of France.²⁰⁷ As in the Irish case-law,²⁰⁸ the decision of the *Conseil constitutionnel* can be considered as stressing constitutional provisions which could potentially justify an opposition to the doctrine of primacy while postponing their actual enforcement, pending applications of these provisions of primary law by European organs and their possible disruption of the French legal order. Thus, if something essential is to be found in the case-law of the *Conseil constitutionnel*, it is its willingness to reconcile European law and the Constitution rather than its interest in determining constitutional provisions which constitute fixed boundaries to the doctrine of primacy due to their preeminent status in the French constitutional order.

In conclusion, when the relationship of European law and its primacy with the notion of constitutional identity is considered, the latter notion has remarkably little actual influence. Due to the material perspective the French constitutional court adopts, the two sets of norms are construed as compatible. In consequence, the normative conflict being avoided, the question of constitutional identity is never actually raised. In this sense, the material perspective adopted by

²⁰³ This could be inferred from the Preamble of the Charter of Fundamental Rights of the Union where it is affirmed that “the Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe” and Article II-82 dedicated to “cultural, religious and linguistic diversity”.

²⁰⁴ On this point, see M.-P. Granger, “France is ‘Already’ Back in Europe: The Europeanization of French Courts and the Influence of France in the EU”, *op. cit.*, at fn. 169 above, at 356 or A. Levade, “Le Conseil constitutionnel aux prises avec la Constitution européenne”, *op. cit.*, at fn. 85 above, at 40-42.

²⁰⁵ See CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 16.

²⁰⁶ On the sensitive nature of these issues justifying that the *Conseil constitutionnel* tried to reconcile the Treaty provisions with the Constitution, see M.-C. Ponthoreau, “Constitution européenne et identités constitutionnelles nationales”, Contribution to the 7th World Congress of the International Association of International Law, Athens 11-15 June 2007, available at <<http://www.enelsyn.gr/papers/w4/Paper%20by%20Prof.%20Marie-Claire%20Ponthoreau.pdf>> at 8 [Last accessed 29 December 2012]. See also, J. Roux, “Le traité établissant une Constitution pour l’Europe à l’épreuve de la Constitution française”, *op. cit.*, at fn. 98 above, in particular at 66-68.

²⁰⁷ In this sense, see B. Mathieu, “Les rapports normatifs entre le droit communautaire et le droit national. Bilan et incertitudes relatifs aux évolutions récentes des juges constitutionnel et administratif français”, *op. cit.*, at fn. 102 above, at 690-692.

²⁰⁸ See *infra* at 262-269.

the *Conseil constitutionnel* postpones the identity issue.²⁰⁹ In contrast to an analysis in essentialist terms, the notion of constitutional identity does not correspond to a pre-defined content. Its genealogy in the case-law of the *Conseil constitutionnel* shows that it does not have an autonomous existence but it emerges from the constitutional reaction to what is now European Union law. While the *Conseil constitutionnel* has taken the view that European obligations “cannot run counter to a rule or principle inherent in the constitutional identity of France”, its decisions show that it is more concerned with the issue of incompatibility than the question of identity. It is when an irreducible contradiction between European law and the Constitution arises that the *Conseil constitutionnel* will have recourse to the notion of constitutional identity to ensure the supremacy of the domestic norm. In other words, the notion of constitutional identity is a legal pedigree which will be granted to constitutional provision as a result of a relation to what is now European Union law and in reaction to its primacy. The primacy principle would not face a limit because of a “rule or principle inherent in the constitutional identity of France”. It is because a constitutional provision could outweigh Article 88-1 - and the recognition of the primacy principle it contains - that it would be categorised as being inherent in the constitutional identity of France. If this is not the case, the primacy of European Union rules would only be the confirmation of the European identity of France agreed to in Article 88-1 of the Constitution. The notion of constitutional identity is thus above all defined by its instrumental dimension as the possibility for the *Conseil constitutionnel* to see certain constitutional provisions prevail over European rules.²¹⁰ This instrumental dimension shows that this notion does not so much correspond to a concept of positive law but rather describes a specific form of discourse on the Constitution. It is best understood as a guideline to the interpretative process of the *Conseil constitutionnel* regarding the balancing of constitutional provisions dedicated to European law and others of a purely domestic nature.

Two factors are consistent with this conclusion. First, this is confirmed by the external origin of this notion. It must be noted that the notion of constitutional identity was absent until

²⁰⁹ For a different opinion presenting the determination of constitutional identity as the first step of the control effected by the *Conseil constitutionnel*, see for example M.-L. Paris, “Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law” (2010) 29 *Yearbook of European Law* 21-64 at 60.

²¹⁰ See M. Troper, “Identité constitutionnelle” in B. Mathieu (ed.), *Cinquantième anniversaire de la Constitution française : 1958-2008* (Paris: Dalloz, 2008) at 128 or C. Charpy, “The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil constitutionnel* and the *Conseil d'État*”, *op. cit.*, at fn. 166 above, at 445-446. In the same way, even though he defends an analogy between the notions of constitutional identity and supra-constitutionality, Dubout acknowledges that, due to the vagueness of the former concept, the content of which can only be determined *a posteriori*, it is a instrumental dimension that prevails in the notion of constitutional identity, see É. Dubout, “« Les règles ou principes inhérents à l'identité constitutionnelle de la France » : une supra-constitutionnalité ?”, *op. cit.*, at fn. 180 above, at 454-455.

recently from French constitutional discourse.²¹¹ It is not an indigenous concept but that it constitutes the reflection in the case-law of the *Conseil constitutionnel* of the respect for national identities proclaimed in European Union law. This principle, which was contained in Article I-5 of the Constitutional Treaty,²¹² is now included in Article 4.2 of the current Treaty on European Union.²¹³ It could be argued that the reference to the notion of identity in its *Treaty establishing of Constitution for Europe* decision in order to conclude to the compatibility of the doctrine of primacy with the Constitution led the *Conseil constitutionnel* to import this notion in French positive law as the new formulation of the limit to the doctrine of primacy. Even if the constitutional discourse acts as a distorting mirror as regards the primacy principle, the willingness to address the question of the relationship between the two legal orders in the language of European Union law itself bears witness to the conciliatory attitude of the French constitutional court. It also confirms that the notion of constitutional identity has a certain autonomy from French positive law.²¹⁴

Secondly, defined in terms of “an express conflicting provision of the Constitution”, the limit to the doctrine of primacy was not without difficulties. Aside from the fact that Article 88-1, the constitutional foundation of the respect for European obligations in the French legal system, is an “express provision of the Constitution” as well, this test could be interpreted as providing a distinction between textual constitutional rules and jurisprudential constructions.²¹⁵ However, this very position is hardly tenable. As defined by Kelsen, a norm is the “objective signification of an act of will”.²¹⁶ Therefore, the legal norms can never be equated with the legal texts. They are, in contrast, the result of the interpretation by an authentic interpreter of this legal texts. It is the exercise of an act of will consisting of choosing a meaning, *viz.*, a norm,

²¹¹ In this sense, see M. Troper, “Identité constitutionnelle”, *op. cit.*, at fn. 210 above, at 123 where the author notes that this notion is absent from constitutional norms both present and past and only appeared lately in academic literature and case-law.

²¹² See CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 12.

²¹³ This reference that was explicit in the *Treaty establishing a Constitution for Europe* decision is also implicit in the decisions of 2006 as it is pointed out by Charpy or Schoettl, see C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information”, *op. cit.*, at fn. 185 above, at 109 or J.-É. Schoettl, “La propriété intellectuelle est-elle constitutionnellement soluble dans l’univers numérique ? (suite et fin)” (2006) n° 162-163 *Les petites affiches* 3-15 at 10.

²¹⁴ For a similar argument, see C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information”, *op. cit.*, at fn. 185 above, at 109-110.

²¹⁵ This point has been widely discussed in academic literature, see for example M.-P. Granger, “France is ‘Already’ Back in Europe: The Europeanization of French Courts and the Influence of France in the EU”, *op. cit.*, at fn. 169 above, at 354, J.-P. Kovar, “Commentaire des décisions du Conseil constitutionnel du 10 juin et du 1^{er} juillet 2004 : rapport entre le droit communautaire et le droit national” (2004) 40 *Revue trimestrielle de droit européen* 587-597 at 595 or J.-É. Schoettl, “Le nouveau régime juridique de la communication en ligne devant le Conseil constitutionnel” (2004) n° 122 *Les petites affiches* 10-21 at 18 fn. 37.

²¹⁶ H. Kelsen, *Théorie pure du droit*, *op. cit.*, at fn. 2 above, at 16 (translation by the author).

among the different potentialities included in the textual basis.²¹⁷ In consequence, defining the limit to the primacy principle on the basis of a distinction between textual constitutional provisions, on the one hand, and the interpretative activity of the *Conseil constitutionnel*, on the other, can hardly be meaningful.²¹⁸

In contrast, from the perspective of the constitutional identity of France, any element belonging to the *bloc de constitutionnalité* can potentially constitute a limit to the doctrine of primacy, *i.e.*, not only constitutional provisions but also legal constructions resting on the case-law of the *Conseil constitutionnel*.²¹⁹ For some, this new case-law represented an extension of the protection of the French constitutional order in the face of the doctrine of primacy.²²⁰ However, it could also be argued that the reintroduction of jurisprudential constructions rather indicates the central role of judicial interpretation in this process, even though the exact limit to the primacy principle is more elusive due to the vaguer nature of the latter criterion.²²¹ In consequence, it is the prevalence of the interpretative process over a concern for what has been drafted *ab initio* in the text of the Constitution that is emphasised by the shift from an “express conflicting provision of the Constitution” to “a rule or principle inherent in the constitutional identity of France”. One could, on this point, draw an analogy between the constitutional identity of France and the fundamental principles acknowledged in the laws of the Republic. The latter principles belong to the *bloc de constitutionnalité* due to their inclusion in the Preamble of the Fourth Republic, which is itself included in the Preamble of the current Constitution. If the category exists as a constitutional one, its content however highly depends on the interpretative activity of the *Conseil constitutionnel*, at least to determine what principles

²¹⁷ *Ibid.* at 339-341.

²¹⁸ In this sense, see J. Roux, “Le Conseil constitutionnel, le droit communautaire dérivé et la Constitution”, *op. cit.*, at fn. 149 above, at 928-929.

²¹⁹ For the norms included in the *bloc de constitutionnalité*, see *supra* at 111-112 and *infra* at 294-295.

²²⁰ See for example C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information”, *op. cit.*, at fn. 185 above, at 115 where the author speaks of a more sovereignist case-law of the *Conseil constitutionnel*. For a similar opinion stressing the fact that the limit put on the principle deduced from Article 88-1 of the Constitution has been widened, see F. Chaltiel, “Nouvelle précision sur les rapports entre le droit constitutionnel et droit communautaire : La décision du Conseil constitutionnel du 27 juillet 2006 sur la loi relative aux droits d’auteurs”, *op. cit.*, at fn. 186 above, at 844 or D. Simon, “L’obscurité clarté de la jurisprudence du Conseil constitutionnel relative à la transposition des directives communautaires” (2006) n° 10 *Europe* 2-3 at 2. It is true that the reference to the jurisprudential constructions seems, at first sight, to display a larger range of principles being able to oppose the primacy of European Union law. However, as Mazeaud pointed out (P. Mazeaud, “Vœux du Président du Conseil constitutionnel, M. Pierre Mazeaud, au Président de la République”, *op. cit.*, at fn. 138 above), if this development is understood in its context, notably, where it is the protection of what is crucial rather than specific to France, one can conclude that this limit is actually narrower.

²²¹ On the increase of the interpretative leeway with this new test, see for example C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information”, *op. cit.*, at fn. 185 above, at 111 or E. Glaser, “Réflexions sur la décision *Arcelor*” in *Le dialogue des juges : Mélanges en l’honneur de Bruno Genevois* (Paris: Dalloz, 2009) 473-493 at 478.

are fundamental and which ones are not.²²² In the same way, if the notion of constitutional identity creates the principle of a limit put on the doctrine of primacy, its content depends on the result of the interpretative activity of the *Conseil constitutionnel*.

Moreover, the authentic interpreter not only determines the content of a norm, it also decides on its status, for example whether the provision is normative or merely declaratory.²²³ In this regard, if the notion of constitutional identity refers to constitutional norms enjoying a particular status, it seems justified to favour the analysis of the activity of the authentic interpreters of the Constitution, and notably the courts, in order to circumscribe this notion rather than attempting through non-authentic interpretation based on the text of the Constitution alone to determine which constitutional provisions should be relevant to the identity issue.²²⁴ In particular, as has been seen regarding for example the secular nature of the state,²²⁵ constitutional provisions which could intuitively be regarded as identity features were avoided by the *Conseil constitutionnel* in its case-law related to the doctrine of primacy.

The genealogy of the notion of constitutional identity not only reveals its existence as an interpretative process. The comparison which it involves with an “express conflicting provision of the Constitution” also shows the distinctive features of this form of discourse used by the *Conseil constitutionnel* on the relationship between the European Union law and the Constitution. The affirmation of the necessary protection of French constitutional identity is paradoxically the sign of recognition of the growing influence of the European Union law on the domestic legal order. The notion of “express conflicting provision of the Constitution”,²²⁶ by considering the textual reference as the decisive factor, tends to favour a formal perspective. In consequence, it emphasises the hierarchical submission of European Union law to the Constitution as the expression of the sovereign in the French legal order as it would involve that any European-influenced rule would have to yield to any constitutional provision, which could be regarded as an outright denial of the primacy principle. The precision given by the *Conseil*

²²² On this question, see for example D. Rousseau, *Droit du contentieux constitutionnel*, *op. cit.*, at fn. 93 above, at 105-109.

²²³ On this point, see M. Troper, *La théorie du droit, le droit, l'État*, *op. cit.*, at fn. 175 above, at 75-77 or O. Cayla, “Lire l'article 55 : Comment comprendre le texte établissant une hiérarchie des normes comme étant lui-même le texte d'une norme ?” (1999) n° 7 *Cahiers du Conseil constitutionnel*, available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-7/lire-l-article-55-comment-comprendre-un-texte-etablissant-une-hierarchie-des-normes-comme-etant-lui-meme-le-texte-d-une-norme.52745.html>> at 2-3 [Last accessed 29 December 2012].

²²⁴ A non-authentic interpretation, as the scientific interpretation carried out by academic literature, corresponds to an act of cognition whereby the different meaning of a provisions are determined, see H. Kelsen, *Théorie pure du droit*, *op. cit.*, at fn. 2 above, at 341-342.

²²⁵ See *supra* at 240 and *infra* at 309.

²²⁶ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7.

constitutionnel after this test was first introduced restricted this limit to elements specific to the constitutional order.²²⁷ As a result it can be inferred that the *Conseil constitutionnel* recognised the willingness of the sovereign to participate in the process of European integration. If the limit to the primacy principle and the control of the constitutional court are justified and grounded in the supremacy of the Constitution as the expression of the French sovereign, then it is not this full superiority that is the object of control. The constitutional provisions which are potentially opposable to the primacy principle are limited. The specificity of the constitutional provisions susceptible to oppose the doctrine of primacy enhances the likelihood of a conciliatory attitude of the constitutional court towards European Union law based on a material relationship put on the normative relationship between the European and domestic legal orders. The notion of constitutional strengthens this logic and extends this material perspective to the different provisions of the *bloc de constitutionnalité* itself. In other words, the notion of constitutional identity consists above all of the same willingness to hide and minimise the question of formal supremacy from the relationship between constitutional and European orders.

The notion of constitutional identity does not merely involve an opposition between constitutional provisions and European Union law along the line of a division between the specific and the common.²²⁸ Confirming that the notion of constitutional identity is best understood in its relation to the primacy of European Union law rather than as a notion primarily concerning the architecture of the Constitution, Mazeaud, President of the *Conseil constitutionnel* (as he was then), echoing the shift from one test to another of the court he presided over, expressed the view that:

“European law, as far-reaching as its primacy and immediacy are, cannot challenge what is expressly written down in our constitutional texts and which is peculiar to us. I want to talk here of all that is inherent in our constitutional identity, in the double meaning of the term; crucial and distinctive. In other words: the essence of the Republic.”²²⁹

²²⁷ CC, decision n° 2004-498 DC on the *Act pertaining to bioethics* of 29 July 2004, *Rec.* 122 at para. 6.

²²⁸ As it was the case for the specific and express provisions of the Constitution, see CC, decision n° 2004-498 DC on the *Act pertaining to bioethics* of 29 July 2004, *Rec.* 122 and J.-É. Schoettl, “La brevetabilité des gènes, le droit communautaire et la Constitution”, *op. cit.*, at fn. 136 above, at 10.

²²⁹ P. Mazeaud, “Vœux du Président du Conseil constitutionnel, M. Pierre Mazeaud, au Président de la République”, *op. cit.*, at fn. 138 above.

It is only when a constitutional provision is regarded as materially crucial that the formal supremacy of the Constitution will come into play against the derogating regime Article 88-1 reserves to European Union law.²³⁰

However, “the essence of the Republic” is not immutable. The principle according to which a “rule or principle inherent in the constitutional identity of France” can act as a limit to the doctrine of primacy has itself its own limit. The *Conseil constitutionnel* made clear when it introduced the notion of constitutional identity in its case-law that it would stand “except when the constituent power consents thereto”.²³¹ As regards the parallel between the notion of constitutional identity and the theory of supra-constitutionality, it is in fact precisely this connotation that the constitutional court prevented when it changed its former test consisting of an “express conflicting provision of the Constitution”. As Troper puts it:

“the invocation of the constitutional identity of France is not therefore and could not be the affirmation of a supra-constitutionality.”²³²

By making an explicit reference to the possibility of the constituent power amending these rules or principles, it affirmed that the sovereign, even understood as an abstraction as it is in the French legal order,²³³ was able to choose its identity rather than being subjected to a definition of its nature by legal rules which were out of its reach.²³⁴ In other words, the notion of constitutional identity does not answer to an essentialist logic corresponding to the determination of immutable values. In contrast, it rather corresponds to the possible for the French sovereign to continuously define itself.

This seems to characterise the new position of the *Conseil constitutionnel* towards the doctrine of primacy which is encapsulated in the notion of constitutional identity. Even though, national sovereignty justifies the supremacy of the Constitution over European law, the recourse

²³⁰ See for example, J.-P. Kovar, “Vers un statut du droit d’exécution du droit communautaire dans la jurisprudence du Conseil constitutionnel (Cons. const., déc. n° 2006-543 DC, 30 nov. 2006, loi relative au secteur de l’énergie)” (2007) n° 2 *Europe* 4-6 at 5.

²³¹ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19.

²³² M. Troper, “Identité constitutionnelle”, *op. cit.*, at fn. 210 above, at 129. In the same sense, see J. Rossetto, “L’Union européenne face à l’identité constitutionnelle de la France” in M. Ameller, P. Avril, J.-P. Camby and *al.* (eds.), *Constitutions et pouvoirs : Mélanges en l’honneur de Jean Gicquel* (Paris: Montchrestien, 2008) 447-464 at 450.

²³³ On this nature of the French sovereign, see *supra* at 167-177.

²³⁴ Contrary to the opinion expressed by Troper (M. Troper, “Identité constitutionnelle”, *op. cit.*, at fn. 210 above, at 125 and 130), the constitutional identity of France cannot be understood as dealing with the Constitution itself but with the Constitution as the expression of the French sovereign. For that matter, the case-law of the *Conseil constitutionnel* points towards the constitutional identity of France rather than the identity of the French Constitution.

to the notion of constitutional identity differs from the direct opposition of this national sovereignty to the process of European integration. In this sense, the notion of constitutional identity answers to a different logic to that of the protection of the “fundamental conditions of the exercising of national sovereignty” which constitutes the basis of the control exercised by the *Conseil constitutionnel* under Article 54 of the Constitution and justifies constitutional amendments prior to ratification.²³⁵ This test stresses that the European legal order is deprived of a sovereignty on its own, a sovereignty susceptible to justify the primacy of its norms. Rather, on the basis of Article 88-1, the *Conseil constitutionnel* recognises that “the constituent power thus formally acknowledged the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order”.²³⁶ The enforcement of European law, and its primacy, in the French legal order is thus the enforcement of the will of the French sovereign.²³⁷ In other words, “the essence of the Republic” is also European, partly at least. The balancing between the consequences of Article 88-1 and other constitutional provisions consists of a balancing between two sovereign commitments. It can thus be said that if constitutional identity is what is “crucial and distinctive” in the French constitutional order, this has to be understood as something more crucial than the constitutional commitment to the process of European integration.

In consequence, one can doubt that the notion of constitutional identity introduces a hierarchy within the *bloc de constitutionnalité*.²³⁸ In contrast, it perpetuates the traditional interpretative activity of the *Conseil constitutionnel* consisting of balancing constitutional provisions of equal value since they find their validity in the same legal source.²³⁹ Nonetheless, this European dimension involves differences in comparison with the balancing of provisions of a purely domestic nature. As the *Conseil constitutionnel* made clear in the decisions where it introduced the notion of “rule or principle inherent in the constitutional identity of France”, the European dimension introduced specific obligations with regard to constitutional review.²⁴⁰ It is

²³⁵ It can be argued that the development of the new case-law of the *Conseil constitutionnel* corresponds to the necessity to define the relationship between the European and domestic legal orders under a new paradigm where the control of the application of European Union law rather than its drafting is the main focus. For further considerations on this point, see *infra* at 338-340.

²³⁶ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 11.

²³⁷ In this sense, see F. Chatiel, “Nouvelle précision sur les rapports entre le droit constitutionnel et droit communautaire : La décision du Conseil constitutionnel du 27 juillet 2006 sur la loi relative aux droits d’auteurs”, *op. cit.*, at fn. 186 above, at 840-841.

²³⁸ For a similar argument, see C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information”, *op. cit.*, at fn. 185 above, at 114.

²³⁹ See B. Genevois, “Normes de références du contrôle de constitutionnalité et respect de la hiérarchie en leur sein” in *L’État de droit : Mélanges en l’honneur de Guy Braibant* (Paris: Dalloz, 1996) 323-340 at 336.

²⁴⁰ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 16-31.

thus only normal that the balancing of the different constitutional provisions cannot be effected under the principles governing purely domestic aspects. The notion of constitutional identity reflects these specific modalities of interpretation when European law is involved. If some constitutional provisions can have a particular value due to their relationship to European obligations, this is disconnected from hierarchical considerations.²⁴¹ In consequence, it is possible to conclude that the constitutional identity of France is not so much a notion which strictly speaking belongs to French positive law. In contrast, it is better read as an insight given by the *Conseil constitutionnel* into the guidelines of its interpretative activity in balancing Article 88-1 of the Constitution (dedicated to the European participation of France) with other constitutional requirements. The constitutional identity of France is rather an interpretative rule, a discourse about the Constitution or, if one wants to say, a meta-norm.

To conclude, the notion of “constitutional identity of France” can only be understood as a response to the European dimension introduced in the domestic legal order by Article 88-1 of the Constitution. It is thus above all the affirmation of the prevalence of the French sovereign, even though this sovereignty concerns as much the willingness to participate in the process of European integration as provisions of a purely constitutional nature. In other words, having recourse to the notion of constitutional identity softens the opposition between the supremacy of the Constitution and the primacy of European Union law. In particular, the idea that a constitutional norm forms part of the constitutional identity of France as a limit to the doctrine of primacy is the consequence rather than the prerequisite of the relationship between the European and domestic legal orders. In this regard, the constitutional identity of France mirrors not so much a new concept of positive law dealing with a differentiated architecture in the *bloc de constitutionnalité* as the expression of a specific and conciliatory interpretative attitude towards European law. With a balance having to be defined between respect for European obligations and the protection of the other aspects of the Constitution, the notion of

²⁴¹ In this sense, see M. Troper, “Identité constitutionnelle”, *op. cit.*, at fn. 210 above, at 127 where the author, in relation to the notion of constitutional identity, notes that “a difference of value between norms does not involve that they are in a hierarchical relationship” (translation by the author) In this regard, the introduction in the French legal system of an *a posteriori* control of constitutionality through the mechanism of the priority preliminary ruling on the issue of constitutionality (see *infra* at 355-362) involved a material division in the *bloc de constitutionnalité*, distinguishing provisions concerning rights and freedoms, without entailing a debate on the creation, in consequence of this distinction, of a constitutional hierarchy.

constitutional identity of France is the scales on which the competing considerations are weighed.²⁴²

²⁴² For a similar opinion, see C. Charpy, “Note sous CC, décision n° 2006-540 DC du 27 juillet 2006, Loi relative au droit d’auteur et aux droits voisins dans la société de l’information”, *op. cit.*, at fn. 185 above, at 119 or A. Levade, “Le Palais-Royal aux prises avec la constitutionnalité des actes de transposition des directives communautaires : À propos de la décision du Conseil constitutionnel n° 2006-543 du 30 novembre 2006, *Loi relative au secteur de l’énergie* et de l’arrêt du Conseil d’Etat, Assemblée, du 8 février 2007, *Société Arcelor Atlantique et Lorraine et autres*”, *op. cit.*, at fn. 164 above, at 569 where the author affirms that the reasoning of the *Conseil constitutionnel* “does not appear particularly original”.

2. *The Determination of Irish Constitutional Identity as the Result of an Interpretative Opposition to the Doctrine of Primacy*

A comparison between Ireland and France as regards the common protection of their constitutional identity in the face of the primacy of European Union law could be regarded as vain if the notion of constitutional identity existed strictly as a concept of French positive law. This would entail a reading of Irish law through a French legal category which would be of little relevance. However, the notion of constitutional identity as it is used in France, and in particular in the case-law of the *Conseil constitutionnel*, seems to refer to an interpretative principle, a specific discourse about the Constitution, when the European dimension is at play in the domestic legal system rather than a legal object endowed with a positive existence. This autonomy of the notion of constitutional identity from French positive law strictly so-called is reinforced when one considers that the very notion of legal identity is not grounded in the domestic legal order but rather consists of a borrowing from the European constitutional discourse.²⁴³ It is this external origin, which Ireland and France have in common, as well as the instrumental and interpretative nature of the concept as it has been used by the *Conseil constitutionnel* that establishes the meaningfulness of an analysis of the Irish legal system from the same perspective.

As defined in this thesis, the notion of constitutional identity corresponds to a specific method of regulating the conflicts between the doctrine of primacy of European law and the supremacy of the Constitution. Even though, due to their specificities, the notion of constitutional identity has a different texture in Ireland and France, it seems justifiable to say that Irish and French courts share a similar way of balancing two sovereign expressions, *i.e.*, constitutional provisions dedicated to the primacy European law and others of a purely domestic nature. In other words they have in common the same meta-discourse about their respective Constitution, a meta-discourse which is determinative of the notion of constitutional identity.

It is certain that this notion is not as explicit in the Irish legal system as in the French one, and the domestic case-law does not display a formal use of this concept. Nonetheless, it would be misleading to affirm that, in consequence, the notion of constitutional identity is absent from the Irish legal world. First, references to this notion are numerous in the Irish academic literature. It even raised a particular attention in the European context and authors

²⁴³ See *supra* at 242-243.

such as Reid, Laffan, O'Mahony and Whelan²⁴⁴ questioned the protection of an Irish identity while participating in the integrated legal order, a defence of its "*national ethos*".²⁴⁵

Secondly and more importantly, one can argue that the question of Irish identity and any risk thereto resulting from participation in the European framework is not confined to academic debates. Almost since Ireland decided to bind its future to the process of European integration, the judiciary has had a similar concern. Indeed, many judges have expressed this question in an extra-judicial context, Henchy J. being, perhaps, the judge who expressed such concerns most explicitly when he warned, considering the consequences of membership, that:

"Art. 1 proceeds to show that the Constitution as then enacted, was cast in an indigenous mould: (...). This is an unqualified assertion of national sovereignty and, with it, the right to national identity in terms of political, economic and cultural life. The Constitution was not intended to be something divorced from national characteristics.

(...)

The right of the Irish people to control the institutions of government and to develop the life of the nation along the lines of 'its own genius and traditions', which was declared by the Constitution to be inalienable, has now in fact been alienated, at least in part."²⁴⁶

Lastly, the protection of specific concerns of the Irish people had punctuated Irish membership to what is now the European Union. For example, after the rejection *via* referendum of 12 June 2008 of an amendment to the Constitution needed in order to ratify the Treaty of Lisbon and before the second referendum that permitted another step towards

²⁴⁴ See M. Reid, *The Impact of Community Law on the Irish Constitution* (Dublin: Irish Centre for European Law, 1990) at 63-79, B. Laffan, "Sovereignty and national identity" in P. Keatinge (ed.), *Ireland and EC Membership Evaluated* (London: Pinter Publishers, 1991) at 187-189, B. Laffan and J. O'Mahony, *Ireland and the European Union* (Basingstoke: Palgrave Macmillan, 2008) at 12, 127 and 243 for instance or A. Whelan, "National Sovereignty in the European Union" in T. Murphy and P. Twomey (eds.), *Ireland's Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998) 277-292 at 290.

²⁴⁵ M. Reid, *The Impact of Community Law on the Irish Constitution*, *op. cit.*, at fn. 244 above, at 4.

²⁴⁶ S. Henchy, "The Irish Constitution and the E.E.C." (1977) 1 *Dublin University Law Journal* 20-25 at 20 and 25. In the same sense, see T. F. O'Higgins, "The Constitution and the Communities - Scope for Stress?" in J. O'Reilly (ed.), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Dublin: Round Hall Press, 1992) 227-241 at 238 where that author affirms, in connection to the European Convention on Human Rights, that "the Irish system of constitutional rights is, particularly in the area of sexual morality, vulnerable in precisely this way; its strict dualism, natural law orientation and distinctive social policy do not necessarily represent a 'lower level of protection' but they do represent an entirely different ethos".

European integration on 2 October 2009, Ireland secured a Declaration from the Council of the European Union on 10 July 2009 according to which:

“the European Council also agreed that other concerns of the Irish people, as presented by the Taoiseach, relating to taxation policy, the right to life, education and the family, and Ireland's traditional policy of military neutrality, would be addressed to the mutual satisfaction of Ireland and the other Member States, by way of the necessary legal guarantees.”²⁴⁷

This declaration bears witness to the Irish strategy in the European Union that consists of immunising in reverse ²⁴⁸ areas of special Irish interests by means of Protocols. Protocol (No 17) attached to the Treaty of Maastricht initiated this trend by protecting the right to life of the unborn defined in Article 40.3.3° of the Constitution from European interferences. The same immunity is now provided for, since coming into force of the Treaty of Lisbon, by Protocol (No 35).

At first sight, the definition of Irish identity would merely be equated with a material division of competences between the state and European institutions. Its protection would therefore consist of the affirmation of the fact that Ireland holds *Kompetenz-Kompetenz*. In consequence, one could argue that the notion of Irish legal identity would be deprived of a specific relevance when compared to the notion of sovereignty, the only relevant question being the *ab initio* formal delimitation of domestic and European spheres of normative creation according to a pre-established definition of constitutional provisions of special value for Ireland, and the subsequent respect for this distribution. However, Irish courts never fully imitated the *Kompetenz-Kompetenz* paradigm developed by the German Federal Constitutional Court. Even if this point requires an in-depth analysis,²⁴⁹ suffice it to say for present purposes that it rests on the conception of the member states as the “Masters of the Treaties”,²⁵⁰ any further

²⁴⁷ Presidency Conclusions of the Brussels European Council of 18-19 June 2009, 11225/8/09 Rev. 2 at 2. See also in Annex 1 to these, the Decision of the Heads of State or Government of the 27 Member States of the European Union, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon for a more detailed presentation, *ibid.* at 17-19 and in Annex 3 the unilateral declaration by Ireland about neutrality, *ibid.* at 22-23.

²⁴⁸ On this idea, see G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 11 above, at 143-162.

²⁴⁹ For the difference between the reasoning developed by the German Federal Constitutional Court and the Irish case-law, see *infra* at 454-460.

²⁵⁰ *Brunner and others v. The European Union Treaty (Maastricht decision)*, BVerfG, decision of 12 October 1993, 2 BvR 2134/92 & 2159/92, [1994] 1 C.M.L.R. 57 at 91.

development of the process of European integration requiring the renewed approval of the sovereigns of each member state. In consequence, they hold the competence to determine the competences enjoyed by European institutions and domestic courts are competent to sanction European rules which are *ultra vires*.²⁵¹ The interpretation made by the Supreme Court on the licence to join the process of European integration granted by what is now Article 29.4.5° of the Constitution hardly corresponds to this logic.²⁵² In *Crotty v. An Taoiseach*,²⁵³ it was decided that the Irish people joined “developing organism”.²⁵⁴ In consequence, the developments of new competences in the Single European Act had already been agreed to as they fell within “the essential scope or objectives of the Communities [as they were then]”.²⁵⁵ Another expression of the Irish people was not necessary in order to ensure the primacy of European Union law in the field of these new competences.

This teleological interpretation of what is now Article 29.4.5° of the Constitution is therefore the opposite of the literal logic that prevails in the protection of constitutional specificities through the careful drafting of the European Treaties and Protocols since, as it has been seen,²⁵⁶ subsequent developments of European law can qualify the initial approval of the Irish people. One can thus affirm that the perspective of the Irish courts on the balance between the primacy of European Union law and the protection of certain constitutional features answers to a different logic, a logic which is similar to that used by the *Conseil constitutionnel* through the notion of constitutional identity. The flexibility of these dynamics and the material perspective characteristic of Irish courts in comparison with the formal standards used by the *Conseil constitutionnel*, as well as factors depending on the legal culture of each countries, explains why, while the identity issue is merely hinted at by the French constitutional court in relation to the ratification of new European Treaties,²⁵⁷ it can be argued that it is actually raised by Irish courts. Indeed, it is possible to identify a similar form of reasoning in the Irish case-law as regards the anticipated primacy of European rules whereby certain provisions receive a particular weight during the interpretative process when confronting obligations resulting from the ongoing development of European Union law. It is in this context that one can affirm that Irish courts, as in the French context, while acknowledging the

²⁵¹ *Ibid.* at 89.

²⁵² On this relative concern of the Irish courts for the issue of *Kompetenz-Kompetenz*, see for example E. Fahey, *EU Law in Ireland*, *op. cit.*, at fn. 60 above, at 47.

²⁵³ [1987] I.R. 713.

²⁵⁴ *Ibid.* at 770.

²⁵⁵ *Ibid.* at 767 and 770.

²⁵⁶ See *supra* at 203-206.

²⁵⁷ See *supra* at 240-242.

sovereign willingness of the Irish people to take part in the process of European integration, are aware of the necessary protection of the Irish domestic identity in this common framework. To put it in the words of the Constitution itself, they ensure that the European identity of Ireland since 1973 has still been compatible with the expression of “its own genius”.²⁵⁸

The dynamics at play are noticeable in the *Crotty* decision itself, in particular where the two parts of the judgment are compared. The second part concerned the possibility of the state ratifying Title III of the Single European Act which provided for European Political Co-operation. As has been seen, it was decided by a 3-2 majority that this was not possible without amending the Constitution.²⁵⁹ However, even though they appear to tackle two different issues since Title III did not formally concern the European Communities as they were then, the two parts of the decision can be commonly read as presenting a unity of logic.²⁶⁰ In this sense, even though the second part of the judgment is expressed in terms of constitutionalism, one can argue that it can be seen under the prism of the “essential scope or objectives” test.²⁶¹ This is particularly noticeable in the opinion of Walsh J. when he declared that:

“the freedom to formulate foreign policy is just as much a mark of sovereignty as the freedom to form economic policy and the freedom to legislate. The latter two have now been curtailed by the consent of the people to the amendment of the Constitution which is contained in Article 29, s. 4, sub-s. 3 of the Constitution. If it is now desired to qualify, curtail or inhibit the existing sovereign power to formulate and to pursue such foreign policies as from time to time to the Government may seem proper, it is not within the power of the Government itself to do so.”²⁶²

Drawing a parallel between the licence to join what were then the European Communities and the licence for the Government to ratify Title III, both parts of the decision can be read as a matter of what extension of European integration would require a new

²⁵⁸ Article 1 of the Constitution of Ireland, referred to by Barrington J. in the High Court and Henchy J. in the Supreme Court in *Crotty v. An Taoiseach* [1987] I.R. 713 respectively at 726 and 787.

²⁵⁹ See *supra* at 196-198.

²⁶⁰ The implication of Title III for the birth of a political union was assessed both by Finlay CJ and Henchy J., [1987] I.R. 713 respectively at 771 and 786.

²⁶¹ In this sense, see G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence” (2009) 5 *European Constitutional Law Review* 32-70 at 42 where the author also argues that the two parts of the judgement, rather than tackling separate issues, can be analysed as offering two visions of the entity Ireland joined in 1973. This difference of interpretation of the same issue, *viz.*, the extent of the openness of the Irish legal system to the process of European integration, justifies that some constitutional norms when confronted to European law are regarded as deserving better protection. It is in this sense that one can talk of a preservation of the legal identity of Ireland.

²⁶² [1987] I.R. 713 at 783.

constitutional amendment.²⁶³ In consequence, and considering the teleological interpretation of the licence to join what is now the European Union adopted in the first part of the decision, the issue is not a conflict between the developments of the process of European integration and the necessary prior approval of the Irish sovereign. If this issue of sovereignty is not absent from the decision, it is rather as a balance between two sovereign expressions, one in favour on European membership contained in what is now Article 29.4.5° and other constitutional principles of a domestic nature. As Henchy J. saw it, the validity of the ratification of the Single European Act had to be tested against Article 1 of the Constitution which provides for the right of the Irish nation to determine itself “in accordance with its own genius and traditions”,²⁶⁴ which confirms that it was an identity issue at stake in the decision on Title III of the Single European Act.²⁶⁵ However, from this perspective, the two parts of the decisions of the Supreme Court may be difficult to reconcile.

It can be argued that the teleological interpretation applied to the examination of Title II of the Single European Act was justified by the fact that it consisted of an extension of what already existed in the European legal order while the very literal interpretation²⁶⁶ of Title III was due to new developments of European integration. However, a strict distinction along the lines of evolution and creation could be questioned. The political dimension of the European project, which played a decisive role in the justification of the judges, has never really been a new objective. One could indeed argue that Schuman already had this very objective in mind when he declared in what is regarded as the first step of the process of European integration:

“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity.”²⁶⁷

²⁶³ On this reading of the two parts of the *Crotty* decision as involving the adhesion to European integration in the broad sense, see O. Doyle, *Constitutional Law: Text, Cases and Materials* (Dublin: Clarus Press, 2008) at 392 or G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 11 above, at 48. The “essential scope or objectives” test can even be extended to European secondary law, which confirms the specificity and the unity of the judicial reasoning when a European dimension is involved.

²⁶⁴ [1987] I.R. 713 at 787.

²⁶⁵ In particular when read in parallel with the opinion he expressed in an extra-judicial context, S. Henchy, “The Irish Constitution and the E.E.C.”, *op. cit.*, at fn. 246 above.

²⁶⁶ Barrett argues that “this part of the ruling [the one dedicated to Title III of the Single European Act] demonstrates the application of a narrow approach to the provisions of Article 29.4.3°. Indeed, the entire Court, not the majority, appeared to take an approach not dissimilar to that which one would expect to see used in the interpretation of a commercial contract”, G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence”, *op. cit.*, at fn. 261 above, at 41.

²⁶⁷ R. Schuman, “Declaration of 9 May 1950”, available at <http://europa.eu/abc/symbols/9-may/decl_en.htm> [Last accessed 29 December 2012].

More importantly, the European Political Co-operation existed as an informal practice in the European Economic Community since 1970, of which Title III of the Single European Act was only a formalisation.²⁶⁸ In this regard, it can be inferred that the participation in European integration agreed to by the Irish people in 1972 took into account the political development already at play between the member states.²⁶⁹ Henchy J. in the majority took a radically different view of the consequences of this formalisation when, after characterising it as the “threshold leading from what has hitherto been essentially an economic Community to what will now also be a political Community”,²⁷⁰ he affirmed the following as a decisive factor in his judgment:

“it is urged on behalf of the Government that the changes in existing inter-state relations effected by Title III are slight, that it does little more than formalise existing practices and procedures by converting them into binding obligations. This, I fear, is to underestimate the true nature in international law of a treaty as distinct from a mere practice or procedure and to misinterpret the commitments for the future involved in Title III.”²⁷¹

The importance given to this formalisation has to be compared with the more generous approach in the first part of the decision of a similar process where concerning the new powers defined in Title II, Finlay C.J. took the view that:

“the identification of topics which while now separately stated, are within the original aims and objectives of the EEC”.²⁷²

One can argue that the differences between Titles II and III of the Single European Act cannot justify by themselves the radical opposition between the two parts of the judgment. It could even be suggested that the infringement of Irish sovereignty stemmed from Title II rather

²⁶⁸ See for example, M. Forde, *Constitutional Law* (Second edition, Dublin: First Law, 2004) at 231.

²⁶⁹ For an analysis of the conciliation between the neutrality of Ireland and its participation in the European Political Co-operation before the Single European Act, see for example P. Keatinge, “Ireland: neutrality inside EPC” in C. Hill (ed.), *National Foreign Policies and European Political Cooperation* (London: George Allen & Unwin for the Royal Institute of International Affairs, 1983) at 137-152.

²⁷⁰ [1987] I.R. 713 at 786.

²⁷¹ *Ibid.* at 788.

²⁷² [1987] I.R. 713 at 770.

than Title III, in particular as regards the development of the qualified majority voting.²⁷³ The limit to the participation in the process of European integration did not therefore find its relevance in the developments of the European Communities. In contrast, it seems that the significant divergence of treatment between Title II and Title III of the Single European Act was the result of an over-determination of these differences by domestic legal factors. In other words, it is in the Irish constitutional order that the reasons explaining the difference between the two parts of the judgement have to be found.

According to the hermeneutic paradigm, a norm is the result of a relationship between the drafting and the interpretation as well as the environment in which this interaction takes place, these three elements being what Timsit qualifies as the predetermination, the codetermination and the over-determination.²⁷⁴ The latter is referred to as the silence of law²⁷⁵ and it seems that it can be argued that the meaning of *Crotty* can be found in the silence of the decision. Even if the point is mentioned only once, by Griffin J. in his minority judgment, in which he concluded that the Single European Act respected Irish neutrality,²⁷⁶ this domestic principle seems to be the real subtext of the strictness according to which Title III has been analysed by the majority.²⁷⁷ To be convinced, it is under this silent heading that the major part of the doctrine²⁷⁸ as well as politicians²⁷⁹ analysed the decision. This point seems to be confirmed by the recent decision of the Supreme Court on the Treaty establishing the European Stability Mechanism.²⁸⁰ Despite the similarities with the legal situation in *Crotty*, the majority held that

²⁷³ In this sense, see for example F. Murphy, "Irish Participation in European Integration: The Casual Abandonment of Sovereignty?" (1996) 31 *Irish Jurist* 22-34 at 26.

²⁷⁴ See G. Timsit, *Les noms de la loi* (Paris: Presses universitaires de France, coll. Les voies du droit, 1991)

²⁷⁵ See for example *ibid.* at 54-55 where the author argues that "the field of decoding of the norm cannot be reduced or limited to its written context – the other norms inscribed in the normative text or in others which would form the environment or the setting of it. The field is in fact the whole set of the principles, ideas, values, beliefs or customs to which the members of a society subscribe and which command their behaviours, their reactions and their interpretations – a culture, in short. (...) It [law] is also over-determination – absence of writing. That is to say silence – body of beliefs, values or ideas which do not find any systematic written expression, pertain to silent affirmation, but nonetheless play an essential role in the determination of the meaning of the law" (translation by the author).

²⁷⁶ [1987] I.R. 713 at 790. For the same opinion, see F. Murphy, "European Communities (Amendment) Act, 1986" (1986) *Irish Current Law Statutes Annotated* 37-01/37-10 at 37-05.

²⁷⁷ Incidentally, this proves that the protection of Irish identity in the face of the primacy of European Union law encompasses more than human rights issues.

²⁷⁸ See for example, B. M. E. McMahon and F. Murphy, *European Community Law in Ireland*, *op. cit.*, at fn. 14 above, at 293 and 314-316, A. Sherlock, "Sovereignty, the Constitution and the Single European Act", *op. cit.*, at fn. 13 above, at 109 or J. P. McCutcheon, "The Irish Constitution and the Ratification of the Single European Act" (1992) n° 4 *L'Irlande politique et sociale* 19-41 at 30. In the same way, Keatinge, writing before the drafting of the Single European Act, stressed the contingent factors explaining the renewed concern for Irish neutrality in the European Political Co-operation scheme, see P. Keatinge, "Ireland: neutrality inside EPC", *op. cit.*, at fn. 269 above, at 149-151.

²⁷⁹ See for example the comments of Haughey: "we have reached, perhaps gone beyond, what is strictly compatible with Irish neutrality", C. Haughey, Session of 22 April 1987, 371 *Dáil Debates*, Col. 2266, available at <<http://historical-debates.oireachtas.ie/D/0371/D.0371.198704220004.html>> [Last accessed 29 December 2012].

²⁸⁰ *Pringle v. The Government of Ireland and others* [2012] I.E.S.C. 47.

the ratification of the Treaty establishing the European Stability Mechanism did not require a referendum amending the Constitution since it did not involve an unconstitutional transfer of sovereignty but was rather an exercise of sovereignty.²⁸¹ The difference of outcomes between the application of similar principles either to Title III of the Single European Act or the Treaty establishing the European Stability Mechanism can be explained by the matter at stake. In other words, it is the issue of neutrality which conditioned the interpretation of the Constitution as making impossible the ratification of Title III without an approval of the people through referendum.²⁸²

The neutrality of Ireland assumes a special form. In particular, for the purpose of this analysis, while it is viewed as an essential Irish feature, it is deprived, in particular at the time of the decision in *Crotty*, of any formal recognition in the text of the Constitution.²⁸³ *Crotty* is a questionable intervention on the part of the judiciary in the Government's ability to conduct foreign affairs. It could be argued that the legitimacy of the decision could not have relied on such an elusive legal ground but that behind the constitutionalist reasoning it is indeed neutrality which constitutes the key to the understanding of this decision. The constitutionalist argumentation provided a firmer justification while reaching the same purpose, *i.e.*, ensuring the actual expression of the Irish people on this issue. However, it has to be noted that it is the European context which led, to some extent, to the textual recognition of Irish neutrality with the insertion of what is now Article 29.4.9° in the Constitution in order to facilitate the ratification of the Treaty of Nice.²⁸⁴

Therefore, considering the vagueness of the “essential scope or objectives” test which seems to link the two part of the decision, *viz.*, the imprecise extent of the licence given by the Irish people to join the process of European integration, the ruling in *Crotty* bear witness to the fact that the limit to European integration and the subsequent primacy of its norms, as in the French case, is not predetermined but is the result of an interpretation.²⁸⁵ In this instance, the development of new European competences in Title II was held as having received a prior

²⁸¹ In this sense, see *ibid. per* Denham C.J., O'Donnell, McKechnie and Clarke JJ. respectively at para. 17. xii, 20, 18 and 8.13.

²⁸² For further analysis of *Pringle*, see *infra* at 281-284.

²⁸³ As noticed, in the High Court, by Kearns J. in *Horgan v. Ireland* [2003] 2 I.R. 468 at 504.

²⁸⁴ Article 29.4.9° states that “the State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 42 of the Treaty on European Union where that common defence would include the State”, which “is the locus of the first, and to date only, visible impression made by Irish neutrality on the text of the Constitution”, G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution”, *op. cit.*, at fn. 47 above, at 166.

²⁸⁵ In this sense, stressing that the scope of the licence to join European integration “remains for the purposes of Irish constitutional law an assessment of Irish courts”, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Round Hall Sweet & Maxwell: Dublin, 1997) at 336.

approval of the Irish sovereign when it joined a “developing organism”.²⁸⁶ In other words, the explicit reference to the Community competence in different areas such as the provision of services, the working environment, or the environment as well as the creation of a Court of First instance would constitute, as mediated through what is now Article 29.4.5°, further lawful qualification of Articles 15.2.1° or 34 of the Irish Constitution, which was the initial purpose of the licence to join the European Communities (as they were then).²⁸⁷ In contrast, the codification of existing practices in Title III was deemed as exceeding the popular will as a result of the confrontation between European law and the principle of neutrality. In the first part of the decision in *Crotty*, the willingness of the Irish people to participate in the process of European integration²⁸⁸ prevailed while, in the second part of the judgment, the question of Irish neutrality was regarded as crucial and minor encroachments of this principle defeated the principle contained in what is now Article 29.4.5° of the Constitution. In this respect, and if one considers that methods of interpretation have a justifying rather than heuristic value,²⁸⁹ the teleological and literal interpretations which distinguish the two parts of the decisions reflect the opposite conclusion reached as to the balance between the sovereign expression in favour of the process of European integration and the sovereign expression of equal value contained in constitutional principle of a purely domestic nature.²⁹⁰ It is because neutrality was able to trump constitutional provisions dedicated to the Irish commitment to the process of European integration, it can be held as forming part of Irish constitutional identity.²⁹¹

However, another dimension of this decision is important as regards present concerns. This decision was greatly criticised as giving a far too restrictive interpretation of the ability of the Government to conduct foreign affairs²⁹² and raised some doubts about the constitutionality of membership to other political organisations such as the United Nations Organisation or the

²⁸⁶ *Crotty v. An Taoiseach* [1987] I.R. 713 at 770.

²⁸⁷ See *supra* at 193-196.

²⁸⁸ This European factor of Irish identity, even though it may refer to a political or social rather than a legal definition of identity, is defended by Laffan and O'Mahony when they affirm that “because membership was not a major source of conflict and contestation, European symbols, notably the European flag and the euro, have become part of Ireland’s symbolic universe. Being a member state forms a core part of Irish official nationalism and has become part of the official Irish narrative”, B. Laffan and J. O'Mahony, *Ireland and the European Union*, *op. cit.*, at fn. 244 above, at 260.

²⁸⁹ In this sense, see for example M. Troper, *Pour une théorie juridique de l'État*, *op. cit.*, at fn. 174 above, at 282-284.

²⁹⁰ In this regard, Henchy J. makes of the “purely national approach to foreign policy” set out by the Constitution one of the decisive argument of its decision, [1987] I.R. 713 at 786.

²⁹¹ In this sense, see for example B. Laffan and J. O'Mahony, *Ireland and the European Union*, *op. cit.*, at fn. 244 above, at 12 where the authors affirm that “neutrality was not a ‘security’ policy; rather it was bound up with identity, values and the projection of a certain idea of Ireland’s role in the world” or at 180 where neutrality is defined as participating in “the self-image of Ireland”.

²⁹² Interestingly, in later decisions, it is rather the wide discretion of the Government in foreign affairs which has been stressed on the basis of *Crotty*. See *Horgan v. Ireland* [2003] 2 I.R. 468 at 512 or *Pringle v. The Government of Ireland and others* [2012] I.E.S.C. 47 *per* Hardiman and Clarke JJ. respectively at para. 17 and 4.22.

GATT²⁹³ under this interpretation. A few years later in *McGimpsey v. Ireland* both the High Court²⁹⁴ and the Supreme Court²⁹⁵ had to decide the constitutionality of the Anglo-Irish Agreement 1985 where the plaintiffs relied on the reasoning developed in *Crotty*. The case was distinguished by both courts. However, the arguments developed to do so do not appear convincing.²⁹⁶ The strictness of the decision can be explained by the European dimension of the *Crotty* decision. In conclusion, as for France, it can be said that the European dimension involves a specific type of reasoning from Irish courts.²⁹⁷ More particularly, when compared to *McGimpsey*, it is as a result of a comparison with the European legal order in particular that the principle of neutrality has gained a special value. Arguably, the relation and the reaction to European law is what constitutes and structures the renewed concern of Ireland for its constitutional identity.

If interpreted as such, *Crotty* confirms another trait of the Irish legal system. While Ireland and France both phrase their opposition to a full primacy of European Union law in terms of sovereignty, they do not share the same conception of their sovereign. In France, due to its abstract and legal nature, the will of the French *demos* can be opposed to participation in the process of European integration for material provisions contained in the Constitution. In contrast, the decision reached by the Supreme Court in *Crotty* upheld neutrality as a crucial feature located outside the express constitutional text.²⁹⁸ This is the reflection of the concrete understanding of the Irish people as sovereign²⁹⁹ and highlights the differentiated instances where identity is constituted in Ireland and France. Defined as the reflection of features

²⁹³ On this point, see G. W. Hogan, "The Supreme Court and the Single European Act" (1987) 22 *Irish Jurist* 55-70 at 69 or B. M. E. McMahon and F. Murphy, *European Community Law in Ireland*, *op. cit.*, at fn. 14 above, at 297.

²⁹⁴ [1988] I.R. 567.

²⁹⁵ [1990] 1 I.R. 110.

²⁹⁶ See for example, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 11 above, at 46-48 or D. R. Phelan and A. Whelan, "National constitutional law and European integration: FIDE Report", *op. cit.*, at fn. 12 above, at 35.

²⁹⁷ See for example, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 11 above, at 48.

²⁹⁸ On this point, see P. Keatinge, "Ireland: neutrality inside EPC", *op. cit.*, at fn. 269 above, at 140 where the author affirms, while explaining how Ireland conciliated its neutrality with the participation in the process of European integration, that "partly this can be explained by the fact that Irish neutrality was not formalized by either constitutional or treaty provision and during its relatively brief history the doctrine of neutrality had not been promoted with the full rigour adopted by Switzerland or Sweden. All the same, neutrality was a persistent aspiration in Irish political culture, pre-dating the foundation of the State". On the vague nature of Irish neutrality, see also J. Temple Lang, "The Irish Court Case Which Delayed the Single European Act: *Crotty v. An Taoiseach and Others*" (1987) 24 *Common Market Law Review* 709-718 at 718.

²⁹⁹ In a similar sense, after establishing that neutrality is above all a legal concept while it only existed in Ireland as a matter of policy, A. O'Donoghue concludes that "it [the inter-war period] has set the tone for Irish neutrality since, which while much avowed by the masses has no legitimacy when it comes to law. Just because something is not enshrined in law or does not have a legal basis does not mean that it has no legitimacy when it comes to law", A. O'Donoghue, "The Inimitable Form of Irish Neutrality: From the Birth of the State to World War II" (2008) 30 *Dublin University Law Journal* 259-278 at 278. It seems that it is the conclusion the Supreme Court reached in *Crotty*.

characteristic of a sovereign external to the Constitution, the notion of constitutional identity in Ireland is expressive. Due to its divergent conception of the sovereign, the French legal order does not display the same relationship between the Constitution and society. Through its comparison with the Irish model, the constitutional identity of France can be characterised as prescriptive.³⁰⁰

It is a continuation of the same logic that fuels the reasoning of Irish courts when European secondary law - and more generally the application rather than the drafting of European law - are concerned. Once again, it is possible to draw a parallel between the Irish and French case-law. While in the case of the ratification of new European Treaties the Supreme Court ensured that the Irish people could give its approval to a modification of its constitutional identity, this issue is not directly raised as a limit to the doctrine of primacy when secondary European law is concerned. In contrast, a conciliatory material perspective is put on the relationship between European rules and constitutional provisions which postpones the identity issue. Therefore, the notion of constitutional identity in the Irish legal order is rather defined by its instrumental dimension rather than in essentialist terms. In other words, this notion emerges from the ability it offers to thwart the doctrine of primacy rather than it consists of predetermined and essentialist constitutional values.

The attitude of Ireland towards European Union law, in particular when the primacy of its law is concerned, has often been described as generous on economic issues and more reluctant in political matters.³⁰¹ This does not seem to be totally exact and would be better described in terms of the preservation of certain features held as participating in the Irish identity when compared to European law rather than a distinction between the different kinds of competences involved in the process of European integration. First, as Article 16 of the French Declaration of Human and Civic Rights of 1789 affirms it, the separation of powers is essential to the constitution of a political society. However, as has been seen, both in the very mechanism defined in section 3 of the European Communities Act 1972 (as amended) - allowing ministers to implement European instruments through statutory instruments³⁰² - as well

³⁰⁰ On this opposition between expressive and prescriptive constitutional identity depending on the understanding of the Constitution as reflecting social features or constituting them, see G. J. Jacobsohn, *Constitutional Identity* (Cambridge, Massachusetts: Harvard University Press, 2010) at 11-15 and at 31 for an analysis of Irish constitutional identity as expressive.

³⁰¹ For example, see B. M. E. McMahon and F. Murphy, *European Community Law in Ireland*, *op. cit.*, at fn. 14 above, at 301-302.

³⁰² See *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329. For further analysis of this part of the decision, see *supra* at 122-124.

as in the specific statutory instruments created,³⁰³ the balance reached between Article 15.2.1° of the Constitution (granting the exercise of the legislative function solely to the Oireachtas) and the requirement of primacy of European Union law entailed a profound modification of the separation of powers in the Irish legal order.³⁰⁴ This institutional consequence of the participation in the process of European integration shows that the generous reception of the doctrine of primacy exceeds the economic sphere.

The political impact of European law is also noticeable from a substantive perspective. This is notably the case with regard to the conception of the family, a question of great political dimension in the Irish legal context to the extent that some regard it as one of the main features of Irish identity.³⁰⁵ In this respect, Article 41.1.1° of the Irish Constitution recognises that the family is “the natural primary and fundamental unit group of Society”.³⁰⁶ This image of family is characterised by its gendered structure.³⁰⁷ As Article 41.2 specifies in relation to the family that:

“1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.”

Even though the justiciability of these constitutional provisions is limited,³⁰⁸ they offer the ideological background which explains the disparities between men and women the Irish legal system presented, notably in the field of labour law.³⁰⁹ The gender distinction presented in the

³⁰³ See for example, *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329, *Maher v. Minister for Agriculture* [2001] 2 I.R. 139, *Browne v. Attorney General* [2003] 3 I.R. 205 and *Kennedy v. Attorney General* [2007] 2 I.R. 45. For an analysis of the validity of statutory instruments in these decisions, see *supra* at 206-216.

³⁰⁴ For an in-depth analysis of the modification of the Irish separation of powers in the face of European Union law, see *infra* at 384-395.

³⁰⁵ In this sense, see for example G. J. Jacobsohn, *Constitutional Identity, op. cit.*, at fn. 300 above, at 252-259.

³⁰⁶ On this importance of the family in Irish polity, Dooley affirms that “it is impossible to overstate the importance of the family as institution within the Constitution”, D. Dooley, “Gendered Citizenship in the Irish Constitution” in T. Murphy and P. Twomey (eds.), *Ireland’s Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998) 121-133 at 126.

³⁰⁷ As Ryan puts it, the Constitution “even appears to settle the age old dispute about who does the washing up, suggesting (though admittedly not mandating) a specifically gendered delineation of duties, clearly intimating that a woman’s career plans need not distract her from the joys of being a stay-at-home mother”, F. Ryan, “21st Century Families, 19th Century Values: Modern Family Law in the Shadow of the Constitution” in O. Doyle and E. Carolan (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 357-380 at 358-359.

³⁰⁸ On this point, see F. Martin, “The Family and the Constitution - Principle and Practice” in T. Murphy and P. Twomey (eds.), *Ireland’s Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998) 79-95 at 90.

³⁰⁹ For a similar opinion, see for example Y. Scannell, “The Constitution and the Role of Women” in B. Farrell (ed.), *De Valera’s Constitution and Ours* (Dublin: Gill and Macmillan, 1988) 123-136 at 125-129.

Irish Constitution appears opposed to the gender equality promoted by European Union law.³¹⁰ However, in this field, Ireland, very early in its membership, accepted the modifications required by European law³¹¹ and showed diligence in the implementation of the directives covering this field.³¹² In particular, as in *Cotter and McDermott v. Minister for Social Welfare*³¹³ concerning discrimination in unemployment benefit to the detriment of married women, both the High Court and the Supreme Court have shown willingness to co-operate with the European Court of Justice in order to determine the obligations for Ireland which resulted from the European intervention in this field.³¹⁴ Knowing that this collaboration between domestic and European courts is the cornerstone of the effective impact of European law in the domestic legal orders, one can deduce that Irish courts promoted the prevalence of European standards on these issues.

However, it is possible, due to the original purpose of European integration, that this influence is limited to the economic aspect of gender equality. Even though no reference was made to Article 41.2 in *Cotter and McDermott v. Minister for Social Welfare*, the enforcement of the equality principle offered by European law implies relying on a different ideology from that offered by the Irish Constitution. Considering the political dimension linked to the representation of the family, it is therefore indeed changes of a political nature that Ireland agrees to by upholding European law.³¹⁵ In consequence, the privilege granted to the primacy principle cannot be considered as limited to the economic sphere but also interferes with Irish political specificities. It could be argued that in doing so domestic courts have changed Irish constitutional identity.³¹⁶ However, the notion of identity involves a claim as to distinctive features which are addressed as a reaction to another entity.³¹⁷ By making constitutional provisions dedicated to the participation in European Union prevail over the constitutional

³¹⁰ For a broad presentation of the issue of gender equality in Ireland under European influence, see I. Bacik, "Women and the Law in Ireland and Europe" in W. Binchy and C. Finnegan (eds.), *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives* (Dublin: Clarus Press, 2006) 111-126. In more details, see M. Reid, *The Impact of Community Law on the Irish Constitution*, *op. cit.*, at fn. 244 above, at 17-62.

³¹¹ See for example, F. Murphy, "The European Community and the Irish Legal System" in D. Coombes, *Ireland and the European Communities: Ten Years of Membership* (Dublin: Gill and Macmillan, 1983) 29-42 at 41-42.

³¹² See for example, I. Bacik, "Women and the Law in Ireland and Europe", *op. cit.*, at fn. 310 above, at 120.

³¹³ Unreported, High Court, 13 May 1985; unreported, High Court, 10 June 1988 ([1990] 2 C.M.L.R. 141); unreported, Supreme Court, 27 July 1989; unreported, Supreme Court, 6 June 1991. For an analysis, see M. Reid, *The Impact of Community Law on the Irish Constitution*, *op. cit.*, at fn. 244 above, at 59-62.

³¹⁴ A similar reasoning is also noticeable, in relation to equal pay, in *Murphy v. Bord Telecom Éireann* [1989] I.L.R.M. 53.

³¹⁵ In this sense and stressing the development of these dynamics due to the broadening of the competences of the European Union, see , I. Bacik, "Women and the Law in Ireland and Europe", *op. cit.*, at fn. 310 above, at 123-124.

³¹⁶ Regarding European influence on Irish identity in the field of gender equality, see for example B. Laffan and J. O'Mahony, *Ireland and the European Union*, *op. cit.*, at fn. 244 above, at 255.

³¹⁷ See *supra* at 6-7 and 11-15.

provisions dedicated to the family, Irish courts did not so much change Irish constitutional identity but rather withdrew identity value from features which were previously regarded as distinctive of the Irish constitutional order.³¹⁸

This interpretative balancing between constitutional provisions at the core of the dynamic notion of constitutional identity show that this notion results from a practice of the Constitution.³¹⁹ This confirms that constitutional identity cannot be determined in essentialist terms on the basis of the constitutional text alone. It is rather a meta-discourse developed by authentic interpreters as to their interpretation of the Constitution. The balance between the different constitutional provisions is the first step in the assessment of the relationship of European law and its primacy with the Constitution, the question of the special value of certain constitutional principles being only subsequent to this process. If Article 41.2 may have been regarded as reflected Irish identity at some point, it is a different vision that is at play in domestic courts on the basis of the European legal order.

While voluntary reliance on European norms has provided means to change political features constitutionally-defined, the limits put on the commitment to participate in the European Union is explained by the protection of constitutional features, the crucial importance of which appear when they are materially confronted to European rules. As in the previous example related to family, it is the same balancing process at play but with an opposite outcome. This confirms the parallel drawn between Irish and French constitutional case-law and the appraisal of the relationships between constitutional and European norms in terms of legal identity through an interpretative process where European law is the yardstick.

This logic is particularly noticeable in the matter of the right to life of the unborn. When the potential conflict between this right protected by Article 40.3.3° of the Constitution and the freedom to provide services defined in the European law arose, one could see the attempts

³¹⁸ In this sense, see for example G. W. Hogan and G. F. Whyte, *J M Kelly: The Irish Constitution* (Fourth edition, Dublin: Lexis Nexis Butterworths, 2003) at 1829-1830 or G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 300 above, at 226 where the author affirms that “the Constitution in Ireland is not silent on the family; indeed it is notable for loudly proclaiming the institution’s centrality in the life of the nation and, more particularly, its constitutional identity.”

³¹⁹ If the notion of constitutional identity is not regarded as involving a distinctive element, it can be said that any constitutional provision, by giving a shape to a certain society, is participating in the constitutional identity of a country. In this sense, constitutional provisions dedicated to European law are, as those concerning the family, constitutive of Irish constitutional identity. By making the former prevail, domestic courts would not so much change Irish identity but rather enforce another identity feature already present in the Constitution. On this disharmony present in Constitutions as a factor of a dynamic constitutional identity, see G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 300 above, at 346-355.

made by the Supreme Court to keep the European dimension at bay and, as in the French case, to avoid direct conflicts between the Constitution and the European legal order.³²⁰

However, in their decision in *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*,³²¹ the Supreme Court judges had to consider the consequences of a potential European intervention in this field due to the preliminary reference made by the High Court to the European Court of Justice. Walsh J. argued that the decision of the European Court of Justice would have to be appraised in the context of the interaction between the constitutional provisions dedicated to European membership and the protection of the right to life of the unborn provided for by Article 40.3.3° of Constitution.³²² Incidentally, he also asserted that “it cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the state of a fundamental human right.”³²³ The reference to the objectives of what is now the European Union is reminiscent of the test used in *Crotty* and confirms the unity of paradigm of the relationship between the domestic and European legal orders, either when primary or secondary norms are concerned.³²⁴

It seems that several conclusions can be drawn from the reasoning of the Supreme Court in this case. First, the approach of defining the relationship between the domestic and European legal systems in terms of formal supremacy of the Constitution over the doctrine of primacy is not the way chosen by the Supreme Court. When the right to life of the unborn has been considered in a purely domestic context, Irish courts have affirmed its hierarchical superiority over other constitutional provisions.³²⁵ An extension of this reasoning *vis-à-vis* Articles 29.4.5° and 29.4.6° of the Constitution could have infringed the primacy principle in

³²⁰ See for example *Attorney General (Society for the Protection of Unborn Children Ireland Limited) v. Open Door Counselling Limited* [1988] I.R. 593 at 618 for the High Court and at 626 for the Supreme Court. See also the criticism expressed *obiter* by the Supreme Court of the decision made by Carroll J. in the High Court to involve the European Court of Justice *via* a preliminary reference, *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan* [1989] I.R. 753 at 769. In this sense, see F. Murphy, “Irish Participation in European Integration: The Casual Abandonment of Sovereignty?”, *op. cit.*, at fn. 273 above, at 27.

³²¹ [1989] I.R. 753.

³²² *Ibid.* at 768-769.

³²³ *Ibid.* at 769.

³²⁴ In this sense, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 285 above, at 337-338.

³²⁵ On the hierarchy of constitutional rights see the opinion of Kenny J. in *The People v. Shaw* [1982] I.R. 1 at 63. For an application of this hierarchy to the relationship between the right to life of the unborn and the right to travel where the European dimension is not concerned, see the opinions of Finlay C.J., Hederman and Egan JJ. in *Attorney General v. X* [1992] 1 I.R. 1 respectively at 57, 73 and 92. If McCarthy J. expressed the issue as a balancing process, it is one where “the scales could only tilt in one direction, the right to life of the unborn, assuming no threat to the life of the mother”, *ibid.* at 84. For a contrary opinion pointing toward a harmonious interpretation of the Constitution, see J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law* (Dublin: Round Hall Sweet & Maxwell, 1997) at 12-19. However, in the decision such a harmonious interpretation is circumscribed to a balance having to be found between the right to life of the unborn and the right to life of the mother and it can be concluded that the balance if made between the same right enjoyed by two different persons (in this sense, see for example, Finlay C.J. [1992] 1 I.R. 1 at 53).

this matter. However, this reasoning was not relied upon and Walsh J. offered another interpretation when he argued that:

“the 8th Amendment of the Constitution is subsequent in time, by several years, to the amendment of Article 29. That fact may give rise to the consideration of the question of whether or not the 8th Amendment itself qualifies the amendment to Article 29. Be that as it may any answer to the reference received from the Court of Justice of the European Communities will have to be considered in the light of our own constitutional provisions. In the last analysis only this Court can decide finally what are the effects of the interaction of the 8th Amendment of the Constitution and the 3rd Amendment of the Constitution.”³²⁶

Constitutional interpretation is thus, once again as in the French legal order, effected in accordance to special modalities when the European dimension is involved. By stating that the right to life of the unborn may prevail over constitutional provisions dedicated to the participation in the process of European integration depending on the interpretation of European law given by the European Court of Justice, the reasoning of the Supreme Court indicates that the possibility for Article 40.3.3° to defeat the doctrine of primacy is not determined *ab initio*.

This material perspective put on the normative relationship postponed the identity issue. There was no direct affirmation made according to which of the right to life of the unborn would constitute a predetermined and immutable feature of the Irish Constitution justifying a irremediable limit put on the doctrine of primacy. The special value granted to the right of life of the unborn is not, as in the case-law disconnected from European law, the result of a hierarchy of rights contained in the Constitution. In contrast, it is only if the interpretation given to the content of European provisions goes beyond what Irish courts consider as a legitimate balance that the right to life of the unborn would acquire a particular status as a fence against the primacy of European rules. The notion of constitutional identity in the Irish legal order is thus the result of an interpretative process between constitutional provisions dedicated to European law and others of a purely domestic nature. It emerges as a reaction to European law and its primacy, which underlines its instrumental nature. In other words, it is because certain constitutional provisions are regarded by the courts as being able to prevail over the doctrine of

³²⁶ [1989] I.R. 753 at 768-769.

primacy as a conclusion of their reasoning that they acquire the character of a norm forming part of the constitutional identity of Ireland. The necessary protection of the Irish Constitution is therefore the result of this interpretation rather than its cause.

This conclusion allows one to appreciate differently the protection of Irish specific constitutional features in the face of European law through their preliminary identification and a careful drafting of European Treaties which would immunise them from the reach of the doctrine of primacy. The Treaty of Maastricht led to the adoption of Protocol (No 17) where it was made clear that European law could not influence the application of the right to life of the unborn in Ireland.³²⁷ By the exclusion of the common rules it provides, Protocol (No 17) represents the willingness of Ireland to maintain a distinctive identity. However, shortly after the ratification of the Treaty of Maastricht, in the decision *Attorney General v. X*,³²⁸ the Supreme Court, while recognising a right to abortion when the life of the mother is in danger, held that under different circumstances the right to life of the unborn could curtail the freedom to travel and to information.³²⁹ The scope of Protocol (No 17) being ambiguous and in order to respond to the concern about this latter issue in Irish society, the Government sought a revision of the Protocol. Instead, the European partners agreed on a Declaration on 1 May 1992,³³⁰ the purpose of which was to give an official interpretation of Protocol (No 17)³³¹ in order to ensure that the Irish people would still enjoy the freedom to travel and the freedom to information existing in European law, in what was seen as a condition for obtaining a favourable vote in the referendum enabling Ireland to ratify the Treaty of Maastricht.³³² These rights would then be formally recognised in the Constitution after the amendment of 23 December 1992 which introduced them in Article 40.3.3°.³³³ For present purposes,³³⁴ while the right to life of the

³²⁷ See J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law*, *op. cit.*, at fn. 325 above, at 37 where the authors stress the “exemption” enjoyed by Article 40.3.3° of the Constitution and therefore the derogatory regime applied to it compared to the normal rules of exemption existing in European law.

³²⁸ [1992] 1 I.R. 1.

³²⁹ It has to be noted that the European aspect to this question, and the recognition of these rights in the European legal order, were avoided in the decision in this case.

³³⁰ Declaration of the High Contracting Parties to the Treaty on European Union (signed at Maastricht on the seventh day of February 1992) 29 July 1992 [1992] O.J. C 191/109.

³³¹ For a broader analysis of the interaction between Protocol (No 17) and the subsequent Declaration, see for example G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 11 above, at 144-155, J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law*, *op. cit.*, at fn. 325 above, at 164-179 or D. R. Phelan and A. Whelan, “National constitutional law and European integration: FIDE Report”, *op. cit.*, at fn. 12 above, at 50-54.

³³² See, on this point, J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law*, *op. cit.*, at fn. 325 above, at 163-164.

³³³ Protocol (No 17), its interpretative Declaration and this constitutional amendment differ from the opinion of Irish courts, which, without always explicitly expressing it, seemed to adopt an absolute interpretation of the right to life of the unborn that would exclude the application of the right to information and the right to travel. This interpretation of its former case-law was even recognised by the Supreme Court in *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill* [1995] 1 I.R. 1 at 35.

unborn definitely appears as an essential and crucial element of the Irish constitutional architecture, it can be said that this does not involve an absolute and *a priori* exclusion of European Union law in this matter. In both instances, Protocol (No 17) and the Declaration related to it are the consequences of a judicial balance between constitutionally-defined European commitment and another constitutional provision of a strict domestic nature.

Secondly, regarding this interpretation of constitutional provisions, the argument of Walsh J. in *Grogan* relied on the balance to be found between the third amendment to the Constitution (which introduced what are now Article 29.4.5° and 29.4.6°) and the eighth amendment related to the right to life of the unborn provided for by Article 40.3.3°. Rather than a strict normative issue, his reasoning stresses the sovereign dimension due to his reference to the constituent power.³³⁵ The question of the relationship between the doctrine of primacy and the protection of specific Irish identity features is not structured as an opposition between sovereignty located in Ireland and its absence in the European legal order. As in *Crotty*, if sovereignty is involved, it is through the balance between two expressions of the Irish people of equal value, *viz.*, the willingness to participate in what is now the European Union and the sovereign concern for the right to life of the unborn. The notion of constitutional identity is the sign that the relationship between the domestic and European legal orders exceeds the necessary approval by the Irish sovereign of the different stages in the deepening of the process of European integration. As in the French legal order, the harmony between the participation in what is common and the protection of the self is an ongoing process.

In conclusion, though it is not as formalised as in the French case-law, it is possible to affirm that both countries consider the relationship between the doctrine of primacy and the Constitution according to the same reasoning which has been defined as the notion of constitutional identity. As in the case-law of the *Conseil constitutionnel*, what is expressed through this notion is that the ultimate formal sovereignty of the Irish Constitution is hidden. Rather than being the object of the control of Irish courts, it is only expressed in specific material fields where, as the result of a material balancing process, the importance given to certain domestic legal traits outweighs the commitment to the participation in the process of European integration. However, due to their different representations of their respective

³³⁴ For further considerations of the relationship between Protocol (No 17) and the subsequent Declaration, see *infra* at 328-334.

³³⁵ For further analysis on this point, see *infra* at 284-286.

sovereign, it can be said that Irish constitutional identity is expressive while the French one is prescriptive.

Nonetheless, both countries, share the same interpretative paradigm with regard to the extent of the doctrine of primacy. Irish and French judicial considerations of the doctrine of primacy are the result of a weighing between a sovereign commitment to European law and other constitutional provisions of which, as a meta-discourse, the notion of constitutional identity is the scales. It is when the latter prevail over the former that the protection of their constitutional *ethos* is raised in the face of the primacy of European Union law. In consequence, both in Ireland and France the notion of constitutional identity departs from an essentialist understanding and it is rather the ability of the sovereign to define itself which prevail. The constitutional provisions pointed out as potential limits to the doctrine of primacy are thus better seen as the particular and contingent occurrences where the form of discourse constitutive of the notion of constitutional identity is instantiated.

Title II The Application of the Primacy of European Union Law under the Scrutiny of Irish and French Courts: An Inter- Jurisdictional Dialogue Respectful of the Notion of Constitutional Identity

The positions of the *Conseil constitutionnel* and Irish courts reveal their opposition to the primacy of European Union law to be an interpretative balancing process between purely domestic constitutional provisions and others which are dedicated to European law issues. What is termed “constitutional identity” in this thesis emerges from this process, by which is meant norms capable of overturning the sovereign commitment to the enforcement of European obligations in the domestic legal orders. Rather than corresponding to predetermined values under an essentialist definition of identity, the notion of constitutional identity in the Irish and French case-law is a form of discourse. The dynamics this notion involves are thus of a central importance.

The decisions of Irish and French courts involving the notion of constitutional identity often appear as the upholding of predetermined features encapsulated in the Constitution (in the case of France) or as the obedience to the original expression of the sovereign people (in the case of Ireland). This difference between the notion of constitutional identity as the result or as the prerequisite of the interpretative process can be explained by the distinction between “interpretation as an activity” and “interpretation as a product”.¹ In other words, it is arguable that the way courts present and justify their decisions differs from the way they reach such a conclusion.² Even though courts present their decision as the upholding of identity features reflected by their respective Constitutions, it seems that this notion is, in contrast, the very result of their interpretative activity.

This reveals that the judiciary is the arbiter of the relationship between the doctrine of primacy and the Constitution. Beyond the different strategies employed by Irish and French courts due to the idiosyncrasies of their respective legal culture, the recourse to the notion of

¹ For this distinction, see P. Nerhot, “Interpretation in Legal Science: The Notion of Narrative Coherence” in P. Nerhot (ed.), *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Dordrecht: Kluwer Academic Publishers, 1990) 193-225 at 198.

² This distinction is similar to the opposition between the “context of discovery” and the “context of justification” used by Golding, see M. P. Golding, “Discovery and Justification in Legal Science” in A. Peczenik, L. Lindahl and B. van Roermund (eds.), *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science, Lund, Sweden, December 11-14, 1983* (Dordrecht: D. Reidel Publishing Company, 1984) 295-305.

constitutional identity bears witness to a common concern for the control of the modalities of application of European Union law in their domestic legal orders and the interpretative task which is inherent in it.

The notion of constitutional identity thus indicates that it is necessary to go beyond the opposition between member states, on the one hand, and the European Union, on the other. It requires to take into account the interactions between organs at both national and European levels. The focus placed on the interpretation, rather than the drafting, of European rules is the sign of the willingness on the part of Irish and French courts to take a greater role vis-à-vis the other branches of government insofar as concerns the impact of the doctrine of primacy in their legal order. Involving an engagement with the European Court of Justice, the notion of constitutional identity endeavours to frame a judicial dialogue mitigating the impact of the doctrine of primacy by taking into account constitutional features of crucial importance in what could be qualified as a unity of words with a diversity of meanings.

Section I Balancing the Doctrine of Primacy and the Protection of Constitutional Identity: The Control of the Application of European Union Law in Different Interpretative Traditions

The actual protection of constitutional identity is arguably conditioned by legal culture and legal ideologies characteristic of Ireland and France.¹ Grounded in the common notion of domestic sovereignty, the forms of this resistance to the primacy principle, the way it is formulated and the authorities enabled to formulate it depend nonetheless on the conception which each country has of its own legal system.

In France, the courts play an active role in the elaboration of an identity which is nonetheless said to be enshrined in the Constitution. In Ireland, in contrast, courts appear to be involved in upholding an identity which is constituted outside the Constitution and merely reflected in its terms. However, even though their aims converge when it comes to the objective of attaining increased control over the application of European Union rules so as to ensure the

¹ For an analysis of ideology as constitutive of social identity, see P. Ricoeur, *L'idéologie et l'utopie* (Trans. M. Revault d'Allonnes and J. Roman, Paris: Éditions du Seuil, 1997) at 339-351 and for the relevance of this perspective on the issue of legal interpretation, B. van Roermund, "Narrative Coherence and the Guises of Legalism" in P. Nerhot (ed.), *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Dordrecht: Kluwer Academic Publishers, 1990) 310-345 at 321-323.

effective protection of their crucial constitutional features, the actual enforcement of these aspirations depends on the respective competences of Irish and French courts. Paradoxically, the *Conseil constitutionnel* seems more limited insofar as the realisation of its pretensions is concerned while the powers of Irish courts seem to go beyond their apparent submission to the will of the Irish people.

Chapter V A Political Instrument and a Legal Document: The Principles Structuring the Irish and French Interpretations of the Constitution in terms of Constitutional Identity

As the notion of constitutional identity is rooted, both in Ireland and France, in sovereignty, its particular shape derives from the *locus* of this principle in both jurisdictions. The notion of constitutional identity, affirmed as it is in connection with the Constitution, therefore depends on the ambivalent nature of this very type of norm which is “a political instrument as well as a legal document”.¹ Constitutional interpretation can differ according to the relative importance given to political issues and strictly normative factors, which in turn is dependent on the respective conception of the sovereign adopted in Ireland and France. For example, in accordance to the constitutionalist paradigm whereby constitutional provisions are the expression of a sovereign understood as a political fact, constitutional interpretation is informed by political realities and aims to uphold the special value of the words of the people expressed in referendums. In contrast, a normativist definition of the Constitution, whereby this norm guarantees the validity of any rule composing the legal system without depending for its validity on any other norm, will diminish the importance of the author of constitutional provisions and will favour an understanding of normative relationships according to their place in the hierarchy of norms. The prevalence of either one or the other argument will be defined in this thesis as the political and legal routes, although it should be understood that this description is given without prejudice to the legal nature of either mode of constitutional

¹ As the Constitution is defined by Costello J. in *Attorney General v. Paperlink Limited* [1984] I.R.L.M. 348 at 385. In this sense, see also for example D. Costello, “The Irish Judge as Law-Maker” in D. Curtin and D. O’Keefe (eds.), *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T. F. O’Higgins* (Dublin: Butterworth 1992) 159-167 at 164-165 or P.-Y. Monjal, “Le projet de traité établissant une Constitution pour l’Europe : quels fondements théoriques pour le droit constitutionnel européen ?” (2004) 40 *Revue trimestrielle de droit européen* 443-475 at 462 where constitutional law is described as being “on a ridge line the sides of which are constituted, on one side, by the political field, and on the other side, by the legal field” (translation by the author).

interpretation. It is through the contrasted relevance given to these two factors in both legal systems that it is possible to ascertain - with the help of the distance which comparison creates - the idiosyncrasies of the Irish and French legal orders.

Focused on legal logic, French constitutional identity appears as diachronic and the *Conseil constitutionnel* claims to play an active role in its formulation. In contrast, it is the political route which is favoured in the discourse of Irish courts. This leads to the display of a synchronic identity which the judiciary has to echo.²

A. The Relative Importance of Political Factors in the Irish and French Judicial Discourses Constitutive of the Notion of Constitutional Identity

Participating in the process of European integration led both countries to adopt constitutional amendments which marked almost every step of the development of what is now the European Union. In consequence, the understanding of the amendment process in each country is central to the question of constitutional identity. From the Irish perspective, amending the Constitution relies on referendums which are regarded as the legally unconstrained expression of the sovereign. The task of Irish courts is thus to protect this genuine expression of an *ethos* and uphold a synchronic form of identity, even though it may require to escape a strict or literal application of constitutional norms in the face of European Union law and its primacy.

The French legal position is far from reflecting the Irish approach. Unlike in Ireland, the amendment process is not conceived as manifesting an expression existing outside the legal realm. In consequence, and in contrast to the Irish case-law, the balance between constitutional and European obligations is not structured by the expression of the sovereign as a political fact. What has been qualified as the political route as regards the interpretation of the Constitution is less pregnant in the case-law of the *Conseil constitutionnel*, a case-law in which, for example, considerations of appropriateness are absent.

² This distinction from diachronic and synchronic identities is made by Reestman, see J. H. Reestman, "The Franco-German Constitutional Divide: Reflections on National and Constitutional Identity" (2009) 5 *European Constitutional Law Review* 374-390.

1. *The Imprint of Political Realities on the Irish Constitutional Interpretation in Issues Related to European Union Law*

Irish constitutional identity can be defined as the result of a balancing process where certain core constitutional values overcome the recognition of the primacy of European Union law in the domestic legal order. In other words, it can be analysed as involving those instances where certain provisions of the Constitution prevail over the licence to join the European legal order provided for by Article 29.4.5° of the Constitution and the constitutional immunity granted by Article 29.4.6°. Constitutional law can be viewed as the screen where political facts are translated into legal terms.³ It thus depends on the relative importance given to these two elements in the interpretation of constitutional provisions.

Although Ireland and France share the same interpretative pattern when potential conflicts between their Constitution and the primacy of European Union law are involved, the form of the decisions as to how this actual balance is to be settled differ.⁴ This difference can be explained by the divergent conceptions of the sovereign the Constitutions of Ireland and France are deemed to be the expression of. In this respect, the concrete representation of the Irish sovereign⁵ explains that a political reading of the relationship between constitutional and European norms prevails.

To a certain extent, the emphasis on the political willingness of the Irish people to join what were then the European Communities in 1973 can be deduced from a textual analysis of the European Communities Act 1972 which ensured the reception of European rules in the domestic legal order. Comparing this legislative instrument to its counterpart in the United Kingdom, Morris stresses that its “simplicity may have been the result of a desire of the then Irish Government to have a Bill resembling the sort of legislation one was led to believe to be the norm in Continental Europe, that is a statement of philosophical principle.”⁶ For this author, beyond strict legal considerations, the European Communities Act 1972 was a political sign that “the country was eagerly embracing the ‘European idea’.”⁷

³ Or as Avril qualifies it, the Constitution is a “*Janus* half-political half-legal”, see P. Avril, “La Constitution : Lazare ou Janus ?” (1990) *Revue du droit public et de la science politique en France et à l'étranger* 949-960.

⁴ In this sense, one could argue that the question of determination of Irish and French identities is congruent with the interpretative paradigm offered by Ricoeur where, referring to H. L. A. Hart, common objective oppositions, in this instance the opposition between the supremacy of the Constitution and the primacy of European Union law, are resolved, actually decided, according to the subjective culture of each interpreter. See, P. Ricoeur, *Du texte à l'action : Essais d'herméneutique II* (Paris: Éditions du Seuil, coll. Points Essais, 1998) in particular at 221-236.

⁵ On this point, see *supra* at 155-166.

⁶ D. Morris, “The Road to Brussels - Two Routes Compared” (1988) *Statute Law Review* 33-61 at 52.

⁷ *Ibid.* at 52.

Membership of the “developing organism”⁸ which has now evolved into the European Union required successive constitutional adaptations. In this respect, the vagueness of the test used in *Crotty* has led Irish governments to hold a referendum in respect of every major European treaty.⁹ The protection of Irish constitutional identity in the face of the primacy of European Union law is therefore directly linked to the amendment process and the attitude taken by Irish courts to this process. It is in this broader context of constitutional reform that the elements governing the conflict between constitutional values and the primacy principle are to be discovered.

Amendments to the Irish Constitution are governed by Articles 46 and 47. They involve a two-stage process. According to these constitutional provisions, a decision must first be made by the representatives. In particular, a bill intended to modify the constitutional text has to be initiated in the Dáil Éireann, the lower chamber of the Oireachtas and passed by both Houses. On completion of this first step, it is then submitted to the approval of the people through referendum. In consequence, any change to the Irish constitutional charter is conditioned to the direct expression of the citizens.

However, one could argue that Irish courts have taken a very radical approach to referendum which is considered as a mechanism of direct democracy.¹⁰ This understanding of the nature of the people’s intervention in the amendment process is particularly at stake in three decisions of the Supreme Court, *viz.*, *McKenna v. An Taoiseach (No. 2)*,¹¹ *Hanafin v. Minister for the Environment*¹² and *Coughlan v. Broadcasting Complaints Commission and RTE*.¹³

McKenna (No. 2) concerned the spending of money by the Government in order to promote a “yes” vote in the referendum held in 1995 intending to remove the prohibition on divorce contained in the Constitution. Apart from the specific outcome of this decision, what is relevant to the issue relative to the primacy of European Union law is the description of the relationship between the representative and direct stages of the constitutional amendment process. One could argue that the mechanism provided for by Articles 46 and 47 of the Constitution points towards continuity between the two stages and a holistic comprehension of the amendment process. The right of initiative regarding constitutional amendments is the

⁸ *Crotty v. An Taoiseach* [1987] I.R. 713 at 770.

⁹ See, for example, G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence” (2009) 5 *European Constitutional Law Review* 32-70 at 43-45.

¹⁰ See for example the opinion of Denham J. (as she was then) in *Coughlan v. Broadcasting Complaints Commission and RTE* [2000] 3 I.R. 1 at 28-31.

¹¹ [1995] 2 I.R. 10.

¹² [1996] 2 I.R. 321.

¹³ [2000] 3 I.R. 1.

monopoly of the organs of state and the participation of the citizens in this process is limited to approval (or rejection) of proposals made by their representatives. At first sight, it seems that the mechanism provided, rather than allowing a direct and independent input of the people in the constitutional normative process, presents an entwined action of represented and direct expressions of the citizens for the purposes of initiating and completing constitutional amendments.

However, it appears that Irish courts proposed a different vision of the amendment process where it is rather a discontinuity and an independence between the different stages which is suggested. The discontinuity between the representative first step and the direct intervention of the people through referendum is first noticeable in the ruling of Hamilton C.J., in particular when he declared that:

“as stated by McCarthy J. in *Crotty v. An Taoiseach* [1987] I.R. 713, the People in having a referendum ‘are taking a direct role in government either by amending the Constitution or refusing to amend it’.

The role of the People in amending the Constitution cannot be overemphasized. It is solely their prerogative to amend any provision thereof by way of variation, addition or repeal or to refuse to amend. The decision is theirs and theirs alone.

(...)

As the guardians of the Constitution and in taking a direct role in government either by amending the Constitution or by refusing to amend, the People, by virtue of the democratic nature of the State enshrined in the Constitution, are entitled to be permitted to reach their decision free from unauthorised interference by any of the organs of State that they, the People, have created by the enactment of the Constitution.”¹⁴

Even though this statement has to be read in its specific context, *viz.*, the spending of money by the Government in order to influence public opinion, one could argue that the idea of a people “free from unauthorised interference” in a process where “the decision is theirs and theirs alone” tends to understate the fact that the Oireachtas has a monopoly in the triggering of the popular expression.

¹⁴ [1995] 2 I.R. 10 at 41-42.

This logic is even more explicit in the judgment of Denham J. (as she was then) where she stated that:

“the Constitution envisaged a government wherein there is a separation of powers between the legislative, executive and judicial organs of government. They operate a system of checks and balances on each other. All three are subject to the Constitution, which recognises that the fundamental power rests in the People. The Constitution envisages a true democracy: the rule of the People. This case is about the constitutional relationship of the People to their government.”¹⁵

It is possible to read in this statement that representation and separation of powers, on the one hand, is radically different from the direct expression of the people, on the other. If the latter is defined as a “true democracy”, the former, *a contrario*, is a limited one.¹⁶ In consequence, the two steps of the amendment process are depicted as disconnected and as having different natures. This disjunctive representation of the relationship between the passing of a bill to amend the Constitution and the referendum process is confirmed by further statements as, for example, in *Hanafin v. Minister for the Environment*,¹⁷ a decision related, as was *McKenna (No 2)*, to the fifteenth amendment of the Constitution, where the same judge reiterated that:

“all powers of government, legislative, executive and judicial derive from the people: Article 6, Constitution of Ireland, 1937. In general, these powers are exercised by, or on the authority of, the said three arms of government. However, on occasion, in a referendum, the people themselves determine national policy, the content of the Constitution, for the common good. It is a basic democratic process.”¹⁸

¹⁵ *Ibid.* at 51.

¹⁶ Hogan J., in the High Court, expressed a similar opinion in *Doherty v. The Referendum Commission and other* [2012] I.E.H.C. 211 at para. 21 where he stated that “the Constitution envisaged a plebiscitary as well as a parliamentary democracy and, in doing so, it has created a State which can demonstrate – in both word and deed – that it is a true democracy worthy of the name.”

¹⁷ [1996] 2 I.R. 321.

¹⁸ *Ibid.* at 400.

This understanding was confirmed and made more explicit in *Coughlan v. Broadcasting Complaints Commission and RTE*,¹⁹ in particular both by Hamilton C.J. and Denham J. The former, after referring to his points in *McKenna*, added that:

“once the Bill has been submitted for the decision of the People, the People were and are entitled to reach their decision in a free and democratic manner.”²⁰

Denham J., while recognising the role of the representatives in the amendment process,²¹ still maintained the difference in nature of the two procedural steps by opposing them when she stated that:

“the referendum process is an important device in a democracy. It is a tool for direct democracy. It is an alternative to the representative government process. It gives people a method of direct democracy on important issues. It is a contrasting system to that of party political representative democracy. It is the people who legislate.

(...)

The presentation of the issue to the public is different to the presentation in an election. The referendum procedure established under the Constitution is an exercise in direct democracy. However, the process commences in the legislature. There the political parties have a key role. There is initial control of the process by the legislature. Thus, the referendum machinery is not a threat to the system of representative democracy. However, once the process leaves the Dáil and Seanad, the institutions of representative democracy, it is a tool of direct democracy and the system should be fair, equal and impartial.”²²

One could argue that viewing constitutional referendums as being matters which are distinct from their parliamentary origin betrays the content of constitutional provisions. In contrast in *Coughlan*, Keane J. offered a representation of the amendment process which was closer to the text of the Constitution. Recognising the crucial role played by the organs of state, he pointed out the decision which had been made in adopting the Constitution in 1937 not to

¹⁹ [2000] 3 I.R. 1.

²⁰ *Ibid.* at 56.

²¹ *Ibid.* at 30.

²² *Ibid.* 30-31.

let the expression of the people through referendum be free from the intervention of the organs of state but, in contrast, that it be conditioned by them and for it to appear as the continuation of this parliamentary expression.²³

One could further argue that the reality of the referendum is that of a process inscribed and defined by the legal system, rather than being an unbound expression of the sovereign. This can be read in certain statements made by Irish judges who nonetheless saw this process as different from the representative, legally-defined, democracy. For example, Hamilton C.J. recognised that the popular expression, as stated in Article 46.2, is conditioned by “the law for the time being in force relating to the Referendum.”²⁴ In the same vein, Denham J. stressed in *Coughlan* a difference between the expression of the people in the General Election and during a referendum amending the Constitution.²⁵ However, this distinction is defined by the Constitution itself and indicates, as also testified to by the reference in Article 46.2, that popular expression is not as free as has been proclaimed but rather that its value derives from the legal system. Making a distinction between the General Election, as tied in with the representative system, and referendums to amend the Constitution is tantamount to what Barrington J. qualified in the same case as an “oversimplification”.²⁶

In the light of the previous points, it is possible to consider what is meant by constitutional referendums as the expression of a “true democracy”. The idea of a government of the people, by the people and for the people receives multiple legal realisations²⁷ and it is difficult to determine its essence.²⁸ By loosening the legal ties between a representative democracy established by the Constitution, on the one hand, and a direct democracy based on the referendum process, on the other, and even introducing an artificial distance from the constitutional text, Irish courts give an almost anarchist image of a popular expression, at least from an etymological point of view, freed from juridical constraints, existing as a pure political fact.²⁹ If the position of the Supreme Court can be deemed to protect democracy,³⁰ it rests on a

²³ *Ibid.* at 54. Even if expressed less explicitly, Barrington J. made a similar comment, see *ibid.* at 43.

²⁴ See *McKenna v. An Taoiseach (No 2)* [1995] 2 I.R. 10 at 33.

²⁵ [2000] 3 I.R. 1 at 30-31.

²⁶ *Ibid.* at 42-43.

²⁷ For example, democracy is by nature a concept inclined to “conceptual stretching” as advanced by G. Sartori in “Concept Misformation in Comparative Politics” (1970) 64 *The American Political Science Review* 1033-1053.

²⁸ On this point, Barrett argues that the Supreme Court offers a vision of democracy which is disconnected from its legal reality in the text of the Constitution and is “unsupported (...) by reference to any theory of democracy” to conclude that “what one is left with is a highly contestable model of democracy constructed on the flimsiest of foundations by the Supreme Court”, G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence”, *op. cit.*, at fn. 12 above, at 63.

²⁹ On this impossibility of equating referendum and direct democracy due to the participation of the organs of state in the process, see for example F. Hamon, “Vox imperatoris, vox populi ? Réflexions sur la place du referendum

conception of the expression of the people that is disconnected from its legal formation. In this context, the “true democracy” referred to seems to consist of considering each successive referendum as a renewal of a genuine and spontaneous expression of the sovereign. In conclusion, rather than being an analysis based on strictly legal elements, one could argue that the depiction offered by Irish courts of the people’s expression in a constitutional referendum is that of a concrete political entity.³¹ Read in this light, it appears that Irish Courts, in interpreting the legal provisions regarding the relationship between domestic and European legal orders, are willing to take into account the political context of these provisions.

The importance of political considerations for the interpretation of the Constitution insofar as concerns European law is noticeable in *Crotty* itself,³² a decision which led the Irish Government to have recourse to referendums in order to amend the Constitution for every step of the process of European integration. As has been seen,³³ the *Crotty* decision is composed of two parts, the first one dealing with what is now European Union law and the second part focused on Title III of the Single European Act which, even though it was concluded between member states of the European Communities (as they were then), was a distinct international agreement. Nonetheless, despite this formal difference, it can be argued that the Supreme Court considered the two issues under the same political perspective and that both parts of the decision were concerned with determining the extent of Irish participation in the process of European integration.³⁴

This political dimension of the relationship between the domestic and European legal orders was also noticeable in the subsequent applications of the principles enunciated in *Crotty*, notably in the recent decision of the Supreme Court in *Pringle* in relation to the Treaty establishing the European Stability Mechanism, *Pringle v. The Government of Ireland and others*.³⁵ As with Title III of the Single European Act, this Treaty, while not being formally part

dans un État de droit” in *L’État de droit : Mélanges en l’honneur de Guy Braibant* (Paris: Dalloz, 1996) 389-402 at 391.

³⁰ See for example, B. O’Neill, “The Referendum Process in Ireland” (2000) 35 *Irish Jurist* 305-344, in particular at 343-344.

³¹ For a similar argument stressing the judicial activism of Irish courts leading towards a disjunctive reading of representative democracy and referendums to the benefit of a political understanding of the latter, see for example G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence”, *op. cit.*, at fn. 12 above, in particular at 52-54.

³² *Crotty v. An Taoiseach* [1987] I.R. 713.

³³ On these points, see *supra* at 193-198.

³⁴ Notably, for the majority, Henchy J. took the view that “Title III of the SEA is the threshold leading from what has hitherto been essentially an economic Community to what will now also be a political Community”, *ibid.* at 786.

³⁵ [2012] I.E.S.C. 47.

of European Union law, binds member states of the European Union. *Pringle* involved questions of European Union law, in particular that of the validity of Council Decision 2011/199/EU³⁶ and of the Treaty itself for which the Supreme Court made a preliminary reference to the European Court of Justice.³⁷ However, the case also concerned issues of constitutional law and, in particular, whether the ratification of this Treaty would be tantamount to an unconstitutional transfer of sovereignty, a matter having to be tested according to the principle laid down in *Crotty*. For all of the judges the principle in *Crotty* was contained in the opinion of Walsh J. according to which “the essential nature of sovereignty is the right to say yes or to say no.”³⁸ However, they also made clear that the *ratio* in *Crotty* could not be defined by this one sentence being taken out of the context of the whole decision.³⁹

For the majority, “the words ‘abdicate’, ‘alienate’, ‘subordinate’ and indeed also ‘transfer’ contain the essence of what was considered impermissible in *Crotty*.”⁴⁰ The majority decided on this basis that the ratification of the Treaty establishing the European Stability Mechanism did not require amending the Constitution. Denham C.J. took the view that the ratification of the Treaty did not involve a transfer of sovereignty.⁴¹ In particular, she drew a distinction between determining policy and implementing policy, noticing that the situations where Ireland could be outvoted concerned only the latter.⁴² O’Donnell and McKechnie JJ. also concluded that the ratification of the Treaty establishing the European Stability Mechanism did not involve a transfer of sovereignty. To do so, they distinguished the unspecified scope of the

³⁶ European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro. [2011] O.J. L 91/1

³⁷ Case C-370/12 *Pringle v. Government of Ireland and others* (unreported). The judgment of the European Court of Justice having been delivered on 27 November 2012, the analysis of the European Union law aspects of this case could not be included in this thesis.

³⁸ [1987] I.R. 713 at 781, a similar definition was given by Finlay C.J., *ibid.* at 769. For the references made by the judges to this opinion, see [2012] I.E.S.C. 47 *per* Denham C.J., Hardiman, O’Donnell, McKechnie and Clarke JJ. respectively at para. 14. Xv, 55, 3, 7 and 4.8.

³⁹ On this point, see for example, [2012] I.E.S.C. 47 *per* Hardiman, O’Donnell and McKechnie JJ. respectively at para. 62, 4 and 7.

⁴⁰ *Ibid.* *per* O’Donnell J. at para. 10. For similar understanding of *Crotty* by the judges forming part of the majority, see *ibid.* *per* Denham C.J., McKechnie and Clarke JJ. respectively at para. 15, 5 and 4.24.

⁴¹ *Ibid.* at para. 17. xii.

⁴² *Ibid.* at para. 17. ix. Clarke J. made a similar argument, see *ibid.* at para. 5.4 or 5.9, concluding at para. 5.14 and 5.15 that “it is clear that the Government of Ireland, through the Minister for Finance as a governor of the ESM, would, in almost all circumstances, retain the right to say no and, in any event, Dáil Éireann, in all circumstances, retains the right to say no. (...) There are many circumstances in which both the Government and the Oireachtas may come under significant practical political pressure, either domestically or internationally, to adopt certain measures. That is the way of the world. However, the architecture of the Irish Constitution is concerned with where the final decision lies.” However, Clarke J. also pointed that the question of unanimity was not determinative since, on the basis of the first part of the decision in *Crotty*, the shift from unanimity to qualified majority voting did not necessarily involve a transfer of sovereignty, see *ibid.* at 4.13. O’Donnell J. made a similar point, see *ibid.* at para. 9.

Title III of the Single European Act pointing from the detailed area and provisions of the new Treaty.⁴³

However, Hardiman J. dissented from the judges forming part of the majority, arguing that they offered an incomplete view of the *ratio* in *Crotty*.⁴⁴ For him, *Crotty* not only affirmed that transfers of sovereignty were unconstitutional but also specified the modalities in consequence of which such unconstitutional transfers would be deemed to have occurred. To come to this conclusion, he relied primarily on the judgments of Henchy and Hederman JJ. in *Crotty*. First, he took the view that the question of the unconstitutional transfers of sovereignty did not only raised a substantive issue but also a procedural one.⁴⁵ While Title III of the Single European Act did not impose any substantive obligation on Ireland,⁴⁶ its ratification required a constitutional amendment since “the State's organs cannot contract to exercise in a particular procedure their policy-making roles or in any way to fetter powers bestowed unfettered by the Constitution.”⁴⁷

Secondly, Hardiman J. insisted on the importance of the notion of perspective in the judgment of Henchy J. in *Crotty*. In particular, he referred⁴⁸ to the statements of Henchy J. pointing out that “a purely national approach to foreign policy is incompatible with accession to this Treaty”⁴⁹ and that “in regard to Ireland, while under the Constitution the point of reference for the determination of a final position on any issue of foreign relations is the common good of the Irish people, under Title III the point of reference is required to be the common position determined by Member States.”⁵⁰ On the basis of this understanding of *Crotty*, Hardiman J. held that the exercise of the powers of the state according to the procedure of the Treaty establishing the European Stability Mechanism⁵¹ as well as upholding the interest of the member states, rather than the common good of the Irish people,⁵² as the “point of reference”

⁴³ See *ibid. per* O'Donnell and McKechnie JJ. respectively at para. 19-20 and 12-14. Clarke J. also raised a similar argument, see *ibid.* at para. 8.14.

⁴⁴ See, for example, *ibid.* at para. 93.

⁴⁵ See, for example, *ibid.* at para. 96.

⁴⁶ On this point, leading Hardiman J. to conclude that Mr Pringle's “position is stronger than that of the successful plaintiff in *Crotty* because the transfer of sovereignty is much more immediate, specific and sharply defined, and less aspirational, procedural or preliminary”, see *ibid.* at para. 41. He made a similar point at para. 46 noting that “what was under consideration in *Crotty* was not a binding agreement to take a particular course of action”.

⁴⁷ [1987] I.R. 713 at 794 *per* Hederman J. In the same way, Walsh J. argued that “this freedom does not carry with it the power to abdicate that freedom or to enter into binding agreements with other States to exercise that power in a particular way or to refrain from exercising it save by particular procedures, and so to bind the State in its freedom of action in its foreign policy”, *ibid.* at 783. This point is raised by Hardiman J. for example at [2012] I.E.S.C. 47 at para. 62 and 184.

⁴⁸ On these points, see for example [2012] I.E.S.C. 47 at para. 70.

⁴⁹ [1987] I.R. 713 at 786.

⁵⁰ *Ibid.* at 787.

⁵¹ See for example, [2012] I.E.S.C. 47 at para. 184.

⁵² *Ibid.* for example at para. 116 or 186.

of the new financial mechanism, constituted infringements of the principles laid down in *Crotty*. In consequence, the ratification of the new Treaty could not be effected without a constitutional amendment authorising this transfer of sovereignty.⁵³

To some extent, the decision of the majority refusing an injunction restraining the ratification of the Treaty establishing the European Stability Mechanism supports the argument of Hardiman J. insofar as concerns the “point of reference” of the new mechanism. In order to justify their refusal, the judges argued that joining the European Stability Mechanism was in the Irish interest but also in the interests of other member states part to this Treaty.⁵⁴ In consequence, it seems possible to consider that an obvious distinction between Title III of the Single European Union Act and the Treaty establishing the European Stability Mechanism on the basis that the former required the definition of a common position between the states which is absent from the latter is questionable.⁵⁵ In conclusion, while the same principles are at play in *Crotty* and in *Pringle*, their application is different. Aside from the question of neutrality which can be regarded as forming part of Irish constitutional identity, it seems that the difference of outcomes can be explained by other political factors. In *Crotty*, the Supreme Court developed a very cautious approach to the process of European integration where Irish sovereignty is opposed to the development of the European legal order. What can be seen in *Pringle* is the ineluctable participation of Ireland in European integration. In consequence, Irish sovereignty is not so much transferred as exercised in the common framework and in relation to other member states.⁵⁶ It is this new political dimension of the Irish position in what is now the European Union which can explain the divergent applications of the same principle in the two decisions.⁵⁷

It is also this politically contextualised reading of the Constitution that throws light on the paradigm used by Irish courts in their appraisal of the legitimate balance to be reached between the protection of Irish identity and the primacy of European Union secondary law. In *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*,⁵⁸ Walsh J. states the

⁵³ *Ibid.* at para. 198.

⁵⁴ See *ibid. per* Denham C.J., O'Donnell and Clarke JJ. respectively at para. 20, 42 and 9.14. O'Donnell J. also made this comment in analysing the position of Henchy J. in *Crotty* in his first part of his judgment dealing with the constitutionality of the ratification of the Treaty establishing the European Stability Mechanism, see *ibid.* at para. 25.

⁵⁵ For this distinction, see *ibid. per* Denham C.J. and McKechnie J. respectively at para. 17. ii-17. iii and 11-13.

⁵⁶ On the ratification of the Treaty establishing the European Stability Mechanism as the exercise of Irish sovereignty, see *ibid. per* Denham C.J., O'Donnell, McKechnie and Clarke JJ. respectively at para. 17. xii, 20, 18 and 8.13.

⁵⁷ For further development on this point, see *infra* at 331-332 and 459-460.

⁵⁸ [1989] I.R. 753.

possible opposition to the primacy principle in the name of constitutional values in the following terms:

“it has been sought to be argued in the present case that the effect of the amendment of Article 29 of the Constitution, which was necessary to permit our adhesion to the treaties of the European Communities, is to qualify all rights including fundamental rights guaranteed by the Constitution. The 8th Amendment of the Constitution is subsequent in time, by several years, to the amendment of Article 29. That fact may give rise to the consideration of the question of whether or not the 8th Amendment itself qualifies the amendment to Article 29.”⁵⁹

It is interesting to note that, in Walsh J.’s interpretation of the Constitution, the notion of amendments is favoured over a consideration of the norms at stake in terms of textual provisions. The consequence of this is the chronological perspective from which the relationship between the right to life of the unborn and the primacy principle is considered. What is to be read in this decision is thus the possible application of the principle according to which *lex posterior derogat legi priori*, a point that Walsh J. had explicitly made in an extra-judicial context by stating that:

“in view of the fact that the “anti-abortion” amendment of the Constitution was enacted many years after Ireland joined the European Communities the question of the effect of an “acte postérieur” in the field of fundamental rights may fall to be considered”⁶⁰

Usually used in cases of legislative conflicts, this interpretative principle enables courts to decide which of two different acts from a formal point of view has to prevail. However, with constitutional amendments being incorporated in the text of the Constitution, it can be argued that they do not constitute autonomous legal acts but are formally part of the same norm. In consequence, one could conclude that the reasoning of Walsh J. tends to minimise this strict formal legal analysis. By refusing to consider Articles 29 and 40.3.3° as different provisions of a single norm, the very process of constitutional amendment as strictly legally conceived is

⁵⁹ *Ibid.* at 768.

⁶⁰ B. Walsh, “Reflections on the Effects of Membership of the European Communities in Irish Law” in F. Capotorti, C.-D. Ehlermann, J. Frowein and *al.* (eds.), *Du droit international au droit de l’intégration : Liber Amicorum Pierre Pescatore* (Baden-Baden: Nomos Verlag, 1987) 805-820 at 820.

superseded by an analysis of the referendum process as the narrative of popular expressions of the Irish people defined as a sovereign political entity whose existence lies outside the constitutional framework.

In the same vein, when the issue of implementing European instruments came to the fore, the reasoning of Irish courts arguably leaned towards an interpretation of the Constitution informed by political factors. Before the Supreme Court settled the issue decisively in *Meagher v. Minister for Agriculture*,⁶¹ Curtin had already considered the constitutionality of the ministerial power to implement European directives through statutory instruments.⁶² She advocated a broad conception of this power due to political constraints, mainly the number of European instruments and the time-limit for their implementation.⁶³ It was therefore on the basis of political expediency that such a power being granted to ministers was justified.⁶⁴ In other words, rather than considering the constitutional validity of the mechanism designed, it was the appropriateness of the result achieved which determined and justified, in her view, the validity of Section 3 of the European Communities Acts.

When Irish courts had to decide the extent of the possibility of resorting to statutory instruments in order to implement directives with regard to the legislative power of the Oireachtas as defined in Article 15.2.1° of the Constitution, it is noticeable that, again, the main concern was focused on the same factual and political elements.⁶⁵ In consequence, the tests used by courts to interpret the “necessitated” clause contained in what is now Article 29.4.6°, defined either as issues of “consequence upon membership”,⁶⁶ “reasonableness”⁶⁷ (as regards the content of the European obligations to be implemented) or in terms of “appropriateness”⁶⁸ (as regards the form of the domestic law instrument of implementation) reflect this political logic⁶⁹ rather than normative considerations.⁷⁰ In contrast, it should be stressed that the expression

⁶¹ [1994] 1 I.R. 329.

⁶² See D. Curtin, “Some Reflections on European Community Law in Ireland” (1989) 11 *Dublin University Law Journal* 207-229.

⁶³ *Ibid.* at 211-213.

⁶⁴ For a recent expression of a similar opinion, see G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution” (2012) 48 *Irish Jurist* 132-172 at 147.

⁶⁵ See for example the opinion of Finlay C.J in *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 at 352 where the opinion of Curtin is echoed.

⁶⁶ *Lawlor v. Minister for Agriculture* [1990] 1 I.R. 356 at 377.

⁶⁷ *Condon v. Minister for Agriculture* (1993) 2 *I.J.E.L.* 151 at 156.

⁶⁸ *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 at 352 and 360.

⁶⁹ Travers stressed the “practicality argument”, rather than the legal one, that guided the Supreme Court in *Meagher*; see for example N. Travers, “The implementation of directives into Irish law” (1995) 20 *European Law Review* 103-110 at 108-109.

⁷⁰ For a similar opinion as to the substitution of a legal logic by a political one in the assessment of the relationship between constitutional constraints and European Union law, see for example G. W. Hogan, “The implementation

“consequent upon membership” had been substituted by the term “necessitated” in the original draft of what is now Article 29.4.6° in order to circumscribe the immunity granted by this provision into a legal framework rather than the broad and political one the former wording implied.⁷¹

*Meagher v. Minister for Agriculture*⁷² initiated the introduction of the “principles and policies” test to interpret the “necessitated” clause. This test was later applied in *Maher v. Minister for Agriculture*⁷³ to the interpretation of Article 15.2.1° of the Irish Constitution (a provisions regarding the legislative power of the Oireachtas) which is considered as the new basis, instead of the immunity clause, to appreciate the validity of the statutory instruments implementing European rules in the Irish legal order. This evolution is often considered as an interpretation of the relationship between constitutional constraints and the primacy of European Union law which is more focused on formal domestic concerns than previous interpretation of what is now Article 26.4.6° of the Constitution.⁷⁴ Nonetheless, the inclination to give a political reading of the Constitution is not absent for all that. For example, in the former decision, Denham J., in order to justify the validity of the statutory instrument, suggested that “the role of the Oireachtas in such a situation [viz., in the implementation of European directives] would be sterile”.⁷⁵ One could argue that her concern rested more with the political merit of the Oireachtas’ powers than with the powers themselves. Similarly, in *Maher*, in order to conclude that the statutory instrument satisfied the “principles and policies” test, Fennelly J. took the view that “the State is acting as delegate of the Community in making the choice to separate land and milk quota.”⁷⁶ By focusing on the political role of member states in the European structure, the judge reduced the legal consideration of the actual European obligations and the concomitant leeway left to Ireland.

The notion of constitutional identity is directly linked to the question of the balance between permanence and changes through time.⁷⁷ In his analysis of the recent use of the notion

of European Union law in Ireland: the *Meagher* case and the democratic deficit” (1994) 2 *Irish Journal of European Law* 190-202 at 193 or A. Whelan, “Constitutional Law - *Meagher v. Minister for Agriculture*” (1993) 15 *Dublin University Law Journal* 152-173 at 162-163.

⁷¹ See, for example, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary* (London: Sweet & Maxwell, 1995) at 31.

⁷² [1994] 1 I.R. 329.

⁷³ [2001] 2 I.R. 139.

⁷⁴ See *supra* at 206-214.

⁷⁵ [1994] 1 I.R. 329 at 367.

⁷⁶ [2001] 2 I.R. 139 at 257-258.

⁷⁷ As has been seen, the idea of identity does not necessarily consist of an essentialist definition based in the permanence of immutable features. Conceived as selfhood rather than sameness, it rather corresponds to the

of identity by French and German constitutional courts, Reestman introduces a distinction which answers to the same logic, differentiating diachronic from synchronic identities by stating that:

“in this definition two dominant meanings need to be distinguished. In the first, the so-called diachronic meaning, identity means ‘permanence through time’ or ‘continuity’. In the second, the so-called synchronic meaning, identity means ‘separate and autonomous individuality’.”⁷⁸

One of the criteria used by Reestman to distinguish the type of identity referred to is the place accorded by courts to politics.⁷⁹ With this in mind, one may consider the link between (a) how we conceive the nature of popular expression in constitutional referendums and (b) the fact that the right to life of the unborn can arguably be regarded as forming part of Irish identity in the face of the primacy principle.⁸⁰ As has been seen, the argument made by Walsh J. in *Grogan*⁸¹ relied on a chronological appraisal of constitutional amendments whereby the eighth amendment (relating to the right of life of the unborn) could qualify the third amendment (dedicated to the participation in what is now the European Union).⁸² From this perspective, upholding the eighth amendment consists of legally enforcing the most genuine statement of the Irish people about themselves. When read in parallel with an understanding of the Irish sovereign as having a concrete existence which is merely reflected in the Constitution,⁸³ this judicial opinion depicts a sovereign being able to shape and change this instrument - and the values it contains - from outside the legal realm. In this sense, it can be said that Ireland opposes the primacy of European Union law on the basis of a synchronic identity.

In conclusion, the approach to European Union law displayed by Irish courts, rather than a constitutional interpretation focused on strictly legal considerations, seems to find its

ability to define oneself and thus to decide to continue or to alter traits established in the past. For further considerations on this point, see *supra* at 9-10.

⁷⁸ J.-H. Reestman, “The Franco-German Constitutional Divide: Reflections on National and Constitutional Identity”, *op. cit.*, at fn. 5 above, at 377.

⁷⁹ *Ibid.* at 388-389.

⁸⁰ See *supra* at 265-269.

⁸¹ *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan* [1989] I.R. 753.

⁸² *Ibid.* at 768.

⁸³ See *supra* at 155-166.

roots in the political context influencing their decision as to the legitimate balance between constitutional values and the primacy principle. Travers, commenting on *Meagher* and agreeing with Curtin, mentioned that:

“Professor Curtin was doubtlessly correct when, a number of years before *Meagher*, she pointed out that, if Irish law required the transposition of all Community directives by way of legislation, Ireland would almost systematically find itself in breach of its obligations under Articles 5 and 189 E.C. due to the sluggishness and limited annual legislative output of the Oireachtas. There would appear to be little doubt that this view, rather than the more purist position taken by those opposed to the use of European Communities Act, (...) has ultimately found favour with the Supreme Court.”⁸⁴

If one takes the view that the “more purist position” is the one relying on legal arguments,⁸⁵ one could argue that, considering the political and juridical natures of the Constitution, the former element receive a particular importance in the case-law of Irish court. In consequence, in the balancing between constitutional provisions related to European law and other constitutional principles, the will of the Irish people understood as the expression of a political fact often takes precedence over purely legal arguments, either to implement a generous reception of the European obligations in the domestic legal order or to oppose the doctrine of primacy on the ground of a synchronic constitutional identity.

⁸⁴ N. Travers, “Community Directives: Effects, Efficiency, Justiciability” (1998) 7 *Irish Journal of European Law* 165-230 at 173.

⁸⁵ The authors Travers refers to advocate a legal analysis to justify their criticism of the Supreme Court decision, see for example G. W. Hogan, “The implementation of European Union law in Ireland: the *Meagher* case and the democratic deficit”, *op. cit.*, at fn. 73 above, at 193 or A. Whelan, “Constitutional Law - *Meagher v. Minister for Agriculture*”, *op. cit.*, at fn. 73 above, at 162-164.

2. *The Lesser Importance Attached to Political Considerations in Determining the Relationship between French Constitutional Norms and the Requirements of European Union Law*

In comparison with Ireland, where a concrete vision of the Irish people as sovereign prevails, the French legal system and culture have always favoured an abstract conception of the authority to which the Constitution is imputed. In consequence, the kinds of strategies deployed by Irish courts in defence of Irish constitutional identity in the face of the primacy of European Union law are, in the main, ignored in the case-law of French courts and in particular in that of the *Conseil constitutionnel*. Indeed, in contrast, a judicial desire to avoid the political route in the determination of the normative relationship between the domestic and European legal orders is noticeable. What follows is aimed at bringing this absence to light. Or, to put matters in different words, it is proposed to consider in comparison with the Irish approach how both the text of the French Constitution and its application by domestic courts depart from a politically informed reading.

First, the text of the French Constitution conditions popular participation in the process of amending the Constitution differently. As in Ireland, the revision of the French supreme norm involves two stages. In a similar fashion, the first of these two stages is in the hands of representatives. It is only in the second phase that the citizens may intervene through the referendum process. As provided for by Article 89 of the Constitution:

“the *Président de la République*, on the recommendation of the *Premier ministre*, and Members of Parliament alike shall have the right to initiate amendments to the Constitution.

A Government or a Private Member’s Bill to amend the Constitution must be considered within the time limits set down in the third paragraph of article 42 and be passed by the two Houses in identical terms. The amendment shall take effect after approval by referendum.

However, a Government Bill to amend the Constitution shall not be submitted to referendum where the *Président de la République* decides to submit it to Parliament convened in Congress; the Government Bill to amend the Constitution shall then be

approved only if it is passed by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the *Assemblée nationale*.”

In contrast to the constitutional position in Ireland, the two stages of the amendment process render a collision between representative democracy ,on the one hand, and direct democracy, on the other, more difficult. The French provision does not distinguish to the same extent as does Article 46 of the Irish Constitution the two stages of the amendment process according to these two forms of democracy. In contrast, it could be argued that the possibility of having recourse, instead of a referendum, to the Parliament convened in Congress in order to complete the second stage (and thus of the effecting an amendment *via* the representatives only), a choice which is left to an organ of the state, tends to emphasise the continuity between representative and direct democracy, and the entwined nature of these two forms of regime in the overall process.⁸⁶ If the text of Article 89 seems to suggest that the decision of the *Président de la République* to take the parliamentary route to amend the Constitution is exceptional, with recourse to a referendum being the norm, the practice of the Fifth Republic indicates that the reverse is the case. Since 1958, the fabric of French Constitution has been retouched twenty-two times but only once, on 24 September 2000 (when the presidential mandate was reduced from seven to five years⁸⁷), did the citizens intervene through referendum on the basis of Article 89.⁸⁸

In consequence, the model offered by the French Constitution can hardly justify a distinction being drawn as to the nature of the expression of the constituent powers according to whether the amendment process is carried out by the organs of states or the citizens. In other words, due the abstract nature of the French sovereign, amending the Constitution is always tantamount to the exercise of a legal power. A referendum is not considered as a more genuine expression of the sovereign and the people’s participation is, to a certain extent, only the intervention of a different representative.⁸⁹ The European context is a good example of this lack of distinction between representative and direct democracy, even though it does not concern directly the constituent power. Nonetheless, while the French citizens refused by referendum to

⁸⁶ In this sense, see F. Hamon, “Vox imperatoris, vox populi ? Réflexions sur la place du referendum dans un État de droit”, *op. cit.*, at fn. 32 above, at 394-396.

⁸⁷ Constitutional Act n° 2000-64 of 2 October 2000 pertaining to the term of office of the *Président de la République*.

⁸⁸ However, the Constitution was also modified *via* referendums on the basis of Article 11 of the Constitution. For further developments on this point, see *infra* at 292-294.

⁸⁹ For a similar argument, see E. Sur, *Contribution à une théorie juridique de la souveraineté nationale* (Villeneuve d’Ascq: Presses universitaires du Septentrion, 2000), in particular at 410-415.

ratify the Treaty establishing a Constitution for Europe, the ratification of the very similar was done by the Parliament without this involving any difficulty from a legal point of view.⁹⁰

Unlike the Irish model, amending the Constitution does not escape the constitutional boundaries themselves. The expression of the citizens *via* referendums cannot be conceived as being free from legal constraints.⁹¹ In this sense, the equal value of the two routes designed by Article 89 is congruent with Article 3 which affirms that “national sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum.” The people is not so much the sovereign as the owner of national sovereignty. It is thus legally empowered by the Constitution. Under this logic, sovereignty is equally exercised either by the representatives or by referendums.⁹²

Article 11 could however present an exception to this framework. As it stands now, it provides that:

“the *Président de la République* may, on a recommendation from the Government when Parliament is in session, or on a joint motion of the two Houses, published in the *Journal Officiel*, submit to a referendum any Government Bill which deals with the organisation of the public authorities, or with reforms relating to the economic, social or environmental policy of the Nation, and to the public services contributing thereto, or which provides for authorisation to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions.”

Designed to be applied to legislative instruments, the use of this Article led to two attempts to revise the Constitution. The first of these was successful while the second one failed to receive the people’s approval.⁹³ De Gaulle first used it this provision 1962 in order to establish the election of the *Président de la République* by direct universal suffrage when the

⁹⁰ For further considerations on this point, see *supra* at 173-74.

⁹¹ It seems to be the conclusion reached by Luchaire when he affirms, stressing the relationship between the representative and direct stages of the referendum process, that “the people is not the master of the referendum since it can only have recourse to it on the will of the *Président de la République*”, F. Luchaire, “Un concept inutile : « la souveraineté »” in *Renouveau du droit constitutionnel : Mélanges en l’honneur de Louis Favoreu* (Paris: Dalloz, 2007) 789-793 at 789 (translation by the author).

⁹² On this interpretation of Article 3 of the Constitution, see M. Troper, *La théorie du droit, le droit, l’État* (Paris: Presses universitaires de France, coll. Léviathan, 2001) at 310.

⁹³ The amendment relative to the election of the *Président de la République* by direct universal suffrage of 6 November 1962 (Act n° 62-1292 of 6 November 1962 pertaining to the election of the *Président de la République* by direct universal suffrage, J.O.R.F. p. 10762) and the proposal relative to a reform of the *Sénat* and the creation of regions defeated on 27 April 1969 were carried out on the basis of Article 11 of the Constitution.

opposition of the Parliament prevented recourse to Article 89. The purpose of this reform as well as the method of implementing it corresponded to the willingness to free the Executive from the Parliament by giving it a democratic foundation on its own as de Gaulle hinted at in his Discourse of Bayeux of 1946, which set the main features of what was to become the Fifth Republic.⁹⁴ He made the point even clearer on 8 June 1962 when he declared that:

“the direct agreement between the people and the one who is responsible for leading it has become, in our modern times, essential for the Republic. We will have, at the right time, to ensure that, in the future and beyond the coming and going of men, the Republic can remain strong and permanent.”⁹⁵

Although this choice to use Article 11 was mainly explained by reasons of practical convenience (one being that the resort to Article 89 was doomed to fail⁹⁶), other justifications were also suggested. Among them, was the argument that, the people being sovereign, it was not bound by any procedural requirement.⁹⁷ In this sense, the people would be defined, as in the Irish instance, as a political fact.⁹⁸

However, in contrasting Irish and French approaches, and the respective importance they give to political elements in the interpretation of constitutional provisions, it does not seem this reading of Article 11 is representative of the French tradition. It can even be argued that it constitutes an exception and illustrates that some legal phenomena escape the hold of legal science due to the specific context in which they take place. The question of whether the Constitution can be amended through Article 11 or if it constitutes part of a so-called “permanent coup d’État”⁹⁹ may not be capable of being answered one way or the other.¹⁰⁰ Article 11 was sought to be used a second time to revise the Constitution in 1969 when an attempt was made to transform the Senate and to modify the regional organisation of France. De Gaulle’s

⁹⁴ C. de Gaulle, “Discours de Bayeux, 16 juin 1946”, available at <<http://www.charles-de-gaulle.org/pages/espace-pedagogique/le-point-sur/les-textes-a-connaître/discours-de-bayeux-16-juin-1946.php>> [Last accessed 29 December 2012].

⁹⁵ Quoted in D. G. Lavroff, *Le droit constitutionnel de la V^e République* (Second edition, Paris: Dalloz, 1997) at 416 (translation by the author).

⁹⁶ See for example, P. Pactet, *Institutions politiques, droit constitutionnel* (Sixteenth edition, Paris: Armand Colin, 1997) at 511-512.

⁹⁷ See for example, F. Hamon and M. Troper, *Droit constitutionnel* (Thirty-second edition, Paris: Librairie Générale de Droit et de Jurisprudence, 2011) at 495.

⁹⁸ See *supra* at 155-166.

⁹⁹ As described by F. Mitterrand (translation by the author).

¹⁰⁰ See F. Hamon and M. Troper, *Droit constitutionnel, op. cit.*, at fn. 100 above, at 495.

inability to rally the majority of the voters to his proposition led to his resignation and, has up to the present time, ended the use of Article 11 as a device for constitutional amendments.

One could therefore argue that, insofar as the use of Article 11 involves a conception of popular expression through referendum equivalent to that employed in Ireland, recourse to this constitutional provision for the purpose of amending the Constitution remains aberrant. Consequently and in contrast to Ireland, balancing between constitutional provisions according to the timing of their introduction is an interpretative approach absent from the reasoning of French courts.¹⁰¹

The question of the relevance of this chronological perspective was not, however, deprived of any relevance as a result of the patchwork design of the set of French norms of constitutional rank, known as the *bloc de constitutionnalité*.¹⁰² In a sense, determining the extent of constitutional provisions is like peeling an onion in the layers of French history. It was decided in 1971 by the French constitutional court, in the *Freedom of association* decision,¹⁰³ that the Preamble of the Constitution of 1958 had a normative nature. The Preamble of 1958 first refers to the Declaration of Human and Civic rights of 1789. It also refers to the Preamble of the Fourth Republic where the French people “solemnly reaffirms the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged in the laws of the Republic” but also “proclaims, as being especially necessary to our times, [a list of] political, economic and social principles”. The question of how to solve the conflicts between these two sets of human rights, the former being inspired by liberalism while the latter finds its roots in collectivism,¹⁰⁴ soon arose. In particular, it was argued that, since the rights proclaimed in 1946 were subsequent in time, they constituted a fresher expression of the French sovereign and qualified the tradition inherited from the Revolution.¹⁰⁵ At first sight, the decision of the *Conseil constitutionnel* of 16 January 1982 appeared to deny this interpretation and, in contrast, offered a reversed image of the hierarchy between the two sets of rights.¹⁰⁶ Maintaining a chronological analysis, the French constitutional

¹⁰¹ On this chronological stance characteristic of the Irish approach to constitutional interpretation, in particular in the European context, see *supra* at 284-286.

¹⁰² On the question of norms constituting the *bloc de constitutionnalité*, see also *supra* at 111-112.

¹⁰³ CC, decision n° 71-44 DC on the *Act complementing the provisions of Articles 5 and 7 of the Act of 1 July 1971 pertaining to the contract of association* of 16 July 1971, *Rec.* 29.

¹⁰⁴ See for example, D. Rousseau, *Droit du contentieux constitutionnel* (Sixth edition, Paris: Montchrestien, 2001) at 121-122.

¹⁰⁵ *Ibid.* at 124.

¹⁰⁶ CC, decision n° 81-132 DC on the *Act of nationalisation* of 16 January 1982, *Rec.* 18.

court took the view that the Declaration of 1789 has “full constitutional value”¹⁰⁷ while the principles of 1946 “merely tend to supplement these”, notably on the basis that the principles included in the Declaration of 1789 were reaffirmed both in 1946 and in 1958.¹⁰⁸ The latter human rights had therefore a corollary and secondary value. Nonetheless, this interpretation has to be understood as a criticism of the opinion of *Conseil constitutionnel* where it was argued that due to their subsequent status in time the “principles especially necessary to our time” should prevail in case of conflict. In its subsequent decisions, the French constitutional court discarded the idea of a chronological relationship between conflicting human rights.¹⁰⁹

Of course, if a chronological interpretation of the Constitution is to be maintained, it could be argued that the legal validity of the Declaration of Human and Civic Rights of 1789 as well as those proclaimed in 1946 depend on their presence in the Preamble of 1958 and that therefore they are concomitant in time and, as such, any potential conflict between them is impossible to resolve on a chronological basis. Such is not the case for the Charter for the Environment which was included in the Preamble of the Constitution in 2004. However, the chronological criterion is absent from the case-law of the *Conseil constitutionnel* and the time when new provisions supplemented the constitutional fabric is irrelevant in settling conflicts occurring in this Harlequin’s dress.¹¹⁰ When compared to its Irish counterpart, the *Conseil constitutionnel* upholds a formal unity which depends on the fact that the different provisions are contained in the same legal text.¹¹¹ As regards the question of whether a chronological hierarchy exists between constitutional provisions, one can therefore extend what Genevois expresses about their material relationship when he states that:

“by making the different constitutional principles guaranteeing fundamental rights dependent on a same source, it is possible to declare that there is no material hierarchy between these principles.”¹¹²

¹⁰⁷ *Ibid.* at para. 16.

¹⁰⁸ *Ibid.* at para. 15.

¹⁰⁹ On this point, see for example, D. Rousseau, *Droit du contentieux constitutionnel*, *op. cit.*, at fn. 107 above, at 125-127.

¹¹⁰ See for example, G. Drago, *Contentieux constitutionnel français* (Third edition, Paris: Presses universitaires de France, coll. Thémis, 2011) at 272-277.

¹¹¹ In this sense, see F. Hamon and M. Troper, *Droit constitutionnel*, *op. cit.*, at fn. 100 above, at 841-842.

¹¹² B. Genevois, “Normes de références du contrôle de constitutionnalité et respect de la hiérarchie en leur sein” in *L’État de droit : Mélanges en l’honneur de Guy Braibant* (Paris: Dalloz, 1996) 323-340 at 336 (translation by the author).

This conclusion is also applicable to the relationship between French and European norms, or to be formally more precise, between Article 88-1 of the Constitution - which is the constitutional foundation of the recognition of the primacy principle in the French legal order¹¹³ - and other potential conflicting provisions of the Constitution. Either where the limit put on the doctrine of primacy was expressed as an “express conflicting provision of the Constitution”¹¹⁴ or where the *Conseil constitutionnel* has finally formulated this limit in terms of constitutional identity,¹¹⁵ the consequences attached to Article 88-1 have never been determined by reference to a narrative of the origins of the constitutional text. As Magnon put it:

“according to the chronological criterion, the express constitutional provision could only prevail against Article 88-1 if it was subsequent to 1992, which is not in accordance with the position of the *Conseil constitutionnel*.”¹¹⁶

Enclosing the sovereign expression in the formal unity and oneness of the Constitution rather than presenting the supreme norm as a stratification where each layer comes from outside the legal realm, it can be argued that French courts, in the balancing process constitutive of that member state’s identity, use different scales to their Irish counterparts. In other words, it is a different form of identity which receives an actual protection in the French system. It is always through, rather than upon, the constitutional text that the expression of the people is assessed. In other words, the sovereign is not as in Ireland conceived as a political entity which imprints its will upon the Constitution. In the French legal order, the expression of the people in referendums is always conceived as the exercise of a legal power and thus exists within the limits of the Constitution. From this constancy, it can be said that French constitutional identity

¹¹³ See *supra* at 78-82.

¹¹⁴ See CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101, CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication* of 1 July 2004, *Rec.* 107, CC, decision n° 2004-498 DC on the *Act on bioethics* of 29 July 2004, *Rec.* 122 and CC, decision n° 2004-499 DC on the *Act relating to the protection of physical persons regarding the treatment of personal data* of 29 July 2004, *Rec.* 126.

¹¹⁵ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88, CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120, CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 or CC, decision n° 2011-631 DC on the *Act pertaining to immigration, integration and citizenship* of 9 June 2011 (unreported) at para. 45.

¹¹⁶ X. Magnon, “Le chemin communautaire du Conseil constitutionnel : entre ombre et lumière, principe et conséquence de la spécificité du droit communautaire” (2004) n° 8-9 *Europe* 6-12 at 8. It has to be recalled that Article 88-1 was included in the Constitution in 1992 in relation to the Treaty of Maastricht.

presents a form of permanence and can be defined, according to the distinction used by Reestman and when compared to the Irish constitutional identity, as diachronic.¹¹⁷

At first sight, this statement seems to contradict the conclusion reached by the same author when he opposed the diachronic identity embodied in German case-law to the synchronic form promoted by the *Conseil constitutionnel*.¹¹⁸ However, other factors point to a different result. First, categorising member states' identities as either diachronic or synchronic involves a classification related to the ideal type that most accurately typifies the case-law of their courts, even though traits of both models can be found in their decisions.¹¹⁹ Secondly, Reestman's characterisation of German case-law as displaying a diachronic identity and French decisions as indicating a synchronic identity is relative in nature. It is by comparing them that the author comes to this conclusion.¹²⁰ One of the decisive criteria employed by Reestman consists of the inability to revise certain provisions of the German Constitution, *viz.*, those contained in Article 79 (3) (also called "eternity clause" for this reason). In the case of France, the author argues that the absence of such a limitation leaves a greater place for politics in constitutional life. It is, in his view, this ability to modify any principle and value enshrined in the French Constitution which justifies the qualification of its identity as synchronic.¹²¹

The division between France and Germany relies thus on a substantive issue.¹²² It is not possible to distinguish Ireland and France according to the same criterion, as their legal systems are both characterised by the absence of immutable values that would fetter their respective sovereign.¹²³ However, it seems that this does not entail that the two member states belong to the same synchronic category. Their relative position can still be defined according to the same opposition between constitutional permanence and variation. The distinction between Irish and French identities does not so much rest on the existence or absence of a constitutional substantive permanence but on a formal criterion. The Irish people are free to alter its identity as expressed in the Constitution by renewed expressions of their will in referendums which are regarded as being required to be free legal constraints. It can be argued that in France, the

¹¹⁷ For a distinction between diachronic identity and synchronic identity, see J.-H. Reestman, "The Franco-German Constitutional Divide: Reflections on National and Constitutional Identity", *op. cit.*, at fn. 5 above, in particular at 376-377.

¹¹⁸ *Ibid.* at 389.

¹¹⁹ *Ibid.* at 377.

¹²⁰ *Ibid.* at 384-390.

¹²¹ *Ibid.* at 388-389.

¹²² For a more detailed analysis of this difference and its consequences for the defence of their constitutional identity in the face of the primacy principle, see *infra* at 438-447.

¹²³ It should be noted in this context that issues relating to natural law and fundamental rights regarding popular sovereignty and the ability of the people to amend the Constitution are dealt with *supra* at 158-164. On this refusal of immutability in the Irish and French legal orders, in particular insofar as concerns the notion of constitutional identity as a limit to the primacy of European law, see *supra* both respectively at 238-250 and at 262-269.

different expressions of the constituent power come to the fore as mediated by the constitutional text. It is thus the permanence of the constitutional text which is upheld in the French legal order. In conclusion, compared with the disruptive impact on the Constitution of amending referendums considered as the political expression of the people, French courts conceive constitutional identity as embodied in the continuity of the text of the Constitution. In this regard, the definition given by Troper of what the notion of constitutional identity in the case-law of the *Conseil constitutionnel* involves mirrors the distinction between synchronic and diachronic identities of Ireland and France, when he states that:

“it [the expression ‘constitutional identity’] can first designate a particular type of national identity (...). In this sense, national identity is a psychological or social phenomenon. But one can also conceive a national identity linked to the Constitution. The Constitution only needs to contribute to produce or to reinforce the identity.
(...)

It [the notion of constitutional identity as used by the *Conseil constitutionnel*] is therefore a different identity from the former. The first one was the identity of the nation produced by the Constitution, the second one has the Constitution itself for subject. The first one is a psychological or sociological, the second one is a properly legal concept.
(...)

It [a principle inherent in the constitutional identity of France] has also to be an essential element of the Constitution itself.”¹²⁴

In consequence, political arguments have little bearing on the interpretation made by the *Conseil constitutionnel* of the consequences which attach to the primacy principle. In this regard, its case-law differs on many points from that of Irish courts.

For example, as regards the method of implementation of directives, one might wondered what the impact on constitutional procedural requirements would have been of the understanding by the *Conseil constitutionnel* of the relationship between the European and

¹²⁴ M. Troper, “Identité constitutionnelle” in B. Mathieu (ed.), *Cinquantième anniversaire de la Constitution française : 1958-2008* (Paris: Dalloz, 2008) 123-131 at 123-125 (translation by the author). However, it can be argued that, either as a reflection of the Irish people existing outside the Constitution or as the channel of the expression of the French sovereign, the notion of constitutional identity, by relying as it does on the constitutionalist paradigm, cannot be reduced to the Constitution alone but is always, even though in different forms, linked to the expression of the *demos*.

domestic legal orders based on Article 88-1 of the Constitution will bear.¹²⁵ In particular, some have argued that the division of normative competence between the Government and the Parliament, as defined by Articles 34 and 37 of the Constitution,¹²⁶ could be considered as part of French constitutional identity and is thus likely to constitute a limit to the doctrine of primacy.¹²⁷ However, partly on the basis of an earlier decision of the *Conseil constitutionnel*,¹²⁸ it had also been argued that the political importance of the willingness to participate in the process of European integration expressed in Article 88-1 of the Constitution could qualify the division of normative competence provided for by Articles 34 and 37¹²⁹ as regards the implementation of European rules in the domestic legal order.¹³⁰

A different position was however taken on the issue by French courts according to which the relationship established between European law and the Constitution on the basis of Article 88-1 could only have a substantive dimension.¹³¹ The first step in this direction came from the *Conseil d'État* in its decision in *Arcelor*.¹³² *Commissaire du gouvernement* Guyomar argued that the principles deduced from Article 88-1 were irrelevant for constitutional provisions of a procedural nature. The method of implementation of directives was a purely domestic matter on which the doctrine of primacy had no direct consequences. According to him:

“the constitutional obligation of implementation of directives was without impact on the respect for constitutional rules of competences (distribution statute/regulation by virtue of Articles 34 and 37 of the Constitution) and of procedure. What holds true with regard to substantial rights is not transposable to institutional rules. In the event of

¹²⁵ On this issue, see S. Monnier, “La répartition des compétences et la hiérarchie des normes nationales à l’épreuve de l’application du droit communautaire” (2006) n° 68 *Revue française de droit constitutionnel* 849-865.

¹²⁶ According to these articles, the material scope of legislative norms is limited and, in consequence, the Government is granted a power to issue regulations the validity of which is directly based on the Constitution.

¹²⁷ In this sense, see É. Dubout, “« Les règles ou principes inhérents à l’identité constitutionnelle de la France » : une supra-constitutionnalité ?”, *op. cit.* at 474-475 or A. Levade, “La décision OGM ou les implicites d’une décision à lire dans son environnement” (2008) n° 30 *La Semaine juridique. Édition générale* 37-42 at 39.

¹²⁸ CC, decision n° 77-90 DC on the *Last corrective Finance Act for 1977 and, in particular, its Article 6* of 30 December 1977, *Rec.* 44 at para. 4.

¹²⁹ See for example, C. Charpy, “The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil constitutionnel* and the *Conseil d’État*” (2007) 3 *European Constitutional Law Review* 436-462 at 443.

¹³⁰ Even though, it is not clear if this decision is concerned primarily with the division of competences between the Parliament and the Executive or between France and what is now the European Union, see for example, S. Monnier, “La répartition des compétences et la hiérarchie des normes nationales à l’épreuve de l’application du droit communautaire”, *op. cit.*, at fn. 128 above, at 852-853.

¹³¹ Such an interpretation had already been defended when the *Conseil constitutionnel* first gave its new interpretation of Article 88-1 of the Constitution in 2004, see J. Arrighi de Casanova, “La décision n° 2004-496 DC du 10 juin 2004 et la hiérarchie des normes” (2004) *L’Actualité juridique. Droit administratif* 1534-1537 at 1536-1537 or J.-É. Schoettl, “La refonte de la loi sur l’informatique, les fichiers et les libertés devant le Conseil constitutionnel” (2004) n° 160 *Les petites affiches* 9-19 at 14.

¹³² CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56.

a violation of the Constitution on such grounds, indeed the ‘opposition will have an origin exclusively domestic’. The invalidation will bear consequences at Community level since it will postpone the implementation of the directive, but without the content of the directive implemented being called into question.”¹³³

The *Conseil d’État* followed his opinion deciding that the application of Article 88-1 involved that “the control of rules of competence and procedure [was] not affected”.¹³⁴ However, the interpretation of this constitutional provision by the *Conseil d’État* is stricter than that of the *Conseil constitutionnel*.¹³⁵ In particular, the *Conseil d’État* does not refer to the notion of constitutional identity and the French constitutional court may have decided the issue differently on the basis of this criterion. In contrast, the *Conseil constitutionnel* followed the case-law of its administrative counterpart in its *Act pertaining to genetically modified organisms* decision.¹³⁶ This statute aimed,¹³⁷ *inter alia*, to implement two European Directives.¹³⁸ The *Conseil constitutionnel* made clear that the method of implementation depended solely on domestic criteria, and had to respect the division of the normative power between the Government and the Parliament,¹³⁹ by stating that:

“although the transposing into domestic law of a Directive is a constitutional requirement, it is clear from the Constitution and in particular Article 88-4 thereof that this requirement does not result in adversely affecting the separation between matters which are the preserve of statute law and those which are the preserve of regulations as determined by the Constitution”.¹⁴⁰

¹³³ M. Guyomar, “Conclusions sur Conseil d’État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*” (2007) 43 *Revue trimestrielle de droit européen* 378-402 at 383 (translation by the author).

¹³⁴ CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56 (translation by the author).

¹³⁵ For further developments on the discrepancies of the interpretations of Article 88-1 of the Constitution by the *Conseil constitutionnel* and the *Conseil d’État* see *infra* at 410-416.

¹³⁶ CC, decision n° 2008-564 of 19 June 2008 on the *Act pertaining to genetically modified organisms*, *Rec.* 313. On this parallel between the positions of the administrative and constitutional courts, see O. Dord, “La loi OGM devant le Conseil constitutionnel ou la dissémination de la jurisprudence AC !” (2008) *Actualité juridique droit administratif* 1614-1618 at 1617.

¹³⁷ Act n° 2008-595 of 25 June 2008 pertaining to genetically modified organisms, *J.O.R.F.* p. 10218.

¹³⁸ Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms [1990] O.J. L 117/1 and Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] O.J. L 106/1.

¹³⁹ On this implicit importance of the principles defined in Article 34 and 37 of the Constitution in the decision of the *Conseil constitutionnel*, rather than the explicit reference to Article 88-4, see A. Levade, “La décision OGM ou les implicites d’une décision à lire dans son environnement”, *op. cit.*, at fn. 130 above, at 39.

¹⁴⁰ CC, decision n° 2008-564 of 19 June 2008 on the *Act pertaining to genetically modified organisms*, *Rec.* 313 at para. 53.

It concluded that, this Act leaving certain information to be determined by the Executive power, the Parliament failed to exercise fully the powers vested in it, violating Article 34 of the Constitution and Article 7 of the Charter for the Environment.¹⁴¹ Even if this position did not directly challenge the primacy of European law, France would have been liable for not dully implementing the Directives in the French legal order.¹⁴² In order to avoid this consequence on the basis of domestic legal issues and to enforce the constitutional requirement to implement directives, the French constitutional court decided to postpone the consequence of its decision¹⁴³ by stating that:

“the drawing up of lists containing such information derives from the constitutional requirement of the transposing into domestic law of Community Directives. Any immediate finding that the challenged provisions are unconstitutional would be tantamount to disregarding such a requirement and entailing patently disproportionate consequences. Therefore, in order to enable Parliament to rectify its failure to exercise its full powers, the effects of the finding of unconstitutionality shall be postponed until January 1st 2009”.¹⁴⁴

In comparison to the Irish case-law, it can be said that this assessment of the implications of membership to the European Union involves determining the objective legal obligations existing in European Union law, a test rather similar to that used by the Irish Supreme Court in *Crotty* to interpret the immunity clause provided for by what is now Article 29.4.6* of the Irish Constitution.¹⁴⁵ The interpretation of the French Constitution by the *Conseil constitutionnel* in cases having a European dimension is not influenced by the political willingness of France to participate in the process of European integration – something which can in contrast be seen in decisions of the Irish Supreme Court, and notably in *Meagher*.¹⁴⁶ This

¹⁴¹ *Ibid.* at para. 56-57.

¹⁴² France had already been sanctioned twice in this regard and the decision of the *Conseil constitutionnel* explicitly referred to the decisions of the European Court of Justice (Case C-429/01 *Commission of the European Communities v. French Republic* [2003] E.C.R. I-14355 and Case C-419/03 *Commission of the European Communities v. French Republic* (unreported, 15 July 2004)).

¹⁴³ This possibility was first used by the *Conseil d'État* in its decision *AC!* (CE, Ass., 11 May 2004, *Association AC! et autres*, *Rec. Lebon* 197). This power would be formally recognised by the constitutional reform which quickly followed the decision of the *Conseil constitutionnel* in 2008 as regards the new *a posteriori* control of constitutionality provided for by Articles 61-1 and 62 of the Constitution.

¹⁴⁴ CC, decision n° 2008-564 of 19 June 2008 on the *Act pertaining to genetically modified organisms*, *Rec.* 313 at para. 58.

¹⁴⁵ *Crotty v. An Taoiseach* [1987] I.R. 713.

¹⁴⁶ *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329. However, although it is not as univocal as in the case-law of the *Conseil constitutionnel*, the decision of the Supreme Court in *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 bore witness to an increased willingness to consider the question of the method of implementation of

confirms the centripetal position of the *Conseil constitutionnel* as regards the relationship between the European and domestic legal orders where European obligations are assessed from the point of view of the Constitution rather than *vice versa* as has seen to be the case in the Irish case-law. In this decision the *Conseil constitutionnel*, by postponing the effects of its decision, reconciled constitutional requirements dedicated to European law and constitutional obligations of a domestic nature rather than qualifying the latter obligations on the basis of the former ones.¹⁴⁷

The implementation of European instruments has never been related to their suitability. In contrast to the Irish experience,¹⁴⁸ in its recent case-law, the *Conseil constitutionnel* always stressed that jurisdictional immunity is only enjoyed when the act of implementation “contents itself with drawing unconditional and precise provisions” from the European instrument.¹⁴⁹ If this is not the case, the question of its appropriateness in the eyes of European Union law is irrelevant. When France is not in a situation where it “does not have any material freedom”,¹⁵⁰ then the *Conseil constitutionnel* regains its competence and the measure is assessed by reference to the yardstick of the Constitution.¹⁵¹ As for the balance between political and legal logics in the interpretation of the Constitution, one could argue that the question of the division of normative competences between the Parliament and the Government is not considered in the same light in Ireland and France. Arguments related to the number of European instruments to be implemented and the constraints of time in the process are absent from the way this issue is considered in France. The interpretation of the consequences of European requirements in the French legal order is not informed by political realities to same extent as it

directives on the basis of purely domestic criteria, and notably Article 15.2.1° of the Constitution providing for the exclusive legislative power of the Oireachtas, rather than the “necessitated” clause contained in Article 29.4.6° of the Constitution. This logic was confirmed in subsequent decisions such as *Browne v. Attorney General* [2003] 3 I.R. 205 or *Kennedy v. Attorney General* [2007] 2 I.R. 45. For further considerations on these decisions, see *supra* at 214-216.

¹⁴⁷ In this sense, see A. Roblot-Troizier, “L’environnement au cœur des évolutions du contentieux constitutionnel” (2008) *Revue française de droit administratif* 1237-1240 at 1240 or A. Levade, “La décision OGM ou les implicites d’une décision à lire dans son environnement”, *op. cit.*, at fn. 130 above, at 40.

¹⁴⁸ Form the point of view of the Irish case-law, the fact that Ireland is left with a degree a choice does not necessarily mean that statutory instruments do not implement “principles and policies” determined by the European rules they intend to implement as is noticeable both in *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 and *Maher v. Minister for Agriculture* [2001] 2 I.R. 139. On this aspect of Irish case-law, see *supra* at 206-214.

¹⁴⁹ See for example, CC, Decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 9 or CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 28.

¹⁵⁰ J. Roux, “La transposition des directives communautaires à l’épreuve de la Constitution (à propos de l’arrêt d’Assemblée du 8 février 2007, *Sté Arcelor Atlantique et Lorraine et autres*)” (2007) *Revue du droit public et de la science politique en France et à l’étranger* 1031-1071 at 1052.

¹⁵¹ See CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication* of 1 July 2004, *Rec.* 107 at para. 20 and J-É. Schoettl, “La loi relative aux communications et aux services de communication audiovisuelle devant le Conseil constitutionnel” (2004) n° 135 *Les petites affiches* 3-14 at 12.

is noticeable in Irish case-law. In contrast, the relationship between the domestic and European Union legal orders is appreciated only in normative terms.

In conclusion, Ireland and France are confronted, in order to determine and protect their respective constitutional identities, with the same requirement to carry out an exercise of balancing constitutional provisions dedicated to European law and its primacy principle on the one hand, and domestic issues on the other. However, the factors which weigh in making an actual decision as to the proper balance are different. Based on a concrete understanding of the sovereign, the importance granted by Irish courts to the political context in their interpretation of the Constitution leads to the upholding of a synchronic identity. Departing from a strict reading of the constitutional provisions, they define themselves as the guardians of an identity which is only expressed outside law and reflected in the Constitution. In France, the minor importance of political considerations in the sovereign expression tends towards the defence of a diachronic identity. As will be seen,¹⁵² the case-law of the *Conseil constitutionnel* rather depends on normative arguments, which implies an active role being played by the French constitutional court in the definition of the constitutional identity of France. In this regard, it is noticeable that similar normative arguments which could equally apply to the constitutional interpretation in Ireland are avoided by domestic courts.

¹⁵² See *infra* at 304-313.

B. The Protection of Constitutional Identity within a Normative Logic in Ireland and France

The effect of the location of the expression of the identity of France in the Constitution is that the opposition to the primacy principle is circumscribed in the constitutional text and its interpretation. In consequence, the French courts appear as the major actors in defining the limits put on the primacy of European Union law in the domestic legal order. Indeed, one could argue that in its recent decisions on European Union law, the *Conseil constitutionnel* displays more overtly a form of constituent power parallel to those defined in Article 89 of the Constitution.

Seen from a French perspective, Irish courts do not appear to show the same willingness to put into play legal arguments of the kind habitually invoked in France in their appraisal of the primacy principle as defined in the domestic legal order. As will be seen in the text which follows, it could even be said that the Irish courts apparently refused to duplicate, when European Union law was concerned, legal arguments which they have developed for similar domestic issues and, in consequence, to appropriate an active role in the definition of the content of constitutional identity in Ireland.

1. *The Construction of the French Notion of Constitutional Identity: The Relationship between European Union Law and the Constitution Framed in a Normative Logic*

According to the French conception of the sovereign as an abstract entity, its expression is conceived within the constitutional framework. In other words, sovereignty is the expression of the constituent power. The refusal to consider the French sovereign as a political entity the existence of which lies beyond the constitutional text tends to move the issue of the relationship between constitutional provisions and European rules in the direction of determining which authorities are able to formulate constitutional norms in France and thus to determine the domestic constitutional identity.

At first sight, and according to Article 89 of the Constitution, (a) the Congress and (b) the citizens *via* referendum appear to be the two authorities endowed with the power to create constitutional norms in the French legal system. However, if, using Kelsenian theory, a norm is

defined as the objective signification of an act of will,¹⁵³ then a distinction has to be introduced between the constitutional text and its meaning, with only the latter being constitutive of the legal norm.¹⁵⁴ In consequence, due to the focus of the French legal system on the sovereign as a legal power, the question of the modalities according to which the constitutional identity of France is protected in the face of the primacy of European Union law is tightly linked to the notion of interpretation. Indeed, if one takes the view that interpretation, “*lato sensu*, is synonymous with the comprehension of a linguistic expression or a speech act”, leading to the conclusion that “every sign has to be interpreted in order to be understood”,¹⁵⁵ the question of interpretation and its dialectical relationship to the constitutional text is essential to the determination of the authorities participating in the expression of the French constituent power. Broadly speaking, interpretation can be conceived as an activity involving primarily either cognition or will.¹⁵⁶

Traditionally, and especially in the French legal culture where judges are merely conceived as “the mouth of the law”, the courts’ interpretative task has been tightly circumscribed and is considered only to be exercised when the legal text is unclear. In other words, where the meaning of the text does not present any difficulty, the judicial interpretation is discarded or, as the adage goes, *interpretation cessat in claris*. The interpretative role of the courts is conceived as an act of cognition, the purpose of which is to disclose a meaning which existed prior to this operation and which corresponds either to the intention of those who created the legal text to be applied or to a unique meaning encapsulated in its linguistic formulation.¹⁵⁷

However, one could argue that this understanding of judicial interpretation is dogmatic and represents what courts *ought* to do to conform with the theory of separation of powers¹⁵⁸ rather than what is the actual, real activity of courts. Understood in a broader sense, *viz.*, as an ascription of meaning, interpretation is inherent in legal practice if law is conceived as a linguistic phenomenon. As Kelsen affirms it:

¹⁵³ See H. Kelsen, *Théorie pure du droit* (Trans. C. Eisenmann, Brussels; Paris: Bruylant; Librairie Générale de Droit et de Jurisprudence, coll. La pensée juridique, 1999) at 13-18.

¹⁵⁴ In this sense, and disagreeing with Kelsen, Troper affirms that “*what is the object of an interpretation is not a norm, but only a text*”, M. Troper, *Pour une théorie juridique de l’État* (Paris: Presses universitaires de France, coll. Léviathan, 1994) at 88 (translation by the author).

¹⁵⁵ J. W. Wroblewski, “Interprétation juridique” in A.-J. Arnaud (ed.), *Dictionnaire encyclopédique de la théorie et de sociologie du droit* (Paris: Librairie Générale de Droit et de Jurisprudence, 1988) 199-201 at 199 (translation by the author).

¹⁵⁶ On this distinction, see. Kelsen, *Théorie pure du droit*, *op. cit.*, at fn. 156 above, at 339-341.

¹⁵⁷ See for example, M. Troper, “Interprétation” in D. Alland and Rials, S. (eds.), *Dictionnaire de la culture juridique* (Paris: Lamy; Presses universitaires de France, coll. Quadrige, 2003) 843-847 at 843.

¹⁵⁸ In this sense, see J. W. Wroblewski, “Interprétation juridique”, *op. cit.*, at fn. 158 above, at 200.

“if a legal organ has to apply law, it has necessarily to establish the meaning of norms its mission is to apply, it has necessarily to interpret these norms. Interpretation is thus an intellectual process that necessarily goes with the process of legal application in its progression from a superior degree to an inferior degree.”¹⁵⁹

In this context, affirming that interpretation must cease when the meaning of a legal text is clear assumes that this text has already been the object of an interpretation in order to affirm the clarity of its meaning.¹⁶⁰ In consequence, the question is not so much to determine which circumstances require an interpretation but rather which legal value to ascribe to interpretative practices. Legal texts are exposed to the inescapable indeterminacy of the natural language in which they are expressed.¹⁶¹ In other words, a legal text always bears different potential meanings and can serve as a support for different norms. Following Kelsen, a distinction has thus to be introduced between an authentic interpretation on the one hand and a non-authentic or scientific interpretation on the other hand.¹⁶² The non-authentic interpretation, as for example the scientific interpretation carried out in academic literature, is based on an act of cognition and consists of identifying the numerous meanings a legal provision can convey. An authentic interpretation, in contrast, is the interpretation for which the legal system reserves the ability to produce legal consequences. The act of authentic interpretation is therefore dedicated to choosing one meaning among various possibilities. In this regard, judicial interpretations are acts of will the consequence of which is the creation of a legal norm. In consequence, an authentic interpretation cannot be said to be right or wrong but is defined in terms of its validity. The result of this is that the authentic interpreter is, at least, as much the creator of a norm as its author.¹⁶³

When applied to the activity of the *Conseil constitutionnel*, one can conclude that this court does not stand in a neutral position vis-à-vis the Constitution and is not so much submitted to it.¹⁶⁴ In contrast, its interpretative activity involves participation in the formulation

¹⁵⁹ H. Kelsen, *Théorie pure du droit*, *op. cit.*, at fn. 156 above, at 335 (translation by the author).

¹⁶⁰ On this necessity of interpretation to assert the clarity of a norm, see for example, M. Troper, *La théorie du droit, le droit, l'État*, *op. cit.*, at fn. 95 above, at 75.

¹⁶¹ On this point, see for example, F. Hamon and M. Troper, *Droit constitutionnel*, *op. cit.*, at fn. 100 above, at 64.

¹⁶² Regarding these two types of interpretation, see H. Kelsen, *Théorie pure du droit*, *op. cit.*, at fn. 156 above, at 339-342.

¹⁶³ On the participation of the author but also of the interpreter to the determination of a norm, see, for example, M. Troper, “Interprétation”, *op. cit.*, at fn. 160 above, at 846.

¹⁶⁴ In this sense, see M. Troper, *Pour une théorie juridique de l'État*, *op. cit.*, at fn. 157 above, at 333-338.

of constitutional norms.¹⁶⁵ As a result, rather than enforcing the will of the constituent power which would pre-exist the application of constitutional provisions, the *Conseil constitutionnel* can be regarded as participating in exercising constituent power¹⁶⁶ in the same way as the Congress and as the expression of the people through referendum when they elaborate constitutional provisions under Article 89 of the Constitution. Thus - and in comparison with the definition of “true democracy” given by Irish courts¹⁶⁷ - it can be argued that French “real democracy”, due to the abstract and legal conception of its sovereign, can be defined:

“not as a government of the people by the people itself, but as a government of a general will partly formed under the influence that the people exercise through the direct or indirect choice of some of those which express it.”¹⁶⁸

As long as one agrees with this theory of interpretation, creativity is inherent in the activity of the *Conseil constitutionnel* and its interpretations of the Constitution necessarily involve the exercising of constituent power. However, the reality of the exercise of this power has often been hidden by a rhetoric upholding the dogmatic representation of the judicial power as the “mouth of the law”. Nonetheless, the recent case-law of the *Conseil constitutionnel* related to European Union law displays a more explicit affirmation by the French constitutional court of its participation in the determination of constitutional norm and thus of the constitutional identity of France.

In order to understand this new stance of the French constitutional court, one has to consider the different competences enjoyed by the *Conseil constitutionnel* with regard to European Union law, *viz.*, both as to European treaties and European secondary law. Article 54 is dedicated to the control of compatibility between international instruments and constitutional provisions prior to ratification. It states that:

“if the *Conseil constitutionnel*, on a referral from the *Président de la République*, from the *Premier ministre*, from the President of one or the other Houses, or from sixty Members of

¹⁶⁵ On this participation of the *Conseil constitutionnel* to the active determination of the French Constitution, see D. Rousseau, *Droit du contentieux constitutionnel op. cit.*, at fn. 107 above, at 477-479 and G. Drago, *Contentieux constitutionnel français, op. cit.*, at fn. 113 above, at 97-101.

¹⁶⁶ M. Troper, “Interprétation”, *op. cit.*, at fn. 160 above, at 846.

¹⁶⁷ See *supra* at 276-281.

¹⁶⁸ M. Troper, *Pour une théorie juridique de l'État, op. cit.*, at fn. 157 above, at 346.

the *Assemblée nationale* or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorisation to ratify or approve the international undertaking involved may be given only after amending the Constitution.”

As has been seen,¹⁶⁹ the logic of this constitutional provision is opposed to the primacy principle and leads in contrast to the conclusion that the French Constitution is still “at the summit of the domestic legal order”.¹⁷⁰ However, while it displays a normative *rationale* which disputes the claims of European Union law, the Article 54 procedure presents congruence in practice between the consequences of the European and domestic claims to normative prevalence. In the case of discrepancies between French constitutional provisions and European treaties, the choice is left to the amending powers to endorse in a sovereign fashion the content of new European obligations. In a way, when applied to the process of European integration, Article 54 appears as a preventive instrument. By ensuring in advance a material congruence between the requirements of the two legal orders, it forms a condition for the formal tension between the European and domestic sources of legal prevalence to be of little impact in the legal practice.¹⁷¹ The role of the *Conseil constitutionnel* in this mechanism corresponds to the traditional conception of the judicial function. It is to determine neutrally if the norms at stake are compatible or not. In the latter instance, its role is to indicate which procedures have to be followed in order to legally ratify European treaties.¹⁷² One could therefore argue that its position with respect to the constituent power is one of an enabler. It acts as the accomplice of the sovereign, allowing, when required, the expression of the constituent power through the amendment process.

However, the attitude of the French constitutional court has moved away from this dogmatic perspective since its *Treaty establishing a Constitution for Europe* decision.¹⁷³ Through a very constructive and unusual interpretation of the normative contents at stake, the *Conseil constitutionnel* concluded that the Constitutional Treaty and the French Constitution were compatible on issues that at first sight appeared as highly contentious.¹⁷⁴ When it came to

¹⁶⁹ See *supra* at 183-187.

¹⁷⁰ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 10.

¹⁷¹ In this sense, see P. Gaïa, “Le contrôle de constitutionnalité des normes communautaires” in H. Gaudin (ed.), *Droit constitutionnel, droit communautaire : Vers un respect constitutionnel réciproque ?* (Paris; Aix-en-Provence: Economica : Presses universitaires d’Aix-Marseille, 2001) 39-70 at 46.

¹⁷² On this conception of the *Conseil constitutionnel* as a neutral “pointsman”, see for example D. Rousseau, *Droit du contentieux constitutionnel, op. cit.*, at fn. 107 above, at 473-474 (translation by the author).

¹⁷³ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173.

¹⁷⁴ See *supra* at 240-241.

the primacy principle itself (provided for by Article I-6) the constitutional court employed a systemic interpretation with, in particular, Article I-5 being read as ensuring that the Union respected the national identity of member states, thereby depriving the European principle of primacy of its absolute value¹⁷⁵ and concluding that it was compatible with the supremacy of the French Constitution.¹⁷⁶ It followed a similar reasoning in considering the possible discrepancies between the freedom of religion under Article II-70 of the Constitutional Treaty and the secular nature of France affirmed in Article 3 of the Constitution;¹⁷⁷ and in considering the possible interpretation of the Charter of Fundamental Rights of the Union as leading to the recognition of collective rights.¹⁷⁸ In its conclusions on the compatibility of the Constitutional Treaty with the Constitution, the *Conseil constitutionnel* distorted the European principle according to which the Union respects “the constitutional traditions common to the Member States”¹⁷⁹ into a respect for “the constitutional traditions of each Member State”.¹⁸⁰ Despite the conclusion of compatibility arrived at by the constitutional court, one could argue that in this one-letter difference there are two opposite conceptions of the normative relationship between the European and domestic legal orders at play.¹⁸¹ Therefore, the decision of the *Conseil constitutionnel* does not forestall future conflicts between the French and European legal orders.¹⁸²

¹⁷⁵ See for example, H. Labayle and J.-L. Sauron, “La Constitution française à l’épreuve de la Constitution pour l’Europe” (2005) *Revue française de droit administrative* 1-29 at 7-9.

¹⁷⁶ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 9-13.

¹⁷⁷ *Ibid.* at para. 18.

¹⁷⁸ *Ibid.* at para. 16. Such a recognition would notably be contrary to the principle of indivisibility of the Republic and the principle of equality contained in Articles 1 to 3 of the French Constitution. This potential conflict concerned more particularly the Preamble of the Charter where it is affirmed that “the Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe” and Article II-82 dedicated to “cultural, religious and linguistic diversity”. On this point, see A. Levade, “Le Conseil constitutionnel aux prises avec la Constitution européenne” (2005) *Revue du droit public et de la science politique en France et à l’étranger* 19-50 at 40-42.

¹⁷⁹ Article II-112 of the Treaty establishing a Constitution for Europe. This principle is now protected by the Preamble of the Charter of Fundamental Rights of the European Union to which the Treaty on European Union refers to in Article 6, ensuring its legal force.

¹⁸⁰ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 18. This idiosyncratic interpretation of the protection provided in European Union law is even more explicit in the French version of the decision (as opposed to the English translation provided) since it is in a singular form that the *Conseil constitutionnel* considered “the constitutional tradition of each Member State” as being protected in the European legal order (translation by the author).

¹⁸¹ For a similar opinion, see for example V. Champeil-Desplats, “Commentaire de la décision du Conseil constitutionnel n° 2004-505 DC du 19 novembre 2004 relative au Traité établissant une Constitution pour l’Europe” (2005) 41 *Revue trimestrielle de droit européen* 557-580 at 569-571.

¹⁸² If Levade sees in this interpretation of the *Conseil constitutionnel* an invitation offered to the European Court of Justice to enter into a jurisdictional dialogue (see A. Levade, “Le Conseil constitutionnel aux prises avec la Constitution européenne”, *op. cit.*, at fn. 181 above, at 40-42), Labayle and Sauron present a more pessimistic point of view arguing that this position of the French constitutional court does not solve the conflicts to come (see H. Labayle and J.-L. Sauron, “La Constitution française à l’épreuve de la Constitution pour l’Europe”, *op. cit.*, at fn. 178 above, at 11-14).

In conclusion, and contrary to the traditional understanding of Article 54 of the French Constitution, one could argue that the *Conseil constitutionnel* prevented the constituent powers defined by Article 89 from expressing their will in relation to European Union law.¹⁸³ However, taking into account the previous remarks on what interpretation consists of, the activity of the *Conseil constitutionnel* appears differently. If it is only through an interpretative process that legal norms are created, then the assessment of the compatibility between constitutional provisions and European Union treaties does not amount to uncovering objective conflicts. In contrast, the assertion of a normative conflict is the very result of the act of interpretation, the result of a decision.¹⁸⁴ In consequence, it is not so much the case that the *Conseil constitutionnel* prevented the Congress or the people through referendum from expressing its will to modify the Constitution in order to ensure its compatibility with European Union law, as it is that the *Conseil constitutionnel* substituted its own constituent power¹⁸⁵ for the power defined in Article 89 of the Constitution. It did so in a conciliatory fashion, postponing possible discrepancies between the domestic and European legal orders in the application of European law.¹⁸⁶

When the political and legal factors taking part in constitutional interpretation are considered, it can therefore be argued that it is the latter that is favoured in the recent case-law of the French constitutional court. Reestman has underlined that the political dimension of the process of constitutional reform springs from the intervention either of representative democracy or of a referendum.¹⁸⁷ However, the recent position of the *Conseil constitutionnel*, rather than promoting a new drafting of the Constitution by political actors, limits the expression of the sovereign in the existing text of Constitution and its interpretation, enclosing the constituent power in the legal world.¹⁸⁸ In other words, although it would be excessive to consider the *Conseil constitutionnel* as the adversary of the constituent power defined in Article

¹⁸³ In this sense, see for example J. Roux, "Le traité établissant une Constitution pour l'Europe à l'épreuve de la Constitution française" (2005) *Revue du droit public et de la science politique en France et à l'étranger* 59-103, in particular at 66-68 where the author argues that the *Conseil constitutionnel* managed to avoid a politically perilous constitutional amendment and only required modifications of the Constitution for issues of a lesser importance. On this willingness of the *Conseil constitutionnel* to "prevent the constitutional reform", see also M.-C. Ponthoreau, "Constitution européenne et identités constitutionnelles nationales", Contribution to the 7th World Congress of the International Association of International Law, Athens 11-15 June 2007, available at <<http://www.enelsyn.gr/papers/w4/Paper%20by%20Prof.%20Marie-Claire%20Ponthoreau.pdf>> at 7 (translation by the author) [Last accessed 29 December 2012].

¹⁸⁴ On the fact that the finding of an incompatibility between norms is always the result of a decision, see M. Troper, "Interprétation", *op. cit.*, at fn. 160 above, at 844.

¹⁸⁵ For a similar understanding of the *Conseil constitutionnel* acting as a constituent power, D. Bailleul, "Quand le juge ressemble au constituant" (2004) *Recueil Dalloz* 3089-3091 at 3090-3091.

¹⁸⁶ For a more detailed analysis of the change of focus in the recent case-law of the *Conseil constitutionnel* from the drafting to the application of European Union law, see *infra* at 338-349.

¹⁸⁷ See J.-H. Reestman, "The Franco-German Constitutional Divide: Reflections on National and Constitutional Identity", *op. cit.*, at fn. 5 above, at 388-389.

¹⁸⁸ In this sense, a distinction could be made between different types of constituent powers, some being linked to the power to amend the constitutional text while others, as for example the one exercised by the *Conseil constitutionnel*, would intervene within a textual stability.

89, one could still affirm that the constitutional court does not appear anymore as its accomplice. Where the judicial activism of Irish courts leads to an increase in the use of the referendum process,¹⁸⁹ the activism of the *Conseil constitutionnel* achieves the very opposite result.

Although the *Conseil constitutionnel* concluded both for the Treaty establishing a Constitution for Europe and the Treaty of Lisbon that constitutional amendments were required prior to their ratification.¹⁹⁰ Issues less “crucial and distinctive, [which did not participate in] the essence of the Republic”¹⁹¹ required textual modifications to be made to the Constitution.¹⁹² This willingness to leave certain contentious areas out of the reach of the constitutional amending power casts light on the modalities of the protection of French constitutional identity in the face of the primacy principle by emphasising the legal perspective put by the *Conseil constitutionnel* on the relationship between the two legal orders.

First, by giving meanings to European Union law which seems to contradict the case-law of the European Court of Justice without being able to bind the latter Court to these interpretations, one can hardly say that the *Conseil constitutionnel* has solved the potential normative conflicts between the two legal orders. By preventing the expression of the amending power provided for by Article 89 of the French Constitution, so as to ensure a material congruence between the two sets of norms, the French constitutional court eased the ratification of the European treaties but at the same time merely displaced the resolution of potential normative conflicts between European and constitutional rules towards the application of European Union law in the French legal order. In consequence, the supremacy of the French Constitution would not so much be ensured within the framework of Article 54 of the Constitution but rather through the control of the constitutionality of statutes implementing European Union law which is governed by Article 61. If both Articles 54 and 61 ensures the supremacy of the sovereign will as encapsulated in the Constitution, the latter procedure does

¹⁸⁹ On this consequence of judicial activism regarding European Union law in the Irish legal order, see G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence”, *op. cit.*, at fn. 12 above, at 35-36.

¹⁹⁰ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 and CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459.

¹⁹¹ According to the definition of constitutional identity given by the President of the *Conseil constitutionnel*, P. Mazeaud, “Vœux du Président du Conseil constitutionnel, M. Pierre Mazeaud, au Président de la République”, 3 January 2005, available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/relations-exterieures/agenda/le-conseil-en-2004/voeux-a-l-elysee.5147.html#prcc>> (translation by the author) [Last accessed 29 December 2012].

¹⁹² In this sense, see for example J. Roux, “Le traité établissant une Constitution pour l’Europe à l’épreuve de la Constitution française”, *op. cit.*, at fn. 186 above, at 87.

not provide for the intervention of the amending power as the former does. In consequence, one may also conclude that, if the limit put on the doctrine of primacy as deduced from Article 88-1 of the Constitution is a “reserve of sovereignty”,¹⁹³ the *Conseil constitutionnel* reserves it for itself.¹⁹⁴

The question could be posed of what consequences are to be attached to the opinion expressed by the *Conseil constitutionnel* according to which the notion of constitutional identity could be opposed to European obligations “except when the constituent power consents thereto”.¹⁹⁵ For example, the *Conseil constitutionnel* could declare constitutionally invalid an act of implementation that would contravene the secular nature of the state defined in Article 3 of the Constitution.¹⁹⁶ France would be in the paradoxical situation where the implementation would only be possible after an amendment to the Constitution when it is this very possibility that the *Conseil constitutionnel* excluded in the first place.

However, it seems that another reading of this statement by the jurisdiction of the Palais-Royal is possible if three elements are taken into account. First, the notion of constitutional identity does not fit easily with an essential and predetermined definition but rather corresponds to the result of a balance between the content of constitutional and European provisions.¹⁹⁷ Secondly, through its interpretative activity, the *Conseil constitutionnel* can be considered as a constituent power parallel to those defined in Article 89 relative to the amendment of the Constitution. Lastly, the change of the formulation of the limit of the primacy principle from an “express conflicting provision of the Constitution”¹⁹⁸ to the notion of constitutional identity corresponds to an extension of this limit to jurisdictional constructions and the concomitant

¹⁹³ T. Georgopoulos, “Le Conseil constitutionnel face à la directive communautaire : trois destinataires pour un message ambivalent” (2004) n° 227 *Les petites affiches* 3-8 at 4-5.

¹⁹⁴ In this sense, and when the *Conseil constitutionnel* used the expression “express conflicting provision of the Constitution”, see B. Mathieu, “Le Conseil constitutionnel conforte la construction européenne en s’appuyant sur les exigences constitutionnelles nationales” (2004) *Recueil Dalloz* 1739-1740 at 1740. If the notion of constitutional identity is understood as the explicit recognition of the creative power of the *Conseil constitutionnel*, then this reserve of sovereignty for itself is only more obvious.

¹⁹⁵ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19, CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120 at para. 6, CC, decision n° 2008-564 of 19 June 2008 on the *Act pertaining to genetically modified organisms*, *Rec.* 313 at para. 44, CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 18 or CC, decision n° 2011-631 DC on the *Act pertaining to immigration, integration and citizenship* of 9 June 2011 (unreported) at para. 45.

¹⁹⁶ Article 51 of the Charter of Fundamental Rights of the European Union limits its application to the European fields of competence. Therefore, it could be argued that this situation could hardly arise. However, the opposition between the right to life of the unborn and the freedom of medical services which is at the core of the *Grogan* case in Ireland (*Society for the Protection of Unborn Children (Ireland) Limited v. Grogan* [1989] I.R. 753) leads to the conclusion that one cannot prejudge the extent of potential conflicts between human rights constitutionally protected and European Union law.

¹⁹⁷ See *supra* at 234-250.

¹⁹⁸ See for example CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7.

affirmation of the active jurisdictional participation in the legitimate degree of compliance with European obligations.¹⁹⁹ These elements lead towards an *a contrario* reading of the principle according to which “the transposition of a Directive cannot run counter to a rule or principle inherent in the constitutional identity of France, except when the constituent power consents thereto”. It could be then understood that in so far as European Union law - and in particular its interpretation by the European Court of Justice - displays a benevolent attitude towards constitutional features that are regarded as crucial for France, the *Conseil constitutionnel* acting as a constituent power will consent to the grant of a monopoly of jurisdiction to its European counterpart - *i.e.*, it will recognise the primacy of European Union law as defined from the domestic perspective.²⁰⁰

When compared to the Irish situation in which the courts tend to favour a reading of the Constitution which is informed by political realities in its relationship with European law, French legal culture (where an abstract conception of the sovereign prevails) leads towards a constitutional interpretation focused on legal mechanisms and an approach in which the *Conseil constitutionnel* has managed to shape a decisive position for itself in the protection of French constitutional identity. Certainly nothing prevents competing constituent powers from initiating an amendment of the Constitution according to its Article 89 and from instilling a higher degree of politics in the question of the definition of French constitutional identity by having recourse to what Vedel qualifies as a “*lit de justice*”²⁰¹ in order to overturn the *Conseil constitutionnel*'s perspective on the matter.²⁰² However, this would depend on chancing a procedure initiated spontaneously rather than acting on the invitation of the constitutional jurisdiction. The *Conseil constitutionnel* is not the only constituent power in the French legal system but in the definition of what constitutes the constitutional identity of France capable of obstructing the primacy of European Union law one could conclude that it uses all means for keeping this issue in its legal bosom.

¹⁹⁹ On this judicial dialogue initiated by the *Conseil constitutionnel* on the basis of the notion of constitutional identity, see *infra* at 481-492.

²⁰⁰ See *supra* at 94-104.

²⁰¹ G. Vedel, “Schengen et Maastricht (À propos de la décision n° 91-294 DC du Conseil constitutionnel du 25 juillet 1991)” (1992) *Revue française de droit administratif* 173-184.

²⁰² Regarding this hypothesis, see for example J.-É. Schoettl, “Le nouveau régime juridique de la communication en ligne devant le Conseil constitutionnel” (2004) n° 122 *Les petites affiches* 10-21 at 16.

2. *The Protection of Irish Constitutional Identity Emancipated from Normative Fetters*

In the light of an interpretation of the French Constitution which is limited to legal considerations, the refusal of Irish courts to take a similar path and, conversely, their favouring of an interpretation of the Constitution in its political context. In this respect, it may be worth pointing out other strategies consisting mainly of normative arguments which would also enable them to protect the constitutional identity of Ireland.²⁰³ By way of an example of this, one could consider methods of interpretation which would have allowed the prevalence of the right to life of the unborn provided for by Article 40.3.3° of the Constitution over the primacy of conflicting European Union norms, other than the approach used in *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*,²⁰⁴ in particular by Walsh J.²⁰⁵

As Phelan has argued, Irish courts could have recourse to natural law principles in order to thwart the consequences of what is now Article 29.4.6°, the constitutional provision granting constitutional immunity to European Union law in the Irish legal system.²⁰⁶ However, for reasons stated previously,²⁰⁷ it seems that this solution has been discarded by the Irish judiciary. Natural law arguments do not in any case fit easily with the image of the Irish people mirrored by Irish courts. They could not adequately provide for the protection of Irish constitutional identity if the Constitution is understood as the embodiment of the unfettered Irish sovereign will. It is therefore within the positivist paradigm that these alternative strategies have to be looked for.

Aside from the natural law perspective and for the purposes of this development, it seems that the different interpretative alternatives presented by Hogan and Whelan in relation to European law²⁰⁸ can be narrowed down. In particular, methods based on the search for the original intention of the drafters of constitutional provisions are problematic. Introducing a psychological dimension, this perspective can be difficult to carry out when the author is collective as is the case for legal texts.²⁰⁹

²⁰³ For a presentation of the different constitutional interpretative methods in an Irish legal context, see G. W. Hogan and G. F. Whyte, *J M Kelly: The Irish Constitution* (Fourth edition, Dublin: Lexis Nexis Butterworths, 2003) at 3-38.

²⁰⁴ [1989] I.R. 753.

²⁰⁵ *Ibid.* at 768-769.

²⁰⁶ For a natural law limit put on the doctrine of primacy, see for example, D. R. Phelan, “‘Necessitated’ by the obligations of membership? Article 29.4.5° of the Constitution” (1993) 11 *Irish Law Times* 272-275 at 273.

²⁰⁷ See *supra* at 160-163.

²⁰⁸ See G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 121-128.

²⁰⁹ In this sense, see F. Hamon and M. Troper, *Droit constitutionnel*, *op. cit.*, at fn. 100 above, at 65 and G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*,

In consequence, if one seeks to protect Irish constitutional identity in the face of the primacy of European Union law as it is defined from the domestic perspective, it is the systemic interpretation - where each constitutional provision is understood in relation to the entire constitutional framework - that seems best suited ²¹⁰ and that will be favoured in the following argument. Such a reading of constitutional provisions was advocated by Henchy J. in *The People v. O'Shea* ²¹¹ when he stated that:

“any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument, that ‘the letter killeth, but the spirit giveth life’.”²¹²

However, it can be argued that the determination of the relationship between different constitutional provisions can assume two forms. On the one hand, it is possible to consider that a hierarchy between the different constitutional elements exists. On the other hand, the determination of the relationship between provisions can also be carried out by considering that they are of equal value in a balancing process which varies according to the different cases, in a way similar to the position adopted by the French *Conseil constitutionnel*.²¹³

At first sight, the first option seems to be a powerful legal solution in order to ensure that the primacy of European Union law does not endanger Irish core constitutional values. The existence of a normative hierarchy within the Constitution itself is supported by the opinion expressed by Kenny J. in *The People v. Shaw* ²¹⁴ where he peremptorily stated that:

op. cit., at fn. 74 above, at 125, where the authors also explain that deprived of the subjective angle the historical method can be equated to literal or teleological interpretations.,

²¹⁰ It seems that Phelan refers to a similar conception when he considers that the interpretation of what is now Article 29.4.6° “in the light of the Constitution as a whole”, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Round Hall Sweet & Maxwell: Dublin, 1997) at 345.

²¹¹ [1982] I.R. 384.

²¹² *Ibid.* at 426. He reiterated this point of view in *Tormey v. Ireland* [1985] I.R. 289 at 295-296.

²¹³ See, for example, *supra* at 149-152.

²¹⁴ [1982] I.R. 1.

“there is a hierarchy of constitutional rights and, when a conflict arises between them, that which ranks higher must prevail”.²¹⁵

This understanding of the Irish constitutional architecture²¹⁶ has played a decisive role in the upholding of the right to life of the unborn by Irish courts and the judiciary could have had recourse to this hierarchical representation in order to ensure its prevalence in the particular context of its opposition to the primacy principle.²¹⁷ The hierarchical superiority of its protection by Article 40.3.3° of the Constitution was at the core of the decision of the Supreme Court in *Attorney General (Society for the Protection of Unborn Children Ireland Limited) v. Open Door Counselling Limited*.²¹⁸ Unfolding the logic that would be at stake in *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*²¹⁹ when the European dimension was actually introduced, this case is the first which arose after the introduction of Article 40.3.3° into the Constitution in 1983. The facts of the case were as follows. Open Door Counselling and Dublin Wellwoman Centre were women’s health and counselling centres that had, in a non-directive manner, discussed abortion with pregnant Irish women and assisted some of them to have this medical procedure performed in British clinics. The Society for the Protection of Unborn Children argued that such activities were conducted in breach of the right to life of the unborn.

A major issue the Supreme Court had to address was to determine the proper relationship between the right to life of the unborn provided for by Article 40.3.3° of the Constitution and conflicting rights, in particular the right to receive and give information existing either as an unenumerated constitutional right or grounded in Article 40.6.1°. ²²⁰ The decision of the Supreme Court to uphold the right to life of the unborn pointed towards a hierarchical appraisal where no other constitutional rights could challenge the provisions of Article 40.3.3°. Finlay C.J. held, (with the other judges agreeing on this point) that:

²¹⁵ *Ibid.* at 63. For a similar opinion, see *ibid.* at 56 *per* Griffin J.

²¹⁶ Regarding the recognition by Irish courts of the existence of a hierarchy of rights “albeit, perhaps, with some reluctance”, see G. W. Hogan and G. F. Whyte, *J M Kelly: The Irish Constitution, op. cit.*, at fn. 206 above, at 1284.

²¹⁷ On such an hypothesis, see J. Casey, *Constitutional Law in Ireland* (Third edition, Dublin: Round Hall Sweet & Maxwell, 2000) at 391.

²¹⁸ [1988] I.R. 593.

²¹⁹ [1989] I.R. 753.

²²⁰ [1988] I.R. 593 at 625.

“I am satisfied that no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child.”²²¹

This hierarchical representation of the Constitution to the benefit of the right to life of the unborn²²² was made even more explicit in *Attorney General v. X.*²²³ In this case, a fourteen year-old girl discovered that she was pregnant as a consequence of an alleged rape. With her parents, she took the decision to go England in order to obtain an abortion and they informed the Garda of their intention. Having been informed by the Garda, the Attorney General sought and obtained an injunction preventing her from doing so. On appeal, the Supreme Court submitted that the right to life should be granted an absolute prevalence over other constitutional rights, and in particular the right to travel. In the opinion of Finlay C.J.:

“notwithstanding the very fundamental nature of the right to travel and its particular importance in relation to the characteristics of a free society, I would be forced to conclude that if there were a stark conflict between the right of a mother of an unborn child to travel and the right to life of the unborn child, the right to life would necessarily have to take precedence over the right to travel.”²²⁴

The judgment of McCarthy J. could be read as challenging such an absolute superiority of the right to life and, in contrast, could be understood as suggesting a balancing of the different rights constitutionally guaranteed according to the specifics of cases. However, since he too opined that any balance would always be in favour of the right to life, his method of interpretation was tantamount to a normative hierarchy.²²⁵ A similar conclusion can be drawn from the judges’ opinions pointing towards an appraisal of the different constitutional rights as being of equal value. This could be read in the decision of Finlay C.J. when he expressed the view that:

²²¹ *Ibid.* at 625.

²²² In this sense, see R.J. O’Hanlon, “Natural Rights and the Irish Constitution” (1993) 11 *Irish Law Times* 8-11 at 10 where it is argued that “it is universally accepted that the most fundamental of all human rights is the right to life.”

²²³ [1992] 1 I.R. 1. For a full account of this case, see for example J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law* (Dublin: Round Hall Sweet & Maxwell, 1997) at 12-19.

²²⁴ [1992] 1 I.R. 1 at 57. Hederman and Egan JJ. expressed a similar point of view respectively at *ibid.* 73 and 92.

²²⁵ See *ibid.* at 84 where McCarthy J. argued that “if it were a matter of a balancing exercise, the scales could only tilt in one direction, the right to life of the unborn, assuming no threat to the life of the mother.”

“I accept the submission made on behalf of the Attorney General, that the doctrine of the harmonious interpretation of the Constitution involves in this case a consideration of the constitutional rights and obligations of the mother of the unborn child and the interrelation of those rights and obligations with the rights and obligations of other people and, of course, with the right to life of the unborn child as well.”²²⁶

However, this statement has to be read in the context of the case where it was held that the right to life of the unborn has to yield to the right to life of the mother, in particular due to her psychological condition. It can therefore be argued that the balance referred to does not so much involve two conflicting rights but is rather concerned with a conflict between the same right enjoyed by two different legal persons,²²⁷ which *in fine* concerned the facts of the case rather than the constitutional rules to be applied.²²⁸

It should be noted that the rulings in both these cases excluded the European dimension.²²⁹ In *Open Door*, even though the question of the compatibility with European Community law was raised at the beginning of the proceedings, it was excluded by Hamilton P. in the High Court since the activities of the defendant were confined to Ireland,²³⁰ while in the Supreme Court European Community law was deemed to be irrelevant to the case due to a concession made by counsel.²³¹ In the *X* case, the willingness to set aside the question of the relationship between the domestic and European legal orders, and in particular between the protection of the right to life of the unborn and the immunity clause provided for in what is now Article 29.4.6°, was the result of the reference to *Doyle v. An Taoiseach*.²³²

In *Grogan* in contrast, due to the preliminary reference to the European Court of Justice made by the High Court, this European dimension could not be avoided by the Supreme Court. However, one might wonder why Walsh J. opted for considering the chronological relationship between the third amendment to the Constitution dedicated to Ireland joining the European Communities (as it then was) and the eighth amendment which introduced the right

²²⁶ *Ibid.* at 53. For a similar opinion, see McCarthy J., *ibid.* at 80.

²²⁷ For a similar interpretation, see G. W. Hogan and G. F. Whyte, *J M Kelly: The Irish Constitution*, *op. cit.*, at fn. 206 above, at 1286-1287.

²²⁸ As Hogan and Whelan put it: “the terms of the first paragraph of Article 40.3.3° afforded very little assistance for the text tried to achieve the impossible - it expressly equated two rights which, on those rare occasions when they come into conflict, cannot be reconciled”, *ibid.* at 1518.

²²⁹ For further considerations in relation to this avoidance of the European perspective, see *infra* at 428-431.

²³⁰ [1988] I.R. 593 at 618.

²³¹ *Ibid.* at 626.

²³² [1986] I.L.R.M. 693 at 714.

to life of the unborn in the Constitution²³³ - and did not extend the normative logic initiated in *Open Door*, and later confirmed by the *X* case in which the courts established the hierarchical superiority Article 40.3.3° of the Irish Constitution, when the European rights concerned had the same material content as those at stake in the two latter cases, *viz.*, the right to information and the right to travel.

One of the reasons for not following this path could be the absoluteness that such an interpretation involves. Indeed, taking the view that Article 40.3.3° prevails over any competing provision of the Constitution would lead, insofar as the doctrine of primacy is concerned, to an irremediable bar on the application of European Union law in this field. In stark opposition to the European principle, this would disable Irish courts from applying an interpretation of European norms in conformity with their understanding of the right to life of the unborn. It was the very possibility of this interpretation that was left open in *Grogan* by favouring a material perspective.²³⁴

However, the use of a political reading of the Constitution in terms of the narrative of the expressions of the Irish people is not necessary in order to reach a similar result. A systemic interpretation between constitutional provisions considered to be of equal value would allow the same outcome to be reached. It is this possibility that Phelan foresaw when he stated that it is possible to make an “interpretation of Article 29.4.5 [as the immunity clause was then] in the light of its interaction with a particular article”, referring as an example to the opinion of Walsh J. in *Grogan*.²³⁵

However, it was not so much a constitutional provision that Walsh J. based his argument upon, as on a constitutional amendment. In consequence, it cannot be said for certain that the Supreme Court was referring to the immunity clause in *Grogan* since the amendment to the Constitution allowing Ireland’s membership introduced a new article in the Irish Constitution, Article 29.4.3°, consisting both of (a) a licence to join the then European Communities and (b) of the immunity clause. It was not until after the Treaty of Maastricht that these two principles appeared separately, *viz.*, in what are now Articles 29.4.5° and 29.4.6°. It is certain that McCarthy, relying explicitly on Article 29.4.3° [as it was then], deduced that it “may exclude from constitutional invalidation some provision of the Treaty of Rome the enforcement of which is necessitated by the obligations of membership of the European Communities”.²³⁶ This

²³³ On the political inclination of the interpretation provided by Walsh J. in *Grogan*, see *supra* at 284-286.

²³⁴ See *supra* at 265-269.

²³⁵ D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 213 above, at 345. For a discussion of this point of view, see G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 139-140.

²³⁶ [1989] I.R. 753 at 770.

statement points towards considering the immunity clause as the central element in his argument. However, the fact that the licence to join what is now the European Union, rather than the immunity clause, may actually be the principle upon which Walsh J. relied can be inferred from other arguments he made in *Grogan* when he mentioned that Article 29 “was necessary to permit our adhesion”²³⁷ or made a reference to the “objectives of the treaties”.²³⁸ This latter expression is reminiscent of the “essential scope or objectives” test used in *Crotty v. An Taoiseach*.²³⁹ In this decision, Finlay C.J. made a distinction between the two principles contained in Article 29.4.3° (as it was then) when he affirmed that “the second sentence in Article 29, s. 4, sub-s. 3 [the immunity clause] of the Constitution is not relevant to the issue as to whether the Act of 1986 is invalid having regard to the provisions of the Constitution”.²⁴⁰ The “essential scope or objectives” test was thus used to interpret the first sentence of this constitutional provision, *viz.*, the licence to join the then European Communities. The reference made by Walsh J. to the “objectives of the treaties” could thus be interpreted as also making the licence to join the basis of his opinion in *Grogan*. However, when it comes to the relationship between Article 40.3.3°, which can be regarded as forming part of Irish constitutional identity,²⁴¹ and other constitutional provisions dealing with European law, it seems that considerations for the immunity clause are favoured and the legal implications of the licence to join the process of European integration are overshadowed.²⁴²

However, it seems important to take both the licence to join and the immunity clause into account for a legal interpretation of the normative relationship between the domestic and European legal orders as defined by the Irish Constitution. The first reason lies in the difficulty of making a systemic interpretation of what is now Article 29.4.6° of the Constitution that would allow the protection of Irish constitutional identity, if one takes the view that a balance has to be found between interpretative legitimacy and interpretative endeavours.²⁴³ Indeed, it may appear

²³⁷ *Ibid.* at 768.

²³⁸ *Ibid.* 769.

²³⁹ [1987] I.R. 713.

²⁴⁰ See *ibid.*, for example, at 767.

²⁴¹ See *supra* at 265-269.

²⁴² See for example J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law*, *op. cit.*, at fn. 226 above, at 114-115 where Article 29.4.3° (as it was then), *viz.*, as including the licence to join and the immunity clause, is substituted by “Article 29.4.5°” (as it was then at the time of their writing), *viz.*, the sole immunity clause. In the same way, when it comes to the possible limits put on the doctrine of primacy, it is often the immunity clause alone which is considered, see for example G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 129-142 or D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 213 above, at 344-349.

²⁴³ In this interpretative balance, see M. Troper, *Pour une théorie juridique de l'État*, *op. cit.*, at fn. 157 above, at 101-105.

difficult for Irish courts to justify that certain constitutional provisions could prevail over an Article the first words of which are: “no provision of this Constitution”.²⁴⁴

However, Article 29.4.5° does not present the same absolute character and one may argue that it constitutes a more suitable ground for achieving the same result as in *Grogan* through a strictly legal interpretation of the Constitution. The basis of this argument is that only European obligations that have been received in the Irish legal system according to the dualist paradigm can benefit from the immunity clause which is the domestic definition of the primacy principle. In other words, the existence of European rules in the Irish legal order depends on the validity of the European Communities Acts (as amended), the validity of which is dependent on the licence to join the European Union.²⁴⁵ In this regard, it might be relevant to consider the German position, another dualist member state, and in particular the *Solange* jurisprudence of the German Constitutional Court, which has for long been the paradigm for national resistance to the primacy of European Union law.²⁴⁶

The opposition to the primacy of European law that the *Bundesverfassungsgericht* expressed for the first time in 1974 was centered on the relationship between the licence provided for in the German Constitution to join what is now the European Union and the acts ensuring the reception of supranational law in the German legal system.²⁴⁷ The possibility of transferring sovereign powers to an international organisation is provided for by Article 24 of the German Constitution. However, for the German Federal Constitutional Court, this Article could not be interpreted independently from the whole Constitution. In particular, it has to be balanced with Article 79 (3) which ensures, by referring to Article 1, the indefeasible protection of human rights. In consequence, the German parliament could not, while ensuring the reception of European law (the validity of which relies on Article 24 of the Basic Law) overcome this constitutional constraint. A European norm that would do so would therefore fall outside the scope of the act of reception. In other words, it would be inapplicable in Germany.²⁴⁸

²⁴⁴ On the difficulties to balance Article 29.4.6° with another constitutional provisions due to its absolute wording, see G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 139-140.

²⁴⁵ See *supra* at 130-141.

²⁴⁶ For a more in-depth comparison between the Irish and German positions towards European Union law, see *infra* at 454-462.

²⁴⁷ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*, BVerfG, decision of 29 May 1974, 2 BvL 52/71, [1974] 2 C.M.L.R. 540 at 550.

²⁴⁸ On this position of the German Federal Constitutional Court, see J. Kokott, “Report on Germany” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 77-131, in particular at 95-96.

It seems that a similar solution could be applied to Ireland. In the task of protecting Irish constitutional identity, it may not be necessary to seek a limitation of the immunity clause. Relying on other constitutional provisions would achieve the same result while avoiding the difficulties arising from the absolute nature of the immunity clause. It could be argued that the licence to join what is now the European Union can be interpreted within the Constitution as a whole and that this authorisation can be limited by what is considered as essential and crucial for Irish constitutional identity. In consequence, the validity of the European Communities Act 1972 (as amended) would be circumscribed to such boundaries. Any European instrument or national act within such boundaries would benefit from the absolute constitutional immunity provided for by Article 29.4.6°. Any European or national norms going beyond this would not be received in the Irish legal order and the question of their immunity in the face of contradictory constitutional provisions would therefore be irrelevant.

Furthermore, this solution offers a degree of flexibility in the sense that the ability of the European instrument to cross or not the domestic screen would depend on its actual content, in particular as interpreted by the European Court of Justice, rather than putting an absolute bar on the introduction of European Union instruments in certain fields as the hierarchical solution implies.²⁴⁹ This is the very flexibility which characterises the decision in *Grogan* where a hierarchical interpretation of the relationship between constitutional provisions was avoided.

A similar argument relying on the relationship between the reception of European law through the European Communities Act 1972 (as amended) and the licence to join what is now the European Union defined by Article 29.4.5° could be applied to the issue of the implementation of European rules *via* statutory instruments. As has been seen,²⁵⁰ the validity of this mechanism as well as the validity of the statutory instruments themselves was decided either on the basis of the immunity clause which is now provided for by Article 29.4.6° of the Constitution or on the basis of a certain “elasticity”²⁵¹ put on the “principles and policies” test necessary to interpret Article 15.2.1° of the Constitution. In both instances, the reasoning of the Supreme Court displayed an emphasis being put on political factors. However, the licence to join what was then the European Communities was necessary in order to qualify Article 15.2.1°

²⁴⁹ This solution was indeed upheld subsequently to the decision of the European Court of Justice in *Grogan*. On this interaction by the Supreme Court and the European Court of Justice, see Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v. Grogan and others* [1991] E.C.R. I-4685 and *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan* [1998] 4 I.R. 343. For a more in-depth analysis of this judicial dialogue, see *infra* at 474-480.

²⁵⁰ See *supra* both at 122-124 and at 206-214.

²⁵¹ As Barrett described the reasoning of the Supreme Court in *Maher v. Minister for Agriculture* [2001] 2 I.R. 139, G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution”, *op. cit.*, at fn. 67 above, at 151.

of the Constitution reserving the legislative power to the sole Oireachtas, and notably in order to render constitutionally valid the normative production of the European institutions. It could be argued that the limitation of the competence of the domestic organ with regard to its European counterparts could also apply to the relationship between the Oireachtas and the Government in European Union law issues. In consequence, relying on a legal logic, it seems possible to ground the validity both of section 3 of the European Communities Acts 1972 (as amended) and of the different statutory instrument adopted on this basis in the relationship between Article 15.2.1° and Article 29.4.5°.

In the light of the French interpretation of the Constitution, it seems that strictly normative strategies are also available in order to secure the protection of Irish constitutional identity. Rather than aiming at criticising the position of Irish courts, the foregoing is above all a way to underline their actual decision to favour an interpretation of the Constitution informed by political realities in order to oppose the primacy of European Union law. With regard to this legal reading of the Constitution, it seems judicious to endorse anew the conclusion reached by Hogan and Whelan when they affirmed that:

“one must conclude that an Irish court could build on any of the existing principles of constitutional interpretation to permit the invalidation of a national measure which, as a matter of Community law is necessitated by the obligations of membership of the Communities

However, (...) it must also be concluded that none of these options represents the test to which the Irish courts subscribe at present.”²⁵²

²⁵² G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 74 above, at 141.

Chapter VI Controlling the Application of European Union Law in the Irish and French Legal Orders: A Common Objective but Different Means for Protecting Constitutional Identity

Although Irish and French courts have different perspectives, their aims converge insofar as they seek to reconcile the supremacy of constitutional values and the primacy of European Union law. The notion of constitutional identity, which can be used to describe this process, is directed towards increased control of the application of European rules in the domestic legal order, as opposed to their drafting at European level.

However, the form of justification given for this kind of interpretative endeavour is not without consequences. The respective importance given to political and legal factors in the interpretation of constitutional provisions conditions the ability of Irish and French courts to attain their comparable objective and enforce the necessary protection of certain constitutional features. In this regard, even though, the *Conseil constitutionnel* affirmed more explicitly its willingness to focus on the application of European Union law and its primacy, it seems that Irish courts are in a better position to perform this task.

A. The Control of the Application of European Union Law Doctrine of Primacy: A Common Objective for an Effective Protection of Irish and French Constitutional Identities

At first sight, the position of Irish courts as to the impact of the primacy principle in the domestic legal order corresponds to the upholding of the fresher expression of the Irish people *via* referendum. Nevertheless, behind this political appraisal of the narrative of the people's will, in favour either of European integration or of purely domestic features, it seems that it is rather the timeless control of the application of European norms that guides the reasoning of the judiciary.

The recent formalisation of the notion of constitutional identity in the case-law of the *Conseil constitutionnel* seems to correspond to the same preoccupation while at the same time making this objective more explicit in the shaping of its new reasoning regarding the relationship between the participation in the European legal order and other constitutional provisions.

1. The Implicit but Necessary Protection of Irish Constitutional Identity in the Application of European Union Law

Due to the specific nature of Constitutions,¹ their interpretation depends both on legal and political elements. In comparison with the *Conseil constitutionnel*, the position of the Irish Supreme Court relies less prominently on a strict normative appraisal of the normative relationship between constitutional values and the primacy principle.² Instead, the relationship established by the Constitution between the domestic and European legal orders is often perceived according to the narrative of the popular expression of a sovereign conceived as a concrete political entity.³ In consequence, the opposition to the doctrine of primacy could be justified, as is notably the case in *Grogan* discussed below, by the upholding of the fresher will of the Irish people expressed in referendum. However, behind this surface logic, it is arguable that the perceived need to control of the application of European Union law explains Irish case-law. To the extent to which this is true, the timing of the people's approval of the process of European integration is of little consequence for the protection of those constitutional principles which are regarded as of crucial importance in the face of the doctrine of primacy. Rather, the protection of Irish constitutional identity points towards the central and active role played by domestic courts.

Up until now, *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*⁴ is the only decision where this interpretation of the Constitution according to the narrative of popular expression was explicitly used to justify the potential limitation of the primacy principle in the name of certain features considered essential for the definition of Irish constitutional identity. While the reasoning in *Grogan* managed to preserve the respect for the right to life of the unborn in the face of the primacy principle, one could argue that the arguments made by Walsh J. were pragmatic and involved an *ad hoc* preservation of Irish constitutional identity. However, they are not without presenting some theoretical difficulties.

¹ As Monjal qualifies it, constitutional law is “on a ridge line the sides of which are constituted, on one side, by the political field, and on the other side, by the legal field”, P.-Y. Monjal, “Le projet de traité établissant une Constitution pour l’Europe : quels fondements théoriques pour le droit constitutionnel européen ?” (2004) 40 *Revue trimestrielle de droit européen* 443-475 at 462 (translation by the author).

² According to the distinction between the normative and political routes of constitutional interpretation made above, see *supra* at 273-274.

³ See *supra* at 284-286.

⁴ [1989] I.R. 753.

The reasoning of Walsh J. relied on a chronological appraisal of the sovereign expression and the application of the principle according to which *lex posterior derogat legi priori* to constitutional interpretation when he stated that:

“it has been sought to be argued in the present case that the effect of the amendment of Article 29 of the Constitution, which was necessary to permit our adhesion to the treaties of the European Communities, is to qualify all rights including fundamental rights guaranteed by the Constitution. The 8th Amendment of the Constitution is subsequent in time, by several years, to the amendment of Article 29. That fact may give rise to the consideration of the question of whether or not the 8th Amendment itself qualifies the amendment to Article 29.”⁵

At first sight this opinion seems congruent with the one he expressed in *Campus Oil Limited v. Minister for Industry*⁶ when he made the following point:

“however, even if the reference of questions to the Court of Justice were a decision within the meaning of Article 34 of the Constitution, I would hold that, by virtue of the provisions of Article 29, s. 4, sub-s. 3, of the Constitution, the right of appeal to this Court from such a decision must yield to the primacy of article 177 of the Treaty [the mechanism now provided for by Article 267 of the Treaty on the Functioning of the European Union]. That article, as a part of Irish law, qualifies Article 34 of the Constitution in the matter in question.”⁷

Even though the chronological dimension does not expressly feature in this ruling, one could argue that, retrospectively read in the light of *Grogan*, the third amendment to the Constitution of June 1972 relating to the participation of Ireland in the process of European integration would overcome Article 34 dating, as the provisions of this Article did, from 1937. Both of these decisions arguably present the same willingness of the judiciary to ensure that the fresher expression of the sovereign would prevail. *Campus Oil* and *Grogan* thus involve a congruent approach concerning the relationship between purely domestic and European-

⁵ [1989] I.R. 753 at 768.

⁶ [1983] I.R. 82.

⁷ *Ibid.* at 87.

orientated constitutional provisions according to the narrative of the Irish identity expressed *via* referendums.

However, the apparent coherence in the reasoning of the Supreme Court can be doubted. One could argue that the statement of the willingness of the Irish people to participate in European integration was not only expressed in the referendum of 1972. In contrast, the tenth amendment of June 1987 necessary to ratify the Single European Act could be regarded as a fresher expression of the sovereign in favour of a full participation in the process of European integration, which can qualify the referendum on the right to life of the unborn. Admittedly, it was the consideration of Title III of the Single European Act (which did not concern European Community law as such) by the Supreme Court in *Crotty v. An Taoiseach*⁸ which justified the holding of a referendum.⁹ Mostly centred on the independence of Irish foreign policy, the considerations given by the Supreme Court in *Crotty* to the Single European Act did not primarily concern the question of the right to life of the unborn. However, Irish courts often offer a politically contextualised reading of the relationship between the two legal orders established by the domestic Constitution, *i.e.*, the licence to join and the immunity clause provided for respectively by what are now Article 29.4.5° and 29.4.6°, where it is the participation in the European framework at large which is their main focus.¹⁰ This leads to question the balance applied by Walsh J. in *Grogan* between the third and the eighth amendments alone. To use the word of Walsh J., it could be said that the tenth amendment of the Constitution necessary for the ratification of the Single European Act was subsequent in time, by several years, to the amendment of Article 40.3.3°. That fact may give rise to the consideration of the question whether or not the tenth amendment itself qualifies the amendment of Article 40.3.3°.

This conclusion is reinforced by the fact that the question of the possible conflict between the European freedom of services and the right to life of the unborn was not completely ignored in the decision in *Crotty*.¹¹ Mr. Crotty argued that the Community law (as it was then) aspect of the Single European Act, *i.e.*, Title II, could constitute an infringement of

⁸ [1987] I.R. 713.

⁹ See *supra* at 196-198.

¹⁰ See *supra* at 255-258.

¹¹ On this issue in *Crotty*, see N. Fennelly and A. M. Collins, "Irlande" in J. Rideau (ed.), *Les États membres de l'Union européenne : Adaptations - Mutations - Résistances* (Paris: Librairie Générale de Droit et de Jurisprudence, 1997) 263-300 at 272. An issue also raised by Walsh J. himself in an extra-judicial context, B. Walsh, "Reflections on the Effects of Membership of the European Communities in Irish Law" in F. Capotorti, C.-D. Ehlermann, J. Frowein and *al.* (eds.), *Du droit international au droit de l'intégration : Liber Amicorum Pierre Pescatore* (Baden-Baden: Nomos Verlag, 1987) 805-820 at 814-817.

the right to life of the unborn.¹² However, the Supreme Court took the view that the new European instrument did not “create a threat to fundamental constitutional rights”¹³ and that, in consequence, the provisions of the Single European Act related to the freedom for the provisions of services fell within the licence to join interpreted according to the “essential scope or objectives” test. It could thus be suggested that the Supreme Court, contrary to the opinion of Walsh J. in *Grogan*, had already decided that the eighth amendment concerning the right to life of the unborn was compatible with the will of the Irish people will to participate in the process of European integration.

It is possible to take the view that, however, the reasoning used in *Grogan* functioned as a pretext for considerations of a different nature from the chronological assessment of their constitutional identity expressed by the Irish people *via* referendums. It seems that it is rather a (timeless) objective of protection of the right to life of the unborn, which was considered as a constitutional identity feature in *Grogan*, which drove the decision of the Supreme Court. In order to come to this conclusion, it is necessary to consider the relationship between the decision of the Supreme Court in this case and the approach displayed by the Irish Government during the drafting of the European Treaty of Maastricht, which “must be seen primarily as response to the possibility (...) that the prohibition imposed by the Irish courts on certain forms of abortion information (...) could in some circumstances be contrary to Community law.”¹⁴

Apparently, in their respective fields of competence, the Government and the judiciary shared the same purpose, *viz.*, ensuring the preservation of the right to life of the unborn from the reach of the European legal order. Following the conflict which arose from *Grogan*, the Irish government secured, during the drafting of the Treaty of Maastricht a Protocol, Protocol (No 17), which is now Protocol (No 35) under the Treaty of Lisbon. Protocol (No 35) provides that:

“nothing in the Treaties, or in the Treaty establishing the European Atomic Energy Community, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.”

¹² [1987] I.R. 713 at 749.

¹³ *Ibid.* at 770.

¹⁴ J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law* (Dublin: Round Hall Sweet & Maxwell, 1997) at 163.

In the aftermath of the decision in *Attorney General v. X*,¹⁵ a Declaration¹⁶ was added in order to clarify the interpretation of the Protocol whereby the member states agreed that:

“it was and is their intention that the Protocol shall not limit freedom to travel between Member State or, in accordance with conditions which may be laid down, in conformity with Community law, by Irish legislation, to obtain or make available in Ireland information relating to services lawfully available in Member States.”

To a large extent, this Declaration was made redundant by the 13th and 14th amendments to the Irish Constitution which included these rights in Article 40.3.3° of the Irish Constitution. Even if some discrepancies may remain, the normative conflict is less stringent.¹⁷ Protocol (No 17) and the subsequent Declaration were presented as the solution to the potential normative conflict which arose when the *Grogan* case first came before the Supreme Court¹⁸ and which could have led Ireland to being in breach of European law as it was contemplated in this very decision.¹⁹ However, it is not certain that this focus on the drafting of European norms achieved the same result as the one produced by Walsh J. through the judicial channel. When read in comparison with *Grogan*, several discordances can be heard concerning the normative results achieved by this legislative endeavour and its capacity to fulfil the anticipated protection of what is seen as an Irish core constitutional feature.

First, Protocol (No 17) (as it was then) constituted a European immunity clause to the benefit of the right to life of the unborn - rather in the same way as Article 29.4.6° of the Irish Constitution ensures the constitutional immunity of laws enacted, acts done or measures adopted by the European Union and its institutions. However, unlike Article 29.4.6° of the Constitution, the solution provided by the Protocol cannot fully be regarded as an instrument the purpose of which is to avoid normative conflicts between the domestic and European levels in a preventive manner. In contrast, it appears rather as an *ex post facto* solution in order for Ireland not to be found in breach of European law by virtue of previous judicial decisions where an issue arose from the unforeseen consequences of otherwise undisputed European

¹⁵ *Attorney General v. X* [1992] 1 I.R. 1.

¹⁶ Declaration of the High Contracting Parties to the Treaty on European Union (signed at Maastricht on the seventh day of February 1992) of 29 July 1992 [1992] O.J. C 191/109.

¹⁷ In this sense, see J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law, op. cit.*, at fn. 14 above, at 164.

¹⁸ For an analysis of the decision of the European Court of Justice following the preliminary reference made by the High Court in this case and the subsequent decision of the Supreme Court in the same case, see *infra* at 474-480.

¹⁹ [1989] I.R. 753 at 770.

competences, as appears from the reflections by the Supreme Court in *Crotty* regarding the relationship between the European freedom to provide services and the right to life of the unborn.

Protocol (No 17) could thus be seen as a reaction to a potential conflict between Irish constitutional provisions and European law which appeared in the process of application of the latter. In consequence, the necessary protection of certain Irish constitutional features in the face of the primacy principle was not so much a question of anticipating the difficulties that might result from the distribution of competences between what is now the European Union and the member states. Protocol (No 17), while recognising that the European organs hold competence on the issue at stake in *Grogan*, aimed to ensure that Article 40.3.3° of the Irish Constitution would benefit from a European immunity.²⁰ The legislative intervention of Ireland in the drafting of European treaties appears as a potential solution to avoid future and unexpected consequences of European competences when applied in the domestic legal order.

The opinion of Walsh J. according to which “it cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right”²¹ is reminiscent of the “essential scope or objectives” test used in *Crotty*.²² From its decision in *Grogan*, in particular when read in parallel with the considerations given to the right to life of the unborn in *Crotty*, until the drafting of Protocol (No 17), one could thus argue that the position of the Irish Supreme Court was tantamount to withdrawing competences,²³ or at least to preventing their application in the Irish legal system, competences that the European Court of Justice could have interpreted as being lawfully included in the European realm. *A contrario*, confronting the diverging decisions in *Crotty* and *Grogan* as regards the relationship between the freedom under what is now European Union law to provide services, on the one hand, and the right to life of the unborn, on the other, bears witness to the difficulties entailed by a constitutional control limited to the drafting of European

²⁰ On this European immunity granted to the right to life of the unborn, see G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary* (London: Sweet & Maxwell, 1995) at 143.

²¹ [1989] I.R. 753 at 769.

²² Incidentally, it is also the sign that the opposition to the primacy of European Union law relies paradoxically in the framework of the licence to join what is now the European Union of Article 29.4.5° rather than the immunity clause provided for in Article 29.4.6°.

²³ For a similar argument about the difficulty of applying to European secondary law a test used to determine if a referendum is needed before the ratification of a new European treaty, see D. R. Phelan and A. Whelan, “National constitutional law and European integration: FIDE Report” (1997) 6 *Irish Journal of European Law* 24-64 at 43.

primary law insofar as concerns the protection of Irish constitutional identity, a protection which needs to take place downstream from the ratification process. It confirms the need to go beyond the distinction between European primary and secondary law. The protection of certain constitutional features considered as being of crucial importance requires an ability to control the application of European rules, either of primary or secondary nature, and to tackle the constitutional issues it may involve.

This element throws light on one of the characteristic of the notion of constitutional identity. The relationship it established between the doctrine of primacy and the supremacy of the Constitution is not merely defined in terms of a sovereignty which belongs to Ireland and which is opposed to a European Union deprived of a sovereignty on its own. In contrast, the notion of constitutional identity rests on the overall willingness expressed by the Irish people to participate in the process of European integration. The upholding of European Union law is thus the upholding of this sovereign expression. This element seems to be present in the definition by the Supreme Court of what is now the European Union as a “developing organism”,²⁴ and in its ruling that the deepening of the process of European integration does not necessarily necessitate a renewed popular approval, as long as it remains within its “essential scope or objectives” of the existing treaties.²⁵ Due the continuous transfers of competences to European institutions and the consequent greater intertwined nature between the domestic and European legal orders, the focus put on the control of primary law in terms of a required preliminary sovereign approval loses at least some of its impact. In contrast, the notion of constitutional identity is the result of the balance effected between two sovereign expressions of equal value - one in favour of the process of European integration and the other concerning constitutional provisions of a purely domestic nature - and thus differs from the mere affirmation of national sovereignty in the face of the doctrine of primacy. In consequence, the domestic consideration of European Union law does not so much consists of ensuring that the necessary prior sovereign approval to the furthering of the process of European integration is respected. Rather, it is primarily the consequences of the membership of what is now the European which need to be controlled. This explains the focus put by Irish courts on the application of European rules in the domestic legal order. This specific logic animating the notion of constitutional identity becomes more explicit when compared to other forms of opposition to the primacy principle in the name of the supremacy of the Constitution, and

²⁴ As argued by Finlay C.J. in *Crotty v. An Taoiseach* [1987] I.R. 713 at 770.

²⁵ *Ibid.* at 767.

notably the *Kompetenz-Kompetenz* paradigm developed by the German Federal Constitutional Court.²⁶

Secondly, the necessary focus on the interpretation of European Union law and its application is the very consequence of the mechanism chosen in order to protect what can be deemed as being part of Irish constitutional identity. It has been argued that²⁷ the wording of Protocol (No 17) ensued a full immunity and could not be submitted to the same restrictions surrounding the derogations member states can claim under European law, and in particular the proportionality principle.²⁸ This point of view has to be paralleled with considerations leading to Protocol (No 17) being regarded as a “*renvoi* in reverse”,²⁹ constituting the mirror image of the “*renvoi*” to European law introduced by the “necessitated” clause contained in what is now Article 29.4.6° of the Constitution. On this basis, some authors have argued that the meaning of this European instrument is a matter for interpretation by Irish courts.³⁰ However, and for the same reasons put forward when the interpretation of Article 29.4.6° of the Constitution was analysed,³¹ the question of the authority competent to determine the content of a provision is directly linked to the formal nature of the provision. In other words, the meaning of Protocol (No 17) is the result of a subjective interpretation of the European Court of Justice as its authentic interpreter.³² In consequence, due to its formal nature, Protocol (No 17) cannot ensure that the scope of immunity it provides will be considered under Irish terms, as, and for the same reasons, Article 29.4.6° cannot guarantee the reception of the primacy principle in the

²⁶ For an in-depth comparison between the notion of constitutional identity as qualifying the position of Irish courts and the traditional case-law of the *Bundesverfassungsgericht*, see *infra* at 454-462.

²⁷ For the different interpretations of the degree of protection offered by Protocol (No 17), see J. Kingston and A. Whelan, “The Protection of the Unborn in Three Legal Orders - Part III” (1992) 10 *Irish Law Times* 166-170 at 168-169.

²⁸ In this sense, see for example, J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law*, *op. cit.*, at fn. 14 above, at 37.

²⁹ G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 20 above, at 144 where the author explain that “the Protocol appears as a matter of Community law [as it was then] to have instituted a ‘*renvoi* in reverse’ because it makes the operation of the constitutional Treaties of the Communities contingent in certain circumstances on the objective requirements of a provision of the Constitution of Ireland as determined by Irish courts.”

³⁰ On this objective meaning of Protocol (No 17) on the basis of the interpretation provided by Irish courts of Article 40.3.3° of the Constitution, see for example D. R. Phelan and A. Whelan, “National constitutional law and European integration: FIDE Report”, *op. cit.*, at fn. 23 above, at 52 where the authors consider that “the Protocol is heterodox because it expressly subjects the interpretation and application of Community law to the application by a national court in the Member State in question of the named national constitutional provision”. J. Kingston and A. Whelan have a similar opinion, see J. Kingston and A. Whelan, “The Protection of the Unborn in Three Legal Orders - Part III”, *op. cit.*, at fn. 27 above, at 169.

³¹ For a critical analysis of Irish law provisions constituting an objective “*renvoi*” to European Union law, see *supra* at 117-129.

³² In this sense, see for example G. W. Hogan, “Protocol 17” in P. Keatinge (ed.), *Maastricht and Ireland: What the Treaty means* (Dublin: The Institute of European Affairs, 1992) 109-121 at 117 where the author argues that “the Protocol *will itself become part of Community law* upon ratification. It is not so much a case of the Irish courts attempting to give precedence to domestic constitutional law in preference to Community law, rather that the Protocol itself states that, as *a matter of Community law*, nothing in the Treaty of Rome or the Treaty of European union can affect the proper application within Ireland of Article 40.3.3.”

domestic legal order on the same terms as the case-law of the European Court of Justice. Of course, nothing could prevent the European Court of Justice from adopting a broad reading of the exemption this Protocol introduces to the benefit of Ireland but it could only result from a self-imposed limitation.³³

While the purpose of the Protocol is to prevent common rules from infringing Article 40.3.3° of the Irish Constitution, it remains a European law instrument and, therefore, does not leave the interpretative ambit of the European Court of Justice. As Hogan and Whelan put it:

“thus, the *renvoi* to Irish constitutional law is circumscribed by a condition expressed in the Protocol itself, and therefore a part of Community law to be interpreted by the Court of Justice. It is open to the Court of Justice to determine the extent of the *renvoi* without in any way second guessing the Irish courts as authoritative arbiters of the requirements of the Irish Constitution.”³⁴

In consequence, nothing prevents the European Court of Justice from subjecting Protocol (No 17) to the same European legal regime as it applies in respect of all derogations. More importantly in contrast to the intention which underlay the introduction of Protocol (No 17), the interpretation of the European Court of Justice could create a gap between the domestically-requested protection and the protection offered by what is now European Union law. Indeed, *Grogan* is the confirmation of what appeared implicitly³⁵ in *Attorney General (Society for the Protection of Unborn Children Ireland Limited) v. Open Door Counselling Limited*³⁶ and later confirmed in the *X* case,³⁷ viz., the limitation of the European dimension of the right to information and the right to travel in the face of Article 40.3.3° of the Constitution.³⁸ However, in the eyes of the European Court of Justice, the words found in Protocol (No 17) “the application in Ireland of Article 40.3.3 of the Constitution of Ireland” would certainly not have received the same meaning. In contrast, as Curtin has argued,³⁹ it would certainly have

³³ In this sense, see J. Kingston and A. Whelan, “The Protection of the Unborn in Three Legal Orders - Part III”, *op. cit.*, at fn. 27 above, at 170.

³⁴ G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 20 above, at 145.

³⁵ On this interpretation of *Grogan* with regard to the *Open Door* decision and the *X* case, see for example, F. Murphy, “Maastricht: Implementation in Ireland” (1994) 19 *European Law Review* 94-104 at 98-99.

³⁶ [1988] I.R. 593.

³⁷ *Attorney General v. X* [1992] 1 I.R. 1.

³⁸ See [1989] I.R. 753 at 764 and 769 respectively *per* Finlay C.J. and Walsh J.

³⁹ See D. Curtin, “The Constitutional Structure of the Union: A Europe of Bits and Pieces” (1993) 31 *Common Market Law Review* 17-69 at 48-49.

supported an interpretation limited to a purely domestic issues – which would have been contrary to the initial intention in drafting Protocol (No 17). Hogan arrived at a similar conclusion by stressing that the Protocol only concerned legal issues arising within Ireland.⁴⁰ In this regard, the subsequent Declaration, where the emphasis is put on the existence of a right to travel and a right to information “in conformity with Community law”, is regarded as opposite to the original purpose of Protocol (No 17),⁴¹ or, as Murphy puts it, pointed to “an interpretation to the 17th Protocol diametrically opposed to the Government’s original intention.”⁴²

In consequence, it can be said that the discrepancies between the intention of Ireland in making Protocol (No 17) part of the Treaty of Maastricht settlement and the scope it was most likely to receive are symptomatic of the different interpretations of what each of the parties hold as existential.⁴³ The balance between the different principles at stake necessarily differs depending on the values inherent in the perspective, domestic or European, from which the conflict is considered and interpreted.⁴⁴ It is not certain that the protection of human rights at European level will be sufficient to avoid normative conflicts,⁴⁵ and in particular to preserve Ireland’s “entirely different ethos.”⁴⁶ Protocol (No 17), being of a European nature, could have limited and postponed the potential conflicts between the domestic and European legal orders but its capacity to solve them in a decisive way can be doubted.⁴⁷ This is the difference with the solution offered in *Grogan*. While the drafting of Protocol (No 17) corresponds to the willingness of the Irish government to ensure the enforcement of the position taken by the Supreme Court in *Grogan*, this mechanism presents some shortcomings. The reasoning of the

⁴⁰ See G. W. Hogan, “Protocol 17”, *op. cit.*, at fn. 32 above, at 115-116.

⁴¹ On this hypothesis, see for example G. W. Hogan and G. F. Whyte, *J M Kelly: The Irish Constitution* (Fourth edition, Dublin: Lexis Nexis Butterworths, 2003) at 1506.

⁴² F. Murphy, “Maastricht: Implementation in Ireland”, *op. cit.*, at fn. 35 above, at 99.

⁴³ This appears in the opposition between economy and morality made by Walsh J. in *Grogan* [1989] I.R. 753 at 769. In the same sense, see B. Wilkinson, “Abortion, the Irish Constitution and the EEC” (1992) *Public Law* 20-30 at 26. For further developments on the opposition of logics between member states and what is now the European Union with regard to the question of constitutional identity, see *infra* at 494-499.

⁴⁴ In this sense, and on the particular instance of the opposition between the right to life of the unborn and the freedom of services, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Round Hall Sweet & Maxwell: Dublin, 1997) at 372-391.

⁴⁵ On this hypothesis, see for example G. W. Hogan and G. F. Whyte, *J M Kelly: The Irish Constitution*, *op. cit.*, at fn. 41 above, at 1536 or D. R. Phelan and A. Whelan, “National constitutional law and European integration: FIDE Report”, *op. cit.*, at fn. 23 above, at 52.

⁴⁶ T. F. O’Higgins, “The Constitution and the Communities - Scope for Stress?” in J. O’Reilly (ed.), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Dublin: Round Hall, 1992) 227-241 at 238.

⁴⁷ On this idea that the Irish legal system is animated by an ethos which is different from that prevailing in the European legal sphere, even though one might disagree with the natural law foundation of the Irish ethos, see D. R. Phelan, *Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of European Union* (1992) 55 *The Modern Law Review* 670-689, in particular at 677-681.

Supreme Court ensures, in contrast, effective protection of Irish constitutional identity, a notion which appears as central to its decision.

Similar reasoning could be applied to the Declaration by the Council of the European Union on 10 July 2009 that Ireland secured before the second referendum on the Treaty of Lisbon and deemed to protect the Irish legal order from European Union law.⁴⁸ Aside from the fact that it is left to the interpretation of the European Court of Justice, this instrument merely stresses the limits of the Treaty of Lisbon but does not modify it to take into account specific Irish concerns.⁴⁹ It can thus be argued that this concern with the drafting of European law cannot achieve a similar level of protection to the one enforced by domestic courts when they take the view that the implementation of European law endangers Irish identity values.

The decision in *Grogan* can be considered anew in this light. In comparison with Protocol (No 17) - which consists of defining in a European norm the limit of European law and therefore submitting its scope to the interpretation given to this norm by the European Court of Justice - it is the very interpretation of the rules belonging to the European legal order and their application in Ireland that the Supreme Court aimed to control in *Grogan*.⁵⁰ This is explicitly affirmed by Walsh J. when he stated that:

“be that as it may any answer to the reference received from the Court of Justice of the European Communities will have to be considered in the light of our own constitutional provisions.”⁵¹

In consequence, the logic underlying the position of the Supreme Court appears to be opposite to the endeavour to protect Irish constitutional identity values in the drafting of

⁴⁸ Presidency Conclusions of the Brussels European Council of 18-19 June 2009, 11225/8/09 Rev. 2 at 2. See also in Annex 1 to these, the Decision of the Heads of State or Government of the 27 Member States of the European Union, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon for a more detailed presentation, *ibid.* at 17-19 and in Annex 3 the unilateral declaration by Ireland about neutrality, *ibid.* at 22-23.

⁴⁹ Pech and Griffin argue, when considering the impact of these legal guarantees, that “it is necessary to ask whether they changed the content of the Lisbon Treaty to such a degree that it differed substantively from the *version* of the Treaty ratified by other Member States. In our opinion, confirming what a Treaty does by saying what it does not do, is, in fact, merely a positive affirmation of its content and thus implicitly implies no change. Consequently, *not changing* a document could never be considered as triggering a requirement of re-ratification”, L. Pech and P. B. Griffin, “Fixing a Hole Where the Rain Gets In: The Lisbon Treaty and the Irish ‘Legal Guarantees’” (2009) 16 *Irish Journal of European Law* 5-36 at 26.

⁵⁰ For a similar argument, see J. Casey, *Constitutional Law in Ireland* (Third edition, Dublin: Round Hall Sweet & Maxwell, 2000) at 215 where the author mentioned that *in fine* “the Supreme Court would have the last word”, which is the very opposite of the dynamics underlying the drafting of Protocol (No 17).

⁵¹ [1989] I.R. 753 at 768.

European instruments. The upholding of Irish constitutional identity requires maintaining the effects of European law in the domestic legal order under the national hold.⁵² One can therefore doubt that the main concern of the judiciary in *Grogan* was to uphold the fresher expression of the Irish people. It could be argued that it is the willingness to control the application of European Union law as interpreted by the European organs, and in particular the European Court of Justice, which constitutes the real *rationale* of the decision. In this respect, the determination courts have to make as to the instrument, domestic or European, which reflects the will of the Irish people is carried out outside of a chronological perspective. Rather than being based on the enforcement of the narrative of popular expression in referendums, the efficient protection of Irish constitutional identity requires the enclosure of the balance between the different constitutional provisions under a legal prism where the interpretative powers of the judiciary as an organ of the state overcomes its alleged submission to the political sovereignty expressed *via* referendums.

While carried out on behalf of the protection of the sovereign, the decisions of Irish courts in relation to European law has led to an empowerment of the judiciary.⁵³ Behind the political fabric of the decisions of the Supreme Court, the control of the application European Union law in the domestic legal order involves ascribing a definition to Irish constitutional identity as the limit to the primacy principle which depends on an unfettered national interpretative power.⁵⁴

However, it can be argued that the Supreme Court is bound by its reasoning in *Crotty* where it presented its decision as the result of the necessary protection of a sovereignty which dwells in the people as opposed to the organs of state, a construction of the people as a political fact, unconstrained by legal instruments, which has been furthered in its subsequent decisions on the referendum process in Ireland.⁵⁵ In this regard, the Supreme Court has no other

⁵² On this point, D. R. Phelan stressed the importance of “different interpretations of a similarly named right” as a source of the normative conflicts between the domestic and European legal order which justifies the necessity to be able to have the national interpretation prevail in order to protect features participating in the constitutional identity of a member state, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 44 above, at 401-403. On this necessity to ensure the protection of Irish identity in the interpretative process of European norms, see also T. F. O’Higgins, “The Constitution and the Communities - Scope for Stress?”, *op. cit.*, at fn. 46 above, at 240-241.

⁵³ For an assessment of the empowerment of Irish courts through European law, see *infra* at 384-395.

⁵⁴ Bearing in mind the concrete representation of the *demos* upon which Irish democracy relies, one could argue, as did Murphy when he analysed the Irish decisions based on natural law and particularly in relation to the right to life of the unborn, that “the consequences [of the decisions of Irish courts opposing the doctrine of primacy in the name of Irish constitutional identity] involve a usurpation of the democratic process by constitutional interpretation”, see T. Murphy, “Democracy, Natural Law and the Irish Constitution” (1993) 11 *Irish Law Times* 81-83 at 82.

⁵⁵ See for example, *McKenna v. An Taoiseach (No 2)* [1995] 2 I.R. 10, *Hanafin v. Minister for Environment* [1996] 2 I.R. 321 and *Coughlan v. Broadcasting Complaints Commission and RTE* [2000] 3 I.R. 1. For further considerations on the representation of the Irish people as a concrete political entity in these decisions, see *supra* at 276-281.

argumentative option than justifying that the supremacy of the right to life of the unborn over the doctrine of primacy as the result of the necessary enforcement of the newer expression of the people rather than a judicial and timeless balance between constitutional provisions.⁵⁶

In conclusion, it is possible to suggest that the protection of Irish constitutional identity requires domestic control of the application of European norms –and of their primacy – in the domestic legal order. However, due to the specificities of the Irish legal culture, and in particular the definition of the Irish people as a concrete political entity, this consideration cannot be stated explicitly, even though this may involve, as in *Grogan*, discrepancies between the justification of the courts and what is actually achieved. However, these difficulties remain, for the most part, of a theoretical nature and do not constitute an impassable obstacle to the efficiency of such an endeavour. In contrast, as will be seen, the choice of Irish courts in favour of a reading of the relationship between the European and domestic legal orders informed by political realities ensures a very pragmatic protection of the Irish constitutional identity.

⁵⁶ On this upholding of the popular sovereignty “as cover” in the Irish case-law regarding constitutional amendments, see G. J. Jacobsohn, *Constitutional Identity* (Cambridge, Massachusetts: Harvard University Press, 2010) at 48.

2. *The Recent Case-law of the Conseil Constitutionnel on the Notion of Constitutional Identity: Empowering Control over the Application of European Union Law*

The decision of the *Conseil constitutionnel* granting the first jurisdictional recognition to Article 88-1⁵⁷ - which constituted the ground for the acknowledgement of the primacy principle⁵⁸ - also enunciated as a twin principle the limit of the European Union requirements in the French legal system. This reserve of domestic sovereignty applied where there was an “express conflicting provision of the Constitution”.⁵⁹ However, this is only one legal face⁶⁰ of a consistent logic detectable in the case-law of the *Conseil constitutionnel* and which is formulated in its current form as a “rule or principle inherent in the constitutional identity of France” since 2006.⁶¹

As has been seen,⁶² this modification made clear that legal constructions resting on the case-law of the *Conseil constitutionnel* played a role in the definition of French constitutional identity and could therefore form an obstacle to the primacy of European norms. However, this change from an “express conflicting provision of the Constitution” to the notion of constitutional identity is not only relevant in order to determine the putative content of the constitutional identity of France. It is certainly a sign of the active participation of the *Conseil constitutionnel* in the protection of the latter notion but one could also argue that it underlines circumstances in which the appropriate balance between the demands of constitutional provisions and those of European Union law must be decided on the identity scales. Enclosing the relationship between the two legal orders in a legal framework necessarily implies a focus on normative interpretation. This importance given to interpretation in this process can be considered as a sign of the willingness of the *Conseil constitutionnel* to appreciate the normative relationship between the two legal orders in the process of legal application, since interpretation and application are intrinsically linked.⁶³ In this respect, a division between European primary

⁵⁷ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7.

⁵⁸ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 9-13.

⁵⁹ For example, CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7.

⁶⁰ Assuming that the notion of identity is inseparable from the concept of person, and the mask it is constituted by on the legal scene.

⁶¹ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 19.

⁶² See *supra* at 243-245.

⁶³ See H. Kelsen, *Théorie pure du droit* (Trans. C. Eisenmann, Brussels; Paris: Bruylant; Librairie Générale de Droit et de Jurisprudence, coll. La pensée juridique, 1999) at 232-237 and 335-339 and P. Nerhot, “Interpretation

and secondary law is substituted by a distinction between the drafting and the application of European norms.⁶⁴

Since its *Treaty of Maastricht* decision, the test applied by the *Conseil constitutionnel* when asked to assess the compatibility between European treaties and the Constitution consists primarily of determining if they “affect the fundamental conditions of the exercising of national sovereignty”.⁶⁵ This test is concerned with the transfers of competences to the European institutions or the modifications relative to the modalities of decision-making in competences already transferred.⁶⁶ Thus, this test deals primarily with the distribution of normative creation between the European and domestic levels. An amendment to the Constitution in order to overcome an infringement of these fundamental conditions by a treaty can be considered as providing a foundation for normative capacity on the part of European institutions.

In contrast, the constitutional identity test, as used in particular by the *Conseil constitutionnel* in its decisions on legislative instruments implementing directives which are the material mirror of the European instrument, follows a logic where the contention does not deal so much with the constitutional foundations of European competences but rather with the compatibility of the exercise of these competences with French sovereignty as embodied in the Constitution. The recent case-law of the *Conseil constitutionnel* points towards a new conception of the relationship between the European and domestic legal orders. Due both to the limited nature of the functions conferred on the *Conseil constitutionnel* by the Constitution and the *Conseil's* own conception of that function, it was impossible for the French constitutional court to consider the compatibility of any given European Treaty with the Constitution after ratification.⁶⁷ The control of European treaties could only be carried out before ratification, either by considering European primary law itself under Article 54 or the act of ratification under Article 61. The *Conseil constitutionnel* refused to control *a posteriori* both European treaties⁶⁸ and European secondary law.⁶⁹ Furthermore, statutes were conceived only

in Legal Science: The Notion of Narrative Coherence” in P. Nerhot (ed.), *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Dordrecht: Kluwer Academic Publishers, 1990) 193-225 at 212-215.

⁶⁴ In this respect it does not seem that the French constitutional case-law can be analysed in terms of *Kompetenz-Kompetenz*. For further developments on this point, see *infra* at 438-447.

⁶⁵ CC, decision n° 92-308 DC on the *Treaty on European Union* of 9 April 1992, *Rec. 55* at para. 14.

⁶⁶ See *supra* at 183-187.

⁶⁷ On this limited competence of the *Conseil constitutionnel* P. Gaïa, “Le contrôle de constitutionnalité des normes communautaires” in H. Gaudin (ed.), *Droit constitutionnel, droit communautaire : Vers un respect constitutionnel réciproque ?* (Paris; Aix-en-Provence: Economica : Presses universitaires d’Aix-Marseille, 2001) 39-70 at 42-45 or L. Dubouis, “Le juge français et le conflit entre norme constitutionnelle et norme européenne” in *L’Europe et le droit : Mélanges en l’honneur de Jean Boulouis* (Paris: Dalloz, 1991) 205-219 at 207-209.

⁶⁸ See CC, decision n° 92-308 DC on the *Treaty on European Union* of 9 April 1992, *Rec. 55* at para. 7-8 and , more recently, CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec. 459* at para. 10.

according to their domestic formal nature and their validity was assessed only by reference to the Constitution, the *Conseil constitutionnel* refusing to include, and therefore to interpret, European law in the *bloc de constitutionnalité*.⁷⁰ As a result of this lack of jurisdiction, European Union law benefitted from a *de facto* constitutional immunity once the ratification process was completed.⁷¹ It is against this background that the developments of the case-law of the *Conseil constitutionnel* since 2004 can be analysed, which explains the opposite considerations by the doctrine as to its recent decisions, whether benevolent or otherwise, regarding European Union law.

From a material point of view, the new interpretation the *Conseil constitutionnel* consists of taking into account normative effects in the domestic legal order derived from European obligations and concomitantly recognising the primacy principle, as constitutionally defined, by guaranteeing the monopoly of competence of the European Court of Justice in relation to the interpretation of European Union law. However, this benevolent attitude towards the European legal order was only made possible due to the formal widening of the powers of the *Conseil constitutionnel*.⁷² Its new case-law, diminishing the importance of the domestic nature of the statute and rather considering its material relationship with the directives the statutes implements, allows the *Conseil constitutionnel* to compare the act supposed to provide for a directive's implementation with the directive itself, which involves a degree of interpretation, and the principles contained in the European rule with constitutional provisions.⁷³ In both instances, the French constitutional court is empowered,⁷⁴ through this new analytical lens put on the normative relationship between the domestic and European legal orders, to interpret and to control indirectly the acceptable meaning of the European rules from a domestic perspective.⁷⁵

⁶⁹ See CC, decision n° 77-90 DC on the *Last corrective Finance Act for 1977 and, in particular, its Article 6* of 30 December 1977, *Rec.* 44 at para. 4 where it was decided that “the repercussions of the distribution of competences thus effected between Community institutions and national authorities (...) are merely the consequence of international undertakings subscribed by France” (translation by the author).

⁷⁰ On the continuation of this principle despite the recent case-law of the *Conseil constitutionnel* based on Article 88-1 of the Constitution, see *supra* at 112-114.

⁷¹ On this *de facto* constitutional immunity, see O. Dord, “Ni absolue, ni relative, la primauté du droit communautaire procède de la Constitution” in H. Gaudin (ed.), *Droit constitutionnel, droit communautaire : Vers un respect constitutionnel réciproque ?* (Paris; Aix-en-Provence: Economica; Presses universitaires d'Aix-Marseille, 2001) 121-140 at 133-134.

⁷² In this sense, see for example, C. Richards, “The supremacy of Community law before the French Constitutional Court” (2006) 31 *European Law Review* 499-517 at 515.

⁷³ See *supra* at 227-230.

⁷⁴ An empowerment with regard to European secondary law which has long been only foreseen in academic literature until 2004, see for example, P. Gaïa, “Le contrôle de constitutionnalité des normes communautaires”, *op. cit.*, at fn. 67 above, at 63-70.

⁷⁵ On this empowerment of the *Conseil constitutionnel* resulting from its interpretation of Article 88-1 of the Constitution, see G. Canivet, “« Constitution nationales et ordre juridique communautaire » : « Contre-éloge de la

In conclusion, the normative interpretation given to Article 88-1 is a remedy for the limited competence of the *Conseil constitutionnel* with regard to European Union law as defined by Article 54 of the Constitution and represents a step further in the control of the norms belonging to this external legal order. It is not only primary law that the constitutional court controls but also its application by the European institutions in the making of secondary law. As Chaltiel concludes, while comparing the case-law of the *Conseil constitutionnel* on the notion of constitutional identity with the control exercised under Article 54 of the Constitution:

“without coming back to this double-edged interpretation of the formula relative to constitutional identity, this is an *a posteriori* reservation of control.”⁷⁶

Many reasons can be suggested to explain this change of focus from the issue of what competences have been transferred to the question of the application of European law in the French legal order. First, it can certainly be justified by political reasons.⁷⁷ The juridical logic underpinning Article 54 of the Constitution may not be congruent with political views on European integration. Recent European developments have shown that legal arguments may be discordant with the strong political willingness to develop European integration. In this regard, French opposition *via* the Treaty establishing a Constitution for Europe did not prevent the ratification of the Treaty of Lisbon, even if the similarity of the Treaty of Lisbon to the Constitutional Treaty was held to justify that the *Conseil constitutionnel* proceeding *par renvoi*⁷⁸ in its *Treaty of Lisbon* decision⁷⁹ with the Constitution. It has to be noted that, in the same vein, the initial opposition of the Irish people did not prevent its ratification, their approval subsequently being secured during a second referendum.⁸⁰

From a legal point of view, nothing prevents the sovereign from changing its mind in an unfettered manner and it does not seem that this involves any condition of time. However, the control exercised under Article 54 may be of little actual bearing since an incompatibility

tragédie »” in J.-C. Masclet, H. Ruiz Fabri, C. Boutayeb and *al.* (eds.), *L’Union européenne : Union de droit, union des droits : Mélanges en l’honneur du Professeur Philippe Manin* (Paris: Pedone, 2010) 611-624 at 615.

⁷⁶ F. Chaltiel, “La décision du Conseil constitutionnel relative au Traité de Lisbonne : autorité de la chose jugée et contribution à la définition de l’Union” (2008) n° 4 *Les petites affiches* 3-10 at 4 (translation by the author).

⁷⁷ On this discrepancy between the legal and the political analyses, see X. Magnon, “Le Traité de Lisbonne devant le Conseil constitutionnel : *non bis in idem*” (2008) n° 74 *Revue française de droit constitutionnel* 310-336 at 318.

⁷⁸ See for example, X. Magnon, “Le Traité de Lisbonne devant le Conseil constitutionnel : *non bis in idem*”, *ibid.* or J. Roux, “Le Conseil constitutionnel et le contrôle de constitutionnalité du Traité de Lisbonne : *bis repetita* ? À propos de la décision n° 2007-560 DC du 20 décembre 2007” (2008) 44 *Revue trimestrielle de droit européen* 5-27.

⁷⁹ CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459

⁸⁰ This had already been the case for the Treaty of Nice in 2001.

between European treaties and the Constitution always involved, *in fine*, a revision of the Constitution and did not constitute an obstacle to the furthering of the process of European integration.⁸¹ The *Conseil constitutionnel* may have therefore decided to develop a new normative paradigm to operate in parallel with the triggering of an amendment process where political realities dictates there is only one appropriate answer. This could be one of the reasons explaining the limited attention⁸² paid by the *Conseil constitutionnel* to the Charter of Fundamental Rights of the European Union in its *Treaty establishing a Constitution for Europe* decision, and more generally the attitude of the *Conseil constitutionnel* towards European primary law which has been described by some as “delivering a discharge”⁸³ to the process of European integration.

However, legal explanations can also be provided to justify this change in the attitude of the *Conseil constitutionnel*. First, it is not certain that the test introduced in 1992 is still an efficient paradigm for viewing European Union law. The notion of “fundamental conditions of the exercising of national sovereignty” refers to a limited set of principles. Taking into account the continuous transfer of competences to the European institutions, one could wonder if testing European law according to the notion was not at the same time draining this category, thereby reducing the ability of the *Conseil constitutionnel* to oppose the supremacy of the Constitution to the primacy principle to a mere postulate.⁸⁴ In contrast, this finite dimension is not present in the concept of constitutional identity understood as a form of discourse on the balancing of constitutional provisions.

Secondly, one can doubt that a harmonious relationship between the domestic and European legal orders can be attained through a careful drafting of their respective

⁸¹ See, for example, X. Magnon, “Le Traité de Lisbonne devant le Conseil constitutionnel : *non bis in idem*”, *op. cit.*, at fn. 77 above, at 336 where the author argues that “each Community Treaty having been declared contrary to the Constitution led to the implementation of the constitutional amendment process. This one has become automatic. What is at stake is not therefore about the adaption of the constitutional text to the evolution of Community law but about the political willingness, either manifested through the Parliament or the people, to pursue the Community integration” (translation by the author). In the same sense, see G. Guillermin, “La construction européenne et le droit : L’Union européenne face au défi de la hiérarchie des normes” in B. Bruneteau and Y. Cassis (eds.), *L’Europe communautaire au défi de la hiérarchie* (Bruxelles: P.I.E. Peter Lang, 2007) 125-140 at 137 where the author argues that the formally superiority of the Constitution displayed by the amendment process is also the sign of the material prevalence of European law or V. Constantinesco, “Des racines et des ailes : Essai sur les rapports entre droit communautaire et droit constitutionnel” in *Au carrefour des droits : Mélanges en l’honneur de Louis Dubouis* (Paris: Dalloz, 2002) 309-323 at 313.

⁸² In this respect, Sudre questions a “selective, and random, choice of the provisions of the Charter submitted for examination” (translation by the author), see F. Sudre, “Les approximations de la décision 2004-505 DC du Conseil constitutionnel « sur la Charte des droits fondamentaux de l’Union ». Réflexions critiques” (2005) *Revue française de droit administratif* 34-39 at 35.

⁸³ P. Gaïa, “Le contrôle de constitutionnalité des normes communautaires”, *op. cit.*, at fn. 67 above, at 54.

⁸⁴ On the issue of the relevance of the former test used by the *Conseil constitutionnel*, see C. Blumann and L. Dubouis put it in *Droit institutionnel de l’Union européenne* (Third edition, Paris: Litec, 2007) at 604 or K. Béchet-Golovko, “Qu’en-est-il du concept de « souveraineté » ? À l’occasion de la décision du Conseil constitutionnel sur le Traité de Lisbonne” (2008) *Politeia* 75-92 at 90 where the author compares this test to an “empty shell” (translation by the author).

competences. In the same way as a legal norm can only emerge from interpretation of a legal provision,⁸⁵ the drafting of the European competences is not determinative of the actual competences enjoyed by the European institutions. In this respect many have argued that the interpretation of the treaties by the European Court of Justice lead to an increase of the scope of intervention of European institutions beyond what was initially intended by the member states.⁸⁶ The danger of such interpretations by the European Court of Justice appears to have led the *Conseil constitutionnel* to take the view that deploying the notion of “fundamental conditions of the exercising of national sovereignty” applied before the ratification of European Union primary law was not the most efficient way of protecting the supremacy of the Constitution. One could argue that the shortcomings in the earlier test in the light of the developments of the process of European integration also justified the development of a new standard by the *Conseil constitutionnel* for determining the relationship between constitutional provisions and European obligations.

This leads on to another aspect of the relationship between the domestic and European levels. As it was exemplified by the abortion cases in Ireland, the protection of core constitutional features is not necessarily a question of distribution of competences. *Grogan*⁸⁷ was not primarily concerned with determining if the European Union extended its competences as defined by the European treaties. Rather, the case revolved around the interpretation of the European freedom to provide services, rather than the very existence of this freedom, and the potential unacceptable interference of this freedom, from the domestic point of view, with the right to life of the unborn (forming part of the definition of Irish constitutional identity).⁸⁸ In such a case, the need to protect constitutional identity is an issue distinct from the issue of the extent of European competences. It rather tends to be focused on the consequences of their application in domestic legal orders.⁸⁹

The nature of the development of European integration further emphasises the point. The economic nature of the first stages of the European project left the core constitutional provisions of member states mostly unchallenged. However, the increase of European competences in the political sphere has now brought European Union law into more sensitive

⁸⁵ See H. Kelsen, *Théorie pure du droit*, *op. cit.*, at fn. 63 above, at 339-341 and *supra* at 243-244.

⁸⁶ On this increase of European competences in comparison to textual provisions, see for example, J. H. H. Weiler, “The Transformation of Europe” (1991) 100 *The Yale Law Journal* 2403-2483 at 2436-2450 or M. Gautier and F. Melleray, “Le champ d’application matériel, la limite à la primauté du droit communautaire” (2003-2004) *Revue des affaires européennes* 27-36 at 35-36.

⁸⁷ *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan* [1989] I.R. 753.

⁸⁸ For a more detailed analysis of the position of Irish courts on this issue, see *supra* at 328-337.

⁸⁹ In this sense, see B. Genevois, “Le Conseil constitutionnel et le droit communautaire dérivé : À propos de la décision n° 2004-496 DC du 10 juin 2004” (2004) *Revue française de droit administratif* 651-661 at 661.

fields⁹⁰ where, furthermore, it is not so much the recognition of principles that is controversial (since they are mostly common to the member states) but rather the extent of the respect given to their particular interpretation in each country.⁹¹ In this respect, the protection of specific constitutional features leads towards a control *in concreto*,⁹² on a case-by-case basis.⁹³ For instance, where France is concerned, the freedom of religion is protected by Article 10 of the Declaration of Human and Civic Rights. However, it is its interpretation in the light of the secular nature of the state provided for by Article 1 of the Constitution which frames French constitutional identity, and could lead to a collision with the definition of the principle of freedom of religion at European level.⁹⁴

In conclusion, one could argue that the concept of constitutional identity embodies the new approach of the *Conseil constitutionnel*, through Article 88-1, focused on the interpretation of European law - and therefore its application rather than its drafting. The new dynamics in the case-law of the French constitutional court are particularly salient in its consideration of the freedom of communication based on Article 11 of the Declaration of Human and Civic Rights in the French Constitution. The *Conseil constitutionnel* decided that this freedom could not stand in the path of the constitutional requirement of the implementation of directives since:

“this freedom is also protected as a general principle of Community law on the basis of Article 10 of the European Convention on Human Rights”.⁹⁵

At first sight, this opinion could mean that the *Conseil constitutionnel* has used the existence of a similar right at European level in order to grant a jurisdictional immunity to the act of implementation. However, this decision has to be read in conjunction with the

⁹⁰ On the growing disruptive effect on the domestic legal orders due to the developments of European integration, see, for example, J.-P. Kovar, “Commentaire des décisions du Conseil constitutionnel du 10 juin et du 1er juillet 2004 : rapport entre le droit communautaire et le droit national” (2004) 40 *Revue trimestrielle de droit européen* 587-597 at 588 and A. Pécheul, “La souveraineté et le Traité de Lisbonne” (2008) *Politeia* 170-191 at 186.

⁹¹ On this point, see C. Charpy, “The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil constitutionnel* and the *Conseil d'État*” (2007) 3 *European Constitutional Law Review* 436-462 at 444. For a similar idea, see B. de Witte, “Community Law and National Constitutional Values” (1991) 18 *Legal Issues of European Integration* 1-22 at 19.

⁹² In this sense, see N. Charbit, “Censure partielle de la loi relative au secteur de l'énergie : le Conseil constitutionnel, juge communautaire de la concurrence” (2006) *L'Actualité juridique. Droit administratif* 2438-2440 at 2439.

⁹³ See, for example, M.-P. Granger, “France is ‘Already’ Back in Europe: The Europeanization of French Courts and the Influence of France in the EU” (2008) 14 *European Public Law* 335-375 at 357.

⁹⁴ See *supra* at 223.

⁹⁵ CC, decision n° 2004-498 DC on the *Act pertaining to bioethics* of 29 July 2004, *Rec.* 122 at para. 6 (translation by the author).

consideration of the same freedom a month earlier where the French constitutional court held that:

“these provisions could have the effect of creating liability on the part of a service provider which has not removed information denounced as illegal by a third party if this information does not obviously display such a character or if its withdrawal has not been ordered by a court; that, subject to this reservation, section 1 (2) and section 1 (3) of Article 6 are confined to implementing unconditional and precise provisions of section 1 of Article 14 of the Directive concerning which it is not the task of the *Conseil constitutionnel* to make a ruling”.⁹⁶

While allowing the valid application of the European instrument in the domestic legal order, the reservation of interpretation⁹⁷ added to this decision affects the content of European Union law. In other words, this operation consisting on the part of the *Conseil constitutionnel* of circumscribing the European principles in the boundaries of what is domestically acceptable is tantamount to constraining the interpretation of European norms. Indirectly, it is thus the interpretation and application of European principles, rather than their mere existence, that constitute the core of the relationship between domestic and European provisions from the new national perspective.⁹⁸

Shortly after the *Conseil constitutionnel* defined the limit of the doctrine of primacy in the domestic legal order in terms of a “rule or principle inherent in the constitutional identity of France”, the *Conseil d’État* also recognised the normative nature of Article 88-1 of the Constitution.⁹⁹ In the words of the supreme administrative court, this concern for the way European Union is applied by the European Court of Justice is much more explicit since the domestic court has to determine if:

“there exists a rule or general principle of Community law that, in view of its nature and its scope, as interpreted at the current stage in the case-law of the Community

⁹⁶ CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 9 (translation by the author).

⁹⁷ See *supra* at 228-229.

⁹⁸ For a similar opinion as to the willingness shown by the *Conseil constitutionnel* to control the application of European Union law, see T. Georgopoulos, “Le Conseil constitutionnel face à la directive communautaire : trois destinataires pour un message ambivalent” (2004) n° 227 *Les petites affiches* 3-8 at 5.

⁹⁹ For further developments on this recognition and its difficult relationship with the interpretation of the same constitutional provisions by the *Conseil constitutionnel*, see *infra* at 410-416.

court, guarantees through its application the effectiveness of respect for the invoked constitutional provision or principle”.¹⁰⁰

As in the Irish case,¹⁰¹ the importance given to the application of European Union law reveals the specific perspective on the relationship between the supremacy of the Constitution and the primacy of European law which is characteristic of the notion of constitutional identity. The relevance of an opposition between the domestic and European legal orders regulated by the sovereign approval to transfers of competences from one to the other has become limited due to the growing integration between them. In contrast, the notion of constitutional identity assumes, rather than questions, the dynamics of the process of European integration and is more focused on the consequences of the French sovereign willingness to participate in it. In other words, upholding the primacy of European rules is also upholding the supremacy of the Constitution. This is what can be read in the interpretation made by the *Conseil constitutionnel* of Article 88-1 of the Constitution, which is the very basis of the notion of constitutional identity, when it stated that “the constituent power thus recognised the existence of a Community legal order integrated into domestic law”.¹⁰² The relationship between constitutional and European rules cannot solely be defined in terms of distribution of competences. The prevalence to be granted to European Union law is dependent on a balancing between two sovereign expressions of equal value, the determination of which necessitates to be effected in the context of application of European rules in the domestic legal order. In this sense, the notion of constitutional identity as a limit put on the doctrine of primacy is different from the mere opposition of national sovereignty to the developments of the process of European integration, which distinguishes this notion from other paradigms such as the theory of *Kompetenz-Kompetenz*.¹⁰³

Taking into account the reasoning which underlay the development of the new concept of constitutional identity focused on interpretation and application, it is possible to determine the scope of the notion of constitutional identity as a limit to the primacy of European Union law. In the first place, it seems that the new case-law of the *Conseil constitutionnel* goes beyond

¹⁰⁰ CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56 (translation by the author).

¹⁰¹ See *supra* at 331-332 and also *infra* at 459-460.

¹⁰² CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 11 or CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 7.

¹⁰³ For further analysis on this point, and notably the specificities of the identity test as it appears in the recent case-law of the German Federal Constitutional Court in comparison to the *ultra vires* test, see *infra* at 444-446.

the traditional distinction between European primary and secondary law. From the perspective of the enforcement of the primacy of European norms in the domestic legal order with due respect for the constitutional identity of France, this distinction may be considered as immaterial. If the protection of constitutional identity in the face of the primacy principle, especially where human rights are concerned, consists of the content given to the European principles, then potential conflicts between the domestic and European legal orders are relegated to an interpretative disagreement between the domestic jurisdictions and the European Court of Justice. In other words, it is against European Union law as applied in the domestic legal order that the protection of the constitutional identity of France needs to be raised.

Secondly, it seems that the logic at stake in the recent case-law of the *Conseil constitutionnel* encompasses the whole body of European Union norms. Until now the implementation of Article 88-1 and the concomitant notion of constitutional identity have been limited to the issue of the implementation of directives in the domestic legal order. However, one could argue that there are reasons justifying a broader reading of the implications of this constitutional provision. The first element depends on the reasoning of the *Conseil constitutionnel*, relying on Article 88-1, leading it to conclude that “the transposing into domestic law of a Community Directive thus derives from a constitutional requirement”.¹⁰⁴ This constitutional provision broadly states that:

“the Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007”.

The French constitutional court also generally deduced from this provision, in its *Treaty establishing a Constitution for Europe* decision¹⁰⁵ (reiterating this opinion with regard to the *Treaty of Lisbon*¹⁰⁶) that “the constituent power formally acknowledged the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order”.

¹⁰⁴ See, for example, CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 17.

¹⁰⁵ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 9.

¹⁰⁶ CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 7.

In consequence, in the interpretation of Article 88-1 by the *Conseil constitutionnel*, there is nothing justifying the view that a special status is reserved to the obligation of implementation. In contrast, one could argue that Article 88-1 refers to all European obligations. As proof of this broad interpretation of Article 88-1, it has to be reminded that the *Conseil constitutionnel* recognised the compatibility of the primacy principle with the Constitution by referring to its decisions of summer 2004.¹⁰⁷ Therefore, the question of the constitutional requirement to implement European directives, which these decisions concerned, is only one particular application of the recognition through Article 88-1 of the body of European obligations, including the primacy principle.¹⁰⁸ As Luchaire argues:

“what holds true for the implementation of a directive holds true, even more so, for the other elements of European law.”¹⁰⁹

However, some authors have argued that, if Article 88-1 can receive a broad interpretation, the limit to the primacy principle in terms of “express conflicting provision”, which is expressed now by the notion of constitutional identity, would however be limited to European directives.¹¹⁰ This argument, as exposed by Luchaire,¹¹¹ often relies on the intervention in the implementing process of a domestic instrument, in particular a statute, that the *Conseil constitutionnel* can invalidate. However, the position of the *Conseil constitutionnel* with regard to the implementation of directives does not depend on the formal nature of the norms at stake but, in contrast, relates to their material identity.¹¹² It could thus be argued that it is on the grounds of the content of European norms rather than due to their legal nature that the *Conseil constitutionnel* held that their primacy can be limited by a “rule or principle inherent in the

¹⁰⁷ For Levade, this broad interpretation of Article 88-1, which arguably underpinned the decision of the implementation of directives (see A. Levade, “Le Conseil constitutionnel aux prises avec le droit communautaire dérivé” (2004) *Revue du droit public et de la science politique en France et à l'étranger* 889-911 at 901-902), was confirmed by the reasoning the *Conseil constitutionnel* applied to the primacy principle in its *Treaty establishing a Constitution for Europe* decision. It therefore rejected alternative interpretations of its decisions of summer 2004, viz., an absolute and *per se* recognition of the primacy principle or the theory of the “directive screen” (see A. Levade, “Le Conseil constitutionnel aux prises avec la Constitution européenne” (2005) *Revue du droit public et de la science politique en France et à l'étranger* 19-50 at 31-32).

¹⁰⁸ On the recognition of the whole European obligations on the basis of Article 88-1 of the Constitution, see C. Charpy, “The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil constitutionnel* and the *Conseil d'État*”, *op. cit.*, at fn. 91 above, at 450.

¹⁰⁹ F. Luchaire, *Le droit européen : Son application en France* (Paris: Economica, 2006) at 37 (translation by the author).

¹¹⁰ For such a limit to the constitutional requirement of implementation, see for example, X. Magnon, “Le chemin communautaire du Conseil constitutionnel : entre ombre et lumière, principe et conséquence de la spécificité du droit communautaire” (2004) n° 8-9 *Europe* 6-12 at 8.

¹¹¹ See F. Luchaire, *Le droit européen : Son application en France*, *op. cit.*, at fn. 109 above, at 43-45.

¹¹² See *supra* at 223-232.

constitutional identity of France”. It is indeed against the whole body of European norms (and irrespective of the formal type of the European instruments) that the notion of constitutional identity can potentially be opposed.¹¹³

The fact that this limit has only been applied to the question of legislative implementation of European instruments seems to be explained by a matter of jurisdictional competence rather than of a normative logic. It was possible for the constitutional court in 1975¹¹⁴ and in 2010¹¹⁵ to affirm both the superiority of external rules over legislative acts and its lack of competence to enforce this normative assessment.¹¹⁶ The reason why the application of the notion of constitutional identity as a limit to the primacy principle has only been applied by the *Conseil constitutionnel* itself to acts of implementation rests on the fact that, for this court - very concerned with the competences vested on it by the Constitution - they are the only norms which can be put under its scrutiny.¹¹⁷

In conclusion, due to the legal framework within which the *Conseil constitutionnel* understands the relationship between constitutional and European provisions, it is in the interpretation and application of European Union law that the French constitutional court can determine the norms that it deems crucial for the integrity of the French constitutional order. In this sense, the introduction of the notion of the constitutional identity of France is the embodiment of the new logic underpinning the normative relationship between the French and European legal orders. The limitation of the primacy principle in the name of this notion can potentially be applied to the entire body of European Union norms, even though, the realisation of this normative logic is dependent, as is often the case where the application of rules is concerned, on a matter of jurisdictional competence.

¹¹³ For this broad understanding of the notion of constitutional identity as a limit to the European obligations at large, for example, X. Magnon, “Le Traité de Lisbonne devant le Conseil constitutionnel : *non bis in idem*”, *op. cit.*, at fn. 77 above, at 320 (contrary to the opinion he formerly expressed in 2004, see X. Magnon, “Le chemin communautaire du Conseil constitutionnel : entre ombre et lumière, principe et conséquence de la spécificité du droit communautaire”, *op. cit.*, at fn. 110 above).

¹¹⁴ CC, decision n° 74-54 DC on the *Act pertaining to the voluntary interruption of pregnancy* of 15 January 1975, *Rec.* 19 for a general statement on the relationship between the domestic and international legal orders.

¹¹⁵ CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78.

¹¹⁶ On the specific issue of the competence of the *Conseil constitutionnel* as regards European law after the introduction of a mechanism of priority preliminary ruling on the issue of constitutionality, see *infra* at 418-420.

¹¹⁷ For a similar argument which links the enforcement of the potentialities contained in Article 88-1 to a matter of jurisdictional competence, see A. Levade, “Le Palais-Royal aux prises avec la constitutionnalité des actes de transposition des directives communautaires : À propos de la décision du Conseil constitutionnel n° 2006-543 du 30 novembre 2006, *Loi relative au secteur de l’énergie* et de l’arrêt du Conseil d’Etat, Assemblée, du 8 février 2007, *Société Arcelor Atlantique et Lorraine et autres*” (2007) *Revue française de droit administrative* 564-577 at 567. For further developments on the relationship between this issue of jurisdictional competence and the effectiveness of the notion of constitutional identity in the French context, see *infra* at 409-423.

Both in Ireland and France the notion of constitutional identity as a limit to the doctrine of primacy corresponds to the necessary control of the use of their competences by European institutions. While it could be argued that the case-law of the *Conseil constitutionnel* displays a firmer theoretical foundation justifying this control, the French court system (which does not have the same unified nature as the Irish one) constitutes an obstacle to the case-law of the *Conseil constitutionnel* being accepted by its counterpart of the *ordres judiciaire* and *administrative*. No such obstacle affects the Irish Supreme Court in achieving the same degree of control. Paradoxically, it seems that the uneasy political perspective used by Irish courts - according to which the relationship between the European and domestic orders is supposedly determined by the fresher expression of the Irish people - gives them a flexibility better suited to the effective execution of a similar degree of control.

B. Divergent Means in Different Jurisdictions for Balancing Constitutional Identity and the Primacy of European Union Law

The control of the application of European norms in the domestic legal order by the *Conseil constitutionnel* is hindered by the limited competences of the French constitutional court. In this regard, the increase of its jurisdiction through the introduction of priority preliminary rulings on the issue of constitutionality is only a limited remedy.

In contrast, the political prism used by Irish courts enables them to choose, on a case-by-case basis, which rules, either European or domestic, best correspond to the will of the Irish people and should therefore be granted prevalence. It could even be said that in this process they decide themselves what Irish identity ought to be.

1. *The Ongoing Restrictions on the Competence of the Conseil Constitutionnel as a Limit on the Enforcement of the Notion of Constitutional Identity*

In comparison with its Irish counterpart, which achieves the same result employing more ambiguous reasoning, one could argue that the recent case-law of the *Conseil constitutionnel* on the notion of constitutional identity aims to increase its control of the application of European norms in the domestic legal order. However, and as is often the case in the French legal system, the enforcement of the normative hierarchy is linked to issues of jurisdictional competence. In this regard, it could be suggested that the *Conseil constitutionnel* faces difficulties realising the protection of the constitutional identity of France. Although the recent introduction of a new jurisdictional mechanism entitled “priority preliminary ruling on the issue of constitutionality” enhanced the competence of the French constitutional court, it is possible to argue that it did not remedy all the limitations emanating from the original position of the *Conseil constitutionnel*, making the full enforcement of the notion of constitutional identity dependent on its adoption by the ordinary courts.

The boundaries within which the *Conseil constitutionnel* has competence to intervene distinguish it from most of its European counterparts.¹¹⁸ Until recently, the control of the

¹¹⁸ On this point, see for example, M.-L. Paris, “Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law” (2010) 29 *Yearbook of European Law* 21-64 at 40. For an overview of the singularity of the *Conseil constitutionnel* among European constitutional courts, see for example, L. Favoreu, *Les cours constitutionnelles* (Third edition, Paris: Presses universitaires de France, coll. Que sais-je ?, 1996).

constitutionality of statutes could only occur *a priori*, viz., before the promulgation of a bill by the *Président de la République* and the completion of the legislative process. This could be said to be a lingering effect of the traditional sacredness of statutes in the French legal tradition.¹¹⁹ As provided for by Article 61 of the Constitution:

“Institutional Acts, before their promulgation, Private Members’ Bills mentioned in article 11 before they are submitted to referendum, and the rules of procedure of the Houses of Parliament shall, before coming into force, be referred to the *Conseil constitutionnel*, which shall rule on their conformity with the Constitution.

To the same end, Acts of Parliament may be referred to the *Conseil constitutionnel*, before their promulgation, by the *Président de la République*, the *Premier ministre*, the President of the *Assemblée nationale*, the President of the *Sénat*, sixty Members of the *Assemblée nationale* or sixty Senators”.

In consequence, the activity of the *Conseil constitutionnel* has long been restricted to a mere control *in abstracto*. The effectiveness of this control therefore required the French constitutional court to anticipate potential unconstitutionality which might arise during the enforcement of the legislative instruments. This required having recourse to what can be regarded as imaginative abilities.¹²⁰ The different techniques used by the *Conseil constitutionnel* bear witness to this difficulty consisting of conciliating the hierarchy of norms legitimating its intervention and the constraints on its jurisdictional competence.

In its attempt to be relevant to the legislative instruments once promulgated, the French constitutional court has taken the view that “the constitutionality of a statute already promulgated may be reviewed on the occasion of the review of legislative provisions amending or amplifying it or modifying its scope”.¹²¹ However, it should be recalled that this exception is limited to the competence the *Conseil constitutionnel* receives from Article 61 of the

¹¹⁹ This explains the original purpose of the *Conseil constitutionnel*, which was primarily to control the Parliament rather than to enforce the full hierarchy of norms, see for example V. Bernaud and M. Fatin-Rouge Stéfani, “La réforme du contrôle de constitutionnalité une nouvelle fois en question ? Réflexions autour des articles 61-1 et 62 de la Constitution proposés par le comité Balladur” (2008) n° Hors-série *Revue française de droit constitutionnel* 169-199 at 173.

¹²⁰ On this point, see P. Blachère, “Les temps de la saisine du Conseil constitutionnel” in D. Rousseau (ed.), *Le Conseil constitutionnel en questions* (Paris: L’Harmattan, 2004) 93-115, in particular at 97-104 where the author makes recurring comments about the necessity for the Conseil constitutionnel to “imagine” the potential constitutional flaws of the statutes, a notion that is quite surprising in regard to the rational nature of jurisdictional activity.

¹²¹ CC, decision n° 99-410 DC on the *Institutional Act concerning New Caledonia* of 15 March 1999, *Rec.* 51 at para. 39.

Constitution. It has refused to apply it to the control of compatibility of international treaties governed by Article 54. This refusal - first expressed vis-à-vis the Treaty of Maastricht ¹²² - was reaffirmed in its decisions both on the *Treaty establishing a Constitution for Europe* ¹²³ and on the *Treaty of Lisbon* ¹²⁴ where the *Conseil constitutionnel* stated explicitly that:

“those provisions of the Treaty which merely reiterate undertakings already entered into by France are however excluded from any such examination as to their conformity with the Constitution”.

This case-law of the *Conseil constitutionnel* seeking to avoid the temporal restrictions imposed by Article 61 can be explained by the necessity of submitting to the Constitution, legislative instruments that might have not been controlled *a priori*. However, the exercise of its jurisdiction downstream from the promulgation is not a strict question of temporality. It might also be the case that an unconstitutionality can only appear in the concrete application of a legislative provision. The supremacy of the Constitution must be enforced in this situation too. This need is reflected in the recourse by the *Conseil constitutionnel* to reservations of interpretation, ¹²⁵ and in particular directive reservations of interpretation the purpose of which is to “define and clarify, for the authorities in charge of their implementation, the modalities of application of the statute necessary for its constitutionality.” ¹²⁶ While such recourse can be justified by the preservation of the constitutionality of the statute through the modification of its content, it is also the sign of a willingness displayed by the *Conseil constitutionnel* to go beyond its limitation to an *a priori* control and to determine in advance the constitutional application of the statute. ¹²⁷

To some extent the new interpretation of Article 88-1 by the *Conseil constitutionnel* responded to the same logic and entailed the ability to examine European Union law beyond the point of ratification of a European Treaty. The new interpretation put an end to a *de facto* constitutional immunity, enabling the constitutional court to consider the application of

¹²² CC, decision n° 92-308 DC on the *Treaty on European Union* of 9 April 1992, *Rec.* 55 at para. 7-8 and CC, decision n° 92-312 DC on the *Treaty on European Union* of 2 September 1992, *Rec.* 76 at para. 3-6.

¹²³ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 8.

¹²⁴ CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 10.

¹²⁵ For a short presentation of this interpretative technique, see *supra* at 219-220.

¹²⁶ D. Rousseau, *Droit du contentieux constitutionnel* (Sixth edition, Paris: Montchrestien, 2001) at 157 (translation by the author).

¹²⁷ See, for example, P. Blachère, “Les temps de la saisine du Conseil constitutionnel”, *op. cit.*, at fn. 120 above, at 97.

normative production of European institutions. However, even though the new case-law of the *Conseil constitutionnel* potentially imposes stronger limitations on the effects of the primacy principle in the domestic legal order, its position is yet not as aggressive as that of its Irish counterpart, the competence of which goes as far as controlling the interpretations of the European Court of Justice itself – a point seen in *Grogan* where the Supreme Court held that “any answer to the reference received from the Court of Justice of the European Communities will have to be considered in the light of our own constitutional provisions.”¹²⁸ From a European law-making point of view, the new case-law related to the control of legislative instruments implementing directives represents a control *a posteriori* – since it post-dates the adoption of the European norm – but, from a national perspective, its intervention only occurs upstream of the domestic law-making, *i.e.*, before an implementing bill becomes a statute. The *Conseil constitutionnel* still remains in an uncomfortable position where the *a priori* nature of its control limits the full unfolding of the normative logic which underlines its new case-law.

In consequence, the full enforcement of the notion of constitutional identity as the limit to the primacy of European Union law has been dependent on the reception¹²⁹ of this jurisdictional construction by authorities competent to confront the application of European Union law with a higher degree of concreteness, *viz.*, ordinary courts.¹³⁰ One could argue, from this perspective, that the case-law elaborated on by the *Conseil constitutionnel* would have been the equivalent, in the particular context of European Union law, to its previous decision of 1975 relating to international law in general. The position of the French constitutional court at the time consisted of recognising that Article 55 of the Constitution ensured the hierarchical superiority of international law over statutes while affirming that it was not competent to enforce this normative logic.¹³¹ Afterwards the *Cour de cassation* and the *Conseil d'État* assumed this jurisdictional responsibility.¹³² It could have been argued that, according to the same logic, the administrative and judicial courts could have deduced their implicit empowerment by the *Conseil constitutionnel* when the latter court was unable to apply the constitutional identity test

¹²⁸ *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan* [1989] I.R. 753 at 768 *per* Walsh J.

¹²⁹ On this dependence of the *Conseil constitutionnel* on the collaboration of courts belonging to the *ordres administratif* and *judiciaire*, see for example G. Drago, “Réformer le Conseil constitutionnel ?” (2003) n° 105 *Pouvoirs* 73-87 at 82.

¹³⁰ For a similar opinion, see G. Alberton, “Et le Conseil constitutionnel ouvrit la boîte de Pandore... (ou les répercussions de la décision rendue le 19 novembre 2004 sur le juge ordinaire)” (2006) *L'Actualité juridique. Droit administratif* 593-601 at 596-601.

¹³¹ CC, decision n° 74-54 DC on the *Act pertaining to the voluntary interruption of pregnancy* of 15 January 1975, *Rec.* 19 at para. 3-4. This position was reaffirmed even more explicitly in 2010, see CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 10-12.

¹³² See *supra* at 73-78.

to the doctrine of primacy. Nonetheless, in view of their subsequent decisions, their willingness to follow this path can seem questionable.¹³³

However, this development of a new perspective on European Union law by the *Conseil constitutionnel* was paralleled by the profound modification of the role of this court, which occurred in July 2008. The constitutional reform concerned more than one third of the constitutional provisions¹³⁴ and the competence of the *Conseil constitutionnel* was greatly enhanced since it was provided for the control by the French constitutional court of Acts of Parliament which had already been enacted. According to the newly introduced Article 61-1:

“if, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d’État* or by the *Cour de Cassation* to the *Conseil constitutionnel* which shall rule within a determined period.

An Institutional Act shall determine the conditions for the application of the present article.”

Rather than the introduction of an exception of unconstitutionality which enables courts to incidentally decide the conformity of a legislative instrument with the Constitution on the occasion of a specific case, it is through its similarity with the mechanism of the preliminary reference¹³⁵ that the new procedure is best defined.¹³⁶ In consequence, even if made *a posteriori*, the control carried out by the constitutional court remains objective, in the sense that it is the legislative provisions as such rather than its application which are under scrutiny. However, it is

¹³³ Contrary to the consequences of the decision of 1975, which involved a distribution of competences between the different courts along the line of a distinction between control of conventionality and control of constitutionality, it is the latter that would be divided. This has to be considered in parallel with the indirect control of conventionality exercised by the *Conseil constitutionnel* through Article 88-1 of the Constitution. The notion of constitutional identity thus hints at a jurisdictional concurrence as regards the determination of the appropriate balance between the primacy of European law and the supremacy of the Constitution. For further developments on this point, see *infra* at 409-423.

¹³⁴ Constitutional Act n° 2008-724 of 23 July 2008 modernising the institutions of the Fifth Republic.

¹³⁵ On this point and its consequences, see, for example, V. Bernaud and M. Fatin-Rouge Stéfani, “La réforme du contrôle de constitutionnalité une nouvelle fois en question ? Réflexions autour des articles 61-1 et 62 de la Constitution proposés par le comité Balladur”, *op. cit.*, at fn. 119 above, at 174-178, A. Roux, “Le nouveau Conseil constitutionnel : Vers la fin de l’exception française” (2008) n° 31-35 *La Semaine juridique. Édition générale* 48-54 at 53 or G. Drago, “Exception d’inconstitutionnalité : Prolégomènes d’une pratique contentieuse” (2008) n° 49 *La Semaine juridique. Édition générale* 13-18 at 14.

¹³⁶ However, on the differences between the two mechanisms, see G. Drago, *Contentieux constitutionnel français* (Third edition, Paris: Presses universitaires de France, coll. Thémis, 2011) at 432-434 or B. Genevois, “Le contrôle *a priori* de constitutionnalité au service du contrôle *a posteriori*” (2010) *Revue française de droit administratif* 1-11 at 5.

difficult to argue that particular circumstances giving rise to its intervention and the concreteness of the application of the norm at stake would be disregarded.¹³⁷

The reasons for the introduction of this mechanism, as they appear from the opinion of the *Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la V^e République* (the report of which formed the basis of the constitutional revision) are threefold.¹³⁸ First, the willingness to reaffirm the position of constitutional provisions in the face of international law¹³⁹ was certainly a decisive factor in the creation of this mechanism since, while ordinary courts could set aside a legislative act repugnant to international law in any litigation, the limited jurisdiction of the *Conseil constitutionnel* did not allow the same to be done on the basis of the (hierarchically supreme) Constitution.¹⁴⁰ Secondly, this mechanism aimed at draining the French legal order of unconstitutional legislative instruments that had escaped the *a priori* control of constitutionality. Thirdly, in many ways, the introduction of this new jurisdictional mechanism only considers the normative hierarchy as the means to an end, and its legitimisation relied first of all on the creation of a new remedy for the citizens.

In consequence, the Institutional Act¹⁴¹ necessary for implementing the new Article 61-1 gave birth to a complex mechanism, the “fruit of subtle politico-jurisdictional balances”,¹⁴² entitled “priority preliminary ruling on the issue of constitutionality”,¹⁴³ where the relationship between the three objectives stated above makes the full implementation of the notion of constitutional identity through this mechanism difficult. In reverse, the priority preliminary rulings on the issue of constitutionality underline once again the necessary collaboration between the *Conseil constitutionnel* and the administrative and judicial supreme courts.

¹³⁷ For a similar opinion, see B. Mathieu, “La question prioritaire de constitutionnalité : une nouvelle voie de droit : À propos de la loi organique du 10 décembre 2009 et de la décision du Conseil constitutionnel n° 2009-595 DC” (2009) n° 52 *La Semaine juridique. Édition générale* 54-69 at 60 or G. Drago, *Contentieux constitutionnel français*, *op. cit.*, at fn. 136 above, at 437.

¹³⁸ *Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la V^e République*, “Une V^e République plus démocratique” at 87-91 Available at <<http://lesrapports.ladocumentationfrancaise.fr/BRP/074000697/0000.pdf>> [Last accessed 29 December 2012].

¹³⁹ Mbongo refers to “juridical nationalism”, see P. Mbongo, “Droit au juge et prééminence du droit : Bréviaire processualiste de l’exception d’inconstitutionnalité” (2008) *Recueil Dalloz* 2089-2096 at 2089.

¹⁴⁰ For a similar point of view, see M. Gautier, “La question de constitutionnalité peut-elle rester prioritaire ?” (2010) *Revue française de droit administratif* 449-458 at 449.

¹⁴¹ Institutional Act n° 2009-1523 of 10 December 2009 pertaining to the application of Article 61-1 of the Constitution, J.O.R.F. p. 21379.

¹⁴² G. Drago, *Contentieux constitutionnel français*, *op. cit.*, at fn. 136 above, at 413.

¹⁴³ For an overview of the mechanism implemented by the Institutional Act in the light of the decision of the *Conseil constitutionnel* (CC, decision n° 2009-595 DC on the *Institutional Act pertaining to the application of Article 61-1 of the Constitution* of 3 December 2009, *Rec.* 206), see for example B. Mathieu, “La question prioritaire de constitutionnalité : une nouvelle voie de droit : À propos de la loi organique du 10 décembre 2009 et de la décision du Conseil constitutionnel n° 2009-595 DC”, *op. cit.*, at fn. 137 above, or J. Roux, “La question prioritaire de constitutionnalité à la lumière de la décision du Conseil constitutionnel du 3 décembre 2009” (2010) *Revue du droit public et de la science politique en France et à l’étranger* 233-259.

As regards the mechanism itself, the issue of constitutionality can be raised before any court. At this stage, the jurisdiction to which the issue of constitutionality is referred constitutes a first filter. Its role consists of assessing three criteria. Its first task is to determine if the issue of constitutionality is relevant to the resolution of the dispute. Secondly, it has to consider if the criticism addressed against the legislative provision has not already been decided by the *Conseil constitutionnel*. This involves taking into account potential changes that may have occurred, such as constitutional amendments. Lastly, the judge *ad quo* has to assess whether the challenge to the constitutionality of the legislative provision is not devoid of a serious character.

Where these conditions are completed, the court has to forward the issue of constitutionality to the supreme court of its jurisdictional order, *viz.*, either the *Conseil d'État* or the *Cour de cassation*. These courts will then constitute a second filter. First, they have to control the assessment made by the judge *a quo* as to the relevance of the issue for the current dispute and the fact that the legislative provision had not already been declared to be in accordance with the Constitution by the *Conseil constitutionnel*. Then their decision to refer the matter to the constitutional court depends on a positive perspective put on the third criterion. The reference will only take place if the supreme courts consider that the issue raised is either new or has a serious character.

If found contrary to the Constitution by the *Conseil constitutionnel*, the legislative provisions would be repealed according to the modalities determined by the *Conseil constitutionnel*, since Article 62 states that:

“a provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the *Conseil constitutionnel* or as of a subsequent date determined by said decision. The *Conseil constitutionnel* shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge.”

The requirement of “priority” was absent from the new Article 61-1 of the Constitution and was only introduced by the Institutional Act necessary for its implementation. In particular, it intended to give priority to the new domestic jurisdictional mechanism over questions related to the conformity of the national legislative provision with European norms, and notably to gain “priority” over the preliminary references to the European Court of Justice now provided for by Article 267 of the Treaty on the Functioning of the European Union. This “priority” character of the new domestic mechanism was thus a way to reinforce the supremacy of the Constitution

in the French legal order, in particular against European law.¹⁴⁴ This consideration, which was already made clear in the decision of the *Conseil constitutionnel* on the *Treaty establishing a Constitution for Europe*¹⁴⁵ was reaffirmed in the decision of this court on the constitutionality of the Institutional Act itself where it stated that “Parliament, when enacting the Institutional Act, intended to ensure compliance with the Constitution and reiterate the place of the latter at the apex of the national legal system.”¹⁴⁶

This stress put on the “priority” nature of this mechanism as well as the timing of its introduction have to be read in parallel with the new approach of the *Conseil constitutionnel* regarding the relationship between the European and domestic legal orders on the basis of Article 88-1 of the French Constitution. This new mechanism provided for by Article 61-1 of the Constitution is the confirmation that the increase of competence of the French constitutional court regarding European law consists of providing it with the jurisdictional means to uphold the supremacy of the Constitution over the doctrine of primacy.¹⁴⁷ Aside from considerations of a purely internal nature, this mechanism will, where European Union law is concerned, enable the *Conseil constitutionnel* to strengthen the concrete control of the compatibility of European law with the constitutional identity of France during its application in the French legal order.¹⁴⁸ In this sense, the priority preliminary rulings on the issue of constitutionality can be regarded as the furthering of the jurisdictional competence improvement which resulted from the new interpretation of Article 88-1 by the *Conseil constitutionnel*.

However, the other objectives fuelling this new jurisdictional mechanism act as a limit to the full unfolding of this hierarchical logic, when it comes both to the instruments being controlled and the norms used for their review. It could be argued that the mechanism of priority preliminary ruling on the issue of constitutionality cannot be the legal device enabling a

¹⁴⁴ In this sense, see for example M. Gautier, “La question de constitutionnalité peut-elle rester prioritaire ?”, *op. cit.*, at fn. 140 above, at 455 or H. Labayle “Question prioritaire de constitutionnalité et question préjudicielle : ordonner le dialogue des juges ?” (2010) *Revue française de droit administratif* 659-677 at 667.

¹⁴⁵ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 10.

¹⁴⁶ CC, decision n° 2009-595 DC on the *Institutional Act pertaining to the application of Article 61-1 of the Constitution* of 3 December 2009, *Rec.* 206 at para. 14.

¹⁴⁷ For a similar analysis of this implicit, and yet decisive, justification of the priority preliminary rulings on the issue of constitutionality, see for example V. Bernaud and M. Fatin-Rouge Stéfani, “La réforme du contrôle de constitutionnalité une nouvelle fois en question ? Réflexions autour des articles 61-1 et 62 de la Constitution proposés par le comité Balladur”, *op. cit.*, at fn. 119 above, at 188-190.

¹⁴⁸ For an example of the issue of constitutional identity in relation to European Union law in the mechanism of priority preliminary ruling on the issue of constitutionality where the *Conseil constitutionnel* held that European rules did not infringe the constitutional identity of France, see CC, decision n° 2010-79 QPC, *M. Kamel D.* of 17 December 2010, *Rec.* 406.

control of the application of European Union law to the level required for a full enforcement of the normative logic justifying the protection of the constitutional identity of France in the face of the primacy principle. This depends as much on the mechanism itself as defined in the constitutional text as on the interpretation of it provided by the *Conseil constitutionnel*.

First, Article 61-1 only extends the *a priori* competence of the *Conseil constitutionnel* to statutes that have already been promulgated. Although it may sound trite, the activity of the constitutional court remains limited to the control of conformity of legislative instruments with the Constitution.¹⁴⁹ This new role of the *Conseil constitutionnel* thus primarily consists of the imposition of constitutional constraints on Parliament.¹⁵⁰ In this respect, the new mechanism introduced in 2008 is more concerned with the temporality of this role than with the jurisdictional enforcement of the pyramid of norms and of the supremacy of the Constitution over every norm of the French legal order. However, the necessity to protect the constitutional identity of France in the face of the primacy principle may be required in other circumstances. Such a circumstance might be, for instance, where there are European rules the implementation of which is not effected by legislative instruments due to the division of normative competences between the Parliament and the Executive according to Articles 34 and 37 of the French Constitution.¹⁵¹ More generally, this would also be the case as regards the provisions of directives which, after the period of implementation, can have direct effect in the domestic legal system¹⁵² or European norms, in the first place Treaty provisions, the application of which does not require the intervention of the state.¹⁵³ In this respect, and from the perspective of the relationship between the notion of constitutional identity and the doctrine of primacy, one could argue that a mechanism similar to the preliminary reference for interpretation provided by Article 267 of the Treaty on the Functioning of the European Union would have been more efficient. It would have enabled the French constitutional court to interpret the Constitution in a specific case and to determine *in concreto* whether the constitutional provisions at stake should

¹⁴⁹ In this regard, the scope of the competences of the *Conseil constitutionnel* is not as extensive as some of its European counterparts, for example the German and Spanish constitutional courts. On this ability to “apply the Constitution in the process of the ‘concrete expression’ of law” (translation by the author), of which the *Conseil constitutionnel* is deprived, see F.-X. Millet, “L’exception d’inconstitutionnalité en France ou l’impossibilité du souhaitable ? Réflexions à travers le prisme de l’interprétation constitutionnelle authentique” (2008) *Revue du droit public et de la science politique en France et à l’étranger* 1306-1332, in particular at 1313-1315.

¹⁵⁰ See *supra* at 110-112.

¹⁵¹ Implementations through ministerial regulations could be examined by the *Conseil d’État*. However, it is not certain that the *Conseil d’État* is inclined to echo the interpretation of the *Conseil constitutionnel*, see *infra* at 410-416.

¹⁵² In this sense, see G. Alberton, “Et le Conseil constitutionnel ouvre la boîte de Pandore... (ou les répercussions de la décision rendue le 19 novembre 2004 sur le juge ordinaire)”, *op. cit.*, at fn. 130 above, at 599.

¹⁵³ It has to be recalled that *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan* [1989] I.R. 753 was concerned with the impact of Treaty provisions on the Irish constitutional identity, *viz.*, Article 59 and 60 of the European Community Treaty (as it was then).

have prevalence over the doctrine of primacy as forming part of the constitutional identity of France.¹⁵⁴

Secondly, besides the limited number of legal situations which can be submitted to the assessment of the *Conseil constitutionnel*, the provisions belonging to the *bloc de constitutionnalité* susceptible to be used on the occasion of this control may impair the full protection of the constitutional identity of France. According to Article 61-1 of the French Constitution, the question of the constitutionality of a legislative instrument can only be raised in relation to constitutional rights and freedoms. The focus on these constitutional provisions is a sign of the concern for opening a new type of remedy for the citizens¹⁵⁵ rather than a sole focus on the French legal hierarchy.¹⁵⁶ It is not certain that only rights and freedoms can potentially form part of the constitutional identity of France. It could be argued that a restrictive interpretation of this rights and freedom would exclude, for instance, the principle of indivisibility of the Republic or the secular nature of the state.¹⁵⁷ It is true that when it comes to constitutional interpretation, these considerations of public policy are always to be balanced with rights and freedoms. However, one could argue that such considerations would be taken into account only if the litigants had first raised a question as to the protection of latter.¹⁵⁸ More fundamentally, the recurring issue of the distribution of jurisdictional competences between the different French courts and its consequences on the application of Article 88-1 lie behind the

¹⁵⁴ In this sense, see F.-X. Millet, “L’exception d’inconstitutionnalité en France ou l’impossibilité du souhaitable ? Réflexions à travers le prisme de l’interprétation constitutionnelle authentique”, *op. cit.*, at fn. 149 above, at 1325 at 1326-1332.

¹⁵⁵ In this sense, it represents a modification of the highly representative nature of the French constitutional tradition by allowing the direct intervention of the citizens in the legislative process, see for example D. de Béchillon, “Élargir la saisine du Conseil constitutionnel ?” (2003) n° 105 *Pouvoirs* 103-116 at 110. This explains why, for example, an issue of constitutionality cannot be raised *ex officio* as provided for in Articles 23-1 and 23-5 of the Institutional Act and recognised by the *Conseil constitutionnel* (CC, decision n° 2009-595 DC on the *Institutional Act pertaining to the application of Article 61-1 of the Constitution* of 3 December 2009, *Rec.* 206 at para. 9). For a critical point of view on this inability of courts, see G. Drago, *Contentieux constitutionnel français*, *op. cit.*, at fn. 136 above, at 452.

¹⁵⁶ On the impossibility for this mechanism to fully enforce the supremacy of the Constitution in the domestic legal order as it was first heralded, see for example. X. Prétot, “La Constitution, la loi et le droit de l’Union européenne : Réflexions sur le caractère prioritaire de la question de constitutionnalité” (2010) *Revue de jurisprudence sociale* 734-747 at 744-745.

¹⁵⁷ On this point and more generally on the difficulties linked to the scope of the notion of “rights and freedoms”, see B. Mathieu, “La question prioritaire de constitutionnalité : une nouvelle voie de droit : À propos de la loi organique du 10 décembre 2009 et de la décision du Conseil constitutionnel n° 2009-595 DC”, *op. cit.*, at fn. 137 above, at 64-69.

¹⁵⁸ The focus of this new mechanism as a remedy for the citizens leads to envisage that the constitutional norms which can be invoked are limited to the rights and freedoms enjoyable by them directly, and therefore excludes considerations of public policy. In this respect, the lesser concern for the hierarchy of norms in this new mechanism explains why Article 61-1 does not empower the *Conseil constitutionnel* to ensure the respect for this hierarchy in every circumstance. On this point, see for example V. Bernaud and M. Fatim-Rouge Stéfani, “La réforme du contrôle de constitutionnalité une nouvelle fois en question ? Réflexions autour des articles 61-1 et 62 de la Constitution proposés par le comité Balladur”, *op. cit.*, at fn. 119 above, at 175, P. Gaïa, “La Cour de cassation résiste... mal” (2010) *Revue française de droit administratif* 458-465 at 459 or P. Fombeur, “Question prioritaire de constitutionnalité, droit constitutionnel et droit de l’Union européenne” (2010) *Recueil Dalloz* 1229-1234 at 1232-1233.

question of which constitutional provisions can trigger the new mechanism provided for by Article 61-1 of the French Constitution. When it has had the opportunity to interpret the scope of this condition, the *Conseil constitutionnel* has made clear that “rights and freedoms guaranteed by the Constitution” could not encompass European Union law at large.¹⁵⁹ In its *Act pertaining to the opening up to competition and the regulation of online betting and gambling* decision, it was affirmed that:

“compliance with the constitutional requirement of transposition of Directives is not one of the ‘rights and freedoms guaranteed by the Constitution’ and thus cannot be raised in the framework of an application for a priority preliminary ruling on the issue of constitutionality”.¹⁶⁰

If one extrapolates this statement according to the broad interpretation of Article 88-1 as encompassing all European obligations, then it can be read¹⁶¹ as meaning that respect for European obligations cannot be considered within the mechanism defined by Article 61-1.¹⁶² This reaffirms, in relation to the priority preliminary rulings on the issue of constitutionality, of a principle it has clearly established in its previous case-law.¹⁶³ The *Conseil constitutionnel* has a strict conception of its jurisdiction as being limited to a control of constitutionality of acts of Parliament.¹⁶⁴ In reverse, the control of conventionality belongs to ordinary courts.¹⁶⁵

¹⁵⁹ This reflection on the part of the *Conseil constitutionnel* is confirmation that the relationship between French and European rules is assessed through the prism of the Constitution. Recent Irish case-law has been developed according to similar lines in particular when it comes to the implementation of European rules by statutory instruments since the ruling of the Supreme Court in *Maheer v. Minister for Agriculture* [2001] 2 I.R. 139. Rather than appreciating the validity of these instruments of implementation according to their appropriateness to the fulfilment of European obligations, as had been the case in previous decision, the Irish Supreme Court made clear that these implementations had to comply with the domestic constitutional design. For further considerations on this point, see *supra* at 210-216.

¹⁶⁰ CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 19.

¹⁶¹ In this specific case, considerations for the validity of the very mechanism with regard to European Union law and the potential sanction of the European Court of Justice also played a part in the reasoning of the *Conseil constitutionnel*, see *infra* at 418-420.

¹⁶² For a contrary opinion, before the interpretation given by the *Conseil constitutionnel*, see for example P. Mbongo, “Droit au juge et prééminence du droit : Bréviaire processualiste de l’exception d’inconstitutionnalité”, *op. cit.*, at fn. 139 above, at 2089-2096 at 2092 or B. Mathieu, “La Cour de cassation tente de faire invalider la question prioritaire de constitutionnalité par la Cour de Luxembourg” (2010) n° 17 *La Semaine juridique. Édition générale* 866-867 at 867.

¹⁶³ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 20 and CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120 at para. 7.

¹⁶⁴ In this sense, see for example X. Prétot, “La Constitution, la loi et le droit de l’Union européenne : Réflexions sur le caractère prioritaire de la question de constitutionnalité”, *op. cit.*, at fn. 156 above, at 738 or B. Mathieu, “La question prioritaire de constitutionnalité : une nouvelle voie de droit : À propos de la loi organique du 10 décembre 2009 et de la décision du Conseil constitutionnel n° 2009-595 DC”, *op. cit.*, at fn. 137 above, at 66.

At first sight, this statement could be seen as a restrictive perspective put on the enforcement of European Union law in the French legal order but the subordination of statutes to European norms is already enforced by the judicial and administrative courts. For the *Conseil constitutionnel*, however, this choice ¹⁶⁶ leads to a reduction of the number of opportunities where, on the basis of Article 88-1, it can review legislative rules, and indirectly the content of the European rules, by reference to other constitutional provisions. In other words, it limits its hold on the application of European Union law in the domestic legal order and the ability to scrutinise it under the interpretative paradigm constitutive of the notion of constitutional identity.¹⁶⁷

This restrictive interpretation of the notion of rights and freedoms echoes the argument according to which the *Conseil constitutionnel* cannot make preliminary references to the European Court of Justice.¹⁶⁸ They both emanate from the refusal of a control of conventionality. By declining to engage in a dialogue with the European Court of Justice, the *Conseil* puts the interpretation made by the European Court out of its reach, unlike its Irish counterparts. If one takes the view that Article 88-1 of the Constitution and its limit apply to the whole body of European obligations, then the protection of the constitutional identity of France may depend on the willingness of ordinary courts to follow the interpretative path devised by the *Conseil constitutionnel*, which they have been reluctant to consider until now.¹⁶⁹

In conclusion, the introduction of priority preliminary rulings on the issue of constitutionality enables the *Conseil constitutionnel* to increase the protection of the constitutional identity of France in the face of the doctrine of primacy by strengthening its control on the application of European norms. However, and considering that the domestic concept of constitutional identity involves the affirmation of the supremacy of certain features contained in the Constitution over European Union law, one could argue that this new

¹⁶⁵ CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 18.

¹⁶⁶ If one takes the view that an interpretation is always the result of a decision, see *supra* at 243-244.

¹⁶⁷ For a justification of the exclusion of Article 88-1 due to the distribution of competences between the different domestic courts, see D. Rousseau, “Toujours « Vive la QPC » ? Oui !” (2010) n° 143-147 *Gazette du Palais* 16-18 at 17.

¹⁶⁸ CC, decision n° 2006-540 DC on the *Act pertaining to copyright and related rights in the information society* of 27 July 2006, *Rec.* 88 at para. 20 and CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120 at para. 7.

¹⁶⁹ See *infra* at 409-423.

jurisdictional mechanism is not the means for a full enforcement of this logic.¹⁷⁰ The situation existing before the introduction of Article 61-1 in the Constitution has been altered but not discarded.¹⁷¹ The reception of the case-law of the *Conseil constitutionnel* by courts belonging to the *ordres administratif* and *judiciaire* still conditions the effectiveness of the notion of constitutional identity as a protection against the primacy of European Union law. This necessary collaboration is even at play in this new mechanism itself. Indeed, it has been argued that their assessment of the new or serious character of the issue of constitutionality makes the triggering or not of the intervention of the constitutional court dependent on their decision.¹⁷² Therefore, the congruence between the analysis of the normative relationship between the domestic and European legal orders made by the *Conseil constitutionnel*, on the one hand, and its reality, on the other hand, is subjected to an internal judicial dialogue where the notion of constitutional identity depends on the collaboration of the different courts to be echoed outside the realm of the *Conseil constitutionnel*.

¹⁷⁰ As Millet put it regarding the priority preliminary rulings on the issue of constitutionality at large: “and yet, by not providing the *Conseil constitutionnel* with the means to achieve its ambition, the constitutional committee as well as the constituent power manifestly stopped in midstream by not planning the alignment of the *Conseil* with the traditional European model” (translation by the author), F.-X. Millet, “L’exception d’inconstitutionnalité en France ou l’impossibilité du souhaitable ? Réflexions à travers le prisme de l’interprétation constitutionnelle authentique”, *op. cit.*, at fn. 149 above, at 1325, even though the author affirms that this solution would not have suited the French legal system and culture.

¹⁷¹ On the normative logic of Article 88-1 and the limited jurisdiction of the *Conseil constitutionnel* in applying it, see for example, X. Magnon, “La QPC face au droit de l’Union : la brute, les bons et le truand” (2010) n° 84 *Revue française de droit constitutionnel* 761-791 at 755.

¹⁷² On this point, see for example, J. Roux, “La question prioritaire de constitutionnalité à la lumière de la décision du Conseil constitutionnel du 3 décembre 2009”, *op. cit.*, at fn. 143 above, at 252.

2. *The Freedom of the Irish Courts to Chose between the Application of Two Sets of Provisions According to Their Suitability to Express Irish Constitutional Identity*

The position adopted by Irish courts on the protection of constitutional identity against the primacy of European Union law has led them to control the application of the European rules in the domestic legal order. Behind the supposed upholding of the fresher expression of the will of the sovereign, it may be argued that this protection is in fact the result of a judicial choice. In this regard, the analysis by the Irish courts of the relationship between the doctrine of primacy and the supremacy of the Constitution according to what they regard as being the will of the Irish people is a powerful tool. Released from overly-tight legal constraints, they can enjoy a great deal of latitude regarding the choice as to the set of norms which best reflects, in their view, what Irish identity is.

According to the modern, or even normativist, definition of what a legal system is, law is depicted as a hierarchy of norms where, according to a relative understanding of validity, the existence of inferior legal rules is determined by their conformity with superior rules of which they are an application. From this perspective, legal rules are distinguished from other social rules due to the specific relationships between the different layers of the so-called pyramid of norms. Legal systems are characterised by the existence of two principles, *viz.*, the static principle that conditions the conformity of content between superior and inferior rules and the dynamic principle dedicated to the normative production and in particular the conditions of competence and procedure.¹⁷³

Within this representation of law as a system, a Constitution receives primarily a formal definition, which particularly suits Irish and French legal orders which are endowed with a written and rigid Constitution due to the special procedure dedicated to its amendment as well as the existence of a mechanism of judicial review.¹⁷⁴ From this perspective, the constitution is the norm which founds *in fine* the validity of all other norms without finding its own validity in another legal prescription.¹⁷⁵ Therefore, one could be surprised by the constitutional value Irish courts seem, at times, to give to European law, even though it is received in the Irish legal order through legislative norms.¹⁷⁶

¹⁷³ See H. Kelsen, *Théorie pure du droit*, *op. cit.*, at fn. 63 above, at 193-200 and M. Troper, *Pour une théorie juridique de l'État* (Paris: Presses universitaires de France, coll. Léviathan, 1994) at 168-176.

¹⁷⁴ On these points, see for example, F. Hamon and M. Troper, *Droit constitutionnel* (Thirty-second edition, Paris: Librairie Générale de Droit et de Jurisprudence, 2011) at 49-52 and 69-73.

¹⁷⁵ See H. Kelsen, *Théorie pure du droit*, *op. cit.*, at fn. 63 above, at 224-226.

¹⁷⁶ In particular, in *Campus Oil Limited v. Minister for Industry* [1983] I.R.L.M. 258 (High Court); [1983] I.R. 82 (Supreme Court) and, to some extent, in *Society for the Protection of Unborn Children (Ireland) Limited v.*

The legal design ensuring the participation of Ireland in the European Union consists of a complex machinery. Article 29.4.5° gives a licence to join the European Union¹⁷⁷ and therefore removes the constitutional bars to the validity of the European Communities Act 1972 (as amended). According to the dualist nature of the Irish state, this Act ensures the reception of European Union law in the domestic legal order. In consequence, one can affirm that European Union law has a legislative value and that its existence in the Irish legal order is *in fine* submitted to the Constitution. The validity of subsequent European legislation or national instruments necessitated by membership in the face of conflicting constitutional provisions is protected by the negative principle included in Article 29.4.6° which provides for constitutional immunity.¹⁷⁸

However, from the very beginning of Irish involvement what has become the European Union, a very different representation of these normative relationships can be seen. It was considered, in contrast, that by joining what was then the European Communities Ireland acquired a new Constitution. As Temple-Lang puts it:

“Ireland has two Constitutions now. Under each of them the Legislature is subject to higher principles of law declared by the courts. The second, ‘offshore’, constitution, the European Community Treaties and the rule of law based upon them, is largely a civil law constitution, and the principles of interpretation applicable to it are not the same as those which apply to the Constitution of 1937.”¹⁷⁹

Furthermore, this representation of European law as a Constitution for Ireland was not limited to academic literature. It was also present in the minds of the judiciary. As early as 1977, Henchy J. took the view, in an extra-judicial context, in words that announced in a premonitory fashion the subsequent decisions of Irish courts, that:

Grogan [1989] I.R. 753 a balance is carried out between the primacy of European law and constitutional provisions – thus considering that they are of the same value – a normative relationship, however, that the “immunity” clause provided for by what is now Article 29.4.6° of the Constitution *prima facie* excludes.

¹⁷⁷ Membership to the European Atomic Energy Community is made possible by Article 29.4.3° of the Irish Constitution.

¹⁷⁸ On these points, see *supra* at 87-93.

¹⁷⁹ J. Temple-Lang, “European Community Law, Irish Law and the Irish Legal Profession – Protection of the Individual and Co-Operation between Member States and the Community” (1983) 5 *Dublin University Law Journal* 1-28 at 4. The author reiterated this opinion later on, see J. Temple-Lang, “The Widening Scope of Constitutional Law” in D. Curtin and D. O’Keefe (eds.), *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T. F. O’Higgins* (Dublin: Butterworth, 1992) 229-245 at 229.

“it is as if the people of Ireland had adopted Community law as a second but transcendent Constitution, with the difference that Community law is not to be found in any single document – it is a living, growing organism”.¹⁸⁰

This was not even an idiosyncratic conception of the legal consequences of membership as it was shared, for example, by Walsh J. who also granted, in an extra-judicial context, a constitutional value to external norms considering that Ireland had three constitutions, European Convention on Human Rights being the third one.¹⁸¹

It is therefore not surprising that this consideration as to the alleged constitutional status of European law promptly won judicial recognition. This occurred in *Campus Oil Limited v. Minister for Industry*.¹⁸² In this case, the Supreme Court had to decide whether it was possible to appeal the choice of the High Court to make a preliminary reference to the European Court of Justice. It was decided that such an appeal could not be upheld as the mechanism provided for by Article 177 (as it was then) of the European Treaty was not a decision in the meaning of Article 34.4.3° of the Irish Constitution. However, Walsh J. gave some insight in relation to the relationship between constitutional and European provisions when he made the following statement:

“even if the reference of questions to the Court of Justice were a decision within the meaning of Article 34 of the Constitution, I would hold that, by virtue of the provisions of Article 29, s. 4, sub-s. 3, of the Constitution, the right of appeal to this Court from such a decision must yield to the primacy of Article 177 of the Treaty. That article, as a part of Irish law, qualifies Article 34 of the Constitution in the matter in question.”¹⁸³

As it was then, the licence to join the European Communities and the constitutional immunity principle were both contained in Article 29.4.3° of the Constitution. It was not until the Treaty of Maastricht in 1992 that these two provisions were separated into what are currently Articles 29.4.5° and 29.4.6°. However, in the balancing between Article 34.4.3° and the constitutional provision dedicated to European law, Walsh J. made reference to the primacy

¹⁸⁰ S. Henchy, “The Irish Constitution and the E.E.C.” (1977) 1 *Dublin University Law Journal* 20-25 at 23.

¹⁸¹ See B. Walsh, “Reflections on the Effects of Membership of the European Communities in Irish Law”, *op. cit.*, at fn. 11 above, at 817.

¹⁸² [1983] I.R. 82.

¹⁸³ *Ibid.* at 87.

principle and one could thus conclude that it is the second part of Article 29.4.3° as it was then that was concerned. This confirms that the relationship established by Walsh J. between Article 177 of the Treaty and Article 34 of the Irish Constitution is better understood on the basis of what is now Article 29.4.6° of the Constitution.¹⁸⁴ The purpose of this constitutional provision is to provide for a domestic definition of the existential European obligation of primacy in terms of immunity¹⁸⁵ by stating under its current version:

“no provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—

- (i) the said European Union or the European Atomic Energy Community, or institutions thereof,
- (ii) the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or
- (iii) bodies competent under the treaties referred to in this section, from having the force of law in the State.”

Having regard, the absoluteness of the terms used, it can be argued that the purpose of this provision is to make the Constitution irrelevant to issues involving European Union law or, to put it differently, to exclude the Constitution from the legal position of the European norms in the domestic order. One could therefore be left bewildered by the reasoning of the Supreme Court. First, in contrast to this constitutional sidelining of European Union law in the Irish legal system, Walsh J. restored a normative connection between the Constitution and the European legal order that a literal meaning of what is now Article 29.4.6° explicitly excludes.¹⁸⁶

¹⁸⁴ However, even if the opinion Walsh J. has to be understood on the less likely basis as having been a reference to the licence to join the process of European integration provided for by what is now Article 29.4.5°, one could argue that it is this provision itself which qualifies Article 34 of the Irish Constitution in order to enable Ireland to participate in the European legal order, see *supra* at 130-132.

¹⁸⁵ On the domestic definition of the primacy principle in terms of constitutional immunity, see *supra* at 83-93.

¹⁸⁶ In this sense, see G. Barrett, “The Evolving Door to Europe: Reflections on an Eventful Forty Years for Article 29.4 of the Irish Constitution” (2012) 48 *Irish Jurist* 132-172 at 141.

Secondly, Walsh J. held in *Campus Oil* that the primacy principle as domestically defined to qualify other constitutional provisions.¹⁸⁷ As the judge underlined it, this construction was a matter of Irish law¹⁸⁸ since the European Court of Justice did not draw such results from the preliminary reference mechanism.¹⁸⁹ According to the opinion of the Supreme Court, legal consequences of membership appeared not only of a constitutional value but also arguably as hierarchically superior to other constitutional provisions; while the overall mechanism designed to receive the European order in the domestic legal system in terms compatible with the primacy principle arguably rests on what is now Article 29.4.5° of the Constitution, to which it is *in fine* submitted.¹⁹⁰

In consequence, the decision in *Campus Oil* can be considered as departing from the intuitive understanding of the mechanism established by the Irish Constitution. It is the opinion of Hogan and Whyte when they affirmed that:

“this seems for several reasons a questionable premise, not least given that the provisions of Article 24.4.3°-Article 29.4.10° [as they were then] do no more than: (i) permit the State to become a member of the European Community and the European Union; and (ii) provide a shield against constitutional attack for Community and domestic legislation and executive acts necessitated by the obligations of Community and Union membership. The reasoning in *Campus Oil* seems to go further than this and would appear to approach the radical proposition that Article 29.4.63°-Article 29.4.10° [as it was then] has the effect of virtually scheduling the European Treaties to the Constitution itself.”¹⁹¹

The perspective on the relationship between the two legal orders initiated in *Campus Oil* does not constitute a singular point of view but, in contrast, shaped subsequent decisions of Irish courts. The Supreme Court reiterated this constitutional force of European law in *Doyle*

¹⁸⁷ [1983] I.R. 82 at 87.

¹⁸⁸ *Ibid.* at 87.

¹⁸⁹ See for example, F. Murphy, “*Campus Oil Ltd., Estuary Fuel Ltd., McMullan Bros. Ltd., Ola Teoranta, P.M.P.A. Oil Company Ltd., Tedcastle McCormick and Company Ltd. v. The Minister for Industry and Energy, The Attorney General and The Irish National Petroleum Corporation Ltd.*” (1982-1983) J.I.S.E.L. 43; (1984) 1 C.M.L.R. 479” (1984) 21 *Common Market Law Review* 741-755 at 744 and *supra* at 119-122.

¹⁹⁰ See *supra* at 130-141.

¹⁹¹ G. W. Hogan and G. F. Whyte, *JM Kelly: The Irish Constitution, op. cit.*, at fn. 41 above, at 521.

*v. An Taoiseach*¹⁹² where Henchy J. held, in a fashion similar to that in which he had expressed his views previously in an extra-judicial context,¹⁹³ that:

“just as it is generally undesirable to decide a case by bringing provisions of the Constitution into play for the purpose of invalidating an impugned law when the case may be decided without thus invoking constitutional provisions, so also, in my opinion, should Community law, which also has the paramount force and effect of constitutional provisions, not be applied save where necessary for the decision in the case.”¹⁹⁴

This point of view has also been echoed in the High Court. For example in *Tate v. Minister for Social Welfare*¹⁹⁵ Carroll J., while considering that European law was not transformed in constitutional law,¹⁹⁶ still held that it had constitutional force by stating that:

“in my opinion, the wrong committed by the State in continuing the discrimination by failing to fully implement the directive is a wrong arising from community law which has domestic effect. It is not a breach of constitutional rights; it is not a breach of statutory duty and it is not a breach of the duty of care. It is a breach of a duty to implement the directive and it approximates to a breach of constitutional duty.”¹⁹⁷

While Article 29.4.6° was meant to exclude constitutional considerations in the face of European Union law, it seems that the principle has been reversed. European obligations bearing on the state are considered as being tantamount to constitutional obligations. This possibility of construing the immunity clause as a positive principle has been evoked in academic writings¹⁹⁸ and in an extra-judicial context by members of the judiciary.¹⁹⁹ As has been seen, the Supreme Court, as the authentic interpreter of the law, benefits from a large power of

¹⁹² [1986] I.R.L.M. 693.

¹⁹³ See, S. Henchy, “The Irish Constitution and the E.E.C.”, *op. cit.*, at fn. 180 above, at 23.

¹⁹⁴ [1986] I.R.L.M. 693 at 714.

¹⁹⁵ [1995] 1 I.R. 418.

¹⁹⁶ *Ibid.* at 437.

¹⁹⁷ *Ibid.* at 438.

¹⁹⁸ See for example, G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary*, *op. cit.*, at fn. 20 above, at 15 where it is argued that “one might add, in any event, that the second clause of Article 29.4.5 may indeed, on another construction give constitutional force to Community law, once incorporated”.

¹⁹⁹ See *supra* at 61-63.

decision as to the meaning to be ascribed to a legal text.²⁰⁰ Nonetheless, this hypothesis as to the interpretation of Article 29.4.6° of the Constitution is reminiscent of the interpretation of Article 88-1 of the French Constitution by the *Conseil constitutionnel* as entailing a “constitutional requirement” to implement European directives.²⁰¹ However, such is the case in France due to the positive obligation being the result of this constitutional provision which states that “the Republic shall participate in the European Union”. The mechanism set in the Irish Constitution, when read in comparison to the French position, seems very different. In consequence, the interpretation of Article 29.46° as conferring a duty of constitutional effect, if not impossible, appears at least counterintuitive.

However, “scheduling the European Treaties to the Constitution itself” raises a more important question when one considers that European law is introduced in the Irish legal order *via* the European Communities Acts 1972 (as amended), which represents, as Carroll J. put it, the “conduit pipe through which community law became part of domestic law.”²⁰² In consequence, it can be argued that European Union law is of a legislative rank in the hierarchy of norms. One might therefore wonder what the reasons are for its elevation to the constitutional level. When Alland considered the possibility for European rules having primacy over the French Constitution, even though it is this domestic instrument that governs its relationship with domestic norms, he pointed out that:

“affirming a subordination supposes the superiority of what one is submitted to, which could not then depend on what is subordinated. And yet, all the ingenuity of the world could not allow the means to be found for a Constitution or one of its constituted organs to place international law above itself. From where would the power of levitation come to them; that permitted the value of whatever norm, outside their own scope, to be hoisted?”²⁰³

²⁰⁰ See for example, T. F. O’Higgins, “The Constitution and the Communities - Scope for Stress?”, *op. cit.*, at fn. 46 above, at 234.

²⁰¹ See for example, CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7.

²⁰² *Tate v. Minister for Social Welfare* [1995] 1 I.R. 418 at 437.

²⁰³ D. Alland, “Consécration d’un paradoxe: primauté du droit interne sur le droit international (Réflexions sur le vif à propos de l’arrêt du Conseil d’État, *Sarran, Levacher et autres* du 30 octobre 2004)” (1998) *Revue française de droit administratif* 1094-1104 at 1101 (translation by the author). For a similar opinion where holding that the supremacy of international law in the domestic legal order on the grounds of the Constitution leads to a logical aporia, see D. Simon, “L’arrêt *Sarran*: dualisme incompressible ou monisme inversé ?” (1999) n° 3 *Europe* 4-6 at 6.

Thus, when applied to the Irish situation, the question consists of determining which lever Courts use to modify the hierarchical position of European law in the domestic legal order. When considering that Ireland had two constitutions neither Temple-Lang nor Henchy relied on arguments relative to the foundations of validity of European Union law once received in the Irish legal order. In contrast, they both used the same decisive argument. Temple-Lang expressed the view that “under each of them the Legislature is subject to higher principles of law”,²⁰⁴ while Henchy noted that:

“the Oireachtas must now frame its laws not alone so as not to exceed the limitations imposed by the Constitution but also so as not to transgress Community law.”²⁰⁵

Their main argument for establishing that Ireland has two constitutions is based on the norms which can be raised to challenge the validity of a legislative norm in the process of judicial review. One could therefore conclude that the notion of constitution rests on its relationship with rules of legislative status and is defined according to its superiority to instruments emanating from the Oireachtas. In consequence, it can also be argued that the core of their argument is not only to affirm the superiority of constitutional and European provisions over legislative acts. It is not so much the norms themselves that are concerned but the “Legislature” or the “Oireachtas”. Rather than a strict normative issue, it is the constraints put by the Irish people’s will on the organs of the state, and more specifically, the people’s representative which seem to justify their argument.²⁰⁶

The question of the legal status of European Union law in the domestic legal order is not therefore deduced from purely hierarchical considerations. Favouring an interpretation taking into account the sovereign expression of the Irish people,²⁰⁷ the issue is rather understood under the constitutionalist paradigm, according to which the Constitution represents the norm stemming from the supposed direct expression of the people.²⁰⁸ One could therefore argue that *Campus Oil* or *Tate* are congruent with the concrete representation of the Irish people in the

²⁰⁴ J. Temple-Lang, “European Community Law, Irish Law and the Irish Legal Profession – Protection of the Individual and Co-Operation between Member States and the Community”, *op. cit.*, at fn. 179 above, at 4.

²⁰⁵ S. Henchy, “The Irish Constitution and the E.E.C.”, *op. cit.*, at fn. 180 above, at 23.

²⁰⁶ On this opposition between the Irish people and the organs of the state, see *ibid.* at 23 where Henchy affirms that “it is as if the people of Ireland had adopted Community law as a second but transcendent Constitution”.

²⁰⁷ On the importance of what has been referred to in this thesis of the political route of constitutional interpretation in the interpretation of the Constitution by Irish courts, see *supra* at 275-289.

²⁰⁸ On the notion of constitutionalism, see for example P. Raynaud, “Constitutionalisme” in D. Alland and S. Rials (eds.), *Dictionnaire de la culture juridique* (Paris: Lamy; Presses universitaires de France, coll. Quadrige, 2003) 266-271.

case-law of Irish courts and its subsequent spontaneous expression free from legal constraints. Considering the normative relationship which is enforced by Irish courts between constitutional and European provisions, one could conclude that they do not consider Article 29.4.5° and, maybe even more, Article 29.4.6° as dealing with a question of normative hierarchy. Through these two provisions, they rather contemplate the willingness of the Irish people to join the process of European integration and to endorse its values. Whelan seems to offer a similar reading suggesting the political expression of the Irish people as the decisive factor of the normative relationship between the doctrine of primacy and the domestic legal order when he states that:

“I wish to outline one possible solution to such potential conflicts with Community law. This is the full acceptance of the claims to authority of Community law, on its own terms, in Irish constitutional law, by virtue of the people’s approval, in three referendums, of a progressive and permanent cession of sovereign constituent authority.”²⁰⁹

This analysis is reinforced by the comparison between the Irish and French appraisals of their respective constitutional provisions dealing with Europe Union law. The position of the *Conseil constitutionnel* insists on the domestic nature of Article 88-1. It justifies its choice to characterise the consequences of this constitutional provisions in terms of what in French law would be regarded as a “requirement” rather than an “obligation”.²¹⁰ In contrast, by taking the view that constitutional provisions and European law are of a different nature while having the same effects in the domestic legal order, Irish courts depart from a strict legal understanding of the Constitution. It can be argued that their equal value is due to the fact that their existence in the Irish legal order is directly dependent on the expression of the Irish people in referendums. The relationship between European Union law and the Constitution is thus read as mediated by the will of the concrete political entity constituted by the people. In comparison with a legal “purist position” where normative relationships are assessed according to the position of the

²⁰⁹ A. Whelan, “National Sovereignty in the European Union” in T. Murphy and P. Twomey (eds.), *Ireland’s Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998) 277-292 at 285.

²¹⁰ The term “*exigence*” translated here by requirement does not imply the synallagmatic dimension that the notion of obligation connotes. This is the sign of the willingness of the *Conseil constitutionnel* to consider the principles contained in Article 88-1 from a constitutional perspective and autonomously from the European legal order. On this point, see *supra* at 108.

legal rules in the pyramid of norm, irrespective of their author,²¹¹ it is the willingness of the Irish people to define its identity by reference to the European principles that enables domestic courts to raise these to a status equivalent to that enjoyed by constitutional provisions.

Having the same origin and the same function from this perspective, the two sets of norms also share the same normative pedestal. Irish courts are therefore before two sets of norms, one purely constitutional and the other one reflecting in the Constitution the values of the European legal order, which both can be deemed to be the equal expression of the Irish sovereign. Accordingly the judicial task consists of selecting, in case of material conflict between domestic and European rules, the one which mirrors the identity the Irish people want to give to themselves. This may explain the reasons why Walsh J. considered the relationship between the primacy principle and Article 34.4.3° of the Constitution as a matter of Irish law.²¹² The main issue in the eyes of the courts was not so much to determine the scope of European obligations bearing on Ireland. If it can be argued that the decision is congruent with the European logic behind the preliminary reference mechanism,²¹³ it seems that such a result is incidental. It is rather a domestic logic that is at stake, *viz.*, the recognition of the willingness expressed by the Irish people to see its legal features shaped by European law, which is decisive in this decision of the Supreme Court.²¹⁴

However, this endeavour has to be considered in relation to what interpretation is, and in particular to the impossibility of determining the intention of a collective author.²¹⁵ In this respect, the twelfth amendment to the Constitution that was proposed on 25 November 1992 illustrates this difficulty. Its purpose was to permit abortion in order to save the life of the mother, as distinct from her health. This was rejected by the Irish people due to “an unlikely coalition”,²¹⁶ some opposed to a recognition of abortion in the Constitution while others considered that it was a limitation of the principle recognised in the *X* case.²¹⁷ One could therefore conclude that imputing the meaning of a legal provision to the intention of its author

²¹¹ N. Travers, “Community Directives: Effects, Efficiency, Justiciability” (1998) 7 *Irish Journal of European Law* 165-230 at 173.

²¹² On this point, see F. Murphy, “*Campus Oil Ltd., Estuary Fuel Ltd., McMullan Bros. Ltd., Ola Teoranta, P.M.P.A. Oil Company Ltd., Tedcastle McCormick and Company Ltd. v. The Minister for Industry and Energy, The Attorney General and The Irish National Petroleum Corporation Ltd.* (1982-1983) J.I.S.E.L. 43; (1984) 1 C.M.L.R. 479”, *op. cit.*, at fn. 189 above, at 748-749.

²¹³ See for example, D. O’Keefe, “Appeals Against an Order to Refer under Article 177 of the EEC Treaty” (1984) 9 *European Law Review* 87-104, in particular at 104.

²¹⁴ In this sense, see D. R. Phelan and A. Whelan, “National constitutional law and European integration: FIDE Report”, *op. cit.*, at fn. 23 above, at 38.

²¹⁵ See also *supra* at 314-315.

²¹⁶ See G. W. Hogan and G. F. Whyte, *JM Kelly: The Irish Constitution*, *op. cit.*, at fn. 41 above, at 1509-1510.

²¹⁷ See for example J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law*, *op. cit.*, at fn. 14 above, at 19-20.

remains, for an important part, illusory and that *in fine* Irish courts reserve the right, by choosing which set of norms should prevail, to determine what Irish identity ought to be. Indeed, the constructive interpretation of the Articles of the Constitution dedicated to European Union law in the name of the will of the people to participate in the process of European integration is not without difficulties for the sovereignty of the people itself. It could be argued that such an interpretation is a distortion of the principles the Irish people intended to impose, *via* referendum, on the relationship between the domestic and European legal orders, which *in fine* could be seen as a deprivation of their sovereignty.²¹⁸

To a certain extent, the ambivalent position of Irish courts regarding which logic, either purely domestic or European, should prevail is exemplified by the recent decisions on the European arrest warrant. Even though it does not directly concern the doctrine of primacy, this issue is revealing as regards the discretion enjoyed by Irish court to determine to what degree European law shapes the domestic legal order. This mechanism was created by a European Council Framework Decision²¹⁹ which was implemented in the Irish legal order by the European Arrest Warrant Act 2003 (as amended). This European mechanism is driven by “the principle of mutual recognition which the European Council referred to as the ‘cornerstone’ of judicial cooperation” and relies on “a high level of confidence between Member States”, as respectively pointed out in the Recital (6) and the Recital (10) of the Framework Decision. The European arrest warrant led to the landmark decision *Pupino*²²⁰ of the European Court of Justice which extended the obligation to interpret national law in the light of European law in what was, prior to the Treaty of Lisbon, the third pillar of the European Union (concerning issues related to Police and Judicial Co-operation in Criminal Matters) without this principle of interpretation requiring an interpretation of national law *contra legem*.²²¹ It is the use of the *Pupino* principle by Irish courts which is relevant for present purposes.

In some instances, this interpretative principle led the judiciary to neutralise provisions of the domestic instrument of implementation. This is notably the case insofar as concerns section 37 of the European Arrest Warrant 2003 (as amended) which affirms that the surrender of a person could be refused if it would involve an infringement of this person’s constitutional rights. However, the Supreme Court has often played down the importance of this provision in

²¹⁸ For further developments on this point, see *supra* at 139-140.

²¹⁹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] O.J. L 190/1.

²²⁰ Case C-105/03 *Criminal Proceedings against Maria Pupino* [2005] E.C.R. I-5285.

²²¹ *Ibid.* at para 43-47.

favour of the European logic. This was the case in *Minister for Justice, Equality and Law Reform v. Brennan*²²² where the respondent tried to rely on this domestic provision to resist his surrender to the United Kingdom arguing that the sentence he might face contradicted the principle of proportionality. The Supreme Court disagreed and decided on the basis of *Pupino* that it was essential to enforce the mutual recognition which was the basis of the Framework Decision.²²³ In consequence, it was necessary to give consideration to the particularities of each legal order and section 37 of the European Arrest Warrant 2003 (as amended) could not be a requirement for principles of Irish law to be mirrored in the state having issued the European arrest warrant.²²⁴ This domestic provision could only be enforced in case of “egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights.”²²⁵

A similar issue was at stake in *Minister for Justice, Equality and Law Reform v. Stapleton*.²²⁶ This concerned a European arrest warrant issued by the United Kingdom in 2005 and related to infractions, notably fraud, committed between 1978 and 1982. Mr Stapleton argued, *inter alia*, that, on the basis of section 37 of European Arrest Warrant 2003 (as amended), that his surrender should be refused since the delay between the time when these alleged offences were committed and the issue of a European arrest warrant by the United Kingdom deprived him of the possibility of a fair trial. The High Court took the view that this issue of reasonable delay was an objective one, which it was as competent as its English counterpart to determine.²²⁷ It concluded in this instance that this delay meant that it could not be ensured that the respondent would benefit from a fair trial and refused his surrender.²²⁸ However, on appeal, the Supreme Court reached another conclusion. As in *Brennan*, the Supreme Court relied on *Pupino* and the duty to uphold the mutual recognition and the mutual trust which is the basis of the European mechanism.²²⁹ In consequence, the Irish courts had to presume that the protection of human rights was also guaranteed in the legal order of the issuing states²³⁰ and that, in these circumstances, parity between the Irish and British legal

²²² [2007] 3 I.R. 732.

²²³ *Ibid.* at 742-743.

²²⁴ *Ibid.* at 743.

²²⁵ *Ibid.* at 744.

²²⁶ [2006] 3 I.R. 26 (High Court); [2008] 1 I.R. 669 (Supreme Court).

²²⁷ [2006] 3 I.R. 26 at 50.

²²⁸ *Ibid.* at 55.

²²⁹ [2008] 1 I.R. 669 at 684.

²³⁰ *Ibid.* at 689.

orders was not required.²³¹ In contrast, it was for the courts of the issuing state to assess if the delay between the allegedly committed offences and the prosecution would impair a fair trial.²³² Considering the importance given to the teleological interpretation to the benefit of European on the basis of *Pupino*,²³³ the Irish case-law “[gave] rise to a question as to the utility of the Oireachtas inserting s 37 into the Act of 2003 in the first place.”²³⁴ In other words, it permits Irish courts to have the European logic prevail over considerations of a purely domestic nature.

However, this use of the *Pupino* interpretative principle to trump a literal reading of Irish domestic law to the benefit of the European principles is not the invariable outcome of Irish case-law. An opposing logic is also noticeable, in particular in the recent *Bailey*²³⁵ and *Tobin*²³⁶ decisions. The purpose of the following development is not to appreciate the merits of these decisions but rather to highlight that, when compared to the previous decisions on the European arrest warrant, Irish courts have a high degree of discretion to determine to what extent domestic rules should mirror the European logic. *Bailey* concerned a European arrest warrant issued by France in relation to the murder of a French citizen committed in Ireland allegedly by a British citizen. The Supreme Court decided unanimously that the surrender of Mr Bailey had to be refused on the basis of section 21A of the European Arrest Warrant Act 2003 (as amended) since according to this provision “the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state.” It was considered that the stage of the French procedure did not correspond to the conditions fixed by this provision.

However, for present purposes, it seems that the arguments made in relation to section 44 of the European Arrest Warrant Act 2003 (as amended) are more revealing. According to this section “a person shall not be surrendered under this Act if the offence specified in the European Arrest Warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State.” This section was regarded as implementing in the Irish legal order an opting-out availed by Article 4.7 (b) of the Framework Decision. In

²³¹ *Ibid.* at 690.

²³² *Ibid.* 692.

²³³ This use of *Pupino* to reduce the importance of section 37 of the European Arrest Warrant 2003 (as amended) was later reaffirmed by the Supreme Court, see for example *Minister for Justice, Equality and Law Reform v. Tobin (No 2)* [2012] I.E.S.C. 37 *per* O'Donnell J. at para. 18, 22 and 37.

²³⁴ E. Fahey, *EU Law in Ireland* (Dublin: Clarus Press, 2010) at 112.

²³⁵ *Minister for Justice, Equality and Law Reform v. Bailey* [2011] I.E.H.C. 177 (High Court); [2012] I.E.S.C. 16 (Supreme Court).

²³⁶ *Minister for Justice, Equality and Law Reform v. Tobin (No 2)* [2012] I.E.H.C. 72 (High Court); [2012] I.E.S.C. 37 (Supreme Court).

consequence, both the majority and O'Donnell J. dissenting agreed that section 44 of the European Arrest Warrant Act 2003 (as amended) required a purposive interpretation with regard to the European provision,²³⁷ in conformity with the *Pupino* principle.²³⁸

However, the majority and the minority disagreed as to the legal context where such a conforming interpretation should be carried out. For the majority, Article 4.7 (b) introduced an exception to the general objective of mutual trust and confidence of the Framework Decision by introducing provision governed by the principle of reciprocity.²³⁹ The interpretation of section 44 of the domestic instrument in the light of the European rule should thus be determined outside the global architecture of the decision framework.²⁴⁰ In this respect, the interpretation provided by the High Court of section 34 allowing the surrender was held to be *contra legem*.²⁴¹ In contrast, the Supreme Court took a position which upheld the protection of Irish domestic legal specificities. France was claiming an extra-territorial jurisdiction to prosecute a foreigner for a crime committed against a French citizen. However, the Irish legal order did not allow the same competence since it is only possible to prosecute murder committed abroad by Irish citizens. In consequence, no reciprocity exists between the Irish and French legal orders, which justified refusing the surrender.²⁴²

However, O'Donnell J. disagreed with the interpretation of the majority. For him, Article 4.7 (b) of the Framework Decision could not be equated with the application of the principle of reciprocity.²⁴³ In consequence, if the meaning to be attributed to section 44 has to be primarily conceived in relation to Article 4.7 (b), this had to be considered with regard to "the Framework Decision as a whole" and the principle of trust it contains.²⁴⁴ This led him to conclude that section 44 could not oppose the surrender. Even if this is only a brief outline of the decision in *Bailey*, it is revealing of the discretion of Irish courts in relation to the balance to be reached between purely domestic and European features in the Irish legal order. As regards the difficult interpretation of section 44,²⁴⁵ which therefore is highly dependent on a choice made by the judiciary, the application of the *Pupino* principle can equally lead to a reading protective of domestic specificities or to the shaping of the Irish legal order according to the

²³⁷ [2012] I.E.S.C. 37 *per* Fennelly and O'Donnell JJ. respectively at para. 49 and 51.

²³⁸ *Ibid.* *per* Fennelly and O'Donnell JJ. respectively at para. 26 and 51.

²³⁹ *Ibid.* *per* Denham C.J. at para. 39 and *per* Fennelly J. at para. 80-88.

²⁴⁰ *Ibid.* *per* Denham C.J. at para. 26 and *per* Fennelly J. at para. 62-63.

²⁴¹ *Ibid.* *per* Denham C.J. and Fennelly J. respectively at para 43 and 72.

²⁴² See, for example, *ibid.* *per* Fennelly J. at para 97-98.

²⁴³ *Ibid.* *per* O'Donnell J. at para. 36.

²⁴⁴ *Ibid.* *per* O'Donnell J. in particular at para. 51.

²⁴⁵ Both the majority and the minority recognised that the meaning of section 44 was not self-evident, see *ibid.* *per* Fennelly and O'Donnell JJ. respectively at para. 91 and 33.

European logic. This conclusion is reinforced when the conclusion reached by the majority in *Bailey* is compared with previous decision which reduced the importance of section 37 of the European Arrest Warrant Act 2003 (as amended) on the basis of *Pupino*.

This point is also supported by the decision in *Tobin*. This case arose when Hungarian authorities issued a warrant in 2005 for the surrender of an Irish citizen in relation to a car accident causing the death of two children. When the Supreme Court had to consider this matter for the first time, the European Arrest Warrant Act 2003 contained a section 10 which stated that a surrender was only possible if the person had fled from the issuing state. It was thus decided that, on the basis of *Pupino*, the surrender had to be refused since an interpretation of section 10 to circumvent the “fleeing” condition would be *contra legem*.²⁴⁶

However, in the aftermath of this decision, the Criminal Justice (Miscellaneous Provisions) Act 2009 amended the European Arrest Warrant Act 2003, in particular to remove the “fleeing” condition. This led to another warrant being issued by Hungary. When this last warrant was challenged, the Irish courts had to determine,²⁴⁷ among other things, if Mr Tobin had acquired a right not to be surrendered pursuant to the first proceedings. Indeed, section 27 (1) (c) of the Interpretation Act 2005 ensures that the repeal of an enactment does not prejudice “affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment”. Such prejudice would only be possible if the Oireachtas expressed a contrary intention, as stated in section 4 of the same Act.

Some of the judges argued that, in contrast to the decision in *Bailey*, the fact that Mr Tobin already successfully resisted the arrest warrant issued by Hungary before the amendment of the European Arrest Warrant Act 2003 entailed that he acquired a right not to be surrendered in accordance with section 27 (1) (c) of the Interpretation Act 2005.²⁴⁸ The question was therefore to determine if the intention of the Oireachtas reversed this presumption in his favour. As in *Bailey*, the question was to determine the effect of the principle of conforming interpretation expressed in *Pupino* and, as in the previous case, two attitudes are noticeable, a narrow interpretation of the case-law of the European Court of Justice which tends to have the Irish legal features prevail and a broad one where European law is granted a greater impact on the shaping of the domestic legal order. Relying on the decision in *Bailey*, O’Donnell J. argued that an interpretation was required to be carried in a specific context, rather than considering the European Arrest Warrant Act 2003 (as amended) in accordance with the general purpose

²⁴⁶ *Minister for Justice, Equality and Law Reform v. Tobin (No 1)* [2008] 4 I.R. 42.

²⁴⁷ *Minister for Justice, Equality and Law Reform v. Tobin (No 2)* [2012] I.E.H.C. 72 (High Court); [2012] I.E.S.C. 37 (Supreme Court)

²⁴⁸ [2012] I.E.S.C. 37 *per* O’Donnell J. and *per* Murray J. respectively at para. 70-72 and 13-14.

of the Framework Decision. In consequence, while the amendment to the Act of 2003 was meant to fulfil in a better way the European scheme, he argued it was expressed in general terms and that there was no explicit provision implying that the Oireachtas intended to reverse the right acquired by Mr Tobin, which justified refusing the surrender.²⁴⁹ It could thus be argued that his decision curtailed the mutual trust and confidence which underline the European arrest warrant and, *a contrario*, preserved the domestic architecture of the Irish legal order.

In contrast, favouring the European perspective, Murray J., for the minority, argued that, beyond the express words, the necessary implication of the amendment was decisive.²⁵⁰ He took the view that the Criminal Justice (Miscellaneous Provisions) Act 2009 aimed to remedy the breach of European law of the previous implementation and therefore to fulfil the obligations imposed on the Irish state by virtue of the European Communities Act 1972 (as amended).²⁵¹ He concluded from this willingness to conform with Irish commitments towards European requirements that, in the light of *Pupino*, the Oireachtas had displayed by necessary implication that its amendment of 2009 was not limited to prospective arrest warrants.²⁵² It could thus be held that the presumption in favour of the vested right enjoyed by Mr Tobin had been reversed in favour of the principle of mutual trust and confidence structuring the European scheme and that its surrender could not, in consequence, be resisted on this basis.

These decisions show that the appropriate balance between the protection of domestic features and the openness of the Irish legal order to a European logic on the basis of the application of the *Pupino* principle rest primarily in the hand of the judiciary. This assumption in relation to the European arrest warrant confirms the previous point made in relation to the balance between certain constitutional provisions and the doctrine of primacy, a balance which is constitutive of the notion of constitutional identity and which is dependent on the interpretation of Irish courts.

In conclusion, the power of Irish courts is the very consequence of the perspective favouring political considerations they put on the relationship between European and constitutional provisions. Paradoxically, freed from the fetters of normative logic, they enjoy a large power of appreciation as to consequences and limits of the primacy of European Union

²⁴⁹ *Ibid. per* O'Donnell J. at para. 76-78. For a similar opinion, see *ibid. per* Hardiman J. at para. 144-147.

²⁵⁰ *Ibid. per* Murray J. at para. 32.

²⁵¹ *Ibid. per* Murray J. at para. 39 and 49. For a similar opinion see *ibid. per* Denham C.J. at para. 67.

²⁵² *Ibid. per* Murray J. at para. 50-57.

law in the domestic legal order. In this regard, they do not face the same difficulties as the *Conseil constitutionnel* in defining and having the notion of constitutional identity prevail.

It is possible to make a parallel between the determination of the *locus* of Irish identity and the solution upheld in *Crotty v. An Taoiseach*.²⁵³ Due to the vagueness of the “essential scope or objectives” test, the actual extent of the licence to join what is now the European Union expressed by the people is left undetermined. In consequence, its appraisal mainly rests in the hands of the judiciary, a situation that has driven the Government to organise a referendum for each new European treaty. It could be argued that the protection of Irish constitutional identity is the continuation of the same logic with regard to the application of European Union law. In some instances, it is the constitutional adherence to European values that will shape the Irish legal order. In other circumstances, it is constitutional provisions of a purely domestic nature which will prevail in the name of the necessary protection of Irish constitutional identity.²⁵⁴

In a sense, *Campus Oil* and *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*²⁵⁵ can be regarded as mirror-images. In the first case, constitutional provisions dedicated to European law qualified purely domestic provisions²⁵⁶ while in the second decision, in contrast, the right to life of the unborn defined by Article 40.3.3°, and without equivalence in the European sphere, qualified the provisions enabling the application of European Union law and its primacy in the domestic legal order. Hogan and Whyte criticise the reasoning of the Supreme Court in *Campus Oil* in that, according to the reasoning in this case, “Article 29.4.3°-Article 29.4.10° [as it was then] has the effect of virtually scheduling the European Treaties to the Constitution itself.”²⁵⁷ In contrast, considering other decisions of the Supreme Court, and notably *Crotty*, Reid argues that for the Irish judiciary “the Amendment [related to constitutional provisions dealing with European law] rather than scheduling the Treaties to the Constitution, has the effect (within the areas of competence of the Communities) of scheduling the Constitution to the Treaties.”²⁵⁸ In the light of the arguments developed above,

²⁵³ [1987] I.R. 713.

²⁵⁴ On these points, see *supra* at 251-269.

²⁵⁵ [1989] I.R. 753.

²⁵⁶ It is certain that what was at stake in *Campus Oil* did not concern legal features that could be considered as participating in Irish identity. Nonetheless, it is the sign that in some circumstances Irish courts are willing to let European Union law shape the domestic legal order beyond what constitutional provisions dealing with European law seem to enable. In this regard, the position on gender equality, while depending on the same logic, bears consequences closer to the notion of identity, see *supra* at 263-265.

²⁵⁷ G. W. Hogan and G. F. Whyte, *JM Kelly: The Irish Constitution*, *op. cit.*, at fn. 41 above, at 521.

²⁵⁸ M. Reid, *The Impact of Community Law on the Irish Constitution* (Dublin: Irish Centre for European Law, 1990) at 16.

one could argue that both propositions are true according to the opinion held by Irish courts as to what Irish identity ought to be.

Section II Irish and French Courts as the Preeminent Actors in a Conciliatory Inter-Jurisdictional Dialogue on the Doctrine of Primacy Respectful of the Notion of Constitutional Identity

The enforcement of the doctrine of primacy by Irish and French courts through the application of European norms is dependent on the interpretation of constitutional provisions and the balancing of the constitutional commitment to participation in the process of European integration with principles of a purely domestic nature. The notion of constitutional identity as a result of this process is not neutral regarding the position of domestic courts. By adopting this perspective regarding the acceptance of the European existential principle, as the doctrine of primacy has been qualified,¹ domestic courts participate in their own empowerment. Stressing their central role in the definition of constitutional identity, they secure a strategic position in the relationship between the national and European legal orders.

On the domestic stage, this results in an empowerment of the judiciary in relation to European matters vis-à-vis the other branches of Government. However, the dynamics go beyond the domestic sphere and contribute to giving a greater influence to the judicial dialogue between the European and domestic courts. The notion of constitutional identity could be regarded as a new *Kompetenz-Kompetenz*, i.e., as a new paradigm of the conciliation between the primacy of European Union law and the supremacy of the Constitution. The threat of the doctrine of primacy being blocked in the name of the protection of constitutional identity is a way for domestic courts to influence their European counterpart to interpret European rules so as to take into account their national specificities. It ensures the peaceful coexistence of the two existential principles.

¹ P. Pescatore, *L'ordre juridique des Communautés Européennes : Études des sources du droit communautaire* (Second edition, Liège: Presses universitaires de Liège, 1973) at 227 (translation by the author).

Chapter VII Courts Engaged in a Form of Conflict: Privileged Actors of the Compromise between Constitutional Identity and the Primacy of European Union Law

The question of the existence of the doctrine of primacy and its recognition by member states can not be limited to the opposition between the national and European levels. Looking beyond the screen of the state, it also affects the relationship between different organs within the state.¹ The development of the notion of constitutional identity as a limit to the doctrine of primacy in the Irish and French legal orders is intertwined with the development of the competences of domestic courts in their relations with other domestic organs.²

The judiciary determines the effect of the primacy of European rules on constitutional provisions and the principles they embody. However, for the same reasons as it is necessary to “‘disaggregate’ the notion of member state as monolithic concept”,³ it could be argued that it would be misleading to conceive the judiciary as a unified entity. The notion of constitutional identity also gives rise to competition between the different courts insofar as concerns the determination of the balance between the enforcement of the doctrine of primacy and the protection of constitutional provisions. In this regard, the different court systems in Ireland and France has a crucial impact on the actual enforcement of the notion of constitutional immunity as a limit put on the doctrine of primacy in their respective legal order.

A. The Notion of Constitutional Identity as an Empowerment of the Irish and French Courts vis-à-vis the other Branches of Government

The question of the reception of European Union law into national legal orders cannot be disconnected from the ambivalent position of the national governments acting both at the domestic and European levels. The primacy of European rules could be used by them to avoid

¹ This strategic dimension for domestic organs is stressed by Póitíneas Maduro when he argues that “frequently, what changes is the balance of representation and participation between different national actors in the definition of a certain policy and not so much the European or national character of the policies. It is a strategic Europeanisation, not an ontological one”, M. Póitíneas Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action” in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 501-537 at 520.

² On this privileged positions of courts in relation to the issue of constitutional identity, see G. J. Jacobsen, *Constitutional Identity* (Cambridge, Massachusetts: Harvard University Press, 2010) at 302-311.

³ J. H. H. Weiler, A.-M. Slaughter and A. Stone Sweet, “Prologue - The European Courts of Justice” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) v-xiv at xiii-xiv.

constitutional constraints put on their normative production.⁴ This concern seems decisive in the case-law of Irish and French courts regarding the question of the doctrine of primacy.

While the role of national parliaments has been increased in the European framework, it may be that the domestic courts take the view that the solidarity between the executive and legislative organs prevents effective control of governments by political means. The Irish and French case-law on the issue of the doctrine of primacy involves an empowerment of the judiciary facilitating their substitution for their national parliaments and to be able the submission of executive power to respect for essential constitutional provisions.

1. The Preeminence of Irish Courts as a Result of the Submission of the Primacy of European Law to the Notion of Constitutional Identity

In an attempt to explain the acceptance by national courts of the primacy principle developed by the European Court of Justice, Alter argues that this depended on the judicial empowerment which was implied by this European doctrine, allowing the judiciary to control legislative instruments.⁵ However, Fahey criticises the value of this theory⁶ and in particular its suitability for explaining the position of the Irish courts towards the primacy principle. It is certain that, unlike the French situation,⁷ the reception of the primacy principle by the High Court and the Supreme Court cannot be explained by an increase of their competence since Article 34 of the Constitution already enabled them to carry out judicial review of legislative instruments. However, Alter's arguments also rely on a differentiated vision of national jurisdictions. In this respect, she explains that the empowerment of lower courts is not only an issue of competence whereby they are granted a power of judicial review which they were not enjoying in the domestic legal order but rather also enables them "to circumvent higher

⁴ For a similar opinion, see C. Geslot, "L'exercice en commun des compétences du point de vue de l'État" in P.-Y. Monjal and E. Neframi (eds.), *Le commun dans l'Union européenne* (Brussels: Bruylant, 2009) 121-151 at 134 or J. H. H. Weiler, "The Transformation of Europe" (1991) 100 *The Yale Law Journal* 2403-2483 at 2452.

⁵ See K. J. Alter, "Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration" in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 227-252, in particular at 239 and more generally, by the same author, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001).

⁶ See E. Fahey, *Practice and Procedure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts* (Dublin: First Law, 2007), in particular at 117-131.

⁷ See *supra* at 71-78 and *infra* at 416-418.

courts.”⁸ Nevertheless, on this point, Fahey questions the appropriateness of this theory in the Irish situation, arguing that “the ‘judicial empowerment’ of the lower courts *via* the preliminary reference mechanism has yet to surface in this jurisdiction.”⁹

However, it could be argued that the issues raised by judicial review are not limited to the recognition of a competence to exercise such review by the domestic legal order. In the judicial appraisal of the validity of a statute, the norms being used for this control are as important as the existence of the control itself. The case-law of the *Conseil constitutionnel* is an example of the entwined nature of these elements. Up until its decision of 1971,¹⁰ the existence of a general power of judicial review was unclear in the French legal order. It is interesting that the affirmation of such a power by the *Conseil constitutionnel* itself went hand-in-hand with the affirmation of the normative status of the Preamble of the Constitution and of the provisions on human rights it indirectly contained.¹¹ This *Freedom of association* decision of 1971 indicates the importance of the norms being involved in the mechanism of judicial review and sheds a new light on the position of Irish courts vis-à-vis European Union law.

Behind the disguise of a political reading of the relationship between the domestic and European legal spheres,¹² Irish courts manage to give, if not a constitutional value, at least constitutional force to European norms, thereby increasing their judicial ability to conciliate conflicting obligations, either European or domestic, in the Irish legal order.¹³ In consequence, one could come to the conclusion that, without increasing their nominal competence, the Irish judiciary nonetheless still empowered itself through European Union law. The improved position of the judiciary consequent on the interpretation they gave to the primacy principle is more obvious when assessed in the context of the separation of powers. In this regard, it could be concluded that the judiciary used European Union law as a lever vis-à-vis the other branches of government. As Costello concludes:

⁸ See for example, K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, *op. cit.*, at fn. 6 above, at 45-52, in particular at 49. For further considerations on the competition between judicial bodies in an Irish context, see *infra* at 424-434.

⁹ E. Fahey, *Practice and Procedure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts*, *op. cit.*, at fn. 7 above, at 36.

¹⁰ CC, decision n° 71-44 DC on the *Act complementing the provisions of the Articles 5 and 7 of the Act of 1 July 1971 pertaining to the contract of association* of 16 July 1971, *Rec.* 29.

¹¹ On these points, see *supra* at 110-112.

¹² According to the distinction introduced above (see *supra* at 273-274) to distinguish constitutional interpretation carried out by Irish and French courts according to the relative importance given to normative and political factors due to the nature of this norm as “a political instrument as well as a legal document”, according to the definition given by Costello J. in *Attorney General v. Paperlink Limited* [1984] I.R.L.M. 348 at 385.

¹³ See *supra* at 365-374.

“the modification of the separation of powers has been described as ‘one of the most far reaching consequences to date of Ireland’s EU membership.’ A broad interpretation of ‘necessitated’ has constitutionally facilitated this transformation, undermining the role of the Oireachtas in EC law-making. Thus a feature of the EC’s democratic deficit, namely the dominance of executive over legislative bodies, has been given a constitutional imprimatur by the Irish judiciary.”¹⁴

One could add that, through the notion of constitutional identity as describing the specific balance made between constitutional provisions dedicated to European law and others of a purely domestic nature, the judiciary substituted its role for that of the Oireachtas and increased its hold on the action of the Government in the European realm.

When it comes to the judiciary’s consideration of the role of the Oireachtas, the position of Irish courts concerning European Union law results in a diminished position of the parliamentary branch vis-à-vis the other branches of government ¹⁵ as is seen in the decision in *Meagher v. Minister for Agriculture*.¹⁶ For present purposes, it is important to take into account the considerations given in this decision to the relationship established by the European Communities Act 1972 (as amended) between the Oireachtas and the Government as regards the implementation of European rules by ministers through statutory instruments. Since these ministerial regulations have statutory effect, Section 4 of the aforementioned rule contained provisions to protect the legislative power of the Oireachtas defined in Article 15.2.1° of the Constitution. Initially, in 1972, confirmation by the Parliament was required to ensure the validity of ministerial regulations. This mechanism presented some difficulties ¹⁷ and was amended a year later. The role of the Oireachtas under the new mechanism was defined negatively rather than positively, *i.e.*, the ministerial instruments would be valid unless the Oireachtas manifested its opposition.¹⁸ When the constitutionality of the European

¹⁴ C. Costello, “European Community Judicial Review in the Irish courts - Scope, Standards and Separation of Powers” in M. C. Lucey and C. Keville (eds.), *Irish Perspectives on EC Law* (Dublin: Round Hall, 2003) 17-49 at 35.

¹⁵ For a similar opinion, see G. W. Hogan, “The implementation of European Union law in Ireland: the *Meagher* case and the democratic deficit” (1994) 2 *Irish Journal of European Law* 190-202 at 200.

¹⁶ [1994] I.R. 329. To a certain extent, this conclusion is less pregnant in *Browne v. Attorney General* [2003] 3 I.R. 205 and *Kennedy v. Attorney General* [2007] 2 I.R. 45. However, as will be seen (see *infra* at 392-393), this consideration for the powers of the Oireachtas rather resulted in an increased control of the Government by the judiciary.

¹⁷ On this point, see M. T. Robinson, “The Irish European Communities Act 1972” (1973) 10 *Common Market Law Review* 352-354.

¹⁸ On the revised mechanism of 1973, see M. T. Robinson, “Recent Legal Developments in Ireland in Relation to the European Communities” (1973) 10 *Common Market Law Review* 467-470.

Communities (Amendment) Act 1973 was questioned in *Meagher*, Johnson J. in the High Court paid great attention to the institutional relationship between the Ministers and the Oireachtas.¹⁹ Indeed, his decision, according to which the mechanism providing for the implementation of European rules was repugnant to the Constitution, was grounded in the following comment:

“can the effect of a positive affirmation and confirmation by the Oireachtas of a regulation have the same effect as the failure to nullify a regulation by the Houses of the said Oireachtas without the President? In my view the answer is no, and that therefore the Regulations of 1988 and 1990 have not been legitimised by s. 1 of the European Communities Act, 1973, and under those circumstances it is necessary for me to consider the constitutionality of s. 3, sub-s. 2 of the European Communities Act, 1972, insofar as it allows repealing or amending of law by regulations.”²⁰

In comparison with this perspective, the different position of the Supreme Court is striking. In order to uphold the constitutional validity of Section 3 of the Act, the opinion of the Supreme Court expressed by Finlay C.J. bore little concern for the role of the Oireachtas and was focused on a generous interpretation of the meaning of the “necessitated” clause contained in what is now Article 29.4.6° of the Constitution.²¹ This view on the meaning of Article 15.2.1° - a constitutional provision which makes of the Oireachtas the “sole and exclusive power of making laws for the state” - is echoed in the opinion of Denham J. (as she was then) on the validity of the statutory instruments themselves. While she stressed that the separation of powers was a “fundamental principle of Bunreacht na hÉireann”,²² one could argue that she nonetheless undermined the rigour of the constitutional text when, describing the role of the Oireachtas with regard to the European affairs, she concluded that:

“that being the case [the implementation of principles and policies contained in the European Directives] the role of the Oireachtas in such a situation would be sterile. To require the Oireachtas to legislate would be artificial. It would be able solely to have a

¹⁹ On this particular attention given in the High Court, compared to the later position of the supreme Court, see T. Carney, “*Meagher v Minister for Agriculture: An Opportunity to Angel Dust Article 29.4.5°*” (1995) 13 *Irish Law Times* 187-192 at 188-189.

²⁰ [1994] 1 I.R. 329 at 342-343.

²¹ See *supra* at 122-124.

²² [1994] 1 I.R. 329 at 366.

debate as to what has already been decided, which debate would act as a source of information. Such a sterile debate would take up Dáil and Seanad time and act only as a window on Community directives for the members of the Oireachtas and the Nation. That is not a role envisaged for the Oireachtas in the Constitution.”²³

It has been argued that this representation of the role of the major legislative organ departs from the traditional conception of the separation of powers as inscribed in the Irish Constitution.²⁴ However, the view could also be taken that Denham J. expressed an opinion mirroring the current institutional dynamics of the parliamentary system. Rather than an opposition between the Parliament and the Government, it is rather the solidarity between the Executive and its parliamentary majority faced by the opposition that characterises the relationship between the constitutional powers.²⁵ As Robinson (later to become President of Ireland) pointed out this relationship between the Government and the Oireachtas existed since the very beginning of membership. Under the initial drafting of Section 4 of the European Communities Act, Robinson noted that the members of the Oireachtas “were in fact confirming blindly regulations”,²⁶ what “illustrated how minimal the role of the Irish Parliament was in reality”.²⁷ Commenting on the modifications of this section in 1973 and the introduction of a Joint Committee on European Community Secondary Legislation, she suggested that it led to a “bipartisan approach”.²⁸ One can argue, on the basis of these considerations, that the position of the Oireachtas insofar as concerns the activity of the Government in relation to European law consists of affirming its solidarity with the executive branch rather than controlling it, which justifies the opinion of Denham J. in *Meagher* when she affirmed that “the role of the Oireachtas (...) would be sterile”.

²³ *Ibid.* at 367.

²⁴ See, for example, G. W. Hogan, “The implementation of European Union law in Ireland: the *Meagher* case and the democratic deficit”, *op. cit.*, at fn. 16 above, at 200-202 or see N. Travers, “The implementation of directives into Irish law” (1995) 20 *European Law Review* 103-110 at 104.

²⁵ In this sense, see for example, P. Avril, “Le parlementarisme rationalisé” (1998) *Revue du droit public et de la science politique en France et à l'étranger* 1507-1515.

²⁶ M. T. Robinson, “The Irish European Communities Act 1972”, *op. cit.*, at fn. 18 above, at 353. On this point, Whelan points out that a positive role of the Oireachtas could still be achieved by means of omnibus bills while admitting that it would not *per se* improve the concern of its members for European law, see A. Whelan, “Constitutional Law - *Meagher v. Minister for Agriculture*” (1993) 15 *Dublin University Law Journal* 152-173 at 157. One could therefore argue that such a mechanism would preserve the legal dogmatic but would not provide actual scrutiny by the legislative organ. On the fact that the control of the Oireachtas depends rather on the attitude of its members than on the mechanism introduced, see also N. Travers, “The Reception of Community Legislation into Irish Law and Related Issues Revisited” (2003) 38 *Irish Jurist* 58-91 at 73.

²⁷ M. T. Robinson, “Recent Legal Developments in Ireland in Relation to the European Communities”, *op. cit.*, at fn. 19 above, at 468.

²⁸ *Ibid.* at 470.

Such an assessment of the institutional dynamics seemed to be confirmed by the reactions to *Browne v. Attorney General*.²⁹ In this case, the Supreme Court found that the creation of an indictable offense by way of statutory instrument was *ultra vires* since this was prohibited by Section 3 (3) of the European Communities Act, this power being “expressly reserved to the Oireachtas”.³⁰ However, the European Communities Act 2007 was passed in order to overturn the decision of the Supreme Court in this case.³¹ In consequence, one could argue that the opinion of the judiciary on the separation of powers as it exists currently in Ireland is justified. Due to the active role of national governments in the drafting of European norms,³² the opposition to the primacy principle indirectly requires being able to control the Executive, a control that the political responsibility of the Government exercised by the Oireachtas seems unsuited to provide.

In consequence, if the notion of constitutional identity is understood as a balancing process between the fulfilment of European obligations and the upholding of certain constitutional provisions for which the judiciary plays an active and decisive role, it could then be concluded that the judiciary reveals its willingness to substitute the political control exercised by the Oireachtas with a judicial control.³³

The empowerment of the judiciary due to European law is not only the result of the affirmation of its role in the face of the role played by the Oireachtas. The protection of the Constitution against the primacy principle was also the opportunity to institute an empowerment of Irish courts in their relationship vis-à-vis the Executive. Once again, due to the usual generous attitude of the Irish courts towards European law in general and the primacy principle in particular, and due as well to the consequences that have been attached to their decisions, there are a few cases where this empowerment of the judiciary in the face of the Executive is noticeable, the first and foremost being *Crotty v. An Taoiseach*.³⁴ The specific question of the case aside, the first issue consisted of the very existence of the competence of the Supreme Court in controlling the action of the Government in the area at stake. Just as Article 15.2.1° of the Constitution reserves legislative power to the Oireachtas, Article 29.4

²⁹ [2003] 3 I.R. 205.

³⁰ *Ibid.* at 220.

³¹ As Doyle puts it, this modification “seeks to reverse both the specific conclusion and the rationale of *Browne*”, see O. Doyle, *Constitutional Law: Text, Cases and Materials* (Dublin: Clarus Press, 2008) at 400.

³² For further developments on this point, see *infra* at 393-394.

³³ For a contrary opinion outlining the importance of the Oireachtas both for the control of the Government’s actions and the improvement of democracy, see G. W. Hogan, “The implementation of European Union law in Ireland: the *Meagher* case and the democratic deficit”, *op. cit.*, at fn. 16 above, at 201-202.

³⁴ [1987] I.R. 713.

grants a monopoly to the Executive in matters of external relations. In consequence, the competence for the judiciary to review such actions was questionable, all the more so since, due to the dualist nature of the state, these actions did not bear legal consequences in the domestic legal order until the reception of international commitments. It is the conclusion reached by Barrington J. in the High Court where he stated that:

“so far as the portions of the Single European Act dealing with European Political Cooperation, and which it is not proposed to make part of the domestic law of Ireland, are concerned, this court does not consider that it has any function in relation to them.”³⁵

The Supreme Court had an understanding of the relationship between the organs of state which contrasted markedly with this. The minority focused on the separation of powers. Relying both on the text of the Constitution and its interpretation in previous decisions, notably *Boland v. An Taoiseach*,³⁶ they concluded that the control of the actions of the Executive in external affairs concerned primarily the Oireachtas,³⁷ rather than the judiciary, since as Finlay C.J. expressed it:

“there is nothing in the provisions of Articles 28 and 29 of the Constitution, in my opinion, from which it would be possible to imply any right in the Courts in general to interfere in the field or area of external relations with the exercise of an executive power.”³⁸

Power on the part of the courts to review the Government could only arise from a clear disregard of the Constitution and in particular in relation to the rights enjoyed by the individuals. This not being the case, the minority argued that the appeal should be dismissed.³⁹

However, the majority offered a different reasoning. Rather than addressing the question of the separation of powers, the focus of their interpretation of Article 6 of the Constitution was rather the notion of the sovereignty of the people from which “all powers of

³⁵ *Ibid.* at 760-761.

³⁶ [1974] I.R. 338.

³⁷ See the opinions expressed by Finlay C.J. and Griffin J., [1987] I.R. 713 respectively at 773-774 and 792.

³⁸ *Ibid.* at 774.

³⁹ On these points, see Finlay C.J. and Griffin J., *ibid.* at respectively 775 and 793-794.

government, legislative, executive and judicial, derive”.⁴⁰ The judges belonging to the majority also noted Article 28.2 of the Constitution which affirms that “the executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.” In consequence, as Walsh J. put it, in matters of international affairs, the Executive was “collectively responsible to Dáil Éireann and ultimately to the people.”⁴¹ This focus of the judges on the sovereignty of the people and the duty of the organs of state to respect the Constitution led them to see the relationship between the legislative and executive organs as involving a common duty to respect the Constitution’s provisions, reasoning that *in fine* established the competence of the judiciary in reviewing the action of the Government in external affairs. As Walsh J. put it:

“nevertheless the powers must be exercised in subordination to the applicable provisions of the Constitution. It is not within the competence of the Government, or indeed of the Oireachtas, to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered so to do by the Constitution. They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution. To the judicial organ of government alone is given the power conclusively to decide if there has been a breach of constitutional restraints.”⁴²

One could draw several conclusions from this reasoning. First, it confirms the point made in the text above according to which the position of the Supreme Court in European matters⁴³ tends to reduce the role of the Oireachtas and to substitute judicial legal control for the political responsibility of the Government to the major legislative organ. Secondly, especially when read in parallel with the position of the judges who took the view that the Supreme Court could not review the actions of the Government in this instance, the majority judges did not put the same emphasis on the competence of the judiciary under the Constitution in external affairs⁴⁴ but rather founded their decision on the necessary upholding of the people’s sovereignty and the subsequent control of the submission of other organs of state to the Constitution. However,

⁴⁰ On this point in the reasoning of the majority in *Crotty*, see *supra* at 196-197.

⁴¹ [1987] I.R. 713 at 782.

⁴² *Ibid.* at 778.

⁴³ As has been seen in the text above, the specifics of *Crotty* can be explained by their European law, as opposed to international law, dimension, see *supra* at 260-262.

⁴⁴ For a similar opinion, see K. St. C. Bradley, “The referendum on the Single European Act” (1987) 12 *European Law Review* 301-311 at 308.

it has been seen that in the protection of Irish constitutional identity - in this instance, comprising neutrality as opposed to the constitutional provisions concerned in the first part of the decision⁴⁵ - the alleged submission to the will of the people is less genuine than rhetorical.⁴⁶ If one examines the relative roles of the judiciary on the one hand and of the Government and the Parliament on the other, the *Crotty* decision rather bears witness to a self-empowerment of the judiciary vis-à-vis the other branches of government,⁴⁷ and in particular to an extension of its control of the Executive in the name of the supremacy of the Constitution in matters related to European law.⁴⁸

Somewhat similarly, the initial generous attitude of Irish courts towards the doctrine of primacy carried with it procedural and institutional consequences, notably as regards the division of the norm-creating powers between the Oireachtas and the Government, consequences which have been for the most part disregarded in the French legal order.⁴⁹ Subsequently, however, the introduction of the “principles and policies” test in European matters in *Meagher* to interpret the “necessitated clause” and later confirmed as the interpretative device of Article 15.2.1° of the Constitution, which is the new basis of the assessment of validity of statutory instruments in *Maher v. Minister for Agriculture*, involved a greater emphasis being put on the separation of powers insofar as concerned the implementation of European instruments in the Irish legal order.⁵⁰ One could argue, however, that the institutional dynamics resulting from these decisions did not so much alter the balance between the executive and legislative branches but rather presented the judiciary as the arbiter of the relationships between the two organs. This is particularly noticeable in the fact that the Supreme Court considered the European rules as the parent statute of the statutory instruments and therefore was more concerned with the relationship between the minister’s rule and European law.⁵¹ This stricter scrutiny of the action of the Government in European-related

⁴⁵ See *supra* at 258-260.

⁴⁶ On this point, even though one can regret that, due to the justification chosen by the Supreme Court, a referendum is perceived as being mandatory for every new European Treaty, *Crotty* is the sign of a judicial activism resulting in the empowerment of the judiciary in the balance of powers. See G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence” (2009) 5 *European Constitutional Law Review* 32-70 at 38-45.

⁴⁷ On this point, K. St. C. Bradley, “The referendum on the Single European Act”, *op. cit.*, at fn. 45 above, at 308. More generally, see M. Troper, *Pour une théorie juridique de l’État* (Paris: Presses universitaires de France, coll. Léviathan, 1994) at 311 on the fact that courts as authentic interpreters of the Constitution determine their own competence.

⁴⁸ On this point, see J. Casey, *Constitutional Law in Ireland* (Third edition, Dublin: Round Hall Sweet & Maxwell, 2000) at 216-217.

⁴⁹ See *supra* at 298-302.

⁵⁰ In this sense, see for example N. Travers, “The Reception of Community Legislation into Irish Law and Related Issues Revisited”, *op. cit.*, at fn. 27 above, at 81 and *supra* at 206-211.

⁵¹ For further developments on this point, see *supra* at 211-213.

matters was further developed in *Browne v. Attorney General*⁵² and *Kennedy v. Attorney General*.⁵³ However, in both cases, it resulted in a tighter control of the Government being exercised by Irish courts.⁵⁴

These decisions can thus be seen as involving increased consideration for formal constitutional requirements in the face of the doctrine of primacy, which is at the core of the notion of constitutional identity as a balancing process. Bearing in mind that the “principles and policies” test finds its roots in administrative law,⁵⁵ the case-law of the Supreme Court shows that, rather than the more political logic implied by the intervention of the Oireachtas, the protection of Irish constitutional identity in the face of the doctrine of primacy involves the Government facing its judge.

These points are confirmed by recent developments in European Union law. Although the decision in *Crotty* might have appeared unusually strict at the time,⁵⁶ its logic is of particular interest when it comes to next developments in the process of European integration. Imitating what was already provided for in the Treaty establishing a Constitution for Europe, the Treaty of Lisbon introduced mechanisms allowing for simplified revisions of the Treaty on the European Union⁵⁷ and allowing in particular a simplified shift from a special legislative procedure to the ordinary legislative procedure (in other words, co-decision) or from unanimity to qualified majority.⁵⁸ These elements are of importance for Irish constitutional identity, since for example the first two elements deal with family law and more importantly with Common Foreign and Security Policy.

Certainly, these mechanisms require a unanimous decision of either the European Council or the Council and, in the case of Article 48.7 of the Treaty on European Union, any national Parliament can unilaterally oppose the change from unanimity to qualified majority or from a special legislative procedure to the ordinary legislative procedure. However, while the European Union is still governed by a balance between intergovernmentalism and supranationalism, these mechanisms throw light on the recent increase in the extent of

⁵² [2003] 3 I.R. 205.

⁵³ [2007] 2 I.R. 45.

⁵⁴ For a more detailed analysis of *Browne* and *Kennedy*, see *supra* at 214-216.

⁵⁵ See D. G. Morgan and G. W. Hogan with contributions from P. Daly, *Administrative Law in Ireland* (Fourth edition, Dublin: Thomson Reuters, 2010) at 12-15, and 21-26 for the European dimension.

⁵⁶ See *supra* at 260-261.

⁵⁷ Articles 48.6 and 48.7 of the Treaty on European Union.

⁵⁸ Article 81.3 of the Treaty on the Functioning of the European Union and Article 31.3 of the Treaty on European Union.

intergovernmentalism.⁵⁹ National executives have thus a greater role in the development of European law and the primacy of European rules is not so much imposed on the states by supranational organs but rather results from the action of the Government at European level – but even this action could lead to the development of the qualified majority voting and thus involve the possibility that a state can be outvoted (not in the process of changing from a system of unanimity voting to qualified majority voting, but rather in the operation of the new voting system). Therefore, understanding the problems involved in the normative relationship between the domestic and European legal orders requires crossing the state screen.⁶⁰ From this perspective, the doctrine of primacy could, in certain circumstances, be analysed as a tool used by the Irish government, not only to avoid constitutional constraints relating to its production of norms,⁶¹ but also to impose these rules over what is considered as the supreme norm from the domestic perspective. Furthermore, as has been seen,⁶² one could argue that, due to the political solidarity that binds it to the executive branch of the state, the Oireachtas cannot provide sufficient control of such norm-production. In this light, the institutional balance displayed in judicial decisions relative to European Union law corresponds to the modern dynamics of parliamentary regime.⁶³ It is interesting to note in this regard the willingness of the judiciary to increase its own powers through the definition of its competences and the consequences for the general institutional balance seen by it as deriving from the separation of powers.⁶⁴ In this regard, the notion of constitutional identity bears witness of the enhancement of the position of Irish courts regarding controlling the impact of European Union law in the domestic legal order while getting, through this control of the European body of rules, an improved position against the other organs of state.

⁵⁹ For further developments on this point, see *infra* at 396-397.

⁶⁰ This necessity to “disaggregate” the notion of member state as monolithic concept is one of the main axes outlined by Weiler, Slaughter and Stone Sweet in order to analyse the primacy principle, see J. H. H. Weiler, A.-M. Slaughter and A. Stone Sweet, “Prologue - The European Courts of Justice”, *op. cit.*, at fn. 4 above, at xiii-xiv. For a particular account of these dynamics in the Irish context, see C. Costello, “European Community Judicial Review in the Irish courts - Scope, Standards and Separation of Powers”, *op. cit.*, at fn. 15 above, in particular at 19 where the author argues that “the overreaching theme is, therefore, the disaggregation of the state brought about by Community law, and its impact for national judicial control mechanisms. The national executive, in particular, has various Community roles which alter its legal status.”

⁶¹ In this sense, see G. W. Hogan, “The implementation of European Union law in Ireland: the *Meagher* case and the democratic deficit”, *op. cit.*, at fn. 16 above, at 199.

⁶² See *supra* at 386-389.

⁶³ For a similar opinion, see N. Travers, “The Constitutionality of the Implementation of EC Directives into Irish Law Revisited” (1994) 88 *Gazette of the Incorporated Law Society of Ireland* 99-101 at 100.

⁶⁴ On this conclusion, see C. Costello, “European Community Judicial Review in the Irish courts - Scope, Standards and Separation of Powers”, *op. cit.*, at fn. 15 above, at 47.

In conclusion, by claiming to enforce the sovereignty of the people as expressed in the Constitution, by choosing between either some domestic features or their willingness to adopt an identity materially defined by European law, Irish courts use European Union law as a lever to become the major actor of the control of the primacy principle in the domestic legal order.⁶⁵ While at first sight, the justifications provided have been expressed in terms of convenience⁶⁶ to the benefit of the Executive, one could argue that the case-law of Irish courts reveals an interpretation of the separation of powers ensuring greater control of Government action, in particular at European level, by placing such control in the hands of the judiciary. This judicial attitude displays, even though built on different foundations, a similar strategy to that arrived at by the *Conseil constitutionnel* through its explicit use of the notion of constitutional identity.

⁶⁵ Through the case-law on European law, one can question the fact that the judiciary is submitted to the doctrine of separation of powers rather than shaping it. For a defence against this alleged submission, see A. Hardiman, "The Role of the Supreme Court in our Democracy" in J. Mulholland, *Political Choice and Democratic Freedom in Ireland: 40 Irish Thinkers* (Glenties, Co. Donegal: MacGill Summer School, 2004) 31-44 at 37-39.

⁶⁶ This was a central argument in *Meagher*, see *supra* at 286-287.

2. *The Control of the Primacy of European Union Law in the French Legal Order as a Jurisdictional Lever vis-à-vis the other Branches of Government*

In his analysis of the notion of supranationalism at European level, Weiler insists on the importance of its dual nature.⁶⁷ This concept can only be analysed if one bears in mind the interconnection between what he labels as normative and decisional supranationalisms. As he expresses it:

“normative supranationalism is concerned with the relationships and hierarchy which exist between Community policies and legal measures on the one hand and competing policies and legal measures on the Member States on the other hand. Decisional supranationalism relates to institutional framework and decision-making processes by which Community policies and measures are, in the first place, initiated, debated and formulated, then promulgated and finally executed.”⁶⁸

In consequence, the primacy principle, which is characteristic of the former form and is focused on the application of European norms, can not be appraised outside of the political process of normative production which takes place upstream. According to Weiler, normative and decisional supranationalisms function like communicating vessels and the increase of the recognition of the primacy principle coincides with a diminution of supranational entities, in particular the European Commission, in the decisions-making process while the member states develop their hold.⁶⁹

This assessment could explain the recent case-law of the *Conseil constitutionnel* and its recognition of the legal specificities of the European legal order. The explicit reference to the doctrine of primacy in its *Treaty establishing a Constitution for Europe*⁷⁰ ruling occurred while the later steps of European integration enhanced its intergovernmental features. Certainly, the nature of the European Union still results from a balance between intergovernmentalism and supranationalism. The latter has been developed with the Treaty of Lisbon, notably with the

⁶⁷ See, for example, J. H. H. Weiler, “The Community System: the Dual Character of Supranationalism” (1981) 1 *Yearbook of European Law* 267-306.

⁶⁸ *Ibid.* at 271. For a similar argument, see J. Foyer, “Union, États membres et souveraineté” in T. de Montbrial and S. Jansen (eds.), *L'identité de la France et l'Europe* (Brussels: Bruylant, 2005) 65-76 at 70-73.

⁶⁹ See J. H. H. Weiler, “The Community System: the Dual Character of Supranationalism”, *op. cit.*, at fn. 68 above, at 273 and 292.

⁷⁰ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 9-13.

increase in the extent of the qualified majority voting. However, it can be argued that, relatively speaking, intergovernmentalism was expanded to a greater extent. This is, for example, the consequence of the specific insistence on the conferral principle⁷¹ – and thus the affirmation of the member states as the “Masters of the Treaties” – as well as the powers granted the European Council, in particular when its position is compared with the position of the Commission.⁷² It could be argued that these are the dynamics at stake in the disappearance of the Community in favour of the Union.⁷³ In this respect, the normative interpretation of Article 88-1 reflects this European increase of intergovernmentalism in the domestic sphere as this constitutional provision, rather than providing for a transfer of competences or of sovereignty, insists on the fact that member states “exercise some of their powers in common”.⁷⁴ Indeed, as it was later confirmed by the Treaty of Lisbon, the European Council and the Council have seen their roles expanded to the drafting of European instruments.⁷⁵ With France having access to a greater control on the creation of European rules to be applied in its domestic legal order, the constitutional court could thus adopt a more generous approach to the effects of European Union law in the domestic legal order.

However, this new jurisdictional position is not the neutral reflection of the enhanced position of France in the European institutional order and one could argue that it is not France as such that is concerned by the increase of the intergovernmental logic in the European Union but its Executive branch.⁷⁶ The position of the *Conseil constitutionnel* is, in this respect, the sign of this necessity to go beyond the state screen in order to comprehend the dynamics at stake in the protection of constitutional identity in the face of the doctrine of primacy.⁷⁷ In other words,

⁷¹ The traditional principle of conferral is affirmed by Article 5.1 of the Treaty on European Union but Article 4.1 and 5.2 of the same Treaty insist on the fact that competences which have not been transferred to the European Union remain with the member states.

⁷² On these points, see M. Dougan, “The Treaty of Lisbon 2007: Winning Minds, not Hearts” (2008) 45 *Common Market Law Review* 617-703 at 692-698 where the author concludes that “if the Member States feel that the tectonic plates have indeed shifted, then our understanding of the Union’s inter-institutional balance, which derives not only from the primary law contained in the Treaties, but also from the conventions which emerge from institutional practice, might also have to accommodate a relative resurgence in intergovernmental influence within the functioning of the Union.” For similar considerations on the increase of intergovernmentalism, see G. Soulier, “Les notions de commun / communauté dans l’histoire” in P.-Y. Monjal and E. Neframi (eds.), *Le commun dans l’Union européenne* (Brussels: Bruylant, 2009) 63-84 at 81-84.

⁷³ P.-Y. Monjal, “À la recherche d’une notion perdue : le « commun »” in P.-Y. Monjal and E. Neframi (eds.), *Le commun dans l’Union européenne* (Brussels: Bruylant, 2009) 7-31 at 19-21.

⁷⁴ For a similar opinion, see for example C. Geslot, “L’exercice en commun des compétences du point de vue de l’État”, *op. cit.*, at fn. 5 above, at 125.

⁷⁵ On this point, see J.-C. Gautron, “Le traité de Lisbonne, mort et transfiguration de la Constitution européenne” (2008) *Politeia* 143-167 at 160-161.

⁷⁶ On this point, see for example J.-V. Louis, “National Parliaments and the Principle of Subsidiarity - Legal Options and Practical Limits” (2008) 4 *European Constitutional Law Review* 429-452 at 444.

⁷⁷ For a similar argument, see W. Mattli and A.-M. Slaughter, “The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 253-276 at 255.

the new position of the French constitutional court is rather a variant of the assessment made by Weiler. The recognition of the primacy principle is not only the consequence of the political empowerment of the French executive organ in the European decision-making but is also dependent on the improvement of the normative competence of the judiciary in relation to these European rules, the creation of which involves the French government. The greater concern for European obligations is concomitant with a modification of the institutional balance between domestic courts and the Executive when the latter is acting at European level.

As has been seen in the text above,⁷⁸ the normative interpretation of Article 88-1 of the French Constitution by the *Conseil constitutionnel* resulted in increased control on the application of European Union law in the domestic legal order. In particular, its activity is not limited to an appraisal before ratification. Recognising the implications of European obligations in its control of the constitutionality of statutes provided for by Article 61 of the Constitution, and in particular acts of implementation, the *Conseil constitutionnel* increased its hold on European norms either through their interpretation or by its ability to oppose to the primacy principle “a rule or principle inherent in the constitutional identity of France”.

This logic at the heart of the recognition of the normative dimension of Article 88-1 is also noticeable in the case-law of the *Conseil d'État*. The test this jurisdiction used as a limit to the principles contained in Article 88-1 of the Constitution is stricter than the notion of constitutional identity.⁷⁹ However, the new case-law of the *Conseil d'État* shows that, for the two courts of the Palais-Royal, the increased consideration given by them to European obligations, and in particular the doctrine of primacy, is concomitant with a greater control of European law in the domestic legal order, and therefore of the consequences of the governmental action at European level.

For a long time, the *Conseil d'État* was blind to the specificities of the European legal order, analysing its interaction with domestic rules under the prism of Article 55, which is dedicated to international law at large. However, the *Conseil d'État* has recently shown a greater willingness to recognise the specificities of the European legal order.⁸⁰ For example, it

⁷⁸ See *supra* at 338-350.

⁷⁹ For further developments on this point, see *infra* at 410-416.

⁸⁰ On the recent case-law of the *Conseil d'État*, see for example J. Biancarelli, T. Ayrault, L. Martini, and *al.*, “Peut-on parler d’un « renouveau européen » du Conseil d’État depuis 2007 ?” in J.-C. Masclet, H. Ruiz Fabri, C. Boutayeb and *al.* (eds.), *L’Union européenne : Union de droit, union des droits : Mélanges en l’honneur du Professeur Philippe Manin* (Paris: Pedone, 2010) 577-593, M.-L. Paris, “Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law” (2010) 29 *Yearbook of European Law* 21-64 at 61-63 or M.-P. Granger, “France is ‘Already’ Back in Europe: The Europeanization of French Courts and the Influence of France in the EU” (2008) 14 *European Public Law* 335-375 at 363-367.

recognised an *erga omnes* value to the decisions of the European Court of Justice⁸¹ or created a new form of state responsibility for legislative acts contravening international law.⁸² This latter decision only concerned the European Convention on Human Rights but the conclusions of *commissaire du gouvernement* Derepas made clear that this principle would also apply to what is now European Union law.⁸³ In the same way, following the principle established by the European Court of Justice in *Köbler*,⁸⁴ the *Conseil d'État* decided that “state responsibility may however be established in the case where the content of the jurisdictional decision is vitiated by a manifest violation of Community law indented to confer rights on individuals”.⁸⁵

As regards more particularly the interpretation of Article 88-1 of the Constitution, the new stance of the *Conseil d'État* on the issue of the primacy of European Union law and the derived obligation of implementation of directives appeared in its *Arcelor* decision,⁸⁶ where the supreme administrative court echoed the position of its constitutional counterpart. This would lead the *Conseil d'État* in its decision in *Perreux*, as regards the doctrine of direct effect, to reverse its *Cohn-Bendit* case-law⁸⁷ and to enforce a Directive which had not been implemented within the prescribed period against an individual administrative act.⁸⁸ In *Arcelor*, while it had to review the constitutionality of a decree⁸⁹ implementing a European Directive,⁹⁰ the *Conseil d'État* recognised, on the basis of Article 88-1, the existence of a constitutional obligation to implement the European instrument. The role of the administrative court, where the constitutionality of the decree is at stake, is to “translate” the constitutional norms in the European language, *i.e.*, to determine if the principles involved also exist at European level. As it was suggested, by *commissaire du gouvernement* Guyomar:

⁸¹ CE, Ass., 11 December 2006, *Société De Groot en Slot Allium BV et autre*, *Rec. Lebon* 512.

⁸² CE, Ass., 8 February 2007, *Gardedieu*, *Rec. Lebon* 78.

⁸³ See L. Derepas, “Conclusions sur Conseil d'État, Assemblée, 8 février 2007, *Gardedieu*” (2007) *Revue française de droit administratif* 361-370.

⁸⁴ Case C-224/01 *Gerhard Köbler v. Austria* [2003] E.C.R. I-10239.

⁸⁵ CE, 18 June 2008, *Gestas*, *Rec. Lebon* 230 (translation by the author).

⁸⁶ CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56.

⁸⁷ On this principle established in CE, Ass., 22 December 1978, *Ministre de l'Intérieur c. Cohn-Bendit*, *Rec. Lebon* 524, see *supra* at 75.

⁸⁸ CE, Ass., 30 October 2009, *Mme Perreux*, *Rec. Lebon* 407.

⁸⁹ Decree n° 2004-832 of 19 August 2004 enacted in application of Articles L. 229-5 to L. 229-19 of the Environment Code and pertaining to the scheme for greenhouse gas emission allowance trading, J.O.R.F. p. 14979. According to Article 34 of the Constitution, legislative acts are materially defined and the Government, in other areas, enjoys autonomous regulatory powers as provided for by Article 37.

⁹⁰ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for green house gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] L 275/32.

“we invite you to draw your inspiration from the approach chosen by the *Conseil constitutionnel* and to proceed, under the examination of the arguments of unconstitutionality that are referred to you, to the transport of the French *bloc de constitutionnalité* towards the Community legal order. This operation of translation, which will lead your control of constitutionality to be performed, for a part, under the bell of Community law, is unseen in your jurisprudence.”⁹¹

In such a case, the normative issue would be redefined in terms of the compatibility of the directive with the relevant European rules or principles. Due to its enclosure in the European logic, the issue would ensure the central role of the European Court of Justice, with the collaboration of national courts.⁹² It is actually what the administrative court did in this case by making a preliminary reference regarding the conformity of the Directive with the equality principle as defined in European Union law.⁹³ This reasoning is a way for the *Conseil d'État* to receive the consequences of the primacy principle in the domestic legal order,⁹⁴ in a fashion similar to the jurisdictional immunity defined by the *Conseil constitutionnel*.⁹⁵

However, this acknowledgment of the specificity of the European legal order in comparison with international law enabled it to assess, the compatibility between European Union law and the Constitution.⁹⁶ As the jurisdiction pointed out:

“if there is no rule or general principle of Community law guaranteeing the effectiveness of respect for the invoked constitutional provision or principle, it is for

⁹¹ M. Guyomar, “Conclusions sur Conseil d'État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*” (2007) 43 *Revue trimestrielle de droit européen* 378-402 at 395 (translation by the author). This “operation of translation” has to be understood in a geometrical sense.

⁹² On this point, see for example J. Roux, “La transposition des directives communautaires à l'épreuve de la Constitution (à propos de l'arrêt d'Assemblée du 8 février 2007, *Sté Arcelor Atlantique et Lorraine et autres*)” (2007) *Revue du droit public et de la science politique en France et à l'étranger* 1031-1071 at 1066.

⁹³ For an analysis of the answer by the European Court of Justice to this preliminary reference, see *infra* at 421 and 447-452.

⁹⁴ In this sense, see J. NGambi, “Un pas supplémentaire dans l'assimilation du principe de primauté par le Conseil d'État : L'affaire *Arcelor*” in J.-C. Masclet, H. Ruiz Fabri, C. Boutayeb and *al.* (eds.), *L'Union européenne : Union de droit, union des droits : Mélanges en l'honneur du Professeur Philippe Manin* (Paris: Pedone, 2010) 696-710 at 706-707.

⁹⁵ On the similarity between the principle of jurisdictional immunity of European Union law in the case-law of the *Conseil d'État* and the *Conseil constitutionnel*, see M. Gautier and F. Melleray, “Le Conseil d'État et l'Europe : fin de cycle ou nouvelle ère ? À propos des arrêts d'assemblée du 8 février 2007” (2007) n° 5 *Droit administratif* 9-17 at 12.

⁹⁶ On this greater consideration for European Union law, see D. Simon, “La jurisprudence récente du Conseil d'État : le grand ralliement à l'Europe des juges” (2007) n° 3 *Europe* 5-9.

the administrative court to directly review the constitutionality of the impugned regulatory provisions”.⁹⁷

In consequence, as for the *Conseil constitutionnel*, a greater material concern for the application of the specificities of European Union law in the domestic legal order is concomitant with their greater formal constitutional control.⁹⁸ Previously, the *Conseil d'État* applied the theory of the “treaty screen”.⁹⁹ As for the “statute screen”,¹⁰⁰ this theory links the question of the competence of the court with the French normative architecture. Questioning the constitutionality of a domestic instrument implementing an international norm would be tantamount to questioning the conformity with the Constitution of the international norm, a control which is reserved to the *Conseil constitutionnel* and exceeds the competence of the ordinary courts. In consequence, international treaties act as a screen between the challenged measure and the Constitution. Ordinary courts would be limited to appraising its validity according to the norm it intended to apply.

When compared to this position, which involves the constitutional immunity of European law due to a lack of jurisdictional competence, the *Arcelor* decision provides a different analysis of European secondary law and, therefore, constitutes an empowerment of the *Conseil d'État* in relation to European Union law since the consideration of the respect for the European norm could be removed in the event of an incompatibility with constitutional provisions.¹⁰¹ In other words, as for its constitutional counterpart, the *Conseil d'État* ensured its own empowerment since its role involves an indirect control of the constitutionality of the European law.¹⁰²

In conclusion, it could be argued the recognition of the primacy principle is not so much dependent on the empowerment of France at European level as it is on the empowerment of French courts with regard to the application of the primacy of European

⁹⁷ CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56 (translation by the author).

⁹⁸ For a similar opinion, see M. Verpeaux, “Quand le juge administratif accepte de contrôler la constitutionnalité des actes réglementaires de transposition de directives” (2007) *Recueil Dalloz* 2272-2277 at 2274.

⁹⁹ On the application of the “treaty screen” theory by the *Conseil d'État*, see for example, F. Michéa, “L’arrêt *Arcelor* du 8 février 2007 ou le Conseil d’État aux prises avec le contrôle de constitutionnalité des traités et des lois” (2008) *Revue de la recherche juridique - Droit prospectif* 255-282 at 276-278.

¹⁰⁰ For further developments on this theory, see *supra* at 231-232.

¹⁰¹ In this sense, see F. Lenica and J. Boucher, “Le juge administratif et le statut du droit communautaire dérivé” (2007) *L’Actualité juridique. Droit administratif* 577-583 at 579-580. For this exception to the “treaty screen”, see also G. Drago, “La « guerre des juges » n’aura pas lieu” (2007) n° 14 *La Semaine juridique. Édition générale* 29-35 at 35.

¹⁰² For a similar opinion, see O. Pollicino, “The *Conseil d'État* and the relationship between French internal law after *Arcelor*: Has something really changed?” (2008) 45 *Common Market Law Review* 1519-1540 at 1526.

Union law in the domestic legal order. It purports to control indirectly Government action at European action in order to ensure that, as in the Irish case, it does not avoid its constitutional constraints at European level, and even overcome constitutional norms through the primacy principle.¹⁰³ It is this very consequence that is considered by the *commissaire du gouvernement* in *Arcelor* when he came to the conclusion the *Conseil d'État* needed to put “the public power in front of its own [responsibilities].”¹⁰⁴

An increased respect for the doctrine of primacy is thus conditioned by an elevated position for the judiciary vis-à-vis other branches of government, in particular in its relationship with the Government. This assessment is reinforced by the doubts of the *Conseil constitutionnel* about the ability of the Parliament to efficiently supervise the Executive.

Paradoxically, in order to answer to the democratic deficit in the European Union,¹⁰⁵ the Treaty establishing a Constitution for Europe gave a more important position to national parliaments in the European institutional framework.¹⁰⁶ For this analysis, their powers as to the enforcement of the subsidiarity principle are particularly relevant.¹⁰⁷ They resulted from the combination of Article I-11 of the Treaty establishing a Constitution for Europe, Article 3 of Protocol (No 1)¹⁰⁸ and Articles 6 and 7 of Protocol (No 2).¹⁰⁹ Within six weeks of the transmission of a European legislative act, it was possible for the national parliaments to send an opinion to the Presidents of the European Parliament, Council and Commission in order to question the respect for the subsidiarity principle. When the European legislative act was contested by one third or one quarter (depending on the policy concerned) of the votes allocated to the national parliaments, the European instrument had to be reconsidered, even

¹⁰³ On this point, see C. Geslot, “L'exercice en commun des compétences du point de vue de l'État”, *op. cit.*, at fn. 5 above, at 134. For a similar consideration by the German Federal Constitutional Court of the governmental action at the European level in its *Treaty of Lisbon* decision where it introduced the constitutional identity test, see D. Grimm, “Defending Sovereign Statehood against Transforming the European Union into a State” (2009) 5 *European Constitutional Law Review* 353-373 at 369.

¹⁰⁴ M. Guyomar, “Conclusions sur Conseil d'État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*”, *op. cit.*, at fn. 92 above, at 402 (translation by the author).

¹⁰⁵ In this sense, see for example D. Blanc, “Contribution à l'étude du « traité-constitutionnel » européen vu par le constituant : les pouvoirs du Parlement français entre continuités et ruptures. À propos de la loi constitutionnelle n° 2005-204 du 1^{er} mars 2005” (2005) n° 64 *Revue française de droit constitutionnel* 845-874 at 847-848.

¹⁰⁶ In this sense, see J.-C. Gautron, “Le traité de Lisbonne, mort et transfiguration de la Constitution européenne”, *op. cit.*, at fn. 76 above, at 165-167.

¹⁰⁷ For an analysis of the role of the national parliaments under the Treaty of Lisbon, see G. Barrett, “‘The king is dead, long live the king’: the recasting by the Treaty of Lisbon of the provisions of the Constitutional Treaty concerning national parliaments” (2008) 33 *European Law Review* 66-84.

¹⁰⁸ Protocol (No 1) on the Role of National Parliaments in the European Union.

¹⁰⁹ Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

though the consequences were minimal as a decision could be made “to maintain, amend or withdraw the draft.”¹¹⁰

This mechanism has been strengthened by the Treaty of Lisbon. According to the newly drafted Article 7 of Protocol (No 2), national parliaments can intervene within eight weeks. The consequences attached to their opposition have also been reinforced. A new Article 7.3 has been added which is dedicated to the ordinary legislative procedure.¹¹¹ If a majority of the votes allocated to national parliaments denies that the principle of subsidiarity has been respected by the Commission, then the European legislator will intervene as arbitrator and the new 7.3 (b) also provides that:

“if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.”

In both instances, the *Conseil constitutionnel* held that, since the French Constitution did not provide for such parliamentary competence, it had to be amended.¹¹² The mechanism relative to the protection of the subsidiarity principle is now found in Article 88-6 of the Constitution.

However, notwithstanding the empowerment of the French Parliament in European affairs, it could be argued that the reasoning followed by the *Conseil constitutionnel* is symptomatic of the difficulty in protecting the French legal order through the major legislative organ. What was striking under the regime established by the Treaty establishing a Constitution for Europe was the lack of decisive intervention on the part of national parliaments. Even though they could raise an issue as to the possible infringement by European institutions of the subsidiarity principle, they were deprived of the last word since European organs, and in particular the Commission, were only under the obligations to review their draft. The Treaty of Lisbon offered the opportunity to put a decisive end to the European decision-making process but once again this solution escaped the hands of the national parliaments and is the prerogative

¹¹⁰ Article 7 (4) of Protocol (No 2) of the Treaty establishing a Constitution for Europe.

¹¹¹ On the relationship between Article 7.2 and 7.3 of Protocol (No 2) of the Treaty of Lisbon, see G. Barrett, “‘The king is dead, long live the king’: the recasting by the Treaty of Lisbon of the provisions of the Constitutional Treaty concerning national parliaments”, *op. cit.*, at fn. 108 above, at 76.

¹¹² CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 37-41 and CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 28-32.

of the Council and the European Parliament.¹¹³ In other words, even if it is true that the French legislative organ can participate in an opposition to European norms, its role is merely to initiate a mechanism provided by the treaties, being therefore in an asymmetric position in comparison with the effect of the primacy principle.¹¹⁴ Certainly, even if this system “reflects the widespread view that compliance with the principle of subsidiarity would be more effectively achieved through a system of *ex ante* political input into the legislative procedure, rather than *ex post* judicial review of legislation after it has been adopted”,¹¹⁵ this question can also be decided by a court.¹¹⁶ However, the last word is given in this case to the European Court of Justice. In consequence, the role of national parliaments is more dignified than efficient.¹¹⁷

This inability for the Parliament to oppose European norms which would infringe the constitutional identity of France is reinforced by the French institutional structure and its consequences for the application of European Union law in the domestic legal order. The institutional balance of the Fifth Republic relies on solidarity between the Executive and its parliamentary majority. When compared to former constitutional experiences, the characteristic of the current Constitution as a form of rationalised parliamentary regime¹¹⁸ is to establish a majority fact, *i.e.*, strong ties between the Government and its parliamentary majority, which explains in most part a governmental stability uncommon in French constitutional history.¹¹⁹

It is according to this institutional balance that the relationship between the Parliament and the Government insofar as concerns European Union law has to be analysed. With the Treaty of Maastricht, Article 88-4 was introduced into the French Constitution in order to enable the Parliament to be informed of draft of European secondary norms and to empower both Houses to make resolutions related to them. The revision of the Constitution of July 2008

¹¹³ As Barrett puts it, “under Art. 7(3) national parliaments do not get the final decision. (...) Rather, the final arbiters of this question under Art. 7(3) become the European Parliament and the Council of Ministers. Thus in effect, national parliaments are given the right to take on collectively only the role of a kind of prosecutor regarding legislative proposals which are viewed by them as incompatible with the principle of subsidiarity. The role of judge (or perhaps jury) in this regard, however, is reserved to the Council and the European Parliament”, G. Barrett, “‘The king is dead, long live the king’: the recasting by the Treaty of Lisbon of the provisions of the Constitutional Treaty concerning national parliaments”, *op. cit.*, at fn. 108 above, at 82.

¹¹⁴ On this point, see the opinion expressed by Pécheul who stressed that, if the national parliaments cannot decisively stop the European decision-making, due to the primacy principle, the European legislation can, in contrast, stop the domestic one, A. Pécheul, “La souveraineté et le Traité de Lisbonne” (2008) *Politica* 170-191 at 179.

¹¹⁵ M. Dougan, “The Treaty of Lisbon 2007: Winning Minds, not Hearts”, *op. cit.*, at fn. 73 above, at 659.

¹¹⁶ See Article 8 of Protocol (No 2) aforementioned.

¹¹⁷ In this sense, see H. Sauron and J.-L. Labayle, “La Constitution française à l’épreuve de la Constitution pour l’Europe” (2005) *Revue française de droit administratif* 1-29 at 20-21.

¹¹⁸ On the dynamics characteristic of this regime, see P. Avril, “Le parlementarisme rationalisé”, *op. cit.*, at fn. 26 above.

¹¹⁹ On this majority fact and the conditions, both political and institutional, explaining its emergence, see G. D. Lavroff, *Le droit constitutionnel de la V^e République* (Second edition, Paris: Dalloz, 1997) at 858-885.

aiming for an enhancement of the Parliament¹²⁰ did not result in Parliament leaving aside its powers in European affairs. Instead, the scope of Article 88-4 has been widened and it also expressly states that “a committee in charge of European affairs shall be set up in each parliamentary assembly.”¹²¹

However, the constitutional reform of 2008 did not change the dynamics underlying the relationship between the Executive and the Parliament and therefore did not alter the conditions participating in the parliamentary mentality, the modification of which is essential to the effective impact of the new powers introduced in the Constitution.¹²² In contrast, the political analysis of the balance between the organs in terms of the confrontation between the Government and its parliamentary majority, on one side, and the opposition, on the other, has received constitutional recognition, the latter being referred to in Articles 48 and 51-1 of the Constitution.¹²³ In consequence, it could be argued that the constitutional reform of July 2008 aimed to enhance the quality of the relationship between the Executive and its majority rather than to deepen the control exercised by the Parliament according to the traditional understanding of the separation of powers. It seems that it is the conclusion implied by Dord when, considering the necessary “cultural revolution” of the members of Parliament, he pointed out that it would require:

“to adopt a true culture of control in which the dialogue between the majority and the Government no longer constitutes a threat, nor compromise with the opposition, a treason.”¹²⁴

The institutional dynamics characteristic of the Fifth Republic, which relies on the solidarity between the Government and its parliamentary majority, throw light on the decision

¹²⁰ On this objective of the constitutional reform, see for example, *Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la V^e République*, “Une V^e République plus démocratique”, available at <<http://lesrapports.ladocumentationfrancaise.fr/BRP/074000697/0000.pdf>> at 30-68 [Last accessed 29 December 2012], O. Dord, “Vers un rééquilibrage des pouvoirs publics en faveur du Parlement” (2009) n° 77 *Revue française de droit constitutionnel* 99-118, X. Vandendriessche, “Une revalorisation parlementaire à principes constitutionnels constants” (2008) n° 31-35 *La Semaine juridique. Édition générale* 40-47 and P. de Montalivet, “Les cadres nouveaux de la démocratie représentative” (2008) n° 31-35 *La Semaine juridique. Édition générale* 22-27

¹²¹ On the increase of parliamentary competences in relation to European law, see, for example, O. Dord, “Vers un rééquilibrage des pouvoirs publics en faveur du Parlement”, *op. cit.*, at fn. 121 above, at 105-106.

¹²² See, for example, X. Vandendriessche, “Une revalorisation parlementaire à principes constitutionnels constants”, *op. cit.*, at fn. 121 above, in particular at 47.

¹²³ On this recognition, see P. de Montalivet, “Les cadres nouveaux de la démocratie représentative”, *op. cit.*, at fn. 121 above, at 24-25.

¹²⁴ O. Dord, “Vers un rééquilibrage des pouvoirs publics en faveur du Parlement”, *op. cit.*, at fn. 121 above, at 118 (translation by the author).

of the *Conseil constitutionnel* as regards the new powers granted to national parliaments in the last stages of the process of European integration, in particular with regard to the test used to protect French sovereignty in the face of European Union law. According to the test applied under Article 54 of the French Constitution to assess the compatibility between European primary law and the Constitution, an amendment is necessary when the treaty provisions infringe the “fundamental conditions of the exercising of national sovereignty”.¹²⁵ In this regard, the possibility of having the last word as to the European normative process is an essential requirement in the eyes of the French constitutional court, which has concluded that:

“any provision of the Treaty which, in a matter inherent in the exercising of national sovereignty already coming under the jurisdiction of the Union or the Community, modifies rules applicable to decision taking, either by substituting a qualified majority for a unanimous decision of the Council, thus depriving France of any power to oppose a decision, or by conferring decision-taking power on the European Parliament, which is not an emanation of national sovereignty, or by depriving France of any power of acting on its own initiative requires a revision of the Constitution”.¹²⁶

In the light of this case-law, the empowerment of the French Parliament at European level is not sufficient to confront effectively European rules when needed. When one takes into account the increased powers of the Executive branch in the drafting of European instruments, the relative consequences of the opposition of the Parliament to these rules at European level and the solidarity between the parliamentary majority and the Government at domestic level, it could reasonably be affirmed that the effective control of the action of the Executive at European level in order to prevent it from evading its constitutional constraints, and in particular provisions regarded as crucial for the French constitutional architecture, through the legislative body can be called into question. It seems that it is in this manner that one could interpret the conclusion of the *Conseil constitutionnel* according to which:

“the ‘principle of subsidiarity’ (...) implies that, in areas not falling within the exclusive jurisdiction of the Union, the latter shall act only ‘if, and insofar as the objectives of the

¹²⁵ See CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 9 for the latest application of this principle.

¹²⁶ See, for example, *ibid.* at para 20.

proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale of the effects of the proposed action, be better achieved at Union level'. However the implementation of this principle may not suffice to preclude any transfers of powers authorised by the Treaties from assuming a dimension or being implemented in a manner such as to adversely affect the fundamental conditions of the exercising of national sovereignty".¹²⁷

In other words, the Parliament cannot turn the tide of European integration which, once reflected in the domestic legal order, entails a diminution of its powers in its relationship with the Executive.¹²⁸ In contrast, due to the support of the parliamentary majority for the Government, it could be argued that the powers given to the national parliaments in relation to the principle of subsidiarity benefit *de facto* the Executive.¹²⁹ *A contrario*, decisions regarding the empowerment of French courts, and in particular the case-law of the *Conseil constitutionnel*, with regard to European Union law *via* their interpretation of Article 88-1 of the Constitution could be analysed as an endeavour to enhance their position vis-à-vis the other branches of government in order to give themselves the means to enforce the protection of the Constitution in the face of a primacy granted to European norms drafted by domestic Executives.¹³⁰

In conclusion, as in the Irish case, the benevolent approach of the French courts towards European Union law, and in particular that of the *Conseil constitutionnel*, has been

¹²⁷ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 25 and CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 16.

¹²⁸ On this point, see S. Monnier, "La répartition des compétences et la hiérarchie des normes nationales à l'épreuve de l'application du droit communautaire" (2006) n° 68 *Revue française de droit constitutionnel* 849-865, in particular at 850-858 or C. Geslot, "L'exercice en commun des compétences du point de vue de l'État", *op. cit.*, at fn. 5 above, at 132.

¹²⁹ In this sense, see G. Barrett, "'The king is dead, long live the king': the recasting by the Treaty of Lisbon of the provisions of the Constitutional Treaty concerning national parliaments", *op. cit.*, at fn. 108 above, at 83 where the author argues that "a third limiting factor stems from the political reality that the majority in national parliaments can normally be expected to support their national executive. (...) In other words, it seems possible - and even likely - that Art. 7(3) will only ever come into play when a majority of national governments want it to." See also, in the particular French context, H. Sauron and J.-L. Labayle, "La Constitution française à l'épreuve de la Constitution pour l'Europe", *op. cit.*, at fn. 118 above, at 22-23 or D. Blanc, "Contribution à l'étude du « traité-constitutionnel » européen vu par le constituant : les pouvoirs du Parlement français entre continuités et ruptures. À propos de la loi constitutionnelle n° 2005-204 du 1^{er} mars 2005", *op. cit.*, at fn. 106 above, at 873 where the author argues that the empowerment of the Parliament provided for by the Treaty establishing a Constitution for Europe did not fundamentally change the nature of its relationship with the Executive, and the solidarity between the two organs prevailing in a rationalised form of parliamentary regime.

¹³⁰ For a similar argument justifying the recent developments of the case-law of French domestic courts in relation to European Union law, see E. Glaser, "Réflexions sur la décision *Arcelor*" in *Le dialogue des juges : Mélanges en l'honneur de Bruno Genevois* (Paris: Dalloz, 2009) 473-493 at 491.

made possible through a formal increase of their competence on the basis of the interpretation of Article 88-1. In this sense, the consideration demanded for giving practical effect of European obligations in the domestic legal order has been the lever of an enhanced position for the judiciary vis-à-vis the other organs of government. The notion of constitutional identity offered the possibility of upholding certain constitutional features in the face of the constitutionally-recognised doctrine of primacy and of establishing, indirectly, a jurisdictional control of respect for them by the Government when acting at European level, instead of the traditional political control through Parliament.

It would be misleading to consider the notion of constitutional identity as displaying strictly opposing positions as between Ireland and France, on the one hand, and the European Union, on the other. As a creation of the member states, European Union law intertwines the national and supranational levels. In this respect, the notion of constitutional identity mirrors this logic. It consists not only of the protection of the domestic sovereignty against the primacy of European rules but participates in the competition between the organs of state as regards the definition of European Union law. In consequence, the empowerment resulting from the notion of constitutional identity is not limited to the relative position of the judiciary in its relationships with the executive and legislative. Both in Ireland and France, it animates a competition between the different domestic courts, a topic which will now be turned to.

B. A Conflict of Interpretations: Jurisdictional Struggles for a Monopoly of the Last Word on the Primacy of European Union Law

In Ireland and France, the notion of constitutional identity does not so much correspond to the enforcement of fixed and predetermined rules common to all legal actors but rather consists of the ability of courts to determine through an interpretative process what they consider as essential constitutional provisions, the content of which being able to evolve through time. In consequence, the empowerment resulting from this notion is directly linked to the ability to define the modalities of this interpretative balancing. This explains the competition between domestic courts to impose their vision of the proper relationship between their domestic legal order and European rules.¹³¹

This situation is most salient in the French context where the notion of constitutional identity defined by the *Conseil constitutionnel* is challenged by the *Conseil d'État* and the *Cour de cassation*, the supreme courts of the *ordre administratif* and of the *ordre judiciaire*. However, this phenomenon is not absent from Ireland where it is possible to note a competition for the interpretative monopoly of the balancing between European Union law and the Constitution.

1. Disharmony in the French Courts as an Obstruction to the Limit Put on the Doctrine of Primacy in terms of Constitutional Identity

The jurisdictional enforcement of Article 88-1 of the Constitution involved an increase of the impact of the primacy principle in the French legal order while at the same time it led to an empowerment of the judiciary vis-à-vis the other branches of government. However, the notion of constitutional identity as an interpretative mechanism is a jurisprudential creation of the *Conseil constitutionnel* and, as has been seen,¹³² its effectiveness depends, to a large extent, on its adoption as a concept by the courts belonging to the *ordres judiciaire* and *administratif*. However, it could be argued that the *Conseil d'État* and the *Cour de cassation* are developing their own conception of the normative relationship as between the domestic and European legal

¹³¹ For a similar argument, see A. Stone Sweet, "Constitutional Dialogues in the European Community" in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 305-330 at 327-328.

¹³² See *supra* at 351-363.

orders on the two sides of the ridge line drawn by the *Conseil constitutionnel*.¹³³ In this regard, the introduction of priority preliminary rulings on the issue of constitutionality,¹³⁴ which can be regarded as a “judicial big bang”,¹³⁵ heightened the dissensions between the different jurisdictional orders. While this new jurisdictional mechanism was justified as a means for the *Conseil constitutionnel* to uphold the supremacy of the Constitution in the face of the doctrine of primacy,¹³⁶ this mechanism also shows that the case-law of the constitutional court has been caught in the courts’ defence of their jurisdictions.¹³⁷

The *Conseil d’État* adopted to a certain extent the case-law initiated by the *Conseil constitutionnel* by relying on Article 88-1 of the Constitution in its *Arcelor* decision, recognising thereby the specificities of the European legal order, and in particular concluding that it entails a “constitutional obligation to implement directives”.¹³⁸ However, the decision of the *Conseil d’État* appears to be inspired by, rather than strictly consistent with, the analysis of its constitutional counterpart.¹³⁹ As *commissaire du gouvernement* Guyomar explained it:

“considerations of expediency and of political realism lead us indeed to propose to you to inspire yourself, while adapting it to your institutional position, from the solution adopted by the constitutional court.”¹⁴⁰

The respective perspectives put by the *Conseil constitutionnel* and the *Conseil d’État* on the normative relationship between the two legal orders are indicative of their differences. The analysis of the former is focused on the conformity of the act of implementation with the European directives it seeks to implement,¹⁴¹ while the latter is primarily concerned with the

¹³³ On these strategies displayed by French jurisdictions in order to protect their respective competences, see F. Chaltiel, “La Cour de justice de l’Union européenne poursuit le dialogue sur les rapports entre conventionnalité et constitutionnalité (À propos de CJUE, 22 juin 2010)” (2010) n° 153-154 *Les petites affiches* 6-13 at 12-13.

¹³⁴ For further developments on this new jurisdictional mechanism, see *supra* at 355-362.

¹³⁵ M.-L. Paris, “Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law”, *op. cit.*, at fn. 81 above, at 24.

¹³⁶ See *supra* at 355-362.

¹³⁷ On this tension between the supreme courts and the *Conseil constitutionnel*, see G. Drago, *Contentieux constitutionnel français* (Third edition, Paris: Presses universitaires de France, coll. Thémis, 2011) at 465-466.

¹³⁸ CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56.

¹³⁹ In this sense see A. Levaë, “Le Palais-Royal aux prises avec la constitutionnalité des actes de transposition des directives communautaires : À propos de la décision du Conseil constitutionnel n° 2006-543 du 30 novembre 2006, *Loi relative au secteur de l’énergie* et de l’arrêt du Conseil d’État, Assemblée, du 8 février 2007, *Société Arcelor Atlantique et Lorraine et autres*” (2007) *Revue française de droit administratif* 564-577 at 573-575.

¹⁴⁰ M. Guyomar, “Conclusions sur Conseil d’État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*”, *op. cit.*, at fn. 92 above, at 388 (translation by the author).

¹⁴¹ See *supra* at 223-230.

respect for the constitutional principles by the European legal order, insinuating a greater concern for the normative supremacy of the Constitution rather than the conciliatory attitude of the constitutional court.

In the first place, the differences between the two courts of the Palais-Royal lie in their respective analyses of Articles 55 and 88-1 of the Constitution. While the former provision has been absent from the case-law of the *Conseil constitutionnel* since 2004, it is central in the decision of the administrative court. Repeating an analysis established since the decision *Sarran, Levacher et autres*,¹⁴² it was affirmed in *Arcelor* that on this basis “the supremacy thus conferred on international commitments does not apply, in the domestic legal order, to principles or provisions of a constitutional nature”. The reference to Article 88-1 alone allowed the *Conseil constitutionnel* to tame or hide the supremacy of the Constitution behind a material perspective.¹⁴³ The reasoning of the *Conseil d’État* on foot of Article 55, in contrast, amounts to the reaffirmation of a formal analysis of the normative relationship between the two legal orders to the benefit of the supremacy of the Constitution.¹⁴⁴ If the *Conseil constitutionnel* reintroduced the reference to Article 55 in its case-law,¹⁴⁵ it merely supported an argument dealing with the distribution of competences between the different French jurisdictions,¹⁴⁶ in particular as to the distinction between the control of constitutionality ensured by the *Conseil constitutionnel* and the control of conventionality – *i.e.*, the control for compatibility with international and European law – devolved to the courts of the *ordres judiciaire* and *administratif*.¹⁴⁷

¹⁴² CE, Ass., 30 October 1998, *Sarran, Levacher et autres*, *Rec. Lebon* 368.

¹⁴³ See *supra* at 218-233.

¹⁴⁴ See, for example, C. Maugué, “L’arrêt *Sarran*, entre apparence et réalité” (1999) n° 7 *Cahiers du Conseil constitutionnel*, available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-7/l-arret-sarran-entre-apparence-et-realite.52746.html>> at 2 [Last accessed 29 December 2012].

¹⁴⁵ CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 10-12.

¹⁴⁶ Especially *ibid.* at para. 10 where, rather than concluding to the supremacy of the Constitution, the *Conseil constitutionnel* drew a conclusion as to its competence by affirming that “firstly, Article 55 of the Constitution provides: ‘Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or Treaty, to its application by the other party.’ Although these provisions confer upon Treaties, in the conditions which they determine, primacy over domestic statutes, they neither require nor imply that compliance with this principle must be ensured in the framework of a review of the conformity of statutes with the Constitution”.

¹⁴⁷ In this sense, see G. Drago, “Le hasard et la nécessité (à propos de la décision du Conseil constitutionnel du 12 mai 2010)” (2010) 23-27 mai 2010 *Gazette du Palais* 12-16 at 12-13 and A. Levade, “Contrôle de constitutionnalité et contrôle de conventionnalité ne sont pas jeux de hasard : la réplique de Conseil constitutionnel à la Cour de cassation !” (2010) *Recueil Dalloz* 1321-1324 at 1323. However, for a different point of view based on the weakening of the favourable approach to the specificities of European Union law and the agreement of the *Conseil constitutionnel* with the reasoning of the *Conseil d’État*, see X. Magnon, “La QPC face au droit de l’Union : la brute, les bons et le truand” (2010) n° 84 *Revue française de droit constitutionnel* 761-791 at 773 where the author argues that Article 55 concerns the doctrine of primacy and that Article 88-1 is limited to the implementation of directives.

In consequence, the position of the two courts of the Palais-Royal, diverge on the meaning of Article 55, in particular where European Union law is at stake. It could be argued that, for the *Conseil constitutionnel*, this constitutional provision is only determinative of an issue of jurisdictional competence between domestic courts while the normative and jurisdictional relationship between the two legal orders is grounded in Article 88-1 of the Constitution. In contrast, the relationship between constitutional provisions and the primacy principle is still seen by the *Conseil d'État* through the formal and hierarchical prism¹⁴⁸ which it has deduced from its traditional interpretation of Article 55.¹⁴⁹ Unlike its constitutional counterpart, the *Conseil d'État* limited the relevance of Article 88-1 to the specific modalities of its control when European law is concerned by affirming that:

“the control of constitutionality of regulatory acts directly ensuring this implementation is called upon to be exercised according to particular modalities”.¹⁵⁰

However, one could argue that the particular conditions of the control of acts linked to European law are not left unaffected by the formal representation of the relationship between the European and domestic legal orders. The reference to Article 55 explains that the position of the *Conseil d'État* concerning potential conflicts between constitutional provisions and European obligations is different from that adopted by the *Conseil constitutionnel*, in particular where the limit to the primacy principle defined in term of constitutional identity is concerned. This latter notion is actually absent from the decision of the *Conseil d'État* since it refused to differentiate the provisions contained in the *bloc de constitutionnalité* according to their content and to distinguish some on the basis of their importance for the French constitutional architecture. While, for the *Conseil constitutionnel*, the reference to Article 88-1 as the basis of the recognition of the primacy principle in domestic law implies that the European doctrine could overcome other constitutional provisions which are not regarded as forming part of the

¹⁴⁸ For a similar opinion, see P. Gaïa, “La Cour de cassation résiste... mal” (2010) *Revue française de droit administratif* 458-465 at 461 or C. Charpy, “The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil constitutionnel* and the *Conseil d'État*” (2007) 3 *European Constitutional Law Review* 436-462 at 441.

¹⁴⁹ Commenting on the decision *Sarran, Levacher et autres*, Simon argues that the reference to Article 55 could lead to two readings, either in terms of normative hierarchy or according to the distribution of jurisdictional competences in the domestic legal order, see D. Simon, “L’arrêt *Sarran* : dualisme incompressible ou monisme inversé ?” (1999) n° 3 *Europe* 4-6. It seems that it is the latter that the *Conseil constitutionnel* adopted while the *Conseil d'État* confirmed that it is the former conception which shapes its case-law.

¹⁵⁰ CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56 (translation by the author).

constitutional identity of France, the formal prism present in the case-law of the *Conseil d'État* leads to a different conclusion.

According to the decision of the *Conseil d'État* in *Arcelor*, the particular modalities of control consist of translating the question of constitutionality in the European discourse by determining whether a European principle exists which has the same content as the constitutional provision relied upon to challenge the validity of the regulatory act.¹⁵¹ In comparison with the limit established by the *Conseil constitutionnel* in terms of constitutional identity, it is noticeable that the *Conseil d'État* does not differentiate constitutional provisions according to how crucial they are for the French legal order.¹⁵² This could be explained by the fact that the *Conseil d'État* is not competent to interpret the Constitution and therefore to make the aforementioned distinction.¹⁵³ However, it could be argued that the administrative court has not always interpreted its role as strictly in this regard. In the past,¹⁵⁴ it deduced fundamental principles acknowledged in the laws of the Republic from its interpretation of the Constitution.¹⁵⁵ The position of the *Conseil d'État* is not so much the consequence of its limited competence but is rather a sign of its refusal to follow the position of the *Conseil constitutionnel*.¹⁵⁶ For this reason, writing about the case-law of the *Conseil d'État*, Schrameck affirms that:

¹⁵¹ On this operation of translation, see M. Guyomar, "Conclusions sur Conseil d'État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*", *op. cit.*, at fn. 92 above, at 395. For further developments on the impact of this "translation", which has to be understood in a geometrical sense, on the jurisdictional relationship between the *Conseil d'État* and the European Court of Justice, see *infra* at 483-484.

¹⁵² In this sense, see M. Verpeaux, "Quand le juge administratif accepte de contrôler la constitutionnalité des actes réglementaires de transposition de directives", *op. cit.*, at fn. 99 above, at 2276 or J. Roux, "La transposition des directives communautaires à l'épreuve de la Constitution (à propos de l'arrêt d'Assemblée du 8 février 2007, *Sté Arcelor Atlantique et Lorraine et autres*)", *op. cit.*, at fn. 93 above, at 1060 where the author notes that the *Conseil d'État* followed the test used by the *Conseil constitutionnel* in 2004 based on the specific features of the constitutional framework rather than the new formulation of the limit to the primacy principle expressed in 2006 and concerned with their crucial nature of these constitutional features.

¹⁵³ On this argument developed by the *commissaire du gouvernement* (M. Guyomar, "Conclusions sur Conseil d'État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*", *op. cit.*, at fn. 92 above, at 396), see C. Charpy, "The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil constitutionnel* and the *Conseil d'État*", *op. cit.*, at fn. 151 above, at 456 or A. Levade, "Le Palais-Royal aux prises avec la constitutionnalité des actes de transposition des directives communautaires : À propos de la décision du Conseil constitutionnel n° 2006-543 du 30 novembre 2006, *Loi relative au secteur de l'énergie* et de l'arrêt du Conseil d'État, Assemblée, du 8 février 2007, *Société Arcelor Atlantique et Lorraine et autres*", *op. cit.*, at fn. 142 above, at 570.

¹⁵⁴ CE, Ass., 3 July 1996, *Koné*, *Rec. Lebon* 255.

¹⁵⁵ On this point, see for example O. Cayla, "Lire l'article 55 : Comment comprendre le texte établissant une hiérarchie des normes comme étant lui-même le texte d'une norme ?" (1999) n° 7 *Cahiers du Conseil constitutionnel*, available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-7/lire-l-article-55-comment-comprendre-un-texte-etablissant-une-hierarchie-des-normes-comme-etant-lui-meme-le-texte-d-une-norme.52745.html>> at 6 [Last accessed 29 December 2012].

¹⁵⁶ For a similar interpretation of the case-law of the *Conseil d'État*, see G. Canivet, "Constitution nationales et Europe : La dialectique du Un et du Deux" in M. Ameller, P. Avril, J.-P. Camby and *al.* (eds.), *Constitutions et pouvoirs : Mélanges en l'honneur de Jean Gicquel* (Paris: Montchrestien, 2008) 73-96 at 92.

“it only adopts the approach of the *Conseil constitutionnel* on the condition that it is made more systematic and demanding, more protective and rigorous.”¹⁵⁷

In contrast to the position of the *Conseil constitutionnel*, it seems that the decision *Arcelor* of the *Conseil d'État* shows a willingness to ensure the supremacy of the whole body of constitutional provisions over European Union law.¹⁵⁸

This formal understanding by the *Conseil d'État* of the supremacy of the Constitution is reinforced by its strict test of compatibility, and in particular by the focus put by the *Conseil d'État* on the interpretation of European rules by the European Court of Justice. The concern for interpretation is not absent from the decisions of the *Conseil constitutionnel* but it is often justified by the willingness to conciliate constitutional provisions and European law,¹⁵⁹ and even leads to the empowerment of the European Court of Justice as regards the interpretation of the French Constitution.¹⁶⁰ In contrast, the particular emphasis put by the *Conseil d'État* on this issue involves a stricter control of the compatibility between constitutional provisions and European law. The *Conseil d'État* requires a strict mirror image of the constitutional provision in the European legal order in order to enforce the principle contained in Article 88-1 of the Constitution.¹⁶¹ It made this clear when it stated that its role was to:

“investigate if there exists a rule or a general principle of Community law which, in view of its nature and its scope, as interpreted at the current state in the case-law of the Community jurisdiction, guarantees the effectiveness of respect for the invoked constitutional rule or principle”.¹⁶²

¹⁵⁷ O. Schrameck, “Réflexions sur l’arrêt *Arcelor*” in M. Ameller, P. Avril, J.-P. Camby and *al.* (eds.), *Constitutions et pouvoirs : Mélanges en l’honneur de Jean Gicquel* (Paris: Montchrestien, 2008) 545-549 at 547. See also J. Biancarelli, T. Ayrault, L. Martini, and *al.*, “Peut-on parler d’un « renouveau européen » du Conseil d’État depuis 2007 ?”, *op. cit.*, at fn. 81 above, at 580 where it is argued that the *Conseil d'État* avoided the issue of constitutional identity.

¹⁵⁸ On this point, see X. Magnon, “La sanction de la primauté de la Constitution sur le droit communautaire par le Conseil d’État” (2007) *Revue française de droit administratif* 578-589 at 584, J. Roux, “La transposition des directives communautaires à l’épreuve de la Constitution (à propos de l’arrêt d’Assemblée du 8 février 2007, *Sté Arcelor Atlantique et Lorraine et autres*)”, *op. cit.*, at fn. 93 above, at 1046 or M. Gautier and F. Melleray, “Le Conseil d’État et l’Europe : fin de cycle ou nouvelle ère ? À propos des arrêts d’assemblée du 8 février 2007”, *op. cit.*, at fn. 96 above, at 13.

¹⁵⁹ See *supra* at 218-233.

¹⁶⁰ See *infra* at 481-485.

¹⁶¹ On the strictness of the compatibility between the constitutional and the European provisions expressed by the *Conseil d'État*, see for example M.-P. Granger, “France is ‘Already’ Back in Europe: The Europeanization of French Courts and the Influence of France in the EU”, *op. cit.*, at fn. 81 above, at 372.

¹⁶² CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56 (translation by the author).

In conclusion, while the interpretation of Article 88-1 by the *Conseil constitutionnel* has been tantamount to a breaking point in its case-law leading to a softening of the formal supremacy of the Constitution in order to ensure a greater effect for the primacy principle in the French legal order, the same constitutional provision has led to the empowerment of the *Conseil d'État*, which has persisted with and further extended the scope of the reasoning developed in *Sarran, Levacher et autres*, regarding the formal supremacy of the Constitution in the domestic legal order.¹⁶³ This position seems reminiscent of the case law of the German Federal Constitutional Court.¹⁶⁴ However, while for the latter the compatibility between the German Basic Law and European law has concerned in the past the general level of protection of human rights, the control exercised by the *Conseil d'État* is done on a case-by-case basis, revealing a willingness to thwart the doctrine of primacy in the French constitutional order.¹⁶⁵

Nonetheless, the *commissaire du gouvernement* in *Arcelor* mentioned the necessity for the *Conseil d'État* to be able to protect the constitutional identity of France when he affirmed, in terms similar to those found in Article 1 of the Irish Constitution, that:

“where constitutional rules or principles, which, without equivalents in the Community legal order, corresponding to the legal genius peculiar to our country, are challenged, facing up your responsibilities and putting the public power in front of its *own* [responsibilities], you will ensure the strict respect for our Constitution.”¹⁶⁶

However, given the decision which was reached, one could conclude that the whole Constitution represents the legal genius of France in the eyes of the administrative court and that it is the full French sovereignty rather than its crucial features that it intends to protect.

¹⁶³ In this sense, see J. Roux, “La transposition des directives communautaires à l’épreuve de la Constitution (à propos de l’arrêt d’Assemblée du 8 février 2007, *Sté Arcelor Atlantique et Lorraine et autres*)”, *op. cit.*, at fn. 93 above, at 1039-1041 or F. Michéa, “L’arrêt *Arcelor* du 8 février 2007 ou le Conseil d’État aux prises avec le contrôle de constitutionnalité des traités et des lois”, *op. cit.*, at fn. 100 above, at 266-267.

¹⁶⁴ On this alleged similarities, following the argument of the *commissaire du gouvernement* (see M. Guyomar, “Conclusions sur Conseil d’État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*”, *op. cit.*, at fn. 92 above, at 386-387), see for example F. Lenica and J. Boucher, “Le juge administratif et le statut constitutionnel du droit communautaire dérivé”, *op. cit.*, at fn. 102 above, at 581.

¹⁶⁵ In this respect, the position of the *Conseil d'État* is different from and stricter than the case-law of the German and Italian constitutional courts. For a similar analysis, see for example, O. Pollicino, “The *Conseil d'Etat* and the relationship between French internal law after *Arcelor*: Has something really changed?”, *op. cit.*, at fn. 103 above, at 1531 or J. Roux, “La transposition des directives communautaires à l’épreuve de la Constitution (à propos de l’arrêt d’Assemblée du 8 février 2007, *Sté Arcelor Atlantique et Lorraine et autres*)”, *op. cit.*, at fn. 93 above, at 1064.

¹⁶⁶ M. Guyomar, “Conclusions sur Conseil d’État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*”, *op. cit.*, at fn. 92 above, at 402 (translation by the author).

In conclusion, and due to the necessary collaboration between the courts of the different jurisdictional orders, the position of the *Conseil d'État* regarding the full supremacy of the Constitution limits the ability of the notion of constitutional identity (which is a balance between the supremacy of the Constitution and the doctrine of primacy) to structure the normative relationship between the constitutional legal order and the primacy of European Union law. It can be seen, in contrast, as an attempt of the *Conseil d'État* to develop its own paradigm as to the consequences of the French participation in the process of European integration.

The position of the *Cour de cassation* seems to be the reverse of the one developed by the *Conseil d'État*. The introduction of a new jurisdictional mechanism entitled “priority preliminary rulings of the issue of constitutionality” with the introduction of Article 61-1 in the Constitution in 2008 gave rise to the opposition of the *Cour de cassation* - the supreme court of the *ordre judiciaire* - where it demonstrated its generous attitude towards European Union law against this new jurisdictional mechanism in order to protect the ambit of its jurisdictional competence. It could thus be argued that the position of the *Cour de cassation*, which will now be turned to, has the same result as the position of the *Conseil d'État*, viz., it impairs the effect of the notion of constitutional identity insofar as concerns the relationship between the domestic and European legal orders.

The empowerment of the ordinary courts regarding the control of conventionality of domestic norms entailed by the decision of the *Conseil constitutionnel* of 1975¹⁶⁷ has greatly benefitted the courts of the *ordre judiciaire*, which gained the competence to review the validity of statutes.¹⁶⁸ The situation was somehow different for the *Conseil d'État* due to its participation in legislative decision-making. As Article 39 of the French Constitution provides, it has to be consulted for Government Bills, an opportunity that has been extended in the constitutional reform of 2008, allowing the President of each house to refer bills introduced by members of the Parliament to the *Conseil d'État*.¹⁶⁹ The introduction of priority preliminary rulings on the

¹⁶⁷ CC, decision n° 74-54 DC on the *Act pertaining to the voluntary interruption of pregnancy* of 15 January 1975, *Rec.* 19.

¹⁶⁸ On this reason explaining the generous attitude of the *Cour de cassation* towards the primacy principle, see for example J. Plötner, “Report on France” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 41-75 at 62 and K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, *op. cit.*, at fn. 6 above, at 148-150.

¹⁶⁹ In this respect, the late application of the consequences attached to the decision of the *Conseil constitutionnel* of 1975 by the *Conseil d'État* is to be explained by other reasons than its empowerment, as for example the willingness to regain an influence in the process of European integration. On this point, see J. Plötner, “Report on France”, *op. cit.*, at fn. 171 above, at 67-70. Similar considerations can be found in the opinion of the *commissaire du gouvernement* in *Arceleor* to justify the modification of the administrative case-law, see M. Guyomar, “Conclusions sur Conseil d'État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*”, *op. cit.*, at fn. 92 above, at 388-389.

issue of constitutionality faced strong resistance from the *Cour de cassation*.¹⁷⁰ It could be perceived by the *Cour de cassation* as a diminution of its jurisdictional competence and of its control of legislative instruments to the benefit of the *Conseil constitutionnel*.¹⁷¹

The *Cour de cassation*'s opposition to the modalities of the new constitutional mechanism¹⁷² appeared in a case which concerned two Algerian nationals who, following an identity check, were subjected to a Prefectural Order that they be escorted to the frontier and a decision to extend the period of pretrial detention.¹⁷³ The validity of these identity checks was challenged. The applicants argued that Article 78-2 of the Criminal Procedure Code, the legal basis of the identity check, was contrary to European Union law - and in consequence to Article 88-1 of the Constitution - and asked for a priority ruling on this issue of constitutionality.

The *Cour de cassation* reformulated the arguments of the litigants¹⁷⁴ and affirmed that they were both questioning the conventionality and the constitutionality of Article 78-2 of the Criminal Procedure Code. In consequence, the *Cour de cassation* argued that the priority nature of the newly introduced jurisdictional mechanism would prevent the triggering of a preliminary reference to the European Court of Justice *ab initio* and that, since the *Conseil constitutionnel* would assess the compatibility of the disputed norm with European Union law, the *Cour de cassation*, bound by Article 62 of the French Constitution to the decisions of the constitutional court, would not be able to make this preliminary reference subsequently. In other words, the mechanism of the priority preliminary ruling on the issue of constitutionality would prevent the *Cour de cassation* from performing its duty as a European jurisdiction.¹⁷⁵ The *Cour de cassation*, reversed the alleged priority of the domestic mechanism¹⁷⁶ and, rather than referring the application to the *Conseil constitutionnel* on the issue of constitutionality, it

¹⁷⁰ In this sense, see for example J.-B. Perrier, "La Cour de cassation et la question prioritaire de constitutionnalité : de la réticence à la diligence" (2010) n° 84 *Revue française de droit constitutionnel* 793-809 or J.-P. Camby, "Le Conseil constitutionnel, la Cour de cassation et les jeux en ligne : le contrôle de constitutionnalité *a posteriori* ne peut nuire au contrôle de conventionnalité" (2010) n° 134 *Les petites affiches* 6-14 at 11 where the author argues that the *Cour de cassation* displayed a "hostility in principle (...) towards the procedure of priority preliminary ruling" (translation by the author).

¹⁷¹ In this sense, D. Simon and A. Rigaux, "Drôle de drame : la Cour de cassation et la question prioritaire de constitutionnalité" (2010) n° 5 *Europe* 5-10 at 7 where the authors stress that the motives of the *Cour de cassation* have to be found in the reduction of its European role due to the introduction of the priority preliminary rulings on the issue of constitutionality. For a similar opinion, see M. Gautier, "La question de constitutionnalité peut-elle rester prioritaire ?" (2010) *Revue française de droit administratif* 449-458 at 455.

¹⁷² Institutional Act n° 2009-1523 of 10 December 2009 pertaining to the application of Article 61-1 of the Constitution, J.O.R.F. p. 21379.

¹⁷³ C. cass., 16 April 2010, *Melki and Abdeli*, n° 10-40.001 and n° 10-40.002, unreported.

¹⁷⁴ On this point, see X. Magnon, "La QPC face au droit de l'Union : la brute, les bons et le truand", *op. cit.*, at fn. 150 above, at 764-765.

¹⁷⁵ For the "paroxysmal" understanding of this status in the decision of the *Cour de cassation*, see F. Chaltiel, "Des premières vicissitudes de la dichotomie entre contrôle de conventionnalité et contrôle de constitutionnalité" (2010) n° 105 *Les petites affiches* 6-12 at 7-8.

¹⁷⁶ In this sense, see for example, X. Magnon, "La QPC face au droit de l'Union : la brute, les bons et le truand", *op. cit.*, at fn. 150 above, at 786.

decided to first make a preliminary reference to the European Court of Justice in order to determine whether the new constitutional mechanism was in conformity with European Union law.

The difficulties raised by the *Cour de cassation* are to some extent questionable. It is certain that, especially when the objective of this mechanism is taken into account, the priority character of the preliminary rulings was intended for the control of conformity with the Constitution to bar or at least to compete with the European route.¹⁷⁷ However, one could be more circumspect about the reasoning of the *Cour de cassation* where the role of the *Conseil constitutionnel* is concerned. As has been seen,¹⁷⁸ the case-law of the *Conseil constitutionnel* denotes a strict understanding of its function, and in particular a refusal to include, as a matter of principle, European rules in the *bloc de constitutionnalité* and therefore to substitute its control for that carried out by ordinary courts on the basis of European law. When one bears in mind that this questionable understanding of the role of the *Conseil constitutionnel* arose due to the disputable reformulation of the arguments of the litigants, these cases rather appear as the occasion for the court of the *ordre judiciaire* to unfold a legal strategy.¹⁷⁹ By affirming that the new jurisdictional mechanism prevented it from collaborating with the European Court of Justice, the *Cour de cassation* opposed the doctrine of primacy to the supremacy of the Constitution in order to preserve its hold on the validity of legislative instruments through the control of conventionality based on European Union law¹⁸⁰ and used the European Court of Justice as an ally in the competition for the domestic distribution of jurisdictional competences.¹⁸¹

This preliminary reference gave rise to a jurisdictional exchange involving the four courts. The *Conseil constitutionnel* seized the opportunity of its *Act pertaining to the opening up to competition and the regulation of online betting and gambling*¹⁸² decision to clarify its position as to the relationship between priority preliminary rulings on the issue of

¹⁷⁷ See, for example, H. Labayle, “Question prioritaire de constitutionnalité et question préjudicielle : ordonner le dialogue des juges ?” (2010) *Revue française de droit administratif* 659-677 at 667.

¹⁷⁸ See *supra* at 110-116 and *supra* at 360-362 as regards the refusal to include the protection of European law in the mechanism of priority preliminary rulings on the issue of constitutionality.

¹⁷⁹ For the instrumental use of this case by the *Cour de cassation*, see for example A. Levade, “Renvoi préjudiciel versus Question prioritaire de constitutionnalité : la Cour de cassation cherche le conflit !” (2010) *Recueil Dalloz* 1254-1258 at 1256.

¹⁸⁰ For a similar argument, see P. Manin, “La question prioritaire de constitutionnalité et le droit de l’Union européenne” (2010) *L’Actualité juridique. Droit administratif* 1023-1029 at 1027.

¹⁸¹ For a similar interpretation of the inversion of priority in favour of the preliminary reference made by the *Cour de cassation*, see D. Simon and A. Rigaux, “Drôle de drame : la Cour de cassation et la question prioritaire de constitutionnalité”, *op. cit.*, at fn. 174 above, at 7.

¹⁸² CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78.

constitutionality and the respect for European obligations. First, it reaffirmed the exclusion of the control of conventionality from its competence and concluded positively, in contrast to in its decision of 1975, on the role of the courts belonging to the *ordre judiciaire* and *ordre administratif* on this matter, *i.e.*, the control for compatibility with international and European law,¹⁸³ extending therefore its earlier case-law to its new *a posteriori* control.¹⁸⁴ In consequence, the authority of its decisions is limited to the questions of constitutionality and do not bind courts as to the conformity of the challenged norms with European law.¹⁸⁵

Secondly, on the basis of this restrictive conception of its role, the *Conseil constitutionnel* developed a neutralising interpretation of the consequences to be attached to the priority nature of the new jurisdictional route.¹⁸⁶ In particular, it still allowed the ordinary courts to simultaneously¹⁸⁷ ensure the respect for European law, notably:¹⁸⁸

“the judge who transmits an application for a priority preliminary hearing on the issue of constitutionality, which must be heard within a strictly delimited period of time, may firstly hand down his decision without waiting for the ruling on the application for a priority preliminary ruling on the issue of constitutionality if statute law or regulations provide that he shall give his ruling within a specific time or as a matter of urgency; secondly he may also take all and any conservatory measures as may be necessary. He may thus immediately suspend any effect of the statute incompatible with the law of the European Union, ensure the preservation of the rights vested in persons coming under the jurisdiction of the courts by international and European commitments entered into by France and ensure the full effectiveness of the forthcoming decision of

¹⁸³ *Ibid.* at para. 10-12.

¹⁸⁴ On this point, see M. Gautier, “QPC et droit communautaire : Retour sur une tragédie en cinq actes” (2010) n° 10 *Droit administratif* 13-19 at 16.

¹⁸⁵ CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 13.

¹⁸⁶ On this neutralising interpretation in order to avoid the criticism of the European Court of Justice, see for example X. Prétot, “La Constitution, la loi et le droit de l’Union européenne : Réflexions sur le caractère prioritaire de la question de constitutionnalité” (2010) *Revue de jurisprudence sociale* 734-747 at 740.

¹⁸⁷ See, for example, B. Mathieu, “La guerre des juges n’aura pas lieu : À propos de la décision n° 2010-605 DC du Conseil constitutionnel” (2010) n° 21 *La Semaine juridique. Édition générale* 1077-1080 at 1078.

¹⁸⁸ In this regard, the new interpretation seems to depart from its earlier decision on the validity of the Institutional Act itself (CC, decision n° 2009-595 DC on the *Institutional Act pertaining to the application of Article 61-1 of the Constitution* of 3 December 2009, *Rec.* 206) where the importance of this mechanism in affirming the supremacy of the Constitution was stressed. On this divergence between the logics of the two decisions, see G. Drago, “Le hasard et la nécessité (à propos de la décision du Conseil constitutionnel du 12 mai 2010)”, *op. cit.*, at fn. 150 above, at 13-14. In the same way, Roux noted that, while the simultaneous exercise of the control of constitutionality and the control of conventionality was possible, it did not seem to be the interpretation chosen by the *Conseil constitutionnel* in 2009, see J. Roux, “La question prioritaire de constitutionnalité à la lumière de la décision du Conseil constitutionnel du 3 décembre 2009” (2010) *Revue du droit public et de la science politique en France et à l’étranger* 233-259 at 247.

the court. Neither Article 61-1 of the Constitution nor Articles 23-1 and following of the Ordinance of November 7th 1958 referred to hereinabove preclude a judge, asked to rule in litigation in which the argument of incompatibility with European Union law is raised, from doing, at any time, all and everything necessary to prevent the application in the case in hand of statutory provisions impeding the full effectiveness of the norms and standards of the European Union”.¹⁸⁹

This possibility of protecting “at any time” - in other words, including before any decision of the *Conseil constitutionnel* on the issue of constitutionality - the respect for European law, is reinforced by the affirmation that, in doing so, courts can still engage in a dialogue with the European Court of Justice through the making of a preliminary reference.¹⁹⁰

The view could be taken that the *Conseil constitutionnel* acted strategically.¹⁹¹ Its interpretation distorted the priority nature of the mechanism - in particular priority over the control for compatibility with European Union law. It rather affirmed the mandatory character of the referral regarding the issue of constitutional while making possible the simultaneous control for compatibility with European law by the ordinary courts.¹⁹² Avoiding seeing priority preliminary rulings on the issue of constitutionality as being opposed to the doctrine of primacy, the *Conseil constitutionnel* offered an interpretation which could receive the approval of the European Court of Justice. In this regard, it was supported by the *Conseil d'État* which - arguably acting equally strategically since the opinion it expressed constituted an *obiter dictum*¹⁹³ - gave a similar interpretation two days later.¹⁹⁴ However, the decision of the *Conseil d'État* stressed more explicitly the necessary protection of the competence of ordinary courts in matters of control of conventionality in the face of the empowerment of the *Conseil constitutionnel* through this new mechanism.¹⁹⁵ It stated that “these provisions [*i.e.*, the provisions dealing with the modalities of the priority preliminary rulings on the issue of

¹⁸⁹ CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 14.

¹⁹⁰ *Ibid.* at para. 15.

¹⁹¹ See, for example, J.-P. Camby, “Le Conseil constitutionnel, la Cour de cassation et les jeux en ligne : le contrôle de constitutionnalité *a posteriori* ne peut nuire au contrôle de conventionnalité”, *op. cit.*, at fn. 173 above, at 7.

¹⁹² In this sense, see F. Donnat, “La Cour de justice et la QPC : chronique d’un arrêt prévisible et imprévu” (2010) *Recueil Dalloz* 1640-1647 at 1646. For a similar opinion as to the distorting interpretation of the *Conseil constitutionnel* making the priority nature of the mechanism a mandatory one, see H. Labayle, “Question prioritaire de constitutionnalité et question préjudicielle : ordonner le dialogue des juges ?”, *op. cit.*, at fn. 180 above, at 670.

¹⁹³ On this point, see B. Mathieu, “La guerre des juges n’aura pas lieu : À propos de la décision n° 2010-605 DC du Conseil constitutionnel”, *op. cit.*, at fn. 190 above, at 1078.

¹⁹⁴ CE, 14 May 2010, *Rujovic*, *Rec. Lebon* 165.

¹⁹⁵ On this point, see M. Gautier, “QPC et droit communautaire : Retour sur une tragédie en cinq actes”, *op. cit.*, at fn. 187 above, at 16-17.

constitutionality] do not impede the administrative courts, the normal courts in which European Union law is applied, from guaranteeing its effectiveness (...) at any time in the proceedings”.¹⁹⁶ Furthermore, it added that a preliminary reference could be made “at all times”,¹⁹⁷ a precision that had been absent from the decision of the *Conseil constitutionnel*.¹⁹⁸ Given the cautious attitude of the *Conseil d’État* towards European law and its primacy, its position could be seen as a support for a mechanism intended to increase the supremacy of the Constitution while retaining its jurisdictional competence. It also implicitly affirms the application of its stricter view of the implications of the primacy principle with regard to constitutional provisions in comparison with the notion of constitutional identity developed by the *Conseil constitutionnel*.¹⁹⁹

The response of the European Court of Justice in this matter was ambivalent.²⁰⁰ After having mentioned its case-law regarding the collaboration on the part of domestic courts required by the doctrine of primacy,²⁰¹ the European Court opposed the interpretation of the *Cour de cassation*, on the one hand, and the one provided by the *Conseil constitutionnel* and the *Conseil d’État*, on the other hand.²⁰² While noticing that the former would be contrary to European principles, it hinted at the compatibility of the latter and concluded by adverting to the duty on national courts to interpret national rules in a way which is compatible with the requirements of European Union law.²⁰³

Taking into account the decision of the European Court of Justice, the *Cour de cassation* concluded that,²⁰⁴ since it could not adopt the necessary measures to ensure the provisional preservation of European rights, it had to refuse the referral of the priority preliminary ruling on the issue of constitutionality and to favour the control of conventionality. In doing so, the *Cour de cassation* chose to ignore two conciliatory solutions.²⁰⁵ From a domestic perspective, the *Cour de cassation* did not take into the interpretation by the *Conseil*

¹⁹⁶ CE, 14 May 2010, *Rujovic, Rec. Lebon* 165 (translation by the author).

¹⁹⁷ *Ibid.*

¹⁹⁸ On this precision of the *Conseil d’État* in order to guarantee the extent of its jurisdiction, see for example F. Chaltiel, “La Cour de justice de l’Union européenne poursuit le dialogue sur les rapports entre conventionnalité et constitutionnalité (À propos de CJUE, 22 juin 2010)”, *op. cit.*, at fn. 136 above, at 12-13.

¹⁹⁹ On the comparison between the positions of the *Conseil constitutionnel* and of the *Conseil d’État* as regards the balancing between the doctrine of primacy and constitutional provisions, see *supra* at 410-416.

²⁰⁰ Joined Cases C-188-189/10 *Melki and Abdeli* [2010] E.C.R. I-5667.

²⁰¹ *Ibid.* at para. 40-45 and 52.

²⁰² *Ibid.* at para. 46-48.

²⁰³ *Ibid.* at para. 49-50. It should be noted that the European Court of Justice reserved special considerations for the priority preliminary rulings on the issue of constitutionality when the domestic instrument concerns the implementation of a European directive. For further considerations on this point, see *infra* at 447-452.

²⁰⁴ C. cass., Ass. plén., 29 June 2010, *Melki and Abdeli*, n° 10-40.001 and n° 10-40.002 (unreported).

²⁰⁵ On these points, see for example M. Gautier, “QPC et droit communautaire : Retour sur une tragédie en cinq actes”, *op. cit.*, at fn. 187 above, at 18-19.

constitutionnel of the new jurisdictional mechanism in a sense compatible with European requirements which excludes respect for European Union law as such from the scope of the mechanism of priority preliminary rulings on the issue of constitutionality, an interpretation which made the use of this mechanism irrelevant in the case under the *Cour de cassation*'s scrutiny.²⁰⁶ More importantly from a European perspective, the *Cour de cassation* did not draw the consequences of the decision of the European Court of Justice in *Factortame*²⁰⁷ according to which a domestic court can adopt interim measures, even though the domestic legal order does not provide for them. Thus, the *Cour de cassation* manifested an uncompromising attitude.

Nonetheless, the obedience of the *Cour de cassation* to the primacy principle is not without limits and its *Fraisse* decision²⁰⁸ bore witness to its willingness to oppose constitutional provisions to external norms. Therefore, it could be first concluded that the attitude of the *Cour de cassation* denotes its concern for the protection of its competence and its ability to define the relationship between the two legal orders under its own terms rather than letting the *Conseil constitutionnel* decide this issue. Secondly, the overall attitude of the *Cour de cassation* is more generous to European law. As a result, one may doubt that the limit to the primacy principle in the eyes of the *Cour de cassation* will coincide in extent with those defined by the *Conseil constitutionnel*. In contrast, rather than the supremacy of the Constitution and its identity, the *Cour de cassation* tends to favour the European logic and the doctrine of primacy. It has even been argued that, in the *Melki* and *Abdeli* decisions, the *Cour de cassation* favoured its role as a European court rather than as a domestic one in order to preserve its competence.²⁰⁹

In conclusion, the effect of the notion of constitutional identity in the French legal system depends greatly on collaboration between the different jurisdictional orders. Nonetheless, it seems that the balance displayed in the case-law of the *Conseil constitutionnel* between the requirements arising from Article 88-1 of the Constitution and constitutional provisions of a purely domestic nature, which is constitutive of the notion of constitutional identity, is not echoed by the courts belonging to the *ordres administratif* and *judiciaire*. In an

²⁰⁶ CC, decision n° 2010-605 DC on the Act pertaining to the opening up to competition and the regulation of online betting and gambling of 12 May 2010, Rec. 78 at para. 19. For further developments on this point, see *supra* at 360-362.

²⁰⁷ Case C-213/89 *R. v. Secretary of State for Transport, ex p. Factortame Limited and others* [1990] E.C.R. I-2433.

²⁰⁸ C. cass., Ass. plén., 2 June 2000, *Fraisse*, Bull. Ass. plén., n° 4, p. 7.

²⁰⁹ In this sense, see F. Chaltiel, "Des premières vicissitudes de la dichotomie entre contrôle de conventionnalité et contrôle de constitutionnalité", *op. cit.*, at fn. 178 above, at 7-8 or D. Simon and A. Rigaux, "Drôle de drame : la Cour de cassation et la question prioritaire de constitutionnalité", *op. cit.*, at fn. 174 above, at 7.

attempt to protect their competence,²¹⁰ it can be said that “if it were a matter of a balancing exercise, the scales could only tilt in one direction”, as McCarthy J. put it in *Attorney General v. X*.²¹¹ The *Conseil d’État* favours the full formal supremacy of the Constitution while the *Cour de cassation* gives priority to the doctrine of primacy and its collaboration with the European Court of Justice. It could even be suggested that their disinclination could have an impact on the ability of the *Conseil constitutionnel* to develop the notion of constitutional identity in its own field of competence. Acting as a second filter on the referral of priority preliminary rulings on the issue of constitutionality, it could be argued that the *Conseil d’État* and the *Cour de cassation* would exercise an indirect control of constitutionality.²¹² In the balance between the doctrine of primacy and respect for other constitutional provisions which is characteristic of the notion of constitutional identity developed by the *Conseil constitutionnel*, the *Conseil d’État* and the *Cour de cassation* would rather favour one or the other.

²¹⁰ On this point, see M.-L. Paris, “Europeanization and Constitutionalization: The Challenging Impact of a Double Transformative Process on French Law”, *op. cit.*, at fn. 81 above, at 52. In particular, for an analysis of the case-law of the *Conseil d’État* consisting of preserving its competence, see M. Gautier, “La question de constitutionnalité peut-elle rester prioritaire ?”, *op. cit.*, at fn. 174 above, at 456 or F. Chaliel, “Des premières vicissitudes de la dichotomie entre contrôle de conventionalité et contrôle de constitutionnalité”, *op. cit.*, at fn. 178 above, at 11-12.

²¹¹ [1992] 1 I.R. 1 at 84.

²¹² For a similar argument, see G. Drago, *Contentieux constitutionnel français*, *op. cit.*, at fn. 140 above, at 495 where the author argues that “the effect of dispersal of constitutional justice, of division, or even of bursting of the constitutional norm, is not to be excluded, according to the divergences of case-law and of appreciation of the Constitution” (translation by the author).

2. *The Irish Courts and Competition for an Interpretative Monopoly on the Relationship between European Union Law and the Constitution*

As in French law, the notion of constitutional identity which can be seen in the Irish case-law involves an empowerment of the judiciary vis-à-vis the other branches of government. At first sight, it could be argued that the competition between domestic courts in order to define the legitimate relationship between the domestic and European legal orders is less pregnant due to a higher degree of judicial integration in Ireland than in France. Nonetheless, it is possible to observe in recent times a willingness expressed in the case-law of the Superior Courts to retain an interpretative monopoly over issues involving European law. This perspective enables one to reconsider the notion of constitutional identity as unfolding the tensions between the High Court and the Supreme Court in their respective understandings of the relationship between constitutional provisions and the doctrine of primacy.

Recent decisions of Irish courts have not directly concerned the principle of the primacy of European Union law itself but rather the modalities of its implementation,²¹³ and in particular with the issue of determining which authorities have jurisdiction to decide the relationship between domestic rules and European obligations. Fahey - differing from the argument made by Alter²¹⁴ in order to explain the recognition of the primacy principle by domestic courts, *viz.*, the judicial empowerment it involved, especially to the benefit of lower courts - argues that this explanation cannot properly describe the Irish legal position.²¹⁵ In particular, neither lower courts nor quasi-judicial bodies have shown a strong willingness to engage in a dialogue with the European Court of Justice through the mechanism of the preliminary reference in order to gain control over legislative instruments which is not constitutionally provided for in the Irish Constitution.²¹⁶ It could however be argued that the Superior Courts have issued decisions which can be interpreted as deterring lower judicial bodies from relying on European law. Such a willingness to maintain the interpretative monopoly over the consequences to be recognised to European Union law and its primacy in the domestic legal order in their bosom has been

²¹³ On these decisions, see E. Fahey, *EU Law in Ireland* (Dublin: Clarus Press, 2010) at 17-23, and in particular at 23 for the distinction between the primacy principle itself and its implementation by domestic authorities. However, from the European perspective, these two dimensions are tightly linked due to the indispensable jurisdictional co-operation at the core of the primacy doctrine, as established by the European Court of Justice.

²¹⁴ See for example, K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, *op. cit.*, at fn. 6 above, for example at 45-52 and, by the same author, "Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration", *op. cit.*, at fn. 6 above, at 241-246.

²¹⁵ See E. Fahey, *Practice and Procedure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts*, *op. cit.*, at fn. 7 above, at 117-119, for example.

²¹⁶ *Ibid.* at 30-40.

central in two recent decisions of the High Court, *viz.*, *Minister for Justice, Equality and Law Reform & Commissioner of An Garda Síochána v. Director of Equality Tribunal*²¹⁷ and *An Taoiseach v. Commissioner for Environmental Information*.²¹⁸

The first case concerned two individuals who applied to train as members of the Irish police force. This request was denied as, being aged 36 and 48, they fell outside the conditions of eligibility set in the Garda Síochána (Admission and Appointments) (Amendments) Regulations 2004²¹⁹ which state that applicants must be at least 18 and under 35. The litigants challenged this refusal before the Equality Tribunal on the basis of Council Directive 2000/78/EC²²⁰ implemented in Ireland *via* the Equality Act 2004. In particular, they claimed that this European instrument prohibited discrimination based on age. In the High Court, the question of the compatibility between the domestic rules and European obligations was ignored.²²¹ Rather, the basis of the decision of Charleton J. revolved around the jurisdiction of the Equality Tribunal. As he argued:

“the question for decision in this case is whether the Equality Tribunal, as a body whose powers are defined by statute, is entitled to commence a hearing that has the result that it assumes a legal entitlement to overrule a statutory instrument made by the first applicant where by law it is not entitled so to do. My view is that it is not.”²²²

For the High Court, even though administrative bodies have a duty to construe national rules in conformity with European law, this “obligation, however, does not extend to re-writing the legislation”.²²³ In particular, in the absence of explicit empowerment by the domestic legal order and due to the absence of a European principle to this effect (a statement which, as will be seen, is highly questionable²²⁴), the Director of Equality Tribunal could not declare the national instrument as repugnant to European obligations,²²⁵ this power being reserved to the Superior Courts.²²⁶

²¹⁷ [2010] 2 I.R. 455.

²¹⁸ [2011] 1 I.L.R.M. 508.

²¹⁹ S.I. No 749 of 2004.

²²⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] O.J. L 303/16.

²²¹ [2010] 2 I.R. 455 at 459.

²²² *Ibid.* at 457.

²²³ *Ibid.* at 459.

²²⁴ See *infra* at 427.

²²⁵ [2010] 2 I.R. 455 at 461.

²²⁶ *Ibid.* at 462.

The reasoning of the High Court was similar to that used in *An Taoiseach v. Commissioner for Environmental Information*,²²⁷ a case which concerned even more directly the relationship between the European doctrine of primacy and constitutional provisions. This case concerned a European Directive dealing with environmental information,²²⁸ which was implemented in the national legal order *via* the E.C. (Access to Information on the Environment) Regulations 2007.²²⁹ In this case, the applicants requested Cabinet discussions on greenhouse emissions. The Department of the Taoiseach refused to disclose certain documents arguing they were covered by the confidentiality clause contained in Article 28.4.3° of the Constitution, invoking an exception to the duty to make available environmental information which was expressly provided for in Article 8 of the statutory instrument. However, the Commissioner for Environmental Information held that this broad exception was contrary to the more limited exception defined in the European Directive.²³⁰ In consequence, finding that the European instrument was directly applicable, she ordered the disclosure of the document, a decision which was appealed to the High Court.

As in the previous case, it was held that the case did not revolve around the primacy principle as such. The main issue was rather determining which authorities had jurisdiction to give effect to it in the domestic legal order.²³¹ As O'Neill J. explained it:

“the problem in this case is not securing supremacy or primacy of Community law over domestic law, but discerning the correct procedural means for doing this.”²³²

He came to the conclusion that the issue of the relationship between European and domestic provisions should be decided by the Superior Courts. Putting forward reasons of legal certainty and clarity, the explicit empowerment of the High Court and the Supreme Courts as well as their expertise played a central role in his decision when he argued that:

“the problem with all this, apart from the violence done to the judicial architecture of the State, is that the party who may wish to rely on domestic law, either as a protection

²²⁷ [2011] 1 I.L.R.M. 508.

²²⁸ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] O.J. L 41/26.

²²⁹ S.I. No 133 of 2007.

²³⁰ [2011] 1 I.L.R.M. 508 at 521-522.

²³¹ On this point, see E. Fahey, *EU Law in Ireland, op. cit.*, at fn. 216 above, at 22.

²³² [2011] 1 I.L.R.M. 508 at 533.

of his rights or as establishing a binding duty, will be denied a hearing of his case in a forum, *i.e.*, the Courts, established by law for that purpose and which by virtue of such, over time have acquired the professional expertise, experience and competence to deal with these matters with the constitutional guarantee of independence and impartiality.”²³³

Therefore, he came to the conclusion that “although the respondent did not have jurisdiction to decide whether the Regulations incorrectly transposed the Directive, this Court does.”²³⁴

Both decisions seem contrary to European law. Depending on the co-operation of domestic courts, the European Court of Justice has always insisted on the link between the normative dimension of the doctrine of primacy and the question of which domestic organs have jurisdiction to enforce it. This logic is at the core of *Simmenthal*, stressing that any domestic court had competence to disapply national rules conflicting with European norms.²³⁵ This principle was extended to administrative bodies in *Larsy*,²³⁶ a decision which directly concerns the Irish cases under discussion here. Moreover, it is difficult to reconcile these decisions with the opinion of the Supreme Court in *Campus Oil Limited v. Minister for Industry*,²³⁷ where Walsh J. adopted a liberal view as to the jurisdiction enjoyed by domestic courts in order to see the primacy principle prevail by stating that “Article 177 of the Treaty confers upon an Irish national judge an unfettered discretion to make a preliminary reference to the Court of Justice”.²³⁸

One could read in these recent decisions of the High Court another example of the more cautious attitude towards the doctrine of primacy recently displayed by Irish courts.²³⁹ However, considering the insistence put on the issue of jurisdictional competence, these decisions can also be interpreted as having been decided according to domestic factors rather than displaying an opinion as to the consequences of the primacy principle on the Irish legal order.²⁴⁰ It is an argument regarding the competences of domestic organs which above all determines their ability to enforce the doctrine of primacy. From this perspective, it could be

²³³ *Ibid.* at 534.

²³⁴ *Ibid.* at 536.

²³⁵ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] E.C.R. 629 at para. 21-22.

²³⁶ Case C-118/00 *Larsy v. INASTI*, [2001] E.C.R. I-5063 at para. 52-53.

²³⁷ [1983] I.R. 82.

²³⁸ *Ibid.* at 87.

²³⁹ In this sense, see E. Fahey, *EU Law in Ireland, op. cit.*, at fn. 216 above, at 23.

²⁴⁰ In this respect, it has to be borne in mind that the solution in *Campus Oil* was determined “as a matter of Irish law”, [1983] I.R. 82 at 87.

suggested that when the competence of quasi-judicial bodies is at stake, their competences is determined in a manner contrary to the case-law of the European Court of Justice. Conversely, when the competence of Superior Courts has been concerned, the Supreme Court has come to a conclusion which developed the Community logic (as it was then) beyond the positive requirements drawn by the European Court of Justice.²⁴¹ In other words, one could argue that, when Superior Courts consider the issue of their own competence to enforce European obligations as a matter of Irish law, their approach goes beyond the European logic but, where they consider the competence of other authorities, they fall below the European standard. It is thus possible to understand their decisions as manifesting a desire to preserve their interpretative monopoly over the effect of European obligations in the domestic legal order, and in particular reconciling the doctrine of primacy and constitutional provisions of a purely domestic nature, a balance which is at core of the notion of constitutional identity.

If one follows this line of thought, it seems possible to consider the notion of constitutional identity as the projection of a similar form of competition between the High Court and the Supreme Court. Defined as a balance between the doctrine of primacy and constitutional provisions to the benefit of the latter, the notion of constitutional identity often appears as an intaglio in the case-law of Irish courts. Due to the absolute and generous initial appraisal of the primacy principle in the domestic legal system, it could be argued that Irish precedents have constrained the courts, in order to circumvent the doctrine of primacy, to avoid the European dimension as a whole rather than explicitly affirming the formal superiority of constitutional provisions. In this regard, it seems that the cases concerning the right to life of the unborn protected by Article 40.3.3° of the Constitution are exemplary. Indeed, the willingness displayed by Irish courts to deny the relevance of European law could be interpreted as a result of an implicit decision to uphold this constitutional provision over European obligations while maintaining the coherence of their case-law.

First, in *Attorney General (Society for the Protection of Unborn Children Ireland Limited) v. Open Door Counselling Limited*,²⁴² the defendant argued that European provisions could be the basis for the legality of their non-directive information and support for pregnant women wanting to terminate their pregnancy in British clinics. However, in the High Court, Hamilton P. took the view that “the issues and facts relevant to the issue in these proceedings

²⁴¹ On this point, see *supra* at 119-122 and, for example, D. O’Keefe, “Appeals Against an Order to Refer under Article 177 of the EEC Treaty” (1984) 9 *European Law Review* 87-104 at 97 where the author comes to the conclusion that the Supreme Court was “*plus royaliste que le roi*”.

²⁴² [1988] 1 I.R. 593.

relate to the activities of the defendants, their servants or agents within this state and that, consequently, the provisions of the law of the European Communities are not applicable.”²⁴³ Read in the light of subsequent decisions of the Supreme Court, one could criticise this conclusion, which therefore appears above all as a willingness to hold the European dimension at bay.²⁴⁴

In the Supreme Court, due to a concession of the counsel for the defendant, the judges were also able to set aside the European implications of the case. As Finlay C.J. put it:

“counsel for the defendants expressly conceded that the corollary right for which they contended was confined to the obtaining of information about the availability or existence of the service and could not be extended to the obtaining of assistance to avail of or receive the service.

It follows from this unavoidable concession that the issue of European law raised in the pleadings does not arise in the case”.²⁴⁵

In conclusion, it could be argued that the Supreme Court displayed an artful reasoning,²⁴⁶ not to say stratagem, limited to the specifics of the case in order to avoid having to determine the consequences of European provisions, as protected by what is now Article 29.4.6° of the Constitution, for the right to life of the unborn.

A similar strategy to circumvent disruptive effects of European law on the domestic constitutional architecture was at stake in *Attorney General v. X*.²⁴⁷ In the High Court, Costello J. considered the consequences of the freedom to provide services – a freedom which is defined at European level and which includes the right to travel to another member states in order to receive these services.²⁴⁸ In the course of his argument, he noted that Council Directive 73/148/EEC dealing with the abolition of restrictions on movement in relation to the supply of

²⁴³ *Ibid.* at 618.

²⁴⁴ In this sense, see B. M. E. McMahon and F. Murphy, *European Community Law in Ireland* (Dublin: Butterworth (Ireland), 1989) at 301 or J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law* (Dublin: Round Hall Sweet & Maxwell, 1997) at 104.

²⁴⁵ [1988] 1 I.R. 593 at 626.

²⁴⁶ As Kingston, Whelan and Bacik, underlining the opportunism of the Supreme Court in this case, put it: “it seems likely that any equivalence between the positions of the defendants and the Court was more semantic than real”, J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law*, *op. cit.*, at fn. 247 above, at 108. In the same way, see B. M. E. McMahon and F. Murphy, *European Community Law in Ireland*, *op. cit.*, at fn. 247 above, at 301 where the authors argue that “the reasoning cannot be described as compelling because it turns on the niceties of pleading rather than on points of principle.”

²⁴⁷ [1992] 1 I.R. 1.

²⁴⁸ *Ibid.* at 13-16.

services²⁴⁹ expressly provided for in Article 8 that derogations were permitted on grounds of public policy, public security or public health. Analysing the case-law of the European Court of Justice, he concluded that member states were left with a great degree of appreciation and therefore stated that there existed “no provision or principle of Community law which would prohibit the exercise of the discretionary power to derogate in the manner contained in the Eighth Amendment.”²⁵⁰ In conclusion, this reasoning justified setting aside the specific European rights that would have been – were it not for this derogation – relevant to this case.

Nonetheless, it has to be noted that Costello J. proceeded to his own interpretation of European law in order to uphold the validity of the Irish derogation. As he put it, this was justified since he was:

“required to determine [issues relative to European law] (...) in respect of which no request to refer to the Court of Justice of the European Community under Article 177 was made”.²⁵¹

However, the preliminary reference mechanism defined in what is now Article 267 of the Treaty on the Functioning of the European Union does not leave the question of whether there should be a reference in the hands of the parties. In consequence, it seems justified to affirm that Costello J. decided not to seek the authentic opinion of the European Court of Justice in this matter and his decision was a strategy to discard the European dimension where the right to life of the unborn was concerned.²⁵²

While the High Court developed its reasoning within the opportunities opened by European law to conclude to its own exclusion, the perspective of the Supreme Court was even more protective since it favoured a domestic perspective in order to reach a similar result. Unlike the High Court, the Supreme Court does not benefit from the same discretion as to the preliminary reference mechanism. However, Finlay C.J. concluded that it was not necessary to

²⁴⁹ Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1973] O.J. L 172/14.

²⁵⁰ *Ibid.* at 15.

²⁵¹ *Ibid.* at 13.

²⁵² For an opinion as to the peculiar interpretation of European law by Costello J. in this case, see J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law*, *op. cit.*, at fn. 247 above, at 153-154.

have recourse to European law to decide the case.²⁵³ To do so, he relied on *Doyle v. An Taoiseach*²⁵⁴ where Henchy J. had that:

“a decision on a question of Community law as envisaged by Article 177 of the Treaty of Rome is not necessary to enable this Court to give judgment in this case. Just as it is generally undesirable to decide a case by bringing provisions of the Constitution into play for the purpose of invalidating an impugned law when the case may be decided without thus invoking constitutional provisions, so also, in my opinion, should Community law, which also has the paramount force and effect of constitutional provisions, not be applied save where necessary for the decision in the case.”²⁵⁵

Applying the same principle to the issue at stake Finlay C.J. determined that:

“it is consistent with the jurisprudence of the Court that there being a ground on which the case can be decided without reference to European law, but under Irish law only, that method should be employed.”²⁵⁶

Read in the light of *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*²⁵⁷ where one can understand Article 40.3.3° as participating in the Irish constitutional identity due to its ability to overcome the primacy principle enshrined in what is now Article 29.4.6° of the Constitution, *Open Door* and the *X* case can be considered as the negative of the same principle.²⁵⁸ In other words, the questionable exclusions of the European dimension are based on a previous balance arrived at regarding the benefit of the right to life of the unborn which endured into in these decisions.²⁵⁹ Therefore, one could conclude that the notion of

²⁵³ For a critical assessment questioning the reasoning of Finlay C.J. as giving “an incomplete picture of Irish law” and therefore willingly setting aside the European dimension this case might have involved, see *ibid.* at 157.

²⁵⁴ [1986] I. L. R. M. 693.

²⁵⁵ *Ibid.* at 714.

²⁵⁶ [1992] 1 I.R. 1 at 61-62. Egan J. followed the opinion of Finlay C.J. in order to avoid European law, *ibid.* at 92.

²⁵⁷ [1989] I.R. 753.

²⁵⁸ One could use in this respect the opposition made by Golding between discovery and justification, M. P. Golding, “Discovery and Justification in Legal Science” in A. Peczenik, L. Lindahl and B. van Roermund (eds.), *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science, Lund, Sweden, December 11-14, 1983* (Dordrecht: D. Reidel Publishing Company, 1984) 295-305. Regardless of the justifications used by Irish courts in these cases, it could be argued that their decisions stemmed from an *a priori* appraisal of the legitimate balance between constitutional provisions in favour of European law and Article 40.3.3° to the benefit of the right to life of the unborn.

²⁵⁹ For a similar argument as to the strategy used by supreme courts to exclude European law and the action of the European Court of Justice in certain domestic fields in order to protect their interpretative monopoly, see K. J.

constitutional identity is not limited to *Grogan* but shapes in a more general manner the attitude of Irish courts as regards the primacy of European law and its relationship with constitutional provisions.

The difference between *Open Door* and the *X* case, on the one hand, and *Grogan*, on the other, lies in the relationship displayed between the High Court and the Supreme Court. In the former two, the High Court and the Supreme Court came to the same conclusion that constitutional provisions had to overcome European rights, which justified their willingness to set aside the effect of the European dimension in these cases. In contrast, the decision of Carroll J. in the High Court to make a preliminary reference to the European Court of Justice²⁶⁰ had potential inverse effects on the Irish legal system. By doing this, she circumvented the previous decisions of the Supreme Court.²⁶¹ Giving the opportunity to the European Court of Justice to have the last word in the relationship between constitutional and European provisions to the benefit of the latter could be understood as an indirect endeavour to modify the state of law in the domestic legal order.²⁶² Indeed, the opinions expressed in the Supreme Court betrayed a criticism of this strategy on the part of the High Court in this case.²⁶³ For example, Walsh J. expressed the opinion that:

“it appears to me that the High Court judge in the present case made a fundamental error in her initial premise by assuming that there was a right vested in a pregnant woman to receive in this State information calculated to assist her in the accomplishment of her intent to terminate, either within or without this State, the protected unborn life. Such right does not exist.”²⁶⁴

Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, *op. cit.*, at fn. 6 above, at 48-49

²⁶⁰ [1989] I.R. 753 at 758.

²⁶¹ It seems possible to argue that the opposition between the High Court and the Supreme Court in *Grogan* confirm the “inter-court competition” explanation and the empowerment of lower courts in the domestic jurisdictional architecture through the primacy principle suggested by Alter, see for example K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, *op. cit.*, at fn. 6 above, at 45-52 or, by the same author, “Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration”, *op. cit.*, at fn. 6 above, 241-243.

²⁶² For a similar argument regarding the potentialities contained in European law from the domestic jurisdictions’ point of view, see W. Mattli and A.-M. Slaughter, “The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints”, *op. cit.*, at fn. 78 above, at 258 and 262-265, where the authors argue that, besides the issue of judicial review which is not primarily relevant to the Irish situation, judicial empowerment can also be seen as “the power to promote certain substantive policies” through the application of European law rather than domestic rules.

²⁶³ As to the “different sentiments” expressed by Walsh J. in *Grogan* compared to its previous statement in *Campus Oil*, see E. Fahey, *Practice and Procedure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts*, *op. cit.*, at fn. 7 above, at 101-102.

²⁶⁴ [1989] I.R. 753 at 769. Similar criticisms of the behavior of the High Court either expressed by the same judge or by McCarthy J. can also be found respectively at *ibid.* at 767-768 and 771.

In consequence, it is possible to read in a different light the conclusion reached by the Supreme Court in *Grogan*. By stating that the answer of the European Court of Justice would have to be considered according to the balance between constitutional provisions dedicated to European law and others of a purely domestic nature,²⁶⁵ the Supreme Court positively affirmed that it would keep the last word on the relationship between the European legal order and the Irish constitutional architecture. In other words, the notion of constitutional identity does not only cover the dynamics between the domestic and European levels. In the same way as this concept requires crossing the state screen in order to consider its impact on the national separation of powers, it is also the sign of a competition taking place within the judicial branch itself. Implicit when the judicial bodies address a unified discourse to the European Court of Justice, the explicit reliance by the Supreme Court on what is regarded in this thesis as the notion of constitutional identity as a balance between domestic and European norms performed in last instance by itself could be analysed as the legal device enabling it to oppose attempts made by the High Court to overcome constitutional provisions *via* the intervention of the European Court of Justice.²⁶⁶

In conclusion, even though it appears in a less acute manner in the Irish jurisdictional architecture than in the French, one could argue that the notion of constitutional identity mirrors competition for the interpretative monopoly regarding the consequences of the primacy of European law on constitutional provisions. On the one hand, one could observe the willingness displayed by Irish Superior Courts to exclude other judicial authorities from this issue. On the other, the genealogy of the notion of constitutional identity in the case-law of the Supreme Court could be seen as the concern of the highest court for imposing its authority over the High Court and preventing its circumvention *via* the European Court of Justice.

Insofar as the French legal order is concerned, the implementation of the notion of constitutional identity as it appears in case-law of the *Conseil constitutionnel* requires the collaboration of other jurisdictional authorities and in particular the *Conseil d'État* and the *Cour de cassation* for what is *in fine* an empowerment of the European Court of Justice when compared to the former state of French case-law.²⁶⁷ In contrast, in Ireland what can be

²⁶⁵ See *supra* at 265-269.

²⁶⁶ In this regard, Fahey qualified the position of Walsh J. in *Grogan* as to the decision of Carroll J. to make a preliminary reference as a “rebuke”, E. Fahey, “An Analysis of Trends and Patterns in the Irish Courts of Practice and Procedure in 30 Years of Article 234 Preliminary References” (2004) 11 *Irish Journal of European Law* 408-445 at 410.

²⁶⁷ On this empowerment, see *infra* 481-485.

characterised as the deployment of a constitutional identity approach is the very means enforced by the Supreme Court to submit the High Court to its understanding of the normative relationship between constitutional provisions and the doctrine of primacy or, in other words, to preserve its monopoly as to the substantive policies to be applied in the domestic legal order. It also involves of a more cautious attitude towards the primacy principle in comparison with the initial generous attitude of judiciary.²⁶⁸ By utilising the notion of constitutional identity it is thus possible to see moves in the Irish and French legal systems towards common ground. Away from the idiosyncrasies of each legal order, this notion which arguably animates courts' decisions both in Ireland and in France could form a new paradigm for considering the relationship between the doctrine of primacy and constitutional provisions of member states.

²⁶⁸ In this sense, see E. Fahey, *EU Law in Ireland*, *op. cit.*, at fn. 216 above, at 23.

Chapter VIII A Unity of Words with a Diversity of Meanings: The Conditions Domestically Required for an Inter-Jurisdictional Dialogue on Primacy Respectful of Member State Constitutional Identity

The self-empowerment of the judiciary in Ireland and France resulting from their application of European Union law confirms the central role played by the European Court of Justice in the conciliation between the doctrine of primacy and the supremacy of the national Constitutions. What is characterised in this thesis as the notion of constitutional identity is the sign of domestic courts' willingness to see the relationship between the doctrine of primacy and the respect for certain constitutional principles established *via* a dialogue established with the European Court of Justice.

As a speech act made in the case-law of the European Court of Justice,¹ the doctrine of primacy depends for its existence on the recognition by domestic courts. In contrast, the notion of constitutional identity as a limit which has been imposed on the European principle of primacy consists of the very refusal of this dialogue and the return of the Irish and French courts to a position of monologue. However, it could be argued that the implicit threat in the approaches of domestic courts conceals the reality of a willingness to co-operate with their European counterpart. The respect given to constitutional identity in Ireland and France aims to influence the interpretation of European rules by the European Court of Justice. In other words, the notion of constitutional identity can be seen as a renewed form of inter-jurisdictional dialogue which is essential to the existence of the doctrine of primacy. It makes possible the peaceful coexistence of the European concern for primacy and the national protection of the constitutional supremacy through what could be qualified as a unity of words with a diversity of meanings.

A. Monologues of Resistance: Envisaged Protections of the Notion of Constitutional Identity against the Doctrine of Primacy in the Irish and French Legal Orders

The notion of *Kompetenz-Kompetenz* developed by the German constitutional court has long been the rallying point of opposition to the primacy of European law on the part of

¹ On this point, see *supra* at 28-32.

member states. However, the notion of constitutional identity does not convey the same logic.² It could be argued that the relationship between the domestic and European Union legal orders in the Irish and French case-law is not structured around the issue of whether competences have been transferred to the European level. Rather than assessing whether the exercise of particular competences exercised by the European institutions has been given the support or approval of the national sovereigns, the notion of constitutional identity corresponds to the control of the application of conflicting wills of the *demos*, one in favour of the process of European integration and the other of a purely domestic nature. In this sense, it is possible to introduce of distinction between sovereignty and constitutional identity as regards the doctrine of primacy.

The latter notion, rather than involving a logic of dialogue, expresses a resistance to the primacy of European law as a form of retreat to a domestic monologue in both countries.³ However, this opposition of Irish and French courts is not express in the same manner. While one could describe the position of French courts as a form of judicial opt-out, the position of Irish courts could be analysed as a right of veto.

1. The French Affirmation of Constitutional Identity as a Form of Jurisdictional Opt-Out from the Doctrine of Primacy

The existence of the primacy principle depends on its reception by the member states in their constitutional discourse. From this point of view, the notion of constitutional identity in French law is an interpretative mechanism justifying a bar on the doctrine of primacy (as this notion is domestically defined through Article 88-1 of the Constitution) rather than a notion existing *per se*. Therefore, it is in the consequences attached to the suspension of the principle contained in Article 88-1 that the nature of the French refusal can be qualified. In the French legal system, the doctrine of primacy, as distorted through the domestic looking-glass, is defined in the French legal system as a jurisdictional immunity. This ensures that the European Court of Justice has a monopoly of the interpretation of European rules, even though they are sometimes implemented in the French legal order by norms of a formal domestic nature. Insofar as it opposes the doctrine of primacy in the name of the constitutional identity of

² On this difference between the two logics, see for example P. Craig, “The Constitutional Treaty and Sovereignty” in C. Kaddous and A. Auer, *Les principes fondamentaux de la Constitution européenne* (Geneva; Brussels; Paris: Helbing & Lichtenhahn; Bruylant; Librairie Générale de Droit et de Jurisprudence, 2006) 117-134 at 130-131.

³ In this sense, see H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Fourth edition, Oxford: Oxford University Press, 2010) at 54-58.

France, the position of the *Conseil constitutionnel* can be analysed as turning a deaf ear to the European claim of primacy and as a return to a position of monologue. This threat, the purpose of which is primarily to make the European Court of Justice accept national constitutional concerns in the European legal order,⁴ is tantamount to a form of jurisdictional opt-out.

The underlying dynamics of the notion of constitutional identity can be deduced from a comparison of the interpretations carried out by the *Conseil constitutionnel* and the *Conseil d'État* of Article 88-1. The main difference between the case-law of these two courts consists of the material distinction operated by the *Conseil constitutionnel* in the *bloc de constitutionnalité*, a distinction which its administrative counterpart refuses to recognise. The position of the *Conseil d'État* guarantees a monopoly of interpretation to the European Court of Justice subject to the condition that constitutional norms are exactly mirrored at European Union level, taking due account of the interpretation given by the European Court of Justice to principles which could nominally be common to both legal orders.⁵ This is thus a way for the administrative court to see French idiosyncrasies imposed *via* the European Court of Justice on every member states.⁶

Unlike the *Conseil d'État*, the substantive differentiation operated within the *bloc de constitutionnalité* by the *Conseil constitutionnel* bears witness to the recognition, through Article 88-1 of the Constitution, of a greater influence for rules created at European Union level on the French legal system. For instance, it entails an empowerment of the European Court of Justice in the definition of constitutional provisions, either when they are not specific or when they are not regarded as crucial to the French constitutional order. For the *Conseil constitutionnel*, in matters which are, to a greater extent than its administrative counterpart, nominally common to the European and domestic legal orders, the doctrine of primacy as constitutionally-defined ensures a monopoly of interpretation of the European Court of Justice and, in consequence, the application of European Union law principles. In these cases, the content of constitutional provisions which is similar to a rule of European Union law would be determined according to the principles existing in the European legal order.⁷ Paradoxically,

⁴ See *infra* at 485-490.

⁵ See *supra* at 412-416.

⁶ On this strategy resulting from the interpretation of Article 88-1 of the Constitution specific to the *Conseil d'État*, see the opinion of the *commissaire du gouvernement*, M. Guyomar, "Conclusions sur Conseil d'État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*" (2007) 43 *Revue trimestrielle de droit européen* 378-402 at 401. For a similar understanding of the position of the administrative court, see G. Drago, "La « guerre des juges » n'aura pas lieu" (2007) n° 14 *La Semaine juridique. Édition générale* 29-35 at 32.

⁷ For a detailed analysis of the empowerment of the European Court of Justice drawn from the new stance of the *Conseil constitutionnel* towards European Union law, see *infra* at 481-485.

upholding the constitutional identity of France fits uneasily with a presumed willingness to impose French specificities at European level. In contrast to the focus placed by the *Conseil d'État* on the need for similar content between constitutional and European norms as interpreted by the European Court of Justice, it seems that the intention of the French constitutional court rather denotes a methodological concern and a willingness to develop a new analytical framework to understand the relationships between the primacy principle and the supremacy of the Constitution. This dimension becomes more explicit when compared to the traditional position of its German counterpart as regards the relationship between constitutional rules and the doctrine of primacy.⁸

The case-law of the German Federal Constitutional Court has long been regarded as providing a paradigm regarding the relationship between constitutional norms and the primacy of European law which has been adopted by domestic courts of other member states.⁹ Even though, the recent case-law of the *Conseil constitutionnel* has often been deemed of a same nature,¹⁰ differences can be seen between the approaches of the two constitutional courts, to the point that one conclude that “the current ruling of the *Conseil* and the *Maastricht* judgment of the German *Bundesverfassungsgericht*, if placed next to each other, portray an image of two constitutional adjudicators that are poles apart.”¹¹

It could be argued that what distinguishes the German opposition to the doctrine of primacy is its dialogical nature. This opposition expressed by the Federal Constitutional Court was first seen in *Solange I*.¹² In this decision, it was held that the ability to transfer rights to European institutions, which was provided for by Article 24 of the German Constitution, was conditional on respect for other provisions of the German Constitution, and in particular to the

⁸ In this sense, the notion of constitutional identity as displayed in the case-law of the *Conseil constitutionnel* goes beyond strict French constitutional concerns. It rather corresponds to a new way of considering the normative conflicts between member states' legal orders and European Union law, as is noticeable in the use of a similar test by the German Federal Constitutional Court.

⁹ See for example the importance given to the notion of *Kompetenz-Kompetenz* in the different national reports in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998).

¹⁰ See for example, C; Richards, “The supremacy of Community law before the French Constitutional Court” (2006) 31 *European Law Review* 499-517 at 508-509, T. Georgopoulos, “Le Conseil constitutionnel face à la directive communautaire : trois destinataires pour un message ambivalent” (2004) n° 227 *Les petites affiches* 3-8 at 4 or D. Biroste, “Précisions sur les rapports entre droit constitutionnel et droit communautaire : Note sous Cons. const., déc. n° 2004-496 DC du 10 juin 2004 (Économie numérique), n° 2004-497 DC du 1er juillet 2004 (Paquet télécom), n° 2004-498 DC (Bioéthique) et n° 2004-499 DC (Protection des données personnelles) du 29 juillet 2004” (2004) *Revue de la recherche juridique - Droit prospectif* 1829-1847 at 1841-1842.

¹¹ L. Azoulay and F. Ronkes Agerbeek, “*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe” (2005) 42 *Common Market Law Review* 871-886 at 883.

¹² *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*, BVerfG, decision of 29 May 1974, 2 BvL 52/71, [1974] 2 C.M.L.R. 540.

respect for fundamental rights which is required by Article 79 (3) of the German Basic Law (also known as the “eternity clause”).¹³ Therefore, it had been impossible to transfer to the European institutions competences which would lead to an infringement of these rights and European instruments of such a nature would not be enforceable in the German legal order.

In conformity with dualist doctrine, the core of the reasoning of the *Bundesverfassungsgericht* was focused on the relationship between domestic norms,¹⁴ *i.e.*, the extent of the European Union obligations which German organs can validly receive in the domestic legal order *via* national instruments in comparison with the constitutional constraints to which they are submitted.¹⁵ However, to a certain degree, the position of the Federal Constitutional Court exceeds the strict dualist paradigm. It is possible to notice in its assessment an openness to a European dialogue, since, according to the *Bundesverfassungsgericht*, the validity of domestic norms is determined by reference to “the present state of integration of the Community”.¹⁶ Further, the “as long as”¹⁷ condition, which envisaged the possibility of European norms not being capable of having effect in the domestic legal order was a factor in the development of the protection of human rights by the European Court of Justice.¹⁸ The entwined nature of the German Federal Constitutional Court’s reasoning, focused as it was on the relationship between the national constitutional discourse, on the one hand, and the European discourse, on the other, justifies qualifying the *Bundesverfassungsgericht*’s position as dialogical rather than strictly dualist.

This characteristic was even further developed in *Bundesverfassungsgericht*’s *Treaty of Maastricht* decision¹⁹ and the introduction of the *ultra vires* test.²⁰ This reasoning rests on the

¹³ This constitutional provision makes certain amendments to the German Basic Law inadmissible, notably to Article 1 concerning human rights. This is why it is qualified as the “eternity clause”.

¹⁴ On this analysis on the German Federal Constitutional Court, and in particular in comparison to its later *Kompetenz-Kompetenz* test, see P. Gaïa, “Le contrôle de constitutionnalité des normes communautaires” in H. Gaudin (ed.), *Droit constitutionnel, droit communautaire : Vers un respect constitutionnel réciproque ?* (Paris; Aix-en-Provence : Economica; Presses universitaires d’Aix-Marseille, 2001) 39-70 at 65-66 and J. Kokott, “Report on Germany” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 77-131 at 96.

¹⁵ These points are developed at [1974] 2 C.M.L.R. 540 at 550-551.

¹⁶ *Ibid.* at 550-551.

¹⁷ *Ibid.* at 551.

¹⁸ On the judicial dialogue maintained by the German Federal Constitutional Court despite the *Solange* jurisprudence which empowered the European Court of Justice to develop, even though under its scrutiny, the protection of the human rights at the European level, see K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001) at 92-96 and 105-106 and J. Kokott, “Report on Germany”, *op. cit.*, at fn. 14 above, at 126 where the author argues that “Germany tries to influence the shape of European integration through the judiciary in the name of fundamental rights of the individual and of democracy.” For further considerations on this point, see *infra* 458.

¹⁹ *Brunner and others v. The European Union Treaty (Maastricht decision)*, BVerfG, decision of 12 October 1993, 2 BvR 2134/92 & 2159/92, [1994] 1 C.M.L.R. 57.

view that the member states are the constituent power of the Union²¹ and therefore, holding *Kompetenz-Kompetenz*, they define the competences enjoyed at European level. To use the Court's own language, member states are the "Masters of the Treaties".²² The German Federal Constitutional Court deduced (challenging, in doing so, the position taken by the European Court of Justice) that it was itself competent to determine directly whether acts drafted by European institutions exceeded the competences defined in Treaties. The sanction of *ultra vires* norms is thus dialogical since it is the result of the relationship between the constitutional and European discourses.²³ By exceeding primary law, European secondary norms would contravene the German licence provided in Treaty ratification and therefore the required German sovereign approval to the process of European integration.²⁴ This entwined nature of the reasoning is noticeable in the conclusion reached by the Federal Constitutional Court that:

"if European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany. Accordingly the Federal Constitutional Court will review legal instruments of European institutions and agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them".²⁵

In other words, it is the role of the domestic court "to assess the constitutionality of European rules, and thus the validity of European law in Germany."²⁶

In comparison, this dialogical dimension is absent from the case-law of the *Conseil constitutionnel* relating to constitutional identity. The matter only involves, strictly speaking,

²⁰ On this deepening of the dialogical logic of the German Federal Constitutional Court, see G. Beck, "The problem of *Kompetenz-Kompetenz*: a conflict between right and right in which there is no *praetor*" (2005) 30 *European Law Review* 42-67 at 52-54.

²¹ If this notion is understood in a broad sense, since the European Union has no Constitution strictly speaking.

²² [1994] 1 C.M.L.R. 57 at 91.

²³ This is reinforced by the stress put on the co-operation between the Federal Constitutional Court and the European Court of Justice, *ibid.* at 79.

²⁴ On these points, and in particular the difference with the principle at stake in *Solange I*, see J. Kokott, "Report on Germany", *op. cit.*, at fn. 14 above, at 95-96.

²⁵ [1994] 1 C.M.L.R. 57 at 89.

²⁶ K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, *op. cit.*, at fn. 18 above, at 64. It is true that the German Federal Constitutional Court affirmed that the European Court of Justice was the only court competent to decide on the validity of European rules ([1974] 2 C.M.L.R. 540 at 549), while the domestic courts could only assess their applicability in the national legal order. However, the same author regards this distinction as a "mere euphemism", *ibid.* at 91.

constitutional provisions, *viz.*, the balance having to be reached between Article 88-1, which is dedicated to European matters, on the one hand, and competing constitutional demands, on the other. In contrast to the “fundamental conditions of the exercising of national sovereignty”²⁷ (the test used by the *Conseil constitutionnel* under Article 54 to determine whether European treaties are compatible with the Constitution or whether a constitutional amendment is necessary before their ratification²⁸) the notion of constitutional identity does not concern the competences transferred to the European level. In consequence, the notion of constitutional identity can constitute an obstacle to European instruments which have been drafted in perfect accord with competences the European institutions actually possess. Conversely, the balance created between Article 88-1 and other constitutional provisions does not preclude the application in the domestic legal order of European rules which, from a domestic perspective, could appear as adopted in excess of the competences actually transferred at European level.²⁹ This reduced consideration for the substantive division of competences between national and European institutions concomitantly to the new test of constitutional identity introduced in the case-law of the *Conseil constitutionnel* is noticeable in its *Treaty establishing a Constitution for Europe* decision.³⁰ As has been seen,³¹ through a very constructive interpretation of the relationship between the Treaty establishing a Constitution for Europe and the Constitution, notably on sensitive issues such as the secular nature of the state or the potential existence of collective rights, the French constitutional court has concluded rather questionably that there was compatibility between the two legal instruments.

The case-law of the *Conseil constitutionnel* on European primacy law can thus be regarded as “delivering a discharge to a growing number of transfers of competences and pertaining to more and more essential fields”.³² This could also be interpreted as the *Conseil constitutionnel* accepting the dynamics of the process of European integration and the consequent intertwined nature of the domestic and European legal orders, and going beyond the issue of the substantive distribution of competences between the two legal spheres – a

²⁷ See for example CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 9.

²⁸ See *supra* at 184-186.

²⁹ For a contrary opinion making of the distribution of competences the cornerstone of the relationship between the European and domestic legal orders, see for example F. Hervouët, “Les relations entre ordre juridique communautaire et ordres juridiques nationaux : De la primauté à la sphère de compétence” in *Le droit administratif : Permanences et convergences : Mélanges en l’honneur de Jean-François Lachaume* (Paris: Dalloz, 2007) 649-665, in particular at 663-665.

³⁰ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173.

³¹ See *supra* at 240-241 and *supra* at 308-309.

³² P. Gaïa, “Le contrôle de constitutionnalité des normes communautaires”, *op. cit.*, at fn. 14 above, at 54 (translation by the author).

concern which is central to the *Kompetenz-Kompetenz* paradigm. In considering the new logic introduced by the notion of constitutional identity, Gaïa concludes that:³³

“it (...) unfortunately overlooks respect for the fundamental conditions of the exercising of national sovereignty even when such sovereignty would be affected by an ‘overstepping’ of the terms of the constituent authorisation organising the transfers of competences and realising, in this respect, an excess of Community powers.”³⁴

If the German and French positions lead to the same result in practice, the review carried out by the *Conseil constitutionnel* does not involve norms of a different nature but rather is limited to the balance between two constitutional provisions. The control carried out by the *Conseil constitutionnel* is primarily focused on the determination of the relevant jurisdictional competence, and subsequently the norms, domestic or European, which have to be applied, rather than on the direct consideration of the validity of European Union norms. In this respect, it does not infringe the competences of its European counterpart as to the interpretation of the *vires* of European rules.³⁵ This was explicitly affirmed as early as 2004 at the occasion of its first interpretation of Article 88-1 where the *Conseil constitutionnel* stated that:

“it is incumbent on the Community court alone, if need be by being asked for a preliminary ruling, to check that a Community Directive respects both the competences defined in the Treaties and the fundamental rights guaranteed by Article 6 of the Treaty on the European Union”.³⁶

³³ Even though one does not necessarily have to consider it as a drawback.

³⁴ P. Gaïa, “Le Conseil constitutionnel et l’Europe” in *Renouveau du droit constitutionnel : Mélanges en l’honneur de Louis Favoreu* (Paris: Dalloz, 2007) 1279-1290 at 1289 (translation by the author).

³⁵ On this refusal of the *Conseil constitutionnel* to import the case-law of its German counterpart and its decision to leave the question of the *vires* of the directives to the monopoly of the European Court of justice, see J. Roux, “Le Conseil constitutionnel, le droit communautaire dérivé et la Constitution” (2004) *Revue du droit public et de la science politique en France et à l’étranger* 912-933 at 919-920 or J. H. Reestman, “*Conseil constitutionnel* on the Status of (Secondary) Community Law in the French Internal Order. Decision of 10 June 2004, 2004-496 DC” (2005) 1 *European Constitutional Law Review* 302-317 at 311-312.

³⁶ CC, Decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 7 (translation by the author). This formula has been repeated, for example, in CC, decision n° 2004-497 DC on the *Act pertaining to electronic communications and services of audiovisual communication* of 1 July 2004, *Rec.* 107 at para. 18, CC, decision n° 2004-498 DC on the *Act on bioethics* of 29 July 2004, *Rec.* 122 at para. 4 and CC, decision n° 2004-499 DC on the *Act relating to the protection of physical persons regarding the treatment of personal data* of 29 July 2004, *Rec.* 126 at para. 7. The same principle was repeated in CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 18, CC, decision n° 2010-79 QPC, *M. Kamel D.* of 17 December 2010,

Accordingly, the opposition to the primacy principle involved in the notion of constitutional identity is not the consequence of an assessment of the relationship between the national and European Union legal orders in terms of their respective competences. Strictly speaking, the legal issue is limited to the balance between different constitutional provisions and holding one to overcome Article 88-1 would mean only the end of the enforcement of European obligations in the domestic legal order.³⁷ Deploying the notion of constitutional identity against the application of European law consists of putting an end to the jurisdictional monopoly of the European Court of Justice that the *Conseil constitutionnel* deduced from Article 88-1 of the Constitution, and conversely to the limitation by the *Conseil constitutionnel* on its own role.³⁸ Were Article 88-1 of the French Constitution to be outweighed by another constitutional provision in the balancing exercise which is characteristic of constitutional interpretation, Article 88-1 would no longer constitute a bar on the competence of domestic courts. By restoring a formal perspective, the deployment of constitutional identity entails considering the legal situation according to domestic rules alone and is tantamount to defining the opposition to the doctrine of primacy as a return to a monologue based purely on domestic constitutional language. In conclusion, the legal situation at stake is expurgated of its European dimension and considered under a purely domestic prism. This leads one to conclude that the limit put by the *Conseil constitutionnel* on the primacy of European norms in the name of a norm inherent in the constitutional identity of France is a form of jurisdictional opt-out. In other words, the notion of constitutional identity involves the possibility for French courts to determine when the domestic legal order should be exempted from the obligations resulting otherwise from its general participation in the common European legal framework.

In this regard, it seems that the German case-law itself confirms the different logics at play between its former position defined in terms of *Kompetenz-Kompetenz* and the constitutional identity paradigm. In considering the Treaty of Lisbon,³⁹ the *Bundesverfassungsgericht* had recourse to its traditional case-law structured by the *Kompetenz-Kompetenz* principle.⁴⁰ However, alongside this principle, the Court also introduced a new

Rec. 406 at para. 3 or CC, decision n° 2011-631 DC on the *Act pertaining to immigration, integration and citizenship* of 9 June 2011 (unreported).

³⁷ In this sense, see X. Magnon, “La QPC face au droit de l’Union : la brute, les bons et le truand” (2010) n° 84 *Revue française de droit constitutionnel* 761-791 at 788.

³⁸ See *supra* at 231-231 on the fact that the jurisdictional monopoly of the European Court of Justice resulting from Article 88-1 of the French Constitution consists of a limitation the French constitutional court puts on its own role.

³⁹ *Gauweiler v. The Treaty of Lisbon* (Lisbon decision), BVerfG, decision of 30 June 2009, 2 BvE 2/08. Available at <http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html> [Last accessed 29 December 2012].

⁴⁰ *Ibid.* at para. 240-241.

“identity test”⁴¹ according to which, using similar reasoning to that developed by the *Conseil constitutionnel*,⁴² it was held to be the duty of the Court “to preserve the inviolable core content of the Basic Law’s constitutional identity by means of an identity review”.⁴³ For the most part, it refers to the “eternity clause” of Article 79 (3) of the German Basic Law⁴⁴ which put certain matters out of the reach of the constituent power. In this sense, the definition of German identity appears as different to the Irish and French ones, being defined in essentialist terms. However, it could also be argued that the permanence in the definition of identity as sameness involves a similar self-determination to that noticeable in Irish and French case-law but consisting of the continuous repetition of the same features.⁴⁵

For present purposes, it is the comparison between this identity test and the traditional doctrine of *Kompetenz-Kompetenz* which is more meaningful.⁴⁶ The reference to an identity contained in the Constitution is not new in the German case-law. In contrast, it punctuated the different stages of its decision on European law. For example, in *Solange I* the Court referred to “the basic structure of the Constitution, which forms the basis of its identity” or to “the identity of the valid constitution of the Federal Republic of Germany”.⁴⁷ However, in contrast to its former case-law, this new identity test is developed in parallel to the question of the competences enjoyed by European institutions, the latter issue being still governed by the *ultra vires* test. It seems that two conclusions can be drawn from the introduction of this latter test.

First, the occurrence of the expression “constitutional identity” is not a decisive factor. It is rather the use the courts make of the concept which is relevant. In this instance, the identity test and the *ultra vires* test answer to two different purposes. The new approach underlined a

⁴¹ *Ibid.* at para. 240-241.

⁴² In this respect, it has to be noted that the notion of constitutional identity as used by the German Federal Constitutional Court is a control of the exercise of the competences transferred to European institutions with regard to crucial constitutional provisions in a similar fashion as the interpretation of Article 88-1 by the *Conseil constitutionnel*. On this point, see for example D. Doukas, “The verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not guilty, but don’t do it again!” (2009) 34 *European Law Review* 866-888 at 877-878.

⁴³ *Ibid.* at para. 240. On this development contained in the *Treaty of Lisbon* decision, see M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)* (Paris: Economica, 2010) at 339-340.

⁴⁴ On this point, J. Ziller, “The German Constitutional Court’s Friendliness towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon” (2010) 16 *European Public Law* 53-73 at 68.

⁴⁵ In this sense, Ricœur points out that sameness does not exist *per se* but consists of a reflexive understanding of identity constantly defining itself according to the same criteria, P. Ricœur, *Soi-même comme un autre* (Paris: Éditions du Seuil, coll. Points. Essais, 1996) at 146. For further development on this point, see *supra* at 9-10.

⁴⁶ For a comparison between the two test, *viz.*, the *ultra vires* and the identity tests, used by the German Federal Constitutional Court since its *Treaty of Lisbon* decision, see F. Schorkopf, “The European Union as An Association of Sovereign States: Karlsruhe’s Ruling on the Treaty of Lisbon” (2009) 10 *German Law Journal* 1219-1240 at 1230-1233.

⁴⁷ [1974] 2 C.M.L.R. 540 at 550. In the *Treaty of Maastricht* decision, the German Federal Constitutional Court also affirmed that “the national identities of the member-States are to be preserved”, [1994] 1 C.M.L.R. 57 at 106. However, related to the principle of subsidiarity, it is once again the question of the distribution of competences between the domestic and the European levels which is the centre of the argument.

perceived need to control European Union law to an extent going beyond the issue of the distribution of competences and to ensure in the concrete application of the European rules that German core constitutional values are not contravened by otherwise *intra vires* European rules.⁴⁸ Furthermore, in comparison with its former case-law, the identity test introduced by the *Treaty of Lisbon* decision does not display the same constructive jurisdictional co-operation but rather constitutes a retreat into a monologue based on constitutional law alone.⁴⁹

Secondly, the specificities of the identity test become more explicit when compared to the previous test focused on the distribution of competences between the European legal order and the member states. In reflecting on what it regarded to be the necessary protection of sovereign statehood and the democratic legitimacy provided to it in the European legal framework, the Karlsruhe Court identified five competences which had necessarily to remain in the national bosom.⁵⁰ However, this list is the result of a negative definition and corresponds to areas which have not already been included in European law-making powers, which raised heavy criticisms.⁵¹ In particular, the control over currency is not listed as one of the competences which belong by essence to member states. One could thus doubt the relevance, in “the present state of integration of the Community”, of such a distribution of competences as the appropriate criterion to arbitrate between the primacy of European Union law and sovereign constitutional supremacy.⁵²

In this light the introduction of an identity test in the German case-law can be seen as creating the necessity to consider the normative relationship between the domestic and European legal orders under a new paradigm when compared to the previous *Kompetenz-*

⁴⁸ On this point, see for example D. Grimm, “Defending Sovereign Statehood against Transforming the European Union into a State” (2009) 5 *European Constitutional Law Review* 353-373 at 361. In this regard and unlike the *Solange* jurisprudence, the constitutional identity test aims to protect specific constitutional principles rather than ensuring a general protection of human rights at the European level, see D. Doukas, “The verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not guilty, but don’t do it again!”, *op. cit.*, at fn. 42 above, at 877.

⁴⁹ On this new logic adopted by the German Federal Constitutional Court, see C. Schönberger, “*Lisbon* in Karlsruhe: *Maastricht’s* Epigones at Sea” (2009) 10 *German Law Journal* 1201-1218 at 1216 where the author suggests that “the Court withdraws into a purely defensive position and gives up any ambition to positively shape the European Union.” For a similar opinion, see J. Ziller, “The German Constitutional Court’s Friendliness towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon”, *op. cit.*, at fn. 44 above, at 72.

⁵⁰ *Gauweiler v. The Treaty of Lisbon* (*Lisbon* decision), BVerfG, decision of 30 June 2009, 2 BvE 2/08 at para. 244-272, in particular at para. 252. Available at <http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html> [Last accessed 29 December 2012].

⁵¹ Halberstam and Möllers argues that “what the Court deems to be protected are merely the leftovers of European integration recycled as necessary elements of state sovereignty. A more devastating bankruptcy of a solipsistic theory of the state is hard to imagine”, D. Halberstam and C. Möllers, “The German Constitutional Court says “*Ja zu Deutschland!*”” (2009) 10 *German Law Journal* 1241-1257 at 1251.

⁵² In this sense, see C. Schönberger, “*Lisbon* in Karlsruhe: *Maastricht’s* Epigones at Sea”, *op. cit.*, at fn. 49 above, at 1209-1210 where the author points out that the position of the Court depends on “political contingency”. See also D. Halberstam and C. Möllers, “The German Constitutional Court says “*Ja zu Deutschland!*””, *op. cit.*, at fn. 51 above, at 1249-1251.

Kompetenz logic. It can and has been argued that it results from a transfer of the notion developed by the *Conseil constitutionnel*.⁵³ If this is really so, it confirms that the effect of the case-law of the French constitutional court exceeds the mere protection of French constitutional provisions and increases its profile in the European Union by providing a new analytical framework to structure the relationship between the doctrine of primacy and constitutional norms in the face of the latest developments of European integration.⁵⁴

Due to their intertwined nature of national and European Union law and the growing scope of European Union law, one could argue that distinguishing state and European substantive competences – and their transfer from one to the other – is less relevant insofar as concerns the opposition to the doctrine of primacy. As has been seen,⁵⁵ the traditional test used by the *Conseil constitutionnel* as regards the deepening of the process of European integration consists of protecting the “fundamental conditions of the exercising of national sovereignty”, in particular with regard to competences transferred to the European Union in fields that are “inherent in the exercising of national sovereignty”.⁵⁶ If “fundamental conditions of the exercising of national sovereignty” are considered from a material perspective as referring to a finite number of competences, the ongoing process of European integration and the constant transfers of competences it involves will exhaust this notion and make of prior national democratic approval a mere token.⁵⁷

In contrast, the notion of constitutional identity takes full account of the principle of European integration, *i.e.*, the sovereign approval to the participation in the integrated legal order. In this sense, it follows the logic present in Article 88-1 of the Constitution which does not refer to transferred competences but affirms that “the Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common”.⁵⁸ From this, the *Conseil constitutionnel* deduced that “the constituent

⁵³ For a similar interpretation of the German Federal Constitutional Court’s *Treaty of Lisbon* decision, see J. Ziller, “The German Constitutional Court’s Friendliness towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon”, *op. cit.*, at fn. 44 above, at 68.

⁵⁴ For an illustration of this jurisdictional strategy based on the decision of the German Federal Constitutional Court, see F. Schorkopf, “The European Union as An Association of Sovereign States: Karlsruhe’s Ruling on the Treaty of Lisbon”, *op. cit.*, at fn. 46 above, at 1239. For a similar interpretation of European dynamics, see the opinion of Denham and Burke arguing that “the time is now ripe for Constitutional Courts of Member States to enter upon a more sustained dialogue with each other and thus by their debate develop and further the fabric of EU law”, S. Denham and G. Burke, “Annual Brian Walsh Memorial Lecture: Constitutional Courts and the Lisbon Treaty” (2009) 16 *Irish Journal of European Law* 93-130 at 93.

⁵⁵ See *supra* at 184-186.

⁵⁶ See for example CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 9 and 18.

⁵⁷ In this sense, see C. Blummann and L. Dubouis put it in *Droit institutionnel de l’Union européenne* (Third edition, Paris: Litec, 2007) at 604.

⁵⁸ On this difference of logics, see F. Luchaire, “Un concept inutile : « la souveraineté »” in *Renouveau du droit constitutionnel : Mélanges en l’honneur de Louis Favoreu* (Paris: Dalloz, 2007) 789-793 at 792.

power thus recognised the existence of a Community legal order integrated into domestic law”.⁵⁹ In comparison with the *Kompetenz-Kompetenz* paradigm, the domestic and European legal orders are not opposed and are considered as connected vessels governed by the democratic approval to transfers of competences from the national sphere to the European level. Assuming rather than challenging this state of affairs, the notion of constitutional identity enables domestic courts to control the consequences of the process of European integration and, notwithstanding the competences actually transferred or not, to tame its harmful effects on what is regarded as constitutive features of the domestic legal order by returning to a monologue ensuring the prevalence a purely domestic expression of the sovereign when necessary.

This domestic monologue resulting from the protection of the constitutional identity of France is confirmed *a contrario* by the specific reflections provided *obiter dictum* by the European Court of Justice on the mechanism of priority preliminary rulings on the issue of constitutionality (newly introduced in the French Constitution by Article 61-1⁶⁰) where acts implementing European law are at stake.⁶¹ In this case, the control of conventionality (*i.e.*, of compliance with European Union law) and the control of constitutionality (*i.e.*, of compliance with the Constitution) are not parallel but rather address the same issue. While the rule implementing a European rule is formally a domestic norm, it is “transparent”,⁶² in the sense that it has the same content as the European instrument. Controlling the domestic norm for constitutionality is thus materially controlling the conformity of European law with the Constitution. However, the control of validity of the normative creation by European institutions is a competence reserved to the European Court of Justice, a control the purpose of which is to assess the conformity of European secondary rules with primary law.

The European Court of Justice hinted at the compatibility of the new French jurisdictional procedure of priority preliminary rulings on the issue of constitutionality with the European Union legal order as long as it allowed the control for compliance with European Union legal requirements⁶³ (and in particular for the exercise of such compliance control to take place concomitantly with the domestic constitutionality checking mechanism via the

⁵⁹ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 11 or CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para. 7.

⁶⁰ For a description of this new mechanism, see *supra* at 355-362.

⁶¹ Joined Cases C-188-189/10 *Melki and Abdeli* [2010] E.C.R. I-5667.

⁶² X. Magnon, “La QPC face au droit de l’Union : la brute, les bons et le truand”, *op. cit.*, at fn. 37 above, at 788 (translation by the author).

⁶³ As regards the decision of the European court of Justice in situations other than ones involving the implementation of European rules, see *supra* at 421.

exercise of the preliminary reference procedure provided for by Article 267 of the Treaty on the Functioning of the European Union). However, its answer was more circumspect and restrictive about the particular legal situation of a domestic norm implementing a European rule. In the eyes of the European Court of Justice, the new jurisdictional mechanism introduced in the French Constitution through July 2008 amendment could impede its control as to the validity of European Union law. This harmful consequence was expressed in the following terms:

“to the extent that the priority nature of an interlocutory procedure for the review of constitutionality leads to the repeal of a national law – which merely transposes the mandatory provisions of a European Union directive – on the basis that that law is contrary to the national constitution, the Court could, in practice, be denied the possibility, at the request of the courts ruling on the substance of cases in the Member State concerned, of reviewing the validity of that directive in relation to the same grounds relating to the requirements of primary law, and in particular the rights recognised by the Charter of Fundamental Rights of the European Union, to which Article 6 TEU accords the same legal value as that accorded to the Treaties.”⁶⁴

In consequence, and in contrast to the allegedly priority nature of the domestic procedure, the European Court of Justice held that, where acts implementing European Union law were concerned, then national courts against whose decisions there was no appeal were under the obligation to make first a preliminary reference under Article 267 of the Treaty on the Functioning of the European Union and could not trigger the new domestic mechanism empowering the *Conseil constitutionnel* before the decision of the European Court of Justice on the validity of the impugned European instrument. In this case, the European Court thus took the view that its control “takes priority”⁶⁵ over the control exercised by the *Conseil constitutionnel*. This is so to protect the monopoly of interpretation of the Court of Justice. However, it could be argued that this reasoning on the part of the European Court is of limited

⁶⁴ Joined Cases C-188-189/10 *Melki and Abdeli* [2010] E.C.R. I-5667 at para. 55. Incidentally, the reference to the new European instrument on human rights confirms the necessity faced by France to change the test formerly used for the compatibility between the Constitution and European Union law. The introduction of the notion of constitutional identity is the sign of a modification of the nature of potential conflicts between the domestic constitutional architecture and European norms. Their multiplication, due to the greater level of integration as well as their focus on the interpretation of similar rights, explains the willingness of the *Conseil constitutionnel* to consider their normative relationship through a new and more suitable paradigm. On these points, see *supra* at 342-346.

⁶⁵ On the description of the priority of the preliminary reference, [2010] E.C.R. I-5667 at para. 56.

application. It is not certain that the decision of European Court of Justice can only be explained by the affirmation of its exclusive competence as to the validity of the norms belonging to its legal order.⁶⁶

First, even though the European court reaffirmed its monopoly as to the appraisal of the validity of European rules,⁶⁷ it would not thwart the indirect control of constitutionality of the European instrument. Indeed, if the directive is found valid according to European Union law, nothing would then prevent the courts of the *ordres judiciaire* and *administratif* from addressing an interlocutory procedure for review for constitutionality in the aftermath of the decision of the European Court of Justice and to challenge the act of implementation due to its contravention with a constitutional provision forming part of the identity of France. In reliance on the position of the *Conseil d'État* as to the consequences regarding Article 88-1,⁶⁸ the enforcement of an interpretative monopoly of the European Court of Justice depends on the equivalence of the material content of constitutional and European provisions. Where such equivalence exists, then if a directive is found valid by the European Court of Justice, interlocutory review for constitutionality is irrelevant.⁶⁹ However, it could be argued that potential conflicts between national constitutional and European Union legal orders do not merely involve comparing principles but also involve the question of how these principles are interpreted. Therefore the postulated equivalence is never definitive. The *Grogan* case provides a good example of this, since, beyond the opposition between the constitutional right to life of the unborn and the European Union freedom to provide services, the resolution of this normative conflict was the result of the interpretation given by Irish domestic courts and the European Court of Justice of the norms belonging to their respective legal order.⁷⁰ The *Conseil d'État* may thus reject the interpretation provided by the European Court of Justice if it differs from its initial assessment as to the similarity between the constitutional and European principles.⁷¹ Therefore, the *Conseil d'État* may consider that a reference to the *Conseil constitutionnel* is still needed in order to

⁶⁶ On this affirmation by the European Court of Justice of its exclusive competence as regards the validity of European rules, see for example X. Magnon, "La QPC face au droit de l'Union : la brute, les bons et le truand", *op. cit.*, at fn. 37 above, at 788.

⁶⁷ [2010] E.C.R. I-5667 at para. 54.

⁶⁸ For the interpretation of the consequences attached by the *Conseil d'État* to Article 88-1 and their discrepancies with the point of view of the *Conseil constitutionnel*, see *supra* at 410-416.

⁶⁹ For such an opinion, see F. Donnat, "La Cour de justice et la QPC : chronique d'un arrêt prévisible et imprévu" (2010) *Recueil Dalloz* 1640-1647 at 1646.

⁷⁰ On this case involving an interpretative exchange in Ireland between the High Court and the Supreme Court as well as the European Court of Justice, see *infra* at 474-480.

⁷¹ To put matters another way, the *Conseil d'État* only grants a monopoly to the European Court of Justice if the European principle mirrors the French one. Therefore, if the European Court of Justice provides an interpretation of European Union law which do not correspond with this initial assessment, the *Conseil d'État* could consider that it is still necessary to have the constitutional principle prevail. For a similar consideration in the German context, see J. Ziller, "The German Constitutional Court's Friendliness towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon", *op. cit.*, at fn. 44 above, at 72.

ensure the supremacy of the Constitution.⁷² Above all, the decision of the European Court of Justice only concerns the mechanism of priority preliminary rulings on the issue of constitutionality, *i.e.*, the control carried out by the *Conseil constitutionnel* after the promulgation of a statute. In consequence, the ruling of the European Court of Justice cannot prevent the indirect control of the conformity of European Union law with the Constitution which is involved in the control of constitutionality exercised by the *Conseil constitutionnel* prior to promulgation under Article 61 of the French Constitution. Indeed, the European Court of Justice has ruled that, when the conformity with the national Constitution of a national legislative provision implementing a European rule is challenged during ordinary proceedings, that question of constitutionality cannot be decided in advance of the decision by the European Court of Justice as to the validity of the European rule with regard to the European legal order.

It seems possible to suggest a hypothesis explaining the special attention accorded by the European Court of Justice to the relationship between preliminary references, the priority preliminary rulings on the issue of constitutionality and statutes implementing European norms. The European Court of Justice set in place the conditions under which the continuation of the judicial dialogue is possible⁷³ by preventing preliminary references under Article 267 of the Treaty on the Functioning of the European Union from being impaired by the rulings of the *Conseil constitutionnel* on the validity of domestic norm which has a European law substantive content. This ensures that the European Court of Justice has the possibility of expressing its opinion as to the validity of European secondary rules and therefore to participate in the dialogue on potential conflicts between European law and constitutional values.

This interpretation seems congruent with two other points regarding the ruling made by the European Court of Justice. First, its attitude towards the mechanism of priority preliminary rulings on the issue of constitutionality when it concerns acts of implementation is surprisingly strict given the general trend of its decision whereby a smooth interpretation of its former case-law regarding the co-operation with domestic courts was provided in order to receive the French constitutional perspective on the new jurisdictional mechanism at European level. In particular, the affirmation that domestic courts could take provisional measures in order to prevent violations of European rules rather than have to effect the immediate enforcement of European

⁷² A similar situation would arise from the implementation of European directives *via* decree for which the *Conseil d'État* is competent to control their validity. It would involve the same kind of reasoning while entailing the assessment of the European Court of Justice's decision by the administrative court alone rather than giving rise to a priority preliminary ruling on the issue of constitutionality.

⁷³ For a similar interpretation of the decision of the European Court of Justice ensuring the validity of the mechanism of priority preliminary rulings on the issue of constitutionality through the maintaining of a jurisdictional dialogue, see F. Chaltiel, "La Cour de justice de l'Union européenne poursuit le dialogue sur les rapports entre conventionnalité et constitutionnalité (A propos de CJUE, 22 juin 2010)" (2010) n° 153-154 *Les petites affiches* 6-13 at 12-13.

obligations can be considered as an inflexion of its *Simmenthal* case-law.⁷⁴ Secondly, the reasoning of the European Court of Justice is not as absolute as it may appear. Its opinion was made “as a rule” and was followed immediately by an exception. Acting as a second filter in the new domestic procedure which can be initiated by lower courts, the *Conseil d’État* and the *Cour de cassation* are entrusted with the role of actually referring the question of constitutionality to the *Conseil constitutionnel*. It is on them that the obligation to make a preliminary reference under Article 267 of the Treaty on the Functioning of the European Union bears prior to this referral. However, this obligation will disappear if the lower court which initiated the interlocutory procedure for review for constitutionality has already made a preliminary reference to the European Court of Justice.⁷⁵ Moreover, for the European Court of Justice, “imposing a strict time-limit on the examination by the national courts cannot prevent the reference for a preliminary ruling on the validity of the directive in question.”⁷⁶ This statement is an implicit criticism of the case-law of the *Conseil constitutionnel* which relied on this consideration to justify its impossibility to establish a direct dialogue with its European counterpart.⁷⁷ In both instances, either positively or negatively, it seems that maintaining a jurisdictional exchange between the domestic and European levels is the main concern of the European Court of Justice.

It could thus be argued that, in the same way as the notion of constitutional identity is an invitation addressed to the European Court of Justice,⁷⁸ the opinion expressed by the European Court of Justice could in turn be read as a call to its French counterparts to maintain the ability of the European Court of Justice to have a word on points of contention between the two legal orders, if necessary by accommodating domestic preoccupations within the language of European Union law.⁷⁹ It also unveils the threat constituted by the notion of constitutional identity, *viz.*, the withdrawal of domestic courts into a constitutional monologue. In this respect, the exchange about this new domestic mechanism, and more generally as to the relationship

⁷⁴ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] E.C.R. 629. For further development of this point, see *infra* at 491.

⁷⁵ [2010] E.C.R. I-5667 at para. 56. On this point, see X. Magnon, “La QPC face au droit de l’Union : la brute, les bons et le truand”, *op. cit.*, at fn. 37 above, at 788.

⁷⁶ *Ibid.* at para. 56.

⁷⁷ See for example CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 18, a decision which considered explicitly the relationship between the mechanism of priority rulings on the issue of constitutionality and the mechanism of preliminary reference to the European Court of Justice.

⁷⁸ See *infra* at 485-490.

⁷⁹ It has to be reminded that, in this instance, a modification of the *Simmenthal* principles can be noticed in order to accommodate the decision of the *Conseil constitutionnel* on the validity of the priority preliminary rulings on the issue of constitutionality, see *infra* at 491.

between the courts under the identity paradigm, is a proof, as Labayle put it, that “in jurisdictional matter, collaboration cannot be imposed by decree, it is built.”⁸⁰

In conclusion, in the tension between the two legal orders, the notion of constitutional identity acts as a centripetal force which encases the protection of the essence of the French legal regime under the domestic prism alone. As a result of the dialogical position which is noticeable in former decisions of the German Federal Constitutional Court, the prevalence of constitutional supremacy over the primacy principle ultimately influenced the European Court of Justice in developing the protection of human rights at European level. This entailed granting a *de facto Kompetenz-Kompetenz* to the European Court of Justice.⁸¹ In contrast, the notion of constitutional identity could be regarded as a new paradigm relative to the normative conflicts between European Union law and domestic Constitutions. In this sense, it is different from opposing a sovereignty located in the member states to a European legal order which is deprived of its own. Rather than being focused on the required democratic approval to the transfer of new competences to the European institutions, the notion of constitutional identity takes into account the irreversible nature of the process of European integration. Beyond an issue of distribution of competences between the domestic and European levels, it is focused on the balancing between two sovereign wills, one in favour of the compliance to European Union law and the other of a purely domestic nature. In consequence, it appears that what is asked of the European Court of Justice through the notion of constitutional identity is the recognition of an exception from common rules in certain crucial areas, *i.e.*, the ability of France to revert to a position of monologue. In other words, while from the traditional German perspective the primacy principle is recognised so long as European law expands, in the French case, the primacy principle will be recognised as long as its development tolerates differentiation and releases its grasp on constitutional elements France considers of a crucial importance. The notion of constitutional identity is focused on the application of European instruments in the domestic legal system and is justified, unlike the *ultra vires* test, by an argument whereby the validity of European instruments according to the standards of European law is ignored. The

⁸⁰ H. Labayle, “Question prioritaire de constitutionnalité et question préjudicielle : ordonner le dialogue des juges ?” (2010) *Revue française de droit administratif* 659-677 at 660 (translation by the author). The author also notes that the European Court of Justice found a conciliatory solution through interpretation, *ibid.* at 674.

⁸¹ For a similar opinion, see U. Elbers and N. Urban, “The Order of the German Federal Constitutional Court of 7 June 2000 and the Kompetenz-Kompetenz in the European Judicial System” (2001) 7 *European Public Law* 21-32 at 32. See also J. Temple Lang, “The Development of European Community Constitutional Law” (1991) 13 *Dublin University Law Journal* 36-54 at 40 where the author argues that the European protection of human rights is instrumental to the doctrine of primacy.

position deduced by the *Conseil constitutionnel* from the protection of rules and principles inherent in the constitutional identity of France is tantamount to a form of jurisdictional opt-out - an exemption, in other words, from the obligations stemming from the European Union legal order to which France participates.

2. *The Irish Veto on European Union Norms through the Protection of Constitutional Identity*

*Society for the Protection of Unborn Children (Ireland) Limited v. Grogan*⁸² is once again central in the determination of the consequences onto the judicial relationship between domestic and European courts of limits put on the doctrine of primacy in the name of Irish constitutional identity. The conclusion reached by the Supreme Court that the application of what is now European Union law might be discarded to protect the right to life of the unborn provided for by Article 40.3.3° of the Constitution seems to have involved involve the same implicit threat as the one expressed by the *Conseil constitutionnel*, viz., that of a return the domestic monologue. However, it has been argued⁸³ that the Supreme Court initiated an argument similar to the *ultra vires* test which structured the decision of the German Federal Constitutional Court on the *Treaty of Maastricht* a few years later.⁸⁴ The decision of the German Court was decisively based on the relationship between domestic and European Union law when it stated that:

“if European institutions or agencies were to treat or develop the Union Treaty in the form that is the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany”.⁸⁵

At first sight, in the *Grogan* decision, the same relationship between the Constitution and European Union law seems to be absent, however. As in the French case, the opposition to the doctrine of primacy has involved only considerations of constitutional law – something which justifies qualifying the Irish position as a form of monologue. This result could be deduced from the reasoning of Walsh and McCarthy JJ. when they affirmed that the claim to primacy could be defeated as a result of the balance between its constitutional recognition and

⁸² [1989] I.R. 753.

⁸³ See J. Casey, *Constitutional Law in Ireland* (Third edition, Dublin: Round Hall Sweet & Maxwell, 2000) at 214 where it is argued that “the [German Federal Constitutional Court] court issued an unmistakable warning against such expansive interpretation [of the European Treaties], in language reminiscent of -though much more pointed than - that used in *S.P.U.C. (Ireland) Ltd. v. Grogan*”.

⁸⁴ *Brunner and others v. The European Union Treaty (Maastricht decision)*, BVerfG, decision of 12 October 1993, 2 BvR 2134/92 & 2159/92, [1994] 1 C.M.L.R. 57.

⁸⁵ *Ibid.* at 89.

other constitutional provisions to the benefit of the latter, framing the issue at stake in the domestic prism.⁸⁶

However, other points expressed by Walsh J. could be interpreted as bringing the Irish stance on the relationships between the domestic and European legal orders closer to the dialogical jurisprudence characteristic of the German Federal Constitutional Court. For instance, he affirmed that “any answer to the reference received from the Court of Justice of the European Communities will have to be considered in the light of our own constitutional provisions.”⁸⁷ More particularly, as regards the preliminary reference made by the High Court to the European Court of Justice in this case, he came to the conclusion that:

“the fact that particular activities even grossly immoral ones, may be permitted to a greater or lesser extent in some member states does not mean that they are considered to be within the objectives of the treaties of the European Communities, particularly the Treaty of Rome, which is the treaty of the European Economic Community. *A fortiori* it cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right.”⁸⁸

First, the concern for the protection of human rights in the face of European law is reminiscent of the decision of the German Federal Constitutional Court in *Solange I*.⁸⁹ Secondly, one could draw a parallel between the notions of “objectives of the European Communities” on the one hand and of competences enjoyed by the European institutions on the other hand, the latter being central to the position of the German Court. Questioning the applicability of European norms in the Irish legal when they are created in excess of the European objectives could appear as the application of a principle similar to the *Kompetenz-Kompetenz* logic of the German Federal Constitutional Court in its *Treaty of Maastricht*

⁸⁶ [1989] I.R. 753 respectively 768-769 and 770, Walsh J. took the view that “the 8th Amendment of the Constitution is subsequent in time, by several years, to the amendment of Article 29. That fact may give rise to the consideration of the question of whether or not the 8th Amendment itself qualifies the amendment to Article 29.”

⁸⁷ *Ibid.* at 768.

⁸⁸ *Ibid.* at 769.

⁸⁹ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*, BVerfG, decision of 29 May 1974, 2 BvL 52/71, [1974] 2 C.M.L.R. 540. These developments will be focused on points that are of particular interest when compared to the Irish case-law. For further analysis of the traditional case-law of the German Federal Constitutional Court, see *supra* at 438-441.

decision with, in consequence, the inapplicability of European norms due to their *ultra vires* nature.

Nonetheless, even though the positions of Irish and German both involve questioning the validity of European rules,⁹⁰ it could still be suggested that they are the result of two opposite arguments. The principle enunciated in *Solange I* rested on the impossibility for an act of ratification to transfer competences to the European institutions which would result in the immutable values of the German Basic Law enunciated by its Article 79 (3) (also known as the “eternity clause” being brought into question.⁹¹ The *ultra vires* doctrine constituted an extension of this principle through the direct assessment of European norms and their respect for the competences defined in the European treaties as transferred *via* the domestic act of accession.⁹² In other words, the position of the German court is characterised by its dialogical nature. When compared to this reasoning, a closer analysis of the Irish case-law reveals, in contrast, a monologue opposed to the primacy principle.

The reference by the Irish Supreme Court to the objectives of what was then the European Communities in *Grogan* represented the enforcement of the principle enunciated in *Crotty v. An Taoiseach*.⁹³ When the Supreme Court had to consider the validity of the ratification of the Single European Act according to the licence to join the process of European integration provided for by what is now Article 29.4.5° of the Constitution, it held that no constitutional amendment was required as long as the development of European integration fell in the objectives of the European legal order conceived as a “developing organism”.⁹⁴ The reasoning used by Irish judges, and especially of Barrington J. in the High Court, was close to the principle expressed in *Solange I*, where the application of European rules in the domestic legal order was indirectly linked to the validity of the act of reception to the Constitution. He prospectively claimed that the validity of the European Communities (Amendment) Act 1986, ensuring the reception of European Union in the domestic legal order according to the dualist paradigm, depended on the licence to join the process of European integration provided for by what is now Article 29.4.5° of the Constitution. In consequence, if this licence was to be exceeded, the legislative instrument would be deprived of validity, entailing the inapplicability of European norms in Ireland.⁹⁵ It could therefore be argued that the argument in *Crotty* displayed

⁹⁰ On the use of the notion of constitutional identity by Irish courts as a form of right of veto, see *infra* at 460-466.

⁹¹ On this point, see *supra* at 438-439.

⁹² On these points, see for example, J. Kokott, “Report on Germany”, *op. cit.*, at fn. 14 above, 95-96.

⁹³ [1987] I.R. 713.

⁹⁴ *Ibid.* at 770. For further considerations on *Crotty*, see *supra* at 193-198, and more particularly in relation with the notion of constitutional identity, *supra* at 254-261.

⁹⁵ *Ibid.* at 759.

a dialogical dimension where the decision on the validity of the domestic instrument depended on its relationship with constitutional provisions, themselves understood according to a teleological interpretation of European law.

In this regard, *Grogan* could be regarded as the development of the reasoning in *Crotty*, following a path similar to that displayed in the German case-law when the *Bundesverfassungsgericht* introduced the *ultra vires* test. The opinion of Walsh J. according to which “it cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right”⁹⁶ could be interpreted as the application in reverse of the “essential scope or objectives” test (*i.e.*, applied to the assessment of the European norm rather than the domestic act of reception). The validity of the European law would be questioned when it exceeded the objectives of what is now the European Union as defined by member states conceived as “Masters of the Treaties”,⁹⁷ or in other words when their interpretation by the European Court of Justice exceeded what domestic courts assume as the people’s approval of the process of European integration.

However, the teleological interpretation adopted in *Crotty* tends to play down the importance of the relationship between the actual approval of the people and the competences enjoyed at European level. In particular, this “essential scope or objectives” test seem to be the very opposite to the requirement of certainty,⁹⁸ an element which is central in the *ultra vires* test of the German Federal Constitutional Court.⁹⁹ In contrast, this “essential scope or objectives” test relies on an assessment of the potentialities included in the European Treaties. In consequence, the extent of the licence to join provided for by what is now Article 29.4.5° is determined from the perspective of European law *per se* rather than depending on the dialogical relationship between the two legal orders.¹⁰⁰ It seems that the same logic is at stake in *Grogan*. Consideration of the link between the Irish people’s approval and the extent of the competences enjoyed by European institutions is scarcely noticeable in the opinion of Walsh J.

⁹⁶ [1989] I.R. 753 at 769.

⁹⁷ [1994] 1 C.M.L.R. 57 at 91.

⁹⁸ On this lack of certainty, see G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence” (2009) 5 *European Constitutional Law Review* 32-70 at 42-43.

⁹⁹ *Brunner and others v. The European Union Treaty* (Maastricht decision), BVerfG, decision of 12 October 1993, 2 BvR 2134/92 & 2159/92, [1994] 1 C.M.L.R. 57 at 89 where it is argued that “what is decisive is that Germany’s membership and the rights and duties that follow therefrom (and especially the immediately binding legal effect within the national sphere of the Communities’ actions) have been defined in the Treaty so as to be predictable for the legislature and are enacted by it in the Act of Accession with sufficient certainty.”

¹⁰⁰ For further analysis on this point, see *supra* at 204-206.

a considerations being given to the link between the Irish people's approval and the extent of the competences enjoyed by European institutions,¹⁰¹ a point which is central in the argument of the German Federal Constitutional Court. Decisively, the affirmation that the applicability of *ultra vires* rules in the German legal order could be suspended for "constitutional reasons"¹⁰² is absent from the decision in *Grogan*. In comparison with the position of its German counterpart, the opinion of the Supreme Court in *Grogan* is deprived of the same dialogical nature and relies only on "the objectives of the European Communities", *i.e.*, on European law interpreted according to its own logic.¹⁰³

Moreover, while the *Kompetenz-Kompetenz* paradigm has long been the prevalent paradigm for domestic opposition to the primacy principle in member states of what is now the European Union, the German Federal Constitutional Court, at the same time, has insisted on the need for a relationship between the domestic and European courts, even though it might have been described as "a thorny co-operation relationship of a happily divorced couple",¹⁰⁴ which is for the European point of view essential to the existence of the primacy of European law.¹⁰⁵ In this respect, the *Solange I* jurisprudence implicitly invited the European Court of Justice to endow the European legal order with a protection of human rights in exchange of its subsequent submission to the primacy principle. The European Court of Justice quickly made explicit its willingness to provide for such protection at European Union level, notably in *Nold*.¹⁰⁶ Due to this development in the case-law of the European Court of Justice, the German Federal Constitutional Court, in its *Solange II* decision,¹⁰⁷ renounced its review of European secondary law by reference to the German Constitution,¹⁰⁸ ensuring the monopoly of its European counterpart as to the determination of the validity of European rules.¹⁰⁹ In the same way, the *Bundesverfassungsgericht's Treaty of Maastricht* decision stressed the necessity of co-

¹⁰¹ [1989] I.R. 753 at 769.

¹⁰² *Brunner and others v. The European Union Treaty (Maastricht decision)*, BVerfG, decision of 12 October 1993, 2 BvR 2134/92 & 2159/92, [1994] 1 C.M.L.R. 57 at 89.

¹⁰³ However, for a contrary opinion, see J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law* (Dublin: Round Hall Sweet & Maxwell, 1997) at 115-116 or G. W. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary* (London: Sweet & Maxwell, 1995) at 136-137.

¹⁰⁴ D. Doukas, "The verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not guilty, but don't do it again!", *op. cit.*, at fn. 42 above, at 868.

¹⁰⁵ On this importance of jurisdictional co-operation in the German case-law, see J. Kokott, "Report on Germany", *op. cit.*, at fn. 14 above, at 84-86 and 108-110.

¹⁰⁶ Case 4/73 *Nold v. Commission* [1974] E.C.R. 491.

¹⁰⁷ *Re Wünsche Handelsgesellschaft (Solange II)*, BVerfG, decision of 22 October 1986, 2 BvR 197/83, 73 BVerfGE 339, [1987] 3 C.M.L.R. 225.

¹⁰⁸ *Ibid.* at 265.

¹⁰⁹ In this sense, see for example K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, *op. cit.*, at fn. 18 above, at 95-97 or J. Kokott, "Report on Germany", *op. cit.*, at fn. 14 above, at 87-91.

operation between the two jurisdictional levels.¹¹⁰ In contrast, it could be argued that collaboration between Irish courts and the European Court of Justice is limited.¹¹¹ In particular, as Fahey has pointed out,¹¹² since *Grogan*, no preliminary reference has occurred which could have led to endangering constitutional provisions of importance, *viz.*, when norms forming part of the constitutional identity of Ireland may be involved.¹¹³ In this respect *Grogan* strengthened a trend already present in domestic case-law whereby the European dimension, when endangering core constitutional values, is excluded by Irish courts.¹¹⁴

In conclusion, as in the case of France and unlike the *Kompetenz-Kompetenz* paradigm at play in the German case-law, the recourse to the notion of constitutional mechanism in Ireland opposes a monologue to the doctrine of primacy.¹¹⁵ In particular, the issue of the consequences of European rules for the domestic constitutional architecture seems to prevail over the question whether competences claimed by European institutions have actually being transferred by the Irish people.

More particularly, according the decision in *Crotty*, it could be argued that the freedom to provide services was lawfully exercised at European level despite the provided for right to life of the unborn provided in Article 40.3.3° of the Constitution. The decision in *Grogan* could therefore be interpreted as a withdrawal of European competences.¹¹⁶ However, the “essential scope or objectives” test could also be regarded as a form of discharge given to European primary law allowing European competences to expand beyond the explicit approval of the

¹¹⁰ [1994] 1 C.M.L.R. 57 at 79 and 82.

¹¹¹ On the general decline of the number of preliminary references and therefore the lesser conciliatory attitude of Irish courts towards the primacy principle, see E. Fahey, *Practice and Procedure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts* (Dublin: First Law, 2007), in particular at 114. There is thus a striking contrast with the attitude of German courts, see K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, *op. cit.*, at fn. 18 above, at 68-70.

¹¹² See E. Fahey, *Practice and Procedure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts*, *op. cit.*, at fn. 111 above, at 31-32, even though the author points out that there is no empirical evidence permitting the establishment of any direct link between the outcome of the *Grogan* decision and the decrease in the number of preliminary references. However, it could be argued that the concomitance between the recent decrease of the liberal attitude towards use of the preliminary reference mechanism, which is essential to the primacy principle, and the increased consideration given to constitutional provisions and more generally to a domestic perspective on the issue of the relationship between the Irish and the European legal orders in recent decisions of Irish courts is not insignificant. On this increase of the domestic perspective, see *supra* at 208-214.

¹¹³ In this respect, the case-law of the Supreme Court is thus opposite to the conclusion reached by Kokott as to the position of the German Federal Constitutional Court when she affirmed that “the Federal Constitutional Court tries to establish a co-operative relationship with the ECJ to arrive at a division of competences between the two courts in order to preserve what is regarded as fundamental to the political system of Germany”, see J. Kokott, “Report on Germany”, *op. cit.*, at fn. 14 above, at 110.

¹¹⁴ For further developments on this judicial strategy, see *supra* at 428-431.

¹¹⁵ From the decrease in the judicial dialogue with the European Court of Justice, one can, *a contrario*, deduce an increase of the domestic monologue, see E. Fahey, “An Analysis of Trends and Patterns in the Irish Courts of Practice and Procedure in 30 Years of Article 234 Preliminary References” (2004) 11 *Irish Journal of European Law* 408-445 at 429.

¹¹⁶ See *supra* at 330-331.

Irish people,¹¹⁷ an approach recently displayed in the case-law of the *Conseil constitutionnel*.¹¹⁸ In this regard, *Grogan* could be interpreted as not being primarily focused on competences transferred to European institutions. In contrast, as in the French case, the notion of constitutional identity does not concern the principle of the process of European integration but its consequences. In other words, *Grogan* questioned above all the use of certain competences that European institutions claim to enjoy. A sign of this is that the possibility for the right to life of the unborn to thwart constitutional provisions dedicated to European law in the name of constitutional identity is not established *ab initio* but is conditioned by the interpretation of the Treaties provided by the European Court of Justice.¹¹⁹ A similar logic seems to be at play in the recent decision of the Supreme Court on the Treaty establishing the European Stability Mechanism. When compared to the very strict decision on the ratification of Title III of the Single European Act in *Crotty*, the decision in *Pringle*¹²⁰ bears witness to a more empathetic interpretation of the process of European integration.¹²¹ It can be argued that the latter decision is the sign that the participation of Ireland in it is an accepted fact and that it is within, rather than against, the European legal order that Irish sovereign is exercised and have to be protected.¹²²

A similar trend can be observed in other decisions of the Irish and French courts, *viz.*, a growing realisation that the normative conflict between the doctrine of primacy and constitutional provisions can not be resolved through the distribution of a finite number of competences between the national and European levels. The notion of constitutional identity displays a different logic relative to the relationship between the two legal orders which consists of balancing two sovereign expressions of the Irish people and of retreating to a domestic monologue when the impact of European law on the Irish constitutional architecture is considered inadmissible by the domestic courts.

However, when compared to the French position where the notion of constitutional identity corresponds to a form a jurisdictional opt-out, this notion rather leads to a right of veto in the Irish case-law. The two arguments advanced by Walsh J., *viz.*, the balancing between the

¹¹⁷ In this sense, see B. M. E. McMahon and F. Murphy, *European Community Law in Ireland* (Dublin: Butterworth (Ireland), 1989) at 267.

¹¹⁸ See *supra* at 441-442.

¹¹⁹ [1989] I.R. 753 at 768.

¹²⁰ *Pringle v. The Government of Ireland and others* [2012] I.E.S.C. 47.

¹²¹ For an interpretation of *Pringle* in this sense, see *supra* at 281-284.

¹²² In this sense, see [2012] I.E.S.C. 47 *per* Denham C.J., O'Donnell, McKechnie and Clarke JJ. respectively at para. 17. xii, 20, 18 and 8.13.

eighth and the third amendments on the one hand and the objectives of the European Communities as they were then on the other hand, referred to constitutional and European law but, in contrast to the case-law of the German Federal Constitutional Court, their existence was disjunctive and constitutive of two monologues. In appearance, this duality of discourses distinguishes the Irish case-law from the position of the *Conseil constitutionnel* which consists of a purely domestic monologue. However, behind this duality, it is actually possible to notice a common domestic point of view which engulfs the constitutional and European logics.

While in the case-law of the *Conseil constitutionnel* the European legal order is defined as being “integrated into the domestic legal order”, it could be said that the decisions of Irish courts reflect a normative architecture whereby the two legal orders are merged. In other words and in contrast to its French counterpart, the implementation of the notion of constitutional identity in the case-law of Irish courts displays a centrifugal or holist perspective. Indeed, the validity of European instruments is assessed within the internal European logic itself and it is from the European perspective that Walsh J. concluded that European law could not challenge the protection of human rights in member states, without considering the issue of transfers of competences in this matter¹²³ - unlike the position of the German Federal Constitutional Court.

Similarly, for the German Federal Constitutional Court, the consequence of the control attached to the *vires* of the European instruments is the determination of their applicability within the domestic legal order. Even though one can doubt whether there is a difference between this notion and the notion of validity,¹²⁴ it could be argued that it bears witness to the willingness of the German Federal Court to insist on the subjective nature of its judgement as based on the specific German democratic approval to the process of European integration. In contrast, the decision in *Grogan* is expressed, as an objective assessment of the validity of European law, resulting in a monologue whereby Irish courts act as authentic interpreters of the European norms.¹²⁵ In this regard, Walsh J.’s very conclusion is nonetheless, when reflecting on the preliminary reference by the High Court as to the existence of a European right to receive

¹²³ In this sense, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Round Hall Sweet & Maxwell: Dublin, 1997) at 337-338.

¹²⁴ See K. J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, *op. cit.*, at fn. 18 above, at 91 where the author argues that, while the German Federal Constitutional Court affirmed that the European Court of Justice was the only one competent to decide on the validity of European rules, the ability of domestic courts to assess their applicability in the national legal order, makes of this distinction a “mere euphemism.”

¹²⁵ In this sense, see the conclusion reached by Fahey, E. Fahey, “An Analysis of Trends and Patterns in the Irish Courts of Practice and Procedure in 30 Years of Article 234 Preliminary References”, *op. cit.*, at fn. 115 above, at 445.

information, that objectively, *i.e.*, from the European perspective itself, “such a right does not exist.”¹²⁶

A literal consideration of domestic norms necessary for the reception of European law shows that, arguably, they do not alter the European nature of the norms applied in the Irish legal system. According to section 2 of the European Communities Act 1972 (as amended), European Union law is received in the domestic legal order “under the conditions laid down in the treaties governing the European Union”. Further, the immunity provided for by Article 29.4.6° of the Constitution provides that “no provision (...) prevents laws enacted, acts done or measures adopted by [European institutions] from having the force of law in the State”, which indicates that their validity springs from outside the domestic legal order.¹²⁷ In consequence, based on a literal interpretation, one could agree with the opinion expressed by Carroll J. in the High Court in *Tate v. Minister for Social Welfare Ireland*¹²⁸ according to which:

“this section is the conduit pipe through which community law became part of domestic law (...). But community law did not thereby become constitutional law or statute law. It is still community law governed by community law but with domestic effect. And it is in that form that it is part of domestic law.”¹²⁹

However, from the Supreme Court’s point of view, as in *Campus Oil Limited v. Minister for Industry*,¹³⁰ questions concerning the application of European rules in the domestic legal order are often seen “as a matter of Irish law”.¹³¹ Therefore, rather than involving two parallel monologues in the face of the doctrine of primacy, one based on purely constitutional law arguments (as in the case of the French courts) and the other relying on the interpretation of European Union law from its own logic by the Irish courts (as when Walsh J. argues in *Grogan* that it cannot be one objective of what is now the European Union to question the protection of human rights in their member states), the Irish judicial understanding of the normative relationship between the domestic and European legal orders seems to indicate a confusion of perspectives whereby the national and European points of view are merged. This justifies the competence of the Irish judiciary to assess the validity *per se* of European norms.

¹²⁶ [1989] I.R. 753 at 769.

¹²⁷ In this sense, see for example D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 123 above, at 349-352.

¹²⁸ [1995] 1 I.R. 418.

¹²⁹ *Ibid.* at 437.

¹³⁰ [1983] I.R. 82.

¹³¹ *Ibid.* at 87. For further developments on this normative transformation, see *supra* at 119-122.

To be convinced of this confusion, the role of constitutional adjudicator entrusted to the European Court of Justice by Irish courts in the judicial dialogue between the domestic and European levels is of particular relevance. It seems that it was such a logic that was at stake in *McCauley Chemists (Blackpool) Limited v. Pharmaceutical Society of Ireland*.¹³² This case concerned the implementation in the Irish legal order of a Directive concerning the mutual recognition of pharmaceutical diplomas.¹³³ The particular contention related to Article 2, which stated that:

“Member States need not give effect to the diplomas, certificates and other formal certificates referred to in paragraph 1 with respect to the establishment of new pharmacies open to the public.”

The implementation of this European instrument having been made through a statutory instrument¹³⁴ amending the Pharmacy Act 1962, it was once again the balance between Article 15.2.1° of the Constitution reserving the legislative power to the Oireachtas and the “necessitated” clause contained in Article 29.4.6° that was at stake. In the High Court,¹³⁵ applying the relevant case-law, McCracken J. concluded that the statutory instrument benefitted from the constitutional immunity provided for by the latter constitutional provision. The decision was appealed and the Supreme Court decided to make a preliminary reference¹³⁶ in order to determine if the expression “need not” contained in Article 2 of the Directive left a discretion to member states in the implementation of the European instrument. The decision to refer the issue to the European Court is open to criticism. In relation to the modalities of implementation of the directives, it tackled a purely domestic constitutional issue, the jurisdictional competence of which comes within the prerogative of domestic courts. In this regard, it has to be noted that the Supreme Court, especially in *Meagher v. Minister for Agriculture*¹³⁷ or in *Maher v. Minister for Agriculture*,¹³⁸ had no difficulty in settling this difficulty

¹³² *McCauley Chemists (Blackpool) Limited v. Pharmaceutical Society of Ireland* [2008] 1 I.R. 16 (High Court); unreported, Supreme Court, 11 May 2005.

¹³³ Council Directive 85/433/EEC of 16 September 1985 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy [1985] O.J. L 253/37.

¹³⁴ European Communities (Recognition of Qualifications in Pharmacy) Regulations 1991 (S.I. No 330 of 1991).
¹³⁵ [2008] 1 I.R. 16 at 23-34.

¹³⁶ Unreported, Supreme Court, 11 May 2005.

¹³⁷ [1994] 1 I.R. 329.

¹³⁸ [2001] 2 I.R. 139.

and in deciding that the mere fact that European rules left a certain leeway to a member state did not preclude the implementation of European rules by statutory instruments.¹³⁹

In conclusion, rather than reintroducing a dialogical interaction, *McCauley* confirms in contrast the existence of confusion over what constitute, respectively, domestic and European issues. It can be argued that the reference to the European Court of Justice did not so much involve the appreciation of European law difficulties but constituted its instrumentalisation by the Supreme Court in order to decide a domestic issue.¹⁴⁰ As Fahey concludes in relation to *McCauley*:

“at a European level the criticism may be made that the Supreme Court effectively burdened the Court of Justice with domestic matters of statutory interpretation and constitutional considerations that it does not wish to resolve itself.”¹⁴¹

In the light of this decision, the options offered in *Grogan* are not fundamentally different but could rather be seen as two formulations of the same domestic perspective where the constitutional and European logics are encompassed in the raising of the notion of constitutional identity as a limit to the primacy principle. In this regard, while the position of the Irish courts is similar to the French one, *viz.*, involving a monologue, they can still be distinguished according to the nature of the warning that their monologues address to the European Court of Justice if elements forming part of their respective constitutional identity are not taken into account at European level.

The position of the *Conseil constitutionnel*, ignoring as it does the issue of *Kompetenz-Kompetenz*, is tantamount to a retreat within a pure constitutional discourse which can be qualified as a form of judicial opt-out. It could be argued that the Irish case-law also rejects the *Kompetenz-Kompetenz* paradigm but, in contrast, Irish courts cross the boundary between the two legal orders and engulf in the same domestic perspective the constitutional and European issues. In consequence, if Ireland has two Constitutions,¹⁴² they have nonetheless only one judge, with the Irish judiciary acting as their common authentic interpreter.

¹³⁹ For a more detailed analysis of these cases, see *supra* at 206-214.

¹⁴⁰ In this regard, the situation is different from the empowerment of the European Court of Justice entailed by the case-law of the *Conseil constitutionnel*, see *infra* at 481-485. In the French instance, it consists of leaving to the European Court of Justice the interpretation of principles which have a material equivalent in the constitutional order. In contrast, the reference made to the European Court of Justice in *McCauley* concerned norms of a strict domestic nature.

¹⁴¹ E. Fahey, “*McCauley Chemists*: The Supreme Court Invokes Article 234 EC to Resolve the ‘Necessitated’ Question” (2006) 28 Dublin University Law Journal 401-408 at 408.

¹⁴² See *supra* at 365-372.

The French use of the notion of constitutional identity is tantamount to a jurisdictional opt-out involving an exemption from European obligations for certain constitutional principles, without challenging their validity from the point of view of European Union law and therefore their applicability in other member states.¹⁴³ In contrast, the decision in *Grogan* indicates that it is the valid existence of European rules which is contested by the Irish judiciary. This leads to the use by Irish courts of dynamics which are characteristic of the notion of constitutional identity by Irish courts as a form of veto right.

Irish and French courts, through the use of the notion of constitutional identity, balance two sovereign expressions of equal value. In doing so, they ensure that the European share the Irish and French legal selfhoods have in common does not overcome crucial constitutional features by enforcing a legal monologue, in the sense that the notion of constitutional identity is the result of a return to a purely domestic discourse based on the Constitution alone and the exclusion of a potential European dimension. However the strength of these monologues varies between the two member states and the Irish right of veto is a much more powerful threat addressed to European institutions than the judicial opt-out displayed by the French constitutional court since it would not merely prevent the application of European rules in the domestic legal order but challenge objectively, *i.e.*, for the entire European Union, the validity of this rules. The difference in the approaches of the Irish and French courts can certainly be explained by legal factors, for example their different conception of the domestic sovereign, which constitutes in both instances the cornerstone of the opposition to the doctrine of primacy. The Irish understanding of sovereignty as a political fact favours seeing the expression of the Irish people as the source of validity of any rule, empowering the Irish courts to decide on the validity of any instrument which the Irish people have subscribed to, either domestic or European. In the same vein, the definition of the primacy principle in Ireland and France forms part of the protection of their respective constitutional identities. Defined in terms of jurisdictional immunity, the French approach reserves a central role to the European Court of Justice when crucial constitutional provisions are not endangered. In contrast, the constitutional immunity provided by the Irish Constitution does not have the same consequences for the judicial dialogue and is more inclined to leave the question of the normative relationship to the domestic courts alone.¹⁴⁴

¹⁴³ In this sense, see E. Glaser, “Réflexions sur la décision *Arcelor*” in *Le dialogue des juges : Mélanges en l’honneur de Bruno Genevois* (Paris: Dalloz, 2009) 473-493 at 484.

¹⁴⁴ It can certainly be said that European law shaped Irish identity, see for example B. Laffan and J. O’Mahony, *Ireland and the European Union* (Basingstoke: Palgrave Macmillan, 2008) at 255-257. However, it is from a domestic perspective or, to put it differently, through the use of European law by Irish courts, even though sometimes willing to involve the European Court of Justice, rather than through a genuine European intervention.

However, this difference might also be dependent on the respective position of Ireland and France in Europe. Ireland can be described as “a small State in a large Union”.¹⁴⁵ It is therefore possible to formulate the hypothesis according to which its stricter case-law is linked to its less influential status in the European decision-making process.¹⁴⁶ As shown by Weiler, the degree of recognition of the primacy principle by domestic courts is directly linked to the powers of the member states in the decision-making at European level.¹⁴⁷ The position of Ireland being less favourable, this would justify the necessity for Irish courts to formulate a stronger limit to the doctrine of primacy in order to protect their constitutional identity.¹⁴⁸ This explanation relies on a political analysis rather than a strictly legal one. However, it could be argued that recent developments in the legal architecture of the European Union reinforce this logic. In the light of the development of intergovernmental dynamics as well as the extension of qualified majority voting¹⁴⁹ Irish courts might be inclined to deepen and formalise a constitutional identity - the principles of which are, however, already present both in the text of the Constitution and in the Irish case-law, as a threat opposed to the doctrine of primacy.¹⁵⁰ This would confirm Irish opposition to the primacy of European Union law in the name of its constitutional identity as a form of judicial Luxembourg compromise.

In conclusion, bearing in mind that the existence of the doctrine of primacy is dependent on its recognition by domestic courts, the Irish and French positions are similar. In both cases, the approaches of their courts in terms of constitutional identity can be distinguished

¹⁴⁵ On this point and its consequences, see *ibid.* at 243-263.

¹⁴⁶ Incidentally, under a similar logic, Article 16.4 of the Treaty on European Union relative to the qualified majority voting mentions that a blocking minority must include at least four states to prevent a too great influence of large states. On this point, see M. Dougan, “The Treaty of Lisbon 2007: Winning Minds, not Hearts” (2008) 45 *Common Market Law Review* 617-703 at 631.

¹⁴⁷ See J. H. H. Weiler, “The Community System: the Dual Character of Supranationalism” (1981) 1 *Yearbook of European Law* 267-306, in particular at 271-273.

¹⁴⁸ On the impact of Irish political weight on its attitude towards the process of European integration, see for example B. Laffan, “The political process” in P. Keatinge (ed.), *Ireland and EC Membership Evaluated* (London: Pinter Publishers, 1991) 197-205 at 198-199.

¹⁴⁹ On the impact of these elements on the Irish position in the European Union, see B. Laffan and J. O’Mahony, *Ireland and the European Union, op. cit.*, at fn. 144 above, at 248-250. It has to be noted that the decision of the Supreme Court on the Treaty establishing the European Stability Mechanism in *Pringle* pointed towards unanimity as a condition for its constitutionally valid ratification, see *Pringle v. The Government of Ireland and others* [2012] I.E.S.C. 47 for example *per* Denham C.J. and Clarke J. respectively at 17. ix and 5.14-5.15. This renewed consideration for unanimity notably differ from the decisions of the Supreme Court in *Crotty* where it was held that “neither the proposed changes from unanimity to qualified majority bring these proposed amendments outside the scope of the authorisation contained in Article 29, s. 4, sub-s. 3 of the Constitution”, *Crotty v. An Taoiseach* [1987] I.R. 713 at 770.

¹⁵⁰ On the importance of the empowerment of domestic courts due to the development of qualified majority voting, see J. H. H. Weiler and U. R. Haltern, “Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz” in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds.), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford: Hart Publishing, 1998) 331-364 at 362.

from an opposition between a domestic legal order embodying sovereignty and a legal European orders which requires democratic approval in the form of an explicit authorisation of the *demos* to the transfer of powers to European institutions. In other words, it could be argued that the notion of constitutional identity which structures the reasoning of Irish and French in European matters is a new *Kompetenz-Kompetenz*, a new paradigm relative to the conciliation between the primacy of European law and the supremacy of the Constitution. The European legal order is not so much opposed to the domestic one but rather the two are conceived as being integrated, taking full account of the sovereign approval to the process of European integration. The notion of constitutional identity mirrors the fact that European Union law, *i.e.*, what they have in common, structures the Irish and French legal orders. Therefore, this notion does not represent a sovereignty which is opposed to European Union law but rather, assuming the principle of the process of European integration, it is focused on its consequences in the domestic legal order.

The notion of constitutional identity as seen in the Irish and French legal orders does not correspond to an essentialist definition. In consequence, the relationship between the domestic and European legal orders structured by this notion also escapes a substantive logic. Indeed, as regards the opposition to the doctrine of primacy, ongoing process of European integration makes questionable the relevance of a distribution of a finite set of competences between the European and domestic levels and their constant transfer from the latter to the former. As de Búrca points it out the development of what is now European Union law and of its primacy necessarily affects the notion of sovereignty.¹⁵¹ In this regard, the opposition to the primacy principle on the basis of the notion of constitutional identity reflects this evolution, where the latter concept appears as being “the auxiliary of sovereignty.”¹⁵² The similar position of the Irish and French courts consists of assessing the relationship between two sovereign expressions and of determining when the common European discourse has to yield to a domestic monologue expressive of their constitutional identity.¹⁵³ In other words, the notion of constitutional identity represents the willingness of the Irish and French courts to keep the last

¹⁵¹ See example G. de Búrca, “Sovereignty and the Supremacy Doctrine of the European Court of Justice” in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 449-460 at 458.

¹⁵² M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, *op. cit.*, at fn. 43 above, at 321 (translation by the author).

¹⁵³ On this distinction between the notions of sovereignty and identity, see T. Daups, “Limites et virtualités du respect de l’identité nationale des États membres par l’Union européenne” (2005) n° 71 *Les petites affiches* 7-14 at 7-9.

words as to the relationship between the European and domestic legal orders and therefore to retain a power of self-determination.¹⁵⁴

This confirms that the notion of constitutional identity is autonomous from the determination of a certain content defined *ab initio* as necessarily out of the reach of European Union law but rather constitutes a form of discourse. More concerned with the exercised of European competences than the valid existence of these competences themselves, the notion of constitutional identity does not put an irrevocable bar on the doctrine of primacy. These monologues disclose a relationship between the Irish and French domestic legal orders, on the one hand, and European Union law, on the other, which can be seen as a jurisdictional cold war in which a juridical arms race leads to a peaceful coexistence between their respective existential principles,¹⁵⁵ *viz.*, the primacy of European Union law and the supremacy of the Constitution.

Recently, while the European Court of Justice has developed threatening doctrines pointed at the member states by affirming their liability in respect of the actions of their courts,¹⁵⁶ this has gone hand-in-hand with greater consideration for principles they deem essential to national constitutional architecture.¹⁵⁷ The notion of constitutional identity plays a similar role. Its purpose is not so much to oppose primacy at daggers drawn but to constrain the interpretative activity of the European Court of Justice in a sense that would make the consequences of the European case-law on primacy compatible with what Ireland and France regard as crucial constitutional norms (when European rules are applied in the Irish and French domestic legal order).

¹⁵⁴ In this sense, see M. Póitres Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 501-537 at 526.

¹⁵⁵ For a similar argument, see J. Rossetto, "Ordre constitutionnel interne et droit communautaire : L'impossible hiérarchie" in *Le droit administratif : Permanences et convergences : Mélanges en l'honneur de Jean-François Lachaume* (Paris: Dalloz, 2007) 889-910 at 904-906.

¹⁵⁶ Case C-224/01, *Gerhard Köbler v. Austria* [2003] E.C.R. I-10239.

¹⁵⁷ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. For further considerations on this decision, see *infra* at 495-497.

B. Unity of Words with a Diversity of Meanings: The Modalities of a Peaceful Dialogue on the Doctrine of Primacy from a Constitutional Identity Perspective

In the recent case-law of the *Conseil constitutionnel*, the affirmation of the necessary protection of the French constitutional identity is concomitant with the empowerment of the European Court of Justice. The two phenomena indicate that the notion of constitutional identity is the condition set by the French constitutional court for its recognition of an increased competence of the European Court of Justice, and subsequently a greater impact of the doctrine of primacy. Its case-law on Article 88-1 is thus a way of establishing a form of jurisdictional dialogue. However, this jurisdictional dialogue takes place outside the preliminary reference mechanism now provided for by Article 267 of the Treaty on the Functioning of the European Union. As will be seen, this is a way for the *Conseil constitutionnel* to constrain the European Court of Justice to take into consideration French constitutional concerns in its interpretation of European rules.

While the willingness to participate in the empowerment of the European Court of Justice is less evident in the case-law of Irish courts, it is still possible to notice a similar pattern. The recognition of the primacy doctrine depends on the consideration given by the European Court of Justice to Irish specific concerns, guaranteeing that even though the arguments of the national and European courts may differ they lead to a similar result, thereby preserving the Irish constitutional architecture. In this sense, the notion of constitutional identity can be seen as an invitation to have a unity of words with a diversity of meanings,¹⁵⁸ *i.e.*, respectively upholding the primacy of European Union law and ensuring the supremacy of crucial constitutional provisions.

1. Irish Courts Setting the Conditions of the Enforcement of a Primacy of European Union Law Aligned with the Protection of the Notion of Constitutional Identity

To a certain extent, the notion of constitutional identity, conceived as a way to influence the interpretation of European norms makes more explicit trends that are already present in the

¹⁵⁸ For a similar interpretation, see N. Scandamis, “Le rapprochement des notions au sein de l’Union européenne : agir à la limite du juridique et du politique et aux confins du code de la répartition des compétences” in P.-Y. Monjal and E. Neframi (eds.), *Le commun dans l’Union européenne* (Brussels: Bruylant, 2009) 219-231 at 230 where the author affirms that “European values [are], at the outset asserted as *common*, almost mythical, later recognised as *diversified*, to the benefit of our multicultural societies” (translation by the author).

Irish case-law through the threat of a bar put on the doctrine of primacy it involves. It could therefore be argued that in Ireland the domestically legitimate acceptance of the primacy principle relies on a reciprocal jurisdictional recognition on the part of the European Court of Justice of crucial constitutional values according to a pattern associating a unity of words with a diversity of meaning.

The use of European words in Irish case-law has seen their meaning distorted by their crossing of the domestic screen. In particular, while the primacy principle was accepted upon accession to what is now the European Union, it was also defined from the very beginning, through what is now Article 29.4.6° of the Constitution, as a clause of constitutional immunity, preventing therefore domestic courts from positively enforcing the prevalence of European law over constitutional provisions which are central in the case-law of the European Court of Justice related to the doctrine of primacy. In consequence, the respective position of the Irish and European legal orders as regards to the primacy principle relies on a compatibility concerning the result to be achieved rather than conformity of legal analysis.¹⁵⁹ Even though, in their reception of European principles Irish courts have sometimes displayed an attitude towards European integration which has been described as “*plus royaliste que le roi*”,¹⁶⁰ this ability of Irish courts to go beyond what is required by what is now European Union law is the very sign that the relationship between the Irish and European legal systems, between Irish courts and the European Court of Justice answers above all to political rather than legal dynamics where a conciliatory relationship between the two legal orders is achieved *de facto* rather than *de jure*.

In consequence, the supremacy of the Irish Constitution still underpins the position of domestic courts concerning European law and its primacy. Nonetheless, this distorted recognition of the European doctrine¹⁶¹ has had an impact on the interpretation of constitutional provisions. This has been the case regarding Article 15.2.1° of the Constitution concerning the separation of powers, and in particular the legislative power of the Oireachtas.¹⁶² From this point of view, by having recourse to the doctrine of primacy, Irish courts shaped the principles structuring the domestic legal order on the basis of what is now European Union

¹⁵⁹ See *supra* at 87-93.

¹⁶⁰ D. O’Keefe, “Appeals Against an Order to Refer under Article 177 of the EEC Treaty” (1984) 9 *European Law Review* 87-104 at 97.

¹⁶¹ Defined in terms of constitutional immunity the Irish definition of the doctrine of primacy makes it, in principle, impossible for the judiciary to assess the relationship between constitutional provisions and European Union law while, from the European perspective, this principle involves the positive empowerment of domestic courts to disapply constitutional rules.

¹⁶² See *supra* at 122-124 as regards the validity of mechanism related to the implementation of European rules by statutory instruments and *supra* at 206-216 as regards the validity of the statutory instruments themselves.

law.¹⁶³ In this regard, an ambiguity is involved in the affirmation of the necessary protection of Irish constitutional identity.¹⁶⁴ Being the consequence of the recognition of the sovereign willingness to participate in the process of European integration, it implies that European Union law form part of the domestic legal order. Defined negatively as a limit to the doctrine of primacy constituted by distinctive constitutional features, the notion of constitutional identity also implicitly involves that part of the nature of the Constitution is common. In other words, it implies that the Irish constitutional order is European, partly at least, or that the identity of the Irish Constitution is constituted by Irish constitutional identity and European identity as constitutionally recognised.

In exchange, it could be argued that when provisions participating in the definition of Irish constitutional identity may be jeopardised by the doctrine of primacy, Irish courts ask for a similar kind of recognition from the European Court of Justice. In other words, rather than a strict opposition to the primacy principle, the notion of constitutional identity has a strategic use in order to threaten and condition the interpretation of the European Court of Justice. The recognition of the primacy of European rules in the Irish legal order would therefore be dependent on an interpretation of European law by its authentic interpreter which, though expressed in its own logic, would pursue a result compatible with the protection of Irish crucial constitutional values. It seems that this logic is at the heart of the main case concerning the protection of Irish constitutional identity in the face of the primacy of European law, *viz.*, *Grogan*.¹⁶⁵ However, it could be argued that the lineament of these dynamics were already noticeable in the decision of the European Court of Justice in *Groener v. Minister for Education and City of Dublin Vocational Education Committee*.¹⁶⁶

In this case, Mrs Groener challenged the refusal to appoint her to a permanent teaching post. She succeeded in the competition for this position but failed the Irish language exam, in which success, in order to prove knowledge of Irish, was a prerequisite for access to the position concerned in this case. Mrs Groener argued that this condition was contrary to Article 48 of the Treaty establishing the European Economic Community as well as Article 3 of Council

¹⁶³ It could be argued that the notion of constitutional identity did not lead in Ireland to the same empowerment of the European Court of Justice as in France. It is European law as used by domestic courts, rather than its interpretation by the European Court, which has bearings on the Irish legal system. For further developments on the French position, see *infra* at 481-485.

¹⁶⁴ For further developments on this disambiguation of the notion of constitutional identity, see *infra* at 484-485.

¹⁶⁵ [1989] I.R. 753.

¹⁶⁶ Case C-379/87 *Groener v. Minister for Education and City of Dublin Vocational Education Committee* [1989] E.C.R. 3967.

Regulation 1612/68 on freedom of movement for workers within the Community.¹⁶⁷ The European Court of Justice had thus to consider, through a preliminary reference, the validity of this language requirement, in particular in the light of the exception to prohibition of discrimination provided for by the Regulation itself which allowed such discrimination only when it was grounded on “linguistic knowledge required by reason of the nature of the post to be filled”.¹⁶⁸ This issue is particularly relevant to the notion of Irish constitutional identity since Article 8 of the Irish Constitution which states that:

- “1. The Irish language as the national language is the first official language.
2. The English language is recognised as a second official language.”

It can be deduced from this provision that the Irish language is viewed as having precedence over the English language due to its inherent link with the Irish people considered in its political and cultural dimension.¹⁶⁹ Indeed, it was in terms of the identity of the state that the Irish Government presented this issue before the European Court of Justice.¹⁷⁰

It seems that the European Court of Justice took into account, to a certain extent, the identity claim in its interpretation. While noticing that knowledge of Irish was not essential to the teaching of art,¹⁷¹ the work involved in the position which Mrs Groener had applied for, the Court considered the issue in the broader context of “the special linguistic situation in Ireland”¹⁷² and even recognised the “the use of Irish as a means of expressing national identity and culture.”¹⁷³ It concluded that the requirement constituted the implementation of a public policy, and, being neither disproportionate nor discriminatory, was compatible with the free movement of workers and fell within the scope of the exception provided for in Article 3 (1) of the Regulation.¹⁷⁴

However, if one considers the notion of constitutional identity as an exemption from the enforcement of the doctrine of primacy, the reference to this notion in the decision of the

¹⁶⁷ Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] O.J. Spec. Ed. 475.

¹⁶⁸ Article 3 (1) of Council Regulation.

¹⁶⁹ On this representation of the Irish sovereign, see *supra* at 164-165.

¹⁷⁰ On this position of the Irish government qualifying the issue at stake “as fundamental to the identity of the State”, see M. Reid, *The Impact of Community Law on the Irish Constitution* (Dublin: Irish Centre for European Law, 1990) at 67-68. The French Government also expressed an observation, as linguistic issues are viewed with special concern in the French legal system.

¹⁷¹ [1989] E.C.R. 3967 at para. 15.

¹⁷² *Ibid.* at para. 17.

¹⁷³ *Ibid.* at para. 18.

¹⁷⁴ *Ibid.* at para. 24.

European Court of Justice assumed a different meaning and, in contrast, defined the Irish specificity as an exception consented to by European law itself, and therefore a consequence of its primacy.¹⁷⁵ This discrepancy is notably noticeable when compared to the opinion of Advocate General Darmon, which seemed closer to the claims of the member states. Considerations of identity were also very present in his reasoning.¹⁷⁶ However, in his view, they were rather considered as a ground for the exclusion of European law since this aspect of the case led him to define the issue as a question of distribution of competences between the member states and European institutions.¹⁷⁷ Accordingly, his opinion tended to ascertain that certain crucial constitutional features, including the protection of the Irish language, should be left to the discretion of member states, unbound by European law considerations.¹⁷⁸ This was made clear when he stated that:

“the preservation of languages is one of those questions of principle which one cannot dismiss without striking at the very heart of cultural identity. Is it therefore for the Community to decide whether or not a particular language should survive? Is the Community to set Europe’s linguistic heritage in its present state for all time. Is it to fossilise it?

It seems to me that every State has the right to try to ensure the diversity of its cultural heritage and, consequently, to establish the means to carry out such a policy.”¹⁷⁹

In conclusion, while both by the European Court of Justice and the Advocate General referred to the notion of an identity defined in the Constitution, these references had different meanings. In other words, “*la définition et l’attente d’un possible*”¹⁸⁰ they offer is divergent. If one takes the view that the opinion of the Advocate General mirrors the position of the member states regarding issues of constitutional identity as a limit to the doctrine of primacy, in

¹⁷⁵ It is a similar conclusion made by Reid when she states that “it [the European Court of Justice] says that for a State to adopt this specific type of policy is *permitted* by Community law *provided that* it does not affect free movement, or infringe Community discrimination rules. (...) The Court’s obvious concern to retain a jurisdiction in this area also prompts one to wonder whether its basing this decision so exactly on the unique terms of the Irish constitution might not arise chiefly from a desire to distinguish it firmly from linguistic policy cases arising in other Member States”, M. Reid, *The Impact of Community Law on the Irish Constitution*, *op. cit.*, at fn. 170 above, at 70.

¹⁷⁶ [1989] E.C.R. 3967, *passim*.

¹⁷⁷ *Ibid.* at para. 16.

¹⁷⁸ For a similar interpretation, see M. Reid, *The Impact of Community Law on the Irish Constitution*, *op. cit.*, at fn. 170 above, at 69.

¹⁷⁹ [1989] E.C.R. 3967 at para. 19-20. It has to be noted that he also considered at para. 21 the fundamental character of the values enshrined in Constitutions.

¹⁸⁰ To express it with the same reference to Barthes made by the Advocate General, *ibid.* at para. 19-20.

contrast, recourse to this notion by the European Court of Justice was made only in order for its interpretation to fulfil *de facto* national demands while utilising it in its own European normative language.¹⁸¹

It could be argued that *Groener* exemplifies the relationship established between the two legal orders where each court, while enforcing its own logic, achieves a result congruent with the claim of its counterpart. While the expression of its specific identity by Ireland would justify an exclusion of common European rules, the decision of the European Court of Justice, constrained by the identity claim, still left Irish courts with the opportunity to abide by European Community law and to acknowledge the primacy of this legal system, since while based on different arguments it would nonetheless permit the *de facto* upholding of a constitutional principle regarded as having a crucial value. In conclusion, one could argue that, from this perspective, reconciling crucial constitutional features with the doctrine of primacy depends on a unity of words being used by both courts while entailing a diversity of meanings. It seems that this jurisdictional relationship is at the core of the judicial exchange between Irish courts and the European Court of Justice in *Grogan*.

When the issue *Grogan* was considered by the Supreme Court¹⁸² after the preliminary reference being made by the High Court, judges strongly expressed their prospective opposition to a ruling from the European Court of Justice which would impair the protection of the right to life of the unborn protected by Article 40.3.3° of the Constitution and, notably on grounds of morality,¹⁸³ and considered that in such circumstances the enforcement of the primacy of European rules in the Irish legal order would be defeated. However, one could argue that the decision of the European Court of Justice,¹⁸⁴ even though it ensured that the application of Article 40.3.3° would be left unscathed by European interference, nonetheless developed a normative reasoning directly opposed to the justification used by the Supreme Court.¹⁸⁵ It could

¹⁸¹ This seems to be the conclusion reached by Phelan and Whelan when they affirmed that “this is an interesting example of the willingness to interpret Community law rules in the light of relevant constitutional commitments on the part of the Member States, at the stage when a derogation from Community rules is considered”, see D. R. Phelan and A. Whelan, “National constitutional law and European integration: FIDE Report” (1997) 6 *Irish Journal of European Law* 24-64 at 50.

¹⁸² *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan* [1989] I.R. 753.

¹⁸³ See the opinion expressed by Walsh J. according to which “the fact that particular activities even grossly immoral ones, may be permitted to a greater or lesser extent in some member states does not mean that they are considered to be within the objectives of the treaties of the European Communities, particularly the Treaty of Rome, which is the treaty of the European Economic Community. A fortiori it cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right”, *ibid.* at 769.

¹⁸⁴ Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v. Grogan and others* [1991] E.C.R. I-4685.

¹⁸⁵ In this sense, see G. W. Hogan, “Protocol 17” in P. Keatinge (ed.), *Maastricht and Ireland: What the Treaty means* (Dublin: The Institute of European Affairs, 1992) 109-121 at 111.

even be argued that this case is a retreat in comparison with the attention reserved to the notion of constitutional identity in *Groener*.

Advocate General Van Gerven refused to consider the issue in Irish constitutional terms, *i.e.*, that the right to life of the unborn, which, due to its participation in Irish constitutional identity, constitutes *per se* a reason for the exclusion of European law and its primacy.¹⁸⁶ In contrast, it encapsulated its reasoning in the boundaries of the European logic alone as structured by the primacy principle.¹⁸⁷ Hence, contrary to the opinion expressed by the Supreme Court,¹⁸⁸ he had no difficulty in concluding that termination of pregnancy was a service under the terms of the Treaty.¹⁸⁹ Nonetheless, he recognised the specific importance attached to the right to life of the unborn in the Irish legal system as a choice of public policy, acknowledging the particular value attached to this constitutional provision, and affirmed that this issue “relates to a policy choice of a moral and philosophical nature the assessment of which is a matter for the Member States”.¹⁹⁰ However, he considered the ban on the provision of information provided by Irish law in accordance with the derogation regime provided for by Article 59 of the Treaty establishing the European Economic Community. In consequence, distorting the claim coming from the member states,¹⁹¹ his reasoning submitted the validity of domestic legislation to respect for European objectives¹⁹² and was opposed to the form of reasoning relied upon by the Supreme Court where the moral dimension of the right to life of the unborn excluded assessment from an economic angle.¹⁹³ Nonetheless, the Advocate General came to the conclusion that, due to its necessary and proportionate character, this restriction on the freedom to provide services on ground of public policy was compatible with European law,¹⁹⁴ recognising therefore, in the logic of European law, a result congruent with the domestic constitutional claim.

¹⁸⁶ On these different assessments of the scope of European law relating to services from either the domestic or the European perspectives, see D. R. Phelan and A. Whelan, “National constitutional law and European integration: FIDE Report”, *op. cit.*, at fn. 181 above, at 48-49.

¹⁸⁷ For a similar argument submitting the question of the interpretation of Article 40.3.3° of the Irish Constitution to the doctrine of primacy, even though it could be considered as a valid derogation to common rules, see J. Kingston and A. Whelan with I. Bacik, *Abortion and the Law*, *op. cit.*, at fn. 103 above, at 129-130.

¹⁸⁸ [1989] I.R. 753 at 769.

¹⁸⁹ See the opinion of the Advocate General, [1991] E.C.R. I-4685 at para. 10.

¹⁹⁰ *Ibid.* at para. 26. On the generous attitude of the Advocate General towards the requirements of member states in general, and Ireland in particular, see S. O’Leary, “The Court of Justice as a reluctant constitutional adjudicator: an examination of the abortion information case” (1992) 17 *European Law Review* 138-157 at 148.

¹⁹¹ More generally, for the “translation” within the European logic of provisions participating in the constitutional identity of member states once seized by the European Court of Justice, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 123 above, at 388-391.

¹⁹² See the opinion of the Advocate General, [1991] E.C.R. I-4685 at para. 23. On this point, see D. R. Phelan, “Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of European Union” (1992) 55 *The Modern Law Review* 670-689 at 679.

¹⁹³ See the opinion expressed by Walsh J., [1989] I.R. 753 at 769.

¹⁹⁴ See the opinion of the Advocate General, [1991] E.C.R. I-4685 at para. 24.

At first sight,¹⁹⁵ the conclusion reached by the European Court of Justice seems more congruent with the claim raised by the Supreme Court as to what is considered as a crucial Irish constitutional feature when it stated that:

“the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law.”¹⁹⁶

This refusal to consider that a European dimension was involved in this case may appear similar to the point of view expressed by Irish courts in cases related to the same issue.¹⁹⁷ However, to the contrary, one could also argue that the position adopted by the European Court is actually radically opposed to that of the domestic court and that, in comparison with the opinion of the Advocate General, its refusal to take into account the constitutional identity of Ireland went a step further. First, like the Advocate General, the European Court of Justice agreed that a termination of pregnancy was a service.¹⁹⁸ However, it explicitly expressed its refusal to consider the matter in the same terms as the domestic court. It purposely excluded the moral dimension from its assessment of this legal issue¹⁹⁹ and affirmed that:

“SPUC, however, maintains that the provision of abortion cannot be regarded as being a service, on the grounds that it is grossly immoral and involves the destruction of the life of a human being, namely the unborn child.

Whatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court's first question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally.”²⁰⁰

¹⁹⁵ For the difference of reasoning between the Advocate General and the European Court of Justice, see J. Handoll, “The protection of national interests in the European Union” (1994) 2 *Irish Journal of European Law* 221-246 at 243-244.

¹⁹⁶ Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v. Grogan and others* [1991] E.C.R. I-4685 at para. 31.

¹⁹⁷ *Attorney General (Society for the Protection of Unborn Children Ireland Limited) v. Open Door Counselling Limited* [1988] I.R. 593 and *Attorney General v. X* [1992] 1 I.R. 1. For further considerations on this avoidance of the European law dimension in these cases, see *supra* at 428-431.

¹⁹⁸ [1991] E.C.R. I-4685 at para. 18.

¹⁹⁹ On the different logics dividing the domestic and European normative perspectives, see for example D. R. Phelan, “Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of European Union”, *op. cit.*, at fn. 192 above, in particular at 673 or D. Curtin, “Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v. Grogan*, Judgment of 4 October 1991, not yet reported in ECR” (1992) 29 *Common Market Law Review* 585-603 at 592.

²⁰⁰ Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v. Grogan and others* [1991] E.C.R. I-4685 at para. 19-20.

Secondly, rather than giving any consideration to the potential consequences in the European legal order of constitutional provisions regarded by member states as having a crucial importance, the decision of the European Court of Justice is based on the specifics of the case.²⁰¹ Indeed, the exclusion of European law was merely the consequence of the fact that an economic connection between the students associations which gave information about abortion and the British clinics concerned was missing.²⁰²

In conclusion, even though the result hinted by the Supreme Court and that reached by the European Court of Justice are akin (which may justify the argument that the threat raised by the Supreme Court on the basis of considerations related to the protection of Irish constitutional identity constrained the interpretation of the European Court) this similarity concealed a real normative disagreement on the relationship of the two legal orders and the scope to be given to the doctrine of primacy. In this regard, and compared with the more conciliatory approach in *Groener*, the *Grogan* decision of the European Court of Justice could be read as a stronger affirmation on its part of the willingness to consider the normative relationship between constitutional provisions and European provisions under its own European primacy prism. It could even be interpreted as the substitution of member states' claim to a genuine constitutional identity by a common European one.²⁰³

Nonetheless, within this European framework, the European Court of Justice modified the interpretation of its legal order by reducing the economic dimension this case might have been regarded as having involved, given the reasoning underlying previous decisions. One could see in this an attempt to accommodate the claims expressed by the Irish Supreme Court, even if not as to the ground of the decision at least as to its result.²⁰⁴ It seems that Curtin comes to the same conclusion when she suggests that:

²⁰¹ On this point, see B. Wilkinson, "Abortion, the Irish Constitution and the EEC" (1992) *Public Law* 20-30 at 26.

²⁰² *Ibid.* at para. 26-27.

²⁰³ For a similar interpretation of the *Grogan* decision of the European Court of Justice despite the congruence of results with the decision of the Irish Supreme Court, see D. R. Phelan, "Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of European Union", *op. cit.*, at fn. 192 above, in particular at 684 where the author states that "this confusion between market rights and human rights, and EC law and ECHR law, a confusion which the Treaty on European Union has increased, will ultimately lead to new values." He made also similar arguments in *ibid.* at 675, 680-681. It is also the opinion expressed by O'Hanlon who affirms that "the importance of the abortion debate extends far beyond the issue of abortion itself, critical though that may be. It extends into the whole area of the extent to which we are prepared to allow supranational tribunals, such as the Court of the European Communities in Luxembourg and the Court of Human Rights in Strasbourg, the final say in issues involving the moral law and the Natural Law, and to determine how we should regulate our affairs in matters on which our moral values may still be fundamentally different from those of many of our European partners", see R. J. O'Hanlon, "Natural Rights and the Irish Constitution" (1993) 11 *Irish Law Times* 8-11 at 11.

²⁰⁴ In this sense, see S. O'Leary, "The Court of Justice as a reluctant constitutional adjudicator: an examination of the abortion information case", *op. cit.*, at fn. 190 above, in particular at 156.

“one is left with the suspicion that the Court’s approach in *Grogan* is a clever judicial stratagem, enabling it, with a great sigh of relief, to avoid dipping as much as its little finger in the murky waters of morality or to engage in a balancing exercise as to the relative strength of competing (highly sensitive) fundamental rights.”²⁰⁵

It is therefore all the more surprising to read the subsequent views given by the Supreme Court to the ruling of its European counterpart, which was qualified as “a pyrrhic victory”²⁰⁶ when the case returned to the domestic level.²⁰⁷ Avoiding mentioning the doubt previously expressed as regards the possible limit to the primacy of the European Court of Justice’s answer to the preliminary reference made by the High Court,²⁰⁸ Hamilton C.J., passing over in silence the strong criticism expressed initially by Walsh J., relied on *Murphy v. Bord Telecom Éireann*²⁰⁹ and *Crotty v. An Taoiseach*²¹⁰ to affirm the submission of Irish courts to the interpretation of European Community law by its European counterpart when he asserted unquestionably that:

“the ruling of the European Court of Justice is binding on the national court.”²¹¹

This statement seems therefore to acknowledge full recognition, through the collaboration with the European Court of Justice, of the primacy of European law. However, it could be argued that this acceptance does not fit with the considerations which had been given to the right to life of the unborn in previous decisions.

In comparison with *Groener*, the proportionality principle which is inherent in the mechanism of derogation, and which is also outlined in the opinion of the Advocate General in *Grogan*, could not correspond to the interpretation of Article 40.3.3° by the Supreme Court as hierarchically superior to other constitutional provisions.²¹² The discrepancy is even more obvious in *Grogan* since, for the European Court of Justice, the exclusion of European law is anything but a matter of principle. This leads one to conclude that unconditional agreement by

²⁰⁵ D. Curtin, “Case C-159/9, *The Society for the Protection of Unborn Children Ireland Ltd v. Grogan*, Judgment of 4 October 1991, not yet reported in ECR”, *op. cit.*, at fn. 199 above, at 596.

²⁰⁶ G. W. Hogan and G. F. Whyte, *J M Kelly: The Irish Constitution* (Fourth edition, Dublin: Lexis Nexis Butterworths, 2003) at 1501.

²⁰⁷ *Society for the Protection of Unborn Children (Ireland) Limited v. Grogan* [1998] 4 I.R. 343.

²⁰⁸ [1989] I.R. 753 at 768.

²⁰⁹ [1989] I.L.R.M. 53.

²¹⁰ [1987] I.R. 713.

²¹¹ [1998] 4 I.R. 343 at 351.

²¹² On this hierarchical interpretation of Article 40.3.3° of the Constitution, notably in *Attorney General (Society for the Protection of Unborn Children Ireland Limited) v. Open Door Counselling Limited* [1988] I.R. 593 or *Attorney General v. X* [1992] 1 I.R. 1, see *supra* at 316-318.

national courts to decisions of the European Court of Justice can be inversely proportional to the level of disagreement concerning the legal reasoning justifying them. In conclusion, it seems that the assessment of the judicial dialogue between the Supreme Court and the European Court of Justice on issues dealing with Irish constitutional identity from a legal point of view is reduced to the principle according to which “all that succeeds is success.”²¹³

In comparison with the preliminary reference made by the High Court which could have impaired a constitutional provision deemed to participate in the Irish constitutional identity, the protection of this provision takes place outside the mechanism now provided for by Article 267 of the Treaty on the Functioning of the European Union. In consequence, it is as a matter of a jurisdictional policy rather than a normative dialogue, *i.e.*, *via* parallel rather than integrated court’ rulings, that the conciliatory relationship between the Irish and European courts has been possible.²¹⁴ Enforcing integration between the two jurisdictional levels, the preliminary reference mechanism makes possible the submission of domestic norms to the primacy principle, stressing once again the importance of the collaboration of national courts for the prevalence of European Union law.²¹⁵ Establishing its relationship with the European Court of Justice as a matter of a jurisdictional policy, this avoidance of jurisdictional integration is a way for the Supreme Court to escape the submission to the European Court. It effectively enables domestic courts to negotiate the effects of European Union law in the Irish system by keeping the last word on the normative relationship for the domestic courts (with their domestic perspective). It also results in some weight attaching to the threat of a judicial veto in the name

²¹³ H. L. A. Hart, *The Concept of Law* (Second edition, Oxford: Oxford University Press, coll. Clarendon Law Series, 1997) at 153. It seems that this analogy between the relationship entertained by domestic courts and the European Court of Justice, on the one hand, and Hart’s demonstration, on the other, can be deepened since his conclusion arises from an analysis of the interpretation of core constitutional provisions, the difficulties of which have been unforeseen. In this case, the interpretation depends more on *a posteriori* political assessment than *a priori* normative reasoning. As he explains: “one form of ‘formalist’ error may perhaps just be that of thinking that every step taken by a court is covered by some general rule conferring in advance the authority to take it, so that its creative powers are *always* a form of delegated legislative power. The truth maybe that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the question have arisen and the decision has been given. Here all that succeeds is success.”

²¹⁴ For a similar opinion in a German context, see J. Ziller, “The German Constitutional Court’s Friendliness towards European Law: On the Judgment of *Bundesverfassungsgericht* over the Ratification of the Treaty of Lisbon”, *op cit.*, at fn. 44 above, at 69.

²¹⁵ For a similar argument stressing the inferior position of domestic courts displayed by the preliminary reference mechanism, see M.-C. Ponthoreau, “Constitution européenne et identités constitutionnelles nationales”, Contribution to the 7th World Congress of the International Association of International Law, Athens 11-15 June 2007, available at <<http://www.enelsyn.gr/papers/w4/Paper%20by%20Prof.%20Marie-Claire%20Ponthoreau.pdf>> at 11 [Last accessed 29 December 2012]. It is an interpretation shared by Drago when he argues that the preliminary reference mechanism would mean, for the *Conseil constitutionnel*, “*de jure* and *de facto* it submission to Community law as well as the submission of French constitutional law”, G. Drago, *Contentieux constitutionnel français* (Third edition, Paris: Presses universitaires de France, coll. Thémis, 2011) at 521 (translation by the author) or by Denham and Burke when, considering the preliminary reference mechanism, they argue that “the development of a system of precedent modifies the original concept of a bilateral relationship. In so far as the ECJ decisions have prudential value, the ECJ is place in a superior position to national courts, indicating a shift to a vertical hierarchy between the ECJ and national courts”, S. Denham and G. Burke, “Annual Brian Walsh Memorial Lecture: Constitutional Courts and the Lisbon Treaty”, *op. cit.*, at fn. 54 above, at 105-106.

of the protection of Irish constitutional identity, an effective threat which therefore can be used as a lever applying pressure on the case-law of the European Court of Justice.

In conclusion, it could be argued that what the Supreme Court expects from the European Court of Justice is that it expresses in its own logic a result that would allow Irish courts to uphold constitutional provisions that they regard as crucial and, in exchange, the Irish courts (as they did in *Grogan*) will affirm their apparent submission to European law and its primacy. If it is true that both courts use, to some extent, the same concepts, the signification they acquire in the case-law of the Irish courts and of the European Court of Justice is nonetheless shaped differently according to the existential principle which structures their legal discourse (be this either the primacy of European Union law or the supremacy of the Constitution). However, this recourse to the same terms means that the conflict of normative logics remains hidden behind a similarity of outcome. It thus seems legitimate to conclude that the conciliatory relationship between the domestic and European courts produced by the notion of constitutional identity answers to a pattern where a unity of words is associated with a diversity of meanings.

2. *The French Constitutional Interpretation of the Wording of European Union Rules: A Negotiation Concerned with Reconciling the Doctrine of Primacy and the Notion of Constitutional Identity*

As in the case of Ireland, the affirmation by the *Conseil constitutionnel* of the constitutional identity of France as a limit to the doctrine of primacy can be interpreted as above all expressing a conciliatory attitude towards the case-law of the European Court of Justice. In other words, it could be argued that, in exchange for its recent acceptance of the European existential requirement, the French constitutional court is asking for a mutual recognition. The jurisdictional monopoly of the European Court of Justice is constrained in order to remain within what is domestically legitimate.²¹⁶ Submitted to a possible jurisdictional opt-out, the relationship between the domestic and European courts can be defined, as in the Irish case, as co-operation structured by a unity of words with a diversity of meanings.

To a certain extent, when compared to the position of the Irish courts which often shape their domestic legal order through the direct use of European rules as a matter of Irish law, the position of the *Conseil constitutionnel* can be regarded as involving a higher degree of co-operation. In the French legal order, the definition of the doctrine of primacy in terms of jurisdictional immunity, entrusting the European Court of Justice with an interpretative monopoly, results in a preeminent role being granted to the relationship between domestic and European courts in the normative relationship framed by the notion of constitutional identity. In this regard, it seems that the consequences of the new position of the *Conseil constitutionnel* consist of conferring a role on the European Court of Justice in the interpretation of constitutional provisions.²¹⁷ In other words, behind its apparent affirmation of the constitutional identity of France, the case-law of the *Conseil constitutionnel* also indicates that this identity is expressed with a dual voice. Nonetheless, the position of the *Conseil constitutionnel* as to the primacy principle could also be regarded as the formulation of criteria for this role being granted to the European Court of Justice to be exercised in a manner which is respectful of the constitutional identity of France.

²¹⁶ For a similar analysis of the case-law of the *Conseil constitutionnel* insofar as European law is concerned, see A. Levade, "Le Conseil constitutionnel aux prises avec la Constitution européenne" (2005) *Revue du droit public et de la science politique en France et à l'étranger* 19-50 at 42.

²¹⁷ On this empowerment of the European Court of Justice for principles not inherent in the constitutional identity of France, see for example B. Mathieu, "Les rapports normatifs entre le droit communautaire et le droit national. Bilan et incertitudes relatifs aux évolutions récentes des juges constitutionnel et administratif français" (2007) n° 72 *Revue française de droit constitutionnel* 675-693 at 678.

The limitation of the implementation of European obligations by the constitutional identity boundary means, conversely, that when what “is inherent in our constitutional identity, in the double meaning of the term; crucial and distinctive, in other words: the essence of the Republic”²¹⁸ is not at stake, Article 88-1 will prevail over other constitutional provisions. In consequence, the position of the *Conseil constitutionnel* is not tantamount to the possible revision of the French Constitution by European Union law²¹⁹ but, in contrast, the monopoly of jurisdiction granted to the European Court of Justice, *i.e.*, the enforcement of Article 88-1, would be the very application of the Constitution.²²⁰ Nonetheless, following the focus put by the *Conseil constitutionnel* on the relationship of content between domestic and European rules,²²¹ it is possible to argue that principles contained in the French Constitution would be left to the interpretation of the European Court of Justice.²²² Adopting the approach of Kelsen, it is possible to make a distinction between legal texts and legal norms, the latter being the signification attributed to the former²²³ and being determined through interpretation. The role of the European Court of Justice regarding constitutional rules which do not exclude, on the basis of the application of Article 88-1 of the French Constitution by the *Conseil constitutionnel*, the enforcement of the doctrine of primacy could therefore be seen as determining the meaning of these provisions.²²⁴ From a substantive perspective, the definition of primacy in the French legal order could be interpreted as entrusting the European Court of Justice²²⁵ with a creative part in the control of constitutionality.²²⁶

²¹⁸ P. Mazeaud, “Vœux du président du Conseil constitutionnel, M. Pierre Mazeaud, au Président de la République”. 3 January 2005. Available at <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/relations-externes/agenda/le-conseil-en-2004/voeux-a-l-elysee.5147.html#prcc>> (translation by the author) [Last accessed 29 December 2012].

²¹⁹ As to this hypothesis, see D. Chagnollaud, “La Constitution française ne peut être révisée par voie de directives... (après la décision n° 2004-505 DC du 19 novembre 2004, *Traité établissant une Constitution pour l'Europe*)” (2005) *Recueil Dalloz* 100-102.

²²⁰ As Roux puts it, the application of European law in the domestic legal order is due “to the Constitution itself (...) this one then yield in practice only because it consents to it”, see J. Roux, “Le Conseil constitutionnel, le droit communautaire dérivé et la Constitution”, *op. cit.*, at fn. 35 above, at 932 (translation by the author). Incidentally, it is possible to draw a parallel with the Irish dualist position where the application of European Union law is the consequence of the application of domestic rules, and in particular section 2 of the European Communities Act 1972 (as amended) which ensures the reception of European rules in the Irish legal order.

²²¹ See *supra* at 218-233.

²²² Commenting on the first decision where the *Conseil constitutionnel* gave a normative interpretation of Article 88-1, Schoettl affirmed that the French constitutional recognised “the primacy of the Community court” rather than of Community law, see J.-E. Schoettl, “Le nouveau régime juridique de la communication en ligne devant le Conseil constitutionnel” (2004) n° 122 *Les petites affiches* 10-21 at 18. In the same sense, see M. Guyomar, “Conclusions sur Conseil d’État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*”, *op. cit.*, at fn. 6 above, at 385. This confirms the hypothesis according to which the *Conseil constitutionnel* entrusted the European Court of Justice with the indirect interpretation of constitutional provisions.

²²³ H. Kelsen, *Théorie pure du droit* (Trans. C. Eisenmann, Brussels; Paris: Bruylant; Librairie Générale de Droit et de Jurisprudence, coll. La pensée juridique, 1999) at 15-16.

²²⁴ In this sense, see A. Pécheul, “La souveraineté et le Traité de Lisbonne” (2008) *Politeia* 170-191 at 182.

²²⁵ In this regard, the new case-law of the *Conseil constitutionnel* can be considered as a “gesture of trust” towards the European Court of Justice, J.-M. Belorgey, S. Gervasoni and C. Lambert, “Droit communautaire et

This statement is confirmed when put in comparison with the distorting appropriation by the *Conseil d'État* of the new point of view introduced by the *Conseil constitutionnel*. The operation of translation,²²⁷ in a geometrical sense, (whereby the domestic relationship between an act of implementation and the Constitution is exported into the logic of European Union law and redefined as a relationship between the instrument intended to be implemented and European primary law, as long as the invoked constitutional principle is reproduced in the European legal order), makes explicit the understanding by the *Conseil d'État* of the mirror principle which structures the normative relationship between constitutional and European provisions and their respective control, in particular when it stated that:

“it is for the administrative court, seized of a plea alleging the breach of a constitutional provision or principle, to investigate if there exists a rule or a general principle of Community law which, in view of its nature and its scope, as interpreted at the current stage in the case-law of the Community jurisdiction, guarantees the effectiveness of respect for the invoked constitutional rule or principle if so, it is for the administrative court, to ensure the constitutionality of the decree, to determine whether the directive that this decree implements complies with this rule or general principle of Community law (...); in contrast, if there is no rule or a general principle of Community law guaranteeing the effectiveness of respect for the invoked constitutional provision or principle, it is for the administrative court to directly examine the constitutionality of the impugned provisions of the decree”.²²⁸

For the *Conseil d'État*, the purpose of its control is to assess whether European rules thoroughly echo constitutional ones. In *Arcelor*, the *Conseil d'État* determined that the principle of equality existing at European level had the same content as the domestic constitutional definition of this principle. The *Conseil d'État* ruled in favour of the application

Constitution française : le débat est relancé” (2004) *L'Actualité juridique. Droit administratif* 2261-2265 at 2264 (translation by the author).

²²⁶ On this point, see P. Blachère and G. Protière, “Le Conseil constitutionnel, gardien de la Constitution face aux directives communautaires” (2007) n° 69 *Revue française de droit constitutionnel* 123-144 at 134 where the authors mentions the “externalisation of the control [of constitutionality]” (translation by the author). For a similar analysis, while more critical of the position of the French constitutional court, see O. Dord, “Le Conseil constitutionnel face à la « Constitution européenne » : contrôle des apparences ou apparence de contrôle ?” (2005) *L'Actualité juridique. Droit administratif* 211-219 at 217.

²²⁷ On this point, see M. Guyomar, “Conclusions sur Conseil d'État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*”, *op. cit.*, at fn. 6 above, at 395.

²²⁸ CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56 (translation by the author).

of European law and made a preliminary reference to the European Court of Justice in order to assess the validity of the Directive in relation to this principle. However, due to the comprehensive nature of this operation of translation, if the French administrative court reserves a role to the European Court of Justice in the control of constitutionality,²²⁹ it is on the condition that it echoes what the domestic court would have held.

In contrast, not only does the *Conseil constitutionnel* limit the number of constitutional norms which can be opposed to the primacy of European law, its case-law also does not give the same importance to the equivalence of interpretations between similar provisions contained at domestic and European levels. In this regard, one could argue that the *Conseil constitutionnel* is more concerned about textual rather than normative congruence.²³⁰ Accordingly, when compared to the position of the *Conseil d'État*, the position of the *Conseil constitutionnel* regarding the role of the European Court of Justice in the indirect determination of constitutional norms leaves a greater creative function to its European counterpart. In this respect, the evolution of its case-law from the protection of French specificities to the guarantee of French constitutional identity is revealing.²³¹ In the latter form of the limit to the primacy principle, one could argue that the *Conseil constitutionnel* agreed to the prevalence of common rules even over legal traits which are singular to the French legal order as long as these legal traits are not essential to the French constitutional order.

In conclusion, while the interpretation of Article 88-1 by the *Conseil d'État* indicates a willingness to impose French principles at European Union level, one could argue that the operation of translation between the two legal orders is reversed in the case-law of the *Conseil constitutionnel*. The empowerment of the European Court of Justice which results from the interpretation of Article 88-1 by the *Conseil constitutionnel* leads a situation whereby constitutional principles, unless when they are considered as forming part of the constitutional identity of France, are shaped by the interpretation given by the European Court to European principles.

It is thus possible to clarify an ambiguity which surrounds the notion of constitutional identity. Identity can be defined in a positive way as the set of features which constitutes an

²²⁹ It is the conclusion reached by the *commissaire du gouvernement* when he stated that “this operation of translation, which will lead to your control of constitutionality being carried out, in part, under the bell of Community law, is a novelty in your case-law”, M. Guyomar, “Conclusions sur Conseil d’État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*”, *op. cit.*, at fn. 6 above, at 395 (translation by the author).

²³⁰ See for example, CC, decision n° 2004-498 DC on the *Act pertaining to bioethics* of 29 July 2004, *Rec.* 122 at para. 6 in relation to the freedom of communication.

²³¹ The concept of constitutional identity not only refers to provisions which are specific to the French legal system but which also are characterised by their crucial nature, see *supra* at 245-247.

entity. In this respect, in accordance with Article 16 of the Declaration of Human and Civic Rights of 1789, any constitutional provision participates in the determination of the identity of a society, and this includes Article 88-1 dedicated to European Union law. As it appears in the case-law of the *Conseil constitutionnel*, the notion of constitutional identity is the consequence of the recognition that the European legal order is included in the domestic one, *i.e.*, of the expression by the French *demos* of its European personality. Implicitly, as in the Irish instance, the upholding of the constitutional identity of France is the implicit recognition that a part of this identity is also European, that France is Europe, partly at least. As defined in the thesis, it is the negative version of the notion of constitutional identity which is favoured. In this sense, identity is understood not as the whole set of constitutional features but as those addressed to another entity in order to vindicate a singularity, a distinctive selfhood.²³² In particular, the notion of constitutional identity corresponds to the constitutional provisions exceeding what the common share of the French legal order, as the purely domestic features which due to their crucial nature are able to overcome the constitutional recognition of the doctrine of primacy.

In consequence, one could legitimately argue that, behind the apparent promotion of French legal idiosyncrasies, an implicit recognition of the dual material nature of the French Constitution is to be read. The interpretation of Article 88-1 of the Constitution by *Conseil* along the lines of the notion of constitutional identity is a division of the constitutional labour, the European court of Justice being entrusted with the interpretation of the common part of the Constitution. The *Conseil constitutionnel* reserves to itself the power of self-determination and therefore the enunciation of the singular constitutional monologue. In other words, the constitutional identity of France is expressed *via* two jurisdictional voices of which the *Conseil constitutionnel* is the conductor.²³³

The empowerment of French courts through the normative interpretation of Article 88-1 of the Constitution has led to the concomitant empowerment of the European Court of

²³² On these different comprehensions of what is involved in the notion of identity, see *supra* at 5-11.

²³³ Gohin wondered after the *Treaty establishing a Constitution for Europe* decision whether “this whisper one thought one heard, in the back of the garden of the Palais-Royal, when the decision of the *Conseil constitutionnel* was given, last 19 November, was it not the swansong in the twilight of a state that let itself die?”, O. Gohin, “Conseil constitutionnel et Constitution européenne : les trois contradictions” (2004) n° 53 *La Semaine juridique. Administrations et collectivités territoriales* 1707-1710 at 1710 (translation by the author). While, one could disagree with the absoluteness of this statement, it could however be argued that the definition of the identity of the French Constitution, if understood in a positive sense, is not anymore a monologue. It is in this sense that one can read the comment of Charpy according to which “both the constitutional court and the highest administrative court give up part of their power to test national rules against the Constitution, to the benefit of the Court of Justice”, C. Charpy, “The Status of (Secondary) Community Law in the French Internal Order: the Recent Case-Law of the *Conseil constitutionnel* and the *Conseil d’État*” (2007) 3 *European Constitutional Law Review* 436-462 at 458. One could however disagree with her conclusion according to which this phenomenon tend to “weaken the constitutional rules’ efficacy” (*ibid.* at 458) and, in contrast, argue that it is rather the role of domestic courts in this process which is diminished, even though only due to self-limitation.

Justice.²³⁴ However, it appears from the differing applications of Article 88-1 of the French Constitution by the *Conseil constitutionnel* that this empowerment of the European Court is not unfettered. In its recognition of the European obligations at play in the domestic legal system, the *Conseil constitutionnel* also defined the conditions which must be met in order for European interpretations to be domestically acceptable. It seems that the purpose of the case-law on constitutional identity is to determine the criteria according to which a similarity of legal outcomes can be attained despite the fact that cases are decided on the basis of opposing principles, *viz.*, the primacy of European Union law and the supremacy of the Constitution. Being focused on the result of the legal reasoning rather than the legal reasoning itself, one could argue that the mutual recognition of domestic and European pretensions also corresponds to a unity of words with a diversity of meanings.

In this regard, the analysis of the understanding by the French constitutional court of the European obligations as they are to be applied in the domestic legal order has to be considered within the relationship the *Conseil constitutionnel* intends to entertain with the European Court of Justice. The first element justifying this hypothesis relies on the interpretation by the *Conseil constitutionnel* of the European principles which are at the roots of the formulation of the notion of constitutional identity. It is possible to see in its case-law a distortion of the European principles behind their alleged recognition, and notably the recognition of the doctrine of primacy. While the French constitutional court uses European semantics, the meaning attributed to their provisions differs from that of the European Court of Justice as an authentic interpreter of the norms belonging to the European legal order. The avoidance strategy is noticeable at the very heart of the tension between the doctrine of primacy and constitutional identity. The *Treaty establishing a Constitution for Europe* decision involved the formal recognition by the *Conseil constitutionnel* of the primacy principle.²³⁵ However, even though the principle deduced by the French constitutional court from Article 88-1 is reminiscent of the wording²³⁶ of the decision of the European Court of Justice in *Costa v. E.N.E.L.*,²³⁷ reference to

²³⁴ In this sense, see T. Georgopoulos, “Le Conseil constitutionnel face à la directive communautaire : trois destinataires pour un message ambivalent”, *op. cit.*, at fn. 10 above, at 4.

²³⁵ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 9-13.

²³⁶ *Ibid.* at para. 11 where it is affirmed that “pursuant to Article 88-1 of the Constitution (...) the constituent power thus formally acknowledged the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order”. This was repeated in CC, decision n° 2007-560 DC on the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* of 20 December 2007, *Rec.* 459 at para 7. On this similarity of words, see H. Labayle and J.-L. Sauron, “La Constitution française à l’épreuve de la Constitution pour l’Europe” (2005) *Revue française de droit administratif* 1-29 at 6. In the same sense, Ritleng argues that the *Conseil constitutionnel* proceeded to a “sovereignist’ rereading of the famous expression in the *Costa* decision”, D. Ritleng, “Le principe de primauté du droit de l’Union” (2005) 41 *Revue trimestrielle de droit européen* 285-303 at 293 (translation by the author).

²³⁷ [1964] ECR 585.

the decisions of the *Conseil constitutionnel* taken in summer 2004 leads an interpretation that differs from the conception of primacy upheld by the European Court of Justice since *Costa*. Understanding primacy as an issue of jurisdictional immunity,²³⁸ the *Conseil constitutionnel* is oblivious of the hierarchical dimension at play in the case-law of its European counterpart.

In the same way, one could argue that the very notion of constitutional identity stems from European legal discourse. In the same *Treaty establishing a Constitution for Europe* decision, the recognition of the primacy principle was made consequent upon a systemic interpretation of the provisions of the Constitutional Treaty, and in particular Article I-5 providing for respect for national identities of the member states by the European Union.²³⁹ However, it is once again a dissonant echo of the interpretations of the European Court of Justice that resonates in the case-law of the *Conseil constitutionnel*. The European case-law relating to the protection of national identities focuses on institutional aspects (such as the internal political and administrative organisation of the member states), what is now Article 4.2 of the Treaty on European Union, which refers to “fundamental structures, political and constitutional, inclusive of regional and local self-government”.²⁴⁰ In contrast, the *Conseil constitutionnel* interprets this provision as having a substantive scope. This substantive perspective is also based on a distortion of European law since the recognition by the *Conseil constitutionnel* that European law respects the constitutional traditions common to member states led the French constitutional court conclude that the singularities of the domestic legal order, such as the secular nature of the state, were preserved.²⁴¹ One could thus argue that, in the process of recognition by the *Conseil constitutionnel* that is essential to the effective operation of the primacy principle as enunciated by the European Court of Justice,²⁴² the avoidance strategy consists of using the words of European law while giving a domestic meaning to them.

This logic – which was present at the origins of the new framework designed by the *Conseil constitutionnel* as regards the normative relationship between the two legal orders – is

²³⁸ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 13.

²³⁹ *Ibid.* at para. 12.

²⁴⁰ On the distinction between institutional and cultural (or substantive) definitions of the notion of national identity and the opposition between the European Court of Justice and domestic jurisdictions along these lines, see M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, *op. cit.*, at fn. 43 above, at 332-342. However, on the recent evolution of the case-law of the European Court of Justice from an institutional to a cultural understanding of the identity of member states, see J.-D. Mouton, “Réflexions sur la prise en compte de l’identité constitutionnelle des États membres de l’Union européenne” in J.-C. Masclet, H. Ruiz Fabri, C. Boutayeb and *al.* (eds.), *L’Union européenne : Union de droit, union des droits : Mélanges en l’honneur du Professeur Philippe Manin* (Paris: Pedone, 2010) 145-154 at 150-154.

²⁴¹ See CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173 at para. 16-18.

²⁴² See *supra* at 28-32.

also present in its subsequent application by the French constitutional court where recourse to reservations of interpretation enables the court to avoid raising the notion of constitutional identity in opposition to the primacy principle.²⁴³

In conclusion, the notion of constitutional identity is not so much a device used by the *Conseil constitutionnel* to fashion a normative impediment to the primacy principle but rather a threat used to constrain the interpretation of European Court of Justice. The case-law of the constitutional court corresponds to an invitation being made to its European counterpart. According to this logic, the greater influence of the process of European integration on the French legal system is conditioned by a leeway being granted in the implementation of European norms where specific concerns are expressed as to the protection of certain constitutional features.²⁴⁴

However, it is not a mere wishful invitation that is being issued by the *Conseil constitutionnel*. The modalities of the relationship it initiates with the European Court of Justice also represent a constraint on the latter Court to accept them. What is striking is the decisions of the *Conseil constitutionnel*, relayed in this respect by the *Conseil d'État*, is that the judicial dialogue between the French and European courts, as is the case with Ireland, takes place without recourse to the preliminary reference mechanism provided for by what is now Article 267 of the Treaty on the Functioning of the European Union.²⁴⁵ In contrast, it takes advantage of the imperfect jurisdictional integration between the domestic and European levels.²⁴⁶ On the part of the *Conseil constitutionnel*, it is argued that due to time constraints, it is impossible to enter into a direct dialogue with the European Court of Justice under Article 267 of the Treaty on the Functioning of the European Union.²⁴⁷ This standpoint, which was not arrived at without the taking into account of strategic considerations,²⁴⁸ entrusts ordinary courts with the mission to

²⁴³ For an example of such a strategy, see CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 9 and *supra* at 228-229.

²⁴⁴ On this strategic use of the supremacy of the Constitution as both a recognition of the European influence in the domestic legal order and the concomitant endeavour to conciliate constitutional imperatives with the primacy principle through jurisdictional policy, see X. Magnon, “Le Traité de Lisbonne devant le Conseil constitutionnel : *non bis in idem*” (2008) n° 74 *Revue française de droit constitutionnel* 310-336 at 316.

²⁴⁵ In this sense, see F. Chaltiel, “La Cour de justice de l’Union européenne poursuit le dialogue sur les rapports entre conventionnalité et constitutionnalité (À propos de CJUE, 22 juin 2010)”, *op. cit.*, at fn. 73 above, at 13 where the author stresses that the jurisdictional dialogue takes place *via* “vicarious court decisions” (translation by the author).

²⁴⁶ On this aspect, see D. Ritleng, “Le principe de primauté du droit de l’Union”, *op. cit.*, at fn. 236 above, at 296.

²⁴⁷ See for example CC, decision n° 2004-496 DC on the *Act to support confidence in the digital economy* of 10 June 2004, *Rec.* 101 at para. 20, CC, decision n° 2006-543 DC on the *Act pertaining to the energy sector* of 30 November 2006, *Rec.* 120 at para. 7, CC, decision n° 2010-605 DC on the *Act pertaining to the opening up to competition and the regulation of online betting and gambling* of 12 May 2010, *Rec.* 78 at para. 18 or CC, decision n° 2011-631 DC on the *Act pertaining to immigration, integration and citizenship* of 9 June 2011 (unreported) at para. 45.

²⁴⁸ It is this very conclusion that the European Court of Justice criticised in its decision on the mechanism of priority preliminary rulings on the issue of constitutionality, see *supra* at 451.

collaborate with the European Court of Justice under Article 267. However, a similar willingness to circumvent a direct dialogue with the European Court of Justice is also noticeable in the case-law of the *Conseil d'État*. The making a reference to the European Court of Justice is first conditioned to the recognition by the *Conseil d'État* of the existence of a European principle similar to the one expressed by the Constitution. In consequence, the collaboration with the European Court of Justice does not consist of a dialogue which regards the relationship between the French and European legal orders in order to determine which obligation of the latter bear on the former. Rather the case-law of the *Conseil d'État* preserves the competence the European Court of Justice as regards European Union law as long as it does not challenge French constitutional requirements.²⁴⁹

Set outside the dynamics of jurisdictional integration between the domestic and European level, the relationship between the different courts depends above all on jurisdictional policy, *i.e.*, a juxtaposition of monologues rather than a direct dialogue channelled *via* the of preliminary reference.²⁵⁰ As in the case of Irish courts, the avoidance the preliminary reference mechanism by the *Conseil constitutionnel* and the *Conseil d'État* paradoxically represents a willingness to institute a true dialogue with the European Court since without the possibility of disagreeing dialogue is merely an echo.²⁵¹ It is possible to argue that, under such conditions, it is not only an invitation but a legal bargain that the *Conseil constitutionnel* is offering to the European Court of Justice.²⁵² Avoiding its complete submission to the authentic interpretation of the European Court of Justice, it is possible to imagine the French constitutional court making a proposition to its European counterpart as to an interpretation of European norm which would

²⁴⁹ CE, Ass., 8 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, *Rec. Lebon* 56.

²⁵⁰ In *Arcelor*, the *Conseil d'État* made a preliminary reference to the Court of Justice. However, it concerned the conformity of the Directive with a general principle of Community law which was deemed similar to the constitutional norm. Therefore, the conformity of the domestic norm implementing the Directive was not directly concerned by the preliminary reference and it would be possible for the *Conseil d'État* to subsequently disapprove the interpretation of the European Court of Justice. In consequence, the compatibility between the constitutional and European norms could still be considered as a matter of jurisdictional policy, parallel but not included in the preliminary reference mechanism. For a similar opinion, see X. Magnon, "La sanction de la primauté de la Constitution sur le droit communautaire par le Conseil d'État" (2007) *Revue française de droit administratif* 578-589 at 586-587. The position of the *Conseil d'État* can thus be distinguished from that adopted by the *Cour de cassation* where the use of the preliminary reference mechanism aimed to question the mechanism of priority preliminary rulings on the issue of constitutionality due to its incompatibility with the primacy principle, see *supra* at 416-418.

²⁵¹ In this respect, it is possible to draw a parallel with the opinion expressed by Drago in the context of the jurisdictional exchange on the mechanism of preliminary priority rulings on the issue of constitutionality when he stated that "what many call the 'judicial dialogue' [is an] elegant expression concealing the reality of a struggle for law that expresses the will of preeminence of some courts over others", G. Drago, "Le hasard et la nécessité (à propos de la décision du Conseil constitutionnel du 12 mai 2010)" (2010) 23-27 mai 2010 *Gazette du Palais* 12-16 at 12 (translation by the author).

²⁵² In this sense, Roux argues that the interpretation of the primacy principle in the decision of the *Conseil constitutionnel* on the *Treaty establishing a Constitution for Europe* leads one to anticipate a "trial of strength" in case of an interpretative discrepancy with the European Court of Justice, see J. Roux, "Le traité établissant une Constitution pour l'Europe à l'épreuve de la Constitution française" (2005) *Revue du droit public et de la science politique en France et à l'étranger* 59-103 at 73 (translation by the author).

be compatible with material respect for the domestic constitutional order. Were the European Court of Justice to accept such an offer European Union law would be granted a patent of legitimacy when applied in the domestic legal order.²⁵³ This would require the European Court of Justice to provide an interpretation that would guarantee a similar outcome as the one deduced by the *Conseil constitutionnel* in order to protect a constitutional provision deemed as crucial, for example giving a definition to the freedom of religion on the basis of the primacy of the common traditions of member states which would be respectful of the singular secular nature of the French state. The *Conseil constitutionnel* would therefore be able to consider, using European words, that the European norms were compatible with the Constitution, passing over in silence potential divergences as to the principles meant by these words, hiding a potential diversity of meanings.²⁵⁴ In this respect, it seems that the *Conseil constitutionnel* is beginning to follow a logic similar to the one already at play in the Irish case-law.²⁵⁵

The interpretative exchange involving the *Cour de cassation*, the *Conseil constitutionnel*, the *Conseil d'État* and the European Court of Justice and related to the compatibility of the new mechanism of priority preliminary rulings on the issue of constitutionality with the doctrine of primacy is a good example of this dialogue between domestic and European courts.²⁵⁶ The French constitutional court gave an interpretation of this mechanism which diminished the importance of its priority nature, a priority which was designed to secure the supremacy of the Constitution in the face of the primacy of European Union law - and the *Conseil constitutionnel* did this in order to conclude that the constitutional mechanism was respectful of the European primacy principle. In its answer to the question referred under the preliminary reference procedure by the *Cour de cassation* on this issue, the European Court of Justice formulated its decision in the language of primacy and concluded that the new French jurisdictional mechanism could be interpreted in a way that would be compatible with this existential principle. One could thus conclude that in doing so, the European Court of Justice

²⁵³ In this sense, see L. Azoulay and F. Ronkes Agerbeek, “*Conseil constitutionnel* (French Constitutional Court), Decision No. 2004-505 DC of 19 November 2004, on the Treaty establishing a Constitution for Europe”, *op. cit.*, at fn. 11 above, at 886 where the authors argue that legitimacy based on national sovereignty constitutes the regulator of “the *concurrence* of constitutional developments in Europe” (translation by the author). For a similar point of view stressing the importance for the European Court of Justice of gaining the approval of domestic courts in relation to the doctrine of primacy in order to ensure the legitimacy of European Union law, see M. Poiares Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, *op. cit.*, at fn. 154 above, at 512-513.

²⁵⁴ It could be possible to see in this dynamics of jurisdictional collaboration a mechanism where the recognition of the primacy principle by the *Conseil constitutionnel* is conditioned by the recognition by the European Court of Justice of constitutional imperatives, avoiding thereby enabling the French Government to escape its domestic constraints by transferring the normative production at the European level.

²⁵⁵ See *supra* at 469-480.

²⁵⁶ For further analyses on this issue, see *supra* 416-422.

came, in the language of primacy, to a result compatible with demands expressed in the language of supremacy.

The conclusion of this issue was that the *Conseil constitutionnel* affirmed that the primacy of European law was compatible with the supremacy of the Constitution while the European Court of Justice determined that the supremacy of the French Constitution was compatible with the primacy principle. In other words, both courts used the same concepts while given them a different content, the conflict between their respective decisions remaining hidden in a unity of words despite a diversity of meanings.²⁵⁷ However, behind the apparent maintenance of the position of the European Court of Justice as to the European requirements related to the preliminary reference mechanism, one could argue that the recognition by the European Court of Justice of the validity for domestic court to take provisional measures in order to prevent violations of European rules as an implicit inflexion of its *Simmenthal* case-law²⁵⁸ based on the principle that national courts would not only prevent infringements of European rules but positively and immediately set aside contrary national norms.²⁵⁹ It seems thus possible to conclude that, while the development by each court of its reasoning in the logic of its own legal discourse led to similar results, in the margin of the text, a situation of derogation, a singularity, was granted to France with regard to common European rules.²⁶⁰

A similar strategy was also used by the European Court of Justice in *Arcelor*²⁶¹ in relation to the principle of equality and subsequent to a preliminary reference having been made by the *Conseil d'État*. The Advocate General pointed out the difference between the French and European definitions of the principle of equality,²⁶² a difference which it was necessary to stress in order to avoid submitting European law to French criteria, which “would be at odds with the autonomy of Community law”.²⁶³ However, the European Court of Justice avoided this conflict by basing its decision on the discretion of the Community legislature²⁶⁴ –

²⁵⁷ On this strategy at play in the case-law of both the *Conseil constitutionnel* and the European Court of Justice, see G. Canivet, “« Constitution nationales et ordre juridique communautaire » : « Contre-éloge de la tragédie »” in J.-C. Masclet, H. Ruiz Fabri, C. Boutayeb and *al.* (eds.), *L'Union européenne : Union de droit, union des droits : Mélanges en l'honneur du Professeur Philippe Manin* (Paris: Pedone, 2010) 611-624 at 622-623.

²⁵⁸ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] E.C.R. 629.

²⁵⁹ On this inflexion, see for example, F. Donnat, “La Cour de justice et la QPC : chronique d'un arrêt prévisible et imprévu”, *op. cit.*, at fn. 69 above, at 1645 or M. Gautier, “QPC et droit communautaire : Retour sur une tragédie en cinq actes” (2010) n° 10 *Droit administratif* 13-19 at 18.

²⁶⁰ According to a logic which was foreseen when the *Conseil constitutionnel* gave its first interpretation of Article 88-1 of the Constitution in 2004, see for example J. Roux, “Le Conseil constitutionnel, le droit communautaire dérivé et la Constitution”, *op. cit.*, at fn. 35 above, at 931.

²⁶¹ Case C-127/07 *Société Arcelor Atlantique et Lorraine and others v. Premier ministre and others* [2008] E.C.R. I-9895. For a further analysis of this decision as regards the nature of the constitutionalisation of the European legal order through the notion of constitutional identity, see *infra* at 497-499.

²⁶² [2008] E.C.R. I-9895. at para. 25-27.

²⁶³ *Ibid.* at para. 27.

²⁶⁴ *Ibid.* at para. 57-74.

under a logic which is reminiscent of its decision in *Grogan* when the Irish right to life of the unborn was at stake.²⁶⁵

In conclusion, the development of the notion of constitutional identity in the case-law of the *Conseil constitutionnel* has an ambivalent status. It is an alleged limit to the primacy principle which results in the implicit empowerment of the European Court of Justice as to the indirect determination of the content of constitutional principles. In this regard, its purpose is not so much to express frontal opposition to the primacy principle but to influence the interpretation of European Union law by its authentic interpreter.

Thus both Irish and French courts display a similar strategy when using the notion of constitutional identity. The recognition of the doctrine of primacy, and more generally the recognition of the European personality of their respective constitutional order, partly at least, are counterbalanced by a similar demand addressed to the European Court. This demand consists of the acceptance of the distortions of the meanings of European laws behind the use of European words and the possibility for each court to reach similar outcomes while using divergent normative logics. It is in this sense that the notion of constitutional identity, as a new paradigm regarding the understanding of the conflict between the primacy of European Union law and the supremacy of constitutional provisions, can be defined as a unity of words with a diversity of meanings.

The constitutional identity which is arguably displayed in the Irish case-law can be interpreted as a retreat from the courts' deliberate, immediate and generous reception of the doctrine of primacy into Irish law. In contrast, the empowerment of the European Court of Justice involved through the use of this notion in the case-law of the *Conseil constitutionnel* bears witness to a new openness to the European legal order. Nonetheless, in both instance, the notion of constitutional identity as a potential limit to the doctrine of primacy constitutes a threat which should move the European Court of Justice in the direction of accommodating the concern of the member states as regards certain constitutional provision in the European legal discourse, without changing the fundamental structure of European Union law. Otherwise, the European Court of Justice would expose itself to the revolt of domestic courts.²⁶⁶ As a form of jurisdictional opt-out, the notion of constitutional identity would, after all, justify a flight of the

²⁶⁵ See *supra* at 474-480.

²⁶⁶ To use the presentation of the conflicts between the Irish and French legal orders, on the one hand, and what is now the European Union legal order, on the other, by Phelan, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, *op. cit.*, at fn. 123 above.

French jurisdictional Earls from the common legal framework.²⁶⁷ Similarly, if a jurisdictional veto was felt to be necessary in order to affirm the constitutional identity of Ireland, Irish courts, which have often been regarded as “*plus royaliste que le roi*”,²⁶⁸ might well bring the *Fronde* in the European legal order.²⁶⁹

²⁶⁷ The Flight of the Earls was an event in Irish history which happened when the leaders of the native Irish nobility, already defeated in the wars of the Tudor conquest, fled Ireland for permanent exile, thereby signaling in very visible form the transition from one regime to another.

²⁶⁸ D. O’Keefe, “Appeals Against an Order to Refer under Article 177 of the EEC Treaty”, *op. cit.*, at fn. 160 above, at 97.

²⁶⁹ The *Fronde* was an event in French history in which the nobles revolted against the king at the beginning of the reign of Louis XIV.

Conclusion

The notion of constitutional identity, as understood in this thesis and insofar as displayed in the case-law of Irish and French courts involves an ambivalent discourse vis-à-vis European Union law. First and foremost, it perpetuates the affirmation of the supremacy of the Constitution against the claim of European Union law to primacy. On this point, the position of the Irish and French legal orders is shared with other member states, as it was notably expressed in the case-law of the German Federal Constitutional Court.¹ The opposition to the doctrine of primacy as defined by the European Court of Justice is based on the intrinsic connection, from the national perspective, between normative prevalence and sovereignty as a political concept, a sovereignty which, at the present stage of the process of European integration, remains located in the member states. According to this constitutionalist paradigm, the notion of constitutional identity indicates that the speech act as initially effected by the European Court of Justice in *Costa*² remains incomplete.³ In other words, from the national perspective, European Union law is deprived of the conditions necessary to make of the doctrine of primacy a valid claim.

However, the notion of constitutional identity also reveals the second aspect of the ambivalent position of Ireland and France towards European Union law and bears witness to a benevolent attitude towards the primacy principle. The notion of constitutional identity rests on a dynamics which is the consequence of the presence of contradictory principles in the Constitution itself. It is the result of an interpretative process carried out by Irish and French courts between constitutional provisions dedicated to European Union law and others of a purely domestic nature. In this interpretative process, the question of the formal supremacy of

¹ See *supra* at 438-441.

² Case 6/64 *Costa v. E.N.E.L.* [1964] E.C.R. 585.

³ It can be argued that the decision in *Costa* is best understood as a speech act. In other words, the position of the European Court of Justice did not represent the description of the European legal order as it was then but introduced a new legal reality, the existence of which relied on its recognition by the domestic courts of member states. On the speech act theory analysis of *Costa*, see H. Lindahl, "Sovereignty and Representation in the European Union" in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 87-114 at 105-112 or B. van Roermund, "Sovereignty: Unpopular and Popular" in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 33-54 at 41-50. For further considerations on this point, see *supra* at 28-32.

the Constitution gives way to a comprehension of the relationship between the European and domestic legal orders from a material perspective where the focus is put on the appropriateness of substantive content between the rules belonging to each legal order. In consequence, the question of whether a constitutional provision corresponds to an identity feature is, in some way, postponed. Rather, provisions may be held to form part of the constitutional identity of Ireland and France as a result of this interpretation. The notion of constitutional identity is a pedigree attributed to rules able to overcome the primacy of European law as a conclusion of a judicial normative balancing. In reverse, however, when the doctrine of primacy, as domestically defined, prevails, it can be said that it is the European Union identity which is upheld by Irish and French courts – implementing thereby the constitutionally expressed willingness to participate in the process of European integration.

In conclusion, while justified by the sovereignty which is located in the states, the notion of constitutional identity differs from the full enforcement of the formal supremacy of the Constitution. Due to the material perspective it favours, the possibility of thwarting the doctrine of primacy is limited to certain constitutional provisions, but otherwise the European principle prevails in the Irish and French legal orders. It could be even said that the identity of the domestic legal order consists of constitutional identity, *viz.*, certain domestic provisions of crucial importance plus the European Union identity, *viz.*, shared principles constitutionally-recognised. The notion of constitutional identity is also the implicit recognition that what Ireland and France are is Europe, at least partly.

Going beyond the radical opposition between the primacy of European Union law and the supremacy of the Constitution, the notion of constitutional identity could be regarded as the key for the reconciliation between the two doctrines. Indeed, it could be argued that the endeavour of Irish and French courts to mitigate, through the notion of constitutional identity, the consequences of the “existential requirement”⁴ which structures their domestic legal order is also reflected in the recent case-law of the European Court of Justice. This seemed to be particularly true of the decision of the European Court of Justice in *Omega*⁵ relating to the protection of the principle of human dignity in the German legal order. The view has been

⁴ As Pescatore qualified the doctrine of primacy, see P. Pescatore, *L'ordre juridique des Communautés Européennes : Études des sources du droit communautaire* (Second edition, Liege: Presses universitaires de Liège, 1973) at 227 (translation by the author).

⁵ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

argued that, when compared to the principle developed in *Internationale Handelsgesellschaft*,⁶ the newer case-law of the European Court of Justice would imply that constitutional provisions involving in the identity of a member state constitute an exception to the doctrine of primacy.⁷ This view relies on the fact that the European Court of Justice in *Omega* gave consideration to the peculiar German understanding of human dignity, a feature which distinguishes Germany from the position of other member states.⁸ It was on the basis of this principle which can be regarded as forming part of the identity of Germany due to its “cardinal constitutional value”⁹ that the European Court of Justice decided that it could prevail over the European Union law freedom to provide services.

The notion of constitutional would thus represent of common ground where the doctrine primacy developed by the European Court of Justice can be recognised by domestic since it enables a relationship between the domestic and European legal orders where the primacy of European law and the supremacy of the Constitution can coexist and even be integrated. From the Irish and French perspective, on the one hand, as well as from the European perspective, on the other, European Union law would prevail in principle, the constitutional identity of member states being the only ex exception to the doctrine of primacy.

A similar view is defended by Póitares Maduro in his model of “contrapunctual law”.¹⁰ This model takes part in the doctrine of constitutional pluralism. Although present in different forms,¹¹ this theory relies on a common basis according to which it is possible to notice a diversity of constitutional claims in Europe where the traditional claims of member states are paralleled by an independent constitutional claim of the European Union legal order. Being equally genuine, their relationship is “heterarchical rather than hierarchical.”¹² Accordingly,

⁶ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] E.C.R. 1125.

⁷ See for example, C. Blumann and L. Dubouis, *Droit institutionnel de l'Union européenne* (Third edition, Paris: Litec, 2007) at 590.

⁸ [2004] ECR I-9609 at para. 37.

⁹ *Ibid.* at para. 16

¹⁰ M. Póitares Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 501-537.

¹¹ The theory of constitutional pluralism has been developed, among others, by M. Kumm (“Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice” (1999) 36 *Common Market Law Review* 351-386 or “The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty” (2005) 11 *European Law Journal* 262-307), N. MacCormick (“The Maastricht Urteil: Sovereignty Now” (1995) 1 *European Law Journal* 259-266 or *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999)), I. Pernice (“Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?” (1999) 36 *Common Market Law Review* 703-705 or “Multilevel Constitutionalism in the European Union” (2002) 27 *European Law Review* 511-529) or N. Walker, (“The Idea of Constitutional Pluralism” (2002) 65 *Modern Law Review* 317-359 or “Late Sovereignty in the European Union” in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 3-32).

¹² N. Walker, “The Idea of Constitutional Pluralism”, *op. cit.*, at fn. 11 above, at 337.

Poiares Maduro argues that the “competing sovereignties”¹³ - national and European - can be reconciled. Under his “contrapunctual law” model,¹⁴ of which the notion of constitutional identity is a central tenet,¹⁵ domestic and European courts could integrate the specific claims of their counterpart, what would result in “harmonising different melodies that are not in a hierarchical relationship *inter se*”.¹⁶

Nonetheless, one could doubt that the European and domestic perspectives on the issue of normative prevalence could merge in the notion of constitutional identity. In *Omega*, the derogation from the European freedom to provide services was only possible on the basis of human dignity constituting a general principle of Community (now European Union) law due to the common protection of human dignity,¹⁷ despite definitional differences, in the legal orders of the member states. In consequence, the validity of the derogation is appreciated in accordance to the canons of European law and in particular the principle of proportionality (the scrutiny of which is reserved to the European Court of Justice¹⁸). *In fine*, it is the primacy of the European Union legal order which was reaffirmed in *Omega*. In other words, “inflection is not (...) revolution.”¹⁹

As regards the primordial reaffirmation of the doctrine of primacy despite of considerations being given to the notion of constitutional identity, the *Arcelor* case²⁰ is of particular relevance. As has been seen,²¹ it results from the adaptation by the *Conseil d'État* to the new consideration of European Union law expressed by the *Conseil constitutionnel* on the basis of Article 88-1 of the French Constitution and which led to the introduction of the notion of constitutional identity in French law. The *Conseil d'État* did not reproduce the case-law of the *Conseil constitutionnel* on the notion of constitutional identity, refusing to effect a material distinction between the different constitutional provisions in the face of the doctrine of primacy. When the question of the conformity with the Constitution of domestic measures implementing

¹³ M. Poiares Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, *op. cit.*, at fn. 10 above, at 505.

¹⁴ See *ibid.* at 524-531.

¹⁵ See *ibid.* at 526-527

¹⁶ *Ibid.* at 523.

¹⁷ [2004] ECR I-9609 at para. 33-34. See also the opinion of the Advocate General to which the European Court of Justice referred, *ibid.* at para. 82-91.

¹⁸ *Ibid.* at 30.

¹⁹ A. Levade, “Identité constitutionnelle et exigence existentielle : Comment concilier l’inconciliable ?” in J.-C. Masclet, H. Ruiz Fabri, C. Boutayeb and *al.* (eds.), *L’Union européenne : Union de droit, union des droits : Mélanges en l’honneur du Professeur Philippe Manin* (Paris: Pedone, 2010) 109-128 at 124.

²⁰ Case C-127/07 *Société Arcelor Atlantique et Lorraine and others v. Premier ministre and others* [2008] E.C.R. I-9895.

²¹ See *supra* at 410-416.

European directives is raised, the *Conseil d'État* assesses whether the constitutional principle also exists in European law. If so, it “translates”²² the constitutional rule into European law and uses, if necessary, the preliminary reference mechanism for the European Court of Justice to determine the validity of the directive in accordance with the rules of its own legal order. This is what was done in this case with regard to the conformity of the Directive pertaining to greenhouse gas emission with the principle of equality.²³

However, it could be argued that the notion of constitutional identity constitutes the context of the decision of the European Court of Justice, in particular in the light of the opinion of Pöiares Maduro acting this time as Advocate General. If one takes account of the view he expressed in an extra-judicial context,²⁴ it is clear that legal actors are bound to give the same existential and absolute nature to the doctrine of primacy in the European legal order, even as regards the notion of constitutional identity. In his capacity as Advocate General, Pöiares Maduro first reiterated the harmonious co-existence of national and European sovereignties introducing his opinion by arguing that it was important “to dispel certain fears of a possible conflict which, as will be seen, are wholly unjustified given the common constitutional foundations on which the national and Community legal orders are based.”²⁵ However,²⁶ as in *Omega*, the member states’ concern for constitutional identity was not considered as such but rather was seen through the European prism according to which common traditions of member states are a source of European Union law. The question of constitutional identity as claimed by Ireland or France (*viz.*, as idiosyncrasies exempted from European rules) was thus encapsulated in the common framework of European law and, from this perspective, the last word in relation to its protection goes to the European Court of Justice.²⁷ Referring to the principle enunciated in *Internationale Handelsgesellschaft*,²⁸ Advocate General Pöiares Maduro affirmed that it was the

²² According to the expression used by the *commissaire du gouvernement*, and which has to be understood in a geometrical sense, in *Arcelor*, see M. Guyomar, “Conclusions sur Conseil d’État, Assemblée, 8 février 2007, *Société ARCELOR Atlantique et Lorraine et autres*” (2007) 43 *Revue trimestrielle de droit européen* 378-402 at 395.

²³ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

²⁴ M. Pöiares Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, *op. cit.*, at fn. 10 above.

²⁵ [2008] E.C.R. I-9895 at para. 1.

²⁶ On the following points made by the Advocate General in *Arcelor*, see *ibid.* at para. 16-17.

²⁷ According to the Advocate General: “Article 6 TEU expresses the respect due to national constitutional values. It also indicates how best to prevent any real conflict with them, in particular by anchoring the constitutional foundations of the European Union in the constitutional principles common to the Member States. Through this provision the Member States are reassured that the law of the European Union will not threaten the fundamental values of their constitutions. At the same time, however, they have transferred to the Court of Justice the task of protecting those values within the scope of Community law”, *ibid.* at para. 16.

²⁸ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] E.C.R. 1125.

European doctrine of primacy which, *in fine*, takes prevalence over national constitutional provisions, even when they express identity features. As he concluded:

“Community law having thus incorporated the constitutional values of the Member States, national constitutions must adjust their claims to supremacy in order to comply with the primordial requirement of the primacy of Community law within its field of application.”²⁹

In other words, this consideration given by Advocate General Poiares Maduro to constitutional identity issue at the European Court of Justice’s level involves the very denial, under the mantle of the primacy principle, of the claim expressed by the member states; in the same way as the position of domestic courts, by relying on the supremacy of the Constitution represents the denial of the doctrine of primacy, under the mantle of constitutional identity.³⁰ It is thus possible doubt the possibility to “reconcile the irreconcilable”.³¹ The discourses of legal actors in the European Union can not but murmur the enduring dissonance between the primacy of European law and the supremacy of the Constitution, reflecting the differing perspectives regarding the relationship between domestic and European legal orders.³²

While one can see in the notion of constitutional identity the reflection of a speech act constantly reiterated by the European Court of Justice and nonetheless (as is argued in this thesis)³³ denied by the Irish and French courts, this notion, however, gives a different shape to the dialogue constitutive of the doctrine of primacy. In comparison with the previous opposition to the doctrine of primacy expressed in terms of *Kompetenz-Kompetenz*, the notion of constitutional identity shows that Irish and French courts are more concerned about the consequences of European integration than its very principle. This has to be compared with the

²⁹ [2008] E.C.R. I-9895 at para. 17 (the English translation mentions “primordial requirement”, but in French, the official language of the decision, the Advocate General referred to an “*exigence existentielle*”).

³⁰ [2008] E.C.R. I-9895 at para. 16

³¹ To use the expression of Advocate General Poiares Maduro in *Arcelor*, [2008] E.C.R. I-9895 at para. 15.

³² On the inconsistency between the harmony suggested by Poiares Maduro as an academic commentator and its position in favour of the primacy of European Union law when acting as Advocate General, see V. Constantinesco, “La confrontation entre identité constitutionnelle européenne et identités constitutionnelles nationales : Convergence ou contradiction ? Contrepoint ou hiérarchie ?” in J.-C. Masclet, H. Ruiz Fabri, C. Boutayeb and *al.* (eds.), *L’Union européenne : Union de droit, union des droits : Mélanges en l’honneur du Professeur Philippe Manin* (Paris: Pedone, 2010) 79-94 at 92-93.

³³ In particular, regarding the domestic basis of the prevalence of European rules, rather than its justification by the autonomous nature of the European Union legal order, and their subsequent submission to the supremacy of the Irish and French Constitutions, see *supra* at 105-152.

decision of the German Federal Constitutional Court on the *Treaty of Lisbon* which,³⁴ reflecting on competences which had to necessarily remain in the national bosom,³⁵ did not list the control over currency as one of the competences which belong by essence to member states.³⁶ One could thus doubt the relevance of such a distribution of competences as the criterion to arbitrate between the primacy of European Union law and sovereign constitutional supremacy.³⁷ This is confirmed, *a contrario*, by the introduction in the same decision of a new identity test similar to the logic animating the Irish and French case-law.³⁸

The notion of constitutional identity does not imply the settling *ab initio* of the potential normative conflict on the basis of the division of competences. Rather, it takes into account the ongoing disharmony between the necessary protection of certain features due to the prevalence of the Constitution and the consequences of the constitutionally-recognised participation in the European Union. In consequence, the notion of constitutional identity displays a concern which is primarily focused on the application of European Union law in the domestic legal orders. With regard to this disharmony, which Jacobssohn holds as being at the core of constitutional identity,³⁹ the case-law of Irish and French courts demonstrate that what is crucial is having the last word on the respective importance to be given to the two sources of their legal identity. As Poiares Maduro recognises it: “identity is lost if it is not self-determined.”⁴⁰ Therefore, the notion of constitutional identity is best understood as a discursive form, as representing the modalities of balancing the disharmony created by the existence of conflicting principles in the Constitution. Rather than being absolute and essential bars put on the doctrine of primacy, the constitutional provisions which are put forward in the Irish and French case-law are better seen as the contingent instances of the interpretative discourse constitutive of the notion of constitutional identity.

Conceived as an interpretative process, the notion of constitutional identity present, implicitly or explicitly, in the Irish and French legal orders endows domestic courts with a

³⁴ *Gauweiler v. The Treaty of Lisbon* (*Lisbon* decision), BVerfG, decision of 30 June 2009, 2 BvE 2/08. Available at <http://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html> [Last accessed 29 December 2012].

³⁵ *Ibid.* at para. 244-272, in particular at para. 252.

³⁶ For further developments on this point, see *supra* at 445-446.

³⁷ In this sense, see C. Schönberger, “*Lisbon* in Karlsruhe: *Maastricht*’s Epigones at Sea” (2009) 10 *German Law Journal* 1201-1218 at 1209-1210 where the author points out that the position of the Court depends on “political contingency”. See also D. Halberstam and C. Möllers, “The German Constitutional Court says “*Ja zu Deutschland!*””, *op. cit.* at 1249-1251.

³⁸ For further developments on this point, see *supra* at 444-446.

³⁹ On this link between constitutional identity and constitutional disharmony, see G. J. Jacobssohn, *Constitutional Identity* (Cambridge, Massachusetts: Harvard University Press, 2010), in particular at 346-355.

⁴⁰ M. Poiares Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, *op. cit.*, at fn. 10 above, at 526.

central role.⁴¹ While Irish and French courts rely on the same argument of sovereignty, it could be argued that they draw opposite consequences. In Ireland, the decision in *Crotty*⁴² required the expression of popular acquiescence in relation to issues (such as neutrality) considered to be of particular importance - a requirement which has been politically extended to every new European Treaty. In contrast, as is noticeable for example in the decision of the *Conseil constitutionnel* on the *Treaty establishing a Constitution for Europe*,⁴³ the French constitutional court circumvented the expression of the constituent power on sensitive issues, and allegedly exercised itself this competence. These distinctive positions can be explained by the differences in the respective amendment process and more generally by the different conceptions of the Irish and French sovereigns. However, despite this apparent difference, one can detect an instrumental use of the sovereign argument leading to an increase of jurisdictional competence in the determination of the balance between the singular and the common in the process of application of European Union law.

This central position of the judiciary also structures the relationship between the domestic and European levels. The notion of constitutional identity as a limit to the doctrine of primacy is not expressly raised in the Irish and French case-law. Rather, it is a way to circumvent the affirmation of the full supremacy of the Constitution in order to draw the consequences of membership to European Union and to accommodate the doctrine of primacy in their respective legal orders. However, this result is often conditioned by adopting a material perspective on the relationship between domestic and European rules (whereby focus is put on the normative content of the respective domestic and European rules and reconciliation between the two is frequently reached by interpretative alterations). The ambivalence noticeable in the notion of constitutional identity as present in the Irish and French case-law can thus be interpreted as an invitation sent to European Court of Justice to adopt a similar strategy which reconciles a unity of words with a diversity of meanings.⁴⁴

⁴¹ On this central role of the judiciary with regard to balancing constitutional dissonances, see G. J. Jacobsohn, *Constitutional Identity*, *op. cit.*, at fn. 39 above, at 351, and, on the particular issue of determining the respective importance of European and domestic identities, see M.-C. Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)*, *op. cit.* at 341-342.

⁴² [1987] I.R. 713.

⁴³ CC, decision n° 2004-505 DC on the *Treaty establishing a Constitution for Europe* of 19 November 2004, *Rec.* 173.

⁴⁴ For example, analysing the notion of constitutional identity, Mouton concludes that “all in all, respecting the constitutional identity on the part of the Union would consist of accepting that member states could give a particular interpretation, on the basis of their constitution, of fundamental rights or fundamental principles of Union law and thus limit thereby the exercise of fundamental freedom of the internal market or the principles governing the implementation of community policies, as far as member states are concerned”, J.-D. Mouton, “Réflexions sur la prise en compte de l’identité constitutionnelle des États membres de l’Union européenne”, in J.-C. Masclet, H. Ruiz Fabri, C. Boutayeb and *al.* (eds.), *L’Union européenne : Union de droit, union des droits :*

It seems that the position European Court of Justice can be interpreted from this perspective whereby, rather than resolving the conflict between the primacy of European law and the supremacy of the Constitution, the issue concerns the forms of expression of this opposition. It seems that the recent case-law of the European Court of Justice constitutes the acceptance of this invitation.⁴⁵ The reference to the notion of constitutional identity in the case-law of the European Court of Justice does not constitute a retreat of the doctrine of primacy. Nonetheless, perceived through the identity prism, it is not enunciated as stringently as in *Internationale Handelsgesellschaft*.⁴⁶ This is particularly noticeable when the newer case-law of the European Court of Justice is compared with its position in *Grogan*.⁴⁷ In this case, the European Court of Justice reached an outcome compatible with the decision of the Irish Supreme Court. However, while the domestic position was defined in terms of which are described in this thesis as being those of constitutional identity, the European Court of Justice disregarded this analysis and based its decision purely on Community law (as it was then).⁴⁸ In comparison, the decision in *Omega* goes beyond this mere adequacy of result. This decision can be regarded as building on *Grogan* and as considering the normative conflict by including concerns expressed by member state in its formulation of the doctrine of primacy. If considerations given to constitutional identity leads to the confirmation of the doctrine of primacy, the different meanings this notion takes in the case-law of the European Court of Justice still ensures the use of similar words which are shared with its domestic counterparts. Even though the use of this notion by the European Court of Justice would require further analysis which is beyond the scope of this thesis, it can be argued that member states persuaded their European counterpart to take into account their concerns and to give a normative dimension, as opposed to a mere textual recognition, to the notion of the identity of member states to an extent was until recently unseen.

Mélanges en l'honneur du Professeur Philippe Manin (Paris: Pedone, 2010) 145-154 at 151 (translation by the author). Some arguments made by Maduro seems to point out in the same direction, see M. Poiares Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", *op. cit.*, at fn. 10 above, at 534.

⁴⁵ This unity of words with a diversity of meanings seems to be principle according to which Jacqu  interprets *Omega* when he argues that the European Court of Justice integrated different national interpretations in the common legal framework, see J. P. Jacqu , "Droit constitutionnel national, Droit communautaire, CEDH, Charte des Nations Unies : L'instabilit  des rapports de syst me entre ordres juridiques" (2007) n  69 *Revue fran aise de droit constitutionnel* 3-37 at 18. In the same sense, see D. Ritleng, "De l'utilit  du principe de primaut  du droit de l'Union" (2009) 45 *Revue trimestrielle de droit europ en* 677-696 at 685-686.

⁴⁶ Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle f r Getreide und Futtermittel* [1970] E.C.R. 1125.

⁴⁷ Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v. Grogan and others* [1991] E.C.R. I-4685.

⁴⁸ See *supra* at 474-480.

Constitutional identity involves increased consideration being given by judicial actors to requirements and concerns stemming from the other legal order.⁴⁹ Irish and French courts, on the one hand, and the European Court of Justice, on the other, express with the same words – the doctrine of primacy and the notion of constitutional identity – a similar disharmony present in their respective legal orders. For each particular state, normative prevalence is accommodated with the membership of European Union while, for the European Union legal order, normative prevalence can not fully ignore the concerns of each particular state. Even though this similar balance is effected according to the differing existential requirements which structure each legal order, domestic courts and the European Court of Justice manage through the use of a common conceptual approach to keep under the surface the dissonance between the doctrine of primacy of European Union law and the national doctrine of supremacy of the Constitution. Therefore, it can be argued the notion of constitutional identity continues the dialogue which has opposed domestic and European courts since *Costa*⁵⁰ while shaping it under new modalities whereby frontal opposition is avoided and an image of the relationship between the domestic and European legal order is offered where, despite their essential opposition, their respective “existential requirements” appear as harmoniously integrated.

To a certain extent, the judicial relationship build upon this notion of constitutional identity ensures a deepening of European integration even in the absence of an agreed approach to primacy being provided for in legal texts. For instance, the consideration of the doctrine of primacy by the *Conseil constitutionnel* in 2004, which led to the development of the notion of constitutional identity in its case-law, endures despite the negative result of the referendum on the Treaty establishing a Constitution for Europe. Conversely, it is merely outside agreed legal texts that this process occurs. Rather than being the result of an increase of the *de jure* integration between the domestic and European legal orders, the notion of constitutional identity structures the relationships between the two legal spheres through jurisdictional policies. It achieves a *de facto* convergence through the juxtaposition of monologues which are developed according to their respective own logic, either in terms of primacy or in terms of supremacy.⁵¹

⁴⁹ In this respect, the contrapunctual model developed by Poiarses Maduro is dedicated to the “ordinary state of affairs” where the question of ultimate authority is avoided, see M. Poiarses Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, *op. cit.*, at fn. 10 above, at 532.

⁵⁰ Case 6/64 *Costa v. E.N.E.L.* [1964] E.C.R. 585.

⁵¹ In this sense, the notion of constitutional identity as a unity of words with a diversity of meanings differ from the solution proposed by Phelan to the alternative between revolt or revolution on the relationship between the national and European legal orders. As the notion of constitutional identity, this solution consists of protecting only certain constitutional values rather than the full supremacy of the domestic Constitutions. However, the

Certainly, one can observe in the growing importance of the normative scope of the notion of constitutional identity in judicial discourses a renewed and more integrated judicial interactions resulting from the discrepancies between the normative positions of the domestic and European legal orders. However, these interactions fall short of a normative unity encompassing European and domestic courts. This is the result of European integration as a process where the intertwined nature of the European and domestic legal orders is recognised by courts at both levels but, due to the incomplete nature of this integration, the reality of their respective claims requires a mutual recognition by the authentic interpreter of the other legal system. This means that the notion of constitutional identity displays a state of affairs whereby domestic courts and the European Court of Justice are rather connected by an interplay of forces. It is in this sense that the relationship within the European Union between the actors at domestic and European levels can be regarded as having a constitution, if it is understood as following a certain structure or shape.⁵²

In his presentation of his “contrapunctual law” model as a form of constitutional pluralism, Poiares Maduro argues that “the European legal order should be conceived of as integrating the claims of validity of both national and EU constitutional law.”⁵³ It is possible to understand this statement in different ways. On the one hand, from a normative perspective, this European legal order consists of a system of rules encompassing both European Union and member states’ claims. Answering the question of what a third legal order encompassing the other two would be would not be without difficulties when compared to the notion of constitutional pluralism.⁵⁴ On the other hand, it is possible to interpret this European legal order referred to from a descriptive perspective.⁵⁵ It would correspond to the account of the interplay

relationship established between domestic courts and the European Court of Justice under the constitutional identity paradigm, based on jurisdictional policies, does not involve an explicit exemption from the doctrine of primacy as determined by national courts, which would lead to a formal recognition of exceptions to the uniformity of what is now European Union law, see D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Round Hall Sweet & Maxwell: Dublin, 1997) at 417-424.

⁵² On this mechanistic definition of the concept of constitution, and in particular its relevance for legal science, see M. Troper, *Pour une théorie juridique de l’État* (Paris: Presses universitaires de France, coll. Léviathan, 1994) at 210-216.

⁵³ M. Poiares Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, *op. cit.*, at fn. 10 above, at 524.

⁵⁴ For a similar understanding, see H. Lindahl, “Sovereignty and Representation in the European Union”, *op. cit.*, at fn. 3 above, at 105 fn. 25.

⁵⁵ In this sense, Poiares Maduro develops its model “from a perspective outside both national and Community legal orders”, M. Poiares Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, *op. cit.*, at fn. 10 above, at 521. On this point, see the opinion of Monteillet who states that “on the other hand, the theoretical pluralist approach presupposes that one accepts as an *external observer* the *de facto* coexistence of several systems, each having its own validity, without giving priority to one in particular. However, this neutral position can never be that of an authority creating norms (including a court)”, S. Monteillet, “Une étude théorique des rapports entre droit communautaire et droits nationaux est-elle d’actualité ?” (2004) *Revue de la recherche juridique - Droit prospectif* 1937-1953 at 1948 (translation by the author).

of forces in the European Union as a result of the doctrine of primacy developed by the European Court of Justice and the resistance of domestic courts on the basis of sovereignty.

The notion of constitutional identity identifiable in the Irish and French positions as regards the doctrine of primacy could thus constitute a deepening and a strengthening of this interplay. However, despite an increased awareness of the European requirement, it nonetheless affirms that normative prevalence can only be granted to norms representing the expression of a political sovereign. At the present stage of European integration where sovereignty remains located in the member states, it is *in fine* their Constitutions which prevail. The notion of constitutional identity is thus the sign that the constitutionalisation of Europe is to be found in discourses about the *de facto* interactions between two legal orders which still remain *de jure* existentially separated.

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Abstract

Abstract in English

Comparing the Irish and French legal orders leads to describe the appraisal of the primacy of European Union law by the notion constitutional identity. In contrast to the claims of the European Court of Justice, the constitutional regime regarding European rules, both in Irish and French law, only provides for immunity and ultimately affirms the supremacy of the Constitution as the norm expressing national sovereignty. Still, Irish and French courts display a conciliatory attitude focused on aligning the material content of domestic and European norms. Rather than essentialism, the notion of constitutional identity represents a discourse on the Constitution whereby the identity status qualifies those constitutional norms which can defeat constitutional provisions dedicated to the prevalence of European rules as a result of an interpretative balancing process.

While manifesting different affirmations of national sovereignty, the common objective of Irish and French courts is attaining increased control of the application of European Union rules. The institutional dynamics distinguishing the notion of constitutional identity as an interpretative process involve both an empowerment of the judiciary and a specific form of dialogue with the European Court of Justice regarding the conciliation between the primacy of European Union law and the supremacy of the Constitution. Judicial monologues protecting constitutional identity mean possible exclusions of the domestic application of European law and constitute an invitation to the European Court of Justice to agree to a peaceful co-existence of the two legal orders defined as a unity of words with a diversity of meanings.

Abstract in French

La notion d'identité constitutionnelle permet de qualifier le positionnement respectif des ordres juridiques irlandais et français face à la primauté du droit de l'Union européenne. Comparé à la jurisprudence européenne, leurs régimes constitutionnels relatifs à ce droit externe n'offrent qu'une immunité et affirme *in fine* la suprématie de la Constitution en tant

qu'expression de la souveraineté nationale. Pourtant, les juridictions des deux pays montrent une attitude conciliante fondée sur une relation de contenu entre normes constitutionnelles et européennes. Plutôt qu'un essentialisme, la notion d'identité constitutionnelle représente un discours portant sur la Constitution suivant lequel une qualité identitaire est reconnue aux normes constitutionnelles susceptibles de mettre en échec les dispositions dédiées à la primauté des normes européennes au terme d'une interprétation les mettant en balance.

Malgré des affirmations différentes de leur souveraineté nationale, l'accroissement du contrôle de l'application du droit européen est un objectif commun dans la jurisprudence des deux pays. La dynamique institutionnelle qui caractérise le processus interprétatif qu'implique la notion d'identité constitutionnelle privilégie les juridictions et mène à une forme singulière de dialogue avec la Cour européenne de justice conciliant primauté du droit européen et suprématie de la Constitution. Les monologues menant à une exclusion de l'application du droit européen au nom de l'identité constitutionnelle sont une invitation faite à la juridiction européenne pour établir une coexistence pacifique entre les ordres juridiques définie par une union de mots dans une diversité de sens.

Keywords (*in English*)

Constitutional identity, Constitutional law, European Union law, France, Hierarchy of norms, Interpretation, Ireland, Primacy, Separation of powers, Sovereignty

Keywords (*in French*)

Droit constitutionnel, Droit de l'Union européenne, France, Hiérarchie des normes, Identité constitutionnelle, Interprétation, Irlande, Primauté, Séparation des pouvoirs, Souveraineté