Transcription of the Debates Presided by Professor Manuel Porto (Chair) and Moderated by Professors Alessandra Silveira and Sophie Fernandes (Debaters)

Professor Alessandra Silveira

I'm going to face some difficulty in countering these arguments because I basically agree with everything that's been said. This raises profound difficulties, compromises the work of debating and polemics, and therefore I will choose to say what I think about that has been said here, my position on the issues that have been discussed, and then you may present counterarguments, comment as you see fit. I'd like to begin by saying to Professor Leonard Besselink and Professor Bruno de Witte that I also prefer the term interconstitutionality to multilevel constitutionalism, because I think interconstitutionality conveys much better the idea of this interconnecting model, this network of constitutions coexisting within the same political area that the term attempts to translate. In fact, I must say that the expression "interconstitucionalidade" (interconstitutionality) was introduced into Portuguese academia by Professor Francisco Lucas Pires, and was later developed by Professor Gomes Canotilho, both of them from the University of Coimbra, and therefore, this is a term originally coined within Portuguese academia, which makes us very proud and, at this point, I'd like to take this opportunity to honour these two great Portuguese constitutionalists.

And in my view, what is the meaning of this phenomenon of interconstitutionality? Interconstitutionality, in the context of EU law, corresponds to the reflexive interaction of constitutional norms from several sources (in case, international, national and European norms regarding fundamental rights) that co-exist in the EU political space, and demands a networked performance to solve common problems. And it is precisely for this reason that Professor Gomes Canotilho argues that the process of European integration must be studied based on a theory of interconstitutionality, or based on a network of constitutions coexisting within the same political area. Professor Gomes Canotilho draws on the metaphor of networks to explain that the instruments of national constitutional law can no longer capture the meanings, the limits, can no longer provide legally adequate interpretations for problems of interconstitutionality. But the new aspect here, as Professor Marcelo Neves explained, the new aspect of this interconnecting model is that it incorporates a transconstitutional rationale. The novelty here being that the bridges between legal orders (therefore, that which connects one legal order to another, one point to another) are constructed directly from the courts of these various legal orders, within the context of which forms of learning and interchange are developed – it being impossible to determine, *a priori*, which will take precedence, as EU law itself, at least in regard to fundamental rights, dictates that the highest (or maximum) standard of protection should be applied from all those involved to solve a specific problem (national law, international law or EU law). For this reason it is said that a plurality of legal orders within this context implies a complementary relationship between identity and otherness; as explained by Professor Marcelo Neves, identity would be rearticulated from otherness, from the other.

And why this theory of interconstitutionality has special relevance to the EU fundamental rights' protection? As defined by the Treaties, the system of fundamental rights' protection in the EU is based 1) on their recognition as general principles of EU law, and 2) on the appeal to fundamental norms from several sources: European norms (from the Treaties and especially from the ECFR), national norms (corresponding to the common and individual constitutional traditions of the Member States) and international norms of human rights (especially the ECHR). None of this is altered by the entry into force of the ECFR – that now adds to the already existing protection [Article 6 (3) TEU]. However, the practical application of different standards of fundamental rights is far from simple. Even the essential core of a norm is apparently the same under several legal orders (the Union's, national and

international legal orders) there are systemic differences that may produce different standards – and thus the cautious filter the ECJ has imposed, to ensure the structure and objectives of the EU legal order. And this careful “filtering” removes the risk that a “reductive” individual tradition will be mechanically incorporated by the EU legal order. Therefore, the specificities of fundamental rights’ protection in the EU (and the logic of interconstitutionality that inspires them) have led to the statement of a principle of the highest standard of protection, in Article 52 (3) and 53 ECFR. According to that, in its respective field of application, the EU law will grant the highest protection available from the many that may be mobilized for the solution of a concrete case concerning fundamental rights. And that highest protection ensured by EU law may be the one established by the ECFR, by the ECHR or by the national Constitution claimed in that case, as there may be differences between the legally relevant standards of protection that derive both from the texts and from their interpretation/practical application by the different courts. The problem encountered by the ECJ and national courts faced with the application of European norms to concrete cases is precisely finding the standard of fundamental rights to apply, because EU law requires the application of the highest standard of protection under Article 53 ECFR.

And what do I think, what do I believe that norm takes into account? Well, according that principle, no provision of the Charter may limit or undermine fundamental rights recognised in their respective fields of application by EU law, by the ECHR and the Constitutions of the Member States. However, if Article 53 ECFR intends to preserve the standard of protection currently afforded, in their fields of application, under EU law, the ECHR and the Constitutions of the Member States, none of the standards reached by such legal orders should be drawn back. Therefore, in a situation of competing standards of protection, the highest one shall be applied. This does not mean that I, in Portugal, can call upon standards found in the German or Belgian Constitution, but it means that from the moment that the ECJ recognises that the standard of legal grounding under the German or Belgian Constitution is applicable to that particular situation, I in Portugal also benefit from this interconstitutional rationale, because decisions made by the ECJ set a binding precedent for similar situations. And therein lays, in my view, the richness of the EU model of fundamental rights’ protection. It lays precisely in this interaction between constitutional norms of 27 Member States; from this perspective, it is perhaps the most sophisticated model of fundamental rights’ protection hitherto conceived. Of course, being sophisticated, it is not exactly simple, but nothing in the EU is simple, and I have to admit that it becomes hugely complicated when we are faced with conflicts of rights, because then it is the highest standard of protection for whom? – And to protect which legal interest? It is complicated indeed, but it seems to me that there is nothing more sophisticated than this highest standard of protection and it cannot be otherwise in the EU because of the various competing standards of protection.

In any case if, as Professor Marcelo Neves noted, transconstitutionalism is the model of the future, I think that, in a certain sense, we have reached that within the EU legal order, we are pursuing the blind spot that others can see in the EU. But when does it apply? That is the major question. In which situations, does this maximum standard of fundamental rights’ protection apply? It is clear from the ECJ case law, indeed covered by Article 51 ECFR, that the fundamental rights protected by the EU may be invoked when the measure at stake falls within the scope of EU law, whether it is a national measure or a European measure. This means that the EU standard of fundamental rights is dragged to the sphere of action of Member States whenever they apply EU law – and that its standard of protection will coexist with the standards of the national Constitution and of the ECHR, giving origin to the referred phenomenon of interconstitutionality. In this context, the dialogue between jurisdictions using preliminary rulings (Article 267 TFEU) is indispensable when it comes to determining the normative content to be applied to a certain concrete situation in a framework of interconstitutionality. This happens because national law and EU law are so closely interconnected in certain matters that it is not always easy to define the border between them – and this way to decide on whether or not the situation is part of EU law’s field of application, a pre-requisite to invoke the EU standard of fundamental rights’ protection.

And if the appeal to the EU standard of fundamental rights' protection depends on whether or not the situation falls under the field of application of EU law, it is important to clearly define the extension of that field. The solution of the enigma results from both the letter and the spirit of Article 51 ECFR: the field of application of EU law is the one that derives from its competences, as stated in Articles 2 to 6 TFEU. Therefore, provided that the EU has competence in a given field, the standard of fundamental rights' protection applicable to concrete situations is that of the EU. That is why the protection of fundamental rights under the national constitutions and the ECHR is relevant for the correct application of EU law: the highest standard of protection may be that which results from the national constitution or ECHR, and if so, this should be the applicable standard. And there is no subversion of primacy, because it is the EU law itself that orders the application of the highest standard of protection, according to its criteria. Problems regarding the EU scope of fundamental rights are the burning question on the agenda, and this is reflected in the latest ECJ case law. In the Zambrano case, Advocate-General Sharpston devoted pages to this subject, concluding that the EU scope of application of fundamental rights corresponds to its powers, including those not exercised – and I think touching on these issues is indispensable in a symposium of this nature. Moreover, it is important to note that the unlimited claim of a highest standard of protection based on national/constitutional traditions is capable of disrupting the very effectiveness of EU law. For this reason, it is necessary for the ECJ to avoid instrumentalising the highest standard of protection, i.e., to prevent Member States from shielding themselves from this principle in order to seek exemption from their obligations under EU law, and unilaterally deciding on the measures to adopt.

To conclude on the subject of political identity/constitutional identity, I would also like to leave some food for thought, perhaps particularly addressed to Professor Balaguer, but not exclusively. Well, we have seen that federalism is in fashion, the weaknesses of the Union, both political and economic, have highlighted the need to deepen the federative components of integration. I think no one can disagree with this, no one with a minimum survival instinct can disagree with this for the reasons that Professor Balaguer clearly explained. But I would say there is nothing new or surprising in this, the federalisation of Europe has been going on for sixty years, since the Schumann Declaration of May 1950, on the 9th of May 1950, the construction of a Union on a federative basis began, with specific reference to the term "federation", it is there, "European federation", it has always been this way. And that is why I think those who believe that the federalisation of Europe depends on a federal constitution designed as such, or the express waiver of the status of sovereign state, are mistaken, because the evolution of the federative system of the European Union never has, and probably never will, take this form. There is no need to wait for the so called "federal Big Bang", an expression already used by some, because it will never happen, this "federal Big Bang" is not going to happen. Nevertheless, it has been advancing in an orderly and quietly way, for sixty years, by means of legal and political unity, based on the rule of law and governed by the highest standard of fundamental rights' protection. The goal is not exactly a federal state, nor is it desirable to be such, because the error of jurists has always lain in seeing federalism solely from the dogma of the sovereign state as structure and not as process, and federalism simultaneously suggests structure and process, a balancing of centripetal and centrifugal forces. As Carl Friedrich said, organising federalism legally does not mean necessarily constituting a state of states, but regulating the process through which various communities may coexist harmoniously and even transform themselves. What is at stake is something so much more sophisticated than the creation of a federal state, as it implies a complementary relationship between identity and authority, as explained by Professor Marcelo Neves, through which the various legal systems involved continuously reconstruct their constitutional identity by becoming interwoven with each other.

But then, if the federalisation of the system is already making great strides, and those who have not yet noticed do not know what stage we are at, why clamour for the deepening of the federative components of the system? In the federative systems, loyalty to the integration process depends on the recognition of the common benefits arising from federation; and here the multilevel citizenship mentioned by Professor Eva Poptcheva certainly has a role to play in the development of this sense of

belonging. Therefore, the sharing of powers and resources that the federative system requires depends on the benefits of union being perceived by citizens and federative entities. Federalism involves a process of mutual recognition, mutual learning, and continuous negotiation. In any case, the success of a federative system depends on how the spheres of power interact in pursuit of common objectives, and it is precisely this mode of interaction that needs to be improved in the EU, and therefore, I think this is what we are looking for when it comes to a deepening of the federative components of the system, without it leading to a federal state. But these are my humble views of what has been said here.

Professor Sophie Fernandes

This panel has had the task of reflecting on political identity in the context of the interconstitutionality characteristic of the European integration process. The crisis to which the overall theme of the Symposium refers, as projected here, refers, in my view, to the financial and economic crisis that affects and concerns us all, but the association of this title and the title of the panel brings to mind another crisis, in my opinion, an identity crisis within the European Union, and I say within the European Union because this crisis affects all those involved in the integration process. It is an identity crisis of a European Union that still does not quite know who it is, still faces the task of identifying itself, as Professor Francisco Balaguer has pointed out, it is an identity crisis of its Member States themselves, before this having long since not been alone in defining their own identities, they must learn to redefine or re-communicate their identity in relation to others, the “otherness” as Professor Marcelo Neves teaches us, but it is also an identity crisis of its own citizens, who find themselves involved in this crossroads, in this maze of identities, of multiple citizenship, and there are two possibilities, they are not sure who to turn to enforce their rights or they have a choice, multiple choices, a forum shopping of citizenships as Professor Besselink has pointed out to us. The entry into force of the Charter is undoubtedly a very important step towards consolidating the identity of the European Union. The visibility given to the protection of fundamental rights is an explicit objective of the Charter itself in its preamble, so it is a desired, intended goal. This brings the inevitable consequence of increasing the number of cases pending before the courts in matters of fundamental rights, an increase in litigation relating to fundamental rights. It is therefore natural that this issue, the protection of fundamental rights, is on the agenda of that which is, by consensus, the engine of the process of European integration, namely the Court of Justice, so it is desirable and expected that there be an increase in cases involving fundamental rights in the Court of Justice itself, and that is why my questions will primarily focus on the role of the Court of Justice within the context of this economic crisis, this financial crisis, but also this identity or identities crisis. It will naturally play an important role, and in my view, also a crucial one, because, sooner or later, all roads will lead to the Court of Justice, no to Rome, to the Court of Justice. But what matters is knowing what means should be employed by the Court of Justice to resolve all these issues.

Before I go on, I wanted to make clear the following, and as Professor Alessandra admitted yesterday, my role here will be more that of Devil's Advocate, my students who happen to be listening know that this reflects a little the method I use in my classes, not always expressing my ideas, my position, sometimes adopting a different position to encourage debate, encourage questions. Therefore, I do not agree with everything I am going to say, but the aim is to encourage debate, therefore, more than express my ideas, express ideas for further discussion. Also because, more than the Court of Justice, I believe that, today, that national courts can do more by means of EU law than the Court of Justice itself. Given its position within the courts structure of the European Union, the Court of Justice is in a somewhat delicate position. It has to simultaneously ensure respect for EU law, but increasingly it is required to respect the constitutional identity of states, therefore, there is a tension here between the deepening of integration and, let’s say, the forces of identity coming from the states, which the Court of Justice itself also has to respect and safeguard. The position it takes is very delicate and that is why I say that, today, more than the Court of Justice, it is the national courts that can go where the Court of Justice cannot go, cannot yet go.

I mentioned earlier, therefore, that there would be an increase in cases pending before the courts in matters of fundamental rights, and this is desirable, it is the objective, it is an unavoidable consequence, and even a desirable one, of the entry into force of the Charter. If I mentioned earlier that the Court of Justice is the engine of integration, the truth is that no engine runs without fuel, and the fuel will be the individuals, will be these same cases. Let's say that European Union law is primarily the product of cases, of individual litigation in national courts and the cases that the national courts refer to the Court of Justice. It is important to preserve this scenario, today more than ever, the crisis is seeing more cases being brought to court, and hopefully the courts will increasingly refer them to the Court of Justice. But besides this factor, there is also another very important one, EU law is also the product of the extent to which the Court of Justice intervenes in such cases – whether it is more directive, or more indicative. There are cases in which the Court of Justice, responding to questions brought to the courts, does not leave much room for manoeuvre for the national court, the Court of Justice would provide a solution ready to be applied, not ready-to-wear, ready-to-apply, and the referring court does not have much to choose from, and a decision about whether or not the national standard is consistent with EU law, for example, is a direct result of the decision, with no room for doubt. In other cases, the Court of Justice is more indicative, it provides a set of criteria or clues for deciding, it provides guidance more or less clearly to the referring court, which effectively then has the task of deciding, and in these cases the preliminary ruling does not necessarily have the effect that the national court intended, it intended to take a practical decision, direct from the decision of the Court of Justice, and finds itself in much the same situation, i.e., with referral, without referral, sometimes the national court may find itself in the same situation.

In matters of fundamental rights and citizenship, I have selected two recent cases that illustrate this situation, the Zambrano and Dereci judgements. Under the Zambrano judgement, which, whether or not we agree with the solution, is a directive judgement, the Court of Justice leaves no room for the court in that case to decide otherwise. On the other hand, we then have the Dereci judgement, in which the Court of Justice provides a set of criteria, but leaves the solution, refers the specific solution for each of those five cases back to the referring court. And then I wonder, and also the most curious feature of these cases is the following, it is more or less agreed that Zambrano represents a step forward in matters of citizenship, of strengthening the protection of fundamental rights or even the actual scope of applying EU law, but the subsequent judgements of the Court of Justice went back on it to a certain extent, so the McCarthy judgement, the Dereci judgement constitute a kind of step backwards, at least compared with Zambrano, they may be incorporated into the same line as earlier judgements, but, when compared to Zambrano, they may be interpreted as a kind of step backwards, or at least some doctrine interprets them as such. And, most importantly, these judgements keep alive an issue, which is the question of purely internal situations, the distinction between active and passive citizens, mobile or not. And I wonder if this will still have relevance in today's world, if it is still relevant to the extent that citizenship is deepened, to what extent it is compatible with the affirmation of citizenship as a direct relationship between the EU and the citizens of Member States as defined by Professor Eva Poptcheva. Therefore, how do we interpret all this also in light of another statement reiterated by the Court of Justice that the status of European citizenship tends to be the fundamental status of EU citizens, and also where does the principle of subsidiarity fit into all this.

I also wanted to return to the issue of constitutional identity and also knowing, therefore, *vis-à-vis* those two lines that I outlined, one more directive, the other more indicative of how the Court of Justice makes decisions, which is preferable when discussing constitutional identity where cultural and social values are concerned, which form the hard core that identifies a community, or its own political and organisational structures that support the same community. Should the Court of Justice be more indicative, more incisive, or should it be more collaborative and more "guiding", so to speak. Within a context of crisis and urgency in making decisions, perhaps the first route is advisable, but it is not properly respectful of national constitutional identities. At the same time, if the Court of Justice exercises this caution, we will be back to what I said earlier, the referring court does not derive from the

decision of the Court of Justice on issues as sensitive, as complex, even desirable, that which it was really seeking by means of the referral. This is an issue about which I feel most divided between emotion and reason, and I cannot properly make a distinction, so with that, I'm going to open this up for discussion among both the speakers and the audience. Thank you very much.

Professor Bruno de Witte

Thank you, I will be brief and just speak on one point. Professor Alessandra Silveira said that she agreed with all the speakers, and that is very kind, but it is also logically impossible if the speakers disagree between themselves. So, I would like to point at one element of disagreement between myself and Leonard Besselink, namely on his concept of the local maximum standard. He defended the idea that it should be possible for member states of the European Union to give more protection to the fundamental rights within that country (that is why it is called a local maximum standard) even at the cost of not applying European Union law. Well, I don't really agree with that and I will try to give you an example of a concrete case to show why I do not agree. The example is the well-known Directive which prohibits tobacco advertising. The Directive was challenged before the Court of Justice by the German government arguing, among other things, that it was in breach of freedom of expression, more precisely the freedom of commercial expression of the tobacco firms. The Court of Justice rejected this claim. Now, based on the theory of the local maximum standard it would hypothetically be possible for the German constitutional court to decide that this Directive is not going to apply in Germany because German law gives more protection to freedom of expression than the European Court of Justice does. I would not agree with this position for two reasons. First, because as you can see it would lead to a playing field which is no longer even within the internal market, with the German tobacco companies still being allowed to advertise, whereas the companies from other EU countries would not be allowed to; so, the whole purpose of having common rules on free movement, which is behind this Directive, would not be achieved. But beyond that economic argument, there is a broader argument about the role of fundamental rights. When the European legislator acts in a given domain, the discussion on the appropriate protection of fundamental rights should be a European discussion, that is to say one that should be conducted within the legislative process of the European Union, with the Parliament, the Council and the Commission, each defending their view as to the appropriate protection of fundamental rights. This point is connected to what Francisco Balaguer said about the European political identity: if we want to create a European political identity we must conduct a discussion on the appropriate protection of fundamental rights at the European level and not delegate it to each member state.

Connected to this is my further view that maximizing the protection of fundamental rights is not necessarily a good thing. I think most of us here have assumed that the more protection you can give to fundamental rights the better. I don't think that's true. Why not? Because whenever you protect fundamental rights you reduce the scope for political decision making, so there is an issue there, of courts exercising power to the detriment of the political institutions by invoking fundamental rights. Let me give you what I consider an extreme example from outside Europe. The United States Supreme Court has held that limiting the amount of money that people can spend in sustaining political campaigns for elections is an unconstitutional breach of freedom of speech. I personally think that this is an outrageous interpretation of the right to freedom of expression by which the judges protect plutocracy, if I can put it like that, rather than democracy, and reduce the room for genuine democratic deliberation. This may be an extreme case, but I think that also in Europe there are many cases in which you can say that courts give too much protection to far-fetched fundamental rights and unduly limit the scope for democratic decision-making in doing so. Although I do agree that fundamental rights are important and should be protected, they should not be the only value in the legal system and it is also for that reason that I would not be in favour of allowing member states to derogate from the application of European Union law in the name of giving more protection to their national constitutional rights.

Professor Francisco Balaguer

I am grateful for the references made by Alessandra and Bruno; I would like to mention three things: the first, I agree with what Bruno said regarding fundamental rights, we have a very important lesson to learn about constitutionalism. Constitutionalism under Article 16 of the French Declaration of the Rights of Man and of the Citizen establishes that the protection, the safeguarding of rights and the structure of power are two inseparable things; we cannot protect rights and ignore the power structure, the division of power. That's why a decision such as that of the US Supreme Court mentioned is a decision favourable to some people's rights, but contrary to democracy, because it favours plutocracy. This reflection is also crucial to understand as the methodologies of these new theories with which I agree, the theory of transconstitutionalism is very important, and also interconstitutionalism, I agree more with these than with the theory of multilevel constitutionalism, although this theory has also made important contributions. But the problem is, Alessandra said this and I agree, we must also mention the context, the system. Here comes my second idea, because what constitutionalism teaches us is that, in order to establish rights, to establish democracy, we also need to look at the context and to look at the structure of power. So it's not the same thing to protect the rights made by a court without the legislator of fundamental rights, without a public space where the issues and rights can be discussed, without the articulation of conflicts, without democracy. With a constitutional court in a State where we have democracy, we can canalize conflicts, we have the opportunity for discussion, we are able to impel legislative policies to interact with the court and so we have a very different situation. We cannot talk of constitutionalism by mentioning only some isolated techniques that are not truly constitutional, but legal ones; they can be important techniques, but we cannot leave these techniques outside their constitutional context. Context is very important in constitutional law and this is also related with the construction of Europe. We do not have a federation, we have, in the words of Professor Häberle, a pre-federal structure, we have a structure that is not currently a federation. Joseph Weiler put it very well, when he said that we have in Europe a confederation at political level and a federation at legal level and, for Weiler, this asymmetry is a good idea. For me, it is a perverse model; it is contrary to constitutional law. We also need to have a federation at the decision-making level, at the level of articulating social conflict, because, Alessandra, you said we have a harmonic federation but democracy thrives on conflict, it thrives on pluralism and one of the functions of constitutional law is the articulation of pluralism and conflict. China's regime, for instance, defines its society with the concept of harmony, and they say they have a society in harmony, well, only dictatorships generate that kind of harmony. We have pluralism and conflict. We need pluralism and conflict at the European level, as Bruno said. This is a very important thing, and here my third point comes in, the Court of Justice is not a factor for establishing identity. It is a very important institution. It is an actor that can make an important contribution to identity, but this identity is democratic identity, constitutional identity. This is the only chance we have to establish identity at a European level, and that means majorities and minorities, because when we analyse the Court of Justice, when we analyse the institutions that are linked to constitutional law but are not constitutional institutions, we may say that the Court of Justice is a constitutional court in a broad sense, but the Court of Justice does not have a legislator of fundamental rights, the European Parliament does not have the capacity. It has begun to do so, but so far, it does not possess the powers to develop fundamental rights at a European level in the same measure that the national parliaments. Moreover, the Court does not have the function that the national constitutional courts have. What is the role of the constitutional courts? The protection of pluralism, the protection of minorities against the majority. The Court of Justice does not exercise this faculty because we do not have a public space in Europe, we do not have majorities and minorities debating, we only have national interests in Europe, so when we try, as we have been trying for many years, to develop constitutional law within a supranational context, we have to use a very precise method, because we cannot study institutions as if they were constitutional institutions. There are differences. It is important to recognise these differences, to know what the problems are that we are now faced with and to overcome these problems. I always recall the words of Schulze-Fielitz, a German

constitutionalist, who said that the function of the narrative of political discourse is to legitimatise, but it is the specific, critical task of scientific discourse to identify the problems and to anticipate. We have to perform this critical task to improve our society, which is our function. So we have to contribute a methodology to better understand the current situation of Europe, not to legitimise it, understand the reality of Europe, overcome and transcend the problems we now face in Europe. I strongly agree with what you say, and also with others. It is true that we have some differences, but it is also true that, in general, in this session we have agreed on many important points.

Professor Leonard Besselink

There were two people in the audience who wanted to pose me the question, on what I thought the Court should answer in the *Meloni* Case, but as they have both left I'll answer to the position taken by Bruno De Witte. It basically raises the issue, who should apply fundamental rights, for instance the Charter and Article 53 ECHR as well. Also it raises the issue of who should decide: is it the *courts*, is it the ECJ, and is it national constitutional courts or other courts, which are competent to decide such matters? And when I say that, as far as I am concerned, the best arguments are in favor of a local standard, and then I think that applies fairly smoothly to primary free movement rights and we see that in Omega. You know, in the 1970s our colleagues from European Union law would say, "If we were to make an exception only for the Germans because they have this strange concept of human dignity, the whole of European law will crumble because it will no longer have the uniform effect, and primacy will be undermined", etc. We see that we are in a much more mature constitutional equilibrium, and we see in *Omega* that this uniform effect is no longer always absolutely necessary, also in the eyes of the Court in Luxembourg. Now, of course things become very difficult if we apply fundamental rights to secondary EU law which aims to harmonize law substantively. First, I fully agree that it is at the level of decision making of the EU legislature that that is the place where also local standards should be taken on board if they are of such importance that they touch on what I would conceive of as the constitutional identity of a member state. Secondly, we should remind ourselves that most of the constitutional courts who do not accept absolute primacy talk about fundamental rights protection; say "we do not need identical protection, for us equivalent protection is sufficient". Actually also the Polish constitutional court has now in November shifted, I think, in the direction of what the German and the Italian constitutional courts have always said on this point, so there is some leeway there. I think that in much EU legislation you take in all kind of national concerns of individual member states on board, so why not fundamental rights concerns as to draft secondary legislation which is considered to infringe national fundamental rights not merely in a peripheral manner, but as to their core. Of course governments are not very sensitive to this, governments don't like obstacles to what they want to achieve, they don't like parliaments, and they don't like fundamental rights and everything which can stand in the way of political objectives. Well, in the EU decision making game they have taken on board how to deal with the argument that your Parliament wants, now they should also take on board the argument "my constitutional court will not allow it"; I don't know of any examples on this field. Then what if courts were to apply the local standard if that is part of the constitutional identity of the member state? If courts do it, we must consider the jurisdictional limits of the ECJ. The European Court of Justice is only competent to interpret EU law; it is not competent to interpret what the Spanish, Portuguese or German constitution means. So if it is to review the claim that a piece of secondary legislation infringes a member state's constitutional identity, it will have to do two things: one, it will have to "translate" – and I think it does it: you see it in Omega, you see it in Sayn-Wittgenstein – they retranslate the constitutional concerns of member states into EU law terms. In these two cases (Omega and Sayn-Wittgenstein) the national constitutional provisions suddenly become captured under the "public policy" exception. This is of course a bit awkward but even so they do it and they apply a proportionality test, so if a claim to constitutional identity arguments is outrageous then they will simply consider it disproportionate. Think of the Mikhaniki case, a case in which basically the Court of Justice was faced with a public procurement law which a secondary law, under EU law,

and an amendment to the Greek constitution, a sort of anti- Berlusconi clause: you clearly see there that it dealt with it in terms of proportionality. The fact that they seemed to ignore the constitutional nature of it in Greek terms was actually not a fundamental problem for the Greeks. I think it may have taken the Greek Council of State five years to take the final decision in the Mikhaniki case after the ECJ delivered its preliminary ruling, but what the Council of State did is basically that to say that proportionality is a very important legal and constitutional consideration. And then they read that into their own anti-Berlusconi provision in the Constitution to accommodate the view of the ECJ. So you do need what some people refer to as the dialogue, and I don't think that this will necessarily threaten either the rights that we have as citizens, or with also the EU objectives hold out for us citizens.

Professor Marcelo Neves

Thank you for your comments and perhaps it is clear that it would be fitting to point out some differences, but the point I wish to raise would be more in the sense of explaining that the problem is not, in my opinion, simply one of textualisation. The texts constructed that have been widely referred to here may appear to be a certain way of solving these problems by means of textualisation, the major problem that arises also here in Europe, not only within the European Union but in relation to the European Convention on Human Rights, is at the time of interpretation and application. It is interesting that it is said that Germany is more reactive, more negative in relation to the European Court of Human Rights, and Austria in 1964 held that, in its Constitution, the Convention forms part of the Austrian constitution, in principle apparently there would no longer be any problem. If the Convention forms part of the constitution, the problem would be solved, so I think it's a bit of European naivety on the part of European intellectuals, concentrating on these games of opinion, they do not understand the game of symbolic constitutionalisation very well; we have a lot more of an idea of it than the Europeans. So, in my opinion, the problem of Austria is clear, Austria says, okay, it is part of the constitution, but the court comes in and says, if the European Court of Human Rights interprets this in a way that we do not agree with, or that is harmful, i. e., the very interpretation of the Convention, if different from what we think adversely affects our constitution, we have to defend our constitution, otherwise we are allowing a constitutional amendment to be made by means of a decision of the European Court of Human Rights, which is the explicit decision of 1987. So even when you incorporate the Convention itself into the constitution this does not solve the problem, because the issue arises at the time of implementation. So here is the point that I would like to add, to some extent, "European constitutionalisation", in quotation marks, because I don't use that term very much, but in the process of so called European constitutionalisation, there is much of what I spoke with regard to Brazil's Constitution of 1988, symbolic constitutionalisation, hypertrophy of the symbolic political at the expense of normative power. This forms part of a whole reflection, also within the university, in a way the European Institute of Florence reflects a little the subordination to the European political game, in other words, it is not very reflective, for example, and not critical of the European experience. So I think that intellectuals, the European legal academic spheres, have become more ideologues than, as Professor Balaguer said, people who reflect critically, as an academy should, on the limits and possibilities of European law in general, and the European Union specifically. This is my criticism, respecting of course the diverse views presented here, I have kept this distance and this precaution, and this recent crisis shows this. My friend Poiares Maduro, we talked in 2000, I was a Jean Monnet Fellow, and she spoke of Europe as an idealisation, it was so beautiful, it was the counterpoint, everything fitted in so well, everything was perfect, and I said it is not so simple... He spoke of that with an immense excitement and I asked him, isn't there any danger of reversal? And he said, no, there is no longer any danger... And now we really have difficulties, and I think you have to be careful not to fall into exactly this simplistic idealisation of the so called process of constitutionalisation. So these would be my criticisms of my eminent colleagues.

Professor Eva Poptcheva

Thank you, Alessandra and Sophie for your comments. Just first of all a reflection to what professor Besselink said on the application of the local standard. I would probably agree on the rest, but what would you think about national fundamental rights limiting Union citizenship rights, taking into account the goal of Union citizenship rights to strengthen the European identity, so I am not sure if applying different national fundamental rights limiting, for example, Union citizenship rights, would function? And to Sophie's comment regarding the Zambrano case, I would say that the Court of Justice's case law has developed very quickly from the principles established in the Rottman case to the Zambrano case, in my opinion negatively. Whereas in the Rottman case the Court of Justice merely held that the Union citizenship as a status would be an optative criterion to be applied within the margin of discretion of the Member States, as a kind of a constitutional value or principle, so that national authorities cannot withdraw German nationality without taking into account that the person concerned would also lose Union citizenship, however, without establishing an obligation upon national authorities to refrain from the withdrawal of nationality. In the Zambrano case, as you said, the Court of Justice went much further and said that just because a person loses Union citizenship as such, the case concerned is no mere national case anymore due to the loss of the genuine enjoyment of Union citizenship rights, so that national authorities are not allowed anymore to withdraw national citizenship. I am not sure if this is a problem of subsidiarity or is it actually a problem of control of distribution of competences because nationality is not a Union power, but in any case I think the Court of Justice went too far in the Zambrano case, and probably the McCarthy case was then a little bit the step back, recognizing that the principles established in Zambrano went too far.