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Working Paper

The role of the German and Italian constitutional courts in the rise of EU human rights jurisprudence: A response to Delledonne & Fabbrini

TRiSS Working Paper Series, No. TRiSS-WPS-02-2020

Provided in Cooperation with:

Trinity Research in Social Sciences (TRiSS), Trinity College Dublin, The University of Dublin

Suggested Citation: Phelan, William (2020) : The role of the German and Italian constitutional courts in the rise of EU human rights jurisprudence: A response to Delledonne & Fabbrini, TRiSS Working Paper Series, No. TRiSS-WPS-02-2020, Trinity College Dublin, The University of Dublin, Trinity Research in Social Sciences (TRiSS), Dublin

This Version is available at:

<https://hdl.handle.net/10419/226792>

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TRiSS Working Paper Series

TRiSS-WPS-02-2020

The Role of the German and Italian Constitutional Courts

in the Rise of EU Human Rights Jurisprudence:

A Response to Delledonne & Fabbrini

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Date: 1st June 2020

Abstract:

The widespread understanding that the ECJ's early fundamental rights jurisprudence in *Internationale Handelsgesellschaft* (1970) and other cases was developed in response to judgments of the German and Italian Constitutional Courts has recently been questioned. Delledonne and Fabbrini claim both that the conventional account is chronologically inaccurate – the European Court's famous fundamental rights decisions came before those of the German and Italian courts – and that it relies on an understanding of postwar human rights leadership by these national constitutional courts which a closer look at their actual record does not support. This paper demonstrates however that there is substantially more evidence that the Court of Justice was responding to the concerns of the German and Italian constitutional courts than is frequently set out by either critics or supporters of the more conventional approach. The Court of Justice's famous fundamental rights decisions did indeed come after this issue had been first highlighted in judgments of the German and Italian constitutional courts; the threat to the uniform application of European law posed by the fundamental rights aspect of these judgments was prominently noted in the writings of ECJ judges; and the caution shown by the German and Italian constitutional courts in reviewing postwar domestic legislation on human rights grounds is not in conflict with an active role in promoting the ECJ's new human rights jurisprudence. In short therefore, there is considerable evidence that the ECJ was motivated to create its new human rights jurisprudence by the possible threat to the uniform application of European law posed by the German and Italian constitutional courts.

Keywords: European Court of Justice, German Constitutional Court, Italian Constitutional Court, Human Rights, European Law, Robert Lecourt

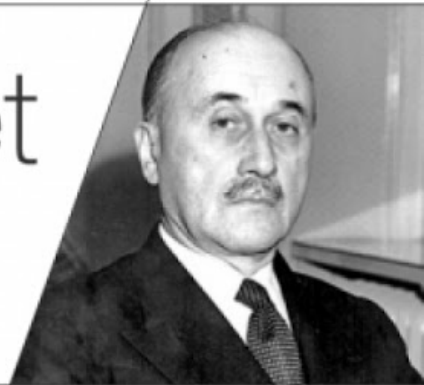
Disciplines: Political Science, Law

This research is supported by the Jean Monnet Chair in EU Politics and Law at Trinity College Dublin.



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Introduction

In the late 1960s and early 1970s the European Court of Justice ('ECJ') made a series of remarkable judgments that claimed for European law, and for the Court itself, a role in reviewing whether European law obligations were in violation of the fundamental human rights of individuals.¹ As the Court explained in 1970 in the most famous of these decisions, *Internationale Handelsgesellschaft*, "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice".² This development of the Court's jurisprudence is often recognized as creative and bold, as the European treaties themselves had not provided any mechanism for reviewing European obligations in light of fundamental human rights. The Court of Justice in effect granted itself this role, one that has had a profound influence on the subsequent development of the European legal order.

Why the Court came to take on this new role in the late 1960s and early 1970s has long been a matter of scholarly interest. The conventional explanation is that the Court of Justice was responding to judgments by the Italian and the German constitutional courts which had highlighted the limited protection of fundamental rights within the newly developing European legal order and raised the possibility that these national constitutional courts themselves might review the domestic applicability of European law obligations in light of the fundamental rights protections of their own national constitutions. A prominent recent contribution on this topic has however suggested an alternative approach. In their 2019

¹ This paper has been much improved by generous feedback from colleagues at the 2019 annual meeting of the Irish Association of Law Teachers in Limerick and the 2019 annual meeting of the Political Studies Association of Ireland in Maynooth. The continuing research project on ECJ judge Robert Lecourt has been generously supported by the Jean Monnet Chair in EU Politics and Law at Trinity College Dublin. Excellent research assistance was provided by Audrey Plan and Dáire McCormack-George.

² Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

European Law Review article, “The Founding Myth of European Human Rights Law: Revisiting the Role of National Courts in the rise of EU Human Rights Jurisprudence”, Delledonne and Fabbrini (henceforth ‘D&F’) criticize the conventional approach as unconvincing, stressing important problems with essential aspects of its chronology, and arguing that previous scholarship relies on an overstated view of the human rights activism of the German and Italian constitutional courts. As the title of their article implies, D&F label the conventional understanding of the origins of EU human rights jurisprudence a “myth”. In their alternative approach, the Court of Justice’s judgments creating new review mechanisms for fundamental human rights in European law were not a supranational response to national pressures but the result of a transnational development consisting of greater sensitivity towards human rights at all levels of government.³

There is a lot at stake here. If accepted, D&F’s argument would substantially revise our understanding of one of the milestones in the early development of the European legal order. It would also call into question more general characterizations of the Court of Justice’s behavior in its founding decades, which often stress the Court’s careful attention to its delicate relationship with national court systems, with the fundamental rights example prominently discussed.⁴ And, of course, the relationship between the German Constitutional Court and the Court of Justice remains highly topical, as loud debates over the German court’s recent *PSPP* ruling (of 5 May 2020) have shown. D&F’s argument therefore deserves careful scrutiny – which is the purpose of this paper. The first section sets out their argument in more

³ Delledonne and Fabbrini 2019: 178. Also : “This article has endeavoured to reconsider a commonly held view of the origin of EU human rights law, suggesting that the emergence of human rights era in Europe should not be simplistically seen a supranational response to national pressure, but rather as a transnational development” (Delledonne and Fabbrini 2019: 194).

⁴ Weiler 1991.

detail, to provide a fuller understanding of D&F's claims and evidence, and to identify similar or contrasting claims made in previous scholarship. The second section sets out a critical assessment of D&F's claims, considering in turn the chronology of judgments by the national and European courts; writings on the fundamental rights question by leading ECJ judges; and the possible motivations of the German and Italian constitutional courts. This section provides a stronger empirical basis for the argument that the Court of Justice was responding to the Italian and German courts than is discussed by D&F or much other scholarship. The concluding section builds on this analysis to offer an overall assessment of the evidence for the role of the Italian and German constitutional courts in the rise of EU human rights jurisprudence, and to advance the more general claim that historical research on the Court of Justice can no longer avoid engaging with the lives and writings of its leading judges.

Delledonne & Fabbrini's "Founding Myth": Revisiting the Role of National Courts in the Rise of EU Human Rights Jurisprudence

The central claim of D&F's paper is that the German and Italian constitutional courts did not play the vital role in prompting the Court of Justice to protect fundamental rights in the newly developing European legal order that more orthodox accounts of the ECJ's early history attribute to them. As they claim, the rise in EU human rights jurisprudence was "not the result of a *supranational* response to *national* pressures. The ECJ did not recognize human rights because of the Italian and West German constitutional courts".⁵

The conventional account of the development of the Court's fundamental rights jurisprudence can be summarized in the following way: The Treaty of Rome had originally failed to provide any mechanism for the protection of fundamental human rights. However,

⁵ Delledonne and Fabbrini 2019: 180.

the direct effect and supremacy of European law – declared by the Court of Justice in 1963 and 1964, and requiring the national application of European law, any conflicts with national legal obligations notwithstanding – indicated that citizens of the member states would be directly subject to European legal obligations that would fall outside the scope of the review mechanisms for the protection of fundamental rights provided for by national constitutions. The constitutional courts of Italy and West Germany raised questions about this development and began threatening to resist the application of EEC norms in their national legal orders in the absence of mechanisms for the protection of fundamental rights. The ECJ eventually “had to bow to the pressures of Member States’ high courts and began protecting fundamental rights in the EEC as general principles of law in order to protect the principles of direct effect and supremacy of EU law”.⁶ The protection of fundamental rights as general principles of European law began with the Court’s *Stauder* judgment in 1969, proceeded famously with *Internationale Handelsgesellschaft* in 1970, and continued thereafter in many other judgments up to the current day.⁷ In Coppel & O’Neill words, cited by D&F as epitomizing the conventional approach, “In response to [the] threat of national courts, ... the [ECJ] discovered that the protection of fundamental rights was indeed a general principle of [EEC] law.”⁸ Even better known is the following passage from Weiler’s famous article *The Transformation of Europe*:

The Treaty contains no Bill of Rights and there is no explicit provision for judicial review of an

⁶ Delledonne and Fabbrini 2019: 179.

⁷ Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125. Note that in *Internationale Handelsgesellschaft* the Court of Justice explicitly rejected any possibility that European law could be reviewed in light of national constitutional rights: “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”.

⁸ Coppel and O’Neill 1992: 670.

alleged violation of human rights. In a much discussed line of cases starting in 1969, the Court asserted that it would, nonetheless, review Community measures for any violation of fundamental human rights, adopting for its criteria the constitutional traditions common to the Member States and the international human rights conventions to which the Member States subscribed. ...

It should be noted further that the human rights jurisprudence had, paradoxically, the hallmarks of the deepest jurist's prudence. The success of the European Court's bold moves with regard to the doctrines of direct effect, supremacy, implied powers, and human rights ultimately would depend on their reception by the highest constitutional courts in the different Member states. ...

Accepting supremacy of Community law without some guarantee that this supreme law would not violate rights fundamental to the legal patrimony of an individual member state would be virtually impossible. This especially would be true in member states like Italy and Germany where human rights enjoy constitutional protection. Thus, even if protection of human rights per se need not be indispensable to fashioning a federal-type constitution, it was critical to the acceptance by courts in the Member States of the other elements of constitution-building.⁹

The pressures exerted by national constitutional courts are most famously exemplified by the *Frontini* judgment of the Italian Constitutional Court in 1973 and the *Solange I* judgment of the German Constitutional Court in 1974. In *Frontini*, the Italian Constitutional Court had asserted a "counter-limit" to the supremacy of European law, providing that the Italian court would ensure that EEC norms could not undermine the fundamental rights set out in the Italian Constitution.¹⁰ In *Solange I*, the German Constitutional Court had similarly

⁹ Weiler 1991: 2417-2418. Similarly, "The 'surface language' of the Court in *Stauder* and its progeny is the language of human rights. The 'deep structure' is all about supremacy. The Court anticipated the threat to the doctrine of supremacy and the integrity of the Community system (later realized by the German and Italian constitutional courts) posed by national jurisdiction over alleged human rights violations by the Community" (Weiler 1986: 1119).

¹⁰ No 183/1973 *Frontini v Amministrazione delle finanze dello Stato* [1974] 2 CMLR 372. In the Italian Constitutional Court's words: "It is hardly necessary to add that by Article 11 of the Constitution limitations of sovereignty are allowed solely for the purpose of the ends indicated therein, and it should therefore be excluded that such limitations of sovereignty, concretely set out in the Rome Treaty, signed by countries whose systems are based on the principle of the rule of law and guarantee the essential liberties of citizens, can nevertheless give the organs of the EEC an unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of man. And it is obvious that if ever Article 189 [of the Treaty of Rome] had to be given such an aberrant interpretation, in such a case

asserted it remained competent to review whether a norm of EEC law was inapplicable in Germany on the grounds of incompatibility with the fundamental rights set out in the German Basic Law.¹¹ As D&F write, “In the conventional narrative these decisions have been taken to epitomise the resistance of national legal orders against an EU law boosted by the judge-made principles of direct effect and supremacy and as the triggering factor in the emergence of a human rights jurisprudence in the European legal order. According to the conventional story, following *Solange I*, the ECJ and the other EU Institutions began taking human rights seriously”.¹²

D&F make two major criticisms of this conventional account.¹³ First and foremost, the chronology of the court judgments, European and national, appears flatly incompatible with such an explanation. After all, the famous judgments of the Italian and German constitutional

the guarantee would always be assured that this Court would control the continuing compatibility of the Treaty with the above-mentioned fundamental principles.” (Oppenheimer 1994: 640).

¹¹ BVerfGE 37, 271, [1974] 2 CMLR 540. In the German Constitutional Court’s words: “The part of the Constitution dealing with fundamental rights is an inalienable essential feature of the valid Constitution of the Federal Republic of Germany and one which forms part of the constitutional structure of the Constitution. Article 24 of the Constitution does not without reservation allow it to be subjected to qualifications ... [T]herefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Constitution, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails ...” (Oppenheimer 1994: 447-448). The German Constitutional Court justified its decision by the present state of integration in the Community, in particular the Community’s lack of “a democratically legitimated directly elected by general suffrage” and “a codified catalogue of fundamental rights” (Oppenheimer 1994: 447-448).

¹² Delledonne and Fabbrini 2019: 181.

¹³ D&F also emphasise that mechanisms for the protection of fundamental rights were absent in the majority of the six founding EEC member states, as only in Italy and West Germany had constitutional courts been established with the responsibility to review legal measures for their compatibility with human rights standards (Delledonne and Fabbrini 2019: 182-184). This is however not in conflict with more conventional accounts which had already emphasised special role of the Italian and German constitutional courts in these developments (e.g. Weiler 1986: 1119).

courts discussing the continuing possibility of national review of EEC norms for compatibility with the fundamental rights protected by their national constitutions took place in 1973 (*Frontini*) and 1974 (*Solange I*). The famous ECJ judgments that set out the Court's new role in reviewing EEC norms for their compatibility with the fundamental rights had however taken place in 1969 (*Stauder*) and 1970 (*Internationale Handelsgesellschaft*). In D&F's words, therefore, "by the time the Italian and West German constitutional courts voiced their concerns against the supremacy of EU law on human rights grounds, the ECJ had already recognised the importance of human rights in the European legal order—for almost half a decade".¹⁴ This criticism is pressed to the full in D&F's account, which states straightforwardly that the chronology does not support the conventional understanding, in that *Stauder* and *Internationale Handelsgesellschaft* "pre-date the warning shots fired by the constitutional courts of Italy and West Germany" in, respectively, *Frontini* and *Solange I*.¹⁵

To this forceful chronological criticism, D&F add another, focusing on the supposed motivations of the Italian and German courts: prevailing accounts of the role of Italian and German constitutional courts in prompting the ECJ to take up its new role in protecting fundamental rights implicitly overemphasise (so D&F claim) the actual commitment of these national courts to the constitutional protection of human rights. In fact, as these authors demonstrate in considerable detail, while the new postwar Italian and German constitutions

¹⁴ Delledonne and Fabbrini 2019: 182.

¹⁵ Delledonne and Fabbrini 2019: 179. See also "[this account] emphasises the incongruences in the conventional narrative about the role of national courts in pushing the ECJ to recognise human rights in its case law" (Delledonne and Fabbrini 2019: 180); "this account of the emergence of fundamental rights in the European legal order seems to clash with several inconvenient chronological facts" (Delledonne and Fabbrini 2019: 181); "the empirical analysis has magnified the chronological disconnect we described: when the Italian and West German constitutional courts threatened in 1973/74 to strike down EU legislation unless it complied with human rights, the ECJ had already been securing this for some years" (Delledonne and Fabbrini 2019: 194).

had created constitutional courts with the power to review national legislation for their compatibility with constitutionally protected fundamental rights, these courts were for many years “cautious” about finding democratically-enacted postwar legislation unconstitutional on these grounds.

Instead, in Italy and West Germany, the laws that the constitutional courts struck down as unconstitutional in the early postwar period tended to be key pieces of legislation from the Fascist or even pre-Fascist eras. Thus the Italian Constitutional Court voided a great number of provisions of the Code on Criminal Procedure of 1930 and the Public Security Act of 1931, and indeed in reviewing pre-war legislation it did rely on a number of human rights clauses enshrined in the 1948 Constitution. However, the court was quite reluctant to strike down state laws enacted after the entry into force of the 1948 Constitution, and here D&F illustrate this claim by showing that of the 49 *sentenze* of the court in 1964 dealing with the constitutional legitimacy of laws enacted after 1948, in only one case did the court find a piece of state legislation unconstitutional because of its incompatibility with a substantial constitutional provision (Article 113 of the Italian Constitution – the right to judicial review of administrative decisions).¹⁶ Overall, as D&F elaborate, “the concept of the [Italian] Constitutional Court as a “rights-protecting judge” was only consolidated in the 1970s”.¹⁷ Similarly in Germany, in its early years the new Federal Constitutional Court can be described as “remarkably cautious when reviewing major legislative initiatives of the German Federal Government”.¹⁸ Even well-known early decisions of the court that had a fundamental rights element, such as the *Lüth* judgment of 1958, did not (according to D&F) have fundamental

¹⁶ In relation to D&F’s argument as a whole, it worth noting D&F’s admission that the Italian Constitutional Court did find a piece of postwar state legislation unconstitutional in 1964.

¹⁷ Delledonne and Fabbrini 2019: 188.

¹⁸ Delledonne and Fabbrini 2019: 189-190.

rights as their primary theme, and were marked by other considerations such as anti-totalitarianism, the attempt to draw lessons from the Weimar experience, and the desire of the Constitutional Court to affirm its institutional position.¹⁹ As in Italy, pre-war legislation was a target, with the Court in 1966 declaring unconstitutional the 1934 law on public meetings which had required preventive authorization of assemblies. Only from the mid-1960s, so D&F explain, did the Constitutional Court extend its oversight towards human rights issues *stricto sensu*.²⁰

In overview therefore, even in Italy and West Germany where postwar constitutions had created constitutional courts to entrench constitutions containing provisions protecting fundamental human rights, during the first two decades of their operation both jurisdictions were mainly concerned with purging the legal regime from the remnants of the Fascist and Nazi eras (and even earlier periods), and much less concerned with enforcing an activist conception of fundamental rights vis-à-vis the new legislation enacted in the postwar era.²¹ This detailed analysis of the human rights review activities of these national constitutional court magnifies, so D&F explain, the “chronological disconnect” already elaborated, that the ECJ’s new jurisprudence on fundamental rights beginning with *Stauder* in 1969 predates the *Frontini* and *Solange* judgments of 1973 and 1974.

D&F conclude by asking how it was possible for the conventional approach to become the dominant narrative “notwithstanding much evidence to the contrary”?²² They suggest that the root causes may be the influence of national traditions on legal scholarship, the self-

¹⁹ Delledonne and Fabbrini 2019: 191-193. BVerfGE 7, 198.

²⁰ Delledonne and Fabbrini 2019: 193.

²¹ Delledonne and Fabbrini 2019: 194.

²² Delledonne and Fabbrini 2019: 193.

promotion of national constitutional courts, and perhaps even Eurosceptic sentiment:

While our answer to this question can only be speculative, in our view an important explanation has to do with the role of national scholarship. ... [L]egal scholarship in the EU Member States has suffered from the weight of national tradition, and has tended to examine the process of European integration through the looking-glass of national jurisprudence ... In this intellectual context, it has not been difficult for national constitutional courts such as the Italian and the German to persuade their national audience that *they* were the triggering factor for the invention of EU human rights—all the more so because of the mixed composition of those courts, which makes it easier for them to enter into dialogue with academia, political elites and other national courts. Once entrenched in a domestic conception of the role of the state in European integration, the founding myth of EU human rights law perpetuated itself—and also became a way for national constitutional courts to reassure themselves about their fundamental importance in EU law, even when subsequent developments in European integration increasingly challenged their role.²³

It is worth noting that the arguments that D&F put forward are not wholly new.

Everling, for example, has written that:

In Germany, the story is believed that it was only under the pressure of *Solange I* [in 1974] that the Court of Justice assumed the role of protector of human rights. This is historically not correct since the relevant jurisdiction began long before [with citations to *Stauder* in 1969 and *Internationale Handelsgesellschaft* in 1970].²⁴

Other scholars have also emphasized the possible relevance of wider transnational developments in favour of human rights in the late 1960s, in fact with rather more specificity than D&F's article. Although Weiler's explanations for the development of the ECJ's human rights jurisprudence have strongly emphasized the centrality of the challenge posed by national constitutional courts,²⁵ he does not neglect the wider background:

It may also be significant that this very period, the late 1960's, saw both the promulgation of the two United Nations human rights protocols as well as a general challenge to the establishment by young liberal and radical elements. The established order in most European countries was coming under attack, and the Community came to be seen, to the extent that it was seen at all, not as the vehicle on which to hang postwar ideals and aspirations, but as a

²³ Delledonne and Fabbrini 2019: 195. Eurosceptic sentiment: D&F favourably quote Brun-Otto Bryde's comment that "concerns about human rights, conflicts about supremacy and Eurosceptic resistance to European integration are often difficult to disentangle in th[e] criticism [against the ECJ]" (Delledonne and Fabbrini 2019: 195).

²⁴ Everling 1994: 14.

²⁵ Weiler 1991: 2417-2418, Weiler 1986: 1119.

vehicle of industry, businessmen, capitalism, and other evils. A "human rights response," whether genuine or opportunistic or both, is not surprising in that climate.²⁶

D&F's article also draws attention to the fact that many summaries of the 'conventional account' of the rise of EU human rights jurisprudence do not provide sufficient indication of the empirical basis for this explanation, even in brief. None of the examples of the conventional narrative provided in D&F's article – "The ECJ's very fundamental rights jurisprudence [was] once called for by the German Constitutional Court..." (Grimm), "the ECJ's human rights doctrines were developed mainly in response to challenges by German courts" (Schimmelfennig), and "In response to the threat [of] national courts ... the [ECJ] discovered that the protection of fundamental rights was indeed a general principle of [EEC] law" (Coppel & O'Neill) – back their claims in ways that directly contest D&F's criticisms – certainly they provide no counter to the telling critique that both *Stauder* and *Internationale Handelsgesellschaft* easily predate *Frontini* and *Solange I*.²⁷

D&F's article is therefore relevant both to those who have advanced similar claims with less detail, and to those who have advanced the conventional account but with insufficient evidence to contradict D&F's critique. It is hoped therefore that a wide range of scholars will be interested to learn that there is substantially more evidence that the Court of Justice was responding to the concerns of the German and Italian constitutional courts than is frequently set out by either critics or supporters of the more conventional approach. Much of the material considered below is omitted even from lengthy descriptions of the early interactions between these national constitutional courts and the Court of Justice, which sometimes offer incomplete accounts of the relevant judgments of the national constitutional

²⁶ Weiler 1986: 1117, also Bryde 2010: 122.

²⁷ Grimm 2017: 205, Schimmelfennig 2007: 105, Coppel and O'Neill 1992: 670.

courts or fail to make full use of writings addressing this topic by ECJ judges.

Response to Delledonne and Fabbrini

Delledonne and Fabbrini's claims are important – and deserve a careful appraisal. This response to D&F's article is in three parts, dealing respectively with issues of chronology raised in their article, writings on this topic by leading ECJ judges, and the possible motivations of national constitutional courts.

Chronology

The first difficulty with D&F's article is that it misunderstands the chronology of the relevant national and European court judgments.

While D&F's article argues strongly that the Court of Justice's new human rights jurisprudence in *Stauder* and *Internationale Handelsgesellschaft* was the result of a transnational development towards greater sensitivity to human rights at all levels of government, they provide little or no direct evidence of such an influence on the Court. D&F's criticism of the conventional account of the development of EU law's human rights jurisprudence therefore rests heavily on a critique of chronology – in particular, the claim that the European Court's famous fundamental rights decisions came before those of the German and Italian constitutional courts. In D&F's words, "by the time the Italian and West German constitutional courts voiced their concerns against the supremacy of EU law on human rights grounds, the ECJ had already recognised the importance of human rights in the European legal order—for almost half a decade" and "when the Italian and West German constitutional courts threatened in 1973/74 to strike down EU legislation unless it complied with human rights, the ECJ had already been securing this for some years". More precisely, the decisions of the Court of Justice that first provided EU law with internal mechanisms to ensure

European law compliance with human rights – *Stauder* in 1969 and *Internationale Handelsgesellschaft* in 1970 – were several years in advance of the Italian Constitutional Court’s *Frontini* judgment of 1973 and the German Constitutional Court’s *Solange* judgment of 1974. Such a chronological critique, if convincing, would indeed strike a blow at conventional explanations the rise of the EU’s human rights jurisprudence.²⁸

The Italian and West German constitutional courts had, however, raised questions about the supremacy of EU law on human rights grounds before 1969. While the *Frontini* judgment of 1973 and the *Solange* judgment of 1974 are indeed the most famous early judgments of these courts addressing the possibility of reviewing European law for violations of fundamental rights, other, not-so-famous judgments of these courts had already indicated this possibility in the mid-1960s.

In 1965, in the *San Michele* case, the Italian Constitutional Court had considered a complaint concerning the constitutionality of the Treaty establishing the European Coal and Steel Community (ECSC), on the grounds that it violated the constitutional prohibition on extraordinary or special judges (Article 102 of the Italian Constitution) and the constitutional right to judicial review of administrative decisions (Article 113 of the Italian Constitution). The Italian Constitutional Court rejected these complaints, pointing out these constitutional provisions were solely concerned with the rights and interests accorded to citizens by virtue of their position in Italy’s internal order, and not with the rights and interests which flowed

²⁸ Nothing like a fatal blow, however, as the possibility would remain that a forward-looking Court of Justice – perhaps aware of prominent scholarly discussions of this issue – was attempting to forestall in advance the risks of national constitutional courts disapplying European law on fundamental rights grounds even before those national constitutional courts had highlighted this issue in court judgments. Since the German and Italian constitutional courts had in fact explicitly highlighted the fundamental rights issue in court judgments prior to *Stauder* in 1969 there is however no need to elaborate this possibility further.

from their position in an external system such as that of the ECSC, and that the rights of individuals against acts of the European institutions could be protected by appeal to the Court of Justice. The Constitutional Court explained that the Italy's internal legal order had recognised the Community order in order to render internally effective that international co-operation to which it had become a party – and then added the following sentence on fundamental rights:

It is not denied that these effects take place without prejudice to the right of the individual to protection under the law; this right is one of the inviolable rights of man which the Constitution guarantees under Article 2, and it is the same consideration which is to be found in Article 6 of the European Convention on Human Rights ...²⁹

The reference to fundamental rights in the Italian Constitutional Court's decision did not go unnoticed in contemporary commentary. Berri's 1966 note in the *Common Market Law Review* drew the following conclusions from *San Michele*:

The Community system of the ECSC (the application to the systems of EEC and Euratom is logical) is extraneous to the Italian internal one. This, besides, does not exclude the fact that the Community system has to fulfil itself in respect of the inviolable rights of man mentioned in the first place in the fundamental principles of our Constitution (Articles 1-12). From that it follows that the Constitution contains principles going beyond the territory of the Italian Republic.

The Community system, although being extraneous to the national one, and thus immune from the State's sovereignty and out of the area of application of the Constitution (except so far as the fundamental principles governing the inviolable rights of the human person are concerned) is liable to produce its effects within the Italian system.³⁰

In 1967, somewhat similarly, the German Constitutional Court had considered a

²⁹ Translation from 4 *Common Market Law Review* 1966, 83.

³⁰ Berri 1966: 242. See also Neri's note in the 1966 *Cahiers de Droit Européen*, where Neri described the Constitutional Court's finding that the judicial protection of individuals provided by the Treaty was sufficient to satisfy the fundamental principles of the Italian Constitution as "a strictly formal analysis and sometimes optimistic interpretation" of the Treaty provisions. In Neri's opinion, the problem remained open, and it would not be possible for Italian courts to decide whether the provisions of the Treaties relating to the judicial protection of individuals respected the fundamental rights of citizens, guaranteed by the Italian Constitution, without examining the effective scope and precise meaning given to these provisions by the decisions of the Court of Justice (Neri 1966: 386).

complaint concerning the constitutionality of EEC Regulations, on the grounds that the Regulations in question had infringed their basic rights to (among others) equality before the law (Article 2(1) of the German Constitution) and to property (Article 14 of the German Constitution). The Constitutional Court's judgment stated that it could only review acts of German public authorities, and Regulations issued by the Council and Commission of the EEC were not acts of German public authorities. The Community legal order had its own special system of legal protection, based on the role of the Court of Justice, before which appeals could be lodged by the Council, the Commission and the individual Member States, as well as by natural or legal persons who was directly and individually affected by a decision of one of the Community institutions.³¹ The Court's judgment concluded with the following passage on fundamental rights:

No ruling is given here regarding the question of whether the Federal Constitutional Court, within the framework of proceedings properly instituted before it, could examine the compatibility of Community law with the provisions of the Basic Law setting out fundamental rights. Neither is any decision taken here with regard to the question of to what extent such a function could be undertaken by this Court ... This would depend on whether and to what extent the institutions of the European Communities might be subject to a system of basic rights in the Federal Republic of Germany or to what extent the Federal Republic could exempt Community institutions from being subject to a system of basic rights, where it has transferred sovereign powers to the Community pursuant to Article 24(1) of the Basic Law.³²

Again, the fundamental rights aspect of the German Constitutional Court's decision did not go unnoticed in contemporary commentary. As Frowein wrote in the *Common Market Law Review* in 1968:

The Court expressly reserved the question as to whether it could – by a different procedure – control the Community-law as to its conformity with the fundamental rights of the *Grundgesetz* [German Constitution]. It stated only that this depended on the prior question, whether Community-organs were bound by the *Grundrechte* [fundamental rights] or – put differently – if under Article 24 the Federal Republic could free the Community-organs from

³¹ An English language translation of the German Constitutional Court's judgment is contained in Oppenheimer 1994: 410-414.

³² Oppenheimer 1994: 414.

Germany's fundamental rights."³³

Torrelli's discussion of the *EEC Regulations* judgment in the 1968 *Revue de Marché*

Commun went further:

The final question raised by the complainants was however of an essential importance which did not escape the Federal [Constitutional] Court, and, on this point, the response of the Court was imprecise.

In preference to the term "imprecision" one could more frankly talk of a "threat" [*menace*] by the Constitutional Court.

The problem is serious because the judicial protection of individuals in the Community legal order is far from being properly assured. Because of the creation of the Communities, courts, notably the judicial courts in France in the matter of contracts for example, which were the natural guardians of the judicial protection of private interests, have lost one part of their competences without this loss having been compensated by the accruing of a protection in the Community order.³⁴

The scholarly commentaries on the 1965 and 1967 constitutional court judgments point to the wider academic debate on this topic. Even before these judgments, the problem of European legal obligations enjoying automatic applicability in the national legal orders but falling outside the scope of fundamental human rights review by national constitutional courts had been raised in legal scholarship, particularly in Germany. The debate in German legal academia on the fundamental rights challenge posed by European legal integration is in fact much too extensive to be effectively summarized here. Perhaps the best account of these controversies is Davies's monograph *Resisting the European Court of Justice: West Germany's Confrontation with European law, 1949-1979*, which demonstrates the heated nature of these discussions, certainly from the early 1960s onwards.³⁵ There can be no doubt whatsoever that this was an important, and polemical, scholarly debate in Germany well in advance of the Court of Justice's *Stauder* and *Internationale Handelsgesellschaft* judgments.

In short therefore, the Italian and West German constitutional courts first raised

³³ Frowein 1968: 486.

³⁴ Torrelli 1968: 723.

³⁵ Davies 2012: esp 47-91.

questions about the supremacy of EU law on human rights grounds in 1965 and 1967,³⁶ well in advance of the famous decisions of the Court of Justice – in *Stauder* (1969) and *Internationale Handelsgesellschaft* (1970) – that first provided EU law with internal mechanisms to ensure European law compliance with fundamental human rights. The threat to the supremacy of EU law from the Italian and German constitutional court judgments was noted by scholarly commentary on these cases, and indeed the concern about the loss of

³⁶ The fundamental rights aspects of the 1965 *San Michele* judgment of the Italian Constitutional Court and the 1967 *EEC Regulations* judgment of the German Constitutional Court are less well known than those in the 1973 *Frontini* and 1974 *Solange I* judgments but they are regularly mentioned in accounts of the national reception of EU law in Italy and Germany. For example, Claes notes that in *San Michele* the Italian Constitutional Court had stated that “there are certain fundamental principles of the Constitution which must be upheld even against the Community and its institutions” (Claes 2006: 424-425); Cartabia notes that *San Michele* stated that the determination of the internal effects of the Community in Italy had to take into account the inviolable principle of judicial protection, and, trying to read more into the case, that “before having effect on the internal legal order, Community acts should comply with human rights” (Cartabia 1998: 138); Kokott notes that in the 1967 *EEC Regulations* case, the German Constitutional Court had left “open the question whether and to what extent the Federal Republic of Germany had been able to exempt the Community organs from being bound by German basic rights when it had transferred sovereign powers under article 24, para. 1 of the Basic Law” (Kokott 1998: 86). Bryde’s discussion of *Internationale Handelsgesellschaft* states that the common perception that a threat from the national courts prompted the ECJ’s development of its human rights jurisprudence is “not without foundation”, noting that in 1967 the German Constitutional Court appeared to reserve a right to review European law on fundamental rights grounds in an obiter dictum (Bryde 2010: 120-121). Fromont’s note on the 1974 *Solange* judgment starts by noting that the German Constitutional Court’s judgment was awaited with anxiety by European circles since the day in 1971 that the Frankfurt administrative tribunal had asked the Constitutional Court to verify the conformity of Community law with certain fundamental rights protected by the German Constitution: “These fears [*craintes*] were due precisely to a short sentence rendered in the Court’s decision of 18 October 1967. ‘No ruling is given here regarding the question of whether the Federal Constitutional Court, within the framework of proceedings properly instituted before it, could examine the compatibility of Community law with the provisions of the Basic Law setting out fundamental rights.’ These fears have unfortunately revealed themselves as well founded as, in [*Solange* in 1974], the Federal Constitutional Court has clearly pronounced itself in favour of the superiority of German fundamental rights over Community Regulations.” (Fromont 1975: 333, noting also 334 that in 1967 the Court had reserved the question of the compatibility of Community Regulations with German fundamental rights, described as a “threat” [*menace*]).

access to national fundamental rights review had also been raised in legal scholarship in advance of these judgments. What we may call the “objective chronology” of national and European court judgments is therefore compatible with the conventional accounts – the problem of human rights protections within the European legal order had been highlighted in decisions of the Italian and German constitutional courts in the mid-1960s, in advance of the famous judgments of the Court of Justice in 1969 and 1970.

The Writings of ECJ Judges

The second difficulty with D&F’s article is that it overlooks the explanations of the development of the Court of Justice’s human rights jurisprudence set out in the writings of leading ECJ judges.

One of the most prominent ECJ judges in the late 1960s and early 1970s was Pierre Pescatore, a former representative of the Luxembourg government in the negotiations on the Treaty of Rome and a prolific author on many topics of European law.

In 1968, Pescatore published a substantial article entitled “*Les Droits de l'Homme et L'Intégration Européenne*” – “Human Rights and European Integration” – in the *Cahiers de Droit Européen*.³⁷ This article is notable for having indicated in 1968, thus in advance of the ECJ’s judgments in *Stauder* (1969), *Internationale Handelsgesellschaft* (1970) and others, the outcome that the Court would come to adopt over the course of these judgments: that the Court itself should protect fundamental rights within the context of the “general principles of law”, drawing on inspiration from the Council of Europe (especially Article 3 of its Statutes),³⁸

³⁷ Pescatore 1968.

³⁸ Pescatore in 1968 rejected however the possibility that Community law could be inspired by the European Convention on Human Rights on the grounds that France had not to date ratified the convention. Circumstances would change on the day that France accepted the

while drawing more concretely on convergent principles of constitutional law among the various member states, in light of the needs of the Community. Pescatore's 1968 article is therefore good evidence for how the need for the Court of Justice to strengthen its role in human rights protection was understood by one of the judges most engaged with this issue.³⁹

Pescatore's article not only points the way to the eventual resolution of the human rights challenge by the Court of Justice – it also sets out Pescatore's view of the origins of this challenge in the first place. These origins, so the article makes clear, lay in scholarly discussions and judgments of national courts that had criticized the lack of human rights protections in the European legal order. We will let judge Pescatore speak for himself – the following passages are drawn from the section "State of the Discussion relative to Fundamental Rights in the Communities":

A broad discussion of the problem of fundamental rights in the Community constitution has developed in Germany; one can equally find some brief references to this question in various Italian judicial decisions. By contrast, the same question does not seem, as yet, to have raised concerns in other Member States of the Community. Why this strange contrast? Without doubt it must be attributed to the fact that German and Italian jurists are particularly sensitive to the problem of fundamental rights, given that the two countries in question provide for the institution of a Constitutional Court charged particularly with ensuring respect for the constitution and for the rights which it had established.⁴⁰

Pescatore then provides an overview of the scholarly debate in Germany, noting that this had begun in relation to the proposed European Defense Community of the early 1950s which ultimately did not come into force after French opposition, but had continued now with a concentration on the Communities that had actually come into being:

The majority of opinions developed on this question tacitly presuppose that the Community constitution does not provide an adequate guarantee of fundamental rights and that it relies

Convention – in that case, the Court of Justice could, and should, be inspired by the contents of the Convention (Pescatore 1968: 649-650).

³⁹ For the influence of Pescatore's 1968 article in the *Internationale Handelsgesellschaft* litigation and judgment see e.g. Bryde 2010: 122, Fritz 2020: 489-490.

⁴⁰ Pescatore 1968: 632.

on structural principles which do not rise to the level of those that inspire the constitutional order of a liberal and democratic state. To the extent that one considers therefore that fundamental rights are not protected in an adequate manner by the Community constitution, the consequence is drawn that, where appropriate, national provisions relating to the protection of fundamental rights should take back their control [*reprendre leur empire*], which is to say that they should take precedence, on national territory, over the effect of acts [...] imposed by the Community institutions.⁴¹

Pescatore proceeds to a discussion of German jurisprudence, noting that the doubts expressed in scholarship had found their way into various German judicial decisions:

A recent judgment of the German Constitutional Court, of 18th October 1967, put an end to these uncertainties in the sense that the Court has rejected, as “non-justiciable”, a complaint (*Verfassungsbeschwerde*) directed against certain Regulations of the Council and the Commission of the EEC. The Constitutional Court decided in effect that the acts complained of were not derived from German public authority. It equally refused to accept, in this context, a means to assure the protection of fundamental rights. But, at the end of its decision, the Constitutional Court expressly left open the question of specifying whether and to what degree it might review Community law in relation to German constitutional rules “in the context of a case where this had been appropriately raised”. We can therefore see that the final word has not been spoken.⁴²

In the Italian case, Pescatore notes, the scholarly discussion has not reached the same importance as in Germany, but by contrast the problem of fundamental rights has proliferated in the decisions of Italian courts, including the Constitutional Court:

In a judgment of the 16th December 1965, the [Italian] Constitutional Court had approved the attitude taken by the majority of inferior jurisdictions and explicitly recognised that the judicial protection granted to individuals within the Community’s ambit satisfies the fundamental requirements of the Italian legal order.⁴³

Pescatore’s review of German and Italian court cases was in fact rather more extensive than a discussion of these two constitutional court judgments alone, with Pescatore listing four other German and six other Italian court cases that had considered the question of the

⁴¹ Pescatore 1968: 633.

⁴² Pescatore 1968: 635. “In the context of a case where this had been regularly raised” is translated as “in the framework of proceedings properly instituted before it” in Oppenheimer 1994: 414.

⁴³ Pescatore 1968: 636.

compatibility of European law with national constitutional provisions including the requirement for fundamental rights protections. Pescatore then notes that these discussions – including both scholarship and the judgments of these national courts – “are not without danger to the effectiveness of Community law and to the very cohesion of the European construction”.⁴⁴ Pescatore then proceeds to offer his own critique of these theories before developing his own understanding for the protection of human rights understood as part of the general principles of Community law, a proposal which the Court of Justice would in broad terms later come to adopt.

An account of the origins of the EU’s protection of fundamental rights has also been left to us by the then President of the Court of Justice, Frenchman Robert Lecourt. Lecourt was appointed to the Court in 1962 by President Charles de Gaulle and appears to have been highly influential from the moment of his arrival. Together with the newly appointed Italian judge, Alberto Trabucchi, Lecourt appears to have taken a leading role in the Court’s revolutionary declaration of the direct effect of European law in *Van Gend en Loos* in February 1963, against the opposition of the then President of the Court, Andreas Donner.⁴⁵ Donner indeed wrote to offer his resignation as President in 1964 after the *Costa v. ENEL* judgment and Lecourt in turn became President of the Court from 1967 until his retirement in 1976 – that is, through the period of the *Stauder* and *Internationale Handelsgesellschaft* judgments.⁴⁶ Robert Lecourt is widely recognised as the single most influential judge on the Court of Justice throughout its crucial foundational period.⁴⁷

Lecourt’s main account of the development of human rights protections by the Court

⁴⁴ Pescatore 1968: 636.

⁴⁵ Rasmussen 2014.

⁴⁶ Fritz 2020: 495.

⁴⁷ Phelan 2019.

of Justice is contained in an article entitled “*Interférences entre la Convention européenne des droits de l'homme et le Droit de la Communauté au regard du contrôle judiciaire communautaire et national*” – “Interferences between the European Convention on Human Rights and Community law with regard to Community and national judicial control” - presented at a conference in Athens in 1978 and published in 1979.⁴⁸ Again, we will let judge Lecourt speak for himself, in the section entitled “Relations between Community law and constitutionally-protected human rights”:

What would remain of the Community if the high national jurisdictions were to hold its law inapplicable in the internal legal order, in the situation that it did not seem to them to conform to fundamental rights that they would reserve to themselves to interpret. The question is all the more delicate because it would depend on the place that each national legal order reserves for community law in the hierarchy of its sources of law. This problem therefore is above all apparent in countries where there exists constitutional judicial review.

Certain jurisdictions were first of all asked whether a member State could, given its own constitution, confer competence on a multinational institution, to adopt provisions which were nationally applicable but potentially failing to respect the principles of democratic control and separation of powers to which the member State was bound.

By a judgment of 16th December 1965, the Italian Constitutional Court refused to question Italy's attribution to the Community of the power to adopt nationally applicable provisions. By a judgment of inadmissibility of 18th October 1967, the German Constitutional Court affirmed the autonomy of Community law and its direct application in the Federal Republic. But, in both cases, these high jurisdictions refrained from relinquishing any control in the situation where a Community act was challenged for violating the liberties guaranteed by the national Constitution.

It is therefore at this stage that it is necessary to take precautions against the risk of either an infringement by the Community of nationally protected individual rights or a break in the unity of Community law.⁴⁹

Like Pescatore in 1968, Lecourt's account in 1979 emphasized the 1965 and 1967 judgments of the Italian and German constitutional courts, i.e. those prior to *Stauder* and *Internationale Handelsgesellschaft*, as well as the need for the Court of Justice to respond to

⁴⁸ Lecourt 1979.

⁴⁹ Lecourt 1979: 96, also 84, 101 on the risks to the unity of Community law from the human rights judgments of national courts.

them.

The 1979 article is Lecourt's fullest account of the Court's fundamental rights jurisprudence, but it is worth noting that there is evidence of ECJ judges' views on the development of European law that goes beyond the most readily available documentation such as articles published in journals or conference proceedings. An alternative collection of relevant materials are the speeches given by ECJ judges and published by the Court of Justice during their periods of office. Looking through these speeches, there turns out to be a relevant section in President Lecourt's speech welcoming a new Advocate General to the Court on 9th October 1973 – thus shortly before the *Frontini* and *Solange I* judgments, at a time when this issue was highly topical. Here Lecourt's discussion of the goals of the Court – “to build a Community” through the uniform application of law, and so on – contains the following passage:

One can therefore realise the danger in which such a law would be placed if national imperatives, no matter how elevated, were to make it yield its Community nature. That explains the concern which the Advocates General, like the Court itself, have always had to ensure that secondary Community law preserves the rights of the human person as they are protected in all the member states, in order to maintain intact the treaties' Community objective.⁵⁰

This passage in Lecourt's speech is contemporary evidence in support of the conventional explanation of the Court of Justice's motives in protecting “the rights of the human person” – to maintain the uniform application of Community law from the danger of “national imperatives, no matter how elevated”.

The writings of judges Pescatore and Lecourt contribute to our understanding of the development of EU law's human rights jurisprudence in four related ways. First, they demonstrate that the *objective chronology* of the case law development that was discussed

⁵⁰ Lecourt 1973: 16.

in the earlier section – where the Italian and German constitutional court judgements in 1965 and 1967 highlighting the potentially problematic relationship between Community law and fundamental rights protections preceded the Court of Justice’s judgments in *Stauder* and *Internationale Handelsgesellschaft* in 1969 and 1970 – was also the *subjective chronology* understood by influential ECJ judges. Second, the writings of judges Pescatore and Lecourt frankly explain the Court of Justice’s new human rights jurisprudence as a response to the fundamental rights concerns of the national courts and related scholarly discussion, indeed as a requirement to ensure that the uniform application of Community law was not threatened by the German and Italian Constitutional Courts.⁵¹ Third, none of these writings by Pescatore or Lecourt suggest that the ECJ’s fundamental rights jurisprudence was a response to the then recent United Nations human rights protocols, the contemporary human rights challenges posed by young liberal or radical elements, or any other aspects of the transnational human rights developments that D&F and Weiler have mentioned.⁵² The impact of such factors in the background cannot be completely ruled out, to be sure, but the writings of Pescatore and Lecourt provide little or no direct evidence in favour of them, concentrating as they do on the challenge to the uniform application of European law posed by the German and Italian courts. Fourth and finally, the writing of these ECJ judges indicate that there is no need to be overly affected by the weight of national legal tradition, a self-

⁵¹ We cannot rule out the possibility that judges Pescatore and Lecourt were also concerned for the protection of human rights for its own sake or saw the protection of human rights at the Community level as a natural consequence of state competences being transferred to the Community. However their concern to ensure that the uniform application of Community law was not threatened by the German and Italian Constitutional Courts on fundamental rights grounds is far more prominent in these writings.

⁵² Pescatore does mention the UN Protocols when discussing possible sources for human rights law for the Communities, although he concludes that these cannot be the source of fundamental rights law for the Communities as they had not yet come into force (Pescatore 1968: 648-649).

interested promoter of the influence of the national constitutional courts, or in any sense a Eurosceptic, to believe that the Court of Justice was prompted to develop its human rights jurisprudence by the jurisprudence of the German and Italian constitutional courts, as none of these descriptions readily apply to Pierre Pescatore or Robert Lecourt.

The Human Rights Motivations of the German and Italian Constitutional Courts

The third difficulty with D&F's article is that the conventional account does not rely on the claim that the Italian and German constitutional courts were leaders in human rights protection in the very specific way that D&F define such leadership. To be sure, D&F's article advances its discussion of the human rights-related motivations of the German and Italian constitutional courts only as a supplementary argument to the supposed "chronological disconnect" of conventional explanations. Now that it is shown that judgments of German and Italian constitutional courts had highlighted the fundamental rights question well in advance of *Stauder* it is arguably unnecessary to address this issue in detail. However, D&F's account of these national constitutional courts appears to prioritize certain functions of these courts over others in ways that may be worth discussing, particularly in light of the more general way that these constitutional courts have addressed the challenge of fundamental rights review of treaty obligations in the postwar period.

D&F claim that the conventional account of the development of the ECJ's human rights jurisprudence *necessarily* involves a claim that the Italian and German constitutional courts were active leaders in human rights protections in a particular sense, that is, necessarily assumes that *only national constitutional courts which regularly struck down democratically enacted postwar legislation on human rights grounds* could logically have been sufficiently committed to human rights to press the ECJ to change its jurisprudence. That is the sense of D&F's brief statement – essential to their argument, but advanced without

much elaboration – that “the founding myth of EU human rights law implicitly claims that national constitutional courts were leaders in human rights protection. By showing that the protection of fundamental rights at the national level during the 1950s and 1960s was weaker than is generally thought, the article seeks to set the record straight”.⁵³ By “weaker than is generally thought”, their account makes clear, D&F mean that these national constitutional courts were consistently cautious about actually striking down democratically enacted postwar legislation on human rights grounds.⁵⁴

D&F’s approach would appear to indicate that these national constitutional courts could have fallen into one of only two categories – either these courts were “leaders in human rights protection” regularly striking down postwar legislation on human rights grounds and therefore can credibly be expected to have insisted on mechanisms for human rights protections in European law, or they were cautious about finding that postwar legislation was contrary to constitutionally protected fundamental rights and therefore could not have been concerned with the possibility of directly applicable European law obligations falling outside the scope of national judicial review on human rights grounds. But the law, and indeed the politics, of appeals systems and tribunals does not fit into such limited categories. These national constitutional courts could – to take a straightforward example – have been committed to protecting the principle that mechanisms of judicial review of legislation to protect fundamental rights must be available to their citizens even if these courts then

⁵³ Delledonne and Fabbrini 2019: 180.

⁵⁴ D&F e.g. Italian Constitutional Court: 185 “this period was characterised by a great number of judgments striking down important pieces of legislation”, 186 “reluctant to strike down”, “the court struck down a legislative provision”, 187 “the court—for the first time—struck down a Republican law on the same ground”; German Constitutional Court: 192 “provisions on the requirement of preventive authorization of assemblies were struck down”, 193 “struck down a first attempt to liberalize German abortion law.”

combined that principle with cautious decision-making in relation to any individual fundamental rights complaints that came before them.

An example that may be intuitive to those working or studying in higher education may be helpful here. At many universities, there exists a committee to which undergraduate students have a right to appeal their examination grades on the basis that an examination question was not covered by the syllabus, or there was demonstrated bias in the grading, or for similar reasons. Such appeals committees can in practice be cautious – even highly cautious – about overturning undergraduate examination grades duly assigned by the designated instructor. Nonetheless, the students’ right to appeal to these committees is widely understood to be an important component of the student grading process at many universities, to which many (not least the members of these committees themselves) are highly attached, and indeed the operation of these appeals committees may have an important salutary effect on assessment standards and procedures even in the absence of grades being explicitly overturned. It would certainly be rash to assume that just because such an appeals committee was reliably highly cautious in allowing undergraduates to successfully appeal their examination grades that the committee and its associated networks and ‘constituents’ would easily consent to the steady reduction or marginalization of its powers or jurisdiction, without any similar arrangement being provided in another forum.

What this example illustrates is that D&F’s demonstration that the Italian and German constitutional courts were reluctant to strike down postwar legislation on human rights grounds until the mid or late 1960s does not at all demonstrate that these courts must have been unconcerned with protecting the principle that their citizens had the right to seek judicial review of legislation that affected them on human rights grounds. D&F’s account over-emphasises just one of the rights-protecting activities of constitutional courts – actively

striking down legislation as contrary to constitutional provisions – and overly marginalizes another – the provision of an institutional forum to hear claims that the fundamental rights of individuals had been violated, even in the absence of ‘striking down’. If the direct effect and supremacy doctrines were understood to require the national application of European law regardless of national fundamental rights protections, the German and Italian constitutional courts would not only lose the possibility of actively striking down (or domestically disapplying) Community law obligations on fundamental rights grounds, they would also be renouncing their status as a duly established forum empowered to hear the fundamental rights complaints of their citizens over an increasing range of legal obligations, without any alternative forum being provided.⁵⁵

A concern to protect the principle that fundamental rights complaints must be heard in combination with caution in exercising the power to invalidate legislation was in fact a regular feature of constitutional adjudication regarding human rights challenges to treaty obligations after 1945. In Germany, the landmark case is the *Saar Agreement* judgment of 1955, where the Federal Constitutional Court reviewed this important international agreement in light of its potential incompatibility with German constitutional law fundamental rights.⁵⁶ The court insisted on its power to subject the Saar Agreement to

⁵⁵ D&F give the example that of 49 *sentenze* of the Italian Constitutional Court in 1964 dealing with the constitutional legitimacy of laws enacted after 1948, in only one case did the court find a piece of state legislation unconstitutional because of its incompatibility with a substantial constitutional provision. On D&F’s logic emphasizing only active use of the power to ‘strike down’ legislation, if the Constitutional Court had been deprived of its jurisdiction to hear complaints about the constitutionality of such laws, only one of these cases would have been adversely affected. On the alternative view however, all 49 of these complainants would have been adversely affected, by being deprived of their access to a duly empowered tribunal to hear complaints about the constitutional legitimacy of the state legislation in question.

⁵⁶ The Saar treaty decision : BVerfGE 4, 157. Statute of Saar Territory Case, International Law Reports 22 (1955) 630.

constitutional review, finding however that it was acceptable to the German Constitution in light of the exigencies of international politics and treaty-making. This balance between principle and pragmatism was characteristic of constitutional court judgments reviewing international agreements on fundamental rights grounds in both Germany and Italy throughout the postwar period.⁵⁷ As scholarly consensus agrees, while insisting on the possibility of national constitutional review of treaty obligations on fundamental rights grounds, particularly in relation to the most fundamental commitments of the national constitutional orders, the German and Italian courts nevertheless tend to permit the constitutionality of otherwise potentially unconstitutional treaty obligations.⁵⁸ The possibility that these constitutional courts could have been motivated to protect the availability of a national venue to hear human rights concerns arising from European legislation even as they were cautious about actually exercising the power to “strike down” such legislation is a highly plausible scenario.⁵⁹ The caution shown by the German and Italian constitutional courts in

⁵⁷ Phelan 2014, with analysis of decisions of both the German and Italian constitutional courts.

⁵⁸ Phelan 2014: 60. Note that on this approach, contrary to e.g. Weiler 1996 (“How would you expect the German Constitutional Court to accept less? ... Its yardstick for scrutiny must be “up to standard” -- the German standard.”), the German and Italian constitutional courts were not motivated to ensure that the European treaties (or other international agreements) did not produce outcomes that failed to respect fundamental human rights standards as those courts defined these for ‘purely domestic’ legislation. Rather, these courts were pragmatic about the need to allow the constitutionality of politically important international agreements, even if domestic standards of fundamental rights protection were not fully satisfied, but simultaneously maintained the principle that citizens could seek constitutional review of such treaty obligations on fundamental rights grounds.

⁵⁹ To avoid any possible confusion, there is no reason to deny the possibility that a concern by national constitutional courts to maintain their independence and institutional position may have been one element in the background of their judgments relating to the protection of fundamental rights within the European legal order. D&F’s argument is however a more specific one – that the reluctance of these courts to strike down postwar domestic legislation on fundamental rights grounds during this period is sufficient to demonstrate that these constitutional courts could not have been much concerned about the lack of any judicial venue to hear fundamental rights complaints about European norms – and that specific argument is not convincingly made out.

reviewing postwar domestic legislation on human rights grounds is therefore not in conflict with the possibility that these courts were sufficiently committed to human rights concerns to play an essential part in promoting the ECJ's new human rights jurisprudence.⁶⁰

Conclusions

Delledonne & Fabbrini have given the conventional account of the rise of EU human rights jurisprudence a useful workout, for which all those interested in the early history of European law can be grateful. In particular, they have shown that many descriptions of the role of the Italian and German constitutional courts in prompting the Court of Justice's *Stauder* and *Internationale Handelsgesellschaft* judgments do not provide evidence that these national constitutional courts had acted in advance of the Court of Justice. Nonetheless, the conventional account is no "myth". It fits the chronology of national and European court judgments, rightly understood. It is the explanation highlighted in the writings of influential ECJ judges. It is also entirely compatible with the cautious approach to actually striking down democratically enacted postwar legislation shown by the Italian and German constitutional courts until the mid 1960s, and indeed fits with widely accepted understandings of the way that these courts approached fundamental rights review of treaty obligations – insistent on the availability of fundamental rights review, but highly cautious about actually finding particular treaty provisions unconstitutional on fundamental rights grounds.⁶¹ In response to D&F's criticisms, the conventional account can therefore be restated and set on a firmer empirical basis.

It is worth repeating that there is as yet no good direct evidence for the alternative

⁶⁰ For criticisms of assessments of constitutional courts that overemphasise the "strike down" power, see e.g. Casper 1976 and Kavanagh 2020 [forthcoming].

⁶¹ Phelan 2014.

claim the ECJ's jurisprudence in *Internationale Handelsgesellschaft* was "the result of a transnational development consisting of greater sensitivity towards human rights at all levels of government".⁶² Indeed, given the clear priority placed on the questions raised by judgments of the German and Italian constitutional courts in the writings of ECJ judges, it seems likely that even if significant evidence is later provided for the direct influence of such transnational developments on the Court's decision-making, this will likely remain a secondary aspect of this important story. To be sure, there is no doubt of a general trend towards the judicial protection of human rights in 1960s and 1970s Europe, but there is no evidence to suggest that this transnational development should displace the centrality of the Court of Justice's concern to respond to the German and Italian Constitutional Courts in any explanation of the rise of EU human rights jurisprudence.

D&F's article makes reference to a number of scholarly descriptions of the rise of EU human rights jurisprudence as a foil for their discussion and to distinguish their alternative approach. Examples used to illustrate the conventional approach include "The ECJ's very fundamental rights jurisprudence [was] once called for by the German Constitutional Court..." (Grimm), "the ECJ's human rights doctrines were developed mainly in response to challenges by German courts" (Schimmelfennig), and "In response to the threat [of] national courts ... the [ECJ] discovered that the protection of fundamental rights was indeed a general principle of [EEC] law" (Coppel and O'Neill).⁶³ Now it is true that none of these brief statements is fully

⁶² Delledonne and Fabbrini 2019: 178.

⁶³ Grimm 2017: 205, Schimmelfennig 2007: 105, Coppel and O'Neill 1992: 670. Equally defensible in this respect are Weiler's accounts in Weiler 1991: 2417-2418, Weiler 1986: 1119, although Weiler's accounts suggest that the national constitutional courts were motivated to insist that EU law match national human rights standards, whereas the better view is that these national constitutional courts sought to maintain the principle of fundamental rights review of treaty obligations but were pragmatic about generously

supported by the necessary evidence to counter D&F's chronological critique in particular. However, if supplemented by appropriate citations to the 1965 and 1967 judgments of the Italian and German constitutional courts as well as to *Frontini* and *Solange I*, and to the writings of judges Pescatore and Lecourt, each of these statements appears reasonably defensible, certainly as brief accounts of these important developments. There is indeed considerable evidence that the Court of Justice discovered that the protection of fundamental rights was indeed a general principle of Community law in response to the possible threat by the Italian and German constitutional courts to review European obligations in light of national fundamental rights protections. It appears that ECJ judges were keeping a careful look out for references to this topic in constitutional court judgments, and assiduously noting even brief passages of text that later research has at times disregarded, or whose import has not always been fully recognised. They were also willing to adapt as necessary.

It may be useful to finish on a methodological note of more general application. D&F's article illustrates a common feature of scholarship on the history of the European law and of the Court of Justice in particular – a persistent tendency to merely infer, or frankly even to guess at, the reasons that may have informed the famous judgments of “the Court”, understood as an anonymous and inscrutable collective institution. While this has been a common approach to the historical study of the Court of Justice, it is rarely employed in historical research on other well-known tribunals, in particular the Supreme Court of the United States, where it is widely acknowledged that research must attempt to incorporate a detailed analysis of the activities and motivations of individual judges. Who would attempt to write a history of a famous early judgment of the United States Supreme Court without a

allowing the constitutionality of politically important treaty obligations which might be unconstitutional if enacted for purely domestic purposes (see Phelan 2014).

thorough knowledge of the relevant writings of Chief Justice John Marshall?

In the case of the Court of Justice of course, there are particular reasons for overlooking the role of individual judges. Above all, the Court of Justice (unlike, in this respect, the United States Supreme Court) produces only a single judgment presented by the Court as a whole, with no individually signed dissenting or concurring opinions. The judges themselves are sworn to secrecy about their internal deliberations, and both judges and their assistants remain reticent to discuss the internal functioning of the Court. The historical archives of the Court itself remain largely closed, even in relation to judgments taken many decades ago. Despite all these challenges and more, historical research on the early Court of Justice is thriving, including biographical research on the judges and advocate generals.⁶⁴ There is now often considerable documentation available – from speeches, published articles, books – that reveals ECJ judges’ own explanations for the principles put forward in the Court’s famous judgments. For Robert Lecourt in particular, the ECJ judge whose role is most often compared to that of Chief Justice Marshall on the early United States Supreme Court, we have good evidence for his views not only on *Stauder* and *Internationale Handelsgesellschaft* (as discussed here) but also for other judgments of even greater centrality to the development of the European legal order such as *Van Duyn*, *Dairy Products*, and *Van Gend en Loos*.⁶⁵ Our knowledge of individual ECJ judges and their explanations for the Court’s decisions will only continue to grow, and engagement with this material is now an unavoidable task for all historians of European law – perhaps particularly for those with revisionist agendas. Studying

⁶⁴ Phelan 2017, Fritz 2018, Phelan 2019, Phelan 2020, Fritz 2020.

⁶⁵ Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337, Cases 90&91/63 *Commission v. Luxembourg & Belgium (Dairy Products)* [1964] ECR 625, Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1. Phelan 2015, Phelan 2017, Phelan 2019.

the history of an enigmatic and impenetrable “Court of Justice” based only on its terse published judgments without reference to the lives, ideas and writings of its leading judges should itself be considered a thing of the past.

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