

Adults in the (Deliberation) Room. A comment on M.A.S.

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For many years, the Court of Justice of the European Union and national Constitutional Courts lived happily ignoring each other. Like neighbours of different nationalities that don't share a common language and celebrate New Year's eve on different dates, the supreme judges of Europe played the role of civilised but distant colleagues, living in worlds apart and dealing with very different duties.

However, in the 1980's a sense of community among Constitutional Courts gradually developed. The event that united them seemed to be a competition to find the cleverest way to prove authority *vis-à-vis* the foreign neighbour sitting in Luxembourg. *Controlimiti*, *Solange*, *ultra vires*, constitutional identity, supremacy/primacy and many other labels flooded the discourse of judges, scholars and baffled external observers, like political scientists, who quickly realised that this was a battle to preserve the enormous powers that Constitutional Courts had been granted in post-war continental Europe.

During that time, the Court of Justice of the European Union remained indifferent to the concerns of Constitutional Courts. Despite the provocations coming from Karlsruhe and other quarters, the position of the European court seemed passionless, devoid of all sensitivity or empathy towards its edgy neighbours. Europe's cold-mindedness seemed to reach its hiatus when it refused to hear the Czech Constitutional Court's submissions in a sensitive preliminary reference procedure raised by the Czech Supreme Court, only to be followed by a blunt ruling in Melloni, blasting the Spanish Constitutional Court's efforts to preserve higher standards of fundamental rights protection in domestic law. Then the turn came to the German Constitutional Court in the OMT case, and finally, on December 2014, the European Court of Human Rights got its fair share of ruthlessness when the Luxembourg court brought to an end the prospect of EU accession to the European Convention of Human Rights.

By 2016, the environment could not have been worse. Despite the diplomatic grins in pictures of official visits, the tension between the Court of Justice of the EU and Constitutional Courts had reached its highest peak. No solutions seemed to be in sight, except for the unconditional surrender on the part of the national courts, or an overt recognition by the European court of the limits of primacy of EU law. At a time in which Europe was in the midst in its worst economic and political crisis, the prospect of institutional insurrection among Europe's top judges loomed large, and it could not have come at a worst time.

But then in 2017 everything seemed to change.

Last year we witnessed the first signs of empathy from the Court of Justice, in a noble effort to reconcile and normalise a historically flawed relationship. The signs have not been discreet, quite the contrary. For the very first time, a Constitutional Court requested the Court of Justice to review a previous judgment, only to find a positive reply from Luxembourg. An episode of the kind should not be the source of much interest or surprise, for supreme courts change their minds every now and then, sometimes at the request of another court. But the events in M.A.S., the case that gave the chance to the Court of Justice to play the pipes of peace with Constitutional Courts, are remarkable in their own right.

In its judgment in *Taricco*, rendered by the Grand Chamber on 8 September 2015, the Court of Justice ruled quite bluntly that short time-limits in Italian law barring criminal investigations in cases involving VAT fraud were contrary to EU law. The Court of Justice was protecting the Union's own resources, but also a recent judgment that had caused havoc among Constitutional Courts: *Akerberg Fransson*. The case in *Taricco* was a sort of reverse *Akerberg Fransson*: did EU law apply when national fundamental rights in areas not harmonized by EU law have the effect of limiting the EU's own resources? The answer given in *Taricco* was positive and Italian criminal courts found themselves reopening criminal proceedings that had been time-barred shortly before. The Corte Costituzionale was quick to refer a new case to the Court of Justice in M.A.S., highlighting the difficulties that the judgment in *Taricco* entailed from the optics of fundamental rights.

The preliminary reference of the Corte Costituzionale was cleverly construed. It explained that under Italian law (and Strasbourg case-law), time-limitations in criminal proceedings are not a strictly procedural matter, but a substantive issue that has an impact on the criminal liability of the accused. Thus, time-limitations form part of the guarantees of every accused under the Constitution. These are not procedural guarantees, but substantive ones closely attached to the principle of legality in criminal law.

The Court of Justice agreed. Without crying *mea culpa*, it ruled that the Corte Costituzionale was right to approach the issue in substantive terms, particularly when a rule of national law has been declared in breach of EU law. Thus, a delicate balance was struck, confirming the incompatibility of the Italian rule on time-limitations with EU law, but conferring on Italian judges the power to keep the rule in place (until the legislature enacted the necessary measures) in case fundamental rights needed protection. The ruling in *Taricco* was preserved, but its practical implications were considerably reduced for the sake of fundamental rights protection.

The judgment in the M.A.S. case is a landmark decision on many counts.

First, the Corte *Costituzionale* could have hidden the genuine issues underlying the case, and particularly the contradictions and flaws of the judgment in

Taricco, whilst suggesting an alternative route that could have led to a different result. But the *Corte* chose a different course: it decided to set the issues openly and at the light of day for all to see. If the Court of Justice was to follow the *Corte's* proposal, there was no dignified way of amending Taricco. We will never know the genuine reasons underlying the *Corte's* approach, but an external observer could wonder if the hostility that had governed relations in the years before was a catalyser of such an explicit attitude from the Italian court.

Second, the *Corte Costituzionale* chose a transparent but non-confrontational strategy. In stark contrast with the German Constitutional Court's preliminary reference in the OMT case, a hawkish and aggressive reference which even threatened to set aside Luxembourg's judgment if necessary, the Italian court chose to point at the alternatives in the hands of the Court of Justice, refusing at all times to warn of the consequences of a response in the negative. It is true that this was the approach of the Spanish Constitutional Court in Melloni, whose order for reference in that case was an example of judicial good-manners among top courts, only to be rejected with a blunt rebuke. But this time the Court of Justice seemed to have learned from past mistakes, and the approach chosen by the Italian court, after witnessing the hostility of others and the reactions from Luxembourg, payed off.

Third, M.A.S. has given the Court of Justice the opportunity to refine its case-law on the level of protection of fundamental rights. In Melloni, the Court of Justice stated that in cases completely determined by EU law, national courts have no choice but to comply with the standards fundamental rights protection set in the Charter. However, in cases in which EU law leaves discretion to the Member State, national judges can choose between national standards or the Charter, unless the latter provides a higher level of protection. In this second case, higher national standards have to give way to the primacy, unity and effectiveness of EU law. This proviso proved, according to many authors, that the margins left to national courts were irrelevant. However, M.A.S. has proved them wrong. What the Court of Justice is stating in its decision is that national courts can keep their higher standards of protection, even if that entails a breach of rules on own resources of the Union. At no point did the Court of Justice raise the fact that such rules on own resources could be relevant to protect the primacy, unity and effectiveness of EU law. Quite the contrary, the Court of Justice seemed happy to ignore the proviso and openly indicated to the *Corte Costituzionale* that the way forward to fix the ill-conceived outcome of Taricco was by keeping the time-limits intact, at least for the time being.

Above all, M.A.S. is good proof of how the Court of Justice is starting to realise that fundamental rights are not only institutional tools to enhance its jurisdiction, or to send popular messages to a demanding audience. The Court's exorbitant protection of privacy in a line of cases such as Digital Rights Ireland, Google Spain, Schrems or Opinion 1/15, have been in stark contrast with very modest and minimalist interpretations of the Charter in fields such as immigration. The Court of Justice seemed to be comfortable in providing *superprotection* to fundamental rights in politically secure terrains, but not much so when the

subject-matter led the Court into muddy waters. From the entry into force of the Charter until 2017, the way in which the Court has handled fundamental rights has been inconsistent and, at times, opportunistic. The M.A.S. judgment is proof of a certain recognition by the Court of the costs of having a strong fundamental rights case-law, which will at times fit the Court's agenda and at others it will not. Assuming a high level of fundamental rights protection entails equivalent levels of protection for *all* rights. Of course there will always be a margin of appreciation to be taken into account, and which will usually be channelled through a proportionality test, but the standards setting the breach must be equivalent, and not asymmetric depending on the right at stake.

The result of M.A.S. is promising, not only for its content, but also its context. The Court of Justice has finally realised that a genuine dialogue entails the possibility of correcting past mistakes. Genuine dialogue also implies the recognition of the other, even as an authoritative interpreter of EU law. To date, the attitude of the Court of Justice was one of selective competence, in which each court was the ultimate authority to interpret its respective legal texts. M.A.S. has proved that the Court of Justice can receive valuable lessons from Constitutional Courts in the interpretation of the Charter of Fundamental Rights of the EU, a text of EU law that is certainly to be interpreted by the Court of Justice, but whose richness and potential can be preserved and exploited if the community of interpreters is enlarged. This community of interpreters has been officially inaugurated and put to work by the M.A.S. judgment.

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