Intersectional litigation and the structuring of a European interpretive community

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In intersectional litigation European courts face conflicts between rival claims of legal authority that, in the absence of a unified European constitutional framework, may receive only context-dependent solutions. This poses critical challenges for judicial bodies: not only are they expected to make up for the absence of an overarching constitutional structure and ensure legal coherence, but they are also put at the forefront of articulating and accommodating the conflict between the largely regulatory framework of the EU and states’ republican constitutionalism. The actual interpretive strategies employed in intersectional disputes, nevertheless, do not appear entirely up to that task. Most of the time, litigation gives rise to a series of judgments on the same or similar issues that, although procedurally connected, are conceived of more as segmented and isolated episodes than coordinated judicial efforts. To cope with these shortcomings, the essay calls for the structuring of a European interpretive community and proposes ‘contextual deference’ as an interpretive strategy promoting external coherence between judicial rulings crafted in distinct legal orders. Accordingly, courts are required to frame cases through their native legal languages and defer to the interpretive and normative claims of related legal systems. Although ‘contextual deference’ establishes a presumption in favor of outside claims and standards of adjudication, it also admits its rebuttal if courts were to decide that the normative claims of their native legal order should prevail.

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1. Introduction

European litigation increasingly takes place at the intersection between the EU and national legal orders.¹ This occurs due to their growing material overlaps and because litigators have learned to play European legal pluralism strategically. These types of disputes are highly demanding for European courts.² A first challenge concerns legal coherence and integrity: in intersectional disputes not only are they entrusted with the task of applying the norms of their native legal systems but, due to the porousness of the boundary between the EU and national legal orders, they are also exposed to outside interpretive and normative claims. Yet, faced with rival claims of legal authority and lacking a unified European constitutional framework, courts can offer only context-dependent solutions, that is, rulings crafted according with their original legal system. In the highly fragmented European legal environment, indeed, there seems not to be a single and neutral perspective where multiple legitimate claims of authority can be reconciled once and for all.

To cope with this inconvenient reality, it might be tempting to identify in republican constitutionalism a possible neutral perspective common to the EU and national legal orders.³ In this view, fundamental rights and common constitutional traditions would emerge as the shared framework to accommodate conflicts of legal authority. Courts would be the main beneficiaries of a similar conceptualisation since, through the language of fundamental rights, they could transcend the borders of their native legal systems and resolve intersectional disputes in the light of universal constitutional principles. Extremely popular at a time in which the EU appeared to be constitutionalised, a similar perspective is still a constant source for important contributions to the legal debate on European integration, despite the mishaps of the Constitutional Treaty.⁴ Moreover, fundamental rights discourse seems all the rage in intersectional adjudication,⁵ and also in the Lisbon Treaty provisions which might uphold a similar view have defied the recent EU constitutional disenchantment.⁶

For all the merit and possible textual justifications of this approach, this essay offers an alternative account of European intersectional disputes. Focusing essentially on economic and social litigation, it suggests that attempts to set republican constitutionalism and fundamental rights as its main conceptual framework are misconceived.

¹ European disputes may ramify also towards the WTO, the ECHR and other international legal contexts. It will be for further research to test whether the ideas presented in this essay can be generalised also in those directions. For a first application of this approach in the relationship between the EU and the WTO legal orders, see Marco Dani, Remedying European Legal Pluralism: The FIAMM and Fedon litigation and the judicial protection of international trade bystanders, 21 Eur. J. Int’l L. 303 (2010).
² In this essay, ‘European courts’ will refer to both member states’ and EU judicial bodies.
⁵ One of the most recent examples is Case C-555/07, Seda Kücükdeveci v Swedex GmbH & Co. KG, 19 January 2010, not yet reported. See also the bold approach suggested by AG Sharpston in C-34/09, Gerardo Ruiz Zambrano v Office National de l’Emploi (ONEM), not yet reported.
⁶ See, in particular, articles 2, 3, 6 and 10 TEU.
as they rely on a conventional and stylised understanding of the EU legal order and the European legal environment. Particularly after the shelving of its constitutional ambitions, a narrative of the EU in purely republican constitutional terms appears problematic. Beneath the surface of the declamations included in the Lisbon Treaty, the EU maintains a prevalent regulatory structure that emerges from much of intersectional litigation. As such, its legal language and culture create an irreducible opposition to the central tenets of states’ republican constitutionalism. Yet, such opposition is not ineluctably destined to yield deadlock nor intractable and disruptive conflicts. In fact, intersectional conflicts not only can be accommodated but can also trigger processes of constructive deliberative engagement.

Against a similar background, therefore, the task of courts is far more important than ensuring coherence in a context of legal fragmentation. Intersectional litigation also poses normative challenges. Besides avoiding the degeneration of intersectional conflicts, courts may also be required to do the best by that fundamental opposition. This requires adjudication of intersectional disputes to be conceived of as a coordinated effort by the relevant judicial bodies—an aspiration largely belied by the actual state of intersectional judgments. Notwithstanding the formidable platform offered by the preliminary ruling procedure, actual litigation maintains a segmented character. Disputes travel from court to court originating judgments conceived of essentially in a logic that is internal to the relevant legal system. Engagement with the arguments proffered in previous judicial rulings by courts belonging to other legal orders is seldom sought, with detrimental consequences to the overall persuasiveness and legitimacy of adjudication.

To cope with these shortcomings, the essay advocates the notion of a European interpretive community. In this view, European courts, alongside acknowledging themselves as parts of their native interpretive communities, are requested also to behave as components of a broader transnational community of interpreters. In this latter capacity, judicial bodies, although aware of legal fragmentation and respectful of the ties with their original interpretive communities, seek also to establish a degree of external coherence between the arguments put forward in their rulings. Intersectional disputes, therefore, are regarded as processes in which their genuine contributions may help in articulating and accommodating the conflicts between the regulatory state and republican constitutionalism.

For this conceptual and doctrinal shift to happen, it is argued that European courts should apply a common interpretive strategy called ‘contextual deference.’ Accordingly, courts will continue to qualify litigation with the languages and conceptual approaches of their native legal contexts. At the stage of proportionality review—where actually most intersectional disputes are decided—they will defer to the interpretive and normative claims formulated in related legal orders. ‘Contextual deference,’ indeed, establishes a presumption in favour of the adjudicative outcomes and standards of review previously adopted by other courts. However, subject to certain conditions, courts are also enabled to rebut that presumption and enforce the standards of adjudication which best reflect the normative claims of their native legal systems.
The essay proceeds as follows: in section 2, the nature of European intersectional litigation is analysed by looking at the rise of intersectional disputes and their challenges to native interpretive communities (2.1), the legal languages employed in adjudication (2.2), and the legal cultures underlying judicial rulings (2.3). Section 3 discusses the actual state of intersectional disputes, pointing out the gap between the challenges posed by intersectional litigation and the interpretive strategies adopted by European courts. Section 4 argues the case for a European interpretive community and spells out the contents of ‘contextual deference.’ Section 5 offers a few concluding remarks.

2. The nature of European intersectional litigation

2.1. Native interpretive communities and the rise of intersectional litigation

European courts are in the business of interpreting and applying the foundational norms of their native legal orders. This is equally true for national supreme or constitutional courts and the European Court of Justice: each within their own legal systems, they are at the centre of ongoing processes where the meaning of the latter foundational texts is constantly regenerated in an unfolding narrative. In discharging this function, courts are not isolated: the interpretation of higher norms may be a joint undertaking involving a broader range of players such as ordinary courts, political institutions, academics, interest groups and public opinion. In their different capacities, all these subjects may participate in that effort and contribute to a shared understanding as to the rules’ meaning and the identity of their native legal order. When this occurs, it may be said that an interpretive community is in place. In this light, therefore, adjudication is not simply about the application of norms to a dispute. In deciding cases, European courts take part in processes of formation of distinctive legal cultures and give voice to the languages, values, and goals inspiring their native interpretive communities.

Today, this comforting reality is questioned by the rise of intersectional litigation. Over the last two decades, disputes have increasingly cut across EU and member states’ legal orders. Overwhelming evidence of this phenomenon may be found particularly in the cases arising in the economic and social sphere, arguably the field that...
absorbs much of the EU policy\textsuperscript{9} and judicial\textsuperscript{10} energies. Three reasons may explain the growing salience of intersectional litigation. The first is trite and regards the incremental expansion of the scope of EU law following successive treaty amendments and the unwavering pro-integrationist attitude of the Court of Justice.\textsuperscript{11} A second explanation concerns the porousness of the boundary between the EU and national legal systems. This may be appreciated by noting that national constitutions not only enable but, critically, mandate the recognition of EU claims of legal authority. Similarly, the EU legal framework, in presupposing for its operation the cooperation with national administrations and courts and incorporating in the treaties several distinctive traits of states’ constitutionalism, exhibits clear functional and normative ties with the latter legal tradition.\textsuperscript{12} As a result, the EU and member states’ interpretive and normative claims, far from remaining confined within native legal systems, project also in further dimensions and expose each other’s interpretive communities to outside vectors of legal authority. The third reason for the rise of intersectional litigation draws from the overlaps and porousness of European legal frameworks and points at the gap between unified social practices and their fragmented legal treatment. In contemporary Europe, the degree of unification achieved in economic and social life is not coupled by a commensurate unification of the legal vocabularies and conceptual frameworks. Particularly in the economic and social sphere, litigators have learned to profit from this state of things and, by playing European legal pluralism, they have acquired an expertise in shifting strategically the relevant legal coordinates of disputes, with critical repercussions on the identification of their participants, relevant interests and possible outcomes.\textsuperscript{13}

These legal practices also have profound theoretical implications. For the mere fact of being set at the intersection, disputes traditionally conceived of with the categories and perspective of a single legal order may end up being reconfigured. Thus, it may happen that a case normally framed in a national jurisdiction through the constitutional language of freedom of assembly and its limits is rewritten in the supranational sphere with the grammar and syntax of free movement of goods;\textsuperscript{14} or, that a dispute that the Court of Justice would once discuss as a routine case concerning the free
movement of services is enriched with constitutional language and the controversial notion of human dignity. Occasionally, the reconfiguration of disputes can even be traumatic since the discovery of additional dimensions to a case may unveil latent conflicts or subvert consolidated habits. Different qualifications of a fact, indeed, bring in competing conceptual frameworks and legal cultures. The latter often entail different understandings of the role of courts and, ultimately, varying styles of adjudication. What is more, intersectional disputes often ramify along a plurality of judicial sites and, on the whole, they may turn out alternating and combining the legal vocabularies and conceptual frameworks employed in those particular contexts. As a result, it is not surprising that intersectional litigation is perceived as a source of confusion and, ultimately, a threat to the integrity of native interpretive communities.

Whereas the last allegation may easily be dismissed by noting that it is precisely due to the attachment to their original legal systems that courts are exposed to outside normative claims, charges for lack of legal coherence and predictability do not seem misplaced. In this respect, intersectional litigation may be perceived as suffering from the absence of a single European constitutional framework and the fact that the competition between the EU and national authority claims is ultimately unsettled. Unsettledness, indeed, is a luxury that courts cannot afford in deciding cases. More than any other institutions, they are expected to deliver coherent and reasoned responses to disputes involving those interpretive cruxes. Coherence and rational reasoning, however, cannot but be context-dependent, for in a highly fragmented legal environment such as that at issue in Europe, there is not a single and neutral perspective where multiple legitimate claims of authority can be reconciled.

If the latter is a structural element of European legal pluralism, intersectional litigation cannot be conceived as the venue where the conflicts between rival interpretive and normative claims find stable and universal solutions.Crudely, those disputes may at best give rise to processes in which those claims will be articulated and find contingent and particular adjustments. In this view, therefore, the role of courts is far more crucial than deciding the case. In intersectional litigation they may be also required to represent their native legal cultures and share them with other judicial bodies as contributions to a common transnational judicial effort. At the same time, the very logic of intersectional litigation implies also that those legal cultures may be discussed and possibly put into question. But what are the legal cultures expressed by European courts in intersectional disputes? To what extent can they accept to have


them discussed? And how can that common judicial effort be structured? To answer these questions, one has first to characterise Europe’s legal frameworks by looking at the legal languages and cultures developed in their particular interpretive communities.

2.2. Legal languages

The variety of legal languages is a defining trait of European intersectional disputes. In judicial reasoning, variations can be detected, so to speak, at both a grammatical and syntactic level. Indeed, depending on the legal context and the relevant interpretive community, the facts of the cases and the interests at issue may receive different juridical qualifications. Similarly, the adjustment of relevant principles and the outcomes of disputes often may follow the application of standards of judicial review on proportionality that may also vary with the legal system. As a result, qualification and standards of judicial review make up distinct languages that, in informing rival perceptions of the cases, emerge as major components of intersectional litigation.

Constitutional disputes in national quarters are mainly shaped with the vocabulary of the relevant constitutional tradition. In this respect, fundamental rights protection features as the most common frame of reference. Accordingly, litigation is framed through constitutive principles that qualify in open-ended terms the relationship between the interests at issue. In economic and social disputes this implies that both the relevant economic interests and policy objectives may be subsumed in constitutional norms and, in that form, subjected to proportionality review. In this respect, comparative analysis reveals a clear preference by national constitutional courts for the ‘rationality test,’ the most deferential of the standards of review. In fact, under this type of scrutiny, the legitimacy of the objectives inspiring legislation goes almost certainly uncontested, and only a minimum degree of coherence between those ends and the impugned legislative provisions is required. As a result, even ostensibly protectionist objectives may be recognised as legitimate limits to economic freedoms, and a generic suitability of the means may satisfy the undemanding palate of constitutional adjudicators. Within national constitutional contexts, therefore, existing distributions of economic resources are not entitled to any special protection from majoritarian decision-making. In this field, constitutional courts are marginal players,

19 On the distinction between constitutive and regulatory principles (see below in the text), see David J. Gerber, Law and Competition in Twentieth Century Europe: Protecting Prometheus 248-249 (1998).
22 The adoption of a similar standard in the review of economic and social legislation seems a rather common feature of contemporary constitutional democracies; see Tim Koopmans, Courts and Political Institutions 249-250 (2003).
23 A valuable example is offered in this regard by the litigation on pasta legislation before the Italian Constitutional Court. See Corte cost., sent. 137/1971, in Giurisprudenza Costituzionale, 1971, 1577, and Corte cost., sent. 20/1980, in Giurisprudenza Costituzionale, 1980, 171.
24 This appears to be the view espoused by the German Constitutional Court since its seminal judgment BVerfGE 4, 7 (1954) Investment Aid case.
their role being confined to the safeguard of economic freedom and social rights only from the most egregious violations perpetrated in legislation.

In the judgments of the European Court of Justice, both the qualification and the standards of judicial review employed in litigation follow a bifurcated pattern and depend upon the type of norms invoked and the nature of the measure at hand. If disputes involve a national measure and the latter triggers free movement principles, litigation will be framed through the common market language. Accordingly, national measures are viewed from the standpoint of regulatory principles, establishing *prima facie* prohibitions on measures that are discriminatory or hinder the access to market. Such default rules, then, are almost invariably mitigated by principled derogations for policy objectives. Unlike national constitutional adjudication, therefore, litigation here is conceived as a challenge to the political autonomy of the member states. The latter are requested to rebut a *prima facie* finding of illegality of their measures by showing that those are genuinely committed to pursuing legitimate policy objectives. Justification, then, brings in proportionality review that the Court of Justice undertakes in light of far stricter standards than the rationality test. First, the Court verifies the legitimacy of states’ policy objectives as well as their effective and coherent pursuit. Next, national measures may be subject to more demanding scrutiny. In a number of cases, legislation is reviewed with an ‘equivalence balance’ test under which the Court assesses whether the level of protection of non-economic values established by domestic legislation can be attained through a less burdensome measure. In other instances, the Court goes even further and employs a ‘pure balance’ test under which the level of protection of non-economic objectives is second-guessed and, ultimately, questioned.

Another scenario emerges when litigation revolves around EU legislative measures. In such situations, disputes may be qualified with the lexicon of EU fundamental rights and general principles. In this light, the goals inspiring EU legislation are normally recognised as legitimate policy objectives whose pursuit may in principle justify limits on individuals’ freedoms. Also in this framework EU legislative measures are reviewed

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27 The only exception is the prohibition of custom duties and charges of equivalent effect (article 30 TFEU) for which no justification is admitted.
31 On the distinction between ‘pure’ and ‘equivalence’ balance tests, see Miguel Pisas Maduro, We, The Court: The European Court of Justice and the European Economic Constitution 56-57 (1998).
on proportionality grounds. Yet, in this kind of situation the Court of Justice operates with more relaxed standards of adjudication, in many ways resembling the rationality test used in national constitutional jurisdictions. In fact, adjudication often ends up reinforcing legislation, and displays a more marginal role of the Court when faced with EU policy-making. Despite these similarities, however, it would be inaccurate to regard this style of judicial review as a genuine reflection of national patterns of policy-making and constitutional adjudication. A crucial difference persists in that in most instances the EU legislation handled by the Court of Justice, far from ensuing from genuine parliamentary deliberation, is the result of intergovernmental and technocratic decision-making. Fundamental rights and the rationality test, therefore, are borrowed by the Court to inform a perception of the case that, beneath that placatory discourse, is more crudely justified by the need to shield delicate political bargains.

2.3. Legal cultures

If language is the mirror of culture, the variety of vocabularies featuring in intersectional litigation reflects the richness and diversity of legal traditions making up European legal pluralism. Those disputes, therefore, besides offering a privileged standpoint for appreciating how legal languages may be combined and accommodated, also provide a valuable point of reference for the characterisation of European legal cultures. Languages, indeed, bear traces of the various stages through which the identities of legal orders have been formed. As such, analysis of them may account for the evolving nature of legal orders as well as their mutual relationships.

In the description of legal languages, the qualification of disputes has emerged as the stage at which their discrepancies are probably the most striking. Whereas in national constitutionalism the relevant facts and interests are defined in the lexicon of fundamental rights through constitutive principles, in the EU the same dispute may be treated with regulatory principles and common market categories. This aspect echoes longstanding divergences between Europe’s legal frameworks that the consideration of their genesis can illuminate. In this view, it may be noted that originally national constitutions and the Community legal framework are concerned with different types of economic and social conflicts. National constitutions revolve mainly around vertical conflicts, namely the political and social redistributive conflicts inherited from 19th century class struggles. Conversely, the Community legal order is conceived of as a framework for dealing with horizontal conflicts associated with the transnational mobility of factors of production and the regulatory competition between the member states. Such different constitutive concerns prompt alternative strategies of integration. Republican constitutional democracy is the dominant model embraced by national constitutions to promote economic and social cohesion. In this framework,

33 This can be confirmed even after the expansion of the legislative powers of the European Parliament in the Lisbon Treaty. It is indeed difficult that such reform will make representative democracy the EU’s main mode of policy-making, for the context in which the ordinary legislative procedure will take place is increasingly characterised by informal practices such as first reading deals and triilogue meetings, and broad delegation of legislative powers.
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fundamental rights and representative democracy are the means to ensure effective political association. The regulatory state, instead, is the form of power inspiring the Community legal order, and the common market with its strategies of harmonisation is the project predisposed to attain economic integration. The variety of approaches to disputes, therefore, refers back to a structural conflict inherent in European legal pluralism. At their essential core, the EU and national forms of political rule are in radical opposition. The latter, far from remaining at a lexical level, extends to all the defining traits of Europe’s legal frameworks, namely the ideological assumptions, substantive principles and modes of political will formation.\textsuperscript{34}

Despite such divergences, regulatory state and republican constitutionalism have appeared to get along relatively well. Rather than sticking rigidly to their respective and opposite identities, they have learned convergence as the way forward. In accordance with this \textit{modus vivendi}, the contents of the common market project have undergone a process of gradual redefinition in which the original economic architecture has been enriched with political and social motives.\textsuperscript{35} The outcome of that process is a system of economic governance that in many aspects challenges both the social state and purely \textit{laissez-faire} regimes.\textsuperscript{36} Indeed, the common market includes both facilitative and protective regulatory dimensions: on the one hand, the circulation of factors of production is encouraged through the enforcement of strategies of positive and negative harmonisation; on the other, non-economic values and social objectives are pursued, although with varying intensity, through flanking policies. All these strategies are operated through a complex legal and institutional architecture that, although in a renewed legal framework, reiterates most of the key elements of the regulatory state.\textsuperscript{39} At a more symbolic level, convergence towards the central tenets of republican constitutionalism receives further endorsement. In this respect, the opening provisions of the Lisbon Treaty appear particularly telling. Social market economy is presented as one of the main EU ideological commitments,\textsuperscript{40} which the incorporation of fundamental rights as resulting from states’ common constitutional traditions\textsuperscript{41} and the bold affirmation of representative democracy as the functioning

\begin{itemize}
\item For a more in-depth discussion, see Marco Dani, ‘Economic and social conflicts, integration and constitutionalism in contemporary Europe’, LEQS paper No. 13/09, <http://www2.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper13.pdf>, at 12-23.
\item See now articles 8-13 TFEU.
\item Giandomenico Majone, \textit{The common sense of European integration}, 13 \textit{J. Eur. Public Policy} 607 (2006). See also Fritz W. Scharpf, \textit{Legitimacy in the multilevel European polity}, in \textit{The Twilight of Constitutionalism} 89, at 93-94 (Martin Loughlin & Petra Dobner eds., 2010), who, while depicting the EU as "... the extreme case of a polity conforming to liberal principles which, at the same time, lacks practically all republican credentials," recognises as a “paramount legitimating achievement” its effectiveness as a regulatory state.
\item Article 3(3) TFEU.
\item Article 6(3) TFEU.
\end{itemize}
The introduction of integration clauses is the way in which national constitutional systems reciprocate the EU convergent move. With them, national constitutions do not simply acknowledge the special status of EU law and establish a constitutional interface to domesticate EU policy-making. Integration clauses have a much more profound meaning: they entrench EU membership in national constitutional compacts; they establish as a defining feature of national constitutions their relationship with an external body of law commanding obedience according to standards of legitimacy which deliberately challenge the basic foundations of the constitutions themselves. This brings about important modifications also in the way in which policy-making and adjudication are conceived at a national level. Under the shadow of integration clauses, market arguments and the rhetoric of regulatory efficiency acquire a more pronounced role and invite reconsideration of the structures of the social state.

However remarkable, the convergence of Europe’s legal frameworks ought not to be confused with their conversion or the abandonment of original legal cultures. Innovations at an EU and national level may be significant, but they are hardly fundamental since they do not amount to a radical revision of their original strategies of integration and constitutive concerns. Admittedly, one could be content with the iconography of social market economy and constitutional democracy and therefore suggest republican constitutionalism as the official philosophy of the EU. Yet, the recent account of the EU and EU membership proffered by the Bundesverfassungsgericht in its Lisbon Urteil seems more nuanced and persuasive:

The constitutional state commits itself to other states which are standing on the same foundation of values of freedom and equal rights and which, like itself, make human dignity and the principles of equal entitlement to personal freedom the focal point of their legal order. Democratic constitutional states can gain a formative influence on an increasingly mobile society, which is increasingly linked across borders, only by sensible cooperation which takes account of their own interest as well as of their common interest. Only those who commit themselves because they realise the necessity of a peaceful balancing of interests and possibilities provided by joint concepts gain the measure of possibilities of action that is required for being able to responsibly shape the conditions of a free society also in the future. With its openness to European integration and to commitments under international law, the Basic Law takes account of this.

42 Article 10(1) TEU.
45 For a more detailed analysis, see Marco Dani, Constitutionalism and Dissonances: Has Europe Paid Off its Debt to Functionalism?, Eur. J. L. 324 (2009).
47 Lisbon Urteil, paragraph 221.
Certainly, Europe’s legal frameworks share common normative bases. Yet, their forms of political rule continue to differ. The state remains the main venue for constitutional democracy and republican life. At an EU level, by contrast, one finds the updated version of the regulatory state: institutions, policies, principles that are primarily devised to “gain a formative influence on an increasingly mobile society,” an objective that only at that level may be pursued since only there is it possible to “gain the measure of possibilities of action that is required for being able to responsibly shape the conditions of a free society also in the future.” At a micro level, the case law of the Court of Justice also validates the notion of a process of convergence rather than conversion towards republican constitutionalism. Indeed, even when explicitly requested to adjudicate on fundamental rights issues, the Court cannot but reinforce the persisting ties of its jurisdiction with the semantics and structure of the common market.\(^{48}\)

Resistance of the original legal matrix may be noted also at a national level. For all the discussion on the ‘economic constitution’\(^ {49}\) and the incorporation of market objectives, representative democracy and the social state maintain a firm grip on states’ constitutionalism. Again, the Lisbon Urteil highlights this point when it affirms that EU membership does not imply the surrender of the defining traits of states’ constitutional identity\(^ {50}\) such as the republican principles or the commitment to social justice. In this respect, national constitutional adjudication follows suit. Economic and social rights continue to be treated as constitutive principles and if market arguments surface at all in judicial rulings, this is unlikely a symptom of radical changes in constitutional culture. Most of the time the recalibration of adjudicative outcomes towards market solutions occurs either because the relevant legislation has incorporated them or courts are dealing with side-effects of supranational adjudication.\(^ {51}\)

In short, convergence has brought about structural compatibility rather than structural congruence between the EU and national forms of political rule.\(^ {52}\) Yet, as witnessed by the achievements of that process, their irreducible opposition has set the basis for their constructive cooperation. This emerges as soon as that opposition is observed in a dynamic perspective. As noted, republican constitutional democracy acknowledges and enhances fundamental rights in order to achieve political and social inclusion. The potentially disintegrating effects of social conflicts are its main concern and in order to deal with them it entrenches an open constitutional framework for political competition and participation modelled on the template of representative constitutional democracy.\(^ {53}\) Yet, as documented by endless EU case-law, in a similar context policy-making is highly exposed to regulatory capture and naked


\(^{49}\) Giovanni Bocchetti, La costituzione economica italiana (1995).

\(^{50}\) Lisbon Urteil, paragraph 226.

\(^{51}\) See, e.g., the follow-up of the pasta litigation at the Italian constitutional court where the ruling of the Court of Justice in Zoni has been extended to purely internal situations, Corte cost., sent. 443/1997, in Giurisprudenza Costituzionale, 1997, 3904.

\(^{52}\) Lisbon Urteil, paragraphs 266-267.

\(^{53}\) Roberto Bin, Che cos’è la Costituzione?, Quaderni Costituzionali 11 (2007).
preferences.\textsuperscript{54} It is at this point that the regulatory state enters the scene. Naked preferences, indeed, may negatively affect outsiders to the national polity and, as such, threaten economic integration and the building of a transnational polity. The common market project is conceived of as curbing these abuses of states’ constitutional frameworks,\textsuperscript{55} but in order to fulfill this task it cannot merely replicate on a European scale the objectives and structures of states’ constitutional settings.\textsuperscript{56} In fact, the common market, far from establishing an open framework for democratic deliberation, detaches regulatory policy not only from the member states but, critically, also from statist constitutional traditions.\textsuperscript{57} This does not make it an unbiased legal setting. On the contrary, also in that context, naked preferences and populism are possible occurrences that the relationship with national constitutionalism might possibly constrain.

As a result, regulatory state and republican constitutionalism may exert disciplinary effects on each other that are intended to correct their possible abuses and induce, through a practice of latent conflict, structural changes to their policymaking and adjudication.\textsuperscript{58} Against this background, the division of labour between European legal systems and, as a reflection, relationships based on the principle of functional complementarity emerge as attractive hypotheses to account for and manage European legal fragmentation.\textsuperscript{59} In this regard, the role of European courts could not be more crucial. As noted above, when involved in intersectional litigation, courts are in the position of representing the claims of their native interpretive communities and take position on those of their counterparts operating in related legal systems. Viewed from the angle of the opposition between regulatory state and republican constitutionalism, this function gains remarkably in perspective. Intersectional adjudication is not simply a process where opposing claims of legal authority can be represented. Critically, the challenge of those disputes is to ensure that that fundamental opposition in European legal pluralism is articulated, discussed and accommodated in the light of the principle of functional complementarity. Considering the high stakes inherent in the latter and, on the other hand, the risk of intractable conflicts if it weren’t to be observed, European courts cannot afford to fail.

\textsuperscript{54} In Sunstein’s words, a ‘naked preference’ is “the distribution of resources and opportunities to one group rather than the another solely on the ground that those favored have exercised the raw political power to obtain what they want.” See Sunstein, supra note 21, at 25.


\textsuperscript{58} The transformative capacity of pluralist legal structures is highlighted by Kriesch, supra note 7, at 85-89.

3. The actual state of European intersectional litigation

If that is the challenge, the way intersectional disputes are carried out does not seem entirely satisfactory. Litigation across Europe’s legal frameworks can profit from a formidable procedural platform by means of which, in principle, the terms of their fundamental opposition could be spelled out and accommodated fairly. In fact, the actual practice of adjudication is not up to that task. On the one hand, courts shape disputes according to their native legal traditions and, by doing so, they are on the whole successful in representing their traditional interpretive and normative claims. On the other, they appear reluctant to engage with the claims proffered by other courts and interpretive communities, thereby revealing a certain aversion to coordinated judicial efforts.

Thanks mainly to the preliminary reference procedure, intersectional litigation unfolds in a framework amenable to productive exchanges between republican constitutionalism and the regulatory state. Despite the supremacy of EU law and the federal twist in the interpretation of preliminary ruling, it can be argued that through that procedural channel both interpretive and normative claims can be articulated so that adjudication can enhance their complementary relationship.

From a procedural standpoint, intersectional disputes may give rise essentially to two typical circumstances. The first is met when litigation is governed by measures of positive harmonisation. In such situations, national ordinary courts are enlisted in the judicial circuits of the regulatory state and national constitutional courts, due to the Simmenthal doctrine,60 are in principle marginalised. This occurs to the clearest extent possible where litigation involves EU regulations: if ordinary courts are interested in testing their validity or interpretation, they are expected to deal exclusively with the Court of Justice.61 More or less the same situation arises where disputes are governed by directives since in those circumstances also ordinary courts will often be requested to consult the Court of Justice as to the validity, direct effect or indirect effect of those acts.62

Yet, the prominent position gained by the Court of Justice—and, as a reflection, by the interpretive community of the regulatory state—does not necessarily entail that in this type of disputes the normative claims associated with republican constitutionalism should be dismissed. Also in cases governed by EU measures, national constitutional traditions can be a key ingredient of intersectional litigation. Notably, besides playing the role of agents of the Court of Justice and the EU legal order,63 ordinary courts may act as principals of their native constitutional traditions and, as such, convey through preliminary references the genuine version of their legal cultures. The importance of such input should not be underestimated. In interpreting

62 This applies in the case of total harmonisation. In the case of partial or minimum harmonisation, to the extent that free movement principles are revived, the next circumstance is relevant.
and reviewing EU legislation, national constitutional traditions are for the Court of Justice a major source of inspiration that, especially when articulated by its authentic interpreters, is difficult to disregard. Although at the peak of the EU judiciary, the Court of Justice needs the cooperation of ordinary courts to enforce its rulings. Consequently, the preliminary ruling procedure creates an incentive for the EU judges to adopt pronouncements appealing also to the republican constitutional tastes of their decentralised partners. Indeed, were the latter to perceive the answers of the Court of Justice as excessively tilted towards the regulatory state paradigm, they could consider several reactions such as protest through cooperation or referring the case to their national constitutional courts.

The last solution, to the extent that it entails an evident dramatisation of the intersectional conflict, may be particularly effective. In many European constitutional systems ordinary courts, when confronted with strident EU rulings, may bring into litigation their constitutional courts as the most authoritative interpreters of their legal cultures by referring the dispute to them. Constitutional courts, on their part, will have the opportunity to re-enter the game after their initial marginalisation and challenge the Court of Justice in the name of national republican constitutionalism. In such circumstances, they could even consider the possibility of departing from an EU judgment. It should be added, however, that such an extreme decision should probably be preceded by another preliminary reference to the Court of Justice. In this further procedural passage, the constitutional court could advocate the exceptional reasons justifying its possible disobedience and, therefore, invite its EU counterpart to a more cautious assessment of the case.

The other canonical circumstance in which intersectional litigation may take place occurs in the absence of positive harmonisation. Here, ordinary courts appear even more at the epicenter of intersectional conflicts since the regulatory state, with the common market principles, shows its most aggressive side. Crucial at this point is the decision over the relevant legal framework for the dispute, a choice that essentially depends on the remit of free movement principles and, notably, the existence of a cross-border element in the dispute. If ordinary courts deem that market principles apply, the procedural configuration of intersectional litigation replicates closely that encountered in disputes covered by positive harmonisation. National constitutional courts are at first bypassed and the Court of Justice stands in a pivotal position. Yet, if

64 For a similar concern, see Scharpf, supra note 39, at 111.


66 In legal systems in which direct access to constitutional justice is allowed, the same result could be achieved by challenging before the Constitutional Courts the rulings of ordinary courts enforcing the judgments of the Court of Justice.

67 This also appears to be the approach endorsed by the German Constitutional Court when it found that EU law could be reviewed in the light of national constitutional identity. See Lisbon Urteil, paragraph 226.

68 Obvious references in this regard may be the Grogan and Laval cases.
the application of common market principles goes too far, ordinary courts may still have their say and react involving their constitutional courts. In other occasions, the application of free movement principles and, particularly, proportionality review can be delegated by the Court of Justice to ordinary courts.69 The latter, depending on the stringency of the EU ruling, will be in the position of either accommodating the claims of the regulatory state and republican constitutionalism in the case at hand or requiring, if needed, further assistance by their constitutional courts.

Finally, if ordinary courts exclude the application of common market principles, the scenario is somewhat reversed. As a matter of principle, the Court of Justice is marginalised and national constitutional courts are the main judicial players. In fact, those are the usual situations for republican constitutionalism since no substantive or procedural intersection with the EU legal order is in place. Yet, also in these type of disputes, national constitutional adjudication may not be said to be completely isolated since, as witnessed by cases concerning reverse discriminations,70 the indirect influence of the EU claims may still be felt.

In short, at least at an abstract level, the configuration of the circuits of intersectional litigation allows for the fair and constructive accommodation between the claims of the regulatory state and republican constitutionalism. Undoubtedly, this outcome cannot result from the simple use of the preliminary reference procedure. Put differently, the fact that a valuable interface for intersectional disputes is in place and is normally employed says little about the quality and contents of that process. To verify whether those disputes are adequately articulated and resolved, therefore, some reflection is needed on their argumentative dimension.71

The observation of the arguments proffered in ruling intersectional disputes reveals a less gratifying scenario than one could expect given their procedural infrastructure. In the majority of cases, judicial unilateralism seems the most common argumentative paradigm. Despite the multiple ramifications of those disputes, the reasoning of judgments follows prevalingly introverted patterns. As a result, from a perspective purely internal to their legal orders, their outcomes and arguments are often persuasive. Yet, once the focus is enlarged to include the views of other courts and interpretive communities, the contents of the same rulings are far from ideal. Coherence is sought only in the internal dimension through almost exclusive references to courts’ own precedents and doctrines. Traces of outside interpretive and normative claims are scant and also previous judgments by other courts on the same or similar issues are frequently overlooked. Not only are quotations of those cases almost invariably omitted, but also discussion of their interpretive and normative claims is absent. To be sure, it can certainly occur that in their reasoning courts deal with arguments echoing those formulated by their counterparts. Yet, if that happens, they seem

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69 On the common practice of silent judgments, see Daniel Sarmiento, The Silent Lamb and the Deaf Wolves: Constitutional Pluralism, preliminary references and the role of silent judgments in EU law, in CONSTITUTIONAL PLURALISM IN THE EU AND BEYOND (Matej Avbelj & Jan Komárek eds., 2010).

70 See, e.g., sent. 443/1997 (Italian Constitutional Court). supra note 51.

reluctant to acknowledge it explicitly and to interpret their contribution to intersectional litigation as part of a wider coordinated judicial effort. A similar style of adjudication boils down to judgments apparently in denial of the high normative stakes inherent in intersectional disputes. The opposition between Europe’s legal frameworks remains unarticulated and litigation eventually gives rise to a series of procedurally connected but argumentatively segmented judicial episodes.

What is missing in European intersectional adjudication is a transnational interpretive community in which coherence and integrity are pursued across segmented legal systems. To achieve this objective, courts’ judgments, irrespective of their original affiliation, should at the very least be recognised and discussed. As noted, in many rulings it is not entirely clear if courts were aware of other courts’ judgments on the same legal issue. What is evident, instead, is that in their transit from court to court disputes may be subject to different qualifications, standards of judicial review and solutions. But at each stage, why should the latest configuration and verdict prevail? Only because of the supremacy doctrine and the authority of the Court of Justice? Or because of states’ sovereignty and their constitutional courts’ last words? One would hope that persuasion alongside formal authority counts in adjudication. Arguably, this is not the case currently in Europe precisely because a transnational interpretive community is absent and only fragmented judicial rulings are adopted. This leaves intersectional conflicts largely hidden and their terms and solutions underdeveloped. It is also the best way for those conflicts to erupt disruptively and undermine the already fragile legitimacy of the European judiciary. In such a situation, therefore, the need for a European interpretive community and, possibly, an interpretive strategy shared by all courts operating in those disputes appears all the more important. Such strategy should not primarily pursue changes in the final outcomes of adjudication, although interesting implications could be envisaged also in that regard. Its main goals should be improving the quality of legal reasoning and, notably, instilling in each court and native interpretive community a discipline of recognition and discussion of the rival claims of their counterparts. With this in mind, an initial proposal on what that transnational interpretive community might look like can now be advanced.

4. Structuring a European interpretive community through ‘contextual deference’

Under the given circumstances, improving the quality of judicial reasoning and structuring a transnational interpretive community may well appear to be daunting tasks. European legal fragmentation poses challenges to both the definition of a shared conceptual framework among courts and the articulation of common interpretive strategies, arguably the essential requirements for an interpretive community to come.

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Intersectional litigation and the structuring of a European interpretive community

Legal fragmentation is only apparently an obstacle for the definition of a shared understanding between courts embedded in distinct native interpretive communities. This is not tantamount to saying that fragmentation can be transcended or European legal cultures and languages unified. A common conceptual framework may be pursued while also maintaining fragmentation. More accurately, a European interpretive community can be structured not only ‘in spite of fragmentation’ but, critically, ‘thanks to fragmentation.’ Indeed, it is precisely on a correct interpretation of the stakes inherent in intersectional conflicts that a shared understanding of the nature and dynamic of European legal pluralism can be constructed. The above analysis on the relationship between regulatory state and republican constitutionalism may illuminate this crucial theoretical passage. As noted, in the current legal environment the normative claims of neither of those forms of political rule can be exclusively upheld because neither has the independent status that would make its claim self-sufficient. Their opposition, therefore, is not meant to be solved once and for all or to be watered down in a comprehensive legal order. Intersectional conflicts are there to be experienced routinely for the good they can yield, and any attempt to promote the regulatory state or republican constitutionalism as their ultimate constitutional framework may be suspected of bias. The challenge of European legal pluralism is to build harmony out of that dissonance, an objective that can only be attained through convergent practices of adjudication enhancing the functional complementarity of regulatory state and republican constitutionalism.

At a more operational level, difficult questions arise as to the articulation of a common interpretive strategy. At this stage, the multiplicity and incommensurability of European legal languages seem to clash with the core purposes of a transnational interpretive community. As said, the latter is meant to carry out intersectional adjudication with methodologies based more on rational persuasion than authority or coercion. In this view, courts participating in intersectional litigation ought to recognise and take into account each other’s perspectives as well as try to incorporate outside arguments into their own interpretive claims. This task calls into question the plurality of European legal languages since recognition, discussion and incorporation of countervailing views are all operations that postulate if not a common medium, at least the possibility of communicating. It is at this point that European legal pluralism is truly problematic and, not by chance, it is in this respect that attempts at unifying European legal vocabularies may appear attractive. However, at this stage also our account of intersectional litigation may offer interesting elements for reflection. Upon closer investigation, the incommensurability of legal languages is relative as it regards essentially the qualification of disputes. As noted, at that stage the regulatory state

73 FISH, supra note 8, at 171.
74 Pavlos Eleftheriadis, Pluralism and Integrity, 23 RATIO JURIS 365, at 380-381 (2010).
and republican constitutionalism rely on alternative descriptive apparatuses reflecting the common market and fundamental rights projects respectively. Nevertheless, intersectional disputes are rarely decided at the stage of qualification. In the enforcement of both constitutive and regulatory principles, broad scope is left to proportionality review. Although also in this respect the standards of adjudication adopted by European courts are remarkably different, the framework of proportionality emerges as the closest thing to a common language that courts can employ to establish a degree of mutuality of interpretation. Indeed, standards of adjudication are not rigidly mandated by legal texts and in that regard courts enjoy important margins of discretion. This is of paramount importance for the definition of a common interpretive strategy. Whereas European grammars remain incommensurable, proportionality is the syntax by means of which the rival claims of legal authority voiced at the stage of qualification can be adjusted. Actual outcomes of adjudication already bear traces of this reality as it has been often at the stage of justification that the discrepancies between the common market and fundamental rights projects have been bridged and convergence promoted.

On these premises, ‘contextual deference’ is submitted as an interpretive strategy for intersectional disputes that pursues coherence between rival interpretive and normative claims while preserving their original diversity. In such an oxymoronic name, in fact, the adjective ‘contextual’ stresses the value of diversity associated with European legal pluralism. ‘Deference,’ on the contrary, invites each court to a degree of awareness and consideration for the claims of legal authority of related legal systems. Accordingly, courts involved in intersectional adjudication may certainly maintain the distinct notions and conceptual approaches required by their native legal systems. Yet, if the differences between the particular interpretive communities are to be bridged, courts may also be expected to develop a sort of cubist sensibility whereby they must grasp the reality of a case from all the relevant directions at once. In this view, ‘contextual deference’ brings about a remarkable innovation in respect to the most traditional conceptions of adjudication. As a rule, courts observe exclusively the norms and precedents of their own legal system since it is essentially in that internal direction that coherence is originally sought. In a context of legal fragmentation such as the one in place in Europe, however, coherence must also be ensured in a further and external dimension by granting a degree of recognition to the outside claims formulated in related interpretive communities. ‘Contextual deference’ is meant to perform this function that, as such, by no means can be regarded as the whim of fashionable judicial activists. The practice of recognising and deliberating outside interpretive and normative claims could easily conform to constitutional orthodoxy.

76 Black, supra note 8, at 33-35.
77 See, e.g., the outcomes of Schmidberger, supra note 14, and Omega, supra note 15.
In fact, the exposure of courts to outside claims owes much more to their attachment to their original legal systems than to their supposed judicial activism. Thus, to suggest that courts belonging to distinct legal orders should also seek a degree of external coherence between their judgments is simply to articulate in a further dimension their constitutive function of interpreting foundational texts. For national courts, indeed, external coherence may be regarded as a corollary of constitutional integration clauses, whereas a similar commitment by the Court of Justice may be justified in the light of the republican constitutional principles inserted in the treaties and, more in general, the new provision on the respect of national constitutional identities.  

But how could such general notions be translated into operative instructions to European judges? The following are more detailed guidelines that European courts could consider in adjudicating intersectional litigation.

(1) Qualification of the dispute. ‘Contextual deference’ must first of all answer questions concerning the identification of the relevant descriptive apparatus informing the facts and interests at issue in the case. What is the conceptual framework to which European courts should refer in deciding an intersectional case? Is it legitimate for them to maintain their distinct native notions and approaches? As mentioned above, the answer of contextual deference in this regard is affirmative. Not only are courts bound to their political communities, but also it is difficult even to imagine how they could abandon or transcend their link with them. But, more crucially, the possibility of qualifying cases with the categories and definitions of native legal systems is vital in preserving the functional diversity inherent in European legal pluralism. Thus, European courts should not retreat from their original languages and cultures since there is value in a decentralised system of adjudication that, depending on the procedural stage, visualises the dispute from distinct vantage points. Defining abortion as a criminal offence, for instance, reflects the existence of an ingrained constitutional culture opposing that medical practice. The same practice, when described as a service, is placed in a broader context in which persons may travel across jurisdictions and take advantage of European regulatory diversity. This alternative description, therefore, highlights a further dimension of litigation concerning the opportunities and risks associated with free movement and the economic and social implications of a transnational market of medical services. Similarly, regarding collective actions both as a fundamental social right and restrictions to the trade in services illuminates on the one hand an indispensable component of industrial relations in a social market economy and, on the other, the problematic repercussions that its exercise...

79 Article 4(2) TEU.
80 Maduro, Courts and Pluralism, supra note 78, at 373.
81 See Grogan, supra note 16, paragraphs 18-21.
82 For a sceptical appraisal of circulation of patients as encouraged by more recent ECJ rulings, see Christopher Newdick, Citizenship, free movement and health care: Cementing individual rights by corroding social solidarity, 43 COMMERCE Rev. 1645 (2006).
may have on certain categories of workers.\textsuperscript{84} As a consequence, qualification is the stage at which it is important to preserve the tensions between European legal systems and disclose their mutual transformative potential. It is here, in fact, that intersectional litigation may expose both the promises and biases of republican constitutionalism and the regulatory state, and possibly open interesting spaces for contestation.\textsuperscript{85}

(2) Proportionality review and the presumption for deference. As noted, rival qualifications of a case do not necessarily give rise to intractable conflicts since disputes are normally decided at the stage of proportionality review. As a consequence, this is the phase in which each other’s claims, arguments and cultural perspectives should be recognised and discussed. The choice of the standard of review and its justification are critical moments in this regard, and the relevant passages of judicial reasoning should account for such cross-systemic discussion. Therefore, while under guideline (1) ‘contextual deference’ defended functional diversity and emphasised the fundamental opposition inherent in European legal pluralism, under guideline (2) it makes a strong claim for mutual awareness and convergence. Accordingly, courts will continue to observe the relevant norms and precedents of their native legal systems. Yet, in addition to those internal sources, they will also take into account the interpretive and normative claims expressed in related legal orders. This relational side of ‘contextual deference’ acquires particular significance in disputes already adjudicated by other European courts. In such situations, our interpretive strategy establishes as default solution a \textit{iuris tantum} presumption in favour of the outcomes of prior judgments rendered in another legal system. In recognising a pre-emptive effect to such rulings, ‘contextual deference’ reinforces essential traits of republican constitutionalism and the regulatory state. Where the presumption favours a prior ruling of a national court, the subsequent judgment would end up enhancing the authority of republican constitutionalism and its capacity to trigger affection and emotional identification by the ruled. Where it is a pronouncement by the Court of Justice to benefit from that presumption, ‘contextual deference’ pays tribute to the normative claims of the regulatory state, recognising its role of tackling naked preferences or prompting structural change. Deference to previous outside rulings, therefore, is proposed as the preferred course of action in intersectional litigation. In this view, subsequent courts are required to tune their standard of review in the type of proportionality test previously applied or suggested\textsuperscript{86} by their counterparts.

(3) Proportionality review and rebuttal of the presumption. Although the external coherence of a judgment requires in principle that previous rulings be followed, reasons associated with the integrity of the native legal system and its interpretive community could still induce a court to depart from them and enforce its original standards of adjudication.\textsuperscript{87} Hence, whereas under guideline (2) courts were required

\textsuperscript{84} Waltraud Schelkle, Laval et al – The market against states or markets against markets? (unpublished manuscript).

\textsuperscript{85} KRIECH, supra note 18, at 81-85.

\textsuperscript{86} In accordance with the ideas expressed in section 3, in referring a dispute to the Court of Justice, ordinary courts could suggest a solution to the case reflecting their native standards of review on proportionality.

\textsuperscript{87} DWORKIN, supra note 7, at 219.
to defer, guideline (3) suggests as an alternative exactly the opposite solution consisting of the rebuttal of the presumption in favour of previous rulings and the activation of a limited conflict. Indeed, it is precisely through episodes of this kind that republican constitutionalism and the regulatory state may exert their mutual disciplinary effects. In more pragmatic terms, it may happen that the Court of Justice is not convinced by a previous ruling of a national constitutional court since, for instance, a legislative measure creating obstacles to cross-border trade has been too leniently reviewed. According to guideline (3), the Court of Justice is not ineluctably bound by the outcomes of that ruling and, if it deems it appropriate, it may stick to its more demanding standards of proportionality review and offer an alternative solution to the case.\footnote{88} Nonetheless, the overruling of previous judgments may also degenerate into intractable conflicts that ‘contextual deference’ is meant to prevent. For this purpose, guideline (3) establishes that the rebuttal of the presumption be assisted by a couple of precautions that, ideally, should help to operate that move constructively. The first precaution concerns judicial reasoning and aims at shaping the conflict in argumentative as opposed to authoritative terms. In fact, a rebuttal may be accepted not as an exercise of ultimate authority but insofar as more convincing substantive arguments are advanced. In this view, if a court decides to depart from previous judgments, a supplement of judicial reasoning is owed.\footnote{89} After having referred to the previous ruling, that court should engage in an in-depth discussion of its arguments and explain with robust reasoning why they are not persuasive and a native solution to the dispute is preferable. It could be argued, for instance, that what the Court of Justice found as a naked preference is actually a policy instrument for the genuine pursuit of legitimate objectives, or, conversely, what a constitutional court declared as a legitimate policy measure is in fact a measure justifying structural change.\footnote{90}

Next, and here is the second precaution, the impact of the overruling on rival interpretive and normative claims should be reduced as much as possible. This means that among the possible alternative solutions to a case, courts should opt for that with the lesser impact on the objectives, institutional structures and judicial doctrines of the related legal system. In this way, also from a substantive perspective the deviation from earlier rulings would be limited and the intersectional collision constrained.

5. Concluding remarks

The analysis proposed in this essay reveals that so far the challenges inherent in intersectional disputes have been rather underestimated. This type of litigation unfolds against the backdrop of the preliminary reference procedure and competing claims

\footnote{88} This is what happened in Zoni, supra note 30.  
\footnote{89} Similarly, see Scharpf, supra note 39, at 108, invoking a supplement of justification (only) for EU law violating member states’ politically salient interests or deeply held normative convictions.  
\footnote{90} This suggestion develops the cycle of justification originally proposed in J. H. H. Weiler, In defence of the status quo: Europe’s constitutional Sonderweg, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 15-23 (J. H. H. Weiler & Marlene Wind eds., 2003).
of ultimate authority by the EU and national legal orders. But that is just the stage; the play is richer and, probably, more entertaining. Its script often tells stories on the conflicts and the search for contingent compromises between the languages and cultures of national republican constitutionalism and the EU regulatory state. So far, by discussing mainly the sovereignty-related aspects of those disputes, legal scholarship has privileged the analysis of the stage. The play has gone quite unnoticed and has evolved largely in denial of the substantive stakes and the underlying challenges of those disputes. Despite the overwhelming evidence, indeed, the structural opposition of republican constitutionalism and regulatory state is still perceived as too inconvenient a reality to be accepted. As a result, substantive conflicts are minimised or alternative narratives are suggested to present the audience with a more irenic reality. 

Improving the style of adjudication and the interpretive strategies in intersectional disputes is an urgent necessity and not just a matter of judicial bon ton. In those cases intersectional conflicts may deliver their promises or disclose their disruptive potential. To a large extent, either of those outcomes depends on the interpretive strategies that courts will adopt. In this respect, ‘contextual deference’ offers a methodology that could contribute to a more considerate handling of intersectional disputes and, notably, to their transformation in moments of constructive deliberative engagement. The fruits of a similar approach could be reaped at different levels. In functional terms, ‘contextual deference’ promotes external coherence as an additional dimension of adjudication. In this view, intersectional litigation would no longer produce a series of unconnected rulings mechanically reflecting particular legal cultures. Judgments would include in their reasoning also the discussion of arguments formulated in other interpretive communities and framed with different languages and concepts. But ‘contextual deference’ is not only about improving coherence in a context of legal fragmentation. By representing and discussing rival claims of legal authority, that interpretive strategy outlines the normative ambitions of a possible transnational interpretive community. Accordingly, against the background of the latent conflicts inherent in European legal pluralism, each court is called to contribute on a case-by-case basis with decisions conceived in the light of the complementary nature of Europe’s legal frameworks. It would indeed be remarkable if courts approached intersectional disputes from this angle and set off the much needed elaboration of conflicts that so far have only loomed over the European legal landscape.

91 Stone Sweet, supra note 633, at 325.
92 For a similar critique, see Ulrich Haltern, Pathos and Patina: the Failure and Promise of Constitutionalism in the European Imagination, 9 EUR. L. J. 43 (2003).
93 Kumm, supra note 3, at 269.