EDITORIAL

Amid the political turmoil following the United Kingdom's popular vote on 'Brexit', the United Kingdom Supreme Court has recently handed down its highly-anticipated ruling in Miller. *This judgment conveys remarkable insights about the United Kingdom Supreme Court's perception of the relationship between the national and European legal orders. We invited Oliver Garner, a Ph.D. researcher at the Law Department of the European University Institute working on the legal ramifications of 'Brexit' and an editor of our journal, to write an editorial on the implications of this ruling. Oliver puts the ruling in a broader perspective, comparing it to two other recent national court decisions:* Dansk Industri *from the Danish Supreme Court and* Taricco *from the Italian Constitutional Court.*

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THE BORDERS OF EUROPEAN INTEGRATION ON TRIAL IN THE MEMBER STATES: *DANSK INDUSTRI, MILLER,* AND *TARICCO*

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I. Introduction

On 6th December 2016, the Danish Supreme Court delivered its judgment in the *Dansk Industri* case.[1] Just over six weeks later, on the 24th January 2017, the United Kingdom Supreme Court delivered its highly-anticipated judgment on the UK Government's appeal in the *Miller* litigation.[2] Two days later, the Italian Constitutional Court issued a second preliminary reference to the Court of Justice of the European Union in the ongoing *Taricco* saga.[3] These

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1 Case no.15/2014 *Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A.*

2 *R(on the application of Miller and another) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

3 Italian Constitutional Court n.24/2017.

three judgments have arisen in divergent factual contexts within three Member States that stand at diverse points of relation to the ongoing project of European integration. However, despite these differences, I will argue that the three judgments converge on the point of constitutional principle which they address: situating the exact borders between the constitutional orders of the Member States, and the Union's own 'autonomous'[4] constitutional order. Consequently, through a novel application of the theoretical framework of Hans Lindahl,[5] this editorial will seek to explain the manner in which these decisions have sought to square the circle between the primacy of European Union law and the borders and identity of the national constitutional order.[6] Ironically, it will be concluded that the court of the Member State which finds itself facing the exit door of the Union, the United Kingdom, has established its national constitutional boundaries in a manner which is most conducive to the coherence of the European Union's legal order.

II. The Facts and the Question at Stake

The facts of the Danish case 'appear trivial'[7] at first glance as they concern a singular employment related pecuniary claim rather than an issue affecting society at large. The deceased claimant fell within the scope of the conditions

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4 Case Opinion 2/13 ECLI:EU:C:2014:2454.

5 Hans Lindahl, *The Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press, 2013).

6 The researchers at the European University Institute have recently had the opportunity to connect the dots between the three judgments and their wider context. Sessions on 'Challenging Primacy' and 'Brexit: EU and national constitutional law' as part of the 'Current Issues in EU Law' seminar have addressed the *Dansk Industri* and *Miller* judgments respectively, the Constitutionalism and Politics Working Group recently welcomed Federico Fabbrini and Oreste Pollicino for their presentation 'Constitutional Identity in Italy: European Integration as the Fulfillment of the Constitution' which covered the *Tarrico* case, and finally, on the theoretical level, the EUI has recently welcomed Hans Lindahl to present his work-in-progress as part of the innovative 'Stealth Legal Order' seminar series.

7 Mikael Rask Madsen, Henrik Palmer Olsen and Urska Šadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation', (23 January 2017) iCourts Working Paper Series No. 85, 4.

under Paragraph 2a(1) of the Danish Law on salaried employers for entitlement to a severance allowance following his job dismissal. However, under Paragraph 2a(3) of the Law, his concurrent entitlement to an old-age pension invalidated his severance entitlement despite his continuing in employment. Consequently, on referral of the case via preliminary reference, the Court of Justice of the European Union ('CJEU' or the 'Court of Justice') held that withholding this severance payment violated the unwritten general principle of EU law prohibiting discrimination on the basis of age.[8] Thus, the case came back before the Danish Supreme Court to apply this interpretation of EU law in its final decision on the merits.

The facts of the United Kingdom *Miller* case, by stark contrast, could not be further from being politically trivial. They concerned the seismic political upheaval of the Member State's withdrawal from the European Union. Specifically, the claimant had filed an application for judicial review to clarify the exact means by which the United Kingdom executive could fulfil the domestic 'constitutional requirements' outlined in Article 50(1) Treaty on European Union ('TEU') for providing notification of a decision to withdraw. The United Kingdom government argued that it was entitled to exercise the executive prerogative power without parliamentary oversight to give notification. They argued that this was because the United Kingdom's membership of the EU, or of any other treaty regime, concerned the realm of relations between sovereign states governed by international law. By contrast, the claimant argued that the specific nature of EU law, which provides substantive rights to individuals in the national sphere, means that it constitutes a form of domestic law. The argument followed that the government was prevented from exercising the prerogative to trigger Article 50 because to do so would be changing the law of the land without the consent of Parliament. This would violate constitutional principles established since the 18th century. Following a decision for the claimants in the Divisional Court, the appeal came before the Supreme Court under an unprecedented amount of public interest both within the United Kingdom and in the rest of Europe.

Falling somewhere in the middle of these two extremes on the scale of political and societal salience, the facts of the *Taricco* litigation concern the

[8] Case C-441/14 *Dansk Industri v Rasmussen* ECLI:EU:C:2016:278, para.27.

limitation periods within which an individual may be prosecuted for VAT fraud under Italian law. The referring Italian court considered that the brevity of these periods may have breached the obligation under EU law to take measures to counteract illegal activities affecting the financial interests of the European Union.[9] Upon preliminary reference, the CJEU held that national limitation provisions that may exempt perpetrators of fraud from punishment are incompatible with the Court's interpretation of the obligations under Article 325 Treaty on the Functioning of the European Union ('TFEU').[10] In so doing, the Luxembourg court also held that its prescription for national courts to refrain from applying such limitation provisions would not amount to a breach of legality under Article 49 of the Charter of Fundamental Rights of the European Union.[11] Thus, the case had to be determined nationally. However, due to the fact that the Italian Constitutional Court's interpretation of the principle of legality as indeed applicable to procedural issues stands in direct conflict with the CJEU's interpretation, both the Court of Appeal of Milan and the Italian Supreme Court made references to the Constitutional Court to determine whether disapplication would violate the national constitution. The Constitutional Court has subsequently taken the unusual step of referring the case back to the Court of Justice once more.

The facts of these cases have arisen in Member States with differing relationships to the project of European integration. To apply an analogy deriving from one of Florence's most famous sons,[12] the United Kingdom currently finds itself within the *Purgatorio* between a popular vote in a national referendum to withdraw from the Union and the formal notification under Article 50 TEU to commence the withdrawal proceedings. After either the negotiation of a withdrawal treaty or two years, failing a vote by the European Council for extension of the negotiation period, the Member State will take the final descent into the *Inferno* of its relationship with the

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[9] https://blogs.eui.eu/constitutionalism-politics-working-group/2017/01/29/cooperation-means-request-clarification-better-revisitation-italian-constitutional-court-request-preliminary-ruling-taricco-case/ (last accessed 20 March 2017).

[10] Case C-105/14 *Taricco and Others* ECLI:EU:C:2015:555, para.52.

[11] ibid para.55.

[12] Dante Alighieri, Robin Kilpatrick (trs), *The Divine Comedy: Inferno, Purgatorio, Paradiso* (Penguin Classics, 2013).

European Union. The United Kingdom has often found itself accompanied by the Kingdom of Denmark in its position as an awkward partner in the European project. After their respective accessions in 1973, both Member States have secured numerous opt-outs from the *acquis communautaire* at treaty amendments. This has been accompanied by rejections of further integration into the European constitutional order by the Danish population in 1992[13] and 2015.[14] This hesitance of the Danish executive and people towards further EU integration, but without taking the ultimate step towards withdrawal, means that Denmark may also be regarded as situated in the *Purgatorio* between full European integration and fragmentation. To complete the Divine Comedy allusion, the Republic of Italy may be perceived to flourish in *Paradiso* in its relations with Europe. One of the 'Original Six' signatories of the Treaty of Rome establishing the European Economic Community in 1957, Italy's engagement with the European Union constitutional order is argued to be so essential that integration has been described as 'fulfilment of the national constitution'.[15]

The *Dansk Industri*, *Miller*, and *Taricco* judgments have arisen from different factual contexts. However, at the abstract level, all three judgments concern the fundamental question of the interaction between separate yet intertwined constitutional orders. Therefore, a move to the theory of how legal orders define their boundaries can provide the framework with which it is possible to explain exactly how the three national courts confronted the claims of the European constitutional order.

III. Borders, Limits, and Fault-Lines: The Legal Theory of Hans Lindahl

In his 2013 monograph, Hans Lindahl provides a three-way distinction between 'boundaries', 'limits', and 'fault-lines' in legal ordering.[16] The first concept refers to how law orders behaviour within a normative community

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[13] 50.7% of the population voted to reject the Maastricht Treaty on 2 June 1992.

[14] 53.11% of the population voted to reject a flexible opt-out on Area of Freedom, Security, and Justice matters whereby the Danish government could choose whether to opt-in on a case-by-case basis on 3 December 2015.

[15] Federico Fabbrini and Oreste Pollicino, 'Constitutional Identity in Italy: European integration as the fulfilment of the Constitution' EUI Law Department Working Paper, 2017/06.

[16] Lindahl (n 5), 174.

by setting its spatial, temporal, material, and subjective boundaries. The author goes on to outline that such ordering cannot create the unity of a legal *order* unless this order is necessarily limited. Thus, boundaries manifest themselves as 'limits' when they are called upon to exclude certain phenomena as either 'legal' or 'illegal'. Crucially, however, Lindahl challenges the dichotomy between legal and illegal by introducing a third category –'a-legality'. Such a-legal phenomena question how a legal order sets the boundaries that give shape to the distinction between legality and illegality.[17] A-legality has both 'weak' and 'strong dimensions'. Phenomena of the former character emerge from the domain of the unordered, yet in principle are *orderable* by the legal collective.[18] By contrast, the latter dimension concerns a normative challenge that a legal collective cannot accommodate either as legal or as illegal by reformulating its limits.[19] Therefore, to return to the constitutive function of borders, Lindahl argues that in its strong dimension, a-legality no longer summons a collective to shift the limit between legal (dis)order and the unordered, but instead lays bare a 'fault-line' between what a collective can order – the orderable – and what it cannot order – the unorderable.[20] Following the lead of Kaarlo Tuori's insightful application of Lindahl's theory to conflicts between national and EU law in general, [21] I will seek to use the framework to explain the specific cases arising from Denmark, the United Kingdom, and Italy.

IV. Explaining the Borders Confrontation between the National and European Order

Viewed through Lindahl's conceptual lens, the key question underlying all three cases is: *Where* are the borders of jurisdiction between the Member State constitutional orders and the European Union constitutional order, and *how* are they determined? The three national courts provided divergent answers to these questions. The Danish Supreme Court refused to follow the CJEU's preliminary ruling and disapply the provision of national law when

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[17] ibid 158.

[18] ibid 164.

[19] ibid 165.

[20] ibid 175.

[21] Kaarlo Tuori, 'Crossing the limits but stuck behind the fault lines?' (2016) 1 Transnational Legal Theory, 133-153.

deciding the merits of the case. Therefore, it can be argued that the Danish Supreme Court in *Dansk Industri* regarded the clash between the applicable EU law and the national legislation as the *strong* form of a-legality, which thus means that the claims of EU law were 'unorderable'. The Danish court concludes that the Law on Accession, through which EU law is made enforceable within the Danish constitutional order, 'does not provide the legal basis to allow the unwritten principle prohibiting discrimination on the grounds of age to take precedence over Paragraph 2a(3) of the Law on salaried employees in so far as the provision is contrary to the prohibition.'[22] The Danish court further reiterates that it would be 'acting outside the scope of its powers as a judicial authority if it were to disapply the provision in this situation'.[23] Consequently, to co-opt the famous phrase[24] applied to the German Constitutional Court, the Danish court has not only barked, but has bitten. It has found in *Dansk Industri* that it would be acting *ultra vires* if it were to disapply the national law provisions. Therefore, it has established the fault-line of the national constitutional order beyond which the European legal order cannot pass. Tuori has outlined his perception that 'the principles of primacy, unity and efficacy form part of the constitutional identity of EU law'.[25] Consequently, the decision by a national court to refuse to accept the primacy of a norm of EU law when in conflict with a national provision can also be argued to trespass beyond the concurrent fault-lines of the EU constitutional order.

In contrast to *Dansk Industri*, the United Kingdom Supreme Court in *Miller* was not confronted with the claim that any *singular* norm of the European Union legal order was incompatible with a norm of the national legal order. Instead, in deciding the question at hand, it saw fit to outline the holistic status of the entire *source* of EU law within the United Kingdom's constitutional order. Nevertheless, the manner in which the majority judgment drew the boundaries between the national and European orders provides an indication of how the UK court would have dealt with an individual conflict of norms in a different manner to the Danish court. In

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[22] *Dansk Industri* (n 1); see Madsen et al. (n 7), 8.

[23] ibid.

[24] See, *inter alia,* Christoph U. Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's "Banana Decision"' (2001) 7 ELJ 95.

[25] Tuori (n 21), 152.

developing its own version of the 'Solange' doctrine,[26] the court set a *procedural* limit to the relationship between the European and national constitutional orders, in contrast to the *substantive* limits arguably created by both the German and Danish courts. Whereas the latter courts have held that EU law may be held to be *ultra vires* if it intrudes upon the substance of fundamental rights protection in national constitutional law, the United Kingdom approach outlines that EU law could only be inapplicable in the national constitutional order if the constitutional procedure by which it is authorised were to be amended.

The UK Supreme Court details that the effect of the European Communities Act 1972 is that 'EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes'.[27] However, this recognition of the primacy of EU law is not unconditional; instead, the court outlines that 'consistently with the principle of Parliamentary Sovereignty, this unprecedented state of affairs will only last *so long as* Parliament wishes: the 1972 Act can be repealed like any other statute'.[28] Therefore, the Supreme Court has drawn the 'limits' of the United Kingdom's accommodation of the European Union along procedural lines: The condition of the European Communities Act remaining in force means that *all* norms of EU law will have primacy over conflicting national norms. At the same time, however, the court does not recognise the final *supremacy* of the source of EU law precisely because its effect is predicated on the enabling national law. As the majority judgment outlines: '[T]he content of the rights, duties and rules introduced into our domestic law as a result of the 1972 Act is exclusively a question of EU law. However, the *constitutional process* by which the law of the United Kingdom is made is exclusively a question of *domestic law'*.[29]

Applying the first-limb of this statement, the argument can be made that if the United Kingdom Supreme Court had been confronted with the *Dansk*

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[26] See https://ukconstitutionallaw.org/2017/01/31/oliver-garner-conditional-primacy-of-eu-law-the-united-kingdom-supreme-courts-own-solange-so-long-as-doctrine/ (last accessed 20 March 2017);

[27] *Miller* (n 2), para. 60.

[28] ibid (emphasis added).

[29] ibid para. 62 (emphasis added).

Industri conflict of norms, it would have held that the status of the EU law norm would require the national court to disapply the conflicting national law, as this conflict is 'exclusively a question of EU law'. Furthermore, this conclusion would not be affected by the nature of the norm as an 'unwritten principle' that is a 'judicial creation'. Further along in the judgment, the United Kingdom Supreme Court recognises the obligation of UK courts to comply with the Court of Justice of the European Union's interpretation of EU law.[30] Consequently, in contrast to the Danish Supreme Court, the UK Supreme Court may be held to have situated the 'fault-line' of the United Kingdom constitutional order not in any substantive border that EU law norms are not authorised to cross, but instead in the *procedural* feature that the source of law's effect remains predicated on the enabling domestic law. 'So long as the 1972 Act remains in force, its effect is to constitute EU law an *independent* and *overriding* source of domestic law'.[31] The judgment in *Miller* also illuminates the question of *who* should answer the question of setting fault-lines. By recognising that the ultimate validity of EU law depends on the repeal of the enabling statute, it can be argued that the court defers the ultimate question of the fault-lines of the constitutional order to the legislature and the political process.

Although the German Constitutional Court's 'Solange' judgments are the most famous examples of the boundary establishing role of Member State courts, it was in fact the Italian Constitutional Court which first established its own progenitor – the doctrine of 'counter-limits' (*contro limiti*).[32] In the same judgment[33] in which Article 11 of the Constitution was identified as Italy's own 'conduit pipe'[34] by which EU law norms are made nationally enforceable, the Constitutional Court held that 'this mechanism would operate only if one crucial condition is met: that EU law complies with the protection of fundamental rights.'[35] Thus, like the German and Danish courts and unlike the United Kingdom court, the Italian constitutional order sets substantive limits to the status of EU law. Despite the establishment of such

[30] ibid para. 64.

[31] ibid para. 65 (emphasis added).

[32] See discussion in Fabbrini and Pollicino (n 15).

[33] Italian Constitutional Court n.14/1964.

[34] *Miller* (n 2), para. 65.

[35] Fabbrini and Pollicino (n 15), 8.

limits, the Italian Constitutional Court has never even barked, let alone bitten. Fabbrini and Pollicino outline that the court 'never invoked such limits in practice: on the contrary [the Constitutional Court] developed a constructive dialogue with the ECJ, aimed at emphasizing the common constitutional tradition of Europe more than the specific identify of Italy'.[36] The evocative claims that European integration functions as fulfilment of the Italian constitution can also be regarded through Lindahl's insights concerning the 'normative point',[37] which provides orientation for the ordering of limits. The claimed receptiveness to the integration of Italian constitutional identity may suggest that the normative point of the legal order is not *threatened* by the presence of norms deriving from the European legal order but is instead *reinforced* by it.

This dialogical approach can help to explain why in *Taricco* the Italian Constitutional Court has not conclusively settled the drawing of the boundaries of the national constitutional order for itself but has instead referred back to the European court in this endeavour. Tuori's comments on how conflicts may be resolved within Lindahl's conceptual framework are appropriate. He details that acceptance may be possible if one of the parties to the conflict does not regard the conflict in terms of an irresolvable fault-line and thus is willing to shift its limits. [38] Thus, the Italian Constitutional Court has not crossed the same Rubicon as the Danish Supreme Court by firmly establishing its fault-lines through a refusal to disapply national law. However, its request for 'revisitation'[39] by the Court of Justice can be interpreted as a request for the Luxembourg court to 'back down' by adjusting its own limits in a 'last attempt to avoid a constitutional collision between the two legal orders'.[40] The fact that following the preliminary ruling the case will again come back to the national legal order for decision means that the Italian court will then have the final word on the extent to which it

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[36] ibid 2.

[37] Such a normative point of a collective concerns 'that which our action *ought* to be about', Lindahl (n 5), 90.

[38] Tuori (n 21), 151.

[39] http://verfassungsblog.de/the-taricco-decision-a-last-attempt-to-avoid-a-clash-between-eu-law-and-the-italian-constitution/ (last accessed 20 March 2017).

[40] ibid.

will compromise in the drawing of its limits in light of the European court's own boundary setting.

V. Conclusion: The Broader Picture

One may well argue that broader contextual factors removed from legal doctrine have played a key role in the different decisions delivered in *Dansk Industri*, *Miller*, and *Taricco*. Regarding the first judgment, Madsen, Olsen, and Šadl ruminate on the possible explanatory causation of changes in the composition of the bench in Copenhagen.[41] On *Miller*, one may ponder whether the United Kingdom's current precarious position on the steps to the exit door of the European Union informed the boldness with which the Supreme Court detailed the conditional primacy of EU law. Following withdrawal, the Court will no longer be confronted with the form of conflicts that have arisen in Denmark and Italy; instead its dicta will become a footnote in the history of the United Kingdom's doomed European Union membership.[42] Finally, in the Italian context, the receptiveness towards the European Union in the rhetoric of the Presidents of the Republic[43] may have created a pressure upon the Court not to give bite to its counter-limits doctrine. This is reinforced by the holistic approach of regarding the President of the Republic and the Constitutional Court as both fulfilling key roles as guardians of the Italian constitution.[44]

However, I would argue that the value of applying conceptual frameworks such as Hans Lindahl's to legal phenomena such as the decisions in these cases is that it may equip legal scholars with the tools to provide prior *doctrinal* explanations for different approaches. This may allow at least an attempt to

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41 Madsen et al. (n 7).

42 See discussion in http://europeanlawblog.eu/2017/01/26/so-long-as-and-farewell-the-united-kingdom-supreme-court-in-miller/ (last accessed 20 March 2017).

43 For example, former President Ciampi's rhetoric that the EU has been 'from its origins a polity; a land of rights; a constitutional reality which does not contrast with our beloved national Constitutions, but rather connects them and complements them. It is a polity which does not turn down the identity of our nation States but rather strengthens them.' (translation from Fabbrini and Pollicino (n 15), 6.)

44 See discussion in Fabbrini and Pollicino (n 15).

give a 'pure'[45] legal account before moving, through a contextual approach, to the no less important extra-legal factors which influence judicial decisions Thus, it may be concluded that in these particular cases the distinction in the *manner* in which the respective national courts demarcate their boundaries – substantive in Denmark and Italy, procedural in the United Kingdom – has informed the different approaches of these courts towards the relationship between the national constitutional order and the European constitutional order. Ironically, this means that the judiciary of the Member State in which the polity has voted to withdraw from European integration have settled the boundaries of the national legal order in a manner that is the most accommodating towards, and respectful of, the coherence and integrity of the European constitutional order. Indeed, to revisit and reshuffle the analogy with Dante's Divine Comedy, the UK Supreme Court's approach may be regarded as *Paradiso* for the primacy claims of the EU legal order, the Danish Supreme Court's establishment of a strong fault-line can be seen as *Inferno*, whereas the Italian Constitutional Court's double-referral suggests that the resolution of the case resides in *Purgatorio*. Although *Miller* may be the twilight of the UK Supreme Court's engagement with the European Union legal order, its salience may live on beyond the borders of the United Kingdom through providing inspiration to the other Member State courts when confronted with the issues of borders, limits, and fault-lines.

[45] Hans Kelsen, Max Knight (trs), *Pure Theory of Law* (University of California Press, 1967).