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MUTUAL CONSTITUTIONAL TOLERANCE IN THE EUROPEAN UNION
THE REQUIREMENT OF PEACEFUL COEXISTENCE

Ph.D Thesis

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Dedicated to the memory of
Professor Géza Kilényi

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One who, as a member of the supreme judicial body, is entitled to decide on matters of life, property and honour needs some essential qualities which I took the liberty of pointing out on a national session back in time, but deeply convinced as I am of their relevance today, I find it necessary to repeat them. First of all, one has to restrain oneself and control the passions and impulses that no one lacks. When crossing the threshold of this room, one must set aside considerations of nation, race, religion and politics. One must shake off family ties, the bonds of friendship and comradeship and one should never be affected by beguiling smiles or tears, bending knees or threats. Besides, one should never be overwhelmed by a feeling of apathy towards one's profession but shall reach a level of objectivity where the person of the judge and the parties dissolves like a veil of mist and only the case and law remain in one's mind. That is when one has reached the standard."

Extract from the speech of Justice György Mailáth, president of the Royal Curia, held on 2 January 1882[1]

I. INTRODUCTION, RATIONALE, METHODOLOGY, STRUCTURE

More than 50 years have passed, since the Court of Justice of the European Union has developed its activist and revolutionary, but for the future of the European integration inevitable case law on the autonomous, directly applicable and directly effective character of Community Law, which requires supremacy above national law, even above national constitutional law.

Equally a great amount of time has passed, since for the first time, the German Constitutional Court, have developed its fundamental rights-based reservations, which were later followed by competence based, sovereignty based and constitutional identity-based reservations with regard the unconditional acceptance of the requirement of the supremacy of Union law above national constitutional law.

The above case law of the German Constitutional Court was followed by other European constitutional courts, and the German Constitutional Court became the leading, and most influential national constitutional court, in a – at least at the beginning – very productive constitutional dialogue, between the ECJ and national constitutional courts.

The legitimate concerns expressed by national constitutional courts have contributed to major changes in European Law. Whether the increased role of the European Parliament until it became co-legislator, or the involvement of the national Parliaments in EU legislation, these changes made the operation of the EU more democratic[2].

In the area of the protection of fundamental rights, concerns expressed by the German Constitutional Court and later other European constitutional courts as well, have contributed to the need for the ECJ,

[1] Website of the Hungarian Curia (Supreme Court): https://www.kuria-birosag.hu/en

[2] There are still democratic shortcomings, which gives a reason to be still critical: WEILER, JHH: Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law, in: Carlos CLOSA and Dimitry KOCHENOV (eds.): Reinforcing Rule of Law Oversight in the European Union, Cambridge University Press, 2016., pp. 313-326.

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to clarify, what it considers to be a part of the EU fundamental rights framework and the Member States have made the decision, that the EU shall accede to the European Convention on Human Rights and by the Lisbon Treaty, the European Union Fundamental Rights Charter became primarily law, and both vertically and horizontally directly effective, upon certain conditions, even with the possible effect outside the scope of Article 51[3].

For almost five decades the above-described constitutional dialogue, have proved to be beneficial and immensely contributed to the development of the European integration. For almost five decades, the CJEU and also the national constitutional courts have avoided, to step on each other toes and to inflict a lasting damage on the common European project. The various reservations, developed by national constitutional courts, following the path of their German counterpart, in the area of fundamental rights, competences, sovereignty and constitutional identity, were not only used carefully, but the dialogue itself has contributed to the development of the European integration in a great extent.

There was probably only one instance, when one of the constitutional courts of a recently joined Member State has applied the ultra vires control over a CJEU decision[4], however that was widely condemned within the literature[5] and was considered as a misstep from a relatively new Member State's constitutional court, and it remained an isolated case. Apart from this isolated incident however, for almost five decades, national constitutional courts have realised the ultimate and immense responsibility of declaring an EU act not applicable, and have avoided to apply the *Damocles Sword*, and to inflict hardly curable wounds, *not only on the European integration, but on rule of law itself*[6].

The above cautious approach has radically changed in 2015[7], when the German Constitutional Court decided for the first time, to ignore its obligation to send a preliminary reference to the CJEU in a European arrest warrant case[8], instead it declared the matter *acte claire*, and refused to execute the

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[3] JAKAB, András: Application of the EU Charter in National Courts in Purely Domestic Cases, in: JAKAB, András– KOCHENOV, Dimitry: The Enforcement of EU Law and Values: Ensuring Member States' Compliance, Oxford University Press, 2017.

[4] As a reaction to the C-399/09 Landtová decision by the CJEU, the Czech Constitutional Court declared an EU act ultra vires, in its Judgment of 31 January 2012, Pl. .S 5/12 Holubec.

[5] KOMAREK, Jan: Playing with matches: the Czech Constitutional Court's Ultra Vires Revolution, UK Constitutional Law Association, 2012.

[6] see: JAKAB, András – SONNEVEND, Pál: The Bundesbank is under a legal obligation to ignore the PSPP Judgment of the Bundesverfassungsgericht, in: Verfassungsblog, 25 May 2020.

[7] On the possible causes and outcomes, see: MAYER, Franz C.: Defiance by a Constitutional Court – Germany, in: JAKAB, András– KOCHENOV, Dimitry: The Enforcement of EU Law and Values: Ensuring Member States' Compliance, Oxford University Press, 2017.

[8] BVerfG 2 BvR 2735/14 15 December 2015 – EAW II

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European arrest warrant in question, citing the violation of Article 1 of the *Grundgesetz*. This approach has been further escalated, in the summer of 2020, when the German Constitutional Court has declared a CJEU decision and a decision of the European Central Bank as ultra vires and not applicable. As a result, the German Federal Bank was under a legal obligation on the basis of EU law, to ignore the judgment of the Federal Constitutional Court, and at the same time was under the legal obligation on the basis of German constitutional law, to ignore the decisions of the ECB and the CJEU in question[9]. The German Constitutional Court was not only ignoring its obligation to send a preliminary reference to the CJEU, but also created the possibility, of an infringement proceeding against Germany[10], and showed a less positive example to other constitutional courts, breaching a practice of great and well respected predecessors for five decades.

In the context of the above recent changes of the earlier careful and responsible approach by the German Constitutional Court, the concept of constitutional tolerance [11] and cooperative constitutionalism[12], as introduced by *Weiler* and *Haberle*, more than two decades ago, seems to be especially relevant. As *Weiler* pointed out, national constitutional actors are required to be tolerant toward EU constitutional actors. Haberle pointed out, that sovereign states decide to cooperate on international level, to confer sovereignty competences on international organisations, in order to provide a higher level of security and welfare. This cooperation also requires, that – as *Weiler* pointed out – Member State constitutional actors show more tolerance towards the EU constitutional actors, particularly in the judicial discourse between national constitutional courts and the CJEU. This approach of self-restraint and tolerance is characterised by *di Fabio*, as the necessary conditions of the peaceful coexistence[13].

The above developments explain why, the recent years have seen a growing interest towards the case law developed by national constitutional courts with the aim of setting-up the main constitutional framework conditions for Member States' participation in the European Union. It is increasingly clear, that the existence of the whole European Integration is at stake in the above outlined judicial

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[9] supra note 5.

[10] PERNICE, Ingolf: Sollte die EU-Kommission Deutschland wegen des Karlsruher Ultra-Vires-Urteils verklagen? PRO; also see: Case C-224/01, Gerhard Köbler v Republik Österreich, ECLI:EU:C:2003:513; Case C-140/09, Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri, ECLI:EU:C:2010:335; Case C-160/14, Ferreira da Silva e Brito, ECLI:EU:C:2015:565; Case C-168/15, Tomásová, ECLI:EU:C:2016:602.

[11] WEILER, J.H.H.: Federalism and Constitutionalism: Europe's Sonderweg, Harvard Jean Monnet Paper, 10/2000. Also: SADURSKI, Wojciech and CZARNOTA, Adam and KRYGIER, Martin: Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders, Springer, 2006, p. 389.

[12] HÄBERLE, Peter, Der kooperative Verfassungsstaat, in: Verfassungslehre als Kulturwissenschaft, 2. Auflage 1998.

[13] DI FABIO, Udo: Friedliche Koexistenz (in: Frankfurter Allgemeine Zeitung, 2010.10.20) http://www.faz.net/aktuell/politik/staat-und-recht/gastbeitrag-friedliche-koexistenz-11057029.html

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dialogue. Recent developments endanger the achievements of the almost 70 years of the European project and there seems to be only the path of mutual constitutional tolerance, which could ensure that further 70 years of peaceful coexistence are yet to come.

Motivated by the above facts, the current research aims to show through the analysis of the divergent interpretations and case law of national constitutional courts of selected Member States and the Court of Justice of the European Union[14], with a special emphasis on the Hungarian perspectives, why mutual constitutional tolerance is the only possible way forward to a peaceful coexistence in the European Union. The starting point is an analysis of the interpretation of fundamental constitutional principles of European Union law defining and determining the relationship of the European Union legal order towards the legal order of the Member States. Regarding this analysis I aim to study the relevant constitutional provisions and the case law of Constitutional Courts / High courts in Germany, the United Kingdom, Austria, Poland and Hungary, from the perspective, how much these high courts have fulfilled the requirement of mutual constitutional tolerance, which I claim is essential to a peaceful co-existence within the European Union. The above selection of Member States demonstrates the impact and practical applicability of European Union law in national contexts linked to the historical enlargement of the European Union, including one of the founding members, the first enlargement and finally, the eastern enlargement. The United Kingdom, even if it has left the European Union is still an interesting subject matter of this comparative research, partly because of its fundamentally different, Anglo-Saxon legal approach and heritage, and partly because of the lessons can be learnt from its withdrawal from the EU, and also, because the withdrawal from the European Union is not irreversible. Since we examine the experience of the UK with EU membership and its withdrawal, from the perspective of possible lessons can be learnt from the UK`s experience, therefore we do not consider it to be justified to change the title of this dissertation, only because the UK is not anymore part of the EU.

Based on the fact, that Germany, as a founding Member State of the EU, has developed probably the most extensive and detailed case law by its Constitutional Court regarding constitutional reservations in the relationship between EU law and national constitutional law – setting an example to its European counterparts, it is logical, to first analyse the approach of the German Constitutional Court and the *Grundgesetz*. Furthermore, the German legal system, the *Grundgesetz* and the case law of the

[14] Constitutional Courts of the Member States and the Constitutional Court of the European Union, as Franz C. MAYER provides a reference to constitutional courts on EU and national level in: Franz C. MAYER, „Verfassungsgerichtsbarkeit" in Armin von Bogdandy and Jürgen Bast (eds.), Europäisches Verfassungsrecht (Berlin: Springer-Verlag, 2009), pp. 559 et seq.

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German Constitutional Court (*Bundesverfassungsgericht*), historically had a significant influence on the Hungarian legal system, particularly following the regime change in Hungary, the founding fathers of the constitutional reform and of the newly established Hungarian Constitutional Court, were significantly inspired by the 'Grundgesetz' and the case law of the German Constitutional Court. This influence is detailed more extensively in the relevant chapter of this research. I have chosen Austria, because it joined the EU in the third accession round and as a neighbouring Member State, we can learn from its approach towards EU law. Finally, I have selected Poland from the fourth accession round of the EU, as similar to Hungary, following the regime change, Poland has experienced similar transition difficulties from the one-party system to the pluralist democracy, rule of law and free market economy, and as a less positive development, it ended up together with Hungary, among the targets of the Article 7, rule of law proceeding, therefore its experience with the EU membership can be also relevant for Hungary.

In terms of the structure of the individual country chapters, I have built each chapter around those key terms of the judicial dialogue between the EU and national constitutional courts, which regularly are in the center of these dialogues, such as the sovereignty[15] (statehood), democracy[16] (democratic governance), rule of law[17], fundamental rights protection[18] and constitutional adjudication[19], the pre-eminent role of national constitutional courts in the European constitutional dialogue. I would like to make it clear that this division is not based on methodological considerations, but rather on practical considerations, as said earlier, as these terms seems to be centerpieces of the European judicial discourse. The principle of rule of law involves the principle of division of powers, judicial control over the public administration, judicial independence, the principle that administration and courts are bound by law (*Legalitätsprinzip*), constitutional adjudication and certainly the protection of fundamental rights as well. Regarding the protection of fundamental rights and constitutional adjudication, because of the utmost importance of these topics, as they appear as separate cornerstones of the European constitutional judicial dialogue, it seemed practical, to insert into separate chapters the closer scrutiny of these topics.

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[15] The so called *Souveränitätskontrolle*, as developed by the GCC or the *Kompetenz-Kompetenz* question, for instance, see: Maastricht decision, Euro-Zone decisions (ch. 4)

[16] Democratic legitimacy, or the lack of that, in EU decisions making, is a constant part of judicial and scholarly discussion, since the GCC Solange decision.

[17] The protection of rule of law, was always in the background of judicial dialogue in Europe, however recent years have seen an increased discussion, in connection with the rule of law proceedings against Poland and Hungary, which justify considering it as a separate section of this analysis.

[18] *Grundrechtekontrolle,* fundamental rights based reservations were always in the forefront of judicial dialogue, since the Solange I decision, which justifies considering it as well as a separate section.

[19] Probably this section of this analysis is, which needs the least justification, as the role of constitutional courts, their judicial stance and perception of their role as guardian of the national constitutional identity, fundamentally determines the case law, which is significant in shaping the fundamental principles of the EU (ch. 1).

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Especially the recent developments of the above-mentioned judicial dialogue have reminded all to the very much relevant and timely concept of constitutional tolerance, brought into the constitutional discourse by *Weiler*[20]*, as one of Europe's most important constitutional innovation*[21]. *Weiler* has pointed out, that the concept of constitutional tolerance is not a one-way concept, it applies equally to constitutional actors on EU and national level, to EU institutions, particularly to the CJEU, as well as to national governments and constitutional courts. I would like to argue, that the concept of *mutual constitutional tolerance* is especially relevant, if not an inevitable condition of the *peaceful coexistence*[22] in today's European Union with 27 different constitutional traditions and identities.

This analysis has been conducted:

a) on the one hand, focusing on the aspect of the Member States, on the European integration clause in the national constitutions, which in principle, provides the legal framework for the application of Union law, characterized by the principles of supremacy and direct effect within the Member States and the case law of national constitutional courts defining Member States' approach towards the interpretation of the national constitutional provisions related to international law and EU law and the major principles of Union law. At this point I intend to highlight, how crucial the case law of national constitutional courts have proven to be in showing *constitutional tolerance*, and which approaches have served so far, and which exact approaches not the compliance with the requirement of *peaceful coexistence*; and furthermore I argue, that only mutual constitutional tolerance and the strict compliance with the requirement of peaceful coexistence can safeguard the future of the European integration. *I argue, that if these requirements will not be carefully considered and safeguarded by key players of the European judicial dialogue, then the days of the European Union are numbered*. Key players of the European judicial dialogue should be aware of the immense responsibility towards the future of the European integration, when exercising their powers – in the spirit of *mutual constitutional tradition* - respectively.
b) on the other hand, the case law of the Court of Justice of the European Union and the fundamental principles of Union law established by the CJEU case law have been analysed, which determine the approach of Union law towards the law of the Member States, and it is equally crucial in terms of exercising *mutual constitutional tolerance* and to the compliance

[20] WEILER, J.H.H.: Federalism and Constitutionalism: Europe's Sonderweg, Harvard Jean Monnet Paper, 10/2000.
[21] WEILER, J.H.H.: On the power of the Word: Europe's constitutional iconography, in I-CON, Vol. 3, Nr. 2 and 3, Special Issue May, 2005, pp. 173-190.
[22] DI FABIO, Udo: Friedliche Koexistenz (in: Frankfurter Allgemeine Zeitung, 2010.10.20) http://www.faz.net/aktuell/politik/staat-und-recht/gastbeitrag-friedliche-koexistenz-11057029.html

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with the criteria of *peaceful coexistence*. How the CJEU case law has been perceived by Member States constitutional courts is equally a key point. This Member State interpretation by these core principles of Union law, which is named by *Paul Craig* and *Grainne de Búrca*[23] as second dimension of the supremacy of Union law, and their interaction with the interpretation of these principles by the CJEU in the course of a European constitutional dialogue, is called by *Christian Calliess* and *Gerhard van de Schyff* as constitutional integration[24].

In the following I intend to clarify the following questions: legal nature of EU law, its supranational characteristic, principles of autonomy, direct applicability, direct effect, supremacy, loyalty and respect of national identities as set out in Article 4 (3) and 4(2) TEU – *EU identity mirroring the national constitutional identity*. Throughout the clarification of these concepts, I would like to show, why constitutional tolerance, exercised by stakeholders of the European judicial discourse, is inevitable to safeguard the mutual coexistence of the EU and its Member States on the long term.

II. EU LEGAL PERSPECTIVE

1. The Supremacy and direct effect doctrine

As described above, until the Treaty of Lisbon, there was no express legal basis within the Founding Treaties for the principle of supremacy. The case law of the CJEU has developed the principles of supremacy and direct effect as logical consequences of the purpose and existence of the European Community. However, as *Kaarlo Tuori* points out[25], without the acceptance of national legal actors, particularly the Member State courts, these principles would have remained as mere unilateral declarations. As *Andrew Oppenheimer* points out[26], in some Member States, such as for instance in

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[23] CRAIG, Paul, Grainne de Búrca, EU Law, Texts, Cases and Materials, Oxford, Oxford University Press, 2003, p. 285.

[24] CALLIESS, Christian and VAN DE SCHYFF, Gerhard: Constitutional identity in a Europe of multilevel constitutionalism, 2020, Cambridge University Press, p. 3., also: VON BOGDANDY A.: Europäische und nationale Identität: Integration durch Verfassungsrecht? in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, 2003, 62, 156 pp.

[25] TUORI Kaarlo: European constitutionalism, Cambridge University Press, 2015.

[26] OPPENHEIMER, Andrew ed., The Relationship between European Community Law and National Law: The Cases, Cambridge, 1994., p.4; Oppenheimer also highlights the relevance of the following national decisions in this regard: Le Ski (Belgium, 1971), Bosch (Netherlands, 1962), Lütticke, Kloppenburg and Working Hours Equality cases (Germany, 1971, 1987 and 1992), Frontini, Granital and Giampaoli (Italy, 1973, 1984 and 1991), Pagani and Bellion (Luxemburg, 1954 and 1984), Factortame (UK, 1990), Crotty (Ireland, 1987), Banana Market and Mineral Rights Discrimination cases (Greece, 1984 and 1986), Canary Islands Customs Regulation and Electoral Law Constitutionality cases (Spain, 1989 and 1991), Cadima and ERDF decisions (Portugal, 1986 and 1989)

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France, the landmark decisions of the Court of Cassation in *Cafés Vabre* in 1975, or the Conseil d'Etat in *Nicolo* in 1989, were as important in themselves, as the CJEU case law in shaping the interpretation of the principle of supremacy of EU law doctrine. According to the CJEU, without the principle of supremacy the whole European Community and Single Market would become meaningless and its whole purpose would be diminished if one Member State could implement conflicting subsequent legislation with EU law, citing the principle of *lex posterior derogat legi priori*. It took some time for Member State courts, particularly constitutional courts within the Member States to accept the principle of supremacy, and as it was shown above, in most cases, it did not happen without reservations.

1.1 Political sensitivity of supremacy

Looking into the political angle, it seems that despite the long and well-established presence of the principle of supremacy of EU law in the jurisprudence[27], it is still not only a principle subject to the reservations by most of the national constitutional courts, but it is also a sensitive topic from a political perspective. This can be underlined by the fact that until the Lisbon Treaty, the principle of supremacy was even not declared on Treaty level, only by case law. Furthermore, even within the Lisbon Treaty, the positioning of the supremacy principle within the Treaty text shows that it was a result possibly of a *political compromise*. Despite the outstanding importance of the principle of supremacy of EU law, it has been positioned into the end of the Lisbon Treaty, more specifically to *Protocol nr. 17* attached to the Lisbon Treaty. Furthermore, instead of providing a clear declaration of the principle of supremacy as one would expect from a fundamental international treaty document when codifying the most important principle of the subject matter, the wording only indirectly refers to a legal opinion of the Legal Service of the Council of the European Union, reflecting the well-established case law of the CJEU on the principle of supremacy.

It should be noted, that earlier the Lisbon Treaty and declaration 17 on primacy Article I-6 of the draft European Constitution Treaty was drafted to declare the supremacy principle on primary law level. Article I-6 declared, that, if adopted by the EU institutions exercising competences conferred on, shall have primacy over the law of the Member States. As *Jenő Czuczai* has pointed out[28], the wording of Article I-6 was better not entered into force in its original form, as the term "law adopted by the institutions of the Union" did not cover certain other measures and non-legislative acts,

[27] Costa v ENEL, Internationale Handelsgesellschaft, Simmenthal decisions of the CJEU

[28] CZUCZAI Jenő, Ratification of the European Constitution in Hungary, in: Dr. Aneli Albi, Prof. Dr. Jacques Ziller, The European Constitution and national constitutions, ratification and beyond, 2007 Kluwer Law International BV, The Netherlands

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implementing measures among others, which otherwise also has the characteristic of supremacy over national law on the basis of the case law of the CJEU.

The sensitivity of this issue can be also evidenced at the level of domestic legislation. Vast majority of the Member States did not declare the principle of supremacy of Union law on constitutional level. Even in those Member States, which joined the European Union after the 2004 enlargement round, we cannot find a single state, which has declared the supremacy of EU law over their national constitutions[29].

Source of legitimacy of Union law

There are different concepts in case law and in the literature related to the source of authority of the supremacy of Union law. According to the CJEU, the source of authority of Union law is clearly within EU law itself. According to the CJEU, Union law is an autonomous legal order created by the Member States, where the principle of supremacy and direct effect are the pre-conditions of its effective existence and therefore only the CJEU is entitled to interpret the Founding Treaties with an *erga omnes* effect, pursuant to Article 19(1) of TEU, it is the CJEU, which shall safeguard, that in the interpretation and application of the Founding Treaties, "the law is observed". As the Hungarian Constitutional Court also pointed out in a recent decision[30], such interpretation by the CJEU even has an *ex tunc* effect, since the CJEU highlights the inherent content of the norm, which content was in the norm, even before the interpretation by the CJEU, just the content was clarified by the authentic interpretation. Notable exception is, if the CJEU itself limits the effect of its decision, such as in the *Defrenne* case[31].

With regard the source of authority of Union law, there is a considerable disagreement between the CJEU and most of the Member States' high courts. Constitutional Courts in the Member States claim, that the source of authority of Union law *stems from the national constitutions*, as the authorization by the national constitution makes possible the accession to the EU and the supremacy of EU law within national law. Most of the Member States who accept the supremacy of EU law over national

[29] KOVÁCS György: Analysis of the European integration clause (in Hungarian, in: Pázmány Law Working Papers, 2011/4, http://plwp.eu/docs/wp/2012/2011-04.pdf); the constitutions of Ireland, Slovakia and Romania includes reference to the primacy of EU law, but no Member State constitution actually recognise explicitly the supremacy of EU law over the national constitution. An overview of European integration clauses, with an emphasis on the connection between identity protection and sovereignty protection: LÁNCOS Petra Lea: Szuverenitás és szupremácia: A tagállami integrációs klauzulákban tükrözött szuverenitáskoncepciók és alkotmányjogi jelentőségük, in: Pázmány Law Working Papers, 2011/17.

[30] Decision nr. 3325/2020. (VIII. 5.) by the Hungarian Constitutional Court, para. 23.

[31] Case 43/65 Defrenne v Sabena, EU:C:1976:56, para. 75.

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constitutions, still deem national constitutions as source of authority of EU law[32]. As a result of this, national constitutional courts establish jurisdiction and remain competent to interpret the European integration clause within the national constitution and as a result, to determine the limits of supremacy and the application of EU law within the Member State.

1.2 Limits of supremacy of Union law – role of national constitutional courts

The abovementioned dialogue between Union law and national constitutional laws is present since almost the beginning of the European integration; however, it became especially relevant, probably since the so-called Solange I decision of the German Constitutional Court in 1974 and it is at the heart of discussions even increasingly today.

In the above context, and as a result of the competence of national constitutional courts regarding the interpretation of the limits of the supremacy of EU law within national law, there is a two-way monitoring regarding the rule of law, level of fundamental rights protection between the CJEU and national constitutional courts. Whereas since the 60s and 70s, the Member States' constitutional courts were looking with a critical approach and scrutiny at the Community legal framework, particularly the level of protection of fundamental rights, democratic legitimacy, competences and constitutional identity, nowadays we see a different tendency, i.e. now the Union is monitoring with even increased scrutiny, the quality of rule of law and democracy within the Member States[33].

1.3 Reverse Solange – *sed quis custodiet ipsos custodes?*

From this aspect, the European Union has two main legal procedures to enforce the application of fundamental rights against the Member States, the first - and according to my view the most important - one is the infringement of EU law proceeding, and the other one is the widely discussed Article 7 procedure, however, the practical application of the latter one is limited since **on the one hand it is**

[32] Notable exception is the Netherlands, where the status of Union law is based on Union law, and not on the national constitution

[33] See: Reverse solange doctrine by Armin von Bogdandy, in: VON BOGDANDY Armin, ANTPÖHLER Carlino, DICKSCHEN Johanna, HENTREI Simon, KOTTMANN Matthias and SMRKOLJ Maja: A European response to domestic constitutional crisis: advancing the reverse-solange doctrine, in: VON BOGDANDY, Armin – SONNEVEND, Pál: Costitutional Crisis in the European Constitutional Area, Hart Publishing, 2015, pp. 242-253.; VON BOGDANDY, Armin and ANTPÖHLER, Carlino and IOANNIDIS, Michael, Protecting EU Values - Reverse Solange and the Rule of Law Framework (March 23, 2016). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-04. Available at SSRN: https://ssrn.com/abstract=2771311, furthermore: various publications developed in the framework of the Reconnect project – available at: https://reconnect-europe.eu/publications/ - practical manifestations in the two ongoing Article 7 proceedings. An approach to explain rule of law as opposed to illiberal or authoritarian approaches: Tushnet, Mark: The possibility of illiberal constitutionalism?, in: 69 Florida Law Review, pp. 1367 et seq.

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political and proceeds without the involvement of the CJEU, and on the other its less conclusive, as in its final stage it requires unanimity in the Council to be able to suspend voting rights. These different approaches are in the centre of the present research: a) Member State constitutional courts are monitoring the compliance of EU law on the basis of the standard of fundamental rights protection provided by their national constitutional framework on the one hand, and b) EU institutions are requiring Member States to comply with fundamental rights and rule of law as set out in Article 2 TEU and in the European Union Fundamental Rights Charter primarily. This dual approach of mutual supervision and fundamental rights scrutiny justify an updated analysis of the existing legal framework, case law and related literature in order to attempt to draw some conclusions from novel perspective in this highly relevant and constantly evolving matter.

Reverse Solange Extended - The EU Safety Net

As pointed out above, it was a fundamental statement by the CJEU first in its *van Gend en Loos* decision, that national judges are judges of EU law, they are working in the front line of the enforcement of Union law and individuals may rely on EU law before their national courts as well. As an extension of the reverse Solange doctrine, EU citizens shall rely on their fundamental rights based on the – horizontally directly effective – EU Fundamental Rights Charter before national courts and authorities.

In matters, where EU law is applicable, it is clear, that individuals can rely on the directly effective provisions of the EU Fundamental Rights Charter before national courts and authorities.

In those cases, where EU law is not applicable, still the Member States have to comply with common minimum standards, the essential content of fundamental rights, as included in Article 2 TEU. Individuals shall rely on the *reverse Solange doctrine* in front of national courts, by arguing in case of grave violations of the essential content of specific fundamental rights listed in the Charter, that such violation, is a violation of Article 2 TEU. The reason of the application of Article 2 TEU in cases not related to EU law is, that with regard Article 2, the limitation of Art. 51 of the EUFC is not applicable, the values listed in Article 2 TEU are universally acknowledged, common denominators across the Member States, also conditions of EU Membership (as part of the Copenhagen criteria[34]), therefore Member States should continuously comply with these values throughout the whole term

[34] see: the Proposal of the Copenhagen Commission by MÜLLER, Jan-Werner: Protecting the rule of law (and democracy!) in the EU. The idea of a Copenhagen Commission. In: CLOSA, Carlos, KOCHENOV, Dimitry (eds.): Reinforcing rule of law oversight in the European Union. Cambridge University Press, 2016.

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of the EU membership and without regard whether in specific instances are applying EU law or not. As *von Bogdandy* points out[35], freedom of speech, media freedom, as a pre-condition of democracy, as well as judicial independence, access to independent judicial system and free elections, are part of the essential content of fundamental rights, as listed in Article 2[36] TEU. *Von Bogdandy* also stresses, that as Article 4 (2)[37] TEU protects the Member States national and constitutional identities, individuals could only successfully argue the violation of essential content of fundamental rights, if such violation by the Member States is a *systemic*, *serious* and *persistent* violation of EU law, and is *not remedied adequately* by the Member States.

These are values and fundamental rights, shared across all the EU Member States, and after all *mutual trust* is the basis of the European integration. It is therefore highly unlikely that such event would occur. It is a similar scenario as airbags of safety nets, we wish that we do not get into a situation where it is needed, there is great trust towards all Member States, however even if it is not very likely that it will be applied, still out of caution it is advisable to have it implemented, to save lives of citizens.

2. Fundamental rights based limitations

Regarding the case law of national constitutional courts – as above said – there seems to be a threefold approach towards the supremacy of EU law. The way of application (or non-application) of these limits shows differences in the legal and constitutional culture as well as the degree and nature of co-operation with Union law and the EU institutions. Firstly, the German constitutional court, first in its Solange I decision - and then numerous other constitutional courts – have expressed their concerns regarding the lack of fundamental rights protection on European level. The reasoning behind the need for fundamental rights-based limitation of the supremacy of Union law by the national constitutions is mainly twofold. On the one hand, at the beginning of EU integration, there were no

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[35] VON BOGDANDY Armin, ANTPÖHLER Carlino, DICKSCHEN Johanna, HENTREI Simon, KOTTMANN Matthias and SMRKOLJ Maja: A European response to domestic constitutional crisis: advancing the reverse-solange doctrine, in: VON BOGDANDY, Armin – SONNEVEND, Pál: Costitutional Crisis in the European Constitutional Area, Hart Publishing, 2015, pp. 244-246.

[36] „*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Art. 2 TEU*

[37] „*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State." Art. 4(2) TEU*

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codified lists of fundamental rights which were binding on the EU institutions, especially on the institutions taking part in the legislation and on the Court of Justice. At the same time, the EC law (later Union law) claimed supremacy and demanded, that Member States obey before Union law. National constitutional courts therefore saw a significant risk from domestic constitutional law point of view here, that whereas the even growing amount of EC (EU) legislation requires supremacy and direct effect within national legislation, at the same time it is not bound by those constitutional guarantees and restrictions, most notably the fundamental rights catalogue in the national constitutions, which guarantees that legislation is in compliance with the standards of a state based on the principles of rule of law, fundamental rights and democracy. Especially in the early years of the European integration, such concerns related to the lack of appropriate level of fundamental rights protection were the main reasons why national constitutional courts expressed concerns towards the supremacy of EU law.

Such fundamental rights-based limitations and reservations, however, still exist in the case law of the national constitutional courts, even following the acceptance of the EU Fundamental Rights Charter and following the declaration in Article 6, paragraph 2 TEU, that the EU should accede to the European Convention on Human Rights (1950, Rome Convention[38]). According to the case law, the reason for keeping such fundamental rights-based reservations, limitations in national constitutional law have been partly vanished following the implementation of fundamental rights guarantees by the CJEU, in the area of Union competences and sovereignty control, Member States have a justified concern to monitor, that the EU is not stepping beyond the already conferred competences. As an internal constitutional limitation, if the Member States themselves are bound by the principles of rule of law and protection of fundamental rights, then they cannot transfer competences on the EU, which competences would be free from such limits (*nemo plus iuris ad alium transferre potest, quam ipse habet*). In practice, however, it is also recognized by national constitutional courts that the national constitutional principles are part of the *international and EU fundamental rights heritage and traditions* that link together the EU institutions and the CJEU (*common constitutional traditions*). Consequently, there should be a considerable convergence between the interpretation of fundamental rights by the EU institutions and national constitutional courts, however divergence is still possible. Motivated by the above fact, for instance, the German constitutional court would only apply the fundamental rights-based limitations towards the principle of supremacy of EU law, if there is a

[38] https://www.echr.coe.int/Documents/Convention_ENG.pdf

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systemic decrease of the level of fundamental rights protection in EU law[39] that would be rather complicated to prove.

The relationship between EU Law and national constitutional law and the application of EU Law within the Member States represent one of the most complex and fundamental questions of European Union law. Without seeing clearly the limits of Union competences and the application of the supremacy of Union law in practice and the possible ways to clarify legal questions arising out of the occasionally different interpretation by the CJEU and national courts it is impossible to ensure the uniform application of EU law across the Member States.

3. Two dimensions of the supremacy principle

The case law of the Court of Justice of the European Union (CJEU) clearly requires unconditional precedence for European Union Law against national law, even against national constitutional law. However, this requirement has not been accepted by all the Member States without reservations. The reason for this phenomenon is the dual character of the principle of supremacy as *Weiler* pointed out[40]. The interpretation of the CJEU, that the principle of supremacy can be with logical conclusion derived from the Founding Treaties has been contested by constitutional courts across the EU. The CJEU case law regarding supremacy is one dimension of the principle of supremacy within the EU – according to *Weiler* -, and its full reception by the Member States is the second dimension, which is equally relevant. As *Weiler* stressed, the *constitutional tolerance is not a one-way concept[41], it applies on the EU institutions, as well as on the Member States, having different constitutional traditions*. At the same time – as *di Fabio* indicated[42] – *mutual intention for co-operation and respect shall shape the cooperation of the EU and national level*.

4. Revolutionary nature of EU law

In the early years of the development of European Union Law, the establishment of the principles of supremacy and direct effect by the CJEU without an express legal basis within the Founding Treaties came unexpected and it was unpredictable and revolutionary from the point of view of the Member

[39] Solange II, BVerfGE 73, 339, [1987] 3 CMLR 225

[40] Weiler, J.H.H.: The Community System: The Dual Character of Supranationalism (1981) 1 Yearbook of European Law 267-306.

[41] Weiler, J.H.H.: On the power of the Word: Europe's constitutional iconography, in : I-CON, Vol. 3, Nr. 2 and 3, Special Issue May, 2005, pp. 173-190.

[42] Udo di Fabio: Friedliche Koexistenz (in: Frankfurter Allgemeine Zeitung, 2010.10.20) http://www.faz.net/aktuell/politik/staat-und-recht/gastbeitrag-friedliche-koexistenz-11057029.html

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States. Whereas, public international law traditionally addressed states and international organizations, individuals were not typically in the position to directly apply international law before their national courts, especially not against their own states. This is the reason why the *CJEU was referring to EU law as a special type of international law, creating a separate legal order with its own characteristics*. The argument of the CJEU, that the principles of *supremacy and direct effect are necessary and logical consequences of the creation of the European Community* and that without the principles of supremacy and direct effect the Single Market and the whole purpose of Community law would be diminished - were unusual and difficult to accept for the Member States. The main reasons for this difficulty are mainly twofold. On the one hand – as mentioned already - there has been no express legal basis within the Founding Treaties for the principles of supremacy and direct effect. On the other hand, *Community law lacked certain safeguards in the field of fundamental right protection and democratic legitimacy* – both considered to be essential by some Member State constitutional courts.

5. Principle of Effectiveness

An important part of the jurisprudence of the CJEU is to require effective[43] enforcement of European Union law by the Member States. In case of a conflict of national law with EU law, it was a reasonable decision for national courts to turn towards their national constitutional courts to wait until the constitutional court will set aside the piece of national legislation which contradicted Community law or to wait for a legislative act of the national Parliament setting aside the piece of national law, which contradicts EU law. The role of the CJEU was essential to declare that national judges are judges of EU law and in fact, *it is the primary responsibility of national courts*[44] *and national public administrations to enforce EU law*; by giving immediate precedence to EU law, immediately setting aside national law that conflicts with EU law without waiting for the national Parliament or the constitutional court to set aside conflicting legislation and to make sure the uniform, effective and immediate application of the requirements of supremacy and direct effect of Community law across Member States.

[43] This is a consequent and consistent case law of the CJEU since the van Gend en Loos decision, see: Cases C-7 and 9/10 Kahveci and Inan EU:C:2012:180, (37).
[44] See more: Allan Rosas and Lorna Armati: EU Constitutional law – an introduction, 2nd ed., Hart Publishing, 2012, p. 272-281.

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Recent decisions of the CJEU[45], have been studied and have reaffirmed the reasoning of the Simmenthal decision. More specifically[46], the CJEU has reaffirmed that **lower courts having different view than higher courts, still have the possibility to ask for a preliminary ruling** from the CJEU[47]. Similarly as referred in Krzysztof[48], the CJEU emphasized that national courts are obliged to set aside conflicting national law with EU law, even if constitutional courts have deferred the date of nullification of such law. There is no contradiction, however, between the two, because as scholars, especially in Austria and Germany, point out that the supremacy of EU law primarily means an application supremacy (*'Anwaendungsvorrang'*) and the conflicting national law will not be automatically null and void. It can be a task of the national Parliament – if such conflict with EU law also involves conflicts with the domestic constitution – or the task of the national constitutional court to annul such legislation.

As the immediate and effective application of Union law is only possible if the specific piece of EU law is directly effective, *Michael Dougan* raised the question[49] whether supremacy and direct effect could be interpreted separately, or direct effect was just a pre-condition of supremacy. The question had particular relevance before the Lisbon Treaty entered into effect, as in the second and third pillars of the EU direct effect was not existing. The CJEU concluded[50] that supremacy and indirect effect could exist even in the second and third pillars, even if direct effect does not exist there[51].

As already mentioned beyond the fact that the principles of supremacy and direct effect did not have an express legal basis within the Founding Treaties, national courts and constitutional courts expressed further reservations. Serious concerns by national constitutional courts have been raised due to the fact that the European Parliament was not directly elected at the early development stages of the European Community and there was no fundamental rights charter or standard for the safeguard of fundamental rights whatsoever within EU law. Quite understandably, for instance, in case of

[45] such as the Case C-112/13 A v B EU:C:2014:2195, (37), Case 18/11 Commissioners for Her Majesty's Revenue and Customs v Phillips Electronics EU:C:2012:532, (38), Case C-409/06 Winner Wetten v Bürgermeisterin der Stadt Bergheim (2010) ECR I-8015, Cases C-188-189/10 Melki and Abdeli EU:C:2010:363 and C-314/08 Krzysztof Filipiak v Dyrektor Izby Skarbowej v Poznaniu (2009) ECR I-11049

[46] In cases C-173/09 Elchinov (2010) ECR I-8889, (25)-(31), case C-396/09 Interedil (2011) ECR I-9915, (37)-(39) and case C-416/10 Krizan EU:C:2013:8, (68)

[47] See more detailed in: Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, 18'th Kolloqium regarding the Preliminary Ruling process before the Court Of Justice of the Euroean Community, Helsinki, 20 - 21 Mai, 2002., http://193.191.217.21/colloquia/2002/gen_report_en.pdf

[48] C-314/08 Krzysztof Filipiak v Dyrektor Izby Skarbowej v Poznaniu (2009) ECR I-11049

[49] M. Dougan, When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy (2007) 44 CMLRev 931, 932-935.

[50] Case C-105/03 Criminal proceedings against Maria Pupino (2005) ECR I-5283

[51] similar arguments were raised in: K Lenaerts and T Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 ELRev 287, 289-291

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Germany, after the terrible waste of lives during the World War II, it was crucial not to allow unconditional supremacy over the Constitution of Germany, the 'Grundgesetz' for a separate legal system which in itself does not have a safeguard regarding a sufficient level of fundamental rights protection and its legislative procedure is not transparent enough and lacks direct democratic legitimacy. As most prominently the German and the Italian constitutional courts pointed out, Community law not only lacked sufficient safeguards which represented at least the standard which the 'Grundgesetz' or the Italian Constitution provided for the protection of fundamental rights, but lacked any fundamental rights standard as well. The dialogue, which was initiated by the decisions of the German and the Italian constitutional courts in this regard, not only facilitated important legal developments within the Community but also resulted in a fundamental reform of the Founding Treaties and Community law as well. The dialogue between the CJEU and national constitutional courts also demonstrates the progress towards integrating lessons learned from judicial dialogue and jointly developing the concept of constitutional identity on national level and on EU level. This dialogue, started by the German and Italian Constitutional Court, were followed by subsequent enlargement rounds by other constitutional courts as well. As mentioned earlier, the purpose of this thesis is, to show the approach of domestic constitutional courts of Member States joined in different accession rounds, beyond the founding Member State Germany, also analyzing the approach of the UK, Austria, Poland and Hungary. Not mentioned in this thesis, but also the approach of – for instance – Baltic high courts and constitutional courts[52] show similar reservations as we experienced in case of Germany and Italy.

6. Constitutional identity and Ultra Vires Limitations

National constitutional courts starting from the early development stages of the European Community started to refer to an untouchable core of national constitutions (or later called as constitutional identity[53], in German: '*Verfassungsidentität'*) including the basic fundamental rights of the national constitutions, the basic structure (federal structure) of the State, certain safeguards and national Parliaments related to public finances that illustrated the limits of the supremacy of EU law over

[52] Decision No 17/02-24/02-06/03-22/04 of 14 March 2006 by the Lithuanian Constitutional Court, Judgment of the Supreme Court of Estonia No 3-4-1-1-05 (19 April 2005), Judgment of the Constitutional Court of Latvia No. 2007-11-3 (17 January 2008)

[53] more on this concept: Rosenfeld, Michel: Constitutional Identity, in Rosenfeld, Michel and Sajó, András: The Oxford Handbook of Comparative Constitutional Law, 2011., pp. 756-776; Wendel, Mattias: Lisbon Before the Courts: Comparative Perspectives, in: European Constitutional Law Review, 2011, 7:96–137.; Saiz Arnaiz, Alejandro and Alcoberro, Llivina Carina (eds.): National Constitutional Identity and European Integration, 2013, Intersentia; van der Schyff, Gerhard: The constitutional relationship between the European Union and its Member States: the role of national identity in Article 4(2) TEU, European Law Review, 2012/37, pp. 563–83.; Lustig, Doreen, Weiler, J.H.H.: Judicial review in the contemporary world: retrospective and prospective, International Journal of Constitutional Law, 2018/16, s. 3.3.

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national constitutional law. Since the Lisbon decision[54] of the German constitutional court, the concept of constitutional identity became widely discussed within European Union law and has been interpreted by constitutional courts in various Member States as well and article 4(2) TEU[55] as interpreted by the CJEU[56] has been applied to set limits against the application of supremacy of Union law. European constitutional identity under article 2 TEU includes human dignity, rule of law, guarantee of fundamental rights protection, democratic governance, equality, pluralismus, non-discrimination, privacy, judicial independence, solidarity, tolerance and justice. *Common constitutional traditions* are reflected in the common *European constitutional identity* and it is a precondition of *mutual trust*, on which the European Union is based. European constitutional identity and *national constitutional identity* are not competing terms, they rather reinforce each other and, in most cases, - also in case of Hungary - European identity is a part of national identity, which is also a core of national sovereignty[57].

This concept and its role as a limit on further European integration will be further discussed in the relevant chapter of this work.

With regard to the competences of the EU, following the Maastricht Treaty, several constitutional courts (for instance the Italian, Hungarian, Lithuanian, Latvian Constitutional Courts) declared that they reserve the right not to apply EU law if it goes beyond (*ultra vires*) the limits established by the competences set out in the Founding Treaties. It is a question if such reservations are in line with the obligations of national constitutional courts as courts of EU law to ensure the application of supremacy and direct effect within the Member States, especially as *Jakab András* points out, those countries who joined the EU, have undertaken the obligation to accept and *comply* with the whole *acquis communautaire*, to which, the principle of supremacy is a fundamental part. According to the

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[54] BverfG 123, 267 (Lisbon)

[55] „The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State." Article 4(2) TEU

[56] for instance: C-293/12, C-594/12 Digital Rights Ireland, C-301/12 (para. 41-42) Cascina Tre Pini, C-227/85 (para. 10) Commission v Belgium, C-46/08 (para. 69) Carmen Media, C-303/05 (para. 52-53) Advocaten voor de Wereld VZW, C-208/09 Sayn Wittgenstein, C-617/10 Akerberg Fransson, C-393/10 (para. 47 és 49) O'Brien, C-58 és 59/13 (para. 55) Torresi, C-650/13 Delvigne, C-105/14 and C-42/17 Taricco, C-51/15 (para. 40) Remondis, C-414/16 Egenberger, C-673/16 Caman, European Arrest Warrant preliminary rulings related to Poland: C-216/18 PPU - Minister for Justice and Equality (deficiencies in the system of justice, EAW Ireland – Poland, LM Judgment) ECLI:EU:C:2018:586 and C-354/20 PPU Openbaar Ministerie (independence of the issuing judicial authority, EAW Netherlands - Poland) ECLI:EU:C:2020:1033 Latter two judgments can be interpreted as exclusions from mutual trust, see: Canor Iris: My brother's keeper? Horizontal Solange: "An ever closer distrust among the peoples of Europe". Common Market Law Rev 50, pp. 383-422; 2013.

[57] see for instance: Faraguna, Pietro: Constitutional Identity in the EU: a Shield or a Sword? in: German Law Journal, Vol. 18, No. 7, pp. 1638 et seq.

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German constitutional court, as stated in their Honeywell decision, as long as EU law respects the competences set out by the Member States within the Founding Treaties, Member State courts should not question the authority of EU law within the Member States[58]. In case, the question of interpretation is related to EU competences, national courts, constitutional courts as well shall ask a *preliminary ruling* from the CJEU[59] - only such approach would be in compliance with the *duty of loyalty*[60] (*sincere cooperation*) imposed by the TEU on the Member States and also required by the CJEU as set out for instance in the *Köbler*[61] and *Traghetti*[62] decisions.

As described above, the main objective of this research is to analyse the different approaches *how high courts, particularly constitutional courts, within the Member States accepted and applied the principle of supremacy and direct effect*. Moreover, dedicated emphasis has been placed into the identification and analysis of what is the possible *way forward* in terms of the relationship between European Union law and national law from the perspective of a Member State with respect further deepening integration of the EU.

7. Case Law

7.1 Van Gend en Loos[63]

The van Gend en Loos decision is probably one of the most important decisions, if not the most important ever delivered by the Court of Justice of the European Union. The van Gend en Loos decision was the first decision, where the CJEU highlighted the difference between ordinary public international law and European Community law as well as it declared that Community law as a special type of international law - creates an autonomous legal order[64] - is separate from the national legal orders. However, the two legal orders are not parallel. As a result, Community law is addressed not only to the Member States but also to its citizens, and these **individuals may directly rely upon** and refer to its directly effective provisions (if such provision **contain clear and unconditional**

[58] see more: Honeywell decision of the German constitutional court - BVerfGE 126, 286, BVerfG, 2 BvR 2661/06, Honeywell, 6 July 2010

[59] As the great architect of the European project, Jean Monet has pointed out: the permanent dialogue between Community organs and national organs is the foundation and real force of the European integration (Jean Monnet: L'Europe et l'Organisation de la Paix, Centre de Recherches Européennes, Lausanne, 1964, p. 7.)

[60] Article 4(3) TEU

[61] Case C-224/01, Gerhard Köbler v Republik Österreich

[62] Case C-140/09, Fallimento Traghetti del Mediterraneo SpA v Presidenza del Consiglio dei Ministri

[63] Case 26/62 [1963] ECR 1 Van Gend en Loos

[64] G.C.R. Iglesias, Gedanken zum Entstehen einer Europaeischen Rechtsordnung, Neue Juristische Wochenschrift 1999, pp. 1-9.

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obligation) **before their national courts** and authorities. The Van Gend en Loos decision also gave a definite response to the question whether the relationship of EU law and national law is a matter of national constitutional law, where the CJEU cannot have a say, or actually it follows from the Treaties that Member States have an obligation to ensure the supremacy of Community law towards national law. National judges were declared by the CJEU to be judges of Community law with the primary responsibility to enforce the supremacy of Community law towards national law, and to grant immediate and effective application for Community law - even above national law, if needed - in individual cases before national courts.

The van Gend en Loos decision was a result of a preliminary reference submitted by a Dutch court in a matter related to the compliance of applicable taxation rules (*Brussels Agreement*) with the rules of Community law. The applicant before the national court challenged the decision of the national tax authority (*Tariefkomissie*) that reclassified chemical products imported to the Netherlands from Germany into a product category where higher customs tariff was applicable. The applicant argued that this was an implied custom increase that is forbidden under article 12 of the Treaty on the European Economic Community.

The Dutch court raised two questions to the CJEU; (i) whether Article 12 of the Treaty on the European Economic Community is **only binding on the Member States** or private individuals, citizens can also refer to it before national courts and (ii) whether **the Dutch system is in compliance with Article 12 or not**? Namely whether the re-classification of the imported products to a higher custom category could be regarded as an increase in customs that is prohibited by article 12 of the Treaty on the European Economic Community?

The governments of Belgium and the Netherlands have raised arguments before the CJEU regarding the inadmissibility of the case based on the lack of jurisdiction of the CJEU by arguing that on the one hand *Community law is only addressed to the Member States* (as it is traditionally the nature of public international law). Therefore, individuals and companies cannot refer to it directly before national courts. Moreover, they argued that the CJEU does not have a jurisdiction in the specific case because in the preliminary ruling procedure the CJEU is not able to determine whether national law is in conflict with Community law or *whether national law or Community law shall have supremacy over the other* (which *is a question of national constitutional law* according to the Belgian government). Furthermore, - according to the Dutch government - the CJEU is not entitled to actually apply Community law in the course of a preliminary ruling procedure, as it is only entitled to interpret Community law as a response to the preliminary reference coming from Member State courts.

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Although, the Advocate General did not concur with the position of the Dutch and the Belgian government that both questions are inadmissible, he proposed to answer both questions raised by the Dutch court negatively. With regard to the first question, the Advocate General acknowledged that certain provisions of the Founding Treaties impose directly rights on individuals, and individuals can directly rely on its provisions before their national courts and public authorities and national courts and public authorities have the duty to enforce those rights. The Advocate General, however, with regard to the Article 12 of the Treaty on the European Economic Community has concluded that it is clear from the wording of the respective provision, that it is addressed to the Member States only and individuals cannot directly establish rights and obligations on it. Moreover, the Advocate General pointed out that even if direct effect would be established for Article 12 of the Treaty on the European Economic Community, it still would not mean that a uniform application of Article 12 could be ensured across the Member States, since some of the Member States' constitutions (the Advocate General mentioned as an example the Belgian, Italian and German constitution) did not grant supremacy for public international law above national law. Therefore, courts of those Member States could choose to apply national customs provisions. Furthermore, the Advocate General noted, that the most important customs provision in Article 11 of the Treaty on the European Economic Community is clearly addressed to Member States and not to individuals. Therefore, individuals cannot directly rely on it before their national courts and cannot directly establish rights and obligations before their national courts on that provision. Since Article 12 is also related to the implementation of the internal market, the Advocate General was arguing that it should be interpreted in a same way and no direct effect should be granted to Article 12.

Compared to the Advocate General's Opinion, the CJEU had positively responded to both questions. The CJEU has pointed out that this being so, individuals can base rights directly on provisions of Article 12 and that there is no substantial difference, whether national custom provisions explicitly increased tariffs or whether it was an implied increase in tariffs via re-classification of certain products, if in fact as a result, an increase took place - that will be at any case in conflict with the stand still provisions of the Treaty on the European Economic Community.

Furthermore, the CJEU dealt with questions related to the following topics:

(1) the relationship of Community law and national law (according to the Belgian government this is clearly a question of national constitutional law, according to the CJEU not),

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(2) the nature of the Community legal order (especially as a special, autonomous form of international law),
(3) effect of Community law on individuals and rights of individuals (according to the Dutch government it is up to the national governments to decide whether they intended to give direct effect to a certain provision of the Treaty on the European Economic Community, according to the CJEU not),
(4) remedies available for individuals to enforce their rights based on Community law,
(5) the role and duties of national judges and public authorities in the enforcement of Community law.

According to the CJEU, it follows from the preamble and from article 177 of the Treaty on the European Economic Community that individuals can directly refer to Community Law as well as that individuals can directly base rights and obligations on directly effective provisions of the Founding Treaties. The Preamble of the *Treaty* on the European Economic Community *refers to the peoples of Europe and not just its Member States*. Furthermore, by referring to "*peoples*", where according to the rules of English grammatic, the work "people" already indicates a plural form, it clearly emphasizes that directly individuals, namely each and every person, as an individual or legal entity, shall be a subject of EU law[65]. This implies, according to the CJEU, that the Founding Treaties are *addressed not only to the Member States, but also to its citizens* and contrary to the traditional concept of international law *individuals can also directly rely on the directly effective provisions of the Founding Treaties before their national courts and authorities* - even against their own state. The CJEU also rejected the (otherwise very *interesting* and *innovative*) argument of the Dutch government that the possibility to ask for a preliminary reference in a case where possibly a Member State is in breach of Community law would be a circumvention of the principle that infringement of EU law proceeding can be brought against a Member State only by the European Commission or another Member State. On the contrary, the CJEU highlighted that the preliminary reference under article 177 of the Treaty on the European Economic Community provides a possibility for individuals to apply European Community law in the national proceedings before their national courts. Provided that the interpretation of Community law is not clear, it opens the possibility to request in the national proceedings that judges of national courts turn to the CJEU for *interpretation* in individual cases where the *application of Community law is necessary for the decision* in the matter.

[65] Highlighted by Daniela Caruso in her EU Law lectures at Boston University

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7.2 Flamino Costa v ENEL[66]

The Costa v ENEL decision of the CJEU established the principle of supremacy. This decision was a result of a preliminary reference by the Italian courts to the CJEU in a case which concerned the application of national law regarding privatization of the national electricity company. The main question of the Costa v ENEL case was whether a subsequent national act can overrule the earlier Community act or with other words, whether **Member States can renounce obligations under EEC Treaty by means of an ordinary law** (*lex posterior derogate legi priori*)? The Costa v ENEL decision was the first one explicitly declaring the supremacy of EU law. Later decisions in Internationale Handelsgesellschaft, Simmenthal have confirmed the earlier decision and highlighted new aspects of the principle of supremacy of EU law towards national law.

Within the preliminary ruling proceeding, the CJEU have made clear the *distinction between application and interpretation* of the Treaty and added, that it is *not allowed* (i) to *apply* the Founding Treaties on a particular case (to decide the case instead of the national judge), or (ii) to declare the *validity* or invalidity *of* a particular *national law*, but pursuant to Article 19(1) TEU, the CJEU has to give an authentic and *erga omnes interpretation* for Community law which will be binding on everyone. Meanwhile, the CJEU is able to identify those questions which require the interpretation of the Founding Treaties by the CJEU even if the preliminary reference was not adequately formulated by the national court. Consequently, the CJEU did not declare the validity or invalidity of the national law, but it interprets the respective provisions of the Founding Treaties or other parts of EU law in the context of the case as it has been submitted by the national court.

In contrast with other international agreements the Founding Treaties have created a *separate legal system* which became an *integral part of the national legal systems* following the Founding Treaties have entered into effect, which national courts have the duty to apply. According to the explanation of the CJEU the Member States have *restricted their sovereignty* by *conferring real competences in a well-defined and limited scope* on the Community by creating a *legal system* which is *binding on* the Member States as much as on their *citizens*. This Community has its *own institutions* with own *legal personality* and is entitled to *act independently on international level*.

The CJEU has stressed that if subsequent national law could overwrite the provisions of earlier EC law, then the whole purpose of the European integration would be diminished. EU Law would

[66] Case 6/64 [1964] ECR 585

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diminish its relevance if Member States could diverge with *any legal* acts from their obligations arising out of the Founding Treaties. As a result, *this decision is a limitation on Member States' rights of derogation and renunciation*.

The principle of *supremacy* is *affirmed* according to the CJEU within the Article 189 of the EEC Treaty, which sets out that *regulations* have a *binding nature* and are *directly applicable* for all Member States. This provision - to which none of the Member States made any reservations - would lose its point if any of the Member States could invalidate or disapply it by a national measure which would have precedence over Community law (because it was passed later than the Community measure, or because of any other reason). It concludes that the Community legal system based on the Founding Treaties, due to its special and unique character, cannot be overridden by law passed by the Member States. However, it should be interpreted in the context of national legal provisions, that may not derogate the effect of Community law and may not compromise the basis of Community law.

7.3 Internationale Handelsgesellschaft[67]

The Internationale Handelsgesellschaft case was a preliminary reference from the German administrative court. In the underlying case, the compliance of the export deposit system set up by Council regulation nr. 120/67 with the principles of self-determination, freedom to conduct businesses and proportionality came into question. The German administrative court turned with a preliminary reference to the CJEU with regard to the validity and interpretation of the obligation to provide export deposit.

The CJEU has confirmed the Costa v ENEL decision and declared that the *unity* and *effectivity* of the Community law, the unity and *integrity* of the internal market and the whole Community would be diminished if the validity of Community law would be determined on the basis of the law of the Member States. *The validity of Community law can only be determined on the basis of the Community law itself.* The law stemming from the Founding Treaties as autonomous legal sources cannot be overridden by national law, even *fundamental constitutional rights cannot take precedence over Community law*[68]. Consequently, the validity or effect of Community law cannot be affected by such arguments that Community law would not provide an *adequate* or *sufficient protection* of

[67] Case 11/70 [1970] ECR 1125

[68] As Géza Kilényi has pointed out, this is completely understandable, as Member States if they do not like a provision of EU law, they could incorporate their contradicting national provisions in the constitution, and could declare, that it would be unconstitutional to comply with EU law. Such trend would make impossible to guarantee the uniform application of Union law. (KILÉNYI, Géza: Alapjogok és az EU (Fórum), in: FUNDAMENTUM, 2003/2, pp. 75-79.)

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fundamental rights or that it would be not in compliance with the fundamental rights (basic rights, *Grundrechte*) protected by the constitution of a Member State or with any other provisions of the constitutional structure of the Member States[69].

The CJEU, besides declaring the above, pointed out, that it is also important to analyse whether the principle of *human rights protection* as applied by the CJEU and based on the *common constitutional traditions* of the Member States is not infringed in the specific case. The CJEU also pointed out the *significance of the European Convention on Human Rights* (1950) for the European Community. The protection of fundamental rights is one of the underlying goals of the European Community and one of the *general principles* of Community law. Based on the above in the specific case the CJEU held, that it is important to analyse the compatibility of the export deposit system with the fundamental rights.

The CJEU declared that the restriction applied by the export deposit system on the *freedom to conduct businesses* is *proportionate with the public interest*, that the Community intended to protect in the specific case. Later, the German administrative court has interpreted the requirement of proportionality differently and turned to the constitutional court - and as a result of which the well-known Solange I decisions has been issued, raising – among others – the question of *division of responsibilities* with the CJEU, that is analysed extensively in the section regarding the relationship between EU law and German constitutional law of this research.

7.4 Nold[70]

Within the Nold case, the petitioner (a large coal wholesaler company) challenged a decision of the European Commission before the CJEU on the basis of discrimination and infringement of fundamental rights. The contested decision of the European Commission entitled the Ruhr-area Coal Wholesaler Agency to issue certain restrictive measures regarding coal transport, as a result of which the coal wholesaler status has been revoked from Nold.

[69] In the Case C-224/97, *Ciola v Land Vorarlberg* [1999] ECR I-2517 the position of the Austrian government was that with regard certain acts of public administration the unconditional and automatic supremacy of EU law can not be applied because it would violate the principle of legal certainty. The CJEU declined this argumentation and affirmed that no administrative or legislative act whatsoever from the Member States may be applied which would violate EU law, having direct effect. SO we can conclude that the CJEU ensures the uniform application of Community law without regard whether it is a norm on the level of the constitution of the Member State or it is an individual administrative decision of one of the Member State authorities.

[70] Case 4/73 [1974] ECR 491

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The CJEU reaffirmed its earlier case law (held in Internationale Handelsgesellschaft), according to which *fundamental rights protection belongs to the general principles of Community law* and therefore, the CJEU ensures the proper application and enforcement of fundamental rights. In setting the standards of fundamental rights protection, the CJEU considers the *common constitutional traditions* of the Member States as underlying principle for setting a European fundamental rights protection standard and therefore, it has to invalidate any Community act that would not be in compliance with the common fundamental rights principles (constitutional tradition) as included in the constitutions of the Member States[71]. *László Sólyom* has pointed out, that the common European constitutional tradition, also plays an important role in supporting domestic constitutional culture of individual Member States[72]. The CJEU also stated that beyond the common constitutional traditions of the Member States, also *international fundamental rights treaties* - to which the Member States are part of - shall be taken into consideration by the CJEU. The CJEU has competence to declare (at the initiative of the European Commission or a Member State) that a Member State has infringed Union law. In line with the abovementioned facts, any Member State law, public administration or court practice may be analysed - and in this regard the CJEU has broader competence than the European Court on Human Rights in Strasbourg.

7.5 Comet[73]

Similar to earlier cases, the Comet case in 1976 also started with a preliminary reference. The Member State court asked the CJEU if it violated any provision of Community law if the national court would decline a legal action challenging an administrative act on the basis of Community law, if such legal action was submitted late.

The legal issue concerned the compatibility of fees having equivalent effect with custom duties to be paid on cereal import to Germany to Article 16 of the Treaty on the European Economic Community and to Article 10 of the Council regulation no 234/68.

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[71] more detailed in: FICHERA, Massimo and POLLICINO, Oreste, The Dialectics Between Constitutional Identity and Common Constitutional Traditions. Which Language for Cooperative Constitutionalism in Europe? (April 15, 2019). German Law Journal, 2019, available at SSRN: https://ssrn.com/abstract=3372617; BELVISI, Francesco: The "Common Constitutional Traditions" and the integration of the EU, in: Diritto e Questioni Pubbliche, 6/2006, pp. 21-37, available at: http://www.dirittoequestionipubbliche.org/page/2006_n6/mono_02_Belvisi.pdf; LÁNCOS Petra Lea: A "tagállamok közös alkotmányos hagyományai" mint az európai alkotmányos dialógus sarokkövei, in: PLWP, 2020/09, available at: https://plwp.eu/images/2020/PLWP_2020-09_Lancos.pdf.

[72] SÓLYOM László: Rise and Decline of Constitutional Culture in Hungary, in: von BOGDANDY, Armin - SONNEVEND Pál: Constitutional Crisis in the European Constitutional Area, Hart Publishing, 2015., p. 31.

[73] Case 45/76 [1976] ECR 2043

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Plaintiff asked the Member State court to set off defendant's claim against those payments, which Plaintiff has paid earlier to the defendant as fees having equivalent effect with custom duties and therefore, violating Article 16 of the Treaty on the European Economic Community. The defendant authority argued that Plaintiff did not raise objections within the statutory time limit against the fee. According to the defendant authority, as the statutory time limit has lapsed, Plaintiff cannot challenge the payment obligation any longer. Plaintiff has argued that supremacy of Community law means that Community law will overwrite any decisions violating Community law, and therefore, national courts are obliged to give effect to Community law, namely to protect the rights of plaintiff arising out of Article 16 of the Treaty on the European Economic Community without taking the rules of national civil procedure, especially on statutory limitations into account, since these rules would actually weaken the principle of direct effect.

Consequently, the CJEU has, on the one hand, declared the direct effect of Article 16 of the European Economic Community Treaty. On the other hand, the CJEU has referred to *Article 5* of the Treaty on the European Economic Community (now article 4(3) TEU) which sets out the *principle of sincere co-operation* and on the basis of the principle of sincere co-operation, Member State courts are obliged to give effect to Community law in order to ensure that citizens and various entities can enforce their rights based on the direct effect of Community law. Based on the above, it is the task of the legal system of the Member States to *assign competent national courts* and to determine those procedural rules that shall be applied also for claims of citizens and various entities based on their rights arising out of the direct effect of Community law; provided that such procedural rules provide *equivalent* remedies and do not make the enforcement of rights based on the direct effect of Community law more burdensome than the enforcement of rights based on national law (*national procedural autonomy*). This will, however, not exclude in national civil procedures the enforcement of *statutory limitations* (on the basis of *legal certainty*, in fact) that will be equally binding on the public authorities as well as on the private entities and citizens.

As a result of the above, the CJEU set out its view on the natural procedural autonomy of civil procedure laws within the Member States. According to the CJEU, if a party challenges the decision of a Member State authority on the basis of Community law, even in that case Community law will not limit the Member States to determine the enforceability of such claims on the basis of their own national procedural rules, provided that the enforcement of such claims based on Community law will not be more burdensome than the enforcement of *comparable* claims based on national law.

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7.6 Simmenthal[74]

The Simmenthal decision of the CJEU in 1978 became fundamentally important for the interpretation of the supremacy of Community law. Moreover, the Simmenthal case was also based on a preliminary reference submitted by a national court to the CJEU. The national court has submitted two questions to the CJEU: the first one related to Article 189 of the Treaty on the European Economic Community on direct applicability, namely how direct applicability shall be applied in the case, when there is a conflict between Community law and subsequent national law, namely in such case the Member State court shall simply ignore (*set aside*) the conflicting provision of the Member State law or shall wait until the national Parliament annuls the conflicting national law or shall wait for the decision of the national constitutional court until it will set aside the unconstitutional norm. The second question was that if the national court has to wait for the decision of the national Parliament or the constitutional court to set aside the conflicting national provision, then the rights of citizens will be enforced retroactively and fully?

In its decision the CJEU pointed out that the direct applicability in a specific case means that the Community law has to be applied entirely and in a *uniform* way in all Member States. With respect to this, Community law is a direct source of rights and obligations, in some cases only effecting the Member States and in other cases citizens as well. On the basis of Community law, individuals can become subject to legal relationships. As a result of this, the CJEU have reaffirmed - which it already stated in van Gend en Loos and subsequent decisions - that it is the primary obligation of Member State courts to protect the citizen's rights based on Community law. The legal effect of Community law having supremacy over national law is not just that conflicting national law shall not be applied and has to be ignored (*set aside*), but supremacy also imposes an obligation for the future (*pro futuro*) that any legislation by the Member States should be in compliance with Community law because otherwise Member States would be in conflict with their *unconditional*[75] obligations arising from the Founding Treaties and it would jeopardise the very fundaments of the Community.

Based on the abovementioned facts, the CJEU has confirmed in the Simmenthal decision that every Member State court has to apply the entire Community law and as a consequence, has to enforce those rights which are established by Community law for individuals as well as has to ignore (set

[74] Case C-106/77 [1978] ECR 629

[75] We note that the Lisbon Treaty includes the procedure applicable in case of a Member State would leave the European Union. According to article 50 of the Treaty on the European Union, it is possible to revoke the conferred competences by a Member State by withdrawing from the EU according to the procedure as set out in article 50 TEU and applied in practice in case of the British withdrawal.

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aside) national law if it contradicts with Community law. As a result of this and according to the case law of the CJEU, every national piece of legislation, any decision of national authorities and/or courts which could adversely affect the *effectivity* of Community law by limiting national courts and authorities to set aside conflicting national law would be in conflict with the very essence of Community law. This would be the case according to the CJEU also in case of a conflict between Community law and national law resolving the conflict would be in the discretion of a Member State authority independent from the competent judicial panel in the specific case. This would violate Community law according to the CJEU also in the case if the limitation on the effect of Community law would be only temporary.

Based on the above reasoning, the response of the CJEU in the Simmenthal case to the first question raised by the Member State court was that the Member State court acting within its field of competences, has to ensure the *full* and *effective application of Community law* and has to deny if necessary, the application of conflicting national law. This has to happen without regard to the fact, whether the conflicting national provision is a subsequent piece of legislation to Community law and national courts should not wait for any decision by national Parliaments or constitutional courts regarding annulling the conflicting national law, but on the contrary, national court has to give *immediate precedence* to Community law even in case of a conflict with national law. Regarding the second question, the CJEU set out that since national courts should not wait for any Member State institution or court to set aside conflicting national law, therefore, there will be no delay in the proceeding.

Summary

1. The Member States have restricted their sovereignty by conferring real competences in a well-defined and limited scope on the Community by creating a legal system which is binding on the Member States as much as on their citizens.

2. EU law is a special type of public international law, which created its own separate and autonomous legal order with its own institutions and characteristics, with its own legal personality, being in the same time part of the legal order of the Member States, which national courts and authorities have the duty to apply.

3. The principles of supremacy and direct effect are necessary and logical consequences of the creation of the European Community and are inevitable for the functioning of the Single Market.

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Union law is addressed not only to the Member States but also to its citizens, and these individuals may directly rely upon and refer to its directly effective provisions (if such provisions contain clear and unconditional obligation) before their national courts and authorities. It is the primary responsibility of national courts and authorities to enforce EU law.

4. Pursuant to Article 4(3) TEU, the principle of sincere co-operation also includes the obligation of Member State courts, that they give effect to Union law in order to ensure that citizens and various entities can enforce their rights based on the direct effect of Union law. Member States have to *assign competent national courts* and have to determine *procedural rules* which give *equivalent* remedies and do not make the enforcement of rights based on Union law more burdensome than the enforcement of rights based on national law (*national procedural autonomy*).

5. The CJEU declared, that *validity* of Union law can only be determined on the basis of Union law itself, as it is an autonomous legal system, and it does not depend on national constitutions. Most Constitutional Courts in the Member States however – following the German model - apply the theory of constitutional authorization (*Theorie der verfassungsrechtlichen Ermächtigung*), and claim that the *authorization* for Union law to enter into the national legal system *stems from the national constitutions*, as the authorization by the national constitution makes possible the membership in the EU and the supremacy of EU law within national law, and this standpoint establishes the foundations reservation rights exercised by constitutional courts. Even those Member States which accept the unconditional supremacy of EU law over national constitutions, still consider national constitutions as source of authorisation for EU law. As a result of this, national constitutional courts establish jurisdiction and consider themselves competent to formulate constitutional (fundamental rights, competence based or identity based) reservations and to determine the limits of supremacy and the application of EU law within the Member State establishing a case law, which is considered as a second dimension of the supremacy of Union law.

6. *Common constitutional traditions* are reflected in the common *European constitutional identity* and it is a precondition of *mutual trust*, on which the European Union is based. European constitutional identity and *national constitutional identity* are not competing terms, they rather reinforce each other and, in most cases, - also in case of Hungary - European identity is a part of national identity, which is also a core of national sovereignty.

7. There is a two-way approach of mutual monitoring regarding rule of law and fundamental rights between the EU and the Member States. On the one hand, Member State constitutional courts are

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monitoring the compliance of EU law with the standard of fundamental rights protection provided by their national constitutional framework, monitoring whether democratic legitimacy is safeguarded within the EU, and that the EU does not step beyond its competences (*ultra vires*), and if EU law does not violate national constitutional identity; on the other hand, EU institutions are monitoring the Member States, if they comply with the fundamental rights and the principle of rule of law as set out in Article 2 TEU and in the European Union Fundamental Rights Charter.

8. The European Union has two main legal procedures to enforce the application of fundamental rights and rule of law against the Member States, the first, and most important one is the infringement of EU law proceeding, and the other one is the widely discussed Article 7 procedure. The political implication is major, the practical effectivity of the Article 7 procedure is however limited. The reason of this is, on the one hand, that Article 7 remains a mostly political tool and proceeds without the involvement of the CJEU, and on the other, it is less conclusive, as in its final stage it requires unanimity in the Council to be able to suspend voting rights of alleged abusers of rule of law.

9. To give it full effect, the argumentation of the reverse Solange doctrine could be well extended towards the application before national courts, by arguing, that if the violation of the essential content of fundamental rights, as listed in Article 2 TEU is obvious by the Member State in question and the violation is a *systemic*, *serious* and *persistent* violation of EU law, and is *not remedied adequately* by the Member States, national courts may enforce Article 2 TEU directly.

10. *Constitutional tolerance* is not a one-way concept, it applies to the EU institutions, as well as to Member States, with very different constitutional traditions. At the same time mutual intention for co-operation and respect shall shape the judicial dialogue between the EU and the Member States, therefore the concept of a mutual constitutional tolerance is more timely than ever, within the EU.

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III. GERMANY

1. Introduction

According to German constitutional law[76], the constitution is a fundamental legal framework of public affairs that is composed by the *main organizational principles* of the state and the main state functions and major *decision-making* principles. On the one hand, constitution should symbolize *stability*, so it should be a very stable and long-lasting instrument on the top of the *hierarchy of norms* – thereby also providing a safeguard for the stability of the whole legal system. On the other hand, the main function of the constitution is to *restrict* the governing parties, to restrict the state power, to prevent the *abuse of power*, as well as to provide stability and accountability for the exercise of state power[77]. The constitution should be *flexible enough* to leave room for change as circumstances might change. However, at the same time certain elements should not change over time, and these are safeguarded by the Eternity Clause (*Ewigkeitsklausel*) within the German constitution (*Grundgesetz*[78]). The constitution also represents a *system of values and culture*.

The preamble of the Grundgesetz declares *Europaoffenheit*[79], as a fundamental decision of the constitution[80], the openness of the constitution towards the European integration, German statehood and participation in the European integration is strongly linked to each other. The German constitution has five basic *principles* set out by Article 20 I and Article 28 II of the German constitution, such as *democracy*[81], *rule of law*, *social state*, *federal state*, *republic* (as opposed to autocracy and monarchy).

Rule of law (*Rechtsstaatlichkeit*[82]) is interpreted as *protection of fundamental rights*[83] (basic rights, *Grundrechte*) and limitation of the state power via basic rights. The principle of *proportionality* protects individuals against unproportionate, unnecessary or not appropriate restriction of their basic (fundamental) rights[84]. Efficient judicial protection of basic rights is provided by the *independent*

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[76] Christoph Degenhardt, Staatsrecht I, 23. edition, 2007., C.F. Muller Verlag, Heidelberg
[77] K. Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20. Aufl., 1995, Rn. 2-4, 17, 31
[78] art. 79 III Grundgesetz (GG)
[79] "...als gleichberechtigtes Glied in einem Vereinten Europa dem Frieden der Welt zu dienen..."
[80] see: verfassungsrechtliche Grundentscheidung, in: BVerfGE 73, 339(386) Solange II.
[81] art. 20 I-II GG
[82] art. 28 I, 1 GG
[83] Bodo Piroth, Bernhard Schlink, Staatsrecht II, Grundrechte, 23. Edition, 2007., C.F. Muller Verlag, Heidelberg
[84] art. 20, M. Sachs (publ.): Grundgesetz Kommentar, 2. Aufl., 1999, Rn. 145.; H. Dreier (publ.): Grundgesetz Kommentar, 2. Aufl., 2007, pp. 1-6.; H. Dreier (publ.): Grundgesetz Kommentar, 2. Auflage, 2004, p. 90.; M. Sachs (publ.): Grundgesetz Kommentar, 4. Aufl., 2007, Rn. 145.

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courts[85]. Further characteristics are the principle that government, administration and the courts are bound by law (*Gesetzmassigkeit*[86]), the *share of powers*, *checks and balances* between legislative, executive and judicial powers and the principle of *legal certainty*, *predictability* and prohibition of retroactive effect (*Rückwirkungsverbot*). The concept of rule of law is also interpreted together with the concept of *social state*[87]. Social state involves the obligation for the state to aim social responsibility and public good, that are obligations for the legislator, the administration and also for the judiciary in interpretation and developing the case law. The *Grundgesetz* also contains built-in safeguards against interpreting the *Rechtstaat* in a pure *formal* way[88]. Art. 19 II *Grundgesetz* protects the essential content (*Wesensgehalt*) of basic rights. The *Grundgesetz* also provides the possibility to ask for judicial protection and the protection of the Constitutional Court[89] (*Verfassungsgericht*) against violation of all basic rights by any of the state powers (i.e. legislative, executive, judicial). As a last resort, the Grundgesetz[90] also provides a *resistance right* to every German citizen against arbitrariness by the state. The role of the constitutional court – as being independent from those of the other courts - is important to protect fundamental rights and it has the competence to review the compatibility of the acts of all the main state powers with the *Grundgesetz*, and to interpret, specify and further develop constitutional law. Although the constitutional court only act on the basis of submissions and should be independent from politics, its decisions will have a political effect.

Germany as a federal state has a parliamentary government system[91]. The lower house of the Parliament is the *Bundestag*. The members of the *Bundestag* are directly elected representatives by the citizens. The upper house is the *Bundesrat*, where the members are representatives of the German states (*Lande*). The Bundesrat has an approval right approximately in the case of 60 % of the legislative proposals[92]. The main principle is that the Lande have competences since certain competences are not expressly reserved for the federal level[93] (*Bund*).

The principle of democratic decision-making is safeguarded by Article 20 I-II of the *Grundgesetz* limited to the basic rights of *minorities*[94] and the possibility to ban *unconstitutional parties* or

[85] art. 19 IV, 20 II, 92 ff., 101 ff. GG
[86] art. 20 III GG
[87] art. 28 I. 1. GG
[88] art. 19 I-II. GG
[89] art. 93 I. 4. GG
[90] art. 20 IV. GG
[91] see: art. 91 GG
[92] Herzog, Roman: Aufgaben des Bundesrates, in: J. Isensee/P. Kirchhof (Hrsg.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band 2, 1987, §45 Rn. 8 ff.
[93] art. 30, 70 I, 83-85 GG
[94] art. 18 GG

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associations[95]. Further safeguard is the obligation of the state to provide active guarantees for the pluralism of political opinions.

2. Sovereignty concept and conferral of competences on the European Union

National sovereignty plays central role within the interplay between European Union law and national constitutional law. The definition of national sovereignty means the supreme power of the state over the territory of the state and its citizens. The state power – according to its classic characterization – consists of the legislative, executive and judicial powers. These branches shall exercise a certain control over each other, thereby exercising the principle of checks and balances. During the history, the concept of sovereignty has taken different forms – including pros and contras. For instance, Louise XIV exercised almost unlimited sovereignty internally and externally (also referred as 'total independence') as well, and on military, financial and political levels. Contrary, by the XXth century – partly as a result of two world wars, globalization and emerging global threats – *international co-operation became more important* than preserving full and unlimited national sovereignty. In other words, members of the international community, sovereign states considered international co-operation more important than preserving the traditional concept of completely sovereign and independent nation states.

Is there a conflict between being an independent nation state and being an integral part of the international community? In certain extent the answer will be clearly yes. As sovereign states begin to co-operate at international level, they decide to confer certain parts of national sovereignty on international organizations, whether it is on the level of economic or military cooperation or protection of fundamental rights, it will be in each cases an agreement to coordinate with the other Member States certain aspects of state powers, not to act fully independently, to confer certain competences on international organizations and to exercise jointly those conferred competences with other Member States.

What is the reason of such sovereignty conferral? Why do members of the international community co-operate with each other? There is always a trade-off in such co-operations. Sovereign states, members of the international community decide to exercise certain parts of their national sovereignty, certain competences jointly (or coordinated) with other states in order to achieve certain benefits via international co-operation. Whether those benefits represent a higher level of security (such as the

[95] art. 9 II, 21 II. GG

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membership in the UN United Nations[96], NATO North Atlantic Treaty Organization[97]) or a higher level of welfare (such as the membership in the WTO World Trade Organization[98], EU European Union[99]), they equally are the reasons why sovereign states decide to confer certain parts of their sovereignty for the tangible and intangible benefit of international co-operation in order to achieve a higher level of welfare and security.

Another relevant question is whether conferring competences on international organizations can be considered as a giving up of national sovereignty? Such question is especially justified, when populist parties (e.g. the promoters of BREXIT) were using such arguments in their campaigning against the EU or constitutional challenges against the Lisbon Treaty included such arguments as well. According to some the conferral of competences on international organizations is a giving up of national sovereignty because those competences belonged to the sovereign state, that has previously been exercised independently by state organs, now are transferred to international organizations – that leaves less power for the state than before to exercise competences independently. On the other hand, it need to be taken into consideration, that certain competences can be exercised in a more efficient way on international level and the sovereign state always remains part of exercising those competences, only it will happen jointly with other sovereign states. Therefore, the correct term will be the *joint exercise* of competences. It should also be noted that, - as Brexit has shown and Article 50 TEU declares -, there is always a possibility to withdraw from an international co-operation, that would not be the case in co-operations where (certain parts) of the national sovereignty were fully transferred or given up.

In this context, the competence conferral by the state on the institutions of the European Union constitutes a significant and gradual limitation on national sovereignty. As it is pointed out by the German constitutional court and also in the literature, such sovereignty conferral is limited (to the competences of the EU) and it is revocable, since Article 50 TEU also regulates the possibility of the withdrawal from the EU. The sovereign competences conferred on the EU are also not given up but are jointly exercised together with other Member States under the umbrella of the European Institutions.

[96] Official website: https://www.un.org/en/
[97] Official website: https://www.nato.int/
[98] Official website: https://www.wto.org/
[99] Official website: https://europa.eu/european-union/index_en

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Article 24 of the Grundgesetz describes general competence conferral on international organisations, whereas Article 23 of the Grundgesetz refers to the European integration[100]. The European countries, based on the experience of the first half of the XXth century, concluded that the fundamental values of peace, freedom, democracy, rule of law and social justice need to be safeguarded not only on national state, but at international level as well. *Peter Haberle* is referring to the concept of *cooperative constitutionalism*[101] (*Kooperative Verfassungsstaat*) in this regard by arguing that there is an increasing need for international cooperation in protecting fundamental rights, rule of law and democratic values. In a similar note stated *András Holló*, a former President of the Hungarian Constitutional Court[102], that the main importance of the national constitutional judiciary in the European Union lays not exclusively in the protection of the national values but also in the common protection of the principle of share of powers, and democracy in a common Europe. According to his statement, the common (cooperative) European constitutionalism and democracy, a European constitutional identity pursuant to Article 2 TEU[103] (reinforced by Article 19 TEU) can be safeguarded via the scrutiny of national constitutional courts and through the cooperation of national constitutional courts and the Court of Justice of the European Union. The Grundgesetz, refers to the European integration as a state goal (*Staatsziel*), the European integration became an obligation for the German federal state and the national constitution opens up towards the European integration[104]. Article 24 (1) of the Grundgesetz in its form till the end of 1992 provided a general constitutional empowerment for participation by law in international (inter-governmental) organizations (*zwischenstaatliche Einrichtungen*).

After 1992 art. 24 (1) has been amended with a provision, which allows German territories (Lande) to confer competences on cross-border regional organizations, such as for instance the Saar-Lor-Lux Region, created partly by Saarland in Germany, Lorain in France and Luxemburg (*grenznachbarschaftliche Einrichtungen*) with the consent of the federal government. Such participation can happen via empowerment of the national Parliament (Bundestag) by passing a law on the conferral of certain competences of the state to an inter-governmental organization. It is key

[100] Maunz-Dürig: Grundgesetz Kommentar, Band IV, Art.23-24, Verlag CH Beck, 2003.

[101] Häberle, Peter, Der kooperative Verfassungsstaat, in: Verfassungslehre als Kulturwissenschaft, 2. Auflage 1998.

[102] András Holló, És mi lesz az alkotmánnyal? (in: FUNDAMENTUM, 2004/3. sz.) see more: Jutta Limbach, Die Kooperation der Gerichte in der zukünftigen Grundrechtsarchitektur (http://www.rewi.hu-berlin.de/WHI/deutsch/fce/fce700/limbach.htm)

[103] The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. (Art. 2. TEU)

[104] K. Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20. Aufl., 1995, Rn. 111

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that the competences conferred on the EU are competences related to the three main branches of the state, the legislative, the executive and the judicial.

It is also important to clarify that the *conferral* of competences is *not* an actual *transfer* of competences, since the state did *not resign* from those competences, but it will *jointly exercise* those competences together with the other Member States (1) and it is possible to *withdraw* from the European integration (2), therefore, it cannot be said that those would be irrevocable competences. Such clause was not present in the previous constitutions and it served as the purpose to provide a legal basis for the participation of Germany in various international organizations. This clause has been used to participate in the European Integration at the time of its establishment and to allow Community law to gain effect within Germany. Art. 24 (1) served as a breach for Community law integrated into the German law, so with other words, it opened up German law for Community law.

After the Maastricht Treaty a special European Integration clause, Article 23 (1), has been inserted into the *Grundgesetz*, specifically giving *constitutional empowerment* for the participation of Germany within the European integration. The relationship between Article 23 (1) to Article 24 is *lex specialis to legi generali*, therefore art. 23[105] sets out the special conditions of the membership of Germany to the EU and declares the European integration as an overall state goal. Article 23 also includes certain *purposes of the European integration*, that were later interpreted by the courts, particularly the Constitutional Court of Germany, as *limitations* on the European Integration (*Integrationsschranken).*

3. The requirement of democratic legitimacy

The constitution sets out that sovereignty is vested to the people. The citizens are the main sources of the state's sovereignty. Therefore, it is important to ensure the proper democratic control *(democratic legitimacy) of the conferred competences* even after they were conferred on the Union. This is the reason why the German constitutional court has pointed out several times the democratic deficit within the European Integration and has cautioned the German government to maintain and increase the level of democratic legitimacy during further steps of the European integration.

In a historical perspective, since the European Parliament has become directly elected in 1979, the role of the directly elected European Parliament has considerably increased, thereby increasing the democratic legitimacy of EU legislation. It remains still a source of democratic deficit, however, that

[105] Jarass, Hans D. - Piroth, Bodo: Grundgesetz Kommentar (4. Aufl.), C.H. Beck, 1997., pp. 494-525.

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the citizens' general interest towards the European Parliament elections is gradually decreasing or at least its changing from time to time. Another way of increasing democratic legitimacy was the stronger involvement of national Parliaments in the European Union decision-making by strengthening the competences of the European Parliament. Further step by the Lisbon Treaty in increasing democratic legitimacy of EU decision-making was, the involvement of national Parliaments in the decision-making of the European Union. Through this, the EU managed to increase democratic legitimacy within the EU decision-making, although such involvement of national Parliaments is by far limited to notification rights in those cases where the subsidiarity principle[106] is applied.

The democratic control also plays a key role both at federal and at state levels in the Federal Republic of Germany. Towards the European integration not only the federal Parliament (*Bundestag*) has to be able to exercise democratic control, but also the local / state Parliaments and the *Bundesrat*. At this regional / state level the Article 23-24 of the Constitution provides the legal framework for the involvement of the Bundesrat and the regional Parliaments in the control towards European Integration. This is a constitutional requirement within Germany as well as the principle that *federal and basic structure of the state* cannot be affected by EU law, thereby providing a limitation (*Integrationsschranken*) towards the European integration and sovereignty conferral.

4. The dual character of the Rule of Law Principle

According to the German constitutional court, beyond increasing democratic legitimacy of EU decision making, it is equally important to keep the principles and level of the rule of law as well as the fundamental rights protection maintained during the conferral of competences on the European Union. The German constitution in its Eternity Clause (*Ewigkeitsklausel*) provides to certain fundamental (basic) rights and to other constitutional provisions an unchangeable character, which therefore are *unamendable* even in connection with the European Integration. Therefore these constitutional provisions clearly serve as a limit for the European Integration and a double safeguard for the principle of rule of law as well.

5. Level of the Protection of Fundamental Rights

The following chapter provides an overview regarding the Constitutional adjudication in Germany regarding the reception and reflection on the principle of supremacy. A significant part of these cases,

[106] From the aspect of national and EU sovereignty point of view, in a critical approach: MacCormick, Neil, Questioning Sovereignty, Oxford, 1999.

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for instance the Solange I and Solange II decisions, the Mangold-Honeywell decision, just to mention a few examples, are clear demonstrations of how the interaction and dialogue between the German FCC and the CJEU has developed in the fundamental rights area in the past decades. In the area of fundamental rights protection, currently there is a three layers of protection, as the ECHR and the EU Fundamental Rights Charter provide two additional levels of protection above the protection provided by the national constitution. Whereas in the Solange I decision, the FCC started to look with reservations and with scrutiny towards the (lack of) inherent fundamental rights protection within the Community, in the Mangold case[107], it seems to be already in the other way around, and the CJEU is looking with suspicion and scrutiny towards the protection of fundamental rights in Germany and comes to a different conclusion, than German courts.

6. Constitutional adjudication

The Federal Constitutional Court interpreting Article 23 of the Grundgesetz, have defined certain limitations on the sovereignty conferral on the EU. Such limitations or conditions (conditional conferral of competences) has to be applied by national courts and authorities that are in the first line *entitled*, or more precisely *obliged* to the task to enforce EU law. Such conditions are *express conditions* listed in Article 23, namely as *democracy, rule of law, social and federal state, subsidiarity and comparable fundamental right protection*. These conditions overlap by those, *implied conditions* [108] , which were developed by the case law of the federal constitutional court (*Bundesverfassungsgericht*), derived from the identity (*Verfassunsgidentitaet*) of the *Grundgesetz*, such as conditions listed in the *eternity clause* of the *Grundgesetz* and *federal structure of the state*, *democracy, rule of law, protection of fundamental rights* (*Grundrechtschutz*), *human dignity* (*Menschenwürde*). These conditions are related to the *basic structure* [109] *and identity* of the constitution according to the federal constitutional court. It should also be noted however, that the concept of constitutional identity, has been developed in German constitutional law, earlier than the Grundgesetz entered into force, and the concept mainly served as a barrier against unconstitutional amendments to the constitution[110]. Such application of the concept of constitutional identity could be considered by other constitutional courts as well.

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[107] C-144/04, Mangold
[108] BverfGE 37, s. 271 (279).
[109] BverfGE 73, s. 339 (375 f.), BverfGE 58, S. 1 (40)
[110] Polzin, Monika: Constitutional identity, unconstitutional amendments and the idea of constituent power: the development of the doctrine of constitutional identity in German constitutional law, International Journal of Constitutional Law, 14 (2016), pp. 411-.

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The supremacy and autonomy of the Community legal system has been acknowledged by the federal constitutional court[111], however, it was not accepted without *reservations*. The Federal Constitutional Court pointed out, that it does not have a competence to exercise constitutional review over EU norms, therefore, it had to reject a submission related to the review of an EU regulation[112]. In another decision, the Federal Constitutional Court pointed out, that it is the duty of ordinary courts (and not the Federal Constitutional Court) to review the compatibility of domestic law with EU law and to set aside conflicting domestic law, if necessary[113]. According to the case law of the federal constitutional court – certain basic structural principles, especially fundamental rights protection[114] can serve as a basis for the federal constitutional court to review the compatibility of Community law with the *Grundgesetz*. The federal constitutional court following 1986 withdraw from this position and held, that as long as the general level of fundamental rights protection is appropriate on Community level, they are not monitoring Community law, if it is compatible with the Grundgesetz[115]. However if this would change, and there would be a systemic decrease in the general level of fundamental rights protection, the FCC would reserve the right to monitor again the compliance of Union law with the Grundgesetz. The Maastricht decision of the Federal Constitutional Court caused further uncertainties as the constitutional court declared that it reserves the right to monitor whether EU law is not extending beyond the competences conferred upon the EU by the Member States. According to the Federal Constitutional Court, EU legislation that goes beyond the competences conferred on the EU (*ultra vires*) or acts of EU institutions which go beyond their competences – is not applicable within Germany and German courts and authorities are not allowed to apply those pieces of Community law or acts of EU institutions because of the prohibition of German constitutional law.

6.1 Solange I decision of the German constitutional court[116]

The Solange I decision served as a first point of conflict between the Community legal order and national constitutional law. The German constitutional court (`*Bundesverfassungsgericht'*) declared that until there is acceptable and with the German level of fundamental rights protection comparable level of fundamental rights protection within the European Community and there is no fundamental rights charter whatsoever within the Community, it will **reserve** the right to monitor the European

[111] BverfGE 22, s. 293 (296) 1 BvR 248/63, 216/67 and BverfGE 31, S. 145 (174) 2 BvR 255/69
[112] BverfGE 22, s. 293 (296) 1 BvR 248/63, 216/67 – EEC regulations
[113] BverfGE 31, s. 145 (174) 2 BvR 255/69 - Milkpowder
[114] BverfGE 37, s 271 (279) – Solange I, BverfGE 58, S. 1 (40) - Eurocontrol
[115] BverfGE 73, s. 339 (387) – Solange II.
[116] Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratstelle für Getreide und Futtermittel (Solange I, 2 BvL 52/71, 29 May 1974, 37 BverfGE s. 271)

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Community law whether it is in compliance with the level of fundamental rights protection of the German constitution. Those provisions of Community law which are not in compliance with the level of fundamental rights protection provided by the German constitution will not be applied in the territory of Germany because their application would be unconstitutional – according to the argument of the German constitutional court.

The above decision of the German constitutional court is one of the most cited and renowned in the literature. The main argument what critics stressed is that the German constitutional court had no jurisdiction to make such a decision that would scrutinize Community law from the point of view of the national constitution, as these kinds of judicial competences (constitutional judiciary included) were conferred by the Founding Treaties on the European Community (the CJEU should exercise it). Community law has precedence even over national constitutions according to the case law of the CJEU and pursuant to Article 19(1) TEU only the CJEU can interpret EU law with *erga omnes* effect. Other critical observation highlights that there was no doubt that the Community does have a fundamental rights protection and there is an appropriate fundamental rights protection within the European Community. As the CJEU has pointed out in multiple decisions[117], the *fundamental rights protection* is one of the basic principles of EU law as well as the common constitutional framework of the Member States and the international human rights treaties, especially the European Charter of Fundamental Rights (in 1950), which the Member States are parties serve together as a common Community fundamental rights standard, which the CJEU applies[118].

Pursuant to the argument of the constitutional court, Article 24 of the German constitution empowers the constitutional court to interpret the constitutional limitations with regard the competence conferral on the Community from national constitutional law point of view. As it has been pointed out above Article 24 GG served as a general clause to *authorize* the Bundestag to confer competences on international originations (*internationale oder zwischenstaatliche Einrichtungen*). However, such competence conferral is not unlimited, since the legislator is bound by Article 73 of the German constitution, which makes Article 1-20 *unamendable*, and thereby even EU law can not have supremacy over them. In other words, the Bundestag cannot confer more competences on the European Community than what itself has (*nemo plus iuris ad alium transferre potest quam ipse*

[117] Nold and other v Commission of the European Communities, Case 4/73, 14 May 1974, ECR 491 and Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratstelle für Getreide und Futtermittel, Case 11/70 [1970] ECR 1125

[118] Confirmed among others in Johnston v Chief Constable of the Royal Ulster Constabulary, Case 222/84, 15 May 1986, ECR 1651 and later by Article F(2) of Title I of the Maastricht Treaty.

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habet)[119]. Such limitation, according to the German constitutional court, gives the constitutional court the obligation to ensure that Community law will not go against those limitations enshrined in the German constitution. This untouchable core of the constitution (*unantastbare Verfassungskern*) is the actual constitutional identity (*Verfassungsidentitaet*) in the interpretation of the German constitutional court, and it can in fact impose actual limitations on the competence conferral and the exercise of Union competences. However, according to the Solange II decision, as said earlier, the FCC would only apply such reservation right with regard Community law, if there would be a systemic decrease of the level of fundamental rights protection within the Community.

According to the German Constitutional Court, the above mentioned an *untouchable core* of the *Grundgesetz*, which consists of the unamendable principles of rule of law, democracy, federal structure of the state, fundamental rights, those principles and fundamental rights which are protected by the above cited article 73 of Grundgesetz. Above this untouchable core, the European Institutions does not have a competence and therefore the constitutional court cannot acknowledge an unconditional precedence of Community law over this untouchable core of the Grundgesetz.

What critics of the Solange I decision also mention is that even if the German constitution (*Grundgesetz*) builds in certain limitations with regard to the sovereignty conferral on the EU by the constitution, still the main principle is the above mentioned *openness* of the constitution towards the European integration (*Integrationsoffenheit*).

According to the well-established case law of the Court of Justice of the European Union and pursuant to Article 19(1) of TEU, only the CJEU is entitled to interpret Community law with *erga omnes* effect. The monitoring of EU law whether it is in compliance with the fundamental rights charter of the German constitution would require the interpretation of Community law in a way which would measure its compliance with national fundamental rights standards. Therefore, it clearly falls under the competence of the Court of Justice and it falls outside the competence of the Member State judiciary.

6.2 Solange II decision[120]

[119] It should be noted, that although the Hungarian Fundamental Law does not include such unamendable clauses, like art. 73 GG, but still in the literature exists the above referred „*nemo plus iuris*" principle as a limit on sovereignty conferral on the EU, such as noted by Sonnevend – Csuhány in the 2009 Commentary on the Hungarian Constitution (Csuhány-Sonnevend: 2/A (European Union) in: Jakab András (ed.): Commentary of the Constitution (Az Alkotmány kommentárja), Budapest, Századvég, 2009.

[120] Wünsche Handelsgesellschaft (Solange II, 2 BvR 197/83, 22 October 1986, 73 BverfGE s. 339)

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The so-called Solange II decision has made an important step forward from the earlier, rather sceptical tendency, towards a more co-operative approach with Community law and with the Court of Justice. In the Solange II decision the German constitutional court have acknowledged first and foremost the positive trends in the case law of the Court of Justice with the aim of maintaining a generally high-level fundamental rights protection within the European Community and of binding its jurisdiction to the 1950 European Convention on Human Rights and the case law of the European Court on Human Rights in Strasbourg and common fundamental rights traditions of the Member States of the European Community. Such developments were already reflected for instance in the Stauder[121] (1969) and Internationale Handelsgesellschaft[122] (1970) decisions of the CJEU, but most importantly, the joint declaration on fundamental rights by the European Parliament, the Council and the European Commission in April 5, 1977[123] had a significance.

Based on these positive trends, the German constitutional court declared that it is not going to monitor Community law whether it is in compliance with the fundamental rights as protected by the German constitution until the essential content of fundamental rights is generally safeguarded by the Community, and there is a *generally sufficient-level of fundamental rights protection* maintained within the Community, which is *substantially equal with the level of protection provided by the Grundgesetz*. It will only monitor Community law for its compliance with the German constitution, if there is a general, systemic decline to be manifested within Community law with regard the protection of fundamental rights.

The above approach – according to the critics of the earlier Solange decision – is also more in line with the German constitution, which would only allow for the application of the limitations built in the German constitution for the European Integration (*Integrationsschranken*) if a general, systemic error of application of fundamental rights would take place on European Community level. It is also important to refer here to the *Philip Morris decision*[124] of the German constitutional court, where the constitutional court has held that first an EC directive if suspected that it infringes fundamental rights, need to be challenged before the CJEU and *only if there was no sufficient protection provided by the CJEU*, than can the implementing national legislation challenged before the constitutional court. It

[121] Case C-29/69 Stauder v Stadt Ulm (1969) ECR 419.
[122] Case C-11/70 Internationale Handelsgesellschaft (1970) ECR 1125.
[123] Joint declaration concerning the protection of fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1977) OJ C103/1.
[124] 2 BvQ 3/89, Philip Morris and Others, dated 12 May 1989.

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should also be noted, that in its 2015 EAW decision, the German constitutional court seemed to be differing from its earlier case law in Solange II, as in the framework of its identity review[125], the constitutional court held, that it would violate Article 1 Grundgesetz, the fundamental right to human dignity, if under the EAW a person would be surrendered to a Member State, where there is no effective remedy available against a judicial decision, which was made in his absence.

6.3 Maastricht decision[126]

In its decision, regarding the constitutionality of the Maastricht Treaty, the German Federal Constitutional Court declared that there can be constitutional concerns with regard the application of Community law if it steps beyond the conferred competences by the Member States, especially, if the EU Institutions tend to interpret EU competences extensively. It is particularly true regarding the Court of Justice trying to extend or go beyond those competences conferred on it by the Member States. This question is a '*Kompetenz – Kompetenz'* question between the EU and the Member States, namely that who has the competence to define the competences and the appropriate exercise of competences conferred by the Member States on the EU? The Member States or the EU? Looking into this question from *different perspectives*, we will have *different answers*.

The constitutional court declared that it will reserve the right to monitor European Union law whether it is in compliance with the competences of the Union, conferred by the Member States in the Founding Treaties. Provided that the European Union law or any act of the European Institutions would go beyond (***ultra vires***) the competences conferred on them by the Member States in the Founding Treaties, the constitutional court reserves the right not to apply those acts which have been issued without having proper competence basis in the Founding Treaties. Consequently, national courts and authorities will be also prohibited to apply any legal acts, which have been issued without a proper competence basis – being such act unconstitutional. (Although in these cases it could be a much more EU friendly approach to send a preliminary reference to the CJEU with regard the ultra vires act (*Ausbrechender Rechtsakt*))[127].

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[125] A comparative overview of the concept: van der Schyff, Gerhard: EU Member State constitutional identity: a comparison of Germany and the Netherlands as polar opposites, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 76 (2016), pp.167–170.

[126] Maastricht Treaty Constitutionality Case, BverfGE 89,155 2 BvR 2134, 2159/92

[127] In more detail about preliminary references by the GCC, in: Lohse, Eva-Julia: The German Constitutional Court and Preliminary References – Still a Match not Made in Heaven? In: 16 German Law Journal, pp. 1491-et seq., 2015.

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In the same decision the constitutional court has declared that the Maastricht Treaty cannot and will not take away national sovereignty, as a whole. The constitutional court did not set a definite line, where the European Integration can go and not beyond, but it has emphasized the importance of the approval by the national Parliament with regard the decisions related to the European Integration.

Critics of the decision – similar to the Solange case – said that the constitutional court did not have a competence to monitor EU law whether it is in compliance with the competences conferred on the EU by the Member States, because pursuant to Article 19(1) of TEU, only the European Court of Justice has the competence to interpret the Founding Treaties with *erga omnes* effect, and therefore, the provisions related to the competences as well. Furthermore, the *judicial competences related to the interpretation of the Founding Treaties* have been *conferred* on the European Union by the Member States and the CJEU interpretation is autonomous[128], independent from how Member States interpret EU law. Therefore, the national constitutional court does not have a competence in this regard. However, we note, that the CJEU does monitor in a systemic way the interpretation of the national constitutions by the national constitutional courts, as the CJEU should accept the interpretation of constitutional courts with regard the national constitutions as binding and authentic.

The German constitutional court, however, pointed out, that the competence conferral on the EU has happened via the national constitution and via an international agreement. Therefore, the constitutional court does have a competence to interpret the respective provisions of the Grundgesetz and the international agreement to determine, whether the EU is not legislating beyond those competences conferred on it via the Member State's constitution.

According to the literature, the constitutional court shall not have a competence to declare individual acts of EU law to be *ultra vires* beyond the competences conferred on the EU by the Member States. Rather, it has the competence only to declare ultra vires certain acts of EU law if there is a general, systemic trend that EU law goes beyond the competences conferred on it via the Member States.

6.4 Bananenmarkt decision[129]

[128] For instance with regard the autonomous interpretation of the CJEU concerning the notion of retroactive effect (Paul Craig, Grainne de Búrca, EU Law, Texts, Cases and Materials, Oxford, Oxford University Press, 2003, p. 381.) or concerning the notion of „Court" in the context of the preliminary ruling pursuant to Art. 267 TFEU

[129] BverfGE 102,147 2 BvL 1/97

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Followed the Maastricht decision, courts in Germany raised the question whether they need to monitor and ignore acts of EU law which go beyond the competences of the EU? The background of the Bananenmarkt decision was a State Aid decision of the European Commission declaring certain aid to be re-paid. This decision has been declared enforceable by an administrative court in Germany and the case was referred to the constitutional court.

The constitutional court has denied to have the competence to decide in this matter, because – as the ruling pointed out – domestic court may only refer to the *non-applicability of an EU act on the basis of unconstitutionality and a breach of fundamental rights*, if the courts are also able to show that there is a *systemic derogation of fundamental rights protection* within the EU according to the standard set by the Solange II decision of the Federal Constitutional Court and therefore it would not be possible to seek remedy on the basis of EU law against a violation of a fundamental rights.

6.5 Lisbon decision[130]

Within the Lisbon decision, some Members of the German Parliament (*Bundestag*) have challenged the constitutionality of the Lisbon Treaty before the Federal Constitutional Court. The petitioners argued in the submission that the Lisbon decision has a major negative impact on national sovereignty, because it confers significantly broader competences on the EU and it has an ambiguous formulation of competences that will allow for the European Institutions to extend those competences against the Member States.

The German Federal Constitutional Court had a different view than the applicants on the impact of the Lisbon Treaty on national sovereignty. The Federal Constitutional Court pointed out, that the Lisbon Treaty instead of setting ambiguous competences has, on the contrary, clarified competences compared to the earlier formulation and now the list of exclusive and shared competences became clearer. The Federal Constitutional Court also pointed out that the Lisbon Treaty made positive steps towards increasing the democratic control over decision-making within the EU through increasing the role of the European Parliament through enabling the European Parliament in becoming co-legislator next to the Council and by the involvement of the national Parliaments in the decision-making procedure of the EU. The constitutional court emphasized the importance of the acceptance of the Fundamental Rights Charter of the EU as a primary law and that it became part of the Treaty on the Functioning of the European Union. The EU Fundamental Rights Charter further increased the

[130] BverfGE 123,267 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09

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level of fundamental rights protection within the EU, as well as the fact that the EU will enter the European Convention on Human Rights (1950) and will also formally accept the jurisdiction of the European Court on Human Rights in Strasbourg.

Beyond the above provisions, the Lisbon decision had important conclusions by re-introducing the term of *constitutional identity*[131]. The constitutional court has emphasized the high importance of constitutional identity as a reference to the core fundamental values (inviolable core content) of the constitution, the *unamendable* provisions of the constitution. It brings together the basic constitutional and federal structures of the state, the principle of democracy, rule of law, proportionality are the fundamental provisions of the constitution that cannot be violated by the sovereignty conferral on the EU and which cannot be overwritten by EU law**.** As equality of member States before the Treaties and their national identities (political and constitutional) are recognized by Art. 4(2) TEU, the German Constitutional Court held, that its identity review is necessary to safeguard national constitutional identity, because the *guarantee of national constitutional identity goes hand in hand under national constitutional law and under EU law*, as stated in paragraphs 240 and 332 of the Lisbon decision of the German Constitutional Court.

It follows from the above, that in case of a conflict between national constitutional identity and secondary EU law, Member States could find a remedy in applying the *annulment action* under Article 263 TFEU, on the basis that the fundamental rights and principles protected by national constitutional identity, are protected by Article 2 and 4(2) TEU as well. The *Taricco* case[132] provides an example, how the CJEU have accepted, that the constitutional considerations raised by the Italian Constitutional Court in this case, related to the statute of limitations and *nulla crimen sine lege*, is a part of European constitutional identity, common constitutional traditions, therefore the same fundamental rights and constitutional values are protected from both sides of the national (Italian) constitutional law and EU law.

[131] Other constitutional courts have also dealt with the concept of constitutional identity, for instance: the Hungarian Constitutional Court in its decision nr. 22/2016, the Belgian Constitutional Court in its decision no. 62/2016, or the French Constitutional Council a decade earlier in its decision no. 540/2005.

[132] C-105/14, Criminal Proceeding against Ivo Taricco (Taricco I) and C-42/17 M.B and M.A.S. (Taricco II) and decision by the Italian Constitutional Court nr. 269/2017, which was just the third time, when the Italian Constitutional Court has submitted a preliminary reference to the CJEU.

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As Advocate General Maduro pointed out in the Marrosu v Sardino[133] case, the constitutional identity, which is defined by the national constitutional courts, shall be respected by the CJEU. However, an important way of *peaceful co-existence*[134] and cooperation can be, if both sides apply the principle of *constitutional tolerance*[135] and pursuant to Article 4(3) TEU *duty of sincere cooperation* in a way, that the CJEU show understanding, that Member State constitutional courts have a duty to interpret the national constitution with an *erga omnes* effect and the CJEU accepts that interpretation of national constitutional courts. We can also state, that conclusions from the CJEU, that national constitutional considerations do not matter during the application of EU law, such as pointed out in the *Melloni* judgment[136] for instance does not help the dialogue. On a similar note, constitutional courts shall accept that pursuant to Article 19(1) TEU, it is the CJEU which has the role to interpret EU law with an *erga omness* effect, and decisions from constitutional courts such as the *Landtová*[137] or *PSPP* ruling[138] will not help the judicial dialogue either on European level - instead sending a preliminary reference to the CJEU and engaging in constant and if necessary repeated dialogue, could advance the judicial cooperation between the European and national level.

Christian Calliess pointed out[139] that on practical terms, constitutional identity also intends to ensure that there remains some room for manoeuvre for a Member State on political level in order *to determine its own economic, cultural and social conditions.*

Koen Lenaerts and *Nathan Cambien*[140] have stated that the Lisbon Treaty was clearly a step in the right direction, by bringing the EU closer to its' citizens, by giving greater weight in EU decision-making to both the European Parliament and to the national Parliaments. It results in introducing the citizens` initiative and in an increased level of protection for fundamental rights within the Union.

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[133] C-53/04 and 180/04, Marrosu and Sardino, on a similar note AG Cruz-Villalon in Gauweiler: of 14 January 2015, Case C- 62/14, Gauweiler ECLI:EU:C:2015:400, para. 53-65. In ultra vires cases the reviewing criteria would be very similar for the national constitutional court as well as for the CJEU. The AG added, that both the CJEU and the national constitutional court should show great cooperation and continue to judicial dialogue as long as it is required (see: in the above Tricco saga for instance).

[134] Udo di Fabio: Friedliche Koexistenz (in: Frankfurter Allgemeine Zeitung, 2010.10.20) http://www.faz.net/aktuell/politik/staat-und-recht/gastbeitrag-friedliche-koexistenz-11057029.html

[135] J. Weiler, The Community System: The Dual Character of Supranationalism (1981) 1 Yearbook of European Law, pp. 267-306.

[136] By indicating, that national constitutional considerations are not relevant in terms of enforcing EU law within the Member States.

[137] As a reaction to the C-399/09 Landtová decision by the CJEU, the Czech Constitutional Court declared an EU act ultra vires, in its Judgment of 31 January 2012, Pl. .S 5/12 Holubec.

[138] Judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15

[139] Christian Calliess, The future of the Euro-zone and the role of the German Constitutional Court, in: College of Europe Research Paper in Law, 5/2012.

[140] Koen Lenaerts and Nathan Cambien: The Democratic legitimacy of the EU after the Treaty of Lisbon, in: Jan Wouters, Luc Verhey and Philipp KKiiver (eds.), European constitutionalism beyond Lisbon, 2009 Intersentia

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Violeta Besirevic pointed out[141] that the Lisbon Treaty has improved the democratic credentials of the EU, by the fact that national Parliaments could exercise a more efficient control over the adoption of some EU acts.

The German Lisbon decision alike, constitutional courts in various EU Member States have issued similar decisions. These decisions had fundamentally similar arguments and conclusions in France[142], Austria[143], Poland[144], Hungary[145], Latvia[146] and other Member States too, however significantly different in the Czech Republik[147].
Sadurski referred to the *recurrence of the Solange story* in case of the CEE countries[148], joined following 2004, as a *natural phenomenon*, being difficult to accept the new limitations of their newly found national sovereignty. In a similar tone says *Juncker*, that the current rule of law problems, manifested most recently in the Article 7 proceedings against Poland and Hungary will be not be problems in a few years time, because those *countries need time to internalize the fact, that rule of law is one of the fundamental building blocks[149]*.

6.6 Honeywell decision[150]

Two years later in the frame of the Honeywell decision, the German constitutional court – according to some critics[151] - had made a U-turn in its earlier developed case law. Compared to the former decisions made, namely Solange I, Maastricht and even Lisbon decisions, in the frame of the

[141] Violeta Besirevic, The constitution in the European Union, the state of affairs, in: Alexandre Dupeyrix and Gerard Raulet (eds.), European Constitutionalism, historical and contemporary perspectives, 2014, P.I.E. Peter Lang SA
[142]French CC, Case 2007-560 DC Treaty of Lisbon, decision of 20 Dec. 2007.
[143]Austrian CC, Case SV 2/08-3 et al. Treaty of Lisbon I, order of 30 Sept. 2008. and Austrian CC, Case SV 1/10-9 Treaty of Lisbon II, order of 12 June 2010
[144] Polish CT, Case K 32/09 Treaty of Lisbon, judgment of 24 Nov. 2010.
[145] Hungarian CC, Case 143/2010 (VII. 14.) Treaty of Lisbon, judgment of 14 July 2010.
[146]Latvian CC, Case 2008-35-01 Lisbon decision, dated 7 April 2009, English translation is available at www.satv.tiesa.gov.lv/upload/judg_2008_35.htm
[147]Czech CC, Pl .S 19/08 Lisbon I decision, dated 26 Nov. 2008, English translation is available at http://angl.concourt.cz/angl_verze/doc/pl-19-08.php , Pl. US 29/09 Lisbon II decision, dated 3 November 2009. See also an analysis on the case by Bříza, Petr, 5 EuConst (2009) pp. 143-164.; Kramer, R.U., Looking through Different Glasses at the Lisbon Treaty: The German Constitutional Court and the Czech Constitutional Court, in Fischer-Lescano, A. et al. (eds.) 'The German Constitutional Court's Lisbon Ruling: Legal and Political Science Perspectives', ZERP-Diskussionspapier 1/2010 (Universitat Bremen 2010) pp. 11-. a comparative view of the first Lisbon decision of the Czech Constitutional Court with the Lisbon decision of the of the German Federal Constitutional Court
[148] Sadurski, Wojciech: Constitutionalism and the enlargement of Europe, Oxford University Press, 2012., p. 47 et seq.
[149] Laura Greenhalgf: Jean-Claude Juncker: Viktor Orban has always been a hero – Commission president defends Brussels policies on Central Europe amid rule-of-law proceedings against Hungary and Poland, POLITICO
[150] BverfGE 126,286 2 BvR 2661/06
[151] Benedikt Forschner: Europarecht und nationale Rechtsordnung: „Mangold" in geklärtem dogmatischem Kontext, ZJS 6/2011, 456; Gerken/Rieble/Roth/Stein/Streinz„Mangold" als ausbrechender Rechtsakt, 2009, pp. 19 et seq; Preis: Verbot der Altersdiskriminierung als Gemeinschaftsgrundrecht - Der Fall „Mangold" und die Folgen, in NZA 2006, 401 (402); Herzog/ Gerken: Stoppt den Europäischen Gerichtshof FAZ v. 8.9.2008, Nr. 210, p. 8

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Honeywell decision the constitutional court has made reference to positive developments, such as the European Parliament became a co-legislative institution, the EU Fundamental Rights Charter became primary law, national Parliaments became involved in the decision making process, and the competences were clarified – that made positive steps further from national constitutional law point of view.

Based on these positive tendencies, the perception of the constitutional court was that there is no justified reason to maintain that renowned former, rather sceptical approach towards the European integration, which manifested in the self-created reservation right of the constitutional court in the field of fundamental rights towards EU law (‘*Reservevorbehalt’*) or the case law related to the non-application of EU acts that goes beyond the competences (*ultra vires*) – according to the view of the constitutional court – conferred on it via the Member States.

The decision has raised several concerns in the literature. For instance, *Rudolf Streinz*, *Thorsten Stein* and others[152] have agreed in posing a joint critical position regarding the Honeywell decision by arguing that “raising the white flag in Karlsruhe” is not necessarily a wise decision in the long run because it is uncertain which direction the EU is going to turn to and equally, which direction the case law of the CJEU is going to take. Therefore, it seems to be a better approach to keep a cautious but rather co-operative stance towards the application of the EU law within the Member State.

Justice *Udo diFabio*, the rapporteur judge of the renowned Honeywell decision, have argued in a speech delivered at Humboldt University, and published later on in the opinion page of the *Frankfurter Allgemeine Zeitung* (FAZ) that the future of the European Integration should be based on mutual co-operation and respect and definitely *not confrontation*. His argumentation mirrors a former concept delivered by *Joseph Weiler* on *constitutional tolerance* – although from a different angle. *Weiler* is arguing that there is such a difference between the various constitutional traditions among the Member States, that the EU Institutions, particularly the Court of Justice, shall be rather tolerant towards the Member States when it comes to the enforcement of EU law. On the other hand, the concept of *co-operative constitutionalism* by *Peter Haberle* pointed to the importance of co-operation among the independent, sovereign States, members of the international community and conferral of sovereignty on international organisation in order to achieve a higher level of security, human rights protection and welfare. Furthermore, this should serve as the purpose of the European

[152] Gerken/Rieble/Roth/Stein/Streinz„Mangold“ als ausbrechender Rechtsakt, 2009, pp. 19 et seq; Preis: Verbot der Altersdiskriminierung als Gemeinschaftsgrundrecht - Der Fall „Mangold” und die Folgen, in NZA 2006, 401 (402); Herzog/ Gerken: Stoppt den Europäischen Gerichtshof FAZ v. 8.9.2008, Nr. 210, p. 8.

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integration. However, protecting these shared values, it is more efficient to co-operate at international level.

Compared to this former case law, the Honeywell decision was fundamental in terms of retreating from its' previous sceptical tendencies. The strong critics are partly justified and later case law of the constitutional court show that it is still considering its major task to provide a constitutional control – to a great extent – towards EU law and towards the participation of Germany within the European integration.

6.7 European financial assistance decisions[153]

The German constitutional court passed its first decision about the European Financial Stability Framework (EFSF[154]) in 2011[155], about the European Stability Mechanism (ESM) in 2012[156] and the second decision in 2014[157]. About the Outright Monetary Transactions (OMT)[158] in 2016 and about the Public Sector Purchase Program (PSPP)[159] in 2020. The main guiding principles evaluated throughout the decisions related to the ECB are however similar.

In the EFSF and ESM decisions the constitutional court has emphasized, that it is a constitutional requirement - when Germany participates in the financial rescue of financially distressed EU Member States - to ensure the *actual control of the Parliament* (Bundestag) about budgetary matters, that the Parliament participates in any decisions related to the further involvement of Germany in the financial rescue efforts of the euro zone including troubled banks and monetary transfer to the European financial rescue funds. The constitutional court pointed out, that the *budgetary autonomy* of the Parliament and its *informed prior consent* and *permanent control* regarding Germany's participation in rescue packages (or the increase of such involvement) need to be safeguarded.
Regarding the spending of rescue funds, the constitutional court stressed, that *parliamentary control* needs to be maintained on the spending of funds. Enough time has to be given to the Parliament to discuss, challenge and approve the proposed financial stability package in order to be able to deliver

[153] EFSF (2011), ESM Treaty (2012 and 2014) and OMT (2016), PSPP (2020) judgments
[154] The EFSF is a temporary crisis resolution mechanism, which was created in 2010, and provided financial rescue funds for Greece, Ireland and Portugal and was financed through issuing EFSF bonds and its role was overtaken by the ESM in 2012, which is an international organization in Luxemburg, created to support crisis hit Member States in the euro-zone and provide a euro rescue package in the form of loans and guarantees.
[155] BVerfG, 2 BvR 987/10, 1485/10, 1099/10 7 September 2011 - EFSF
[156] BVerfG, 2 BvR 1390/12 12 September 2012 – ESM, BVerfG, 2 BvR 1390/12 17 December 2013.
[157] BVerfG, 2 BvR 1390/12 18 March 2014 – ESM II
[158] BVerfGE 134, 366, 2 BvR 2728/13 - OMT
[159] BVerfGE 2 BvR 859/15, 1651/15, 2006/15, 980/16, 5 May 2020

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an informed decision. The constitutional court, although, did not set express constitutional limit for the further development of the European financial architecture, it pointed out, that financial contributions to large rescue packages has to be *limited* and *defined*, *financial liabilities has to be calculable*, and it has to be ensured, that Germany will be able to *meet its payment obligation* and will be able to exercise its *voting rights* within the governing board of the ESM and obtain the approval of the Bundestag in case of increase of financial contribution by Germany. Consequently, it has warned that there can be a level of monetary transfer from Germany towards the financial rescue fund, which could put into risk the statehood and the *sovereignty* of Germany.

In the OMT[160] case, the *Bundesverfassungsgericht* has asked the CJEU in a preliminary reference, if the unlimited purchase of debts of certain Euro-zone countries by the ECB under the OMT, is in line with the limitations of competences of the ECB, as defined in article 119 and 127 TFEU. The other question was, if the prohibition of monetary budget financing under article 123 (1) TFEU is not violated by the ECB. The CJEU has responded affirmatively to both questions[161], and added, that there can be judicial limits of ECB competences, and the rule of the prohibition of monetary budget financing may not be circumvented.

Very similar questions arise in the PSPP[162] case before the German constitutional court, which we can say without much exaggeration, that almost literally exploded the internet. The question raised in the PSPP judgment was related to the ECB's public sector purchase program (PSPP), if the PSPP program is in line with the prohibition of monetary budget financing and the principle of limited single authorisation. The decision – because of declaring a CJEU decision[163] ultra vires and eroding rule of law[164] in its effect – was extensively criticised[165] by the literature, with a good reason[166]. As

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[160] The OMT Program prepares for the selective purchase of government bonds of certain euro-zone Member States.

[161] C- 62/14, Gauweiler ECLI:EU:C:2015:400. A more in depth, critical analysis, comparing the approach oft he GCC with ist earlier case law regarding national identity and constitutional identity: Claes, Monica – Reestman, Jan-Herman: The Protection of National Constitutional Identity and the Limits of European Integration, at the occassion oft he Gauweiler Case, in: German Law Journal, Vol. 16, No. 4.

[162] The PSPP Program is the purchase of government bonds of certain euro-zone Member States, agencies and European Institutions, regional and local governments.

[163] C-493/17 Weiss ECLI:EU:C:2018:1000

[164] Jakab András – Sonnevend Pál: The Bundesbank is under a legal obligation to ignore the PSPP Judgment of the Bundesverfassungsgericht, in: Verfassungsblog, 25 May 2020.

[165] see: Paul Dermine: The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union: Bundesverfassungsgericht 5 May 2020, 2 BvR 859/15 and others, PSPP , in: European Constitutional Law Review, Volume 16, Issue 3; Franz C. Mayer: The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020, in: European Constitutional Law Review, Volume 16, Issue 4; Ingolf Pernice: Sollte die EU-Kommission Deutschland wegen des Karlsruher Ultra-Vires-Urteils verklagen? PRO, in: Verfassungsblog, 16 May 2020; Franz C. Mayer: Auf dem Weg zum Richterfaustrecht? Zum PSPP Urteil des Bundesverfassungsgericht, in: Verfassungsblog, 7 May 2020;

[166] As AG Cruz-Villalon pointed out in Gauweiler (Case C- 62/14, Gauweiler ECLI:EU:C:2015:400, para. 53-65), both the CJEU and the national constitutional courts should show great cooperation and continue to judicial dialogue as long as it is required. The German constitutional court instead of raising its concernes in another preliminary reference (such as the Italian courts did in the Taricco case), the German constitutional court decided to choose the path of direct confrontation, risking the delicate balance between EU and national constitutional courts and risking the erosion of rule of law.

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all coins, however, this one also has two sides and we can not say that it came entirely as a surprise. The Kronberger Kreis research group at Stiftung Marktwirtschaft already in 2016 has forecasted[167], that if the German constitutional court would follow the OMT decision by the CJEU then it would have an irreversible effect as it would demolish the frontiers of the ECB's monetary policy mandate and would weaken the prohibition of the monetary financing of the Member States and thereby the effective judicial review of the ECB's competence would no longer be assured and it could turn the European Monetary Union in a wrong direction.
Responsibility for the future directions of the European Integration (*Integrationsverantwortung*) is in the centre of all these decisions, where the constitutional court held, it important, that the European Integration Program, also in case of ultra vires acts by EU institutions is enforced.

6.8 European Arrest Warrant decisions

The German constitutional court dealt in multiple occasions with the application of the European Arrest Warrant in Germany.

For the first time, the main legal question was, whether German citizens can be surrendered[168]. According to a number of constitutions in Europe (e.g. Germany, France, Poland), nationals of the executing country cannot be surrendered to other countries. This was a major obstacle which led ultimately to the amendment of the German constitution[169].

For the second time, the German constitutional court dealt with the issue of the European Arrest Warrant in 2015[170], in connection with the extradition of a US national to Italy. The American citizen was convicted *in absentia* to 30 years in prison in 1992 in Italy for taking part in a criminal organization and in 2004 he was arrested in Germany on the basis of a European Arrest Warrant. The German constitutional court held, that since Italy cannot guarantee an appeal proceeding on the basis of all facts and evidence, if convicted in absentia, essential fundamental rights to defence and the criminal law guarantees of *nullum crimen sine lege*, *nulla poena sine lege* would be violated.

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[167] Kronberger Kreis: Dismantling the boundaries of the ECB's monetary policy mandate: The CJEU's OMT judgement and its consequences, Kronberger Kreis-Studien, Stiftung Marktwirtschaft, Berlin, 2016.
[168] BVerfG 2 BvR 2236/04 18 July 2005 - EAW
[169] "*Durch Gesetz kann eine abweichende Regelung für Auslieferungen an einen Mitgliedstaat der Europäischen Union oder an einen internationalen Gerichtshof getroffen werden, soweit rechtsstaatliche Grundsätze gewahrt sind.*" Article 16(2) Grundgesetz, as amended by the 47th amendment to the Grundgesetz in 2000.
[170] BVerfG 2 BvR 2735/14 15 December 2015 – EAW II

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According to the German constitutional court, this would lead to a violation of a right to an effective judicial remedy, that according to the German constitutional court, is also a violation of human dignity, protected in article 1 of the *Grundgesetz*. As the constitutional court pointed out, the violation of human dignity would be a violation of constitutional identity (*Verfassungsidentität*) and the protection of the constitutional identity (*Identitaetskontrolle*) is an essential task of the constitutional court. Such approach seems to be a departure from the jurisprudence developed in the Solange II decision by the German constitutional court, where it was held, that the Court will not review EU acts, as long as its level of fundamental rights protection is substantially equal to the level of protection provided by the German constitution. As *Jakab* and *Sonnevend* points out[171], that was a result of clever judicial politics, which recently the German constitutional court seem to abandon.

In addition to the above, it should be noted that the constitutional court considered the case as an '*acte claire*' arguing that the EAW FD allows to deny the surrender of a person, if that would be a violation of the Fundamental Rights Charter of the EU, specifically the violation of the fundamental right to human dignity. Whether the case was an '*acte claire'* or the German constitutional court just wanted to avoid to receive a response like the Spanish constitutional court received from the CJEU in the *Melloni* case[172], that certainly remains a question.

In the *Melloni* case, under very similar circumstances, the CJEU held at a response to a preliminary reference submitted by the Spanish constitutional court, that a Member State shall not deny the application of the EAW FD on the basis of a higher protection provided by the national constitution than the EU Fundamental Rights Charter. Specifically, whether the right to a fair trial and an effective judicial remedy is provided, if a person is convicted *in absentia*, although was informed about the trial and was represented by a lawyer. The CJEU stated that since Article 4a(1) of the EAW FD contains an exhaustive list, Member States cannot make the surrender conditional on the right to a retrial, unless specified in the EAW FD.

The German constitutional court also pointed out that on the basis of the protection of national constitutional identity, they see a possibility to suspend the application of the EAW FD and it will not be a violation of the principle of supremacy of EU law or the principle of sincere cooperation as set out in Article 4(3) TEU, because Article 4(2) TEU states that the EU must respect the Member States' national identities, of which *constitutional identity* is an integral part. However, the

[171] Jakab András – Sonnevend Pál: The Bundesbank is under a legal obligation to ignore the PSPP Judgment of the Bundesverfassungsgericht, in: Verfassungsblog, 25 May 2020.
[172] C-399/11, Stefano Melloni v Ministerio Fiscal ECLI:EU:C:2013:107

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constitutional court argued in this specific case that there is no need to suspend the application of the EAW FD, as it can be interpreted in line with the European Fundamental Rights Charter, that provides the same protection as the *Grundgesetz* in the specific case.

The third European Arrest Warrant case was in 2017[173], where the German constitutional court held, that the higher regional court should have sent a preliminary reference regarding the clarification of the EAW FD, and the absence of such request was a violation of Article 101 *Grundgesetz*, the right to a rightful judge and therefore the constitutional court did not examine further, whether the surrender in the specific case would be a violation of Article 1 *Grundgesetz*, the right to human dignity.

Based on the above case law of the German constitutional court and compared to the Court of Justice, it can be concluded that there is a certain tendency of judicial activism at both levels (or dimensions) of the case law of the principle of supremacy. Whereas, the Court of Justice has invented – quite without a direct legal basis in the Founding Treaties – the principles of supremacy and direct effect as logical and necessary consequences of the existence of the Founding Treaties, the German constitutional court – equally showing the signs of judicial activism and creativity – have invented the practice of constitutional reservations towards EU acts, if such acts (i) did not comply with the fundamental rights catalogue in the German constitution and fundamental rights protection standards developed by the German constitutional court (*fundamental rights control*), (ii) are in breach of the competence conferral on the EU (*ultra vires control* or *sovereignty control*), or (iii) violate the unamendable core of the constitution (*identity control*). Ultra vires control shall be considered as a prior step, before the court gets to the evaluation of the identity control.

Summary

1. Main function of the constitution is to prevent the abuse of power.

2. The main relevance of national constitutional courts from a European perspective lays not exclusively in the protection of the national constitution, but also in the common protection of common constitutional traditions, a European constitutional identity, where the protection of the principles of share of powers and democracy plays an eminent role.

[173] BVerfGE 2 BvR 427/17 EAW decision 19 December 2017

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3. In the Bananenmarkt decision the German constitutional court made clear, that only if it can be proven, that there is a systemic derogation of fundamental rights protection, only in that case will the constitutional court consider the non-applicability of an EU act on the basis of unconstitutionality and a breach of fundamental rights.

4. First a Union act if suspected that it infringes fundamental rights, need to be challenged before the CJEU and only if there was no sufficient protection provided by the CJEU, then can be the implementing national legislation challenged before the constitutional court.

5. As AG Cruz Villalon pointed out in his Opinion to the Gauweiler case, the CJEU and constitutional courts should show great cooperation and continue to judicial dialogue as long as it is required, following the example of the CJEU and the Italian Constitutional Court in the Taricco case.

6. A forward looking way of peaceful co-existence and cooperation between European and national level constitutional courts can be, if both sides apply the principle of constitutional tolerance and sincere cooperation in a way, that the CJEU shows understanding, that Member State constitutional courts have a duty to interpret the national constitution with an erga omnes effect and the CJEU accepts that interpretation of national constitutional court.

7. Constitutional courts shall equally accept that pursuant to Article 19(1) TEU, it is the CJEU which has the role to interpret EU law with an erga omnes effect, and decisions from constitutional courts such as the Landtová or PSPP ruling will not help the judicial dialogue either - instead sending a preliminary reference to the CJEU and engaging in constant and if necessary repeated dialogue, could advance the judicial cooperation between the European and national level.

8. From a practical point of view, constitutional identity also intends to ensure that there remains some room for manoeuvre for a Member State on political level in order to determine its own economic, cultural and social conditions. The guarantee of national constitutional identity goes hand in hand under national constitutional law and under EU law, EU constitutional identity provides an additional safeguard to protect national constitutional identity.

9. The German constitutional court with an activist and creative approach, has invented the practice of constitutional reservations, which served as a model for constitutional courts across the EU.

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10. Ultra vires review shall be considered as a prior step before identity control is exercised. If an EU act is ultra vires, there is no need to conclude an identity review.

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IV. AUSTRIA

In this chapter, following a very brief introduction of the special characteristics of Austrian constitutional law, I describe the (i) hierarchy of norms in Austria, (ii) the fundamental constitutional principles and how what transformation they have gone through in the context of the EU membership (such as democracy, rule of law, form of government, division of powers), and the impact of the EU accession on these principles, (iii) the technicality of the accession process itself, (iv) limitations on the application supremacy of EU law within Austrian law, (v) consequences of EU law infringing instructions in public administration, (vi) role of the National Council and the Federal Council, as well as the regions (with regard the effect on the democracy principle), and (vii) the enforcement of individual rights (challenging laws, administrative and judicial decisions, as well as unlawful acts, enforcement of fundamental rights and remedies against an infringement of EU law by EU institutions or by Member States – with regard the effect on the judicial protection of fundamental rights and the constitution).

1. Introduction

In Austria, the constitution is not written in one single document, but it is spreaded out in multiple documents and constitutional provisions (*zersplitterte Verfassungsrecht*[174]). The corpus of the Austrian constitution consists of *multiple historical documents*[175], such as the 1920 federal constitution, multiple additional constitutional acts[176] and certain provisions of ordinary laws and international treaties, which are, characterized as constitutional provisions. There are two basic criteria of a *constitutional provision*: firstly, it has to be passed by 2/3 of the present Members of the Parliament (and at least ½ of the members has to be present), while secondly, the specific provision has to be expressly characterized as a constitutional provision.

In the 1920 constitution, one of the most important constitutional question was to consider, whether Austria is an association of independent states or is a decentralized central state. The result was a compromise to establish an atypical federal state with strong competences for the federal level. The

[174] Jakab Andras: Az osztrák EU csatlakozás alkotmányjogi szempontból (2002/1., http://jesz.ajk.elte.hu/jakab9.html, p. 12)
[175] Mayer/Kucsko–Stadlmayer/Stöger: Bundesverfassungsrecht, 11.Auflage, MANZ, 2015, pp. 77-79.
[176] Schaefer Heinz: Österreischische Verfassungs-und Verwaltungsgesetze, C.H.Beck,1992.

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establishment of a *constitutional court* with strong competences to nullify unconstitutional acts of Parliament was an important novelty of the 1920 Austrian constitution[177]. This constitutional court model provided an *example for Europe* and for the rest of the world after the second world War. It should be noted, that the Austrian Constitutional Court also provides an example for Europe since Austria joined the EU. As it will be demonstrated in this chapter, it is not only the Austrian Constitutional Court, which was first to submit a preliminary reference to the CJEU shortly after its EU accession, however it is also one of the most active and EU friendly, which clearly shows an example of constitutional tolerance for other constitutional court in the EU[178].

The Austrian constitution – as other European constitutions – is based on the principles of *democracy, rule of law and protection of fundamental rights*[179]. In terms of rule of law or *Rechtsstaat* – as stated above - Austria has a long tradition, since its 1867 constitution already had a *fundamental rights catalogue* and a *judicial control over decisions of the public authorities*. The constitutional court established in 1920 had developed important case law regarding the interpretation of the concept of rule of law in Austria. Cornerstone of its case law has been the fact that an *essential content* (*Wesensgehalt*) of a legal provision can only be regulated by an act of Parliament. Furthermore, the government may issue decrees only on the basis of an *empowerment* from the act of Parliament. There are *three high courts* in Austria that provide *judicial protection for fundamental rights*: for civil and criminal cases there is the Supreme Court for administrative cases against the decisions of public authorities there is the Supreme Administrative Court and the Constitutional Court.

Similar to the German *Grundgesetz*, the Austrian constitution also establishes a federal system, although, a rather *atypical federal system*. The judiciary is per definition federal competence and the *Bundesrat* has only weak competences. Although, the Austrian constitution does not declare that Austria is a social state, it still has *one of the most advanced social welfare systems in Europe*.

Within the hierarchy of norms, the basic constitutional principles are higher ranked than the constitutional documents themselves. This is the reason why, *the literature acknowledges*[180] *the supremacy of Union law above the constitutional documents, but not above the fundamental constitutional principles*. It should be noted, however, that in practice, the *constitutional court of*

[177] Manfred Stelzer, The Constitution of the Republic of Austria, HART, 2011, p. 18.
[178] See in more detail: Orator, Andreas: The decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action? In: German Law Journal, pp. 1429 et seq., 2015.
[179] Ludwig K. Adamovich, Bernd-Christian Funk, Gernhart Holzinger, Stefan L. Frank: Österreischisches Staatsrecht, 2. Auflage, Springer, 2011, 1. Kapitel
[180] Mayer/Kucsko–Stadlmayer/Stöger: Bundesverfassungsrecht, 11.Auflage, MANZ, 2015.

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Austria does not set such limitations towards the acceptance of Union law above the constitution. The approach applied in the Austrian literature, not accepting the unconditional supremacy of Union law above the basic principles of the Austrian constitution, is similar to what we can see in Germany regarding the unchangeable provision of the *Grundgesetz* serving as limitations on the European integration and the competence conferral, with the fundamental difference, that in Austria such limitation only appears in the literature and not the in the case law of the constitutional court, which – as above said – rather acknowledges the unconditional precedence of EU law above the Austrian constitution.

2. Sovereignty concept and conferral of competences on the European Union

Membership in the European Union has a major impact on *national sovereignty*. In case of Austria, the question of sovereignty conferral is discussed in the context of *constitutional identity* as well. Constitutional identity (also in the sense of constitutional continuity) is a concept which can be both linked to German, but also to Austrian constitutional law and it can be interpreted as a limitation for sovereignty conferral on the European Integration. There are no eternity clauses in the Austrian constitution such as in Germany, but the literature[181] is also referring to the key elements of the national constitution as barriers to the European Integration (*Integrationsschranken*). However, such barriers are only discussed in the literature in Austria, but it does not appear in the practice of the Austrian constitutional court.

Traditionally, Austria only had a general clause[182] regarding international law in the Austrian constitution that declared that the *generally recognized principles of public international law are part of the Austrian legal system*. This is a traditionally existing clause in several European constitutions, among others also in the Hungarian or the German constitution. Which made the Austrian approach special in this regard is that unlike in other European countries, in Austria there was no express provision on the level of the constitution until the EU accession[183], empowering the Parliament to *confer specific competences on inter-governmental organizations*. In Austria, traditionally, for the participation in international organizations the abovementioned clause on the acknowledgement of the generally recognized principles of public international law has been *interpreted extensively* via an activist approach and interpretation[184].

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[181] Mayer/Kucsko, pp. 146-149. and Adamovich-Funk, pp. 259-278.

[182] Article 9(1) of the Federal Constitution of Austria

[183] Article 9(2) now declares, that "*By Law or by a State Treaty which must be ratified in accordance with Article 50(1), specific sovereign rights (einzelne Hoheitsrechte) of the Federation can be transferred to intergovernmental institutions and their organs and the activity of organs of foreign states in Austria (Inland) as well as the activity of Austrian organs abroad can be regulated within the framework of International Law*"

[184] Mayer/Kucsko, pp. 112-113.

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In connection with the *accession* to the European Union in 1997, there was a need for a *general overhaul (Gesamtaenderung) and significant changes to the Austrian constitution*. For such a general, large-scale amendment of the constitution, a national *referendum* was required to approve the amendment of the constitution and at the same time to approve the international agreement about the accession to the European Union. Beyond the national referendum, the federal Parliament had to vote with a *2/3 majority* in the *presence of at least ½ of the members* of the Parliament members and the consent of the Bundesrat - the representative organ of the Austrian states - was also necessary. There is a consensus in the literature that future amendments to the Founding Treaties of the European Union will not be considered to require a general overhaul to the constitution. Therefore, no referendum will be necessary in these future cases[185].

3. The requirement of democratic legitimacy

The *accession to the EU* had a major impact on the principle of democratic representation as well, as in the area of the competences of the EU, the Austrian legislative organs have either partially conferred *legislative competences* on the EU institutions (*exclusive* EU competences) or limited them (*shared* EU competences). In both cases, of course, we can only talk about the joint exercise of competences and not a lost sovereignty.

In terms of *democratic legitimacy* of the EU decision-making, it has been key for Austrian constitutional law to secure the involvement of the federal Parliament (*Nationalrat*) and the representative assembly of the Lande[186] (the regions) (*Bundesrat*) in the *forming of the Austrian standpoint* in the EU decision-making. In the various fields of decision-making, where the Lande (regions) have a competence to decide internally, the majority standpoint of the Bundesrat will be binding on the government member who is going to represent the position of Austria in the Council of the EU.

In a similar way, if the relevant decision-making area falls into the federal competence according to the internal distribution of competences, then, the position of the federal Parliament is binding on the member of the federal government (minister) who is going to represent the position of Austria in the Council of the European Union. Similar mechanisms have been implemented by other Member States, such as Germany for example. It provides an additional layer for democratic legitimacy for

[185] Mayer/Kucsko, pp. 132-135. and Adamovich-Funk, pp. 259-278.
[186] Art. 23d B-VG

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the EU decision-making, in addition to the involvement of national parliaments - introduced by the Lisbon Treaty. Art 32d abs. 5 regulates the implementation of international agreements for the regions[187].

Art. 23a. – f. of the federal constitution is addressed to the membership of Austria within the European Union. Unlike in Germany or in the vast majority of Member States, in Austria the European Integration clauses embedded into the constitution *are not regulating explicitly the conferral of competences on the European Union,* neither regulating a *joint exercise of competences* under the EU institutions *nor the limits of such competences*. Rather, it sets out certain internal rules on exercising rights and duties related to the EU membership:

a) 23a - 23b of the federal constitutions deals with the *election* of the Members of the European Parliament in Austria,
b) Article 23c is about the internal rules related to the *nomination* of the Austrian member(s) of the European Commission, Court of Justice of the European Union, the Court of First Instance, the Court of Auditors, Managing Committee of the European Investment Bank, the Committee of the Regions and the Economic and Social Committee,
c) Article 23d regulates the details of the obligation of the federal government to *inform* and to co-operate with the *Laender* (the Austrian states) and municipalities in case of projects within the framework of the European Union that affects the autonomous sphere of competence of the Laender,
d) Article 23e regulates the details of the federal government to *inform* the *National Council* and the *Federal Council* about projects within the framework of the European Union and provide them the possibility to cooperate and provide opinion. The opinion of the National Council and the Federal Council will be binding in most of the cases, except imperative foreign policy or integrative policy matters and,
e) Article 23f regulates the detailed obligations of the government and the Parliament (National Council) related to the participation of Austria within the *Common Foreign and Security Policy and the police and judicial cooperation* within the European Union.

4. The dual character of the Rule of Law Principle

In the area of *rule of law* and the *protection of fundamental rights*, it is a significant change that the constitutional court will not be entitled to exercise constitutional review over EU law, *as a result of this, over the Union law part of national law, the CJEU will exercise fundamental rights control on*

[187] Mayer/Kucsko, pp. 146-147

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the basis of the Fundamental Rights Charter. Supposed, that the common constitutional values among the Member States and on EU level are very much convergent, this should not cause a major problem.

Concerning Germany, it has already been mentioned that certain Member States include specific *limitations* in the European integration clause of their constitutions such as peace keeping, reciprocity, democracy or general limitations. Most of these principles are derived from the *identity* of the constitution, namely in case of the Germany the unchangeable, so-called eternity clauses, basic structure of the state, federal structure, social state, democracy, rule of law and protection of fundamental rights.

In case of Austria there is no such a general eternity clause within the constitution, however, according to the literature[188] the competences conferred on the EU are equally bound and therefore, limited by those basic principles (considered as Austrian constitutional identity) of the Austrian constitution, that bound the federal government and the Parliament, themselves. These principles are democratic governance, republican principle, federal structure, rule of law. The Austrian constitutional law literature also highlights that it is an immanent limitation, that means that there is no possibility for a general competence conferral on the EU, only specific, well-defined and limited competences can be conferred on the EU and jointly exercised with the other EU Member States[189].

5. Level of the Protection of Fundamental Rights

Within the Austrian constitutional law, there is a debate if the source of supremacy of EU law[190] stems from EU law itself or it is rooted in national constitutional law. As a result, there is a view in the literature that we cannot specify the *position of EU law* in the hierarchy of norms within the national legal order (but definitely not above the national constitution, rather between the ordinary laws and the constitutional order[191]), since its supremacy is only an application primacy and does not

[188] Öhlinger, Theo: Staatlichkeit zwischen Integration und Souveränität, in St. Griller et al. (eds.), 20 Jahre EU-Mitgliedschaft Österreichs, Verlag Österreich, 2015, pp. 111 – 125; Öhlinger, Theo and Eberhard, Harald: Verfassungsrecht, 12th ed., Facultas, 2019, para. 158, 193; Kröll, Thomas and Lienbacher, Georg: 'Country report Austria' in European Parliament (ed.), National Constitutional Law and European Integration, 2011, pp. 141–150; Kröll, Thomas: Der EuGH als "Hüter" des republikanischen Grundprinzips' in Georg Lienbacher and Gerhart Wielinger (eds.), Jahrbuch Öffentliches Recht, NWV, 2011, pp. 313– 326.; St. Griller, Crit 'Der Stufenbau der österreichischen Rechtsordnung nach dem EU Beitritt', Jornal für Rechtspolitik, 2000/8, pp. 273–279.

[189] Mayer/Kucsko, pp. 148-149. and Adamovich-Funk, pp. 272-278.

[190] or primacy of application / *Anwendungsvorrang* – as opposed to primacy of validity / *Geltungsvorrang* which would invalidate conflicting national law, but it is not the case with a conflict with EU law

[191] Stolzlechner, Die Auswirkungen einer Mitgliedschafts Österreichs in der Europaische Union auf die österreichische Verfassungsordnung, in: Waldemar Hummer (Hrsg.), Die Europaische Union und Österreich (1994) pp. 163- und Theo Öhlinger, Verfassungsrecht, 9th edition, 2012, pp.117-

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reflect a real hierarchy of norms. The Federal Constitutional Court of Austria, however, accepts the *unconditional supremacy of EU law* above the national constitutional order[192].

Öhlinger for instance pointed out, that EU treaties are on the same level as Austrian fundamental laws (*Baugesetze*)[193]. He argued that since the Austrian accession treaty was ratified via a federal constitutional statute (*Bundesverfassungsgesetz*), therefore, EU law is on the same level and not above, and as a result of this, any future treaty amendment has to be ratified according to Article 44 (3) of the Austrian Constitution (which requires a referendum, if requested by 1/3 quorum by the National Council of the Federal Council).

In practice, however, if EU law would conflict with fundamental rights, or another norm of the constitution, national judges or public administration officials will be obliged to set aside (disregard) any national law (even the constitution) which conflicts with a specific provision of EU law pursuant to the earlier discussed CJEU case law and also in accordance with the relevant case law of the Austrian Constitutional Court. In addition, Article 2 of the *Austrian Accession Act* declares that provisions of EU law are binding and have an effect within Austria *according to its own rules of EU law*. Such declaration clearly includes the principles of autonomy, supremacy and direct effect, which would put EU law above the constitution.

6. Constitutional adjudication

As discussed earlier, the principle of supremacy of EU law is a principle that has been deducted by the Court of Justice of the European Union via the interpretation of the Founding Treaties themselves (and later it was included in the Lisbon Treaty, therefore the principle became part of the EU Founding Treaties), but national constitutional courts still have the jurisdiction to interpret the national constitutional limits of the European Integration. Such conclusion follows partly from most of the national constitutions' European Integration clauses, probably not directly in case of Austria, and from the principles of democracy, rule of law, fundamental rights, competences will remain as checks on the future development of Union law by the national constitutional courts. *As a result of this, the Austrian constitutional court could, in the future, certainly make reservations regarding the application of Union law, similarly as it has been done by quite few other constitutional courts in Europe, for instance the German, the Italian, the Polish or the Hungarian constitutional court, and it would be in line with the more sceptical approach of the literature. So far however, as it has been*

[192] VfSLg 15.427; VfSLg 17.065
[193] Öhlinger, p. 97; p. 107

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pointed out earlier, the Austrian Constitutional Court proved to be one of the most EU friendly as not expressing any reservations, towards accepting the supremacy of EU Law, and being one of the first (in 1999, four years following its EU accession) to send a preliminary reference to the CJEU.

Regarding further future directions in the practice of the Austrian constitutional court, *Lachmayer* notes, that given the ever-increasing role of public international law in domestic law, in the future the Austrian constitutional court could get a competence, to review domestic norms, whether they are in compliance with public international law[194]. Such new competences on the one hand, would be probably very much different from the nature of *constitutional adjudication*, if we define the main function of constitutional adjudication to annul domestic acts of Parliament in case of non-compliance with the Constitution. On the other hand, domestic ordinary courts are anyway mandated, to enforce the hierarchy of norms and enforce domestic law against public international law. To conclude, – unless constitutional aspects are involved – probably for the sake of clarity of the division of competences between ordinary courts and the constitutional court, better to leave to domestic courts the determination of the compliance of domestic law with public international law[195].

Based on the principle of "application supremacy" (*Anwendungsvorrang*), the supremacy principle does not necessarily reflect an actual hierarchy of norms – therefore, it could be argued, that the principle of supremacy of application is only valid with regard to directly effective norms. However, such arguments could be easily challenged because also in the case of non-directly effective norms, for instance, directives had to be applied by judges and national officials of public authorities in a way in order to interpret national law in the light of the directive even before the expiry of the implementation period (*indirect effect or von-Colson Principle*) that clearly reflects the practical application of the principle of supremacy in case of a non-directly effective norms as well.

Distinctions should be made between *traditionalist* and *autonomist* theories in terms of the relationship between EU law, public international law and Austrian constitutional law. According to the *traditionalists*, the primary sources of EU law are actually public international law with the exact same legal nature related to the national law, whereas, *autonomists* deny this, saying that even the case law of the European Court of Justice states that EU law is a genuine and special type of public

[194] Lachmayer, Konrad: The constitution of Austria in international constitutional networks: pluralism, dialogues and diversity, in: Albi, Anneli and Samo Bardutzky (ed.): National constitutions in European and global governance: democracy, rights, the rule of law – national reports, Springer, 2019., p. 1316.

[195] It should be noted however, that pursuant to Article 24(2)f) of the Hungarian Fundamental Law and Art 32 of the Hungarian Act on the Constitutional Court, ¼ of Members of the Parliament, the Government, the President of the Curia, the Chief Prosecutor, the Ombudsman, or a judge, if it is necessary to decide in the underlying matter, may request that the Constitutional Court decides, about the compliance of national law with public international law.

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international law imposing an autonomous legal order of European Union law, *directly applicable* within the Member States.

It should also be noted, that as pointed out above in the first chapter, according to the case law of the Court of Justice, primary sources of EU law are – since the early beginning of its case law – public international law, however, in a revolutionary way, having a different nature than ordinary public international law because it creates an international organization, having its own institution, own autonomous legal system that becomes directly applicable and part of the legal system of the Member States.

In such aspect, the Founding Treaties do have certain different characteristics compared to "traditionally" public international law, and as discussed above, it also has a different position within the national legal system. The primary sources of EU law form an *invisible constitution* for the EU, that is based on public international law and that is part of the national legal system. At the same time, this remains an autonomous legal order, which directly effective provisions can be invoked by private individuals before national courts and authorities and those previsions will be supreme to the national constitutions. But this does not contradict the fact that primary sources of EU law are actually part of national law.

Similar dichotomy could be identified in case of the dispute around the *source of validity* of EU law (as pointed out earlier), when being integrated into national law. The CJEU has long been argued against the view, which is also immanent in the Austrian literature, that the source of the validity of EU law would be national constitutional law. According to the CJEU, the *source of validity of EU law is in EU law itself*. This argument is also supported in the frame of the current research, underlined by the fact that the principles of supremacy and direct effect has been deducted by a logical reasoning from the Founding Treaties, however, on the other hand we have to note that it is the national constitutional law that gives *constitutional empowerment* for EU law to enter into national constitutional law.

Summary

1. Unlike its German counterpart, the Austrian constitutional court does not set limitations towards the acceptance of Union law above the national constitution.

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2. Article 2 of the Austrian Accession Act declares that provisions of EU law are binding and have an effect within Austria according to its own rules of EU law. Such declaration clearly includes the principles of autonomy, supremacy and direct effect, which would put EU law above the constitution.

3. The Austrian constitution did not include a specific clause allowing the conferral of competences on international organizations or on the European Union. The clause, which mentions international law, is only states, that the generally recognized principles of public international law are part of the Austrian legal system without a need for transformation, and this clause is interpreted extensively, in order to allow the competence conferral on international organizations.

4. Austrian constitutional court accepts the underlying EU law, that since Austria joined the EU, the Austrian constitutional court may not exercise constitutional control over EU law or national law implementing EU law, such competences were shifted to the CJEU, to exercise fundamental rights control on the basis of the Fundamental Rights Charter.

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V. United Kingdom

1. Introduction

The position of the United Kingdom (hereinafter referred as 'UK') within the EU has always been quite unique. The UK applies a legal system fundamentally based on customs and case law[196], *judge made law* (from the *immemorial times of the Realm*). Moreover, the UK has no single document as a constitution, instead, an unwritten and flexible, so-called historical constitution that consists of multiple historical documents and customs. Such a fundamentally different legal background provided a special position for the UK within the EU, as it imposed special difficulties from the law harmonization point of view.

The UK historical constitution consists of several laws[197], such as the law regulating the relationship of the Crown and the people, the Crown and the Parliament, the relationship of the two houses of the Parliament, the duration of Parliament, independence of the judiciary and the government, union with Scotland and Northern Ireland. However, no constitutional provision codified by an act (e.g. Magna Carta, Bill of Rights, European Communities Act) takes superior status to any other statutory provisions. There are also uncodified principles that also belong to a part of the UK historical constitution, such as sovereignty of Parliament, rule of law, equality, fairness and proportionality.

Furthermore, there is no strict division between public and private law in the UK. Compared to the principle well-known from Ulpianus, from Roman law, that *ius publicum est quod ad statum rei romanae spectat, privatum ad utilitatem spectat*, is not followed by a legal system which is not based on Roman law traditions. *Jakab András* points out[198], that such distinction also in continental legal systems is long outdated and does not mirror the reality of legal systems. Further the uniqueness of UK constitutional law so far is the fact that the *state does not have a legal identity, it is not a legal concept. The Crown* represents and symbolizes the State, the central government operates under the identity of the Crown and the Crown has been put on the top of the hierarchy.

The executive power is formally vested to the Queen; she is the Head of State and Ministers act in the name of the Queen, and the Queen can act only on the advice of the Ministers. Ministers have

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196 Peter Leyland, The Constitution of the United Kingdom, Hart Publishing, 2nd edition, 2012.

197 David Feldman, Peter Birks (ed.): English public law, Oxford University Press, 2004.

198 Jakab András: Az Európai alkotmányjog nyelve. Budapest: Nemzeti Közszolgálati Egyetem, 2016., p. 310

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their statutory power from the Parliament. Ministers are answerable to Parliament. The Parliament represents the legislative power. Each bill has three readings and the Royal Assent is needed to enter into law. Veto power of the Monarch has not been used since 1707. It is questionable, whether the British Monarchy would survive, if the Monarch would re-start to use their veto power.

2. Sovereignty concept and conferral of competences on the European Union

The relationship between the EU law and the British law, is interconnected with the question of the relationship between public international law and British law. Regarding the relationship between the EU law and British law, the starting point should be - probably the most important doctrine of British constitutional law - the doctrine of *Parliamentary Sovereignty*[199]. Parliamentary sovereignty means that no Parliament can bind its successor, every act of Parliament can be repealed or amended by the Parliament, which imposes a major risk towards the enforcement of the principle of *supremacy* of EU law within the UK domestic law. The *1972 European Community Act*[200], however, contained provisions, to prevent that subsequent conflicting act of Parliament could override EU law. Article 2 (1) of the European Communities Act expressly recognized the principle of supremacy of EU law, and recognised the directly applicable and directly effective provisions of EU law to be directly effective in Britain[201]. Pursuant to Article 2 (4) of the European Communities Act, domestic law shall be interpreted in line with EU law and Article 3 ordered the case law of the Court of Justice of the European Union to be binding for British courts as precedents.

The *European Union Act from 2008* and another *European Union Act from 2011* are also relevant. In practice, an Act of Parliament approved the conferral of competences on the EU, in each and every instance of Treaty revisions, as set out in Art. 5 of the European Union (Amendment) Act 2008, which set out, that Treaty revisions shall be approved by an Act of Parliament. European Union Act from 2011 provided more specific measures and limitations with regard EU Treaty changes[202], whereby either an Act of Parliament together with a referendum, or only an Act of Parliament in itself, or only a parliamentary approval would suffice, if it is passed in both the House of Commons and the House of Lords approving the transfer of competences, depending on the type of amendment, the Act provides a list, that which type of procedure shall be followed. Further important European Union Act need to be mentioned, which will be discussed more in detail later, this is the *2018 European*

[199] Besselink, Leonard; Bovend'Eert, Paul; Broeksteeg, Hansko; de Lange, Roel; Voermans, Wim, Constitutional law of the EU Member States, Kluwer, 2014, p 1656

[200] Jackson, Paul and Leopold, Patricia, Constitutional and administrative law, Sweet and Maxwell, 8th edition, 2001, p. 67

[201] Feldman, David, Birks, Peter (ed.): English public law, Oxford University Press, 2004., p. 28-29.

[202] Craig, Paul: The European Union Act 2011: locks, limits and legality, in: 48 Common Market Law Review (2011) 1881.

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Union Act, the *Brexit Bill*, which repeals the European Communities Act 1972, in its Article 1, and the European Union Act 2011 as well, both repeal took effect on the day of the withdrawal of the UK from the EU.

In terms of British constitutional law, no international agreement will be binding upon citizens and will be applicable by domestic courts until it is incorporated (*promulgated*) into national law via an act of Parliament. This does not mean ratification, it requires an act of Parliament promulgating an international agreement into national law. Even if, an international agreement is ratified, the courts in Britain cannot apply it (because ratification does not affect domestic law, it is not incorporation) until it is incorporated into national law via an act of Parliament.

The *treaty-making power* is otherwise a Royal prerogative vested upon the Crown that exercise such prerogatives via its Ministers. When this Royal prerogative was questioned in 1971 regarding the entry to the European Communities, the court (*Lord Denning*) declared in the *Blackburn v AG* case[203] that it is not the courts, rather the competences of the Crown (acting via its Ministers) to enter into international agreements on behalf of the United Kingdom and such international commitment will be binding on the UK. *Since it is a Royal Prerogative, it cannot be challenged before the courts* and therefore, the court refused to deal with the case.

Lord Denning again in his 1972 *McWhirter v AG* decision stated that the Treaty of Rome has no effect in Britain until it is made an Act of Parliament[204] and it will be only enforced by courts and only to the extent as it is regulated by the Act of Parliament[205]. Based on this ruling, it follows that the UK has a rather *dualist* legal system in terms of the relationship to public international law. The reason of this is that British law is traditionally wishes to curb any possible excesses by the executive / prerogatives in order to establish a control by the legislative power, the Parliament. *Courts, whereas applying international agreements only in an extent as it is ordered by the Parliament, also applying and interpreting national law in the light of international law, particularly the generally recognized principles of public international law* that have direct effect without specific need for incorporation by the Parliament.

[203] Blackburn v AG (1971) 2 All ER 1380 at 1382
[204] Explained in more detail in: Hilaire Barnett, Constitutional and administrative law, seventh edition, Routledge – Cavendish, 2009, p.226
[205] McWhirter v AG (1972) CMLR 882 at 886

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Referring to the nature of the Treaty of Rome and EC law, *Lord Denning* famously stated in the *Bullmer v Bollinger* case[206] in 1974, that EC law is like an "incoming tide" and "It flows into the estuaries and up the rivers[207]. It cannot be held back, Parliament has decreed that the Treaty is henceforth to be part of our law." *Leyland* points out, that whereas the membership in the EC was intended to be a participation in an economic integration, it turned out that the *EC membership sacrificed national sovereignty in a great number of areas*[208]. *Paul Craig* also stressed[209] that Britain should be concerned about the method of EU legislation, especially how the European Parliament scrutinize legislation when exercising its role as a co-legislator and how that affects the principle of parliamentary sovereignty in Britain.

According to the White Paper issued by the British government before the UK acceded the European Communities, there was *no risk that the membership in the EU would erode 'essential' national sovereignty*[210]. Behind this statement was the fact, that the principle of Parliamentary Sovereignty in Britain would not allow for a complete transfer of sovereignty on the EU. It did not cut the competences of the legislative or the judiciary, neither the British Parliament nor the courts would allow that. What is however possible under British law is a *conditional limitation* (or rather a different way of exercise of sovereignty[211]), a *limited and conditional sovereignty conferral* on the EU, which remains revocable in the same time, as we saw it in practice on the occasion of the Brexit. These are the *conditions of sovereignty conferral* that we could see also in case of other Member States and that is in line with the requirements of the Founding Treaties. Based on this interpretation of national sovereignty, sovereignty means also the *freedom to limit* (not to give up) its own (political) sovereignty. In the context of XX-XXIst century limitations on national sovereignty via international cooperation and participations in international organizations, we can see a continuous trend, that members of the international community confer more and more sovereignty on various forms of international co-operation, in order to achieve a higher level of welfare and security.

3. The requirement of democratic legitimacy

[206] Bulmer v Bollinger (1974) 2 All ER 1226
[207] Michael Foley: The politics of the British constitution, Manchaster University Press / St. Martin's Press, 1999., 83-84.
[208] Peter Leyland, The Constitution of the United Kingdom, Hart Publishing, 2nd edition, 2012, p.23.
[209] Paul Craig, Britain in the European Union, in: Jeffrey Jowel, Dawn Oliver, Colm O'Cinneide, The changing constitution, Oxford University Press, 8th edition, 2015, p. 104.
[210] UK and European Communities (1971.)
[211] As several Member States' constitution, also the Hungarian Fundamental Law (article E) refers to a „joint exercise" of competences together with the other Member States

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As noted earlier, in case of Austria and Germany, the accession to the EU certainly had an impact on the overall *distribution of competences between the legislative and the executive* branch[212], since the power of the executive has grown significantly as a result of the accession to the EU[213]. At the same time of the accession to the EU, the role of national Parliaments were decreased, until the Lisbon Treaty. Even after the Lisbon Treaty, when the involvement of national Parliaments became compulsory in certain legislative matters, still the competences of the executive were overwhelming. The European integration facilitated certain developments such as the *creation of new remedies as mentioned earlier and the creation of new institutions at government level to participate in EU decision-making* procedures more efficiently.

Furthermore, as a result of the European integration, *the laws of the different parts of the UK (England, Scotland, Northern Ireland) became more approximated* as a result of the EU law harmonization, imposed as an obligation on the UK by the EU.

From the aspect of the conferral of competences on the EU and increasing the competences of the European Parliament (at the expense of national Parliaments), the Single European Act has been significant by extending the application of qualified majority voting. The extension of the qualified majority voting was significant from the aspects of national Parliaments and from the aspect of the British Parliament too, since it allowed to pass decisions within the Council of the EU without the consent of all the Member States. As a result of this, *decisions could be made at EU level without the involvement of the British Parliament* that was one of the sources of growing concerns[214] in the UK. Based on the above, some considered the growing competences of the EU in the field of qualified majority decision-making as direct steps against Parliamentary Sovereignty[215].

The UK demanded for *more information prior to Council meetings* and demanded *greater direct co-operation between national Parliaments and the European Parliament.* Although, provision of information to national Parliaments has been improved by the Amsterdam Treaty, institutionalized relationship established only – albeit in a limited form - by the Lisbon Treaty.

[212] We noted this also in case of Austria.
[213] Birkinshaw, P. And Ashiagbor, D., National participation in Community Affairs: Democracy, the UK Parliament and the EU (1996) 33 CMLR 499.
[214] J.W.F. Allison: The English historical constitution – continuity, change and European effects, Cambridge, 2007. pp. 103-123.
[215] Michael Allen and Brian Thompson: Cases and materials on constitutional and administrative law, Oxford University Press, 2008., p. 130.

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Even if the committee, which advised the government in connection with the accession to the EC, has advised against a general authorizing act before the ratification, *the Parliament made a decision that the act authorizing the accession to the EC and future amendments shall be approved before ratification* of the accession treaty by the government. The 1978 legislation provided Parliamentary approval for the direct election of the European Parliament. Pursuant to section 6 of the 1978 legislation, however, specific approval remains a requirement whenever the *powers of the EP are increased*. As a result of this, such parliamentary approval had to be granted before the UK joined the Single European Act (SEA), the Maastricht Treaty (TEU) and all the forthcoming Treaty amendments. The reason behind such requirement was the suspicion that the directly elected European Parliament will seek the extension of its competences *at the expense of national Parliaments*. Such earlier approval was aimed to avoid subsequent lengthy disputes, possibly used by the opposition to attack the government. This practical advantage could avoid long, obstructionist debates that could block the international commitments to be ratified by the UK. Regarding the legal status of international agreements within national law, British courts have expressed their views in several landmark decisions.

As mentioned above, British courts consider, that the *source of validity of EU law is the Parliament and the Parliament's 1972 European Communities Act*, whereas according to the CJEU, the source of validity is in EU law, is itself, the Founding Treaties. This practical difference would cause a difficulty if the Parliament deliberately made a law which would clearly contravene to the UK's obligations arising from its membership in the EU. As we saw earlier, this is a point where the position of courts has changed. Whereas, earlier the UK courts accepted the principle of supremacy of EU law above national law, but also made clear that if the UK Parliament passed a legislation that would deliberately go against EU law, than UK courts would give precedence to the act of Parliament. Such practice seemed to be *reversed* following the *Factortame* decision, where the court accepted – as stated above – that it has to *overrule (set aside) any domestic law, act of Parliament that contradicts EU law*. It should also be noted that by such approach the UK courts do not rule about international treaty obligations of the UK, rather about compatibility or incompatibility of EU law and domestic law.

With such an approach, the UK is not alone among the Member States of the EU, and there is an argument that until Member States comply with EU law, it will not raise any particular obstacle towards the application of EU law within the Member States. There are also multiple British arguments, saying that the CJEU is going "*ultra vires*" when introducing Member State liability for

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the breach of EU law or requiring Member State courts to interpret national law in the light of non-directly effective directives.

Lord[216] *Bridge* in the *Factortame* decision made it clear, that it is the duty of the UK courts to ignore (simply put to set aside) any national law contradicting the EU law – as a result of the voluntary conferral of sovereignty by the Parliament on the European Communities by the 1972 Act[217]. It is important to refer to the *Webb v EMO* decision of the House of Lords[218], where the House of Lords interpreted prior domestic legislation in line with a subsequent non-directly effective directive, showing a turn compared to the earlier case law, where the UK courts did not accept the supremacy of non-directly effective provisions.

Traditionally, British judges found the acts of Parliament and legislation undesirable in the context of common law, and therefore, intended to give acts of Parliament a restrictive interpretation and in the same time did not allow courts to examine official legislative records and other documents. Especially the *Pepper v Hart*[219] and *Three Rivers DC v Bank of England*[220] cases gave much broader room for interpretation of acts and regulations implementing EU legislation.

In the *R v HM Treasury ex p Centro-Com Srl*[221] case in 1997 the British court dealt with the conflict of an international agreement and the Founding Treaties of the EU. In another case, the *Rees Mogg*[222] case the court show (despite that it held that it is an exercise of prerogative and therefore non-justiciable) that the legality of an international agreement (TEU) can be questioned before British courts. The applicant questioned the competent Minister's authority to ratify the Treaty on the European Union. The court referred to the *AG v De Keyser's Royal Hotel*[223] case, where the court pointed out that once the Parliament limits the power of the prerogative by statutory provision, the statute will take precedence, therefore the government did not violate the prerogative of the Crown by amending common law with the ratification of the protocol on social policy attached to the TEU, since it exercised prerogative power which *could become part of common law and recognized by Parliament only following an incorporation into domestic law by an act of Parliament*. It was also

[216] Factortame v Secretary of State for Transport (No2) (1991) 1 All ER 70
[217] Nicholas Bamforth and Peter Leyland (ed.): Public law in a multi-layered constitution, Hart Publishing, 2003., p. 96.
[218] Webb v EMO Air Cargo (UK) Ltd (No2) (1995) 4 All ER 577
[219] Pepper v Hart (1993) 1 All ER 42 (HL)
[220] Three Rivers DC v Bank of England (No 2) (1996) 2 All ER 363 (QBD)
[221] *R v HM Treasury ex p Centro-Com Srl*
[222] R v Secretary of State FCA ex p Rees Mogg (1994) 1 All ER 457 (QBD)
[223] AG v DeKeyser's Royal Hotel (1920) AC 508, Rv Secretary of State for Home Affairs ex p Fire Brigades' Union (1995) 2 All ER 244 (HL)

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argued that the prerogative on foreign and security policy has been abandoned being bound by the Second Pillar.

4. The dual character of the Rule of Law Principle

In British Constitutional law and common law, rule of law is a constitutional principle and the Constitutional Reform Act 2005 declares, that the principle of the rule of law cannot be violated. The rule of law principle has a *formal and a substantive interpretation*[224] and it is justiciable. Rule of law also includes the principle of *judicial control over administrative actions*[225] in the UK, it is relevant in determining the scope of judicial review and in safeguarding, that the arbitrary decision-making by the executive branch is prevented.

The membership in the EU had a major impact and affect on the interpretation and justiciability of the rule of law principle. As mentioned earlier, the *1972 Act on the European Communities* incorporated EC law into British law and provided also a framework for the incorporation of future amendments of the Founding Treaties. Article 2 (1) of the European Communities Act does recognize the principle of supremacy and orders the directly applicable and directly effective provisions of EU law to be directly applicable and directly effective in Britain[226]:

"*All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.*"

As a consequence of the above provision of the European Communities Act judges have the obligation to enforce EU law in Britain, which also effects the enforcement of the principle of rule of law and fundamental rights. Statutory law prevails the judge made law and courts have to follow the acts of Parliament. Pursuant to article 2 (4) of the European Communities Act, domestic law shall be interpreted in line with EU law.

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[224] R v. Secretary of State for the Home Department ex parte Pierson [1998] AC 539, 591

[225] R (Cart) v. Upper Tribunal [2011] UKSC 28, [2012] 1 AC 663, 37

[226] David Feldman, Peter Birks (ed.): English public law, Oxford University Press, 2004., p. 28-29.

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Article 3 of the European Communities Act is also highly important, since it ordered the case law of the Court of Justice of the European Union to be binding for British courts as precedents, also in the area of the interpretation of the EU Fundamental Rights Charter and the principle of rule of law. As a result of this, British courts have to follow the interpretation of the CJEU, as in its interpretation EU law will be binding.

The wording of the 1972 European Communities Act is supported by the interpretation of *Lord Denning* as set out in the *Macarthys v Smith*[227] decision that EU law will override any part of British law that is inconsistent with EU law and courts have to give priority to Community law over any conflicting domestic legal provisions. It is an interesting point of Lord Denning's argumentation in the *Macarthys v Smith* decision that he was saying that if the British Parliament would pass an act where it deliberately would contradict Community law, then British courts had to follow the act of Parliament. However, this part of the decision seems to contradict to what has been said earlier, namely that Community law would override any conflicting provisions of domestic law.

The court has reaffirmed in the *Garland v British Rail Engineering Ltd*. decision[228]that courts have to give precedence to Community law against any conflicting domestic law, whether it is prior or subsequent to the conflicting Community law provision. As discussed earlier in details, this requirement is set by the Court of Justice of the European Union in the *Simmenthal* (1978) decision. However, it should be made clear, that the *Simmenthal* decision requires Member State courts and authorities as well to give immediate and direct application to EU law.

As a result of the absence of a written constitution in Britain, *EU law is incorporated into domestic law via an ordinary act of Parliament that will avoid that EU law would conflict with any higher norms of the constitution, such as in Germany* for example, as we saw earlier, or that it would conflict with the interpretation of a higher court, since higher courts also have to follow the act of Parliament and the interpretation of the CJEU, as precedents, and have to interpret domestic law in the line of EU law and in case of a conflict, EU law will override national law, domestic courts have to apply EU law as interpreted by the CJEU.

As the court stated in *Lord Woolf MR in R v HFEC ex p Blood*[229] decision EC law is part of the English law. In the *Shields v Coomes* case[230] the court held that directly effective provisions of EC

[227] Macarthys v Smith (1981) 1 All ER 111 at 120.
[228] Garland v British Rail Engineering Ltd (1983) 2 AC 751.
[229] Lord Woolf MR in R v HFEC ex p Blood (1997) 2 All ER 687 at 691j
[230] Shields v Coomes (1979) 1 All ER 456 at 461.

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law shall prevail over conflicting national provisions, even if conflicting national law is a piece of subsequent legislation. According to the well-established case law of the CJEU, the supremacy criteria is not bound to direct effect, which means that *not only directly effective provisions of EU law have supremacy* over domestic law (e.g. directive). Therefore, in this regard, British court practice had to change accordingly. In British literature, there were several discussions whether non-directly effective provisions of EU law can have the character of supremacy at all in practice, as shown above, however, not only directly effective provisions of EU law have supremacy over domestic law. Supremacy is a general characteristic of every provision of EU law without regard if it has the characteristic of direct effect or not. As a result of this, directives do have the character of supremacy, however, directives typically have no direct effect, only indirect effect and direct effect only exceptionally under certain circumstances. Normally, non-directly effective provisions are either norms addressed to the States and as such entail only state obligations, does not concern individuals or are already implemented directives, where there is no need to refer directly to the directives before national courts, since it has been already implemented fully by national legislation.

According to the case law[231] of the CJEU, domestic law has to be interpreted in the light of directives, regardless of it is an earlier or subsequent domestic law than the directive. Initially, the House of Lords did not accept the principle of *indirect effect* without reservations. In the *Duke v GEC Reliance Ltd* case[232] the House of Lords argued that even the CJEU cannot require to distort the meaning of domestic statutes in order to conform with non-directly effective directives, especially, if the domestic law was passed prior to the directive was issued. Subsequently, in the *Webb v EMO Air Cargo* case[233] the House of Lords applied *prior acts of Parliament in accordance with provisions of a directive*, by showing a more co-operative approach towards the requirement of indirect effect.

As previously concluded, for example in the *Macarthys v Smith* decision by the House of Lords, even if British courts accepted at the beginning some form of supremacy of EC law over British law, it held that if the British Parliament would make a deliberate move to pass contradicting legislation with EU law, that British courts would consider this as a political decision by the Parliament, than the courts would have no choice, just to obey the act of Parliament. Such practice *clearly contravened the long-established case law of the CJEU* that requires all Member States to obey before EU law and that national courts grant immediate precedence to EU law. In the *Factortame*[234] decision British courts made a decisive turn towards the acceptance of the supremacy of EU law over national law by

[231] E.g. Marleasing decision (1992) ECR-I 4135
[232] Duke v GEC Reliance Ltd (1988) 1 All ER 626 at 636 (HL)
[233] Webb v EMO Air Cargo (UK) Ltd (No2) (1995) 4 All ER 577
[234] Factortame v Secretary of State for Transport (No2) (1991) 1 All ER 70

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allowing an interim injunction against the British government (the Crown), disapplying an act of Parliament that was a clear breach of EC law[235]. *Loughlin* points out, by reference to *Sir William Wade*, that the impact of the Factortame decision is a strong limitation on the principle of Parliamentary Sovereignty ("*Parliament of 1972 had succeeded in binding the Parliament of 1988 and restricting its sovereignty*")[236]. One additional important impact by the Factortame decision is that certain judicial remedies against administrative acts which were not available under the 1949 Crown Proceedings Act became available following the Factortame decision[237]. As the CJEU pointed out, the absence of the possibility of an interim injunction within the British legal system against the Crown, is in itself a breach of EU law.

In sum, it can be argued that – especially following the Factortame decision – *British courts accept the doctrine of Supremacy of EU law*, however, it remains with a slight reservation (although not in such an extent as its German counterparts) towards the activist judicial approach of the CJEU. These reservations can be summed up in the following three aspects: 1) direct effect[238] of EU law 2) supremacy of non-directly effective provisions[239] (e.g. the debate related to the indirect effect of directives) 3) liability of Member States for the breach of EU law[240]. The UK government remain suspicious towards activist approach of the CJEU and EU institutions, and such suspicion is probably which is reflected in the recent Brexit decision of the British voters to withdraw from the EU.

The source of supremacy, the *source of legitimacy of the supremacy of EU law* is also a fundamental question that has been addressed by British courts. According to the case law, the source of legitimacy of EU law stems from domestic constitutional order according to British courts, as it was pointed out[241] in the 2003 decision of the Queen's Bench case, *Thoburn v. Sunderland City Council* (QB 151.), which also established the constitutional ranking of the 1972 European Communities Act and most importantly declared, that directly effective provisions of EU law can disapply primary British legislation. With regard the constitutional relationship between the EU and the UK, the court pointed out, that it has to be decided by British courts and not the CJEU, since the application of EU law depends on the 1972 Act, a domestic statute. Such interpretation leaves also the door open that the Parliament may derogate from EU law, if indicates such aim with a clear and unambiguous wording

[235] explained in more detail in: Adam Tomkins: Public Law, Oxford University Press, 2003, 108-127.
[236] Martin Loughlin: The British Constitution – a very short introduction, Oxford, 2013., p. 79.
[237] Besselink, Bovend'Eert, Broeksteeg, de Lange, Voermans, Constitutional law of the EU Member States, Kluwer, 2014, p 1655
[238] Van Duyn v Home Office (1974) ECR 1337; Marshall v Southampton and SWAHA (1986) 723; Foster v British Gas (1990) ECR 3313
[239] Marlaesing (1990) ECR I-4135
[240] Francovich (1991) ECR I-5357 and CJEU opinion C-48/93, 28 November 1995
[241] Thoburn v Sunderland City Council [2002] EWHC 195

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of an act of Parliament. This case law is obviously not in line with the case law of the CJEU claiming an *autonomous character* for EU law. More specifically, - according to CJEU case law, as pointed out earlier - the source of validity of EU law is in the Founding Treaties and not in domestic constitutional law. It should be noted however, that the majority of the Member States consider, that the status of Union law is based on the domestic constitution, and not in Union law. A notable exception is the Netherlands for instance, where the unitary stance of the CJEU is accepted, that the *status of Union law in the Netherlands is based on Union law, and not on the domestic constitutional order*[242]. The above *Thoburn* case is also relevant, because it leaves room for an interpretation of the European Communities Act that *would not give effect to EU law if that conflicted with fundamental rights or constitutional principles*, protected by British law. Which may be also interpreted as a British version of constitutional identity case law, however with a much less defined content than in elsewhere.

The above interpretation was confirmed by the Supreme Court (Lord Reed) in the R(HS2) [243] case in 2014, and later also in the R(Miller)[244] case in 2017.

Furthermore, in the *Benkharbouche v. Embassy of the Republic of Sudan*[245] case, it was pointed out, that legislative provisions can be disapplied if they conflict with the EU Charter of Fundamental Rights (Charter) and as a result of this, specific provisions of the State Immunity Act 1978, were held to be in breach of Article 47 of the EU Charter of Fundamental Rights and has not been applied in the specific case.

Similarly, in the *Google v. Vidal-Hall*[246] case, provisions of the Data Protection Act 1998 were disapplied too, as being in breach with Article 7, 8 and 47 of the EU Fundamental Rights Charter, as not providing the possibility of obtaining damage by individuals for distress caused by breach of data protection laws.

In the *R (Davis) v. Secretary of State for the Home Department*[247] case, provisions of the Data Retention and Investigatory Powers Act 2014 were disapplied, and preliminary reference has been submitted to the CJEU to determine if Article 1 of the Act has infringed EU law[248].

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[242]Besselink, Leonard: Curing a „childhood sickness"? On direct effect, internal effect, primacy and derogation from civil rights, 3 MJ 165, 1996.

[243] R (HS2 Action Alliance Ltd) v Secretary of State for Transport (2014) UKSC 3, (79), (203-(205); P.Craig, Constitutionalising Constitutional Law: HS2 (2014) PL 373.

[244]R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5

[245] Benkharbouche v. Embassy of the Republic of Sudan [2015] EWCA Civ 33.

[246] Google v. Vidal-Hall [2015] EWCA Civ 311.

[247] R (Davis) v. Secretary of State for the Home Department [2015] EWHC 2092

[248] See more detailed, in: Fusco, Alessia: The Supreme Court of the United Kingdom and Preliminary References to the European Court of Justice: An Opencast Constitutional Lab, in: 16 German Law Journal, pp. 1529-et seq., 2015.

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5. Level of the Protection of Fundamental Rights

Whereas, in the UK there were no bill of fundamental rights prior EC accession, no written constitution and no significant tradition of constitutional adjudication, EU law brought really significant changes as a result of making the case law of the European Court on Human Rights and the case law of the CJEU binding within the UK. Besides the impact of the EU membership, the membership in the European Convention of Fundamental Rights also had a significant impact on British law and court practices. Before joining the European Convention on Human Rights and the EC, there was no significant limitation on the UK Parliament from human rights point of view and the *Parliament was able to overrule via legislation any human right protection imposed by the courts, therefore these changes can be considered as constitutional changes in Britain*[249]. After joining the ECHR[250] and the EC, the European Convention on Human Rights was used by lawyers and courts to defend human rights more effectively, and also as an interpretative tool for domestic British law.

The CJEU itself, by its case law, aimed to incorporate as binding principles into EU law (1) the principles and fundamental rights protected by the European Convention on Human Rights, (2) the related case law developed by the European Court on Human Rights and (3) common constitutional principles (traditions) of the Member States, as well as (4) principles derived from the international human rights agreements to which the Member States are parties. It provided significant changes in the legal system of the UK as well. Such changes for instance, the possibility for British courts to strike down discriminative measures.

A particular consequence of the membership in the ECHR is that courts had to start interpreting national law in the light of the ECHR and striking down any national measures or acts of authorities that did not comply with the fundamental rights tests applied by the ECHR. Therefore, even if formally – according to the interpretation of British constitutional law – the ECHR is not binding in relation to individuals, still, it has a clear effect on private relationships, as courts will interpret domestic law in compliance with the ECHR. A similar effect is achieved by the Fundamental Rights Charter of the EU with the exception that there are more ways available for enforcement of rights contained in the Fundamental Rights Charter for the EU institutions.

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[249] Vernon Bogdanor, The new British Constitution, Hart Publishing, 2009, p. 5. Also in Mark Elliott and David Feldman: The Cambridge companion to Public law, Cambridge, 2015., p. 210.

[250] incorporated into English law by the Human Rights Act 1998

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Practical examples on how the effect to the European Charter of Fundamental Rights has influenced the law of the UK in the field of freedom of expression contra public security and public interest, the court favoured freedom of expression in the *Att Gen v Guardian Newspaper Ltd* case. Moreover, in the case of the famous as the *Spycatcher*[251] case the same is applicable, where the government wanted to stop the publishing of the press reports on the book of a former MI5 agent on the ground of public interest. As *Lord Goff* pointed out in this case, freedom of expression existed in the UK before it existed in any other countries in the world. He explains the above difference regarding the approach of the UK from the ECHR by stating that in the UK there was always an assumption that free speech exists and law has been used only as far as there was a need to establish exceptions to free speech. However, according to *Lord Goff*, the ECHR goes the opposite way and firstly it states the fundamental right and then qualifies it.

Similar case about the relationship of freedom of expression contra public security was the *R v Secretary of State for the Home Department ex p Simms*[252] where the House of Lords declared that a prisoner cannot be deprived from its right to access to the press. In another case[253], the court declared that a prisoner cannot be denied to get access to the court, even if a provision of an existing act of Parliament about compulsory contribution denied it in case of lack of legal aid contribution.

In the *R v Secretary for Social Security ex p JCWI* (1996) the court declared a statutory provision *ultra vires* that denied benefit entitlement from asylum seekers who awaited appeal, for example[254]. The court based its ruling generally on the law of humanity, without more specifying the obligations of the state and the legal basis in human rights law or the ECHR, itself.

In *R v MAFF ex p Hamble* decision[255] it is, for example immanent, that British courts were influenced by European human right legal approach when they started to apply the principles of *legal certainty, equality, legitimate expectations and proportionality* too. More recent appearance of the *proportionality* principle in British high court practice is in the *Kennedy v Charity Commission* case[256], and confirmed in *Pham v. Secretary of State for the Home Department*[257] case and in the *Keyu*

[251] Att Gen v Guardian Newspaper Ltd (1988) 3 All ER 545 (chD, CA and HL)
[252] R v Secretary of State for the Home Department ex p Simms (1999) 3 All ER 400
[253] R v Lord Chancellor ex p Witham (1997) 2 All ER 779 (QBDC)
[254] R. v. Secretary for Social Security ex parte JCWI (1996), 4 All ER 385 (CA)
[255] R v MAFF ex p Hamble (1995) 2 All ER 714
[256] Kennedy v. Charity Commission [2014] UKSC 20
[257] Pham v. Secretary of State for the Home Department [2015] UKSC 19.

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v. Secretary of State for Foreign and Commonwealth Affairs[258] case. In the *Re M*[259] case, it has been clarified how EU law without qualification could affect purely domestic law, where the area of asylum right. According to the reasoning of *Lord Woolf*, no "twin track" approach should be allowed which means that only an approach, in compliance with the Community law, should be allowed. Similar to the *Factortame* proceeding, the court granted an injunction against servants of the Crown (traditionally not allowed) because an applicant for asylum has been deported from the UK, contrary to a court order. Although, the injunction in this case was different than in the Factortame decision granted against the Crown due to in Factortame, the decision was issued to prevent the breach of Community law due to an act of Parliament.

6. Constitutional adjudication

As noted above, in the UK common law, judge made law constituted a more extensive part of English law than statutory legislation. The membership in the ECHR and the EU resulted in increased legislation (harmonization) and solving institutional conflicts in a judicial way[260] (via litigation, juridification, also constitutional juridification[261]), rights protection (e.g. privacy, general principles), analysing political issues by courts[262]. The earlier cited *Factortame* case is a good example of constitutional litigation that would not be possible under the provisions of the law of the UK only legislation that effects only British affairs. The reason of this is that historically, the British judges had limited role in interpreting the UK historical constitution. In the *Stoke on Trent City Council v B&Q plc* case[263] the court had an activist approach, almost taking over the role of the legislative branch when applying EU law in accordance with the case law of the CJEU, particularly in the case of *Sunday tradi*ng, where courts decided on the question of proportionality in the case of whether shops shall be open or closed on Sunday. As judge made law is overwhelming in the history of the UK, as it was pointed out earlier, probably learning such an activist approach was closer to British judges than to any other judges in the continent.

Further impact of EU law on the constitutional law of the UK was the *opening-up of administrative procedures*[264], such as to allow legal representation, give hearings, obligation to give reasoning in case of adverse decisions.

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[258] Keyu v. Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69.
[259] Re M (1993) 3 All ER 537 (HL)
[260] Weiler, Joseph H. H.: The Transformation of Europe, in: Yale L. J. (1991) 2403
[261] Capelletti, M., Seccombe, M. and Weiler J. (eds.) Integration through Law: Europe and the American Federal Experience (1987)
[262] Rawlings, R. (1994) Public Law 254 and 367.
[263] Stoke on Trent City Council v B&Q plc (1993) 1 All ER 481 at 512.
[264] European Policy Forum: The Developing Role of the European Court of Justice, August 1995.

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All in all, as explained earlier, the European integration had a significant impact on the UK legal system, prominently via the practice of British courts in human rights cases[265], which impact will be long lasting, even following the UK long left the EU. Constitutional adjudication in the field of human rights created important changes in the UK and there was a growing sensitivity in constitutional matters mostly focused on human rights issues by British judges.

7. Legal aspects and lessons learnt from the withdrawal of the UK from the EU (Brexit)

The 2011 European Union Act

Significant scepticism towards the efficiency and necessity of EU regulations gradually resulted in the rise of anti-EU sentiments within the UK. As *Roel de Lange* points out[266], the coalition agreement in May 2010, already included, that no further sovereignty conferral should take place on the EU. Such tendencies have resulted in a legislation in 2011 that intended to provide a better control over future EU Treaty changes for the UK Parliament and voters via referendum. The *2011 European Union Act* has imposed further limits on further conferral of competences on EU level by the UK, which clearly opened the way towards a more EU sceptical atmosphere, which led to a narrowly won referendum on the withdrawal from the EU.

Regarding future potential Treaty changes (simplified or ordinary Treaty revision procedure), the 2011 Act made it obligatory to *seek Parliamentary approval for entering into new EU Treaties* or concluding Treaty amendments and to *hold a national referendum* on the Treaty change in order to seek public support (Section 4 and 6).

As the 2011 Act concerned future potential Treaty amendments, it had no effect on existing EU law. Pursuant to the Act, EU law is recognized in the UK on the basis of the 1972 European Communities Act (Section 18). Further important rule of the 2011 Act was that ministers representing the UK, could not cast their vote in specific issues without obtaining prior Parliamentary approval (Section 10). It should be noted, however, that similar legislations were passed even earlier, for example in Germany, even before 2005, when Parliamentary committees not only had to be informed prior to Council meetings, but in some cases, votes were necessary on the position represented by the

[265] e.g. Att Gen v Guardian Newspaper Ltd (1988) 3 All ER 545 (chD, CA and HL), R v Secretary of State for the Home Department ex p Simms (1999) 3 All ER 400, R v Lord Chancellor ex p Witham (1997) 2 All ER 779 (QBDC), R. v. Secretary for Social Security ex parte JCWI (1996), 4 All ER 385 (CA), R v MAFF ex p Hamble (1995) 2 All ER 714

[266] Roel de Lange: The United Kingdom of Great Britain and Northern Ireland, in: Besselink, Bovend'Eert, Broeksteeg, de Lange, Voermans, Constitutional law of the EU Member States, Kluwer, 2014, p 1655

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government in the Council. As the popularity of the EU sank within the UK, the 2011 Act – even if not affecting existing EU law – had the potential to slow down or even to defeat forthcoming EU reforms. As a result of this, it was not surprising, that the anti-EU tendency which started by the 2011 Act got to the peak in the frame of the *2016 referendum where 51% of the participating voters in the referendum voted to leave the EU.*

Following the referendum, the first important decision by the UK Supreme Court confirmed, that the *Parliament has to give authorization to submit Article 50 withdrawal notice to the EU*.

First Supreme Court ruling on Brexit - R (Miller) v Secretary of State for Exiting the EU (UK Supreme Court, 24 January 2017)

The Supreme Court upheld the High Court's ruling that giving notice of the UK's withdrawal from the EU under *Article 50 TEU requires the authorization of Parliament* and cannot be done by the government alone acting under Royal prerogative. The principles of Parliamentary sovereignty and Royal prerogative are key in terms of the reasoning of the Supreme Court. The Supreme Court expressly declared, that *legislation will be needed to authorize the use of Article 50.*

Pursuant to Article 50, a notice of withdrawal from the EU has to be submitted by a Member State in compliance with its own constitutional requirements. The Supreme Court, held, that even a Royal prerogative does not enable ministers to amend a legislation by the Parliament. The Supreme Court pointed out, that by the withdrawal, EU law will cease to be a source of domestic law, therefore the rights of UK residents based on EU law are affected by the withdrawal notice. Such major impact on citizens` rights require Parliamentary legislation.

The Supreme Court's judgment confirmed the sovereignty of Parliament in relation to the Brexit process, and gave increased scope for Parliament to become more involved throughout the Brexit process.

The Notification of Withdrawal Act 2017

The Notification of Withdrawal Act 2017 gave Parliamentary approval to the Brexit and it confirmed to leave the EU on 29 March 2019. The Brexit did not happen on the set date, because the draft withdrawal agreement has been rejected by the Parliament, as well as the withdrawal without an agreement option, therefore the British government applied for and the EU Member States granted

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an extension of the withdrawal deadline. Among many uncertainties related to Brexit, Scottish court have asked the CJEU in a preliminary ruling, if the withdrawal notice can be withdrawn.

CJEU ruling on Brexit - C-621/18, Wightman and others v Secretary of State for exiting the European Union (Court of Justice of the European Union, 10th December 2018)

The Court of Justice of the EU has held, that an EU Member State may unilaterally revoke a notice to withdraw from the EU, under Article 50 of the TEU. Following such revocation, the Member State's EU membership will continue under the same terms as previously. Major conclusion of the decision is, that it made clear, that the UK Parliament may withdraw the UK's Article 50 notice without need for consent either from any of the EU institutions or from the Member States.

The CJEU based its decision on the principle that the EU is composed of States which have voluntarily committed themselves to the EU and its values. Given that a State cannot be forced to accede to the EU against its will, neither can it be forced to withdraw from the EU against its will. The CJEU followed the AG Opinion, that the sovereign nature of the right of withdrawal in Article 50 of the TEU supports the conclusion that the Member State concerned has a right to revoke the notification of its intention to withdraw from the EU, provided that a withdrawal agreement has not yet been concluded between the EU and the Member State, and provided that the two-year period in Article 50 (3) TEU (whether or not extended) has not expired.

The CJEU decision[267] had important implications. The fact that a Member State can unilaterally withdraw its withdrawal declaration gave the chance to the UK to hold a second referendum. Finally, UK government decided not to use this opportunity, and a newly elected government intention was to finish the Brexit process, whatever it takes, if necessary, without an agreement with the EU.

The decision of the Prime Minister to advise the Queen to prorogue the Parliament for 5 weeks and the Second Supreme Court ruling on Brexit – R (on the application of Miller) v the Prime Minister (UK Supreme Court, 24 September 2019)

[267] C-621/18, Wightman v Secretary of State for Exiting the European Union, December 10, 2018, ECLI:EU:C:2018:999

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The main focus of the Supreme Court in this case was the following: (i) was the decision to prorogue Parliament justiciable? (ii) if justiciable, was the prorogation decision lawful? (iii) what are the available remedies?

(i) Question of justiciability

The Supreme Court held, that courts can rule on the extent of prerogative powers, by determining the limits of such powers as against the important constitutional principles of the sovereignty of Parliament and the accountability of the executive branch to the legislative.

The Supreme Court added, that: "..... *the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model.*"

(ii) Question of lawful prorogation

The question, analyzed by the Supreme Court was, if the lengthy prorogation for five weeks, had the effect of *preventing the constitutional role of Parliament* in holding the executive accountable.

The Supreme Court has also analyzed the question, if there was any reasonable justification for lengthy prorogation of the Parliament. Former Prime Minister John Major stated that normally one week, and not five is needed for the government, to establish an agenda for the Queen`s Speech. Since no reasonable justification was provided (or found), why the government advised the Queen to prorogue Parliament for five weeks, the decision was held to be unlawful.

(iii) Question of available remedies:

As the Prime Minister's advice to the Queen to prorogue Parliament was held to be unlawful, the resulting Order in Council was held similarly unlawful, without legal effect. As a result of the judgment, the Parliament had not been prorogued, therefore there was no need for Parliament to be recalled, it could resume its normal operation.

The UK Supreme Court ruling has *upheld the constitutional principles of the sovereignty of Parliament* and the *accountability of the Prime Minister to Parliament* and the *limits on the*

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prerogative powers exercisable by the Prime Minister. As a result, the UK Supreme Court has made clear, what is otherwise obvious, that the government is bound by the UK unwritten constitution, even when preparing for the withdrawal from the EU.

As by the end of the second extension period for the withdrawal, the Prime Minister managed to get support by the majority in the House of Commons to call a new election, where the supporters of Brexit achieved to gain majority in the House of Commons, which resulted to agree with the EU in a final Brexit deadline.

Summary

1. In the UK, the state does not have a legal identity, it is not a legal concept. The Crown represents and symbolizes the State, the central government operates under the identity of the Crown.

2. Article 2 (1) of the European Communities Act expressly recognized the principle of supremacy of EU law, and recognised the directly applicable and directly effective provisions of EU law to be directly effective in Britain. Pursuant to Article 2 (4) of the European Communities Act, domestic law shall be interpreted in line with EU law and Article 3 ordered the case law of the Court of Justice of the European Union to be binding for British courts as precedents.

3. Article 1 of the 2018 European Union Act, the Brexit Bill, repealed the European Communities Act 1972, and the European Union Act 2011, both took effect on the day of the withdrawal of the UK from the EU.

4. Article 3 of the European Communities Act ordered the case law of the Court of Justice of the European Union to be binding for British courts as precedents, also in the area of the interpretation of the EU Fundamental Rights Charter and the principle of rule of law.

5. As a result of the absence of a written constitution in Britain, EU law is incorporated into domestic law via an ordinary act of Parliament that will avoid that EU law would conflict with any higher norms of the constitution, such as in other EU Member States.

6. No international agreement is binding upon citizens and is applicable by domestic courts until it is incorporated (promulgated) into national law via an act of Parliament.

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7. Similarly to other Member States, also in the UK, power shifted significantly towards the executive branch via the EU accession, and new remedies were created, as well as new institutions at government level to participate in EU decision-making procedures more efficiently.

8. It was result of the European integration and law harmonisation, that laws of the different parts of the UK (England, Scotland, Northern Ireland) became more approximated.

9. The Factortame decision made clear the obligation, that courts have to ignore (set aside) any domestic law, act of Parliament that contradicts EU law, as a result of the voluntary conferral of competences by the Parliament on the European Communities by the 1972 Act.

10. Most difficult for british courts to accept the supremacy of EU law, were centered around the following three areas: 1) direct effect of EU law 2) supremacy of non-directly effective provisions (e.g. the debate related to the indirect effect of directives) 3) accepting the liability of Member States for the breach of EU law.

11. As in the UK there were no bill of fundamental rights prior EC accession, after the UK joined the ECHR and the EC, the European Convention on Human Rights was used by lawyers and courts in the UK to defend human rights more effectively, and also as an interpretative tool for domestic British law.

12. As a result of ECHR membership, British courts had to start interpreting national law in the light of the ECHR and striking down any national measures or acts of authorities that did not comply with the fundamental rights tests applied by the ECHR.

13. As a result of EU membership, also *administrative procedures*, have opened up, and had significant impact for instance in the areas of legal representation in administrative proceedings, giving hearings, obligations to give reasoning in case of adverse decisions.

14. The coalition agreement of the British government in May 2010, already included, that no further sovereignty conferral should take place on the EU.

15. The sovereign nature of the right of withdrawal in Article 50 of the TEU supports the conclusion that the Member State concerned has a right to revoke the notification of its intention to withdraw

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from the EU, provided that a withdrawal agreement has not yet been concluded between the EU and the Member State, and provided that the two-year period in Article 50 (3) TEU (whether or not extended) has not expired.

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V. POLAND

1. Introduction

Poland has passed a *new constitution in 1997*, seven years after the change of the political regime in Central-Eastern Europe. At this time, Poland has already submitted its official request to join the European Union and the constitution was passed with the perspective of a membership in the European Union. However, at the same time, the Polish constitution declared its supremacy within the hierarchy of norms[268], which after the EU accession had to be reconciled with the principle of the *supremacy of EU law* over national law by the Polish Constitutional Tribunal[269].

As a result of the legislative need to prepare for EU membership, the constitution contained specific, tailor-made provisions to prepare for the future membership in the EU. Specifically, *art. 90 and 91* are the provisions, which are describing the relationship of international legal norms and domestic law as well as the *legal status of acts issued by international organizations*. Even if the European Union is not specifically mentioned in these two clauses of the Polish Constitution, the intention was to *prepare Poland for the EU accession* by the Constitutional amendments[270].

Article 8 declares the principles of supremacy and direct applicability of the Constitution. *Article 9* declares the principle of the respect of international law by the State. Poland follows a primarily dualist approach to public international law[271]. Even if the Constitution is the supreme law of Poland, it must respect its *international commitments*. And if there is a contradiction between the Constitution and the international commitments of the State, then it is the duty of the Constitutional Tribunal to call upon the legislator if necessary, to find a way of reconciliation. The above logic was reflected by the above cited decision of the Polish Constitutional Tribunal about the Accession Treaty[272]. The Constitutional Tribunal stated that since the constitution declares itself as the supreme law of the land,

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[268] Article 8 of the Polish Constitution

[269] decision nr. K 18/04 – Accession Treaty Judgment of May 11, 2005 by the Constitutional Tribunal of Poland, OTK Z.U. 2005/5A/49.

[270] S. Biernat, Constitutional aspects of Poland's future membership in the European Union, 36 Archiv des Völkerrechts (1998), pp. 398-424; S. Biernat, A. E. Kellermann, J. Czuczai, S. Blockmans, A. Albi, W. Douma, eds. The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-) Candidate Countries. Hopes and Fears (The Hague, T.M.C. Asser Press 2006) pp. 419-436.

[271] Also see: WYROZUMSKA, Anna: Transnational Judicial Dialogue on International Law in Central and Eastern Europe, Łódz, 2017, pp. 20-23.

[272] decision nr. K 18/04 of May 11, 2005 by the Constitutional Tribunal of Poland (re Conformity of the Accession Treaty 2003 with the Polish Constitution, OTK Z.U. 2005/5A/49, http://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf)

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the legislator has to resolve any conflicts that might arise between the Constitution and the international commitments of the State.

Article 87 declares that ratified international agreements are sources of law in Poland. *Article 91* declares that ratified international agreements gain legal force and become part of national law, by a promulgation in the national official gazette. Following such promulgation, ratified international agreements can be directly applicable and international agreements promulgated by an act of Parliament will stay higher within the hierarchy of norms, than the ordinary acts of Parliament. This provision provides a link between domestic law and EU law. Article 91 (3) grants precedence to acts issued by international organizations over acts of Parliament, however, not over the Polish Constitution, that may result in a collision with European Union law. As mentioned earlier, whereas *courts and authorities have a duty based on EU law to immediately set aside conflicting national law on whatever level, on the level of legislation, the Constitutional Tribunal declared that the Parliament has to resolve such conflicts*.

2. Sovereignty concept and conferral of competences on the European Union

Article 91 serves as the *European integration clause* within the Polish constitution, although, without providing an express reference to the European Union. It regulates the "delegation" of "competences of public institutions to international organization or international institution in relation to certain matters". How shall the delegation of competences in certain matters be interpreted? The answer to this question is mainly given by the Polish Constitutional Tribunal in the past decade. Although, there are no express *limits* to integration or conferral of competences, the literature[273] still mentions some, such as "*reserved sphere*", "*control gap*", "*system of state*", basic rules, model of state and general *freedoms and constitutional identity*[274] appears both in the literature and in the case law of the Polish Constitutional Tribunal[275]. In its case law, freedom, equality and essential content of fundamental

[273]Dudzik, Sławomir and Półtorak, Nina: The Court of the last word: competences of the Polish Constitutional Tribunal in the review of European Union law, in: Yearbook of Polish European Studies, 15 (2012), 225–8.

[274] With regards the earlier mentioned European dimension of constitutional identity: Sadurski, Wojciech: European constitutional identity? In: Sydney Law School Research Paper (2006) No.06/37.

[275] Judgment (TK) no. K32/09 – Treaty of Lisbon, of 24 November 2010. on constitutional identity, but also in K28/13 – Contempt of Polish Nation of 21 September 2015 on national identity, giving a broad definition to „nation"; in the following cases the Constitutional Tribunal has identified constitutional identity as freedom and an essential content of fundamental rights: P32/05 – Confiscation of wood of 15 May 2006; K5/99 – Pensions from the social security fund of 22 June 1999, SK16/01 – Pensions increase regulations of 22 October 2001, P22/07 – Reformationis in peius of 28 April 2009 and P11/98 – Statutory limits of rents of 12 January 2000; as well as in SK26/02– constitutionality of civil procedural rules of 31 March 2005 - as a first appearance of constitutional identity in an internal aspect in Poland. In K2/00 – on tenancy rules, of 26 November 2001 - constitutional identity has appeared as a limitation of state competences. Constitutional identity in the sense of „equivalence" or „equality" is used in the following judgments: no.

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rights are primarily defined as the content of Polish constitutional identity. Also the first five provisions of the Constitution are considered as part of constitutional identity (common good, democracy, rule of law, social justice, unitary principle, territorial integrity and personal rights. *Article 1* declares the common good for all citizens, *article 2* declares the principles of democratic principle based on rule of law and social justice, *article 3* declares the unitary principle and *article 5* declares the principles of territorial integrity, protection of personal rights, *article 6* includes reference on the national identity and article 35.2 on cultural identity, and as explained above based on case references, the Constitutional Tribunal has developed the term of *constitutional identity* in an unique Polish interpretation following in the path of its German and other counterparts.

As discussed above, the Accession Treaty case[276] by the Constitutional Tribunal provides more diverse considerations on the interpretation of these terms. These considerations also show similarity to the considerations raised by the German constitutional court when developed the concepts of reservations (*Reservevorbehalt)*, such as the fundamental rights control (*Grundrechtekontrolle*) *Ultra Vires* control or sovereignty control, identity control (*Identitätskontrolle – Verfassungsidentität)*.

The Constitutional Tribunal has dealt with the question of the relationship of the concept of sovereignty and participation in the EU and sovereignty conferral in its decision about the constitutionality of the EU Accession Treaty bellow.

In the case related to the constitutional review of the Accession Treaty of Poland, the applicant has argued, that on the basis of *article 8* of the Constitution, the participation in the EU would be unconstitutional, since the legal system of the EU requires *supremacy* over national constitutions and article 8 of the Polish constitution declares the supremacy of the Polish Constitution.

Other argument pointed out that the participation in the EU violates article 4 (1) of the constitution by taking away national *sovereignty* and the membership in the EU also violates article 90 (1) of the Polish Constitution as the EU membership is an unlimited and irreversible transfer of state competences on the EU.

SK3/05 on right to appeal, of 27 March 2007; no. SK47/08 on the costs of an effective remedy in civil proceedings of 23 March 2010, no. SK62/08 on tax deductions, of 12 April 2011, and case no. K29/07 on teachers' rules of 9 June 2010.

[276] nr. K 18/04 – Accession Treaty Judgment of May 11, 2005

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Applicants also pointed out that EU membership imposes a threat *on real estate*, since after a certain period of time, even non-Polish nationals could purchase real estate in the territory of Poland.

Some of the applicants found the principle of supremacy of EU law over national law violating article 91 (3) and 188 of the Polish constitution as – they argue – the principle of supremacy leads to a *alteration* of *jurisdiction* of the Constitutional Tribunal.

Further argument was that the membership in the EU also violated *article 235* of the Constitution, as – the applicants argued - the accession to the EU is actually a *revision* of the Constitution and article 235 – which would be necessary for a revision of the constitution – was not applied in the specific case.

It was also argued that the *non-discrimination* requirement of EU law would violate *article 18* of the Constitution that declares that marriage should be between a man and a woman.

Another applicant stressed that the EU membership would *take away competences from the Parliament by increasing the competences of the executive* with the participation in the Council meetings. As a result of these arguments, in those fields which fall into EU competence and previously the national Parliament had the competence to pass legislation, after the accession the government would make decision by participation in Council meetings that would violate the rule of law and constitutional principles of *division of powers* as well as the *checks and balances*.

In its *decision* about the approval of the accession treaty, the main argument of the Constitutional Tribunal - addressing arguments related to the loss of sovereignty and unlimited and irreversible competence conferral - was that it was a sovereign decision by the sovereign nation of Poland, to approve via referendum the accession to the EU, according to a due process regulated by the Constitution. It is required by the Polish Constitution that *both houses of the Parliament participate in the decision-making of the EU institutions* as it is set out by the Founding Treaties and Polish law. Whereas, on the one hand, the Constitutional Tribunal emphasized the co-existence of EU law and domestic law as well as the highly *co-operative relationship* between the abovementioned laws. Moreover, it made also clear that under article 8 of the Constitution the primacy of EU law cannot be accepted.

The Constitutional Tribunal suggests *three scenarios* to unlock a possible conflict between EU law and the Polish Constitution. (1) Scenario one refers to the amendment of the EU law, in order to be

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in compliance with the Polish Constitution - this scenario seems to be less realistic for the Constitutional Court judges. (2) Scenario two is addressed to amend the Polish Constitution[277] which become compliant with EU law, represents is rather a realistic way to solve such a conflict. (3) Last but not least, scenario three, the least plausible option, is to withdraw[278] from the EU. Such an interpretation and constitutional provision in article 8 are clearly in a contradiction to the well-established case law of the CJEU and declaration nr. 17 attached to the TFEU as EU law requires an immediate and unconditional obey by national courts and authorities in case of conflict between EU law and national law. The CJEU developed case law requires national judges and authorities to set aside any national legislation, at all levels, and directly apply EU law.

Furthermore, in its decision on *secondary EU law*[279], the Polish Constitutional Tribunal has declared, that in European judicial dialogue with the CJEU, it has the last word, and it can declare secondary EU law as an *ultra vires* legislation and declare it not applicable in Poland. It should be noted, as a justified critic, that such approach, without using the option of the preliminary reference to the CJEU[280], is an infringement of Union law in itself, not speaking about the fact, that in some Member States (notably in Germany, see: above discussed EAW III decision by the *Bundesverfassungsgericht*) is also a violation of the constitution, as a violation of the *right to a lawful judge.*

The *Brzezinski* case[281] was the first preliminary reference submitted by a Polish court to the CJEU and it touched upon the relationship of the concept of national sovereignty and membership in the EU. According to the facts of the case, Mr Brzezinski requested the reimbursement of already paid excise duty from the Polish Tax Authority on the basis of Council Directive 92/12/EC[282] on excise duty. The tax authority considered this as a violation of national *sovereignty*, as essential national sovereignty pre-supposes *the state authority over taxation* and the determination of economic policy.

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[277] Exactly this has happened as a result of the P1/05 judgment, where the Constitutional Tribunal has declared, that the EAW FD is unconstitutional in the extent, as the surrender of a Polish citizen is prohibited by the Constitution. This provision has been eliminated in order to comply with EU law.

[278] Withdrawal from the EU is regulated – since the Treaty of Lisbon – in article 50 TEU and even in case of withdrawal, the withdrawing state would be liable for two years from the date of notification of withdrawal from the EU.

[279] Judgment (TK) no. SK45/09 – on EU Secondary Law of 16 November 2011.

[280] The Polish Constitutional Tribunal only submitted once, a preliminary question in case no. K61/13 of 7 July 2015. See more: Kustra, Aleksandra: Reading the Tea Leaves: The Polish Constitutional Tribunal and the Preliminary Ruling Procedure, in: 16 German Law Journal, pp. 1543-et seq., 2015.

[281] Case III SA/WA 254/07, Maciej Brzezinski v Dyrektor Izby Celnej w Warszawie (2008), Voivod Administrative Court in Warsaw, dated 6 March 2007 - before the CJEU: Case C-313/05 Maciej Brzezinski v Dyrektor Izby Celnej w Warszawie (2007) ECR I-513.

[282] Council Directive 92/12/EEC, 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, OJ 1992 L 76/1

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The Warsaw Administrative Court had to decide about the arguments of Mr Brzezinski that tax discrimination occurred in the case of second-hand cars compared non-imported second-hand cars sold domestically. In order to clarify the obligation imposed by the relevant EU directive and Treaty provisions, the Polish Administrative Court submitted a preliminary reference to the CJEU with regard to the interpretation of the applicable provisions of EU law, particularly Council Directive 92/12/EC on excise duty. The CJEU in its preliminary ruling concluded that the charge *did not have an equivalent effect with custom duties* and there was no discrimination between cars produced in Poland and those imported cars before the expiry of the two-year period following production. But in case of second-hand cars which were two years old or older, there could be a discrimination established if the amount of the excise duty to be paid on the market value of the imported cars exceeded the amount of the same duty incorporated in the market value (purchase price) of similar cars registered domestically. The CJEU rejected to have a *temporal limitation* on its judgment and it had a major effect on similar cases.

3. The requirement of democratic legitimacy

Poland is a representative democracy. Similarly to other Member States, to counterbalance the shift of legislative competences towards the executive branch as a result of the accession to the EU, there is an *EU affairs committee* established in the Parliament, which should exercise the *Parliamentary control over governmental positions* represented with regard EU legislative proposals in the Council. In one of its early decisions, the Constitutional Tribunal dealt with the question of the relationship between the Constitution, adopted by the democratically elected Parliament and Union law.

In the *European Arrest Warrant decision*[283] the Polish Constitutional Tribunal gave important interpretation concerning the relationship of *Article 8* and *Article 9* of the Polish Constitution. As the Constitutional Tribunal pointed out, that the Polish Constitution has to be interpreted in the light of international obligations as *Article 9* of the Constitution requires.

In the underlying case, a Polish citizen's extradition was asked by Dutch authorities on the basis of the European Arrest Warrant decision. The Polish court turned to the Constitutional Tribunal, whether *article 55 (1)* of the Constitution, prohibiting the extradition of Polish citizens is applicable here and whether the court shall distinguish between extradition and surrender of Polish citizens. The Constitutional Tribunal concluded that *surrender* is included in the term of the *extradition*. Moreover,

[283] The constitutionality of the European Arrest Warrant has been raised in other Member States as well. In Germany: Case 2 BVR 2236/04, 18 July 2005, (2006), 1 C.M.L.R. 16. In Czech Republik: 3 May 2006 (2007) 3 C.M.L.R. 24.

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it also concluded that the *European Arrest Warrant framework decision clearly contradicts article 55 (1) of the Constitution, therefore, it is unconstitutional*. The Constitutional Tribunal also elaborated briefly on the fact that framework decisions are binding in Poland as part of its international obligations. As a conclusion, the Constitutional Tribunal declared the unconstitutionality of the European Arrest Warrant but delayed the annulment of the implementing legislation as a result of a pro-European interpretation of *article 55 (1)* of the Constitution. On the other hand, the Constitutional Tribunal also suggested the Parliament to revise the Constitution in this regard and pointed out that *similar revisions had to take place in Germany and France*, for instance.

The institution of the European Arrest Warrant is a constant source of constitutional questions, starting from the surrender of nationals to other EU member states, or surrendering to an EU Member State, where the *right to a fair trial* or the *independence of the judiciary*[284] is not guaranteed, as the right to a fair trial has been raised recently by the German Federal Constitutional Court in the end of 2015 in a case involving the extradition of a US citizen to Italy. Namely, if anyone can be surrendered to an EU Member States that criminal procedure allows for a treatment violating human dignity and right to *defense*. The details of this case were discussed earlier in the German chapter. Furthermore, in a recent Irish preliminary ruling case, the question was raised in PPU by the Irish Supreme Court, if surrender to Poland is in compliance with rule of law, as the independence of judges cannot be guaranteed[285], therefore a surrender to Poland can be blocked[286].

The question of the source of legitimacy (authority) of the supremacy of EU law was raised for the first time in a lower court decision in Poland. A Polish local court *has derived the supremacy of EU law from the art. 91 of the Constitution and not from Union law*. In this case[287], the local administrative court has established the conflict between the Polish VAT Act and the applicable Council Directive on VAT Tax 77/388/EEC. As a result of the non-conformity of the Polish VAT Act with the VAT directive, the Administrative Court argued that *on the basis of article 91 of the Polish Constitution*, Polish courts have to give supremacy to EU law towards national law. Therefore, if the conditions of direct effect of the VAT directive were fulfilled, the Administrative Court would

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[284] In fact Poland has become under scrutiny in recent years.

[285] Irish High Court submission to the CJEU in a preliminary ruling in a criminal proceeding against Mr. Celmer, raises concernes, as if free trial rights of a person moved to Poland for a criminal trial would be undermined (as well as mutual trust in the EU) as a result of recent changes in the Polish judiciary. More detailed in: CANOR Iris: My brother's keeper? Horizontal Solange: "An ever closer distrust among the peoples of Europe". Common Market Law Rev 50, pp. 383-422; 2013. and BÁRD, Petra and van BALLEGOOIJ, Wouter: Judicial independence as a precondition for mutual trust, Verfassungsblog, 2018/4/10.

[286] Case C-216/18 PPU LLM Judgment (Ireland – Poland) ECLI:EU:C:2018:586

[287] Case III SA/Wa 2219/05 General Electric Polska v Dyrektor Izby Skarbowey w Warszawie, Voivod Administrative Court in Warsaw, dated 12 October 2005 (available online: orzeczenia.nsa.gov.pl/doc/9626EF05C0)

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establish its decision on the basis of the VAT directive and it set aside the non-conform Polish VAT act. Even if the conclusion of the Polish Administrative court was right in this case, it should be pointed out that it has derived the principle of supremacy of EU law from the Polish Constitution and not from EU law, CJEU jurisprudence itself, as it is required by EU law and the well-established case law of the CJEU about the autonomy of Union law.

In a sex discrimination case[288] related to access to retirement pensions with special conditions the Polish Supreme Court established the *direct effect of the equal treatment directive*[289]. In the underlying case, a male conductor has been denied from the possibility of early retirement, which would be otherwise open to female conductors based on the applicable law for special working conditions. The Supreme Court took the position that it is a discrimination based on sex and therefore, unlawful violating the equal treatment directive as well as the applicable law was not in line with the equal treatment directive.

4. The dual character of the Rule of Law Principle

Despite the ongoing rule of law proceeding against Poland, in Poland the Constitution orders the protection of *rule of law* and it is considered as a part of Polish constitutional identity. Traditionally, the case law of the Constitutional Tribunal and ordinary courts, via the protection of fundamental rights, legal certainty, constitutional adjudication and judicial independence, developed a core of the rule of law concept in Poland. In the practice of recent years however, especially in the area of judicial independence recent legislation made multiple attempts to harm the independence of judges, establish *disciplinary panels* for instance to intimidate judges and distract the independent judiciary.

In the Jerzy S. v. Naczelnik Urzedu Skarbowego[290] decision, a VAT related case, the local administrative court has applied the principle of *legal certainty*, by enforcing EU law by ignoring administrative obstacles in national administrative law. In the specific case, the right of the applicant to reclaim VAT was refused by the tax authority because the applicant had no prior VAT registration in Poland. The Wroclaw Administrative Court has applied the principle of *indirect effect* and pointed out that *national VAT law shall be interpreted in the light of the applicable VAT directive*. It

[288] Case I UK 182/07, Zbigniew G. V. Zaklad Ubezpieczen Spolecznych, Supreme Court of Poland dated 4 January 2008.
[289] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatement for men and woman in matters of social security, OJ 1979 L. 6/24.
[290] Case I SA/Wr 1452/05, Jerzy S. v Naczelnik Urzedu Skarbowego, Voivod Admonistrative Court in Wroclaw, dated 26 July 2006. (available online: orzeczenia.nsa.gov.pl/doc/C4BDDC2F02)

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concluded that on the basis of the applicable VAT directive, the principle of neutrality as set out in the directive, does not allow to make VAT deduction conditional upon an earlier VAT registration.

In another case, the Constitutional Tribunal dealt with the constitutionality of the *jurisdiction of the CJEU in third pillar cases* as well as the possibility for Polish courts to turn with a preliminary reference to the CJEU in third pillar cases. The argument related to *legal certainty* and *rule of law* was raised by the Head of State. The reference submitted to the Constitutional Tribunal by the Head of State was related to the constitutional review of the act acknowledging the jurisdiction of the CJEU in third pillar cases. The Polish Head of State argued – among others - that acknowledging the jurisdiction of the CJEU in third pillar cases and thereby opening the possibility for preliminary ruling procedures, could cause *unpredictable delays* in court proceedings which would violate the principle of legal certainty and rule of law. The Constitutional Tribunal declared that even without accepting the jurisdiction of the CJEU in third pillar cases, the preliminary ruling decisions of the CJEU passed in cases submitted by other Member States are already binding in Poland and consequently, Polish courts will apply CJEU decisions passed as a response to preliminary references by courts of other Member States. The Constitutional Tribunal also referred to the decision of the Polish Supreme Court in the case of criminal proceeding against Jakub G., where the Supreme Court expressed its regret that it cannot submit a preliminary reference to the CJEU in third pillar cases, however, it applied decisions of the CJEU issued as a response to preliminary references submitted by courts of other Member States.

The application of the principle of *non-discrimination* was in question in the *Nerkowska* case[291]. The applicant, a Polish national was entitled to *special benefit available for victims of war*, however, since she lived in Germany, Polish authorities refused the payment of such benefit. After Poland joined the EU, the applicant turned again to Polish authorities to obtain the special benefit and she challenged the decision of the Polish authorities before the Regional Court in Koszalin. The Regional Court in Koszalin turned to the CJEU in order to clarify the content of the applicable EU Internal Market legislation. The CJEU in its preliminary ruling declared that citizens of new Member States can fully benefit from the European citizenship and *any national legislation that puts nationals in a disadvantage just because they exercised their right to move within the EU cross-border, shall be*

[291] Case IV U 1660/06 Halina Nerkowska v Zaklad Ubezpieczen Spolecznych, Regional Court in Koszalin, dated 30 June 2008 – before the CJEU: Case C-499/06 Halina Nerkowska v Zaklad Ubezpieczen Spolecznych Oddzial w Koszalinie (2008) ECR I-3993

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considered as a violation of the Single Market, particularly the right to free movement[292]. In the specific case, Poland can impose obligations such as personally attending medical and administrative examinations in order to determine the eligibility for the special benefit but imposing an obligation to change permanent residence would be *disproportionate* to the objective to verify eligibility for the special benefit of the applicant.

When discussing the impact of EU law on the situation of rule of law in Poland, it is not possible, not to point out recent worrying developments with regard the situation of the rule of law in Poland. The European Commission has initiated the Article 7 proceeding against Poland, in December 2017. The main reasons, that the Commission decided to trigger the rule of law proceeding pursuant to Article 7 (1) TEU against Poland, were the developments between 2015 and 2017 with regard the attempts to limit the independence of courts and particularly of the constitutional court in Poland[293]. Relevant decisions by the CJEU related to the judicial independence in Poland stand out: the C-192/18[294] decision related to the independence of Polish ordinary courts, decision nr. C-619/18 [295] and particularly interim order nr. C-619/18 R related to the independence of the Polish Supreme Court, and the earlier (forced) retirement of judges, and particularly relevant from the aspect of the Article 7 procedure, is the case nr. C-791/19[296] and particularly interim order nr. C-791/19 R concerning the disciplinary chambers for judges, introduced at the Polish Supreme Court. Interim orders C-619/18 R and C-791/19 R[297] immediately suspended the application of the relevant Polish legislation, until the CJEU made its final decision on the matter, which proved to be an efficient remedy in the given proceedings.

With regard safeguarding judicial independence in the context of overlapping interests throughout the appointment of justices, the CJEU has passed important rulings in its decisions nr. C-585/18, C-624/18 and C-625/18. These CJEU decisions were *not well received* on the level of the Polish Parliament and the Polish Constitutional Court. The Parliament has introduced a new law in the end of 2019, which introduced a new disciplinary offence punishable with dismissal from office, for those cases, where a judge challenges the existence, legitimacy or the effect of a judicial appointment, and

[292] Further related decisions of the CJEU: Case C-192/05 K. Tas-Hagen and R.A. Tas v Raadskammer WUBO van de Pensioen- en Uitkeringsraad (2006) ECR I-10451; Case C-221/07 Krystina Zablocka-Weyhermüller v. Land Baden-Württenberg (2008)

[293] For a more detailed account of the developments, which led to the Article 7 proceeding and particularly the response by the EU Institutions, see: Sadurski, Wojciech: Poland's Constitutional Breakdown, Oxford University Press, 2019., pp. 192-241.

[294] C-192/18 Commission v Poland (independence of ordinary courts) ECLI:EU:C:2019:924

[295] C-619/18 European Commission v Poland ECLI:EU:C:2019:531 (lowering the retirement age of judges)

[296] C-791/19 Commission v Poland (disciplinary system for judges)

[297] C-791/19 R Commission v Poland (disciplinary system for judges, interim order) ECLI:EU:C:2020:277

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the Polish Constitutional Court has suspended the decision of the Polish Supreme Court, which wanted to give effect to the CJEU ruling.

The CJEU ruling on 2 March 2021, in case C-824/18[298] with regard the judicial control over judicial appointment procedures is of a paramount importance from the aspect of strengthening judicial independence within the EU. The CJEU has held, that Article 19(1) and 267 TFEU, as well as Article 4(3) TEU precludes the application of national law, which, *deprive a national court of its jurisdiction* to rule on appeals in judicial appointment cases (particularly: Polish Supreme Court, against decisions of the Polish National Council of the Judiciary) or which, declare such appeals to be discontinued by law while they are still pending, ruling out the possibility of being continued or lodged again, and which, thereby also, deprive a national court of the possibility of obtaining an answer to the questions that it has referred to the Court for a preliminary ruling.

Particularly, the CJEU pointed out, that Article 267 TFEU and Article 4(3) TEU precludes the application of national law, which have the effects of preventing the CJEU from ruling on questions referred for a preliminary ruling, and Article 19(1) second subparagraph TEU precludes the application of national law, which gives rise to legitimate doubts, as to the independence and neutrality of the judges appointed. Article 19(1) second subparagraph TEU also precludes the application of national law, which would have the effect, that the outcome of appeals in judicial appointment cases are ignored or would otherwise the possibility for an appeal court, to re-assess the judicial candidates' fulfilment of the criteria taken into account when a decision on the presentation of the proposal for appointment was made.

As pointed out earlier, the efficiency of the Article 7 procedure has been questioned in multiple times in the literature because of rightful reasons[299], of its political character, its *lack of efficiency* and because of the fact, that the *ultimate judicial authority within the EU plays no role in determining an*

[298] C-824/18 A.B. and Others (nomination of Supreme Court judges, Poland) ECLI:EU:C:2021:153

[299] Scheppele, Kim Lane: What can the European Commission do when member states violate basic principles of the European Union? The case for systemic infringement actions (available at: http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf), 2013; Bárd Petra and Sledzinska-Simon Anna: The Puissance of Infringement Procedures in Tackling Rule of Law Backsliding, August 9, 2019, RECONNECT Project; Bárd Petra and Sledzinska-Simon Anna: The Puissance of Infringement Procedures in Tackling Rule of Law Backsliding, June 3, 2019, Verfassungsblog; Petra Bard and Anna Sledzinska-Simon: Rule of law infringement procedures – A proposal to extend the EU's rule of law toolbox, CEPS Paper in Liberty and Security in Europe No. 2019-09, May 2019; Skouris Vassilios: Die Rechtsstaatlichkeit in der Europäischen Union, Europarecht Beiheft, 2015; Drinóczi Tímea and Bień-Kacała Agnieszka: Rule of Law, Common Values, and Illiberal Constitutionalism Poland and Hungary within the European Union, Routledge, 2021., p. 18.

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existential, but purely legal question with an utmost importance[300]. The Article 7 procedure does have a role in *keeping the situation of rule of law in particular Member States on the European political agenda and in the centre of European political discourse*[301], but this is not what the original aim of Article 7 would be and it neither helps much the state of rule of law in the particular Member States.

There is an ongoing intense debate in the literature, which alternative model and improvement of the current enforcement legal framework could provide an efficient alternative method of enforcement of rule of law and particularly Article 2 TEU. As it was pointed out, the *measurement of rule of law* is debated, there arguments that it is not measurable[302] and others point out that it is more complex, difficult to agree in uniform indicators[303] or simply taking a catalogue of values on a self-explanatory basis[304]. In recent years, in connection with the European Parliament's proposal on the DRF Pact[305] and in the European Commission's regulation proposal[306] to safeguard the EU budget in case of manifest rule of law violations, having an impact on the EU financial interests, the idea of establishing a panel of external experts[307] have been raised in determining the situation of rule of law in particular Member States. In case of the DRF Proposal, the Commission has justly raised the concern of accountability and legitimacy in connection with the establishment of such an expert panel. In case of the regulation proposal however, the legitimacy question meant to be remedied by the Commission from two angles: on the one hand, national Parliaments would be in charge to delegate one member

[300] See on a critical note, particularly related to the Commission's role: Bárd Petra, Carrera Sergio: The Commission's decision on 'Less EU' in safeguarding the rule of law: a play in four acts. CEPS Policy Insights (available at: https://www.ceps.eu/wp-content/uploads/2017/03/PI%202017-08_PBandSC_RoL.pdf) 2017/18, March 2017.

[301] Kochenov argues, that this problem is much bigger, than an enforcement issue, the foundation of EU law need to be changed to tackle the problem. See: Kochenov, Dimitry: The EU and the Rule of Law – Naïveté or a Grand Design?, in: Adams, Maurice et al. (eds.): Constitutionalism and the Rule of Law, Bridging Idealism and Realism, CUP, 2017, pp. 425-445.

[302] SCHMITT Carl: The Tyranny of values. Plutarch Press, Washington DC, 1996.

[303] JAKAB András, LŐRINCZ Viktor Olivér: International indices as models for the rule of law scoreboard of the European Union: methodological issues. Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper 21/2017; see also: MAY, Christopher and WINCHESTER, Adam: Handbook on the Rule of Law, Edward Elgar, 2018, pp. 49-56.

[304] MÜLLER, Jan-Werner: A democracy commission of one's own, or what it would take for the EU to safeguard liberal democracy in its member states. In: JAKAB András, KOCHENOV Dimitri (eds) The enforcement of EU law and values ensuring member states' compliance. Oxford University Press, Oxford, 2017.

[305] The European Parliament with its resolution dated 25 October 2016 have recommended the European Commission, to establish a special rule of law mechanism, a rule of law scoreboard, focusing on the protection of rule of law, fundamental rights and democracy by establishing an interinstitutional agreement, an EU Pact. European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL) P8_TA(2016)0409 (DRF Proposal).

[306] Proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States A8-0469/2018, 2018/0136 (COD). The proposal would mainly measure the following indicators: efficient investigation, judicial independence, quality of available remedies and implementation of judgments, legal certainty, pluralistic and transparent legislative processes, as well as lack of arbitrariness.

[307] The DRF Proposal also proposed to involve national Parliaments and civil organisations in the assessment of the situation of rule of law on the basis of a proposed scoreboard.

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per each to the expert body and one member by the European Parliament, and on the other hand, the Commission has emphasized, that the Commission's role in evaluating the situation of rule of law in Member States will not be replaced by the expert group.

Even if the DRF Proposal has not been accepted in its form by the Commission, it remains remarkable, from the aspect, that it raised the idea of a uniform evaluation of rule of law situation within the Member States, on the basis of a set of rule of law indicators (scoreboard) for the first time, and this idea has been developed, although in a different format, and without the establishment of an external expert panel by the European Commission in its Communication on the strengthening of rule of law within the Union[308]. The Communication introduced annual rule of law reports, where instead collecting data from a special expert panel, data are collected from well-respected organisations, such as the Council of Europe, the European Union Fundamental Rights Agency and the Organisation for Security and Co-operation in Europe.

The DRF scoreboard Proposal was also remarkable in terms of its system of proposed sanctions, as it rendered has introduced the term of systemic (connected multiple) infringement[309] actions, which seems to be probably the most efficient alternative to the application of Article 7 under the current legal framework.

5. Level of the Protection of Fundamental Rights

In Poland there is a fundamental rights catalogue included in the Constitution and enforced by the judiciary and the Constitutional Tribunal. Furthermore, the Membership in the EU and in the ECHR should provide effective second and third layers to fundamental rights protection in Poland.

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[308] Communication from the Commission, on the strengthening the rule of law within the Union. COM(2019) 343 final

[309] As pointed out earlier, Scheppele in 2013, Bárd and Śledzińska-Simon in 2019 have proposed the application of systemic infringement actions in: Scheppele, Kim Lane: What can the European Commission do when member states violate basic principles of the European Union? The case for systemic infringement actions (available at: http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf), 2013; Bárd Petra and Sledzinska-Simon Anna: The Puissance of Infringement Procedures in Tackling Rule of Law Backsliding, August 9, 2019, RECONNECT Project; Bárd Petra and Sledzinska-Simon Anna: The Puissance of Infringement Procedures in Tackling Rule of Law Backsliding, June 3, 2019, Verfassungsblog; Petra Bard and Anna Sledzinska-Simon: Rule of law infringement procedures – A proposal to extend the EU's rule of law toolbox, CEPS Paper in Liberty and Security in Europe No. 2019-09, May 2019.

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In the area of employees` rights, a Polish district court case[310], the Plaintiff wanted to enforce *compensation* and holiday extension claims for overtime work, including night shifts starting from 1 May 2004 directly on the basis of the 93/104/EC working time directive. The Polish local court has evaluated the conditions of direct effect of the working time directive and concluded that the working time directive does not have direct effect. In the specific case, it should not be applied in horizontally, since the Public Health Authority is not considered as an emanation of the state, therefore, the *Plaintiff could not rely on the working time directive*. The District Court, furthermore, added that on the basis of the Accession Treaty of Poland to the European Union, there is a five years transitional period where the working time directive is not applicable and the District Court pointed out that, in the meantime, a new working time directive has been introduced, namely the 2003/88/EC directive[311]. On appeal, the District Court held that the directive can be relied on by the Plaintiff because the *directive can be applied vertically as national health authorities are emanations of the state* according to the case law[312] of the CJEU. The District Court also pointed out that the five years transition period is not applicable in this particular case, therefore, the working time directive had immediate effect in Poland since 1 May 2004. The District Court rejected the appeal of the Plaintiff and ordered financial compensation for the overtime (extra hours worked) but further extra leave was not granted. The Plaintiff requested annulment of the decision of the District Court from the Supreme Court. The Supreme Court annulled the decision and ordered retrial. It pointed out that the *facts of the case have to be evaluated in the light of the directive*, particularly article 17, which allows Member States to allow derogations in certain organizations of the health sector from general working time rules.

In another employees` rights case, the Polish Supreme Court had to interpret the term *"date of insolvency of an employer",* and in this context have ruled, that if EU law is applicable, courts shall apply EU law, whether the parties have referred to the application of EU law in their submissions or not. This *automatic or ex-officio application of EU law* is a cornerstone of the case law of the CJEU[313] and it has been extensively cited by the Polish Supreme Court. According to the facts of the case, Plaintiff claimed its outstanding salaries, whereas, defendant declared insolvency. The "date of insolvency" has been a central legal question that long has been interpreted in Polish law in different

[310] Case I PK 263/05, Cz. Mis v Samodzielny Publiczny Zaklad Opieki Zdrowotnej im. Jedrzeja Sniadeckiego w Nowym Saczu, Supreme Court of Poland, dated 6 June 2006.
[311] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ 2003 L 299/9.
[312] Case 152/84 M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (1986) ECR 723.
[313] Joined cases C-430/93 and C-431/93 Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten (1995) ECR I-4705.

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ways, as Directive 80/987/EEC and related case law[314] by the CJEU would require. Based on the fact that the directive together with the case law of the CJEU provided a clear interpretation for the applicable EU law, specifically to the term of "*date of insolvency of an employer*" – interpreting it as the day when the application for bankruptcy was filed - the Supreme Court of Poland considered itself as released from the obligation to submit a preliminary reference to the CJEU, since the matter has been an *acte claire* according to the relevant case law[315] on the application of preliminary references of the CJEU.

As described in the earlier chapter, there is an ongoing *Article 7 (rule of law proceeding*) against Poland, primarily because of new legislation and administrative practices aiming to curb the *independence of the media and the judiciary*. *Sadurski* however provides a detailed account, on how *individual rights, such as freedom of assembly, have been eroded* as a result of the above-described anti-democratic tendencies in Poland, since 2015[316].

6. Constitutional adjudication

Article 188 of the Polish constitution gives the constitutional tribunal strong competences, among others, in adjudicating regarding the conformity of statutes and international agreements with the Constitution, conformity of ratifying statutes of international agreements prior the ratification with the Constitution and in complaints concerning infringements of the constitution.

As Stanislaw Biernat pointed out,[317] the Polish Constitutional Tribunal passed quite EU-friendly decisions *prior Poland joined* the European Union. For example, the Polish constitutional tribunal emphasized in multiple decisions[318] that it took *EU law as an inspiration* into account already prior to the accession to the European Union.

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[314] Case C-373/95 Federica Maso and others and Graziano Gazzetta and others v Instituto nazionale della previdenza sociale (INPS) and Repubblica italiana (1997) ECR I-4051; joined cases C-94/95 and C-95/95 Daniela Bonifaci and others, Wanda Berto and others v Instituto nazionale della previdenza sociale (INPS) (1997) ECR I-3969; Case C-160/01 Karen Mau v Bundesanstalt für Arbeit (2003) ECR I-4791.

[315] Joined cases 28/62, 29/62, 30/62 Da Costa en Schaake NV, Jakob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration (1963) ECR 31; Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health (1982) ECR 3415; Case C-495/03 Intermodal Transports BV v. Staatssecretaris van Financien (2005) ECR I-8151;Case C-461/03 GastonSchul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit (2005) ECR I-10513.

[316] Sadurski, Wojciech: Poland's Constitutional Breakdown, Oxford University Press, 2019., pp. 150-161. Putting the emphasis on individual rights, Claes explaines, that

[317] Stanislaw Biernat, Die europaische Rechtssprechung polnischer Gerichte vor dem Beitritt zur Europaischen Union in J. Masing and W. Erbguth, eds., Die Bedeutung der Rechtssprechung im System der Rechtsquellen. Europarecht und nationales Recht (Stuttgart-München et al., Richard Boorberg Verlag 2005) pp. 191-207.

[318] See: Case K 27/99 (re Conformity of Teachers Charter Act with the Constitution), OTK Z.U. 2000/2/62; Case K 2/02 (re Conformity of Combating Alcoholism Act with the Constitution), OTK Z.U. 2003/1A/4.

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The Constitutional Tribunal in multiple decisions dealt with the relationship[319] between the Court of Justice of the European Union and the Polish Constitution as well. Particularly the Constitutional Tribunal has confirmed the application of the *Simmenthal Principle* in Poland in its decision no. P 37/05 on the division of competences between the Constitutional Tribunal and the CJEU[320]. The Constitutional Tribunal has clarified, that *domestic courts shall directly apply EU law and disregard national law* which would conflict with a clear provision of EU law, and if the provision of EU law is not clear, then the court shall send a preliminary reference to the CJEU.

In another case, the Constitutional Tribunal settled the dispute between the Prime Minister and the Head of State regarding the *representation in the European Council* meetings. The case referring to the *participation in the European Council meetings[321] before the Constitutional Tribunal* is noted as an example that the Polish Constitution even four years after the accession was not in compliance with the membership requirements of the EU. It should be added that it is quite evident that the Constitution needs interpretation when the country faces new constitutional challenges. The question, in fact, is how flexibly the constitutional provisions allow interpretation and how the Constitutional Tribunal is ready to provide flexible interpretation in conformity with the supremacy requirements of EU law. In the specific case, part of the constitutional question has been addressed, according to article 4 of the Treaty on the European Union heads of states or governments of the Member States attend European Council meetings. However, which of the two, is up to national constitutional arrangements[322]. As a result, it is up to *domestic constitutional law*, whether the head of state or the head of government shall represent the country in European Council meetings.

Similar interpretation had to be provided by the Constitutional Court in the early 1990s in Hungary related to the competences of the Head of State, when it came to the exercise of presidential competences for example related to military or foreign policy. The Hungarian constitutional court used to narrow down the competences of the Head of State in this case, stating that the Hungarian Head of State shall fulfil a symbolic role, when representing the *unity of the nation*, instead of an actual operational leadership role regarding the military or directing foreign policy. Day-to-day administration of defence or foreign policy shall be exercised by the government.

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[319] Case Kp 3/08 on 18 February 2009 (re Conformity of the Act authorising the President to Recognise the Jurisdiction of ECJ pursuant to Arcticle 35 TEU with the Constitution)
[320] Case P 37/05 on the division of competences between the TK and the CJEU
[321] Case Kpt 2/08 (re Participation in meetings of the European Council), 20 May 2009, Polish Constitutional Tribunal
[322] J. Werts, The European Council (London, John Harper Publishing 2008.)

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The *Constitutional Tribunal* of Poland has provided with a guidance and *encouragement* for the application of the preliminary ruling procedure for Polish courts in several cases. In case of the constitutional review of the *Excise Duty Act*, the Constitutional Tribunal held that the specific case is inadmissible because it dealt with the application of EU law within Poland and not with the relationship of the Constitution of Poland and EU law. The Constitutional Tribunal used this opportunity with reference to article 8 of the Polish Constitution to declare that *in case the Polish Constitution would be in conflict with EU law, then the Polish Constitutional Tribunal would have ultimate jurisdiction*. The Constitutional Tribunal provided a *guidance* for the local administrative courts as well on how to apply EU law in the specific case by declaring that in case of a conflict between Polish law and EU law, *Polish law should be set aside*, and in case of a non-directly effective provision of EU law, *Polish law should be interpreted in the light of EU law*. If it is not clear how to interpret EU law, Polish courts should turn with a *preliminary reference* to the CJEU.

The above mainly EU friendly approach of the CT has changed radically, as a result of the earlier described attempts by the Polish government following 2015, to influence the independence of the Polish Constitutional Tribunal. As a first step, serious legitimacy issues have been raised with regard to five judges of the Constitutional Tribunal, due to the fact, that the President of Poland in 2015 has refused to swear in five justices elected by the Polish Parliament to the Constitutional Tribunal, only because parliamentary elections were coming in that year, and he expected, that his party (PiS) will win the elections. Following the elections, PiS has won in fact, and the newly elected Parliament has elected five new justices, who were sworn in by the President. The ECHR however in May 2021, in its earlier cited Xero Flor judgment (application nr. 4907/18), has declared, that the judges sworn in, in 2015 (particularly the decision focused on one of those judges, Mariusz Muszinsky) were not legitimately elected judges, and Article 6 of ECHR (right to a tribunal established by law / right to a fair trial) has been violated.

The case related to the enforcement of CJEU rulings regarding the appointment of judges, became a turning point, also from the aspect of the Polish Constitutional Tribunal with regard its approach towards the enforcement of EU law. In connection with the domestic enforcement of three CJEU rulings[323], related to the appointment of judges, the Polish Constitutional Tribunal has suspended the effect of decisions of the Polish Supreme Court in those cases, where they wanted to give effect to the CJEU rulings by hearing challenges from judges with regard the existence, legitimacy, or the

[323] Cases nr. C-585/18, C-624/18 and C-625/18.

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effect of judicial appointments. By this approach, the CT was not only defying the enforcement of Union law, but it also blocked the Supreme Court to fulfil its duties under Union law.

The above situation has further escalated on October 7, 2021, when the CT declared in its decision nr. K3/21, specific provisions of the TEU to be unconstitutional. Based on the earlier cited case law of the CT, the Polish government and parliament has now basically two options (as amending TEU at the request of the CT is less likely): a) either amending the constitution of Poland, or b) for Poland to withdraw from to European Union. Since within the population in Poland, the EU membership is still supported by the large majority[324] of Polish citizens, option b seems to be less feasible from the perspective of the political future of the ruling party. Given the history of the governing coalition since 2015 in Poland, option a) seems to be equally not likely. As a result, the CT decision nr. K3/21 seems to result a dead end for Poland, and probably reach only one tangible result, which is the 1 million euro daily penalty payment imposed on Poland, for not complying with the CJEU order in C-204/21 R, particularly, not suspending the operation of the disciplinary chamber at the Supreme Court (failure to fulfil obligations).

Summary

1. Article 8 declares the principles of supremacy and direct applicability of the Constitution. Article 9 declares the principle of the respect of international law by the State. According to the ruling of the Polish Constitutional Tribunal, the Polish Constitution has to be interpreted in the light of international obligations as *Article 9* of the Constitution requires.

2. In case of a conflict between the Constitution and EU law, the Polish Constitutional Tribunal introduced three scenarios: (1) amendment of the conflicting EU law, in order to be in compliance with the Polish Constitution - which seems to be less realistic; (2) Scenario two is to amend the Polish Constitution in order to become compliant with EU law; (3) Last but not least, scenario three, the least plausible option, is to withdraw from the EU. These options deserve close examination, as Poland is facing an Article 7 procedure because of the multiple and serious violations of rule law.

3. Article 90 and 91 are the provisions, which were designed to prepare Poland for the EU accession. It concerns the relationship of international legal norms and domestic law as well as the legal status

[324] https://www.bankier.pl/wiadomosc/Ponad-80-proc-Polakow-za-pozostaniem-w-Unii-Sondaz-Kantar-8186349.html

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of acts issued by international organizations. Article 91 (3) grants precedence to acts issued by international organizations over acts of Parliament, however, not over the Polish Constitution.

4. Under EU law Polish courts and authorities have a duty to immediately set aside conflicting national law with EU law, without regard to the level of the national legislation; in the same time the Constitutional Tribunal took the position, that it is the role of the Parliament to resolve a conflict between EU law and the Polish Constitution.

5. Polish courts shall apply EU law automatically and ex-officio, without regard to the fact, whether the parties have referred to the application of EU law in their submissions or not.

6. Constitutional identity in Poland is also considered as a limitation on competence conferral on the EU and is interpreted to include democracy, rule of law, freedom, personal rights, equality, essential content of fundamental rights, territorial integrity, unitary principle, common good and social justice.

7. The Polish Constitutional Tribunal reserved the ultimate jurisdiction for cases, where the Polish Constitution would be in conflict with EU law and it reserved the right to declare secondary EU law ultra vires if necessary and not applicable in Poland.

8. Polish courts derive the principle of supremacy of EU law from art. 91 of the Constitution and not from Union law. However the Constitutional Tribunal declared the supremacy of the Polish Constitution, since its (in)famous K 18/04 decision.

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VII. HUNGARY

1. Introduction

After the change of the political regime, Hungary has made a fundamental revision of its Constitution[325] following the model of Western democratic states based on the principle of rule of law and the protection of fundamental rights. It is frequently stressed regarding the significance of the constitutional revision in 1990, that only one sentence remained unchanged from the "Stalinist" Constitution, namely that the capital of Hungary is Budapest. The fundamentally revised constitution kept its initial numbering, i.e. act XX of 1949, and this numbering remained the only resemblance to the former "Stalinist" constitution. In terms of its structure, namely the system of values and governing principles, it has fully followed the model of constitutions of democratic states based on the principles of rule of law and the protection of fundamental rights[326].

Hungary made a first step towards joining the European integration by signing an agreement on trade, commercial and economic cooperation in 1988 with the European Communities[327], then becoming a Member State of the *Council of Europe* in 1990[328] and signing an *association agreement* (so called Europe Agreement[329]) with the European Communities and its Member States in December 1991[330] and submitting its formal request to join the European Communities in March 1994.

The initial idea was, to keep the amended constitution as a temporary instrument for the transition period from dictatorship to democracy as well as to create a new constitution for Hungary, followed by free and democratic elections based on the fact that the legal and political system based on rule of democracy and free market economy have been stabilized. Even the Preamble of the amended Constitution in 1990 indicated its preliminary character, in the end it had to serve for much longer period.

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[325] Act XXXI of 1989, Act XXIX of 1990 and Act XL of 1990 on the Amendment of the Constitution, MK 1989/74, MK 1990/46 and MK 1990/59; available at http://www-archiv.parlament.hu/angol/act_xx_of_1949.pdf

[326] See: PACZOLAY Peter: The new Hungarian Constitutional State: Challanges and Perspectives, in: A.E. DICK Howard (ed.), Constitution Making in Eastern Europe, Woodrow Wilson Center Press, Washington (1993)

[327] OJ1988L327/2, signed on 26 September 1998 and entered into effect on 1 December 1998.

[328] Hungary signed the ECHR on 6 November 1990 and ratified it on 15 October 1992, see: http://www.coe.int/en/web/conventions/search-on-states/-/conventions/treaty/country/HUN

[329] For a more detailed analysis of the Europe Agreements, see: Marescau, M., Montaguti, E., The Relations between the European Union and Central and Eastern Europe: A Legal Appraisal, CMLRev. 32(1995), pp. 1327- 1367.

[330] OJ 1993 L347/1, entered into force on 1 February 1994. As an association agreement it was a mixed agreement, as not only the EC, but also its Member States were part of the agreement, the reason of which was, that it contained areas which were still in Member States competence.

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In the next two decades, *many drafts* have emerged, created by various political parties, constitutional scholars and other stakeholders[331]. Until 2010, however, there was no consensus on the acceptable version, either because the governing coalition did not have the constitution-making quorum (2/3 majority of the Members of the Parliament) or because the coalition parties (between 1994 and 1998, the socialists and the liberals) could not agree on a mutually acceptable constitution text, even if they had together the required constitution-making majority in the Parliament.

In 2010, the conservative Christian-democrat governing coalition managed to secure the constitution-making majority in the Parliament and in Easter 2011 have passed a new constitution, called Fundamental Law[332] (in Hungarian: '*Alaptörvény'*) for Hungary[333]. The name *Fundamental Law*, unlike the German *Grundgesetz* did not refer to the provisory character of the new Fundamental Law, rather emphasized the fact that it is a fundamental part, a foundational element of a so-called *Historical Constitution*[334]. Following the acceptance of the Fundamental Law by the Parliament, also new act[335] regulating the competences of Constitutional Court has been passed.

The Venice Commission[336], the European Parliament and also scholars in the literature[337] have expressed criticism due to a lack of pluralistic debate before passing the Fundamental Law. Following the entering into effect of the Fundamental Law, its transitory provisions, and its amendment, most

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[331] On the importance of a new constitution for Hungary in the perspective of the the EU accession: a conversation with Bruce ACKERMANN in: ACKERMANN, Bruce, HALMAI, Gábor: A magyar alkotmányos vívmányok túlságosan sérülékenyek, in FUNDAMENTUM, 2003/2, pp. 51-60.

[332] English translation of the Fundamental Law is available at http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARY\mostrecentversion01102013.pdf

[333] Jakab András provides an overview of different positions related to the new Fundamental Law of Hungary, from the supportive till the absolute critical, in: JAKAB András: A magyar alkotmányjog tudomány története és jelenlegi helyzete, in: JAKAB, András – MENYHÁRD, Attila (ed.): A jog tudománya, HVG-Orac, 2015., pp. 182-182.

[334] see more detailed in: CSINK Lóránt, SCHANDA Balázs, VARGA Zs. András (ed.): The basic law of Hungary, Clarus Press, 2012; TRÓCSÁNYI László: Az alaptörvény elfogadása és fogadtatása, in: VARGA Norbert (ed.): Az új alaptörvény és a jogélet reformja, SZTE Doktori Iskola, 2013. pp. 293-302; TRÓCSÁNYI László: Alaptanok, in: TRÓCSÁNYI László – SCHANDA Balázs (ed.): Bevezetés az alkotmányjogba, HVG-ORAC, 2012, pp. 19-76; KOVÁCS György: Ungarns neue Verfassung – In Kraft 1. Januar 2012, pp. 253–261, in: OER Osteuroparecht, 57 (2011)/3.;

[335] Act CLI of 2011 on the Constitutional Court of Hungary

[336] Venice Commission Opinion No. 614/2011, Strasbourg 28 March 2011, and Opinion No. 621/2011 on the new constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17–18 June 2011) Debate.

[337] ARATO A., HALMAI G., KIS J. (eds.) (2011) Opinion on the Fundamental Law of Hungary (available at: http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf); VÖRÖS Imre: The constitutional landscape after the fourth and fifth amendments of Hungarian Fundamental Law, in: Acta Juridica Hungarica, 2014/55, pp. 1–20; ZELLER Judit: Nichts ist so beständig… Die jüngsten Novellen des Grundgesetzes Ungarns im Kontext der Entscheidungen des Verfassungsgerichts, in: Osteuropa-Recht, 2013/59, pp. 307–325; VINCZE Attila: Wrestling with Constitutionalism: the supermajority and the Hungarian Constitutional Court, in: ICL Journal, 2013/7, pp. 86–97; SAJÓ András: Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy, in: Zeitschrift für Staats- und Europawissenschaften, 2004/3, pp. 351–371.

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notably its *fourth amendment*, has received substantial criticism. Regarding the *competences of the constitutional court*, substantial restrictions were made. Compared to the earlier act[338] on the constitutional court, the new act has altered and in some crucial points significantly *restricted the competences of the constitutional court*[339]*, most notably with regard the constitutional review of the substance of the amendments to the Fundamental Law*[340].

In the field of the *ex post abstract* review of norms (the so-called *popular action* or *actio popularis*, including also statutes promulgating an international agreement), the new act has abolished the earlier, very broad and abstract norm control that made it possible for every person, without a legal interest to challenge the constitutionality of any legal act before the Constitutional Court. In practice, the Constitutional Court did not even verify the identity of the applicants because – according to the Constitutional Court - it was not relevant from the point of view of determining the contested legal act`s constitutionality, *only the constitutional question did matter*.

Such a broad application of the *abstract norm control* has been unprecedented in Europe, even the Venice Commission advised against keeping it and by the 2011 Constitutional Court Act has abolished it. As said, even the Venice Commission in its first opinion on the draft Fundamental Law, did not recommend to keep it in its original form. According to the literature, the abstract norm control, as applied before 2011, has *fulfilled its purpose*[341], namely that it gave the possibility theoretically to every citizen to discover unconstitutional provisions in the legal system and thereby giving the possibility to the Constitutional Court to eliminate as many unconstitutional provisions remained from the totalitarian, socialist legal system as possible.

Another critical restriction regarding the competences of the Constitutional Court was that the Fundamental Law has *restricted competences of the Constitutional Court with regards to the*

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[338] Act XXXII of 1989 on the Constitutional Court of Hungary

[339] SZENTE Zoltán argues, that in parallel to this, also the argumentation of the Constitutional Court has changed, and started to follow political considerations, in: SZENTE Zoltán (2015): The Decline of Constitutional Review in Hungary – Towards a Partisan Constitutional Court? in: SZENTE Z., MANDÁK F., FEJES Z. (eds.) Challenges and Pitfalls in the Recent Hungarian Constitutional Development, L'Harmattan, Paris, pp. 185–210., also in a critical tone: a conversation with László Sólyom: SÓLYOM László, KOVÁCS Kriszta: Az Alkotmánybíróság többé nem az alkotmányvédelem legfőbb szerve., in: Fundamentum, 2013/1, 19-30.; JAKAB András – SONNEVEND Pál: Continuity with Deficiencies: The New Basic Law of Hungary, in: European Constitutional Law Review, 2013/1, pp. 102-138.; KÜPPER Herbert: Ungarns Verfassung vom 25. April 2011, Peter Lang, 2012.

[340] see more detailed in: SONNEVEND Pál, JAKAB András, CSINK Lóránt: The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary, in: VON BOGDANDY, Armin – SONNEVEND, Pál: Costitutional Crisis in the European Constitutional Area, Hart Publishing, 2015, pp. 52-62.

[341] see: VARGA, A. Zs.: Role of Constitutional Courts in protecting national/constitutional identity, in: Iustum, Aequum, Salutare (in Hungarian: *Az alkotmánybíróságok szerepe a nemzeti/alkotmányos önazonosság védelmében*), 2018/2, pp. 21-28., http://ias.jak.ppke.hu/hir/ias/20182sz/03_VZsA_IAS_2018_2.pdf

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constitutional review of specific legislative acts concerning state budget and taxes until the state debt exceeds half of the gross domestic product.

Specifically, for a presumably longer period, until the aggregate state debt exceeds one half of the GDP, the Constitutional Court may only declare a legislative act regarding the state budget and taxes unconstitutional, if such legislative act violates *human dignity, right to life, freedom of thought, conscience and religion, protection of personal data or rights related to the Hungarian citizenship*. It should be noted that the Constitutional Court almost exclusively held in the past legislative acts in this field unconstitutional on the ground of the *violation of the right to property*. Consequently, holding a piece of tax legislation or legislative act concerning the state budget unconstitutional based on the violation of human dignity could be relatively rare. However, it happened for instance in the case of the 95% special tax on severance payments that was held unconstitutional on the basis of the *violation of human dignity, which show, that the Constitutional Court still has some room for manoeuvre, even in the area of taxation and budget policy*. In connection with these amendments, the government has received strong criticism, most notably from the Venice Commission[342].

Some scholars also consider article R(3) of the Fundamental Law as further limitation regarding the competences of the Hungarian Constitutional Court because article R(3) says that the Fundamental Law *has to be interpreted in accordance with its purposes and in accordance with the achievements of the Historical Constitution*.

Further important change implemented with regard to the competences of the Constitutional Court was that an *individual constitutional complaint* can be requested also by one of the parties in a specific court case *against a specific court decision*. Such competence also follows the German model, until 2011 the Constitutional Court only overturned an ordinary court decision only once in the Jánosi case.

The competence of the Constitutional Court did not change with regard to the *revision of domestic norms on their compatibility with international agreements*. Such procedure can be exercised *ex officio* or can be launched at the request of (according to the 2011 Act on the Constitutional Court) one quarter of Members of the Parliament, President of the Curia, Parliamentary Commissioner for Human Rights and Chief Prosecutor. Moreover, individual judges may ask the review of national law with regard its compatibility with an international agreement.

[342] available at: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)001-e and http://www.venice.coe.int/webforms/documents/CDL-AD(2011)016-E.aspx

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Interpretation of a provision of the Fundamental Law can be requested by the Parliament, a parliamentary standing committee, the government and the President.

2. Sovereignty concept and conferral of competences on the European Union

Article B (1) of the Fundamental Law (identical with the former Article 2.§(1) of the former Constitution) has declared, that *Hungary is an independent, democratic state, based on rule of law*. According to the case law of the Hungarian Constitutional Court, the source of all sovereignty are the people. The *sovereignty of the people* is exercised directly only in exceptional cases, however, in those exceptional cases it shall enjoy *priority* towards the indirect form of the exercising of the sovereignty of the people, which is occurs via the directly elected national Parliament. Any legislation has to have a *democratic legitimacy* and among the state institutions the Parliament has the highest democratic legitimacy.

National sovereignty is defined by internal and external aspects. According to its internal concept, sovereignty ensures that the supreme power, the Parliament can make legislation without any limitations or restrictions. The external concept of sovereignty ensures that the state is completely free in its external foreign relations in the international arena in deciding about foreign policy and international co-operation. The *reality of sovereignty* is that the state has voluntarily restricted its own sovereignty via international agreements in order to achieve certain benefits, typically higher level of welfare or security.

In terms of the relationship of international law and national law, the Constitutional Court has based its arguments on the relevant Art. 7 (1)[343] (now Article Q paragraph (3) of the Fundamental Law[344]) provision of the Constitution that declares that national law shall be in line with *international law obligations* (more precisely: Hungary ensures the compliance of international law and national law) and that *generally recognized principles of public international law* are part of the national legal

[343] Article 7(1) *A Magyar Köztársaság jogrendszere elfogadja a nemzetközi jog általánosan elismert szabályait, biztosítja továbbá a vállalt nemzetközi jogi kötelezettségek és a belső jog összhangját. (The legal system of the Republic of Hungary accepts the generally recognized principles of public international law and it safeguards the compliance of national law with the public international law obligations.)*

[344] Also the Constitutional Court has confirmed in its 1/2013. (I.7.) decision, that Article 7 (1) of the earlier Constitution, and Article Q(3) of Fundamental Law, are in terms of their content, largely identical.

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system without a need for transformation. Art. Q[345] of the Fundamental Law includes different wording with the same legal content, than Article 7 (1) of the former Constitution.

In such context has the Hungarian Constitutional Court argued in its decision 30/1998 that on the basis of article 7 (1) of the Constitution, public international law has supremacy above national law, except above the Constitution. Even before Art. Q paragraph (3) of the Fundamental Law was adopted, the Constitutional Court concluded purely on the basis of Art. 7 (1) of the Constitution that in Hungary the relationship of public international law and national law can be described as a primarily *dualist* regime[346] and therefore, international agreements in order to become binding need to be *promulgated* (as a final step of *incorporation*) in domestic law via national legal provisions. As primary sources of EU law are in the form of international agreements, in order to have a binding character within the Member States, they need to be properly transferred with a *transformative act*, - depending on, whether it is a monist or a dualist country – into the national legal system. Only in this extent, it is relevant from EU accession point of view, whether the Member State has a monist or a dualist approach to public international law[347]. The Constitutional Court also pointed out that the position of an international agreement within the national legal system is determined by the level of promulgating legal act in the national hierarchy of norms. From the aspect of the relationship of domestic law to EU law, it is also important to note that the Constitutional Court declared that *essential elements of sovereignty*, such as democracy, rule of law and protection of fundamental rights cannot be abrogated, which in fact resembles the earlier discussed case law of the German Federal Constitutional Court.

With regard to the constitutional review of international agreements, the Constitutional Court has adopted in its 4/1997 decision[348], the doctrine of *judicial self-restraint.* According to this doctrine,

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[345] Article Q **(***2) Magyarország nemzetközi jogi kötelezettségeinek teljesítése érdekében biztosítja a nemzetközi jog és a magyar jog összhangját. (Hungary safeguards the compliance of national law with public international law, in order to fulfill its international law obligations)*

(3) Magyarország elfogadja a nemzetközi jog általánosan elismert szabályait. A nemzetközi jog más forrásai jogszabályban történő kihirdetésükkel válnak a magyar jogrendszer részévé. (Hungary accepts the generally recognized principles of public international law. Other sources of public international law become part of the Hungarian legal system upon promulgation.)

[346] See for instance decisions of the Constitutional Court of Hungary nr. 53/1993. (X.13.), but also 4/1997 (I.22) or 30/1998 (VI.30.). Also see: WYROZUMSKA, Anna: Transnational Judicial Dialogue on International Law in Central and Eastern Europe, Łódz, 2017, pp. 43-48.

[347] see: KOVÁCS Péter: Nemzetközi közjog, 2nd edn. Osiris, Budapest, 2011; MOLNÁR Tamás: A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe, Dialóg Campus-Dóm, 2013; MOLNÁR, Tamás: A nemzetközi jog és a magyar jog viszonya, in: JAKAB András – FEKETE Balázs (szerk.): Internetes Jogtudományi Enciklopédia (Alkotmányjog rovat, rovatszerkesztő: BODNÁR Eszter, JAKAB András). Forrás: http://ijoten.hu/szocikk/a-nemzetkozi-jog-es-a-magyar-jogviszonya

[348] Decision no 4/1997 (I. 22.) of the Hungarian Constitutional Court

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the Constitutional Court will declare the unconstitutionality of a provision of an international agreement if it is necessary but will not annul such promulgating act of an international agreement. Rather it will suspend its proceeding for a reasonable time and will call upon the Parliament to solve the unconstitutional situation by either amending the Constitution or by starting international negotiations in order to amend the international agreement in a way that it does not impose unconstitutional obligation on the state and that it becomes in compliance with the constitution. This technic developed by the constitutional court aims to protect and honour the international commitments of the state. Such a principle of *constitutional self-restraint* has been developed by other constitutional courts as well, as pointed out above in chapter 5.1 on Poland.

Jakab András points out, that the 4/1997 decisions had certain errors[349], with regard its approach to Union law. As *Jakab* clarifies, Community law /Union law, will not lose its character, as it enters into the legal system of the Member States, Union law is a separate legal system, which enjoys supremacy above national laws. He also clarifies that Union law does have supremacy above the national constitutions and that you do not need a monist legal system in order to be able to become a member state of the European Union (as the majority of the Member States do have a dualist legal system). *Jakab* also expressed critics with regard the ability of constitutional courts to limit the supremacy of Union law, as in the hierarchy of norms, decisions of constitutional courts are below the level of Union law, and when Hungary entered to the European Union, Hungary accepted the whole *acquis communautaire*, which included the doctrine of supremacy of Union law above national law, above national constitutions as well.

As referred above, the *Association Agreement* between the European Communities and its Member States as well as Hungary has been signed in 1991 and promulgated by act I of 1994. Similar association agreements were concluded with the other CEE EU candidate countries. These association agreements aimed to provide a framework for the preparation for the membership in the European Union for these candidate countries also by defining main categories of harmonization of national law required as a pre-condition for the accession. One particular provision related to the harmonization of the so-called competition acquis were challenged before the constitutional court and became the subject of the 30/1998 decision. The relevant provision of the association agreement ordered the direct applicability of certain parts of the competition acquis in Hungary. The constitutional court pointed out that since Hungary was not a Member State of the European Communities at that time, therefore the provisions of the European Community Law cannot have

[349] JAKAB András: A magyar jogrendszer szerkezete. Budapest-Pécs: Dialóg Campus, 2007., pp. 245-247.

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direct applicability within the territory of Hungary without an express authorisation by the Hungarian Constitution, because that would be a violation of *national sovereignty*, i.e. that Hungary is a free and democratic state[350]. Moreover, in the specific case, the constitutional court has applied the earlier stated principle of *judicial self-restraint* by not annulling the relevant provisions of act I of 1994 (promulgating the association agreement), but instead, asking the Parliament to resolve the conflict in the specific case. The 30/1998 decision is also relevant, because it has a first recognition, reference to the principle of direct effect by the Hungarian Constitutional Court - even before the accession.

The above reasoning became also relevant in the context of the constitutional discourse regarding the preparation for the accession to the European Union. The vast majority of the constitutional scholars believed that the sovereignty clause in the Hungarian Constitution does not allow the membership in the European Union without an express *constitutional authorisation*. According to further arguments, the accession to the European Union, resulting to an unprecedented degree of sovereignty conferral and limitation of the competences of all state institutions, most notably the Parliament, the Courts and the Government, did further require a *referendum* on joining the European Union, even if such referendum was not expressly required by law.

According to an argument, that did not consider the constitutional amendment necessary for empowering the sovereignty conferral on the EU, states, that the general clause regarding the relationship between international law and national law should suffice and after the accession the constitutional court could provide with guidance whether an amendment of the constitution is necessary in order to give empowerment for the supremacy and direct effect of EU legislation within the Member State[351].

Not all the Member States have an express sovereignty (Europe or European integration) clause in their constitutions, some Member States did not explicitly include in their constitutions an express European integration clause. For instance, Article 11 of the Italian Constitution, only refers to sovereignty conferral on international organisations, but it does not have an express reference to the European Union. Similarly, Article 20 of the Constitution of Denmark, Article 49 of the Constitution

[350] Art. 2 (1) of the Constitution

[351] See more: VÖRÖS Imre, Az Alkotmány módosításának állása és az EU csatlakozás, 2003.; Imre Vörös, Az EU csatlakozás alkotmányjogi, jogdogmatikai és jogpolitikai aspektusai, Jogtudományi Közlöny, 2002/9.; László KECSKÉS, Magyarország EU-csatlakozásának alkotmányossági problémái és a szükségessé vált alkotmány módosítás folyamata, Európai Jog, 2003/3, KECSKÉS László: Az EU-csatlakozás magyar alkotmányjogi problémái, in: Magyar Tudomány, 2006/9., pp. 1081–1089; Lecture of Géza KILÉNYI on the impact of European Law on National Constitutions, Pázmány Péter Catholic University, Ph.D. School; KILÉNYI, Géza: Alapjogok és az EU (Fórum), in: FUNDAMENTUM, 2003/2, pp. 75-79.

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of Luxemburg, Article 34 of the Constitution of Belgium, and Article 92 of the Constitution of the Netherlands does not include such express references on the European Union. Following the Maastricht Treaty however – as it involved an unprecedented extent of sovereignty conferral on the EU by establishing the political pillars and the monetary union – several Member States have incorporated into their constitutions further specific European integration clauses in order to provide with specific constitutional empowerment for further stages of the European integration.

In Hungary, the majority of constitutional scholars by 2002 took the position that the accession to the EU involves such an unprecedented level of sovereignty conferral on the EU that without an express empowerment by the constitution itself, it would violate national sovereignty. For instance, the directly applicable legislation passed by the Council and the Parliament itself would violate national sovereignty, unless the constitution would give an explicit empowerment. In terms of the legislative technic, there has been extensive discussions and the final version of the European integration clause has attracted several criticisms.

Article 2/A[352] (1) of the former constitution was until 2017 in terms of its legal content identical[353] with article E[354] (2) of the Fundamental Law, passed in 2011 by the Hungarian Parliament[355]. Paragraph 1 of Article E is identical with Article 6 (4) of the former Hungarian Constitution, as amended in 1989, as pointed out and interpreted in the literature[356]. It should be also pointed out, that

[352] By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as 'European Union'); these powers may be exercised independently and by way of the institutions of the European Union.

[353] FAZEKAS Flóra takes a different position, by arguing, that actually Article E(2) is more restrictive, than the earlier Article 2/A, because Article E would only allow exercise of competences by the EU, with the participation of Hungary, whereas Article 2/A did allow such exercise of competences without the participation of Hungary, in: FAZEKAS Flóra: Az uniós tagság alkotmányos alapjai az Alaptörvény előtt és után, in: Pro Futuro, 2015/1., p. 40.

[354] In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity. Article E (2) – „With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union. ***Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.*** (3) The law of the European Union may, within the framework set out in Paragraph (2), lay down generally binding rules of conduct." - The 2017, 7th Amendment to the Fundamental Law are indicated with bold. (emphasis added, translation: https://njt.hu/translated/doc/TheFundamentalLawofHungary_20201223_FIN.pdf)

[355] see: JAKAB András (ed.): Az új Alaptörvény keletkezése és gyakorlati következményei, HVG-Orac, 2011., p. 188; JAKAB András: Kommentár az Alaptörvényhez, 2012.;

[356] BRAGYOVA András (2012): No New(s), Good News? The Fundamental Law and the European law. In: TÓTH Gábor Attila (ed.): Constitution for a disunited nation. CEU Press, Budapest-New York, pp. 335–338, BLUTMAN László, CHRONOWSKI Nóra (2011) Hungarian Constitutional Court: Keeping Aloof from European Union Law. ICL Journal 5:329–340., BÁRD, Petra. (2013) The Hungarian Fundamental Law and Related Constitutional Changes 2010–2013. Revue des Affaires Européennes: Law and European Affairs 20:457–472.

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Article E (1) is not only a clear expression of commitment by Hungary towards the participation in a supranational EU, but it also includes *limitations on the sovereignty conferral* towards the EU. The express mentioning of *liberty, well-being and security*, are also the expressions of the purpose of the participation by Hungary within the European integration. Enhanced liberty, well-being and security can also be considered as the consideration, which *Hungary aims to receive in return of the conferral of certain limited and defined competences upon the European Union.* Similar value-based limitations, or conditions of the competence conferral also appear in numerous constitutions across the EU. For instance Article 88-2 of the French Constitution defines reciprocity, Article 11 of the Italian Constitution sets out equality, peace and justice, Article 23 (1) of the German Constitution – as pointed out earlier – refers to democratic, social and federal principles, rule of law, subsidiarity, fundamental rights protection comparable to the standard of the German constitution. Art. 20 (1) of the Danish Constitution also refers to rule of law, as well as Article 7(6) of the Portuguese Constitution, which also refers to subsidiarity and reciprocity. Reciprocity also appears in Article 28 (3) of the Greek Constitution, together with equality and democratic government. Chapter 10 Article 5 of the Swedish Constitution refers to fundamental rights protection and the European Convention on Human Rights and conditions of the participation in the European integration.

The European integration clause conferred competences on the EU necessary to fulfil the obligations arising out of the EU membership. Such conferral happens in accordance with *Article 5* TEU that declares that the EU shall act *only* within the limits set by the competences conferred upon it by the Member States[357] in the Treaties to attain the objectives set out therein. The list of competences of the EU are listed in the TFEU and provides a limit for the competence conferral. Article 4(3) TEU furthermore, requires *loyalty*[358] from the EU towards the Member States and from the Member States towards each other and the EU and a readiness for co-operation. Such duty to loyalty, pursuant to Article 4(3), requires *duty to sincere co-operation* and *sincere mutual respect* from all sides of the dialogue and it requires the EU Institutions to be fully in compliance with Article 4 (2) TEU[359] that

[357] Article 5 (1)-(2) TEU: (1) The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. (2) Under the principle of conferral, *the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*. Competences not conferred upon the Union in the Treaties remain with the Member States.

[358] Article 4 (3) TEU: Pursuant to the principle of *sincere co-operation*, the Union and the Member States shall, in *full mutual respect, assist each other* in carrying out tasks which flow from the Treaties. The *Member States shall* take any appropriate measure, general or particular, to *ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*

[359] Article 4 (2) TEU: The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State,

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requires the EU Institutions to respect the *equality of Member States* before the Treaties as well as their *national identities*, inherent in their fundamental political and constitutional structures. Member States, however, shall fulfil their obligations under EU law and shall facilitate the fulfilment of the tasks of the Union as well as shall *refrain from any activities that could jeopardize the achievement of the Union objectives*, as it is set out in Article 4 (3) TEU.

The principle of conferral of competences, set out in Article E (2) of the Fundamental Law, involves that it is on the one hand *limited* and on the other is a *single authorization* and at the same time *revocable* (*limited conferral of competences*). It is *limited* as it is limited to the competences defined by the Member States in the Founding Treaties for the EU and it is *revocable* as there is a possibility to withdraw from the EU. It is appropriate to talk about *single* authorization and single conferral of competences, since it happened via joining the EU and there is no need for a continuing repeated authorization in each and every case if a new EU act is passed. The authorization *limited* by the EU competences has been granted by the Member State when it joined the EU, gave single authorization for the joint exercise of competences by the Member States in the framework of the Union competences. *Conferral* of competences also did not mean that the Member States would have lost their influence over those competences, since in fact the conferred competences are *jointly exercised* by the Member States in the European institutions. There are always representatives in each Institutions from every Member State and there are also officials from every Member State working in the EU Institutions, even if those officials represent Union interests and not national interests (if such division is possible at all).

One source of criticism with regard to the European Integration clause was that the legislator according to the critics *missed the opportunity to clarify the relationship* of EU law with the national legal order, it did not declare the supremacy of EU law over the national constitution and it failed to provide an *express list of limitations* for the conferral of competences on the EU[360]. This has changed – at least with regard to the express mentioning of limitations within the text of the Fundamental Law – by the *7th Amendment* of the Fundamental Law, effective as of 29 June, 2018. New Paragraph (2) inserted into Art. E of the Fundamental Law which adds that joint exercise of competences within the

maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

[360] *see:* „introducing express value based limitations in the European Integration clause, following the model of other EU Member States, for instance Article 23 of the German Constitutions, would not only declare Hungary's commitment towards these common European values, but would also serve as a guidence for the Constitutional Court, in determining the constitutional limits of the participation of Hungary within the EU" in: KOVÁCS, György: Analysis of the European integration clause (in Hungarian: Az európai integrációs klauzula értékelése, in: Pázmány Law Working Papers, 2011/4, p. 6, available at: http://plwp.eu/docs/wp/2012/2011-04.pdf).

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EU, has to be in line with *fundamental rights and freedoms,* shall not restrict Hungary's unalienable right related to its *territorial integrity, population, state form* and *state structure*. These new express limitation are in addition to the earlier ones, included in paragraph (1) of Article E, namely, that the "fulfilment of *freedom*, *welfare* and *security*" are the main goals (or reasons), for which Hungary participates in the "establishment of the European integration"[361].

The new express limitation introduced by the 7th Amendment to the Hungarian Fundamental Law, is actually in line with the attempted enumerative exemplary *definition of constitutional identity* (in Hungarian: '*alkotmányos önazonosság*', in German: `*Verfassunsgsidentität*`), as provided with an exemplary definition in paragraph 65 of the decision nr. 22/2016 (December 5, 2016) by the Hungarian Constitutional Court. In the literature, critics noted, that the HCC missed to provide an actual precise *exhaustive* interpretation for the term of constitutional identity[362], that the exemplary definition provided is nothing else than a concealed constitutional amendment in fact[363], that the interpretation provided is *too vague* or that it *abused* the term of constitutional identity[364]. *Drinóczi* pointed out[365], that the identity is an unique characteristic of a specific country and reflects its unique constitutional traditions, and it is applied consequently in the constitutions or the case law of the Member States. *Drinóczi* further pointed out, that the Hungarian Constitutional Court represented a confrontational, individualistic approach towards EU law in the 22/2016 decision, as it missed the opportunity to stress the need for communication with the CJEU, it missed to clarify, whether in case of an identity conflict, the HCC would be open to send a preliminary reference to the CJEU[366]. As *Varga* pointed out[367], constitutional identity enables constitutional courts, to re-define their approach

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[361] Seventh Amendment to the Fundamental Law of Hungary (Effective: 29 June, 2018)

[362] KÉRI Veronika – POZSÁR-SZENTMIKLÓSY Zoltán: Az Alkotmánybíróság határozata az Alaptörvény E) cikkének értelmezéséről, In: JeMa, 2017/1-2., pp. 5-15., also a critical approach: DRINÓCZI Tímea: A 22/2016 (XII. 5.) AB határozat: mit (nem) tartalmaz, és mi következik belőle. Az identitásvizsgálat és az ultra vires közös hatáskörgyakorlás összehasonlító elemzésben, in: MTA Law Working Papers, 2017/1, pp. 1-19.; BLUTMAN, László: Szürkületi zóna: az Alaptörvény és az Uniós jog viszonya, Közjogi Szemle, 2017/1, pp. 1-14.

[363] DRINÓCZI Tímea, GÁRDOS-OROSZ Fruzsina, POZSÁR-SZENTMIKLÓSY Zoltán: Formal and informal constitutional amendment in Hungary, in: MTA LAW WORKING PAPERS (2019), available at: https://jog.tk.mta.hu/uploads/files/2019_18_Drinoczi_GardosOrosz_PozsarSzentmiklosy.pdf

[364] LAWRENCE, Jessica C: Constitutional Pluralism's Unspoken Normative Core, In: Cambridge Yearbook of European Legal Studies, 21 (2019), pp. 24–40.; HALMAI, Gábor: Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law, in: Review of Central and East European Law 43 (2018), pp. 23-42.

[365] DRINÓCZI Tímea: A tagállami identitás védelme. In: JAKAB András – FEKETE Balázs (ed.): Internetes Jogtudományi Enciklopédia (EU-jog rovat, rovatszerkesztő: VARJU Márton, HORVÁTHY Balázs), available at: http://ijoten.hu/szocikk/a-tagallami-identitas-vedelme; also see: DRINÓCZI, Tímea: Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System, in: Vienna International Constitutional Law, 2017/139.

[366] DRINÓCZI Tímea: Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach; in: German Law Journal, 2020/21, Cambridge University Press, pp. 105-130.

[367] VARGA Zs. András: Az alkotmánybíróságok szerepe a nemzeti alkotmányos önazonosság védelmében, in: Iustum Aequum Salutare, 2008/2, pp. 21–28. Also in a more comprehensive and international perspective: VARGA ZS. András: Constitutional identity as interpreted by the Council of Europe and the European Union. Conflict of Laws – Conflict of Courts, in: SZABÓ Marcel – LÁNCOS Petra Lea– VARGA Réka (eds.): Hungarian Yearbook of International Law and European Law 2016., Eleven Publishing, pp. 385–405.

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to Union law. In paragraph 65 of the above cited decision nr. 22/2016, the HCC does attempt to provide an *exemplary definition for constitutional identity* in Hungary, by including fundamental rights and freedoms, division of powers, republican state form, protection of autonomies under public law, religious freedom, exercise of state power under the principle of legality, parliamentarism, equality, acknowledgement of judicial power (*meaning: safeguarding the independence of the judiciary*), and the protection of minorities. The Constitutional Court has also emphasized that constitutional identity is not a static, but rather a *dynamic definition*, and the values, expressed as components in paragraph 65 are *exemplary* components. Although this *exemplary definition* provided by the HCC for constitutional identity, is not far from the German concept of constitutional identity[368], it should be noted, that the case law of the CJEU does require, that Member States define with a degree of certainty[369] the content of their constitutional identity and that it correlates to the European concept of constitutional identity under Article 4(2) and Article 2[370] TEU. There are however also important differences, such as for instance both the German concept of constitutional identity and the Article 2 TEU lists *human dignity, democracy and rule of law*, as parts of constitutional identity, which values were however not mentioned, neither in the exemplary definition of constitutional identity as included in the 22/2016 decision of the HCC, nor in the Seventh Amendment to Article E(2)[371] of the Fundamental Law. As earlier stated, the Lisbon Treaty has introduced Article 4 (2) TEU[372], the identity clause, introducing a *de facto* limitation on the supremacy of EU law principle. As *Trócsányi* has pointed out[373], this limitation was necessary to

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[368] As pointed out above, the German Constitutional Court has mainly defined constitutional identity, as **rule of law** and the protected content of its Eternity Clause (*Ewigkeitsklausel*) in Article 79.3 Grundgesetz. Article 79.3 protects Article 1 and Article 20 Grundgesetz as unchangeable clauses, which includes **human dignity, democracy**, social state, peoples' sovereignty, right to resistance against unlawful state actions.

[369] see: C-393/10 O'Brien ECLI:EU:C:2012:110 (47-49.), C-58-59/13 Torresi ECLI:EU:C:2014:2088 (55.) cases

[370] **„***The Union is founded on the values of respect for* ***human dignity****, freedom,* ***democracy****, equality, the* ***rule of law*** *and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." Article 2 TEU (emphasis added)*

[371] **„.....***Exercise of competences under this paragraph shall comply with the* ***fundamental rights*** *and* ***freedoms*** *provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure..." Article E(2) inserted section by the Seventh Amendment to the Hungarian Fundamental Law.* This list is actually shorter, than the exemplary list, included in paragraph 65 of the 22/2016 HCC decision, because the HCC also lists division of powers, republican state form, protection of autonomies under public law, religious freedom, exercise of state power under the principle of legality, parliamentarism, equality, acknowledgement of judicial power (meaning: safeguarding the independence of the judiciary), and the protection of minorities, did not mention however the principles of *territorial unity and population*, which were later included in the Seventh Amendment, and are traditional components of sovereignty.

[372] *"The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their* ***fundamental structures****, political and constitutional, inclusive of* ***regional and local self-government****. It shall respect their* ***essential State functions****, including ensuring the* ***territorial integrity*** *of the State, maintaining law and order and safeguarding* ***national security****. In particular, national security remains the sole responsibility of each Member State." Article 4(2) TEU (emphasis added)*

[373] TRÓCSÁNYI László: Alkotmányos identitás és európai integráció, in: JAKAB Éva – POZSONYI Norbert (ed.): Ünnepi kötet dr. Molnár Imre egyetemi tanár 80. születésnapjára, 2014., p. 477.

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avoid either to giving up the supremacy principle, or the *erga omnes* effect of the national constitutions.

Several Member States provide such express limitations for the sovereignty conferral on the EU[374], such as *peace, reciprocity, protection of fundamental rights or democracy or rule of law*. For instance, Article 24 of the German Constitution (*Grundgesetz*) provides a general clause on competence conferral on international entities. Whereas, Article 23 specifies the EU, to which certain competences are conferred. However, in the Hungarian legal theory, the principle of *nemo plus iuris* has been applied on the sovereignty conferral to the EU even before the Seventh Amendment was introduced, namely that the state itself is bound by the principles of rule of law, democracy, protection of fundamental rights, therefore it follows that the competences which are conferred by the state on the European Union[375], are also limited by the principle of *nemo plus iuris*, i.e. limited by the principles of rule of law, democracy, protection of fundamental rights. Such limitations provide – in addition to the above discussed limits in Article E (1) and (2) – Implied integration limits with regard the application of EU law within Hungary and also with regard further steps of EU integration or further legislation in this regard. This interpretation shows similarities to the above discussed constitutional identity (*Verfassungsidentität*) theory of the German constitutional court that has been used to provide the contours of limits of the European Integration (*Integrationsschranken*) from the aspect of German constitutional law. As pointed out in detail earlier in the chapter regarding Germany, in the interpretation of the German Constitutional Court, constitutional identity (enshrined first in the Solange I judgment) covers the so called *unamendable clauses*, principles within the German Constitution, such as the principles of democracy, rule of law, social state, the republic as a state form, the federal structure of the state, human dignity and those fundamental rights which are directly derived from human dignity, what is untouchable for the authority responsible to adopt or amend the constitution, will be untouchable for the European legislator as well. However, *Vosskuhle* points out[376], that these values, national constitutional identities are protected not only by the national Constitutional Courts, but also by the CJEU, by EU law. *National constitutional identity and European identity are not competing terms, rather are actually reinforcing each other*. Art. 4(2) TEU

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374 Constitutions of Germany, Denmark, Greece, Portugal, Sweden, Estonia, Lithuania, Lettland, Slovakia, Slovenia, Malta and since 2017 Hungary include such express limitations. See: KOVÁCS György: Evaluation of the European Integration Clause, in: Pazmany Law Working Papers, 2011/4, p. 6-12., http://plwp.eu/docs/wp/2012/2011-04.pdf

375 CSUHÁNY Péter – SONNEVEND Pál: 2/A.§ (Európai Unió) (in: JAKAB András (szerk.): Az Alkotmány Kommentárja, Budapest, Századvég, 2009, (2nd edition) pp. 238-269.

376 Andreas Vosskuhle: „Integration durch Recht" – der Beitrag des Bundesverfassungsgerichts – Humboldt Universität, 22 October 2015., https://www.rewi.hu-berlin.de/de/lf/oe/whi/humboldt-reden-zu-europa/archiv-humboldt-reden/rede-vosskuhle

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declares national identity and national constitutional structures as protected by Union law[377]. constitutional courts in the Member States have to find the *right balance* between advancing and protecting the enforcement of Union law within the Member States (*Integrationsverantwortung*) and protecting national constitutional identity in the same time. In the area of exercising ultra vires competences, *Vosskuhle* has emphasized, that national constitutional courts shall ask for interpretation or the question of validity of Union law in a preliminary ruling, and furthermore ultra vires control should only be exercised if there is a *systemic and obvious* ultra vires act by an EU institution against the Member States; it seems as a contradiction, that in the earlier discussed PSPP judgment, the above advice was not followed by the German Constitutional Court.

3. The requirement of democratic legitimacy

As pointed out earlier, Hungary is a representative democracy, where referendums are mostly consultative, even in case of decisive referendums, if successful, they only induce legislative obligation, but it is up to the legislator to find the exact content of the legislation. To adopt a new constitution, or to adopt the existing one, no referendum is necessary.

The accession to the EU, similarly to other Member States, have meant a significant shift of competences, from the legislative towards the executive. In comparison, there are different approaches on how the Member States have responded to the partial shift of legislative competences in specific matters towards the EU. The responses of the Member States via national legislation mainly focused on the increase of democratic and Parliamentary control over the government and over the executive positions formed within the Council of the EU.

Pursuant to Article 19 of the Fundamental Law, the Parliament may request information from the government on the government position to be represented in the decision-making processes in the Council, and may comment on that position. Throughout the EU decision making processes, the government shall act on the basis of the position taken by the Parliament.
The Act on the Parliament regulates the procedure, how the Parliament takes part in the EU decision making indirectly. It sets out the rules of the cooperation between the executive and the legislative branch with regard the formation of the national position in the Council.

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377 "The Union shall respect the equality of Member States before the Treaties as well as their *national identities*, inherent in their *fundamental structures*, political and *constitutional*, inclusive of regional and local self-government. (…)" Art. 4(2) TEU

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As above said, the Parliament closely follows government actions in EU affairs. The Parliamentary actions available towards the government are available and are used to obtain information and discuss national positions. Furthermore, the government has specific obligations to inform the Parliament for instance with regard tasks, which are related to the subsidiarity checks carried out by the Parliamentary Committee on European Affairs.

If the Parliamentary EU Affairs Committee considers that a draft Union legislative act does not comply with the principle of subsidiarity, it sends a report to the plenary session on the adoption of a reasoned opinion. The Speaker of the Parliament will send the reasoned opinion, if adopted, to the Presidents of the relevant EU Institutions and to the government. The EU Affairs Committee is also entitled to propose the government to bring an action before the CJEU on the basis of Art. 263 TFEU, the infringement of the subsidiarity principle starting an annulment procedure.

4. The dual character of the Rule of Law Principle

As noted above, already during the change of the political regime, the Constitutional Court played an essential role in establishing the principles of rule of law and protection of fundamental rights in Hungary. Article B (1) (former Constitution's Article 2(1) declares, that Hungary is an independent and democratic state, based on rule of law. In Hungary, the concept of rule of law for instance includes the principles of legality, human rights protection, equality, proportionality, constitutional adjudication, judicial independence and legal certainty.

The Constitutional Court decisions played an important role to interpret the content of rule of law, such key principles, as the *separation of powers, legality, non-retroactivity and legal certainty*[378]. The constitutional court, as a result of the so-called "roundtable negotiations" between the previously governing communist party and the new democratic parties, notably the Democratic Forum and the Liberal Democrats, has gained strong competences in 1990. Among the competences of the constitutional court - as pointed out above - the ex post abstract *actio popularis* constitutional review had a historical relevance. As mentioned before, every people had the right to file a constitutional complaint without proving any personal interest or even without the Constitutional Court verifying the identity of the claimant. Such competence increased the possibility to identify and to strike down provisions of the former communist legal system which were not in conformity with the new constitution.

[378] Decisions nr. 9/1992, 10/1992 and 11/1992 by the Hungarian Constitutional Court

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The Constitutional Court case law has in many aspects followed the *German model* regarding general and specific cases. In general, its newly developed case law had multiple similarities to the case law of the German Constitutional Court. For instance, the constitutional court has developed the theory of mother rights[379] (in German: '*Mutterrechte Theorie'*) following the case law of the German Constitutional Court. The application (and later incorporation into the Fundamental Law) of the *proportionality and necessity test* similarly show German constitutional influence. An unique important characteristic of the Hungarian Constitutional Court's case law was that it followed a so-called *avantgarde* approach by achieving in some fields (e.g. environmental protection) a higher standard than it has been set by counterparts internationally. For instance, in environmental law, the Hungarian Constitutional Court has set the standard of *non-derogation*, meaning that an already achieved level of environmental protection cannot be derogated, i.e. there is no step back according to the Constitutional Court – when it comes to environmental protection.

According to *László Sólyom*[380], Hungarian Constitutional Court regularly puts its legal analysis in the context of the case law of the *European Court on Human Rights* in order to ensure compliance of its interpretation of fundamental rights with the European Convention of Human Rights[381]. Reference to the relevant case law of the ECHR became a regular part of the Constitutional Court decisions, internally calling it as the "*European tail*" of the decisions, resembling the earlier practice of "*red tail*" of legal acts, before the regime change, in the communist times, when the communist reasoning of legal acts had to be included in legal texts. Furthermore, in its approach towards the requirements of supremacy and direct applicability, direct effect of European Union law, the HCC has followed the case law of the German Constitutional Court. *László Blutman*[382] however points out that there were different approaches in applying the decisions of the ECHR in the case law of the Hungarian Constitutional Court, but it was always clear, that the ECHR should serve as a minimum level of protection of fundamental rights, which shall be maintained at least.

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[379] Fundamental rights (*Grundrechte*) are stemming from so called mother rights. For instance, the right to dignity (*Menschenwürde*) is the mother right of all other rights and in the same time it serves also as a measure of limitation of possible competing fundamental rights, it is the only fundamental right which cannot be restricted. Freedom of expression (*Redefreiheit*) is the mother right of all communications rights and itself stems from the right to dignity, therefore the right to human dignity (and in cases the *dignity of communities*) will be always a limit of restriction of the freedom of expression (see: 30/1992, 37/1992, 36/1994, 13/2000).

[380] Seminar by László Sólyom, on Constitutional Adjudication in 2001, at Pázmány Péter Catholic University, Budapest

[381] From a critical point of view: SAJÓ András: Önvédő jogállam, FUNDAMENTUM, 2002/3-4, pp. 55-68.

[382] Blutman, László: A nemzetközi jog használata az alkotmány értelmezésénél, in: Jogtudományi Közlöny, 2009/7-8., pp. 309-311.; Blutman, László: Törésvonalak az Alkotmánybíróságon: mit lehet kezdeni a nemzetközi joggal?, in: Közjogi Szemle, 2019/3., pp. 4-5.

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It should be noted, that in a number of infringement cases against Hungary, the CJEU contributed to shape the practice of fundamental rights in Hungary. For instance, in the area of anti-discrimination with regard the early retirement of judges, or in the area of data protection, related to the term of the Data Protection Supervisor, in the field of academic freedom, concerning the amendment of the Hungarian higher education law related to foreign higher education institutions, and also in the area of freedom of association, related to the Hungarian law on the transparency of associations[383]. As noted earlier, in the last two cases, the Hungarian Constitutional Court has suspended its proceeding, until the decision of the CJEU.

As pointed out above, the 7th Amendment of the Fundamental Law has inserted a new paragraph (2) to Art. E of the Fundamental Law which provides a special protection for rule of law in Hungary, as *fundamental rights and freedoms, territorial integrity, population, state form* and *state structure* were added as constitutional limitations on the competence conferral on the EU. These express limitations are corresponding to the *definition of constitutional identity* provided by the Hungarian Constitutional Court[384].

When discussing the impact of EU law on the state of rule of law in Hungary, it is necessary to point out, that the European Commission has initiated the Article 7 proceeding against Hungary, in 2018[385]. The main reasons, that the Commission decided to trigger the rule of law proceeding pursuant to Article 7 (1) TEU against Hungary, were the developments between 2012 and 2017 in the area of media freedom, new laws introduced related to the organisation of the judiciary, the early retirement of judges[386], restrictions related to the competences of the constitutional court, dismissal of the data protect protection Ombudsman[387] and the president of the Supreme Court before their term expired in connection with changes introduced by the Fundamental Law[388]. Certain targeted laws with regard civil organisations and in the area of higher education, as well as trends with regard constitutional

[383] Case C-286/12 Commission v. Hungary [2012] ECLI:EU:C:2012:687; Case C-288/12; Commission v. Hungary [2014] ECLI:EU:C:2014:237; Case C-66/18 Commission v. Hungary [2020] ECLI:EU:C:2020:792; Case C-78/18 Commission v. Hungary [2020] ECLI:EU:C:2020:476

[384] As pointed out earlier, the HCC did not provide an exhaustive list of static constitutional values, which shall form a part of Hungarian constitutional identity, however it pointed out, that the HCC shall safeguard these values in the framework of a constitutional dialogue with the CJEU and other European constitutional courts, based on the principles of collegiality, equality and mutual respect.

[385] European Parliament resolution of 12 September 2018 on a proposed calling on the Council to determine, pursuant to Article 7 (1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL.)), P8_TA(2018)0340.

[386] Article 26 (2) of the Fundamental Law (with the exception of the President of the Curia, no judge may serve longer than the general retirement age)

[387] Article 38 of Act CXII of 2011 on the Right to Informational Self-determination and Freedom of Information

[388] Article 25(2) of the Fundamental Law, the Supreme Court was renamed Curia, also see: ECHR decision no. 20261/12, Baka v Hungary, para. 96)

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amendments (particularly the fourth amendment to the Fundamental Law) have played further role in the Commission's decision, to trigger Article 7 regarding Hungary. Drinóczi and Bien Kacala further argues, that as every situation has the potential to be exploited for political gain, such as the management of the COVID 19 crisis[389], and even this very recent experience shows, that the European community needs to take these warning signs seriously. I argue, that Article 7 is neither an appropriate, nor an effective tool to handle rule of law deficiencies across the Member States, and rather a systemic application of the infringement action by the Commission, and especially the CJEU, can provide a more effective tool in this regard.

The infringement proceeding with regard Hungary in connection with the early retirement of judges[390], the restrictions related to the competences of the constitutional court and the amendments (particularly the Fourth) of the Fundamental Law, have been discussed earlier. In the following, I would like to focus on the termination of the position of the data protection Ombudsman, the president of the Supreme Court, infringement proceedings related to the law on civil organisations[391] financed from abroad[392] and the infringement proceeding[393] related to the amendment concerning foreign campuses of the higher education law[394].

As pointed out earlier, in connection with the entering into force of the new Fundamental Law, the name of the former data protection ombudsman has changed, the position of the data protection ombudsman was terminated and a new National Authority for Data Protection and Freedom of Information has been established[395]. The new rules did not only change the name, but also the way of selection has been changed. As said previously, the data protection ombudsman was elected by the Parliament, the president of the National Authority for Data Protection and Freedom of Information (NAIH) shall be appointed by the Head of State (the President of Hungary) on a proposal from the Prime Minister. The NAIH President also can be re-elected one time.

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389 See more detailed: Drinóczi, Timea and Bien-Kacala, Agnieszka: COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism, in: The Theory and Practice of Legislation, Volume 8, Issue 1-2, 2020.

390 C-286/12, Commission v Hungary ECLI:EU:C:2012:687, comparing the CJEU decision with the decision of the Hungarian Constitutional Court in the same subject: Vincze Attila: Der EuGH als Hüter der ungarischen Verfassung – Anmerkung zum Urteil des EuGH 6. 11. 2012, Rs. C-286/12 (Kommission/Ungarn), in: Europarecht 3.

391 C-78/18, Commission v Hungary ECLI:EU:C:2020:476

392 Act LXXVI of 2017 on the transparency of civil organisations financed from abroad

393 C-66/18, Commission v Hungary ECLI:EU:C:2020:792

394 Article 2 of Act XXV of 2017 on the amendment of Act CCIV of 2011 on the national higher education, Act CXXVII on the amendment of Act CCIV of 2011 on the national higher education and of Act XXV of 2017.

395 Article 38 of Act CXII of 2011 on the Right to Informational Self-determination and Freedom of Information

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In case of the Supreme Court President, a similar change has taken place. The new Fundamental Law has renamed the former Supreme Court, and it became the Curia of Hungary, and in connection with this the Supreme Court President's term has been terminated[396]. Both cases have received criticism, because the organisational changes also resulted to the termination of the term of the Ombudsman and the President of the Supreme Court, without letting them to finish the duration of their original term for which they were elected.

As said earlier, two further cases have contributed to the Commission's decision regarding the triggering of the Article 7 procedure against Hungary. One act related to the nongovernmental institutions: reporting obligation of financing received above a certain limit by civil society organizations, and another amendment of the law on higher education, related to mandatory foreign campuses of foreign owned universities.

In the first case, as mentioned, according to the new rules, civil organizations, which receive financing from abroad, exceeding the threshold of HUF 7.2 million (approx. EUR 24.000) per annum, shall be obliged to register as an entity, receiving financing from abroad and to provide information about the sources of financing[397]. As said earlier, the proceeding before the Constitutional Court related to the challenges of the above provisions (on the grounds of freedom of association, legal certainty, privacy, freedom of speech), together with other cases, have been suspended by the Constitutional Court, until the CJEU decides about the ongoing infringement cases. The critic of these decisions about the suspension has been discussed earlier. In the meantime the CJEU made the awaited decisions in the parallel cases, however at time of the closing this work, the cases are still pending before the Constitutional Court.

The second case affected an amendment to the Higher Education Law, as said earlier. According to this amendment, if a university is operated from abroad, which country is outside of the European Economic Area, the operating entity has to have a campus (educational activity) in the country of origin and there has to be an international agreement in place between Hungary and this other country, and if this other country is a federal state, then also with the federal government there has to be an agreement with regard the operation of the specific university in question in Hungary[398]. As among the Hungarian universities operated from abroad, there was only one university which has been

[396] Article 25(2) of the Fundamental Law, the Supreme Court was renamed Curia, also see: ECHR decision no. 20261/12, Baka v Hungary, para. 96)

[397] Act LXXVI of 2017 on the transparency of civil organizations financed from abroad

[398] Article 2 of Act XXV of 2017 on the amendment of Act CCIV of 2011 on the national higher education, Act CXXVII on the amendment of Act CCIV of 2011 on the national higher education and of Act XXV of 2017

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adversely affected by the foreign campus requirement of the new law, the Central European University[399], therefore there appeared arguments in the literature and also before the Constitutional Court and the CJEU, that this new law could be *tailored* for this specific university. As with regard the above civil organizations law, also in the case of the amendment to the Higher Education Act, several constitutional challenges and *amicus curiae* briefs have been brought before the Constitutional Court, which - similarly to the earlier mentioned case regarding the new law on the transparency of civil organizations - has decided to suspend the cases[400] until the CJEU decides about the parallel infringement cases. As pointed out earlier, the CJEU has already made its decisions in these cases, therefore now at the time of the closing of this work, the ball is still in the courtyard of the Constitutional Court, to make its decisions in these cases.

As explained earlier, in case of Poland, there appear several arguments in the literature, that the Article 7 procedure is neither effective (being not conclusive), nor an appropriate (being political, instead of referring the case to the CJEU) tool to handle rule of law, EU values related divergencies across the Member States, and a more coherent and targeted approach by the Commission, by a combination of the earlier discussed reverse Solange approach and the systemic infringement actions, could end up with more fruitful results. In the end of the day, it is likely, that the ongoing Article 7 proceedings against Poland and Hungary will prove, that the above critics were right.

5. Level of the Protection of Fundamental Rights

Articles II–XXIX includes the list of fundamental rights in the Hungarian Fundamental Law. The necessity and proportionality test, developed following primarily the German model by the Hungarian Constitutional Court, has been introduced to the text of the Fundamental Law.

As pointed out earlier, Article B provides, that Hungary is an independent, democratic state, based on rule of law. Article C(1) includes the principle of the division of powers.

The Hungarian Constitutional Court, despite its earlier discussed highly EU friendly approach, similarly to its other European – most notably German – counterparts, reserves the right to apply

[399] Because it had no actual campus in the United States at the time of passing this new law

[400] Orders by the Constitutional Court no. 3198/2018 (VI. 21), 3200/2018 (VI. 21) and 3199/2018 (VI. 21)

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fundamental rights-based reservations with regard the acceptance of the supremacy of Union law within Hungary, as confirmed in its highly relevant 22/2016 decision[401].

Hungarian courts accept the case law of the CJEU in the area of fundamental rights[402]. The Hungarian Constitutional Court, in its decision nr. 61/2011[403] has confirmed the protection of fundamental rights in compliance with the international obligations of Hungary, considering the level of protection provided by international agreement and courts (most notably the ECHR, and the EU Fundamental Rights Charter, CJEU) as a minimum standard for domestic fundamental rights protection. Similar to this approach, Article 53 of the EU Charter of Fundamental Rights provides, that its provisions cannot be interpreted in a way, to restrict or adversely affect fundamental rights and freedoms as protected by Member State constitutions or other international agreements, particularly the ECHR, to which the Member States are parties. As a result, Article 53 of the Charter could be interpreted as incorporating a mandate for the CJEU to allow for higher levels of constitutional protection, if there are no other rights or general interests that should prevail in the particular case[404].

In the area of fundamental rights protection and judicial dialogue on EU level, the Attila Vajnai case[405] provides a special example. The Hungarian court has sent a preliminary reference to the CJEU in a criminal case related to the public use of signs and symbols of a totalitarian regime. This specific case concerned the public use of the communist red star, that has been that time criminalized by the Hungarian Criminal Code, in order to protect the *dignity of communities*. According to a decision by the Hungarian Constitutional Court in the summer of the year 2000[406] on the criminalization of the public use of symbols of totalitarian regimes, the *human dignity of communities* are also worth for recognition and protection by the Constitution and the rather practical argument was that for the victims of the totalitarian regimes of the XXth century and for their families the public use of the symbols of totalitarian regimes can cause fear and it is an inevitable and fundamental duty of every state to protect its citizens and to provide an environment, where they can live without fear. In the

[401] Decision no. 22/2016 (XII.5.) of the Hungarian Constitutional Court; in English: http://www.europeanrights.eu/public/sentenze/Ungheria_30novembre2016.pdf This decision is probably the most important, in terms of outlining the approach of the HCC towards EU law for the future. It should be noted, that many of the main conclusions of the 22/2016 decision, already appear in the parallel reasoning provided by Justice Trocsanyi to decision nr. 143/2010 (VII.14.).

[402] see for instance: Metropolitan Court 3.K-30698/2006/33 and 5.K.20.155/2010/13; Supreme Court Kfv.IV.37.256/2008/14.

[403] Decision of the Hungarian Constitutional Court nr. 61/2011 (VII.13)

[404] C-617/10 Akerberg Fransson (para. 36), Case C-36/02 Omega [2004] ECR I-09609, Case C-112/00 Schmidberger [2003] ECR I-05659, Joined cases C-411/10 and C-493/10 N.S. [2011] ECR I-00865

[405] Case C-328/04 Criminal proceedings against Attila Vajnai (2005) ECR I-8577, in the legal literature: A. Osztovics, Az első magyar előzetes döntéshozatali eljárás iránti kérelem (The first Hungarian preliminary reference), 5 Európai Jog

[406] Decision no 14/2000 (V.12) of the Hungarian Constitutional Court

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Attila Vajnai case, the Hungarian court submitted a preliminary reference to the CJEU with the concern that the relevant provision of the Hungarian Criminal Code criminalizing the public use of symbols of totalitarian regimes is in a contradiction with the fundamental human rights and freedoms protected by the EU. The Hungarian court also made a reference on the EU Fundamental Rights Charter which that time was not yet a binding legal act. The CJEU rejected the preliminary reference by the Hungarian court on the basis that it is wrong to refer to non-discrimination and directive 2000/43[407] on equal treatment as it is not applicable in the specific case. The CJEU also pointed out that the EU Fundamental Rights Charter as it were not enacted that time as primary law, it was therefore still not applicable in the specific case and could not be relied on by the Hungarian court.

The case later has ended up before the European Court on Human Rights which ruled[408] in 2008 that a respective criminal provision criminalizing the public use of symbols of totalitarian regimes is not in line with the freedom of expression as regulated in Article 10 of the European Convention on Human Rights. For the sake of completeness, it should be noted that the Hungarian Constitutional Court in 2013[409] has nullified the respective provision of the Hungarian Criminal Code on the criminalization of the public use or display of the symbols of totalitarian regimes.

6. Constitutional adjudication

The accession to the EU – similarly to other countries – raised the question, whether the role of the Constitutional Court is in any way impacted by the fact, that as in other Member States, the monopoly of the Constitutional Court regarding disapplying national norms was diminished, ordinary courts and authorities have the duty since the EU accession, to set aside any national norms, which contradict EU law (also the EU Fundamental Rights Charter, as part of primary law). After careful consideration however, the roles of national court and authorities under the Simmenthal doctrine are fundamentally different, as national courts and authorities, to give application precedence (*Anwendungsvorrang, alkalmazási elsőbbség*) to EU law over national law, *does not invalidate or annul* national law, it only ignore (*set aside*) conflicting national law provisions, which contradicts EU law, but that does not have any effect on the validity of the particular national law provision in anyway, therefore such new obligations, do not restrict in fact the competences of the Constitutional Court in any way.

[407] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22
[408] ECtHR, Vajnai v Hungary, Case 33629/06
[409] Decision no 4/2013 (II.21) of the Hungarian Constitutional Court

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With regard decisions of the HCC prior to the new Fundamental Law has entered into effect in 2012, it should be noted, that pursuant the closing provisions of the Fundamental Law, decisions by the HCC shall be ineffective, which have been passed before the date of the entering into effect of the Fundamental Law. For the purposes of this dissertation however, we are also taking into account case law of the HCC, which was passed prior to 2012, as those decisions will stay relevant, if there is a significant verbatim similarity between the relevant constitutional texts, or, if the HCC itself confirmed their relevance.

With regard the relevant case law of the Hungarian Constitutional Court, probably the first relevant decision is from 1997. The HCC has pointed out in its 4/1997 decision[410], that it has a competence to *review a posterior* the constitutionality of national law *promulgating an international agreement* and that it cannot abrogate from its core competence to act as a guardian of the constitution. In the decision nr. 30/1998 the Constitutional Court[411] has made clear, that without a constitutional empowerment, legislation and case law created by international institutions, cannot become automatically part of the Hungarian legal system, an *express authorisation* is required on the level of the constitution[412]. Without such express authorization, it would be a concealed attempt to amend the constitution. This decision therefore had a major impact on the drafting process of the European Integration Clause[413], the so-called Europa Article, initially 2/A, amended the Hungarian Constitution in 2004 in connection with Hungary entering the EU.

The principle formulated in the above 4/1997 decision[414] by the Hungarian Constitutional Court, has been significantly narrowed down in decisions nr. 58/2004[415], 1053/E/2005[416], and decisions nr.

410 Decision no 4/1997 (I. 22) of the Hungarian Constitutional Court

411 Decision no 30/1998 (VI. 25.) of the Hungarian Constitutional Court

412 See more in: CHRONOWSKI Nóra: Az Európai Unió és az Alkotmány, in: Európai Tükör, 2000/4. p. 86.; BERKE Barna: Az európai közösségi jogrend strukturális elveiről, in: Ius Privatum Commune Europae. Liber Amicorum Studia Ferenc Mádl Dedicata, ELTE, 2001, pp. 51–54; SOMOGYVÁRI István: Az uniós csatlakozás alkotmánymódosítást igénylő kérdései, in: Európai Közigazgatási Szemle (a Magyar Jog melléklete), 2001/1., pp. 22–25.; WALLACHER Lajos: Az Európai Unióhoz való csatlakozás alkotmányos kérdései, in: VEREBÉLYI Imre (ed.): Európai integrációs válogatott tanulmányok, Magyar Közigazgatási Intézet, 2001, p. 139; SAJÓ András, Az EU csatlakozás alkotmányosságra gyakorolt hatása az új tagállamokban (in FUNDAMENTUM, 2003/2, pp. 14-26.); PACZOLAY Péter: Az Európai Unió és az Alkotmánybíróság, in: PESTI Sándor – SZABÓ Máté (ed.): „Jöjj el szabadság!" Bihari Mihály egyetemi tanár 60. születésnapjára készült ünnepi kötet, Rejtjel, 2003., p. 674.

413 see more detailed: Chronowski Nóra – Petrétei József: EU csatlakozás és alkotmánymódosítás: minimális konszenzus helyett politikai kompromisszum, in: Magyar Jog, 2003/8., pp. 453–454.

414 Decision of the Hungarian Constitutional Court nr. 4/1997 (I. 22)

415 Decision of the Hungarian Constitutional Court nr. 58/2004. (XII. 14.)

416 Decision of the Hungarian Constitutional Court nr. 1053/E/2005 (16 June 2006)

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32/2008[417] and 61/2008[418], where the Hungarian Constitutional Court held, that international agreements, after entering into effect will be considered by the Constitutional Court for the purposes of its constitutional review as EU law[419]. As a result, EU law, which have an origin as international agreements, can only be reviewed by the Constitutional Court *only until they enter into effect*[420], but not after they became part of EU law[421]. This principle has been overruled by the Constitutional Court in its 143/2010 decision[422] about the Lisbon Treaty[423], where the Constitutional Court reached back to its earlier and above cited 4/1997 decision, by re-stating, that the *Constitutional Court has the competence to review the constitutionality of an international agreement, also following it has entered into effect*. The Hungarian Lisbon decision did not elaborate on the relationship of Union law and national constitutional law, particularly, whether and in what extent certain national constitutional principles can serve as a limitation on Union law[424].

After the accession to the EU, judicial cooperation on EU level, particularly the participation in the preliminary ruling procedure before the CJEU gained special importance, only a few days following the accession. The Hungarian Constitutional Court in its Judgement Nr. 17/2004. (V.25) ABh, has dealt with the constitutionality of a statute, which contained the executive rules of EC regulation Nr. 230/2004/EC on trade in agricultural products. The statute imposed special penalty for farmers, whose average agricultural product reserves exceeded the average amount of reserves from previous

417 Decision of the Hungarian Constitutional Court nr. 32/2008. (III.12.), see more detailed: KOVÁCS Péter: Az EUIN-megállapodás és az alkotmányosság, in: Magyar Jog 2008/55, pp. 409–413; VINCZE Attila: Az Alkotmánybíróság esete az Unió által kötött nemzetközi szerződésekkel, in: Európai Jog, 2008/4, pp. 27-34.

418 Decision of the Hungarian Constitutional Court nr. 61/2008. (IV. 29.)

419 Such practical approach seems to be reasonable, if the Constitutional Court would like to avoid to serve as an ultimate forum, in case of deciding about conflicts between EU law and national law. Such approach would not be reasonable (and also not in compliance with EU law), as it is the duty of national courts to give an effective application to Union law, to immediately set aside conflicting national law and apply EU law. As it has been ruled since the Costa v ENEL decision by the CJEU and than subsequently confirmed in its long established case law, national courts shall not wait for the decision of their national constitutional courts, rather national courts shall directly and immediatelly apply Union law. In case of a question of interpretation or validity of Union law, national courts shall turn to the CJEU with a preliminary ruling.

420 On a critical note related to this approach: VINCZE Attila: Odahull az eszme és a valóság közé: az árnyék az szuverenitás-átruházás az Alkotmánybíróság esetjogában in: MTA Law Working Papers, 2014/23, p. 6; VÖRÖS Imre: Csoportkép Laokóónnal. A magyar jog és az alkotmánybíráskodás vívódása az európai joggal. MTA JTI, 2012., p. 31; SZABÓ Marcel: Minek nevezzelek? A nemzetközi szerződéses eredetű uniós jog az Alkotmánybíróság gyakorlatában, in: Közjogi Szemle, 2020/3, pp. 19-29.

421 The Hungarian Constitutional Court also in its decision nr. 9/2018 (VII.9.) about the European Patent Court, considered the international agreement on the establishment of the European Patent Court as public international law

422 Decision of the Hungarian Constitutional Court nr. 143/2010 (VII. 14.)

423 BLUTMAN, László: Milyen mértékben nemzetközi jog az Európai Unió joga a magyar alkotmányos gyakorlatban? (in: KOVÁCS, Péter (ed.): International Law- a quiet strength / Le droit international, une force tranquille (Miscellanea in memoriam Géza Herczegh), Budapest: Pázmány Press, 2011, pp. 294-296., also: BALOGH-BÉKESI, Nóra: Az Európai Unióban való tagságunk alkotmányossági összefüggései az esetjog tükrében, Budapest, in: Pázmány Press, 2015, p. 131.

424 BLUTMAN, László: A magyar Lisszabon-határozat: befejezetlen szimfónia luxemburgi hangnemben, in: Alkotmánybírósági Szemle, 2010/2., p. 91.

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years. The decision held the particular provisions of the statute as unconstitutional, due to its retroactive effect. *András Sajó*[425] pointed out, that the CJEU earlier gave different interpretation for retroactive effect and there is no uniform interpretation of retroactive effect among the Member States, therefore he asked the question, why the constitutional court did not refer the question to the CJEU (as for instance Austrian colleagues did earlier[426]) and why the problem was regarded as a national constitutional question. This is not the only case, where the Constitutional Court considers EU legal aspects of a case, but in the end decides about the matter as a purely domestic one, without involving EU legal aspects[427]. *Jakab András* however points out[428], that the Constitutional Court was not in the position to ask for a preliminary ruling in this case, because – as the CJEU pointed out in the *Zabala Erasun and Foglia* cases[429] – national courts can not submit a hypothetical question to the CJEU, the question submitted to the CJEU need to be necessary to be able to decide about the matter, which in this case, was not. *Jakab* also points out, that the Constitutional Court should not have annulled the executive national rules of the 230/2004/EC regulation, because the reason, which caused the unconstitutionality of the executive national rules of the regulation were actually the delayed adaptation of the executive rules, therefore the legislator lost the possibility of constitutional adaptation of the executive rules (the time window has closed). With regard the other reason of unconstitutionality in this case, *Jakab* points out, that if the EU legislator gives multiple ways to adapt executive rules to a regulation, then the national legislator should automatically choose the constitutional way of adaptation.

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[425] SAJÓ, András, Miért nehéz tantárgy az együttműködő alkotmányosság? (in: FUNDAMENTUM, 2004/3. sz.); SAJÓ András: Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy, in: Zeitschrift für Staats- und Europawissenschaften, 2004/3, pp. 351–371.

[426] Nr. B 2251/97, Austrian Constitutional Court (C-143-99, ECJ), Nr. W I-14/99, Austrian Constitutional Court (C-171/01, ECJ), Nr. KR 1/00, Austrian Constitutional Court (C-465/00, ECJ)

[427] Similar approach has been followed by the Constitutional Court in the 32/2012 (VII.4), 72/2006 (XII.15) and 26/2013 (X.4.) cases. In other cases the Constitutional Court decided to ignore EU legal aspects of the cases entirely and decided it only as purely domestic cases, without elaborating at all on EU aspects, such as in 3255/2012 (IX. 28), 828/B/2004 and 33/2012 (VII.17) decisions. And on the contrary, in some cases the EU legal aspects played a role in deciding the matter, such as in 766/B/2009, 142/2010 (VII.14.), 3144/2013 (VII.16) and 3025/2014 (II.17) cases. On a critical note see: ALBI Aneli (2009) Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums, in: European Law Journal, 2009/15, pp. 46–69; FAZEKAS Flóra: EU Law and the Hungarian Constitutional Court, in: VARJU Márton, VÁRNAY Ernő (eds.) The Law of the European Union in Hungary. HVG-ORAC, Budapest, 2014, pp. 32–76; UITZ Renáta: EU Law and the Hungarian Constitutional Court: Lessons of the First Post-accession Encounter, in: SADURSKI W. et al. (eds.): Après Enlargement. Legal and Political Responses in Central and Eastern Europe, European University Institute, Florence, 2006, pp. 41–63.

[428] JAKAB András: A magyar jogrendszer szerkezete. Budapest-Pécs: Dialóg Campus, 2007., pp. 250-252.

[429] C-422-24/93, Zabala Erasun and others v Instituto Nacional de Empleo (1995) ECR I-1567, 29.; 244/80 Foglia v Novello (1981) ECR 3045.

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The Hungarian Constitutional Court first in its 1053/E/2005[430], 72/2006[431] and 87/2008[432], 8/2011[433], 34/2014[434] decisions have acknowledged the *autonomous* and specific (different) character of EU law, in comparison with public international law by declaring, that in the practice of the Constitutional Court, EU law is not treated as public international law, therefore the Constitutional Court *does not have a competence to rule about possible conflicts between national law and EU law*. In the 1053/E/2005 decision, the Hungarian Constitutional Court has pointed out, that Article 2/A of the Constitution defines the conditions and framework of Hungary's membership within the EU and the status of EU law within the Hungarian legal system, and in its 61/B/2005 decision, the Hungarian Constitutional Court also indicated, that Article 2/A authorises Hungary to enter to the European Union, to enter into the Accession Agreement, and it also serves as a *basis of validity of EU law* within the legal system. It is however a disputable statement, as the European integration clause can be considered as a legal basis of the application of EU law within the Member States, but not of its validity. The validity of EU law will depend on its compliance with the founding treaties of the EU and not with its compliance with constitutions of the Member States. In its decisions nr. 942/B/2001[435], 61/B/2005[436], 29/2011[437] and 61/2011[438] the Hungarian Constitutional Court also made it clear that a *violation of EU law is not a violation of the Constitution* and similarly, even if the Constitutional Court Act establishes a competence for the Constitutional Court to evaluate the compliance of a national legislative act with an international agreement, the Constitutional Court does not consider EU law as international law from the aspect of its constitutional review as stated above. It follows, that the Constitutional Court does not have a competence to review national law whether it is in compliance with EU law. As the Constitutional Court pointed out in multiple decisions, as stated above, EU law has different nature and character from public international law when it comes to its application within domestic law. Therefore, it is primarily the task of ordinary national courts and authorities to ensure the compliance of national law with EU law[439]. *Chronowski* pointed out[440],

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[430] Decision of the Hungarian Constitutional Court nr. 1053/E/2005 (16 June 2006)
[431] Decision of the Hungarian Constitutional Court nr. 72/2006 (XII.15.)
[432] Decision of the Hungarian Constitutional Court nr. 87/2008 (VI.18)
[433] Decision of the Hungarian Constitutional Court nr. 8/2011. (II. 18.)
[434] Decision of the Hungarian Constitutional Court nr. 34/2014. (XI. 14.)
[435] Decision of the Hungarian Constitutional Court nr. 942/B/2001 (13 December 2004)
[436] Decision of the Hungarian Constitutional Court nr. 61/B/2005
[437] Decision of the Hungarian Constitutional Court nr. 29/2011 (IV.7)
[438] Decision of the Hungarian Constitutional Court nr. 61/2011 (VII.13)
[439] Spanish, Austrian (VfGH G 2/97, 24 June 1998, VfSlg. 15215) and the Portugiese Constitutional Court had a similar approach, considering the violation of EU law, not a violation of the Constitution and such review simply beyond their competence.
[440] CHRONOWSKI, Nóra: "Az Európai Unió jogának viszony a magyar joggal", in JAKAB András – KÖNCZÖL Miklós – MENYHÁRD Attila – SULYOK Gábor (szerk.): Internetes Jogtudományi Enciklopédia (Alkotmányjog rovat,

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that the Constitutional Court did not clarify the characteristics of Union law as opposed to public international law and domestic law in its case law, and that the Hungarian Constitutional Court was not consequential in its decisions related to EU law.

The unique role of the Hungarian Constitutional Court, in protecting national constitutional identity has been reinforced by the constitutional court in its 22/2016 (XII.5.) decision in December 2016[441]. The constitutional court carefully examined the case law of German and other constitutional courts when arriving to this conclusion. In the literature[442], especially in Germany, it is widely discussed that according to the constitutional court the supremacy of EU law is not accepted in the sense of being the highest norm in the hierarchy of norms. However, it has in fact supremacy to the application of EU law (application priority or *Anwendungsvorrang*). In case of a conflict between EU law and the Fundamental Law, the constitutional court could ask the Parliament to settle the conflict between the Fundamental Law and EU law, either by starting negotiations with the EU to request the change of the unconstitutional content of EU law, or if such content is also contrary to higher norms of EU law, typically the Founding Treaties, the constitutional court can *question the validity of EU law with a preliminary reference* sent to the CJEU and the Member State can start an *annulment proced*ure before the CJEU. As a result of such distinction, where EU law has a competence and supremacy, the principle of application supremacy prevails, but outside the scope of EU competences, the national constitution remains on the top of the legislative hierarchy. As pointed out earlier, the source of legitimacy of Union law is an equally important and widely discussed question, however on a practical level it is a convincing argument, that the duty of national judges and authorities to set aside conflicting national law with EU law, stems from the EU law itself[443].

In its decision nr 2/2019 (III.5), the HCC took the position, that the basis of the application of EU law within Hungary is Article E of the Fundamental Law and it is the Constitutional Court, which has the duty to interpret it with an *erga omnes* effect – confirming its 22/2016 judgment -, in order to safeguard *sovereignty*, *fundamental rights* and *constitutional identity*, as limitations on the application of EU law in Hungary. The HCC also pointed out, that the Constitutional Court does not exercise a direct control over Union law. Its sovereignty or identity control does not directly relate to Union law, it can only relate to national norms enforcing or implementing Union law. Furthermore, as the

rovatszerkesztő: BODNÁR Eszter, JAKAB András) http://ijoten.hu/szocikk/az-europai-unio-joganak-viszonya-amagyar-joggal (2019) (8)

[441] Decision of the Hungarian Constitutional Court nr. 22/2016. (XII. 5.) concerning Article E) para. (2) of the Hungarian Fundamental Law

[442] HWANG, Shu-Perng: Anwendungsvorrang statt Geltungsvorrang? Normlogische und institutionelle Überlegungen zum Vorrang des Unionsrechts in: EuR Europarecht, Vol. 51 (2016) pp 355 – 372.

[443] CHRONOWSKI Nóra (2012): The New Hungarian Fundamental Law in the Light of the European Union's Normative Values, Revue Est Europa 2:111–142

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Constitutional Court has pointed out, the Constitutional Court interprets Fundamental Law in conformity with EU law, in the framework of *Europafreundlichkeit*, and with respect to the European constitutional dialogue. With regard the identity review, the HCC has also pointed out, that constitutional identity is not a list of static values, it includes the *fundamental freedoms, division of competences, republic as form of government, respect of autonomies under public law, freedom of religion, parliamentarism, equality, acknowledging judicial power, protection of nationalities living with us – altogether the achievements of the Hungarian Historical Constitution, entire legal system is based upon – all these has to be safeguarded in the framework of a constitutional dialogue*[444] with the CJEU and other European constitutional courts, based on the principles of collegiality, equality and mutual respect. *Drinóczi* points out, that judicial dialogue is, when courts take into consideration other courts, international and European level courts' case law as well.

With regard the cooperation between the HCC and the CJEU[445], in a set of cases, the HCC – due to the same subject matter and overlaps in the fundamental rights aspects of the pending cases before the CJEU – the HCC has suspended the cases until the CJEU decides in the matter[446]. It should be noted, that not all the justices of the HCC saw equally the need for a suspension of these proceedings, until the CJEU makes a decision. Justice *Hörcherné* and Justice *Schanda* have pointed out, that there is a different approach and different legal basis to these cases by the CJEU and the Constitutional Court (but they supported the suspension), however Justice *Juhász* and Justice *Stumpf* went further, by saying, that the CJEU decides on the basis of EU law, the Constitutional Court decides on the basis of domestic constitutional law, the proceeding at the CJEU does not have an impact on the proceeding before the Constitutional Court, and therefore the suspension is not only not justified, but it also ignores the immense *urgency of the remedy of the harm of fundamental rights in connection with the alleged violation of the Fundamental Law*, which remedy is delayed because of the suspension. In any case, this high degree of readiness for cooperation with the CJEU and judicial dialogue from a constitutional court in the EU is unprecedented, and is certainly a promising sign for

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[444] More on the notion and forms of a judicial dialogue in this context, in: DRINÓCZI Tímea: Alkotmányos párbeszéd-elméletek, in: Jura, 2012/2, pp. 60–72., also on the distinction between monologues and real dialogues in: VINCZE Attila – CHRONOWSKI Nóra: Magyar alkotmányosság az európai integrációban, HVG-Orac, 2018, p. 496-497. Also in a critical tone: Gárdos-Orosz, Fruzsina: Preliminary reference and the Hungarian Constitutional Court: a context of non-reference, in: 16 German Law Journal, pp. 1569-et seq., 2015.

[445] more on the cooperation between the HCC and the CJEU: SAJÓ András, Miért nehéz tantárgy az együttműködő alkotmányosság? (in: FUNDAMENTUM, 2004/3.); CHRONOWSKI Nóra – NEMESSÁNYI Zoltán: Európai Bíróság – Alkotmánybíróság: felületi feszültség, in: Európai Jog 2004/3, pp. 19–29., as well as VÁRNAY Ernő: Az Alkotmánybíróság és az Európai Bíróság. Együttműködő Alkotmánybíráskodás?, in: Állam és Jogtudomány, 2019/2, pp. 63-91.

[446] Orders of the HCC nr. 3198/2018. (VI. 21.), 3199/2018. (VI. 21.), 3200/2018. (VI. 21.), 3220/2018. (VII. 2.)

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the future, where the Hungarian Constitutional Court might send its first preliminary reference to the CJEU, following the example of already the majority of constitutional courts of EU Member States.

Dezső Márta and *Vincze Attila* pointed out[447], that in already a range of cases[448], the Hungarian Constitutional Court had the chance, to ask for a preliminary ruling from the CJEU, such as for instance, in the – earlier discussed - 17/2004 (V.25.), where also *Sajó András* argued[449], that the HCC have missed the opportunity to ask for a preliminary reference from the CJEU. *Gyeney Laura* and *Szabó Marcel* have pointed out[450], that the Constitutional Court could have sent a preliminary reference in case nr. 32/2012 as well, related to higher education student contracts.

Balogh-Békesi Nóra has pointed out[451], that even if Member States remain committed towards the EU integration, they also have to protect their hard won freedom (which is especially true for CEE countries), their history, their cultural and legal traditions. Therefore, it cannot be reasonably expected, that the Member States would allow without any constitutional reservations, the unconditional supremacy of Union law over their national constitutions. On the other hand, the CJEU need to be sensitive towards the various constitutional traditions across the Member States, such as it has demonstrated in the *Taricco* case[452]. In the *Sayn-Wittgenstein* case[453] for instance, the CJEU has accepted, that Austria's constitutional identity would limit the freedom of movement and residence of citizens[454], however in the Las case[455], the CJEU was reluctant to allow, that the constitutional identity of Belgium impose a limitation on the freedom of movement for workers[456], highlighting, that constitutional identity need to be specified and be based on and comply with the conditions of Article 4 (2) TEU, and cannot be used as a *trump card*, to challenge the supremacy of Union law.

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447 DEZSŐ Márta – VINCZE Attila: Magyar alkotmányosság az európai integrációban, HVG-Orac, 2014, pp. 214-216.

448 Decisions of the Hungarian Constitutional Court nr. 744/B/2004, 1053/E/2005, 72/2006 (XII.15.), 32/2008 (III.12.), order nr. 3025/2014 (II. 11.)

449 SAJÓ, András, Miért nehéz tantárgy az együttműködő alkotmányosság? (in: FUNDAMENTUM, 2004/3. sz.)

450 GYENEY, Laura; SZABÓ, Marcel: A magyar alkotmányjog az Európai Unióban, In: CSINK, Lóránt; SCHANDA, Balázs; VARGA, Zs. András (szerk.): A magyar közjog alapintézményei, Pázmány Press, (2020) pp. 143-192.

451 BALOGH-BÉKESI, Nóra: Közösségi jog és szuverenitástranszfer a csatlakozási klauzulák és a hatáskör megosztás mentén (PhD értekezés), 2008, Károli Gáspár Református Egyetem, p. 7.

452 Case C-105/14 Taricco, ECLI:EU:C:2015:555, 8 September 2015.

453 Case C-208/09, Sayn-Wittgenstein ECLI:EU:C:2010:806

454 Art. 21 TFEU

455 Case C-202/11, Las ECLI:EU:C:2013:239; The CJEU has dealt with the concept of constitutional identity in a couple of other cases too, for instance: in C-391/09, Runevič-Vardyn and Wardyn EU:C:2011:291, the language as part of national constitutional identity has been acknowledged by the CJEU in case of Lithuania, however it does not mean an automatic acknowledgement of the national language as part of constitutional identity in case of all Member States as well; also in the Case C-438/14, Bogendorff von Wolffersdorff EU:C:2016:401, the CJEU has accepted a broad interpretation of constitutional identity by the Member State.

456 Art. 45 TFEU

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The above cases were all preliminary ruling decisions. *Gyeney Laura* and *Szabó Marcel* have pointed out, that there are only two cases, where the CJEU touched upon the question of constitutional identity, outside of a preliminary ruling procedure, one in a European citizens' initiative case[457], and the other, in an infringement case[458] and the latter case was the only case, where the protection of constitutional identity was connected to the question of protecting statehood and sovereignty. In this regard, it worth to highlight, that – as pointed out earlier – sovereignty control is connected to ultra vires control in the case law of the German Constitutional Court, and it is considered as a preliminary phase to apply the identity control by the Constitutional Court. The reason is, that pursuant to Art. 4(3) TEU, the loyalty clause, Member States are obliged to cooperate in good faith with the EU, and if constitutional courts have a concern regarding the validity of an ultra vires EU act, they shall use the opportunity provided by the preliminary ruling procedure, to submit a preliminary reference to the CJEU regarding the question of validity of the ultra vires legal act. Furthermore, as pointed out earlier, national courts shall continue the dialogue with the CJEU, as long as it is necessary to resolve the differences. Concurring with the above, and as earlier said, the HCC has pointed out in its 2/2019 decision, that the Constitutional Court interprets Fundamental Law in conformity with EU law, in the framework of *Europafreundlichkeit*, and with respect to the European constitutional dialogue.

As a result, the Hungarian Constitutional Court remains open towards a judicial dialogue with the CJEU and its European Counterparts. As above said, the preliminary reference remains the most important tool for national courts to engage into a judicial dialogue with the CJEU on the development and unification (or more precisely: *harmonisation*) of the application of Union law within the Member States, although the Constitutional Court has not yet used this opportunity in Hungary. The preliminary reference procedure is the most important tool to develop EU law via the cooperation of national courts and the CJEU. Its importance is even higher in case of a relatively new Member State that judiciary and law enforcement institutions need to adopt to the direct application and direct effect of EU law. It took some time until courts and authorities in Hungary accustomed to the preliminary ruling procedure – even if Hungary was among those Member States in the CEE region, which was statistically one of the most active in submitting preliminary references.

Maartje de Visser points out that in connection with the process of constitutionalisation of the entire legal order, constitutional courts might require that national courts interpret national law in

[457] Case T-529/13, Izsák and Dabis v EC, ECLI:EU:T:2016:282, 10 May 2016.
[458] Case C-364/10, Hungary v Slovakia, ECLI:EU:C:2012:630, 16 October 2012.

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accordance with the national constitution before sending their request for preliminary ruling[459]. Such interpretation, however, does not necessarily mean a conflict with EU law.

In terms of domestic procedural rules, if the judge in a court proceeding perceives that there is a question of interpretation of EU law that requires the opinion of the CJEU, pursuant to the applicable provisions of the Hungarian civil and criminal procedure law, the judge shall suspend the court proceeding and will turn to the CJEU with the preliminary reference, and the proceeding will continue as soon as the CJEU proceeding is closed. In a 2013 opinion on the Hungarian practice of the preliminary reference to the CJEU, the Hungarian Supreme Court (Curia) has stressed the importance of the *Cartesio* ruling[460] of the CJEU, highlighting, that judicial order to submit a preliminary reference to the CJEU cannot be appealed[461]. The competence of national judges to submit a preliminary reference is based on article 267 (2) TFEU, therefore it *cannot be subject to an appeal* of a higher level court, such requirement of review would be an infringement of EU law by the Member State.

The Constitutional Court under national law is not part of the court system, therefore on pure domestic law consideration, it would not be eligible to submit a preliminary reference, as being not a court in the sense of the Hungarian Constitution[462]. However, as stated above, it is not a question of national law, rather the question of interpretation of EU law by the CJEU, what is considered as *court* or *tribunal* under art. 267 TFEU.

Concerning constitutional courts, the CJEU took the position that the constitutional courts are not only eligible, but even encouraged to take part in the preliminary ruling procedure, and Member States are not allowed to restrict the application of the preliminary ruling procedure[463]. So far quite a high number of constitutional courts have participated in the preliminary ruling procedure, for instance, the Belgian Cour d`Arbitrage, the Austrian, the Spanish, the German, the Polish and the Italian Constitutional Courts. The Hungarian Constitutional Court has not submitted yet a preliminary reference to the CJEU, however in the literature there appear persuasive arguments to do so[464].

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[459] Maartje de Visser, Constitutional review in Europe, a comparative analysis, 2015 Hart Publishing, Oxford and Portland, Oregon, p. 439.
[460] C-210/06 CARTESIO Oktató és Szolgáltató Bt (2008) ECR nyr.
[461] OSZTOVITS, András: "Az Európai Unió jogának alkalmazása: az előzetes döntéshozatali eljárások kezdeményezésének tapasztalatai" elnevezésű joggyakorlat-elemző csoport összefoglaló véleménye, p. 117
[462] BLUTMAN, László, Az előzetes döntéshozatal. KJK KERSZÖV, Budapest (2003), p. 233.
[463] Case 166/73 Rheinmühlen-Düsseldorf v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel (1974) ECR 33.
[464] GÁRDOS-OROSZ, Fruzsina: Az Alkotmánybíróság szerepvállalása és annak kötöttségei az uniós jog valamint az alkotmány kapcsolatának meghatározásában, in: CHRONOWSKI, Nóra (szerk.): Szuverenitás és államiság az Európai Unióban, ELTE Kiadó, 2017., pp. 75-93.

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The CJEU in the *Cartesio* decision also touched upon the legal issue of "*court of last instance*" by referring to its *Lyckeskog* decision[465] where the CJEU held that court decisions can be challenged before a supreme court, are not considered as court of last instances, against which decision there is no judicial remedy. Pursuant to article 267 TFEU courts of last instance, against which decision there is no further remedy, are obliged to send a preliminary reference to the TFEU in case if there is a question of interpretation of EU law that is applicable in order to be able to decide on the merits of the case. In the latter case, the national court has an obligation to suspend the on-going case and send a reference to the CJEU, unless there is an acte claire situation, meaning that there is no ambiguity in terms of the application of the relevant provisions of EU law in the on-going case, for instance, because of a clear and well-established case law of the CJEU in the case.

As pointed out earlier, for a time being Hungarian law allowed to appeal decisions of courts on referring the matter to the CJEU as a preliminary reference. During this period, the Hungarian Supreme Court in its decision[466] gave guidance for lower courts in the application of the appeal procedure. The Supreme Court concluded on the basis of the CJEU's Rheinmühlen Düsseldorf[467] decision that article 267 TFEU does not exclude the possibility to appeal the decision of national courts on referring a preliminary reference to the CJEU, if there was such an appeal possible against the substantive decision as well. The Rheinmühlen Düsseldorf decision itself, left open the possibility for the Member States to allow in their legislation the possibility of an appeal against a national court decision on sending a preliminary reference to the CJEU. Furthermore, the Hungarian Supreme Court – applying the CJEU's Rheinmühlen Düsseldorf and earlier cited Lyckeskog decision - also pointed out that, even if only an extraordinary appeal is possible against the substantive decision of the court, still, an appeal against an order of the court about sending a preliminary reference to the CJEU would be possible.

Following such a practice, the CJEU made it clear in 2008 within the *Cartesio* judgment that *jurisdiction of a national court under article 267 to submit a preliminary reference to the CJEU, cannot be jeopardized by any national provisions that would grant an appeal court the competence to amend or to annul the preliminary reference of the lower court or to order the lower court to resume the proceeding.* The Hungarian Constitutional Court has also affirmed in its 61/B/2005

[465] Case C-99/00 Kenny Roland v Lyckeskog (2002) ECR I-4839
[466] Decision of the Hungarian Supreme Court no. 24.705/2005/2
[467] Case 166/73 Rheinmühlen-Düsseldorf v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel (1974) ECR 33

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(VII.21.) decision[468], - citing C-166/73 decision by the CJEU - that Member States do not have the competence to restrict preliminary references to the CJEU. The question in the 26/2015 (VII.21.) decision[469] was, whether it would violate the Fundamental Law, if a judge would not ask for a preliminary ruling, in a case, where either because of a question of interpretation, or because of a question of validity of the underlying EU legislation, a preliminary reference could be justified. The Constitutional Court has concluded, that violation would only occur, if in the judicial order, deciding about a rejection of a request by the party(ies), the judge (or at least in the final decision of the case) does not provide a proper reasoning for rejecting the request of the party(ies) not sending a preliminary reference to the CJEU.

Summary

1. The reality of sovereignty is that the state has voluntarily restricted its own sovereignty via international agreements in order to achieve certain benefits, typically higher level of welfare or security.

2. Article E (1) is not only a clear expression of commitment by Hungary towards the participation in a supranational EU, but it also includes limitations on the sovereignty conferral towards the EU. The express mentioning of liberty, well-being and security, are also the expressions of the purpose of the participation by Hungary within the European integration.

3. The sovereignty conferral via the European integration clause occurs in accordance with Article 5 TEU that declares that the EU shall act only within the limits set by the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.

4. The Hungarian Constitutional Court has also pointed out, that constitutional identity is not a list of static values, it includes the fundamental freedoms, division of competences, republic as form of government, respect of autonomies under public law, freedom of religion, parliamentarism, equality, acknowledging judicial power (meaning safeguarding judicial independence), protection of nationalities living with us – altogether the achievements of the Hungarian Historical Constitution,

[468] Decision of the Hungarian Supreme Court no. 61/B/2005 (VII.21.)
[469] Decision of the Hungarian Supreme Court no. 26/2015 (VII.21.)

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entire legal system is based upon – all these has to be safeguarded in the framework of a constitutional dialogue

5. Constitutional courts in the Member States have to find the right balance between advancing and protecting the enforcement of Union law within the Member States and protecting national constitutional identity in the same time.

6. Constitutional Court interprets Fundamental Law in conformity with EU law, in the framework of Europafreundlichkeit, and with respect to the European constitutional dialogue.

7. The jurisdiction of a national court under article 267 to submit a preliminary reference to the CJEU, cannot be jeopardized by any national provisions that would grant an appeal court the competence to amend or to annul the preliminary reference of the lower court or to order the lower court to resume the proceeding.

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VIII. Comparative perspective – EU and national constitutional identity: turning constitutional tolerance into cooperative constitutionalism

1. Sovereignty concepts and conferral of competences on the European Union

Membership in the EU did not diminish, and Member States did not give up their national sovereignty, rather they conferred certain competences of sovereignty on the EU[470], by a joint exercise of competences, strictly defined in the Founding Treaties, together with other EU Member States, under the umbrella of the EU institutions. Although states long before the EU membership have limited certain aspects of their national sovereignty via participation in international organizations and international agreements, the membership in the EU have meant an unprecedented extent of sovereignty conferral. *Neil MacCormick*[471] use the term of *shared sovereignty*, which is formulated in national constitutions as joint exercise of competences. Particularly the reason behind the fact, that national constitutional courts cannot accept without reservations the requirement of unconditional supremacy of Union law over the national constitutions as set out in the Internationale Handelsgesselschaft decision by the CJEU and confirmed in multiple decisions, among others in the earlier discussed Melloni decision, is that *EU law has supremacy only in those fields, where the EU has a competence*, where the Member States decided to confer competences on the EU, to share certain competences of national sovereignty, to jointly exercise them with other Member States within the EU, but the Member States in the same time *retained their national sovereignty and decided not to create a federal state* like the United States of America[472].

National constitutional courts' case law in the context of European integration and national sovereignty tend to center around the following cornerstones: (1) The sovereignty conferral on the EU can be withdrawn[473], and (2) Member States take part in joint decisions and influence the legislation made by the institutions of the EU (even decisions, which *smaller states would not have the chance to influence if they would be outside the EU, but their outcome would impact them; in fact smaller states can influence EU decisions beyond their weight, partly because from time to time they can act as the tie braker*), (3) The conferral on the EU is reciprocal, Member States receive in return for their conferral of certain competences of the national sovereignty certain benefits, most

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[470] Limitation on national sovereignty in the context of the EU, further discussed in: Nagy Boldizsár: a szuverén határai, in: FUNDAMENTUM, 2003/2, pp. 38-50.

[471] MacCormick, Neil: A szuverenitásról és a posztszuverenitásról, in: FUNDAMENTUM, 2003/2, pp. 5-15.

[472] See: Fazekas, Flóra: A magyar Alkotmánybíróság viszonya a közösségi jog elsőbbségéhez egyes tagállami Alkotmánybíróság felfogások tükrében, 2009, PhD értekezés, pp. 8-11, Blutman László – Chronowski Nóra: Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában I. és II. Európai Jog, 2007/2., pp. 3-16., 2007/4, pp. 14-28.

[473] Art. 50 TEU

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prominently a higher level of security and welfare, therefore *solidarity lies in the heart of the European integration*, (4) national constitutions (in most Member States following a referendum) give express empowerment for the conferral of certain competences from the national sovereignty[474] on the EU, (5) as well as the conferral of competences will remain limited and specific, limited on the competences listed in the TFEU and as Member States' constitutional courts point out, (6) the exercise of competences conferred upon the EU will be controlled by national constitutional courts and ultra vires acts will not be acknowledged and obeyed by Member State institutions, furthermore (7) Member States will remain the Masters of the Treaties (*Herren de Vertrage*[475]; *a Szerződések urai*), and last, but not least, (8) as the German Constitutional Court has pointed out in its Maastricht decision, as the competences of the EU increase in the future, in the same extent need to increase its *democratic legitimacy*[476].

As it has been clarified by constitutional courts in the earlier cited Lisbon decisions, the (1) Lisbon Treaty not only defined more precisely, the *competences* of the EU, but it also set a clear legal framework for the (2) *withdrawal* from the EU, that can be considered also as an assurance from the national sovereignty point of view. Retained sovereignty and a maintained control over the conferred competences, that they are not only (3) *jointly exercised*, but *clearly defined* and can be anytime withdrawn according to a clearly set procedure. The (4) *subsidiarity protocol* introduced by the Lisbon Treaty and the involvement of national Parliaments in the EU decision making procedure, as well as the (5) evolvement of the directly elected European Parliament to the position of a *co-legislator* - are also important steps towards an increased democratic control over EU legislation and the exercise of joint control over the conferred competences upon the EU. And finally, as the German, the Hungarian and the Polish constitutional courts have pointed out, (6) constitutional courts will remain the final interpreter of the national constitution and thus will retain their competences to protect constitutional identity, to interpret the European integration clause in the domestic constitutions, the "necessary extent of competence conferral" on the EU, that will remain an important assurance as well towards the control over the conferred competences by national sovereignty.

As it has been shown above, if used cautiously, the above constitutional reservations have helped and can help in the future, to further the development of EU law, in order that the EU becomes more

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474 Chronowski and Petrétei point out, that the sovereign power is indivisible and sovereignty can not be transferred - it is possible however, to confer certain competences, which comprise parts of national sovereignty, which is a share of the exercise of sovereignty, but not the share of sovereignty itself (Chronowski, Nóra – Petrétei, József: Alapjogok és az EU (Fórum), in: FUNDAMENTUM, 2003/2, pp. 67-72.)

475 as the German Constitutional Court's Kloppenburg (2 BvR 687/85 BVerfG 75, 223) decision has highlighted

476 Paczolay Peter has pointed out this connection as well (Paczolay, Peter: Alapjogok és az EU (Fórum), in: FUNDAMENTUM, 2003/2, pp. 66.)

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democratic, could serve better its Member States` and its citizens` interests and provide a more coherent protection for fundamental rights and rule of law in general. If these ultra vires reservations are however not used with caution[477], not used with responsibility and constitutional tolerance, then inevitably that would be not only harmful for the Member State itself, but it could lead on a long term to the collapse of the European Union.

In the frame of this section, I intend to compare, sum up and analyze the different approaches to national sovereignty in the light of the EU integration, through showcasing the cases of Germany, UK, Austria, Hungary and Poland.

AUSTRIA

The Austrian Constitution has no specific sovereignty (European integration) clause regulating the conferral of specific competences on the EU, apart from the general clause conferring competences on international organizations (article 9.2 of the Austrian Constitution). The conferral of competences are related to individual and federal competences and without introducing specific express limits on the EU sovereignty conferral. As article 2 of the Austrian law on the accession to the EU formulates (in a very similar way, than the 1972 European Community Act formulated it in the UK), EU law is applied according to its principles as enshrined in EU law, which is a clear and unconditional recognition of the fundamental principles of EU law, most notably, supremacy, direct applicability and direct effect.

GERMANY

In Germany, already the Preamble and Article 23.1 of the Grundgesetz[478] declares the openness[479] of the constitution towards the European Integration (*Integrationsfreundlichkeit*) and the participation within the European Integration became a goal of the state (*Staatsziel*). The participation in the European Integration requires a constitutional empowerment, which, until the Maastricht Treaty was a general clause[480] empowering the state to take part in and confer competences on international

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[477] See for instance for such less cautious use, the Czech Landtova decision, or the German PSPP decision.

[478] "*als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen*" Preamble of the Grundgesetz and Art 23.1 GG: "*Zur Verwirklichung eines vereinten Europas wirkt die Bundesrepublik Deutschland bei der Entwicklung der Europäischen Union mit, die demokratischen, rechtsstaatlichen, sozialen und föderativen Grundsätzen und dem Grundsatz der Subsidiarität verpflichtet ist und einen diesem Grundgesetz im wesentlichen vergleichbaren Grundrechtsschutz gewährleistet*."

[479] Streınz, Rudolf. "Das Grundgesetz: Europafreundlichkeit Und Europafestigkeit: Zum Lissabon-Urteil Des Bundesverfassungsgerichts." Zeitschrift Für Politik, vol. 56, no. 4, 2009, pp. 467–492. JSTOR, www.jstor.org/stable/43783561; Andreas Vosskuhle: „Integration durch Recht" Der Beitrag des Bundesverfassungsgerichts, Humboldt-Universitat zu Berlin, 11 Oktober 2015, https://www.rewi.hu-berlin.de/de/lf/oe/whi/humboldt-reden-zu-europa/archiv-humboldt-reden/rede-vosskuhle.

[480] Article 24 Grundgesetz

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organizations. Following the Maastricht Treaty, however, it became necessary to put a specific amendment to adjust the Grundgesetz and give specific empowerment for the participation in further integration steps (*Integrationsstufen*) within the EU[481], as pointed out earlier in connection with the Maastricht decision of the German Constitutional Court.

Similarly, to Austria, Germany is a federal democratic republic (article 20.2 of the German Constitution, Grundgesetz), where federal level and regional level coexist with equal rights, they respect and support each other based on the governing principle of *loyalty*. Similarly to Austria, because of a shift of state competences, states are compensated by a larger influence over federal legislation in the *Bundesrat*.

As said, the Preamble of the *Grundgesetz* declares, that Germany keeps the constitution open for international cooperation, to serve peace as an equal part of a united Europe and defining European integration as an aim of the state, from which it clearly follows, that the concept of sovereignty in Germany goes beyond the nation state. A general clause allowing the conferral of specific sovereignty competences on international organizations, cross-border cooperation (art. 24 of the Grundgesetz) was inserted into the German Constitution, however following the Maastricht Treaty, a specific EU integration clause (article 23 of the Grundgesetz) was inserted as well, providing a specific empowerment for sovereignty conferral on the EU, by also stating, that the EU integration should not violate democratic, federal and social principles (structural clause or Struktursicherungsklausel), as well as serving the purposes of rule of law, subsidiarity, human rights protection, equal to the standards of the German Constitution.

Unlike in Austrian constitutional law, the German Constitution does include express limitations on the sovereignty conferral on the EU. The German Constitutional Court held, that basic structure/balance of the constitution, on which identity is built, and identity of the constitutional order cannot be violated, showing that the term of constitutional identity as a limit of the European integration already enshrined in the case law of the German Constitutional Court in 1974. Further limitation is the content of the Eternity Clause (*Ewigkeitsklausel*, article 79.3), the federal principle, human dignity, rule of law, democracy, which are pre-conditions of the statehood of Germany. Which will always implicitly involve the possibility of a conflict. As mentioned earlier, the Bundesrat, as the representative institution of the regions has right to be informed on EU matters, the federal government has to consider their opinion in matters which effect the regions (article 23.5) and has to balance it against the obligation of the federal government to safeguard the federal interests against state interests. Furthermore, the approval of any EU Treaty changes requires a two third majority

[481] Article 23 Grundgesetz

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approval not only by the Bundestag, but also by the Bundesrat. If a matter to be decided on EU level falls into the competence of the regions, the Bundesrat has to nominate one delegate, who will represent the interests of the regions in the EU Council.

UK

In the UK, the principle of the Parliamentary Sovereignty imposed a difficulty, namely that no Parliament can bind its successor. If so, how could the Parliament accept the European Community Act on the accession to the EC, how can it be sure that its successors will respect the earlier agreement. Such concerns were dismissed or at least mildened by British high courts, when in Factortame and also in Macarthys v Smith, high courts made clear, that they are going to enforce the principle of supremacy and direct effect of EU law on the basis of the European Community Act and as it follows from the Founding Treaties.

Codified texts and uncodified principles comprise the constitutional law of the UK. UK is a Parliamentary monarchy, a centralized unitarian state. The constitutional principle of Parliamentary Sovereignty can be seen as a limitation on sovereignty conferral to the EU, but in the same time, it does not block the conferral of competences to the EU via the 1972 European Community Act (ECA). The ECA orders EU law to be applied and enforced directly (Article 2 ECA), as well as to be interpreted according to the principles of the case law of the CJEU (Article 3 ECA). Similarly to Austria and Germany, neither the erosion of national sovereignty, nor the erosion of the principle of Parliamentary Sovereignty as a consequence of the EU membership was raised as an issue in the UK. However, it should be noted, that Parliamentary Sovereignty has been limited by the fact, that as a result of the EU accession, subsequent Parliaments cannot freely legislate contrary to the EU Treaties, and remaining in the same time within the EU. This, being seen (and explained to citizens with increasingly populistic arguments) by politics, as an intrusion into national sovereignty, probably contributed to the decision of British citizens to vote to withdraw from the EU[482].

POLAND

[482] Similar arguments have been seen in case of Poland. Not only in politics, but also in judicial decisions. Clear difference however, that in Poland and in other CEE countries, despite all these tendencies, there is a strong support in the population for EU membership (PL: 85%, HU: 82%, 2020). This is the reason why, on the long run, openly positioning against EU Membership does not pay off for major political forces: CEE: opinion on staying in the EU by country 2020 | Statista

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In Poland for the conferral of certain sovereignty competences on the EU, the constitution requires a two third majority of all members of the Parliament to be passed and it need to be promulgated in the official journal, the concept of the constitution is more formal in this sense.
There is a specific sovereignty clause in the Polish constitution, which confers competences on the EU and includes certain express limitations as well. There is a Parliamentary committee for EU affairs, which requests the government to regularly report about its position on legislative proposals to be represented in Council.

HUNGARY
Similarly to Poland, in Hungary also a two third majority of all members of the Parliament is required to adopt a new constitution or to adopt amendments (such as earlier the European Integration clause) to the current one, which need to be promulgated in the official journal, in this aspect the constitution follows a formal concept. The 2012 new Fundamental Law however has introduced the concept of the historical constitution and included the historic achievements of the Hungarian legal system as a reference and method of interpretation, a part of constitutional identity into the Preamble of the Fundamental Law. Hungary, similarly to Poland, is a parliamentary democratic and unitarian republic, follows a chancellery model, which gives the major executive power to the prime minister and the head of state is rather a symbolic figure, representing the unity of the nation. There is a specific sovereignty/EU integration clause in the Fundamental Law, including express limitations towards the sovereignty conferral on the EU. With regard the exercise of competences jointly with the other Member States in the EU institutions, there is a Parliamentary committee on EU affairs, which should be consulted on EU legislative proposals by the government.
As explained earlier, there are implied and express limitation listed in the Hungarian European integration clause, as limitation on the conferral of competences on the EU.

2. The requirement of democratic legitimacy

From the Member States' point of view, it has been a concern for decades, that the membership in the EU does not mean a shift of legislative power towards the executive branch, as a result of its participation in the EU legislation via the Council of the EU. Furthermore, the so-called democratic deficit, the lack of democratic legitimacy and influence by the European Parliament in the EU decision-making has been a further source of concern from the Member States point of view. Both concerns have been addressed by the Member States throughout the decades and particularly by the Lisbon Treaty, as the (1) European Parliament became a co-legislator, with equal rights in the legislative procedure and the (2) national Parliaments became involved since the Lisbon Treaty in the

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Union legislation, by the subsidiarity protocol attached to the Lisbon Treaty. At national level, furthermore, (3) in most of the Member States, national governments have an obligation under national law, to report to their national Parliament with regard the national positions to be represented in the Council with regard the various legislative files, and government has to *take into account the binding position of national Parliaments in representing national positions in the Council*.

There are different approaches on how the Member States concerned have responded to the partial shift of legislative competences in certain matters towards the EU, via national legislation to increase democratic and Parliamentary control over the government and executive position formed within the Council of the EU.

To counterbalance (or to compensate) the shift of legislative competences from the national Parliaments (and states or *Lande*, in case federal structure) towards the executive branch as a result of the EU Membership, the democratic legitimacy of EU decision making has been increased in multiple levels in the past decades, as well as the national Parliamentary control and control of the local states in federal structures on governmental positions in the EU Council have been increased.

AUSTRIA

As said earlier, Austria has a representative democracy, with certain elements of direct democracy, similarly to other Member States discussed in this work, such as Germany, Poland or Hungary. If the constitution as a whole would change, then a referendum is mandatory.

As said earlier, as a result of the membership in the EU, there was a shift of competences from the legislative towards the executive. To counterbalance the loss of Parliamentary competences, article 23 e) s. 1. of the B-VG provides, that *Nationalrat* and *Bundesrat* has to be immediately informed about EU legislative proposals and the government will be bound by the position of the *Nationalrat*, unless there is a vital political reason to do otherwise and to hold a consultation on the matter with the *Nationalrat*.

GERMANY

Similarly, to Austria, representative democracy prevails (referendum is almost none), and similarly to Austria, to counterbalance the shift of competences from the legislative towards the executive branch, as a result of EU membership, both the Bundestag and the Bundesrat can participate in EU affairs, and an EU Affairs Committee was established, to form opinion on EU legislative proposals. Germany and the German Constitutional Court had a *major impact on the democratization of EU legislation*. As explained earlier in detail, the constant criticism by the German Constitutional Court

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with regard the lack of democratic legitimacy of EU decision making, has contributed to the amendment of EU Founding Treaties in a way, that the European Parliament became directly elected, its role in EU decision making processes were increased in a way, which resulted that by the Lisbon Treaty, the European Parliament became a co-legislator and national Parliaments became more involved in EU legislation, even if in a limited way.

UK

Similarly to Germany, referendum is very rare in the UK (last was the Brexit referendum, and for long time there are discussions on a new referendum related to the independence of Scotland), because it would contradict the principle of Parliamentary Sovereignty, therefore the UK is very much a representative democracy. There is a Select Committee on European Legislation in the Parliament and a Select Committee on the European Union in the House of Lords to counterbalance the shift towards the executive, by evaluating EU legislative proposals in the form of reports, which is mostly respected by the government. British Parliament looked traditionally with suspicion at the competence increases by the European Parliament, and fear that law might be passed without British consent, which would violate Parliamentary Sovereignty.

POLAND

Poland is a representative democracy, where no referendum is needed to amend the constitution or to adopt a new one. There is also an EU affairs committee in the Parliament, which should exercise the Parliamentary control over governmental positions represented with regard EU legislative proposals in the Council.

HUNGARY

Hungary is a representative democracy too, where referendums are mostly consultative, even in case of decisive referendums, if successful, they only induce legislative obligation, but it is up to the legislator to find the exact content of the legislation. To adopt a new constitution, or to adopt the existing one, no referendum is necessary.

3. The dual character of the Rule of Law Principle

Member States and the EU institutions, both level protect the principle of rule of law, giving a dual character of its interpretations and a dual level of protection. The sincerity of both parties` intentions and mutual constitutional tolerance can be the way to peaceful coexistence.

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The principle of rule of law involves the principle of division of powers, judicial control over the public administration, judicial independence, the principle that administration and courts are bound by law (*Legalitätsprinzip*), constitutional adjudication and certainly the protection of fundamental rights as well. With regard to the protection of fundamental rights and constitutional adjudication, because of the utmost importance of these topics, and because they are separate infliction points in the European judicial discourse, it seemed practical, to insert into separate chapters the closer scrutiny of these topics.

The principle of *national enforcement of Union law* and *national procedural autonomy* impose an obligation on national courts and authorities to *set aside* any conflicting national law *immediately* and *effectively*, as soon as there is a conflict with an applicable provision of EU law and to provide *equivalent* remedies in case of EU law violations (compared to remedies available in case of violations of domestic law). From Member States point of views, it remains important to maintain an efficient counterbalance and checks and balances between the different branches of state power, not just on national level, but also on the level of the EU Institutions.

It is also important to note that since the *Jörg Hayder, Austria case*, the EU started to monitor with increased intensity the situation of rule of law within the Member States, and since Article 7 has been included in the TEU, there is a legal mechanism to monitor and, if necessary, penalize the systemic erosion of rule of law in the Member States. This approach is signified by the *reverse solange* theory, as discussed in detail earlier, where now the EU is monitoring the level of rule of law protection within the Member States. Such procedures are important not to become political weapons and subject to the *game of daily politics*, as these tools are *destinated to serve a much greater purpose*, namely the protection of the very foundations and essence of the European integration. When it comes to the protection of rule of law on European level, the question should be addressed, if really Article 7 is the most efficient tool available for the EU Institutions to safeguard the general standard of rule of law across the Member States? As Article 7 is mainly subject to Parliament and ultimately European Council scrutiny, it gives the procedure into the hands of politics, instead of the CJEU. Furthermore, in the end of the day, the European Council has to vote with a unanimous majority to impose any sanctions (*suspension of voting rights*) on the specific Member State. Both arguments, question the efficiency and impartiality of the procedure, the ultimate question is the *political reality to achieve a unanimous decision in the European Council* to impose effective sanctions against a Member State because of the breach of the rule of law. Furthermore, as *Weiler* pointed out, there is a certain degree of *constitutional tolerance*, required from EU institutions towards the diversity and very much divergent constitutional traditions of Member States. In this context, the highest EU

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judicial power has a higher and *more certain authority* to decide about the appropriate *common minimum* level of rule of law protection within the Member States, than political actors, such as political actors taking part in the Article 7 decision making procedures.

Alternatively, since the Lisbon treaty, the European Union Fundamental Rights Charter became primary law, having horizontal direct effect according to the case law of the CJEU, it seems to be more efficient, in case of a manifest systemic erosion of rule of law within the Member States, to start a *systemic infringement proceeding* by the Commission on the basis of the EU Fundamental Rights Charter[483], combining potentially more cases together and ultimately bringing the matter before the CJEU in a *fast track* proceeding.

In the forthcoming section, I will collate the different approaches accessible in the Member States in how rule of law in Member States has been affected by the membership in the EU.

In general, rule of law is the fundamental of all legal systems in the 28 Member States. Rule of law is not only an entry level criteria, as part of the Copenhagen criteria to join the EU, but it has to be maintained as a fundamental principle across the EU Member States[484]. As a fundamental principle of the Member States, still there are differences in terms of its scope and interpretation, depending mostly on historical constitutional traditions.
However, as discussed earlier, recently, an article 7 procedure has been launched against Poland and Hungary, due to alleged existence of a clear risk of a serious breach of the founding values of the European Union, prominently because of the infringement of the principle of rule of law. The symptoms center of the discussion in case of these two countries are however different. In case of Poland, the emphasis is put more on the independence of the judiciary, whereas in case of Hungary, arguments are more centered on the media freedom, academic freedom, freedom of the civil organizations, however also the independence of the judiciary is also put into question, especially with regard the appointment practice and promotion of justices by the Hungarian Judicial Council[485]. As a general argument, and also in the literature point was made, that whereas article 7 procedure is

[483] A more in-depth analysis on the scope of application of the EU Fundamental Rights Charter, as opposed to the European Convention on Human Rights: BÁRD, Petra: Alapjogok és az EU (Fórum), in: FUNDAMENTUM, 2003/2, pp. 82-86.
[484] see: the Proposal on the Copenhagen Commission by MÜLLER, Jan-Werner: Protecting the rule of law (and democracy!) in the EU. The idea of a Copenhagen Commission. In: CLOSA, Carlos, KOCHENOV, Dimitry (eds.): Reinforcing rule of law oversight in the European Union. Cambridge University Press, 2016.
[485] See more detailed, in: SZENTE, Zoltán: Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them, in: JAKAB, András – KOCHENOV, Dimitry: The enforcement of EU law and values: ensuring member states' compliance, Oxford University Press, 2017, pp. 456-475.

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not a proceeding before the Court of Justice of the Union, rather before the European Parliament and the Council, it is much more politicized, and much less is based on legal arguments. If the ultimate reason of the creation of the European integration was to solve conflicts by law and before court, this principle should be followed through in a conscious way also in case of such highly important matters, than the question of the rule of law. There are initiatives to give the CJEU the right to monitor the situation of rule of law within the Member States and to impose sanctions if necessary. There is however such procedure in place, first and foremost the infringement of EU law proceeding[486]. Since the EU Fundamental Rights Charter became primary law and it has a horizontal direct effect[487], the Commission can start an infringement proceeding and bring a Member State before the CJEU, if specific fundamental rights are infringed[488]. As mentioned earlier, *Scheppele*, *Bard* and *Sledzinska-Simon* pointed out, that the infringement proceeding is focusing on an isolated violation and does not address the "roots and entirety" of the problem, therefore they suggest that the CJEU should clearly identify and prioritize rule of law related infringement proceedings, applying a systemic infringement action and request interim measures and accelerated, fast track procedure from the CJEU, to provide fast remedy and avoid irreparable harm[489]. There are pro-and contra arguments[490] in the literature, whether infringement proceedings are more effective to protect the values of the European Union, as opposed to article 7 procedure, which is less effective and more politicized.

AUSTRIA

In Austria rule of law has been a part of the 1867 constitution, and since than, the Constitutional Court - which started to operate in 1923 -, held, that all the *essential content of norms*, has to be determined by the legislators. Furthermore, the *protection of human rights* and the *legality of the administrative procedures* are considered as cornerstones of the concept of rule of law in Austria. As a result of the EU membership, the Austrian Constitutional Court has shared certain tasks with the CJEU on the one

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[486] In the scope of the rule of law proceeding: C-619/18 P Commission v Poland

[487] FRANTZIOU, E., The horizontal effect of the Charter of Fundamental Rights of the EU: rediscovering the reasons for horizontality, European Law Journal 2015, pp. 657-679. In a broader context: CIACCHI Aurelia Colombi: The direct horizontal effect of EU fundamental rights: ECJ 17 April 2018, Case C-414/16, Vera Egenberger v Evangelisches Werk fur Diakonie und Entwicklung e.V. and ECJ 11 September 2018, Case C-68/17, IR v JQ, European Constitutional Law Review, 15(2), 294-305, also available at the Cambridge University Press Online, 13 June 2019; HOFFMEISTER, Frank: Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels? in: in: VON BOGDANDY, Armin – SONNEVEND, Pál: Costitutional Crisis in the European Constitutional Area, Hart Publishing, 2015, pp. 196-206.

[488] For instance in Case C-286/12 Commission v Hungary case related to the newly introduced Hungarian rules on the earlier compulsory retirement of judges

[489] BÁRD Petra and SLEDZINSKA-SIMON Anna: The Puissance of Infringement Procedures in Tackling Rule of Law Backsliding, August 9, 2019, RECONNECT Project; BÁRD Petra and SLEDZINSKA-SIMON Anna: The Puissance of Infringement Procedures in Tackling Rule of Law Backsliding, June 3, 2019, Verfassungsblog; Petra BARD and Anna SLEDZINSKA-SIMON: Rule of law infringement procedures – A proposal to extend the EU's rule of law toolbox, CEPS Paper in Liberty and Security in Europe No. 2019-09, May 2019.

[490] In favor of article 7 in: PRETE, Luca: Infringement Proceedings in EU law, Wolters Kluwer, 2017., p. 27.

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hand, and with ordinary courts on the other, which were previously the tasks of the Austrian Constitutional Court. *Legality* of EU law norms and their compatibility with constitutional principles, *fundamental rights*, even if being a part of national law, they have to be reviewed by the CJEU. As well as the legality of national norms, in terms of the review of the compatibility of national norms with EU law (and in connection with this, also the review of their legality) has been shifted to ordinary Austrian courts, as it will be their duty, following the principles of *Simmenthal* and *Fratelli Constanzo*[491]. Also the term of the *legality of the administrative procedures* have a different meaning, if the public administration also has to immediately set aside any national acts of Parliament, which is incompatible with Union law. As the Austrian Constitutional Court stated in its decision nr. V 6-8/98, dated 16 June 1998, that it is not competent to review the compatibility of Austrian laws with Union law, and it declared, that the CJEU is not competent either to annul an Austrian law which is incompatible with Union law. As a critic we could add, that there is no need to annul a national norm which is incompatible with Union law, as national courts and authorities have the obligation on the basis of EU law, to set aside national law, which conflicts with EU law.

GERMANY

The concept of rule of law in Germany means, that the state does not have an unlimited authority. Primarily, the principle of legality, fundamental rights, such as equal treatment, proportionality, effective legal protection, judicial independence, legal certainty and legitimate expectations are effective limitations. The fact, that national courts and authorities have the duty under EU law to set aside any national provisions, which is incompatible with EU law, does have an effect on the competences of the Constitutional Court, as it is not anymore the ultimate institution, which have the competence to declare non-applicable national norms. Of course, national courts and authorities only set aside, and not annul an incompatible national norm with EU law, however, it still has an impact on the competence of the Constitutional Court.

UK

In the UK, rule of law means[492], that the government and the public administration is bound by law, but the Parliament has no limitation whatsoever[493]. Parliamentary Sovereignty put even the judicial power to a secondary position. In this aspect, the EU Membership caused an increase of judicial power in providing injunction against the Crown, or setting aside national law by ordinary national

[491] Case 103/88, ECR (1989) Fratelli Constanzo

[492] Dicey, Introduction to the study of the law of the constitution, 10. ed., 1959.

[493] Jowel, The Rule of Law today, in: Jowel/Oliver (ed.): The Changing Constitution, 3. ed., 1994, pp. 57 et seq.

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courts, which were incompatible with EU law, for instance with the law on anti-discrimination[494]. Similar example is the interim relief granted by national courts against the Crown in the Factortame decision[495].

POLAND

In Poland, rule of law used to have a similar interpretation, then in Germany and in Hungary, which means, that fundamental rights protection, legal certainty, constitutional adjudication and judicial independence are understood as a core of the rule of law concept in Poland. Recent years have seen however as discussed earlier in detail, a considerable amount of threats against judicial independence in Poland[496], which resulted to a general erosion of rule of law.

HUNGARY

In Hungary, similarly to Germany and in Poland, the concept of rule of law includes the principles of legality, human rights protection, equality, proportionality, constitutional adjudication, judicial independence and legal certainty.

The accession to the EU had a similar impact on the role of the Constitutional Court, as in other Member States, namely, that the monopoly of the Constitutional Court regarding disapplying national norms was diminished, ordinary courts and authorities have the duty to set aside any national norms, which contradict with EU law.

The ongoing Article 7 procedure and relevant infringement actions have been discussed earlier in detail. As the consequent position of the Hungarian government have been to follow the rulings of the CJEU, its decisions will have a significant role in settling the arguments, raised also in the Article 7 procedure.

4. Level of the Protection of Fundamental Rights

At the early days of the European Integration, first in its Solange I decision by the German Constitutional Court, and later followed by other constitutional courts as well, it has been raised as a strong concern that whereas the Community demanded Member States to obey before the supremacy of Community law, it lacked a reliable and uniform standard of fundamental rights protection binding towards EU legislation. Under such circumstances, accepting the unconditional supremacy of

494 Case 222/84, Johnson, ECR (1986), pp. 1651 et seq

495 Case C-213/89, Factortame, ECR (1990), pp. I-2433 et seq

496 https://www.iustitia.pl/informacje/2182-the-response-of-the-polish-judges-association-iustitia-to-the-white-paper-on-the-reform-of-the-polish-judiciary-presented-to-the-european-commision-by-the-government-of-the-republic-of-poland

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Community law over the national constitutions, could have been an irresponsible act from the side of national constitutional courts, entrusted by the ultimate protection of the national constitution.

Later, as the ECJ explained and committed towards, what it understood as a binding standard of Fundamental rights protection within the EC and later the Fundamental Rights Charter was enacted, the Member States and national constitutional courts started to accept the principle of supremacy upon certain conditions. Throughout this judicial discourse, participants on all sides were mostly all of time open for discourse and used their competences, national constitutional courts their reservations carefully and with constitutional tolerance, and most importantly, constitutional courts did not question the authority of the CJEU as ultimate interpreter of the Treaties, and vica versa, the CJEU never questioned the role of the national constitutional courts as the guardian of the national constitutions. By the acceptance of the Fundamental Rights Charter of the EU as a primary norm, there has been also a third layer of fundamental rights protection emerged in the Member States, besides the national constitutions and the European Convention on Human Rights.

In this section, therefore, I will compare the different national approaches described in the above chapters in the area of fundamental rights protection and its interplay with the protection of fundamental rights on EU level.
Not only national constitutional courts influenced the level of fundamental rights protection within the EU, but also EU Law had a major influence on the interpretation of fundamental rights in the Member States, even if not all Member States had a codified catalogue of fundamental rights. On the level of case law for instance, CJEU decisions, such as Mangold, Egenberger with regard Germany, Taricco in case of Italy or Melloni in case of Spain, it could be manifestly experienced.

AUSTRIA

As it was pointed out earlier, the 1867 Staatsgrundgesetz contains a catalogue of fundamental rights (which is referred to by the current Austrian Constitution in article 149) and it is the duty of the Constitutional Court to protect fundamental rights, however unlike in Germany or Hungary, the Austrian Constitutional Court has not so far set any fundamental rights-based reservations towards the European integration. There is also another important difference to highlight in case of the Austrian system of fundamental rights protection, namely, that individual court decisions cannot be challenged before the Austrian Constitutional Court and social rights are not recognized as fundamental rights. Also in case of Austria, the CJEU with its jurisdiction based on the European Union Fundamental Rights Charter, in the areas of EU competences, will provide with a third layer of protection for fundamental rights besides the Austrian Constitutional Court and the ECHR.

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GERMANY

The fundamental rights catalogue plays a prominent role in the German Constitution, effectively safeguarded by the right to effective judicial protection (*access to justice* – art. 19 (1) 2.) and the constitutional complaint (art. 93. (1) no. 4.) related to individual fundamental rights violations before the German Constitutional Court. As it was widely discussed above, in the relevant section of this thesis, it was the German Constitutional Court, which first developed those fundamental rights-based reservations, which later has been implemented by many other European constitutional courts, for instance, the Italian, and later the Hungarian Constitutional Court. Unlike however, like in the case of the competence-based reservation, the GCC used the fundamental rights-based reservations always carefully and with a constitutional tolerance, the most prominent example for which is probably its Honeywell decision, detailed in the relevant section of this thesis. It implies from the above, that when it comes to questions of competences and national sovereignty, the GCC cannot afford to exercise the same degree of tolerance, as in case of its fundamental rights-based reservations. As it was also elaborated more earlier, in the area of fundamental rights-based reservations, national constitutional courts, particularly the GCC has contributed tremendously to fundamental rights protection on EU level. There is a mutual enrichment of jurisprudence between German courts and the CJEU. We saw arguments, that the CJEU in Mangold or Egenberger went probably too far. In case Mangold, as it was mentioned earlier, the GCC was heavily criticized for its too lenient approach in its Honeywell decision. Now the response to Egenberger is awaited keenly, whether the GCC would follow the way set in its Honeywell decision, or would rather follow a PSPP like approach. Mutual constitutional tolerance would dictate to follow the Honeywell approach.

UK

In the UK previously was no codified list of fundamental rights apart from the unwritten customary law and non-constitutional statutory law, and the accession to the ECHR gave way for effective judicial protection of individual fundamental rights, with a long-lasting impact, shaping British law far after the UK's withdrawal from the EU.

POLAND

In Poland there is a fundamental rights catalogue included in the constitution and enforced by the judiciary and the constitutional court, and the membership in the EU and in the ECHR provides effective second and third layers to fundamental rights protection in Poland. As explained earlier, judicial independence is, which causes worries in case of Poland and raised the scrutiny by the EU institutions and the forthcoming Article 7 proceeding.

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HUNGARY

In Hungary the catalogue of fundamental rights are part of the Fundamental Law and traditionally are traced back to the historical constitution, enforced by the judiciary and the Constitutional Court, following a strong German model. EU and ECHR membership provide effective second and third layers of protection of fundamental rights in Hungary as well, similarly than in other EU Member States.

5. Constitutional adjudication

According to national constitutional courts, the ultimate role of constitutional courts is to safeguard the constitution, and it cannot abdicate from its role, even not within an EU Member State, to protect the constitution, sovereignty and constitutional identity. As a result, constitutional courts reserve the right to interpret the European integration clause within the national constitutions, whether the necessary extent of conferred competences or national constitutional identity are not violated by EU law. At the same time, however, national constitutional courts remain committed in their role, to engage and take part in the judicial discourse on EU level with the CJEU, by accepting its role as the ultimate interpreter of the Founding Treaties. At the same time, the CJEU also accepts, that national constitutional courts cannot abdicate from their role, in safeguarding the national constitutions and national constitutional identity. Mutual constitutional tolerance lies in the acceptance of these cornerstones, as the basis of constitutional discourse, and as a condition of peaceful coexistence. The irresponsible use of the doctrine of constitutional reservations, might not only damage the authority of the constitutional court which applied that, but will be harmful for the Member State itself, and on a long term has the potential to gravely damage the European integration.

In the upcoming section, the different models of constitutional adjudication within selected EU Member States will be briefly summarized in a comparative perspective.

AUSTRIA

The main difference between the Austrian and the German system of constitutional adjudication is, that in Austria there are no constitutional courts on the regional level. The Austrian Constitutional Court has been one of the first to ask for a preliminary ruling in 1999, in the Adria-Wien Pipeline

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case[497], since then, many constitutional courts followed. The Austrian Constitutional Court (unlike its German counterpart) did not express reservations with regard the supremacy of Union law above the Austrian Constitution, so from this aspect, probably the Austrian Constitutional Court is the most cooperative, a good example of constitutional tolerance towards EU law, contributing to the peaceful coexistence in the European constitutional dialogue.

GERMANY

The German Constitutional Court is one of the first constitutional courts in the EU, which started to develop constitutional boundaries towards EU law and played the most prominent role[498] in participating in – until the very recent PSPP judgment – a productive constitutional dialogue with the CJEU to develop EU law. The doctrine of fundamental rights reservations, ultra vires competences, reservations based on constitutional identity and sovereignty control created important safeguards for possible excesses of power by the EU institutions and showed example for constitutional courts across the EU and in the same time contributed to make the EU more democratic, more transparent and to provide a higher level of fundamental rights protection for its citizens. By this long-standing approach, the GCC provided a good example for national constitutional courts, how to safeguard the domestic constitution, its identity, sovereignty, fundamental rights and in the same showing tolerance towards EU law. As long as such tolerance was mutual, it served as a safeguard of peaceful coexistence for five decades and contributed to the development of the whole EU. The CJEU judgments however in Mangold and Egenberger show a decreasing level of tolerance on the side of the CJEU towards national constitutions in the area of fundamental rights. Even if the GCC response to Mangold, in its Honeywell decision was given in the spirit of constitutional tolerance, later the GCC in its PSPP judgment failed to follow the principle of constitutional tolerance. There is a legitimate fear, that the PSPP judgment was only the first in the line, and the CJEU Egenberger decision could be the next to be held ultra vires by the GCC. If such trend would follow, that would set not only a harmful example for other European constitutional courts, but in the same time could send the GCC into a dangerous path for Germany[499] and for the whole EU.

United Kingdom

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[497] Case C-143/99 Adria-Wien Pipeline GmbH, OJ 1999, C 188, p. 18 case

[498] Jutta Limbach, Im Namen des Volkes – Macht und Verantwortung der Richter, 1999, pp. 127 et seq.

[499] As Ingolf Pernice forecasted, the Commission started an infringement proceeding against Germany, because of the PSPP judgment.

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In Britain, apart from the populist political argumentation, there have been substantial signs of skepticism towards the development of EU law, which led to the withdrawal from the EU.
It should be noted however, that EU law brought a major conceptual change to the UK legal system. Before the Francovich and Factortame decisions, there was no judicial control above the acts of Parliament, violations of norms and authorities could not be challenged before ordinary courts. Francovich and Factortame decisions by the CJEU made important changes in this area. The significance of these changes explains in the same time, why the Francovich and von Colson[500] decisions and especially the principle of indirect effect were seen as ultra vires decisions[501].

POLAND

The Polish Constitutional Tribunal played a key role for more than a decade in the Polish court system to demonstrate an example and effective leadership towards lower-level courts with regard the compliance with Union law on the one hand and to provide a careful balance with their role to protect the Polish constitution.
Following the above a responsible and cooperative approach for almost one and a half decade, the recent reaction of the Polish Constitutional Tribunal to the CJEU interim measures[502] on the Supreme Court's disciplinary chamber[503] or to the Xero Flor judgment[504] of the ECHR, show a decisive turn in the case law, towards a more confrontative and less tolerant approach in the European judicial dialogue, which lacks the basic willingness to comply with the EU Treaties or with the ECHR, which Poland accepted to be bound when entered the EU and the ECHR. Such practices proved not only to be harmful for Poland, as it can lead to substantial financial penalties, but also these practices, if other national (constitutional) courts would follow, could lead to the end of the European Union.
These kinds of tendencies resonate to the German Constitutional Court's PSPP judgment, which as I argued earlier, served as previously as a dangerous example for other European constitutional courts by questioning the very fundaments of the European integration. These recent developments in the case law of the Polish Constitutional Tribunal, and more broadly with regard the situation of rule of

[500] Joined cases C-6 and C-90, Francovich I. ECR (1991), pp. I-5357 et seq.
[501] Geddes, Andrew, Claims for damages against the State for breach of Community law, in: Andenas, Mads / Jacobs, Francis (ed.): European Community Law in the English Courts, 1998, pp. 57 et seq.; Craig, Paul, Once more untot he breach: the Community, the State and damages liability, in: Andenas, Mads (ed.): English Public Law and the Common Law of Europe, 1998. pp. 141 et seq.
[502] C-791/19 R Commission v Poland (disciplinary system for judges, interim order) ECLI:EU:C:2020:277 and the judgment of the Polish Constitutional Tribunal nr. P7/20
[503] Lawson, Rick: "Non existent" The Polish Constitutional Tribunal in a State of Denial of the ECHR Xero Flor Judgment, in: Verfassungsblog, available at: https://verfassungsblog.de/non-existent/
[504] Xero Flor w Polsce sp z.o.o. v. Poland (ECHR)

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law in Poland, also underlies the importance of the principle of mutual constitutional tolerance, which as the above cases show, can be the only way to safeguard the requirement of peaceful coexistence.

HUNGARY

The Hungarian Constitutional Court in large part follows the German model and similar interpretation can be seen in the case law regarding the fundamental rights and competence-based reservations, as well as regarding the concept of constitutional identity. The Hungarian Constitutional Court is open towards the European constitutional dialogue, although has not yet submitted a preliminary reference to the CJEU. As explained earlier, the Hungarian Constitutional Court has been criticized in the literature, that it had abused the term of constitutional identity in the 22/2016 decision. In fact, the HCC only set out the available constitutional reservations, which it believed can be applied, similarly to the GCC well established case law, however it did not apply any of those reservations. If we would look for justified reasons for criticism in the 22/2016 judgment of the HCC, than I would rather point to the fact, that the definition of constitutional identity given as an exemplary definition in the text of the decision, lacks the term of rule of law, and also instead of expressly including judicial independence, it states the acknowledgement of judicial power, which is not exactly the same as judicial independence, because you can have a lots of power as a judge, despite being not fully independent from governmental influence. Mutual constitutional tolerance requires, to interpret the Fundamental Law in conformity with EU Law, in a sense of *Europafreundlichkeit* (not *Europafeindlichkeit* for sure), throughout the European constitutional discourse, and so far, exactly it is, what the HCC has pledged in its 22/2016 and 2/2019 decisions.

6. Relationship between EU law and national law in the light of the case law of the above Member States

EU law requires Member States to obey before Union law. National constitutional courts made clear, since the beginning of the EU integration, that there is a core of national constitutions, the national constitutional identity, above which Member States cannot accept the supremacy of Union law, because those values and core principles of national constitutional law should be also *taboos* for the constitution making authority. In this context of multilevel constitutionalism[505], where a certain

[505] More in depth analysis in: Pernice, Ingolf: Multilevel constitutionalism and the crisis of democracy in Europe, in: European Constitutional Law Review, 2015/11, pp. 541–62.

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constitutionalization of public international law [506] can be observed, in the same time, core constitutional values are not perceived as competing with the identity and values of the EU, on the contrary, they are *two sides of the same coin*, and shall be equally protected by national courts, as well as the CJEU, national constitutional identity and EU identity should reinforce each other and sensitivity, mutual tolerance and mutual respect shall characterize all sides of the judicial dialogue, which also impose a great responsibility on these courts, both on the EU and on national level.

Whereas national constitutional courts approach with reservations the increased competences of EU institutions and the concept of unconditional supremacy of Union law over the national constitutions, national constitutional courts also acknowledge their *double identity* under Union law. On the one hand, *national constitutional courts have the duty under EU law* (since there Member State accepted to be bound by the Founding Treaties) *to ensure the effective enforcement of EU law*. As an example, the German Constitutional Court considers unconstitutional, a violation of the fundamental right of access to justice under the *Grundgesetz*, if a court does not submit a preliminary reference to the CJEU in case of a question of interpretation or question of validity of Union law in the underlying case. On the other hand, national constitutional courts have the duty to *protect national constitutional identity*. Such dual identity can only be resolved, if national constitutional courts actively take part in the *judicial dialogue* with the CJEU and their national counterparts.

European and national constitutional law increasingly go hand in hand, as well as European and national constitutional identity are reinforcing each other contributing towards the strengthening of a European constitutional architecture.

In the literature there are different concepts regarding the future of the EU. Some scholars envision a federal Europe and a fully harmonized *ius communae europaeum*, whereas others expect that further Member States would follow the UK. Protecting national constitutional identity and EU identity in the same time is a joint task of national constitutional courts and the CJEU, where continuous dialogue and *mutual tolerance* (constitutional tolerance – *Weiler*) has to be the cornerstone of the *peaceful coexistence*[507].

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Table 1- The comparative analysis of sovereignty – statehood, democracy, rule of law, fundamental rights protection and the judicial protection of the constitution.

	Sovereignty - statehood	**Democracy**	**Rule of law**	**Fundamental rights protection**	**Judicial protection of the constitution**
Germany	*Europafreundlichkeit*, openness towards the European integration is a part of the statehood	obligation to inform federal and local legislators to counterbalance a shift from legislative towards the executive branch	unchangeable clauses, CJEU case law influence, and influence by the GCC	triple layer of fundamental rights protection, CJEU, ECHR case law influence GCC case law	constitutional identity, untouchable core, *Reserve-Kompetenz*, ultra vires case law influence on CJEU
Austria	Identity as limitation in theory	obligation to inform federal and local legislators and to involve them in the decision making	Double binding nature	CJEU, ECHR case law became incorporated	Constitutional Court acknowledged unconditional precedence of EU law
Great Britain	Sovereignty of the Parliament	Parliament criticizes EU of shifting towards executive governance	ECHR and EU Fundamental Rights Charter provides guarantees	Bill of rights, ECHR and EU Fundamental Rights Charter established	Courts acknowledged supremacy and direct effect of EU law
Poland	Constitution is the supreme law defining sovereignty	Parliamentary EU affairs committee introduced to monitor	ECHR and EU Fundamental Rights	CJEU, ECHR case law; following German	Providing leadership in compliance with Union

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	and constitutional supremacy	government participation in EU decision making	Charter provides guarantees	practice on reservation right and ultra vires case law	law and judicial dialogue
Hungary	Historical Constitution, European identity – national identity should reinforce	Parliament monitors and expresses opinion on the decisions prepared by the government for Council meetings.	ECHR and EU Fundamental Rights Charter provides guarantees	CJEU, ECHR case law; following German practice on reservation right and ultra vires case law	constitutional identity case law (reinforced by 7th amendment to the FL), lists all the possible reservations

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