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

Abstract of Doctoral Thesis

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I. SUBJECT AND RESEARCH OBJECTIVE OF THE THESIS

More than 50 years have passed, since the Court of Justice of the European Union (hereinafter: CJEU) 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, has 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[1].

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, 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 Charter of Fundamental Rights of the European Union became primarily law, and both vertically and horizontally

[1] There are still democratic shortcomings, which gives a reason to be still critical: WEILER, J. H. H.: 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.

directly effective, upon certain conditions, even with the possible effect outside the scope of Article 51[2].

For almost five decades the above-described constitutional dialogue, has 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 stepping step on each other's toes and inflicting 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 the constitutional court of a recently joined Member State has applied the *ultra vires* control over a CJEU decision[3], however that was widely condemned within the literature[4] 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 applying the *Damocles Sword*, and inflicting hardly curable wounds, *not only on the European integration, but on rule of law itself*[5].

The above cautious approach has radically changed in 2015[6], 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[7], instead it declared the matter *acte claire*, and refused to execute the European arrest warrant in question, citing the violation of Article 1 of the

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[2] 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.

[3] 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.

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

[5] 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.

[6] 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.

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

Grundgesetz. This approach has been further escalated, in the summer of 2020, when the German Constitutional Court 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 it was under the legal obligation on the basis of German constitutional law, to ignore the decisions of the ECB and the CJEU in question[8]. 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[9], and showed a less positive example to other constitutional courts, by 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[10] and cooperative constitutionalism[11], as introduced by *Weiler* and *Häberle*, 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. *Häberle* 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* said – 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[12].

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[8] supra note 5.

[9] 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.

[10] WEILER, J.H.H.: Federalism and Constitutionalism: Europe's Sonderweg, Harvard Jean Monnet Paper, 10/2000.

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

[12] 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

II. METHODOLOGY

The above discussed developments contributed to the fact, that 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. As a result, this issue, has even increasingly got into the forefront of academic debates in the recent years. Motivated by the above facts, the current research aims to analyse the divergent interpretation in the case law of national constitutional courts of certain selected Member States and the Court of Justice of the European Union[13], with a special emphasis on the Hungarian perspectives.

The entire research is addressed to describe the interpretation of fundamental constitutional principles of European Union law and national law of selected Member States, defining the relationship between the European Union legal order and the legal order of the Member States. Regarding this analysis I aim to study the relevant EU legal framework, with special emphasis on the case law of the CJEU. The other important focus of this study are constitutional provisions and the case law of national constitutional courts, on the basis of selected Member States, which determine how Member States perceived and comply with the fundamental principles and the requirement of supremacy of Union law. This part of the research is divided into individual country chapters.

In terms of the structure of the individual country chapters, I have decided to build 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 (statehood), democracy (democratic governance), rule of law, fundamental rights protection and constitutional adjudication, the pre-eminent role of national constitutional court in the European constitutional dialogue. I would like to clarify, that this division is not based on methodological considerations, but rather on practical considerations, as these terms seem to be centerpieces of the European judicial dialogue. The principle of rule of law involves the principle of division of powers, judicial control over the public administration, the principle that administration and

[13] 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.

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, it seemed practical, to insert into separate chapters the closer scrutiny of these topics.

As it is required by the nature of this research and as it was pointed out above, I used the methods of comparative law. I compared the approaches of the selected Member States, based on the defined criteria mentioned above. In the course of this study, I also utilized the findings of Hungarian and foreign legal literature, as well as the major principles and conclusions of the extensive case law of the CJEU and the selected Member States' constitutional courts.

My approach throughout this research was multidirectional. As it was required by the nature of this study, I explored international trends in the case law of national constitutional courts, highlighted differences with regard to their approach and application of constitutional reservations with regard to the supremacy of European Union Law. In the same time, my aim was to conduct the comparative research with a fresh perspective and draw conclusions from the analytical examination of selected Member States' solutions, which can possibly contribute to shape the Hungarian legal environment and approach in the European judicial dialogue.

III. BRIEF SUMMARY OF THE THESIS AND THE RESEARCH

Especially the recent developments in the area of (lack of) judicial dialogue have reminded to the concept of constitutional tolerance, brought into the constitutional discourse by *Weiler*[14]*, as one of Europe's most important constitutional innovation*[15]. *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 on 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 concepts of *mutual constitutional tolerance* and *cooperative constitutionalism*[16] are especially relevant, if not an inevitable condition of the *peaceful coexistence*[17] in today's European Union with 27 different constitutional traditions and identities.

This research is divided into eight chapters. The analysis has two major focuses, on the one hand the focus is on the major principles of Union law, as set out by the case law of the CJEU, which determine the relationship from the side of Union law and institutions towards the Member States, and on the other hand, its focus is on the Member States' constitutional actors, particularly the constitutional courts, how the requirement of supremacy of Union law is perceived on the level of the case law of national constitutional courts.

Following an introduction with regard the rationale, methodology and structure of the research, in the second chapter, the research focus is to analyse the fundamental principles of Union law established by the case law of the CJEU and to draw conclusions with regard the approach of Union law towards the legal system of the Member States. In the course of this analysis, there is a particular emphasis on the principle of conferral, in the context of the duty of loyalty by the Member States and the interplay between European and national constitutional identity. European constitutional identity and national constitutional identity are not competing terms,

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[14] WEILER, J.H.H.: Federalism and Constitutionalism: Europe's Sonderweg, Harvard Jean Monnet Paper, 10/2000.

[15] 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.

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

[17] 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

they rather reinforce each other[18] 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[19].

There is also another major topic which is touched upon in the second chapter, and that is related to the monitoring of Member States' compliance with the fundamental principles, particularly with the rule of law, as contained in Article 2 TEU. On the one hand, Member State constitutional courts have been monitoring the compliance of EU law with the standard of fundamental rights protection provided by their national constitutional framework already for almost five decades. They are monitoring whether democratic legitimacy and fundamental rights protection is adequately 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, as a more recent development, since the *Jörg Hajder Austria case*[20], EU institutions are also developing mechanisms, to monitor the compliance of the Member States with the fundamental principles and particularly the principle of rule of law as set out in Article 2 TEU and in the Charter of Fundamental Rights of the European Union.

In connection with the monitoring of Member States' compliance with the EU fundamental principles, there is strong argument, that the *Reverse Solange* doctrine could be extended towards its 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 directly enforce – also outside the ambit of EU law – Article 2 TEU.

Beyond analysing the approach of EU constitutional actors, particularly the CJEU towards the Member States, the other major focus of this research is on the case law of national constitutional courts. Chapters from three to seven, examine the different approaches of selected

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[18] LENAERTS, Koen: EUdentity, as a way of promoting national identity, in: Alkotmánybírósági Szemle, 2020/Különszám

[19] see also: MARTONYI, János: Law and Identity in the European Integration, in: Alkotmánybírósági Szemle, 2020/Különszám; STUMPF, István: The importance of constitutional identity in Europe, in: Alkotmánybírósági Szemle, 2020/Különszám

[20] see: LACHMAYER, Konrad: Questioning the basic values: Austria and Jörg Haider, in: JAKAB, András–KOCHENOV, Dimitry: The Enforcement of EU Law and Values: Ensuring Member States' Compliance, Oxford University Press, 2017.

Member States, particularly the European Integration clauses in the national constitutions, as well as the case law of constitutional courts / high courts in Germany, the United Kingdom, Austria, Poland and Hungary. This Member State interpretation of the core principles of Union law, – which is referred to by *Paul Craig* and *Grainne de Búrca*[21] 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[22], – is the subject of the individual country chapters.

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 and the third enlargement and last but not least, the eastern enlargement. The United Kingdom, even if it has left the European Union is still an interesting and useful subject matter of this comparative research, partly because of its fundamentally different, Anglo-Saxon legal approach and heritage, partly because of the lessons can be learnt from its withdrawal from the EU, and last but not least, because the withdrawal from the European Union is *not irreversible*.

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 reasonable, 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 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. Austria was chosen, because it joined

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

[22] 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.

the EU in the third accession round and as a neighbouring Member State, Hungary connects to it in several ways, and we can learn from its approach towards EU law. Finally, Poland has been chosen from the fourth accession round of the EU, as similarly 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.

Each country chapter focuses on how national constitutional law and particularly constitutional courts, have adopted the fundamental principles of Union law. As pointed out earlier, the structure of each chapter, therefore follows the main central points of the European constitutional dialogue, such as national sovereignty and competence conferral, principle of democracy, rule of law, fundamental rights protection and constitutional adjudication.

In case of Poland and Hungary, the ongoing Article 7 procedure is analysed with a critical approach, taking into consideration alternative ideas and proposals, developed by the different group of scholars.

The last chapter of this research aims to provide a synthesis of the individual approaches by the selected Member States. As EU law requires Member States to obey Union law, national constitutional courts duly focus on the protection of the core of the national constitutions, on 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*[23], where a certain constitutionalization of public international law[24] 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

[23] 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.

[24] DE WET, Erika, The constitutionalization of public international law in Rosenfeld, Michael and Sajó, András. (eds.), Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012), pp. 1209–1230; Wiener, Antje; Lang, Anthony F.; Tully, James; Maduro, Miguel Poiares and Kumm, Mattias: Editorial. Global constitutionalism: human rights, democracy and the rule of law, in: Global Constitutionalism, 2012/1, pp. 1–15. 2012/1, pp. 1–15., Häberle, Peter, Der kooperative Verfassungsstaat, in: Verfassungslehre als Kulturwissenschaft, 2. Auflage 1998.

EU identity should *reinforce* each other and sensitivity, *mutual tolerance* and mutual respect[25] shall characterize all sides of the judicial dialogue, which also imposes 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 their Member State *accepted to be bound by the Founding Treaties and the whole acquis Communautaire in its entirety*) *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*, *access to a lawful judge* 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 the constitution and thereby the 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.

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*[26].

[25] see: VARGA, Zs. András: Respect of national identites as european value – European aspects of constitutional identity of Hungary, in: Alkotmánybírósági Szemle, 2020/Különszám

[26] 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

IV. List of Publications on the Topic of the Dissertation

1. Kovács, György: Hazánk Európai Uniós csatlakozásának alkotmányjogi összefüggései (különös tekintettel a csatlakozást előkészítő munkálatokra), 2003, Budapest, PPKE-JÁK, edited by Prof. Dr. Horváth, Pál

2. Kovács, György: Hazánk Európai Uniós csatlakozásának alkotmányjogi összefüggései, 2004, Budapest, Prof. Dr. Lábady Tamás 60. születésnapjára kiadott ünnepi kötet

3. Kovács, György: Constitutional Impact of the Membership in the EU, in: Selected Papers on European Law (SPEL) Journal of the European Law Students Association (ELSA), Brussels, 2005.

4. Kovács, György: Impact Of European Law On National Laws (Cooperation of national and European jurisdictions), 2005, University of Olmütz, International and Comparative Law Journal, Czech Republic

5. Kovács, György: Zusammenwirken von Europarecht und Verfassungsrecht anhand der Beispiele von Österreich und Ungarn, 2005, Eastlex, Austria

6. Kovács, György: Impact of EU law on national Constitutional Laws, 2006, Harvard European Law Research Center / Harvard European Law Association

7. Kovács, György: Research at Harvard Law School – in: My Fulbright Experience, Hungarian-American Fulbright Scholarship Board, 2008.

8. Kovács, György: Az európai integrációs klauzula értékelése, in: Pázmány Law Working Papers, 2011/4, http://plwp.eu/docs/wp/2012/2011-04.pdf)

9. Kovács, György: Ungarns neue Verfassung – In Kraft 1. Januar 2012, pp. 253–261, in: OER Osteuroparecht, 57 (2011)/3

10. Szabó, Marcel – Kovács, György: Az Európai Unió kialakulása, jogrendszere és intézményei, in: Az Európai Unió jogának alapjai (edited bySzabó, Marcel; Debisso, Kinga; Gyeney, Laura; Pünkösty, András), Pázmány Press, 2018, Budapest, Hungary