RIGA GRADUATE SCHOOL OF LAW

Methods of achieving the balance between the application of EU law primacy principle and protection of fundamental constitutional principles

BACHELOR THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) …….

RIGA, 2024

Abstract

On July 15, 2024, the primacy principle of the EU Law will have been in place for exactly sixty years since its establishment in *Costa* v. *E.N.E.L* in 1964. Notwithstanding such a long time, EU Member States still experience challenges in its application, especially when their constitutional law is being affected. The thesis examines the clash between the application of the primacy principle and the protection of fundamental constitutional principles. The author has established the following research question: "How should the national courts apply the EU Law primacy principle to simultaneously safeguard the constitutional fundamental principles while still adhering to the primacy principle?"

The analysis of jurisprudence of both the European Court of Justice and Constitutional Courts of EU Member States shows the need for careful balance between the interests of national states and the European Union as a whole.

Keywords: Constitutional fundamental principles, values, rights, constitutional identity, national identity, "*Solange*," "*Controlimiti*," European Union, integration.

SUMMARY

The first chapter "The Origins of European Project: integration, the Primacy Principle, and the Direct Effect," explores the time when the European project was invented. It explores the rationale behind the invention of the European Coal and Steel Community, which was the need for integration to avoid another war at the time. It explores the three directions of integration as such – political, economic, and legal. While doing this, it provides a very brief excursus of this supranational organization up until the time of the invention of the Monetary Union. Then, it explores in deep two fundamental tenets of the European Union Law – the principle of primacy and the direct effect, and how they were evolving over time in the jurisprudence of the European Court of Justice. In particular, the attention is directed onto how these principles were advancing in their scope of application since their establishment in the *Costa* v. *E.N.E.L.* and *van Gend en Loos* cases respectively.

The second chapter "Early Developments: Fundamental Constitutional Principles as Restriction of EC Law Primacy Principle," explores just the beginning of the "restricting the primacy principle" mainstream among Member States. The attention is directed onto the exploration of the notion of fundamental constitutional principles. Then, the concerned chapter discusses the first two constitutional doctrines created by EC Member States that restrict the primacy principle. In this regard, the "*Solang*e" doctrine of the German Federal Constitutional Court and "*Controlimiti*" doctrine of the Italian Constitutional Court are discussed and how they evolved. Both doctrines are similar as both prescribe the behaviour of Member States to comply with Community Law only as long as the latter provides the same level of protection of constitutional rights/principles as constitutions of respective states, establishing so-called fundamental rights/principles review. Then, attention is directed to two important decisions – *Maastricht* by the German Constitutional Court, and *FRAGD* by the Italian Constitutional Court, as exactly in these two judgements, both Courts granted themselves authority to review Community Law on *ultra vires* acts, including the judgements of ECJ.

The third chapter explores the notion of constitutional identity as the protection of constitutional fundamental principles evolved into the protection of constitutional identity after the Treaty of Lisbon came into effect. Firstly, the chapter provides a discussion on the concept itself, how it can be perceived and what are its sources. Then, constitutional identity is discussed within the context of Article 4(2) of the Treaty on the European Union. In particular, attention is directed towards discussion on whether the concerned Article encompasses this concept, as nevertheless, it speaks of national identity, rather than of constitutional identity. However, the legal analysis showed, that Article 4(2), nevertheless, should include the discussed concept. Finally, the chapter discusses the application of constitutional identity by both the Court of Justice, to show how it perceives the identity concept, and by Constitutional Courts, which shows how they use it to safeguard their constitutional identity, i.e. creation of so-called identity review. In particular, to show the application of this concept by Constitutional Courts, German jurisprudence is taken as an example.

The final fourth chapter explores the methods of how national courts should apply the EU Law primacy principle to simultaneously safeguard the constitutional fundamental principles while still adhering to the primacy principle. Firstly, the chapter examines the position of the European Court of Justice, which is a full absoluteness of the primacy principle, and concludes that it would not work as all EU Member States would never accept this principle to the fullest extent due to their sovereignty concerns and *Kompetenz-Kompetenz* issue as well as the fact that in such circumstances there would have just been no choice, as ultimately the

EU Law would have applied in all scenarios. Then, it is being argued that the decision of particular Member States' courts to declare ECJ's judgements as *ultra vires* even in cases where it ultimately acts so, would be a violation of EU Law, as rulings of the Court of Justice are legally binding upon Member States. Additionally, the issue of constitutional identity's abuse to circumvent EU Law is also discussed in the present chapter. Finally, the chapter discusses the possible solution based on constitutional pluralism and operationalization of the preliminary ruling mechanism.

Overall, the thesis is comprised of four primary chapters, along with eleven sub-chapters, and twelve tertiary sub-chapters. The comprehensive aim of the thesis is to explore how the EU Law primacy principle and constitutional fundamental principles of Member States conflict and co-exist with each other in the two-dimensional legal space of the European Union.

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LIST OF ABBREVIATIONS

AG	Advocate General
Benelux	Belgium, the Netherlands, Luxemburg
BverfG	German Federal Constitutional Court (*Bundesverfassungsgericht*)
EAW	European Arrest Warrant
EC	European Communities
ECB	European Central Bank
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EU	European Union
GG	The Constitution of the Federal Republic of Germany (*Grundegesetz*)
ICJ	International Court of Justice
OMT	Outright Monetary Transactions
PCT	Polish Constitutional Tribunal
PSPP	Public Sector Purchase Program
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
U.S.	United States
UK	United Kingdom
UN	United Nations
VAT	Value-added tax
VCLT	Vienna Convention on the Law of Treaties
WWI / WWII	First/Second World War

INTRODUCTION

"United in diversity"[1] – the motto of the European Union since 2000.

The EU's motto perfectly describes the essence of the European Union; however, it also forms part of the never-ending problem in the EU which derives from "diversity," and where "unity" might be a solution. The present thesis revolves around a long-standing issue on which neither legal scholars nor legal professionals in the field succeeded in finding a common solution which would satisfy all parties to the fullest. The issue of primacy of EU Law over so-called Member States' constitutional fundamental principles.

In 1970, the Court of Justice in *Internationale Handelsgesellschaft* famously proclaimed the prevalence of EU Law over national constitutions of EU Member States.[2] Since then, almost no member states accepted it to the full extent. They reserved a right to themselves to safeguard the core of their constitutions and, thus their states in case of unauthorized EU encroachment. However, throughout time, these untouchable cores of constitutions or as they are also being called by legal scholars – "constitutional fundamental principles" have been enlarging in scope, which in its nature, more and more restricts one of the fundamental tenets of the EU – the primacy of EU Law. So, in cases, where the EU with its actions violates those constitutional cores of its Member States as per their interpretation, the Member States through different means reserve a right to themselves to declare such actions as *ultra vires*, and thus not to accept or implement EU Law. However, such actions of EU Member States, under the principle of primacy, become a violation of EU Law. Here, comes the clash between two levels of law – the national constitutional law and the EU Law.

Furthermore, as all Member States are diverse, including their constitutional frameworks, this becomes a widespread issue, especially for the ECJ, which is being demanded by the Member States to take into account their constitutional fundamental principles when passing its judgements. Considering such a wide spectrum of constitutional diversities in the EU legal space, it is hard both for ECJ and its member states to find a common solution which would satisfy both the EU Law requirements and those constitutional cores of EU Member States. While the problem originated over fifty years ago, the issue is still relevant and will become even more important soon. Clashes between the EU and its Member States over the dilemma of what is legally higher – constitutional cores of states or EU Law happen regularly with more intensity, numbers, and wider jurisdictional space. The infamous *Weiss/PSPP* decision of 2020 by the *Bundesverfassungsgericht*[3] or still ongoing "Hungarian issue" are perfect examples. Moreover, this year on May 1st, the EU is celebrating twenty years since its largest enlargement so far, when ten states became members of the EU, and it is expected that soon Montenegro, Serbia, Albania, Bosnia and Herzegovina, Moldova, North Macedonia, as well as Ukraine and Georgia would join EU family if all criteria would be met, making EU even more diverse space.[4] Those countries then would have to take a position on their attitude

[1] European Union. EU Motto, available on: https://european-union.europa.eu/principles-countries-history/symbols/eu-motto_en. Accessed May 1, 2024.

[2] *See* Court of Justice: Judgment of the Court of 17 December 1970. *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. C-11/70, ECLI:EU:C:1970:114.

[3] *See Bundesverfassungsgericht* [*BverfG*] [Federal Constitutional Court], *PSPP,* Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15.

[4] In December 2010, Montenegro received EU candidate status after submitting an application for admission in December 2008. June 2012 marked the beginning of the EU-Montenegro accession negotiations. Out of the 35

towards this dilemma, and if they would not accept the primacy of EU Law to the fullest extent as was done, for instance, by the Netherlands, the ECJ would face unprecedented pressure. Nevertheless, the present thesis would attempt to find the most suitable solution to the described dilemma, which would best satisfy both sides.

Ultimately, the research question of the present thesis is as follows: "How should the national courts apply the EU Law primacy principle to simultaneously safeguard the constitutional fundamental principles while still adhering to the primacy principle?" While this thesis aims to find a common solution in this dilemma for both the EU Member States and the ECJ, the objective of the thesis is to critically analyze from the legal perspective stances of EU Member States and ECJ, so that it would be possible to provide methods on how to achieve so-needed balance between the application of EU Law primacy principle and safeguarding constitutional fundamental principles of EU States. To achieve the aim and objective of the thesis, so that the research question would be answered, the author of the present thesis applies legal doctrinal research. The thesis is primarily based on the jurisprudence of Constitutional/Supreme Courts of EU Member States to show their position in this dilemma, as well as the jurisprudence of the ECJ to show their perspective. For the critical analysis of both positions, contributions by legal scholars in the form of articles and books were used to provide unbiased analysis. However, this research is limited in its size, therefore many related topics such as common European identity have been skipped, which would have complemented the research positively.

The present thesis consists of four chapters. The first chapter provides quick excursus on what led to the establishment of the EU law primacy, then it provides the reader with the discussion of the two most fundamental tenets of the EU Law, which have a direct connection

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negotiation chapters, 33 have been opened thus far. *See* European Council. EU Enlargement Policy: Montenegro, available on: https://www.consilium.europa.eu/en/policies/enlargement/montenegro/. Accessed May 1, 2024.
Serbia submitted an application to join the EU in December 2009, and in March 2012, it was approved as a candidate. 2014 saw the start of the EU-Serbia admission negotiations. Out of the 35 negotiation chapters, 22 have been opened thus far. *See* European Council. EU Enlargement Policy: Serbia, available on: https://www.consilium.europa.eu/en/policies/enlargement/serbia/. Accessed May, 2024.
Albania submitted an application to join the EU in April 2009, and in June 2014, it was approved as a candidate. In July 2022, the EU convened its inaugural intergovernmental meeting with Albania. *See* European Council. EU Enlargement Policy: Albania, available on: https://www.consilium.europa.eu/en/policies/enlargement/albania/. Accessed May 1, 2024.
In February 2016, Bosnia and Herzegovina submitted their application for EU membership, and in December 2022, they were awarded candidate status. After achieving the required level of conformity with the membership requirements, accession talks can begin for Bosnia and Herzegovina. *See* European Council. EU Enlargement Policy: Bosnia and Herzegovina, available on: https://www.consilium.europa.eu/en/policies/enlargement/bosnia-herzegovina/. Accessed May 1, 2024.
In June 2022, Moldova was given EU candidate status after submitting an application for membership in March 2022. EU leaders resolved to begin accession negotiations in December 2023. *See* European Council. EU Enlargement Policy: Moldova, available on: https://www.consilium.europa.eu/en/policies/enlargement/moldova/. Accessed May 1, 2024.
In March 2004, North Macedonia submitted an application for membership in the EU, and in December 2005, it was given candidate status. In July 2022, the EU convened its initial intergovernmental meeting with North Macedonia. *See* European Council. EU Enlargement Policy: North Macedonia, available on: https://www.consilium.europa.eu/en/policies/enlargement/republic-north-macedonia/. Accessed May 1, 2024.
Ukraine received EU candidate status in June 2022 after submitting an application for membership in February 2022. EU leaders resolved to begin accession negotiations in December 2023. *See* European Council. EU Enlargement Policy: Ukraine, available on: https://www.consilium.europa.eu/en/policies/enlargement/ukraine/.
Georgia submitted an application for EU membership in March 2022, and in December 2023 it was given candidate status—as long as it followed the recommendations of the Commission. *See* European Council. EU Enlargement Policy: Georgia, available on: https://www.consilium.europa.eu/en/policies/enlargement/georgia/. Accessed May 1, 2024.

to the issue discussed, and which are the principle of EU Law primacy and the principle of direct effect, and their evolution through ECJ jurisprudence.

The second chapter discusses the notion of fundamental constitutional principles and provides the reader with early developments regarding national constitutional restrictions of the EC/EU Law primacy principle. These developments are shown in examples of jurisprudence of two EU Member States – Germany with its famous "*Solange*" doctrine and Italy with its not less famous "*Contrlimiti*" doctrine, which brought constitutional fundamental rights and principles review. Furthermore, this chapter also provides later developments in the time of the Maastricht Treaty, when *ultra vires* review was established by the Court in Karlsruhe.

The third chapter provides a discussion on the notion of constitutional identity, its sources, and its vague legal basis in EC/EU Treaties. The stance of the Court of Justice is also analyzed on the subject of whether Article 4(2) TEU encompasses the constitutional identity of Member States. Moreover, in this chapter, the author analyzes the stance of the EU Member States and how they use it to restrict the primacy principle in their attempt to protect their constitutional fundamental principles, so-called "identity review."

The last chapter is a critical analysis of both positions – of the Court of Justice and the EU Member States. Firstly, the author discusses the stance of ECJ in this dilemma, in other words, why the position of ECJ on full absoluteness of EU law primacy is unfeasible in present circumstances, from the point of view of sovereignty concerns of states. Secondly, the author critically analyzes the stance of EU Member States in this dilemma, why rendering ECJ judgements as *ultra vires* due to alleged breach of states' fundamental constitutional principles/identity – EU Law violation. Separate attention is given to the constitutional identity's bad faith instrumentalization to circumvent the primacy principle. Finally, the author provides a common solution on how national courts should apply the primacy principle to simultaneously safeguard the constitutional fundamental principles while still adhering to the primacy principle, - a solution deriving from constitutional pluralism theory and operationalization of preliminary reference mechanism.

1. THE ORIGINS OF THE EUROPEAN PROJECT: INTEGRATION, THE PRIMACY PRINCIPLE AND DIRECT EFFECT

Before heading to the analysis of the issue making this thesis, the author considers it worth it to provide a brief excursus on the origins of the European Project, which has a direct connection to two principles which are - the principles of the primacy of EU Law and the direct effect. These two principles are of crucial importance since they are part of the issue hereby discussed.

1.1. The Need for European Integration

The European Project arose out of the idea of unification of European states which through centuries were divided by wars and discrepancies in their political opinions based on the supremacy of their nationalist identity, and the First and the Second World Wars brought upon the European land the widespread clash between European nation states due to, among other things, aggressive effect of nationalism.[5] WWII generated a common feeling among the European states that common international agenda should be developed to reduce the chance of having another widespread conflict, so the Resistance movement advocated for a project of united Europe which could replace the destruction effects of aggressive nationalism, however this idea of integration has slowed down after WWII, especially after the electoral defeat of Winston Churchill in the UK, who was a prominent supporter of federalist vision of Europe, so-called United States of Europe.[6]

After the defeat of Churchill, the UK no longer wished to participate in European integration plans, which made the French Foreign Minister, Robert Schuman propose that France and West Germany should have common administration of coal and steel resources and their production as at that time it was believed that this project apart from being an excellent economic incentive, would also control Germany from re-armament as coal and steel were still primary sources for weaponry production.[7] Later the plan was drafted by Jean Monnet which led to the signing of the ECSC Treaty in 1951 by France, Germany, Italy, and Benelux countries.[8] The Treaty's signees saw European Coal and Steel Community as a supranational body, in which the High Authority could enact decisions which could then be used as step forward to a more widespread European integration, however, later, the ECSC States decided that it was the time for further European integration, so the conference of Foreign Ministers was held in Italy in 1955, whereby they proposed the most important initiative of newly established community was creation of common market.[9] This was another step to further European integration through economic means. From the political site, *inter alia*, the Commission was awarded the role of supervisory body which would watch states on their compliance with Treaties, nevertheless, the issue arose on how to maintain the integrity of EEC

[5] Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 2020), p. 2.
[6] *Ibid.*
[7] *Ibid*., pp. 2-3.
[8] European Council. The Schuman Declaration, available on: https://www.consilium.europa.eu/en/70-schuman-declaration/. Accessed April 26, 2024.
[9] Paul Craig and Grainne de Burca, *supra* note 5, pp. 4-6. This idea connotes the alienation of barriers to trade such as quotas which limit the imports volume of certain goods, or tariffs which increase the cost of imports, so after the Treaty of Rome, those limitations had to be abolished and the common customs tariffs had to be created, so that it would entail the free movement of goods. *See* Jun Inoue, "Has the EU become uncontrollably divergent?: Analysis of EU governance, from the Treaty of Rome to the Treaty of Lisbon," *Hitotsubashi Journal of Law and Politics* 39 (2011): p. 87, accessed April 26, 2024, http://hermes-ir.lib.hit-u.ac.jp/hermes/ir/re/19006.

Member States.[10] States were not so sure how to properly handle the two levels of law, the national and European in cases where they conflict, hence in 1964 the first decision on primacy principle of EC Law was handed down by the ECJ, laying down the basis for legal integration.

1.2. Establishment of Primacy Principle: *Costa* v. *E.N.E.L.* Case

Interestingly, the principle of primacy is not provided explicitly in any EU Treaty. One may recall only declaration No. 17 to the Treaty on the Functioning of the EU, which provides this principle in writing, however, such declarations are not legally binding upon Member States.[11] Contrarily, the primacy principle was established and evolved through ECJ case law.

On July 15, 1964, the Court of Justice issued the first declaration of the principle of primacy in answer to a query from an Italian Court that had been asked to resolve a conflict involving a private citizen named M. Costa and the corporation that controlled the monopoly on the production of energy, E.N.E.L. The court inquired as to whether specific EEC Treaty clauses, which were put into effect by a law on December 6, 1962, forbade the nationalization of electricity, however Italy contended that the Commission should, if needed, suggest Italy alter its laws in the event of a disagreement between Italian law and the Treaty, therefore the Court could not respond to the request for a preliminary ruling.[12] The Court concluded that nationalization like that carried out in Italy was not prohibited by the EEC Treaty in this specific situation, as well as it denied the Italian government's claim that doing so would have prevented the Court from responding to the Milan court's query.[13] The *Costa* v. *E.N.E.L.* ruling says that there is no primacy of domestic law, and that domestic law cannot take precedence over EC Law, not that Community Law is superior to domestic law, thus the ruling makes a solid case for primacy by specifically citing the EEC Treaty.[14] Advocate General Maurice Lagrange also emphasized in his opinion, delivered on June 25, 1964, that primacy was not based on a hierarchy between national and community law but rather the latter partially replaces the national legal system.[15]

In this case, the Court has adopted a teleological approach to interpretation, which emphasizes the aims of the European Communities and the Treaties' spirit, providing several arguments in defence of the primacy of EC Law.[16] First is a contractarian argument which states that as Member States have joined the Communities, they automatically agreed with them that

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[10] Paul Craig and Grainne de Burca, *supra* note 1, p. 5. When in 1951, the Treaty of Paris established the Court of Justice, it was evident to the authors of the treaty that contracting states could not be released from their obligations under the EC treaties and secondary legislation, so the concern of what might happen when national law of Member States would come into conflict with the law of community raised attention in legal community, especially after the Treaty of Rome entered into force. *See* Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies of the Union. *The primacy of European Union Law*, p. 11. Available on: https://www.europarl.europa.eu/RegData/etudes. Accessed January 22, 2024.

[11] *See generally* European Union. *Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. Declaration concerning primacy.* 12008E/AFI/DCL/17. Available on: https://eur-lex.europa.eu/legal-content/. Accessed on April 27, 2024.

[12] Court of Justice: Judgement in *Flamino Costa* v. *E.N.E.L.*, C-6/64, ECLI:EU:C:1964:66, p. 589.

[13] *Ibid*., pp. 587-600. *See also* Amedeo Arena, "How European Law Became Supreme: the Making of *Costa* v. *ENEL,*" *Jean Monnet Working Paper* 05/18, pp. 1-24, accessed January 22, 2024, https://jeanmonnetprogram.org/wp-content/uploads/JMWP-05-Amedeo-Arena.pdf.

[14] *Ibid*., p. 594. For the analysis of *Costa* v. *E.N.E.L.*, *see* Eric Stein, "Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case," *Michigan Law Review* 63, no. 3 (1965): pp. 491–518.

[15] Opinion of Mr. Advocate General Lagrange delivered on 25 June 1964 in *Flamino Costa* v. *E.N.E.L.* Case 6-64, ECLI:EU:C:1964:51. Available on: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61964CC0006. Accessed January 24, 2024.

[16] Paul Craig and Grainne de Burca, *supra* note 5, p. 305.

they put EC order above national one, - this follows from the Court's statement that the Treaty has created its own legal order, which became an integral part of Member States' legal systems.[17] It also follows from the statement that Member States had transferred some of their powers to the EC institutions, stemming from limitation of sovereignty, hence limited their sovereign rights.[18] The second argument can be classified as functional, as it has originated from the idea of EC Treaties' functionality, - so, it follows from the Court that the aims of the EC Treaty could not have been achieved by the Member States and the Communities as a whole, if primacy was not accorded to the law of EC, therefore cooperation and integration purpose of the Treaties would be endangered if Member States were refusing to give full effect to EC Law which should be binding on all equally and uniformly.[19] The third line of arguments used by the Court is egalitarian, stemming from the idea that if the domestic law of Member States could unilaterally take precedence over EC Law, this would lead to an applicatory discrimination of EC Law between the Member States, entailing states to benefiting from EC Law while not taking its burdens.[20]

1.2.1. The Notion of the Primacy Principle

The principle of primacy is long-standing and derives from the international treaty practice of *pacta sunt servanda*.[21] This principle ensures uniform application of EU Law and strengthens further the European integration as under this principle the national law should comply with common EU law standards, thus now integrating the legal systems of Member States as well, what was called by some a "European legal integration."[22] However, the primacy should not be necessarily considered to be a supremacy on hierarchical scale in the sense that all national laws' validity would depend on their compliance with EU Law as the primacy principle does not impose a negative obligation on legislators not to enact laws incompatible with EU Law and the positive obligation to amend the laws that are already incompatible, it does not in automatic mode render such laws as invalid, rather this principle puts an obligation just to merely set-aside such laws and make them inapplicable in cases where these laws conflict with certain EU norms that is why, for instance, in German parlance, the principle of EU Law primacy only concerns *Anwendungsvorrang*[23] and never *Geltungsvorrang*.[24] Bearing this in mind, the EU version of the primacy principle is different from similar principles that are found in federal states such as *Bundesrecht bricht Landesrecht* in Germany under Article 31 of

[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] Policy Department, supra note 10, p. 9. This Latin phrase is actually the name of the Article 26 of the Vienna Convention on the Law of Treaties, hereinafter VCLT, a convention that in 1969 established the rules and customary law on how states, inter alia, shall behave in their international agreements obligations. Article 26 provides that treaties that were signed by the parties are binding upon them and shall be executed in good faith. Whereas the Article 27 of the VCLT continues on elaborating on this rule and provides that states cannot invoke their internal law as the justification of their failure to execute the obligation under the treaty they have signed. *See* United Nations, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969. Available on: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Accessed January 22, 2024. *See* Articles 26 and 27.
[22] *See e.g*. Andreas Schöpgens, "The 'European Multilevel Constitutional Review Composite' Between 'Primacy/Precedence' and 'Supremacy': European Legal Integration After the Judgments by the German Bundesverfassungsgericht in 'ECB-PSPP' and the Polish Trybunal Constytutyjny in 'K 3/21,'" *European Review of Private Law* 31 (2023): pp. 723-777.
[23] *Anwendungsvorrang* - Priority of application (English translation).
[24] Damian Chalmers and Anthiby Arnull, *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015): pp. 182-183. *Geltungsvorrang* – Priority of validity (English translation).

Grundegesetz and the *Supremacy Clause* in the United States laid down in Article 6, Clause 2 of the U.S. Constitution.[25] The primacy principle has effects only on applicability of national norm in conflict, not its validity, where the EU has no say whatsoever as in true systems of federalism, the federal institutions and especially federal courts have a right to invalidate norms which conflict with the federal level of legislation.[26] In contrast, the EU and the ECJ are not in such jurisdictional power as they can only declare national provision in violation of EU Law and, consequently, put an obligation on local authorities to set it aside, therefore the EU is dependent on cooperation between Member States and EU institutions, including the ECJ.[27]

1.2.2. Evolution of the Primacy Principle

Many more rulings followed, adding to the *Costa* v *E.N.E.L.* ruling to create settled case law on EC/EU Law primacy. The decision in the *Internationale Händelgesellschaft* case, rendered on December 17, 1970, is one of the most crucial ones as it was among the first decisions to explicitly address a crucial issue regarding primacy, specifically, the primacy of EC/EU Law over constitutions.

The case concerned Common Agricultural Policy under which only exporters that received licences, - were allowed to export. The applicant argued that the licencing system went beyond what was required to accomplish the stated public goal, so constituting a disproportionate breach of their right to conduct business under the *Grundegesetz*.[28] The ECJ ruled that national constitutional provisions were also subject to the primacy principle.[29] The approach taken in this case was that the autonomic character of EC Law necessitated the inspiration from constitutional traditions which are common to Member States and to be utilized

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[25] *Ibid.*, *See also* Germany: Basic Law for the Federal Republic of Germany (*Grundegesetz*), 23 May 1949. Available on: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html. Accessed April 18, 2024. *See* Article 31. *See also* United States of America : Constitution, 17 September 1787. Available on: https://constitutioncenter.org/media/files. Accessed April 18, 2024. *See* Article 6(2)

[26] *Ibid.*

[27] *Ibid.* Another unique aspect of the primacy of EU Law also lies in the fact that the founding treaties of the EU provide specific procedures for EU institutions that guarantee the application of the EU Law in a much more effective way than any other international treaty, for instance, since the Treaty of Paris, the state's accession into the EC/EU means that they automatically accept the jurisdiction of the ECJ. *See* Treaty Establishing the European Coal and Steel Community, 18 April 1951, 261 U.N.T.S. 140, Article 89. Available on: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF. Accessed January 22, 2024. In contrast, the statute of ICJ, does not entail the obligation for states to accept the jurisdiction of the International Court of Justice. *See* United Nations, Statute of the International Court of Justice, 18 April 1946. Available on: https://www.icj-cij.org/statute. Accessed January 22, 2024. *See* Article 36. One more unique characteristic of the EU Law primacy is the fact that the Commission can bring proceedings before ECJ against Member States on the failure to exercise their obligations, which can lead to a judgment against the Member State. Additionally, under the treaty of Rome, the national courts of Member States are entitled to ask ECJ how correctly interpret the EU Law in the case brought by an individual, business, association, or any other entity, what is called a preliminary ruling mechanism, and which is provided under the Article 267 TFEU. *See* Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012, Articles 258 and 267. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT. Accessed January 22, 2024. In contrast, most international courts are limited to hearing the cases only brought by Member States, meaning that neither individuals nor any other entities except states can bring the case before international courts, except the European Court of Human Rights in case of European dimension.

[28] *See Internationale Handelsgesellschaft* case, *supra* note 2.

[29] *Ibid. See also* Bill Davies, "Internationale Handelsgesellschaft and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence," *Communities* 18 (2017): pp. 343-351, accessed January 26, 2024, https://d1wqtxts1xzle7.cloudfront.net/63963557/. Nevertheless, it chose to investigate whether the contested regulatory provisions violated any other EC legal principles, aside from the principle of proportionality, which it believed the disputed regulatory provisions did not raise. *See also* Bill Davies, "Integrity or Openness? Reassessing the History of the ECJ's Human Rights Jurisprudence," *The American Journal of Comparative Law* 64, no. 4 (2016): pp. 801-814, accessed January 26, 2024, https://academic.oup.com/ajcl/article/64/4/801.

within the framework of structure and objectives of the EC.[30] This dual framework found the basis in realistic view of discrepancies between the Member States and the EC, especially, in particular to organization and separation of powers, democratic participation, the institutional role, and historical economic importance in legislative field, however, as some authors noticed, the focus is placed rather on them as instruments of integration than as subjectively.[31] Moreover, this case makes a precedent for an absolute primacy of EC/EU Law, as it follows from the statement of the Court that the validity of the EC Law can only be evaluated within the EC Law itself and thus cannot be affected by claims that some particular EC Law provision runs contrary to either fundamental rights as formulated by the constitution or the constitutional principles which are to be found within constitutional structures, what was reiterated by Court of Justice in many subsequent cases.[32] In the opinion of some author, the primacy which disregards the essence and the role of principles having constitutional character as an expression of fundamental values which prevail in Member Sates' societies is a "rather blunt and ruthless instrument"[33] because if some norms are given a constitutional form, character, and meaning is an expression of the importance of these norms for a certain state and society.[34]

Later, the Court of Justice, in *Simmenthal* once again restated its position.[35] The court underlined again that the EC Law prevails over any national law of the Member State, including the Italian Constitution. However, this time it also included the following: "...any legislative, administrative or judicial practice which might impair the effectiveness of Community law."[36] Thus, this language encompasses not only the constitution but also all lower regulatory rules and laws, as well as covers how courts and other authorities apply and interpret national law. Moreover, exactly in this case, the Court established the duty to disapply the conflicting national provision.[37] It also stated that all national courts shall have a right to disapply the national law, including constitutional law in case of conflict with EC Law, so no decision of Constitutional or Supreme court is needed in this regard, the principle which was re-iterated by Court many times later.[38] Again, as some author points out, it seems that the rationale behind this decision

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[30] Chalmers and Arnull, *supra* note 24, p. 185.
[31] *Ibid.*
[32] *Ibid. See e.g.* Court of Justice: Judgment of the Court of 6 May 1980. *Commission of the European Communities* v. *Kingdom of Belgium*. C-102/79, ECLI:EU:C:1980:120; Court of Justice: Judgment of the Court (First Chamber) of 10 June 2004. *Commission of the European Communities* v. *Italian Republic*. C-87/02, ECLI:EU:C:2004:363; Court of Justice: Judgment of the Court (First Chamber) of 10 January 2008. *Commission of the European Communities* v. *Portuguese Republic*. C-70/06, ECLI:EU:C:2008:3; Court of Justice: Judgment of the Court (Grand Chamber), 8 April 2014. *European Commission* v. *Hungary*. C-288/12, ECLI:EU:C:2014:237.
[33] Chalmers and Arnull, *supra* note 24, p. 185.
[34] *Ibid.*
[35] *See* Court of Justice: Judgment of the Court of 9 March 1978. *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA*, C-106/77, ECLI:EU:C:1978:49.
[36] *Ibid*. For the analysis of the case, *see* Working Paper of Academy of European Law 2021/06. "The Court of Justice in the Archives Project: Analysis of the Simmenthal case (106/77),", pp. 3-18. Accessed January 27, 2024, https://cadmus.eui.eu/bitstream/handle/1814/71542/WP_%20AEL_2021_06.pdf?sequence=1.
[37] *Ibid.*
[38] *Ibid. But see e.g.* Court of Justice: Judgment of the Court (Grand Chamber) of 8 September 2010. *Winner Wetten GmbH* v. *Bürgermeisterin der Stadt Bergheim*, C-409/06, ECLI:EU:C:2010:503; Court of Justice: Judgment of the Court (Third Chamber) of 19 November 2009. *Krzysztof Filipiak* v. *Dyrektor Izby Skarbowej w Poznaniu*, C-314/08, ECLI:EU:C:2009:719; Court of Justice: Judgment of the Court (Grand Chamber) of 22 June 2010. Joint cases - *Aziz Melki* (C-188/10) and *Sélim Abdeli* (C-189/10), ECLI:EU:C:2010:363; Court of Justice: Judgment of the Court (Second Chamber) of 20 December 2017. *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* v. *Bezirkshauptmannschaft Gmünd*, C-664/15, ECLI:EU:C:2017:987; Court of Justice: Judgment of the Court (Grand Chamber) of 4 December 2018. *The Minister for Justice and Equality and The Commissioner of An Garda Síochána* v. *Workplace Relations Commission*, C-378/17, ECLI:EU:C:2018:979; Court of Justice: Judgment of the Court (Grand Chamber) of 29 July 2019. *Alekszij Torubarov* v. *Bevándorlási és Menekültügyi Hivatal*, C-556/17, ECLI:EU:C:2019:626.

was the full and immediate effect of EC Law within the national legal order of Member States – *effet utile*, as now the immediate effectiveness of EC Law in Member States is ensured by the fact that ordinary courts are no longer obliged to have a decision of Constitutional or Supreme Courts on the compatibility of domestic law with EC Law.[39] Moreover, the primacy requires that domestic courts shall have the freedom to make preliminary rulings that it considers to be necessary, at whatever proceedings stage it thinks appropriate, including in states where references to the Constitutional or Supreme Court are prioritized under the domestic law.[40] Primacy applies to both domestic law that precedes EU Law and to later domestic law, as is made especially clear by the *Costa* v. *E.N.E.L.* ruling.[41] This was later clarified by the *Pigs Marketing Board* case.[42] Later, it was clarified that EU Law prevails in the form of regulations,[43] directives,[44] decisions,[45] international agreements EU concludes,[46] as well ECJ judgements.[47]

1.3. Establishment of Direct Effect: *van Gend en Loos* Case

One of the most significant features of primacy is that it follows from the other fundamental tenet of the EC/EU Law, which is the principle of direct effect. The direct effect principle stipulates that EU Law not only puts obligations on Member States of the EU but also grants rights to individuals.[48] This principle has been in place since the ruling in the case of *van Gend en Loos* on February 5, 1963, which the Court mentioned in opinion 1/91 on the EEA, stating that the direct effect of the number of provisions is one of the essential characteristics of the Community's legal order.[49] Before a Dutch Administrative court, the applicant contested the rise in customs taxes on specific products transported from Germany to the Netherlands. Whether Article 12 of the EEC Treaty has direct application within the territory of a Member State—that is, whether citizens of such a state can assert individual rights that the courts are obligated to defend—was the question posed to the Court. If such were the case, the Dutch

[39] Chalmers and Arnull, *supra* note 24, p. 184. *See also* Paul Craig and Grainne de Burca, *supra* note 5, pp. 311-312.
[40] *Ibid.*
[41] *See generally Costa* v. *E.N.E.L.* case, *supra* note 12.
[42] *See* Court of Justice: Judgment of the Court of 29 November 1978. *Pigs Marketing Board* v *Raymond Redmond*, Case 83/78, ECLI:EU:C:1978:214.
[43] *See* Court of Justice: Judgment of the Court of 14 December 1971. *Politi s.a.s*. v. *Ministry for Finance of the Italian Republic*, Case 43-71, ECLI:EU:C:1971:122. *See also* Court of Justice: Judgment of the Court of 7 March 1972. *SpA Marimex* v. *Ministero delle Finanze*, Case 84 71, ECLI:EU:C:1972:14.
[44] *See* Court of Justice: Judgment of the Court of 7 July 1981. *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen* v. *Hauptzollamt Kiel*, Case 158/80, ECLI:EU:C:1981:163.
[45] *See* Court of Justice: Judgment of the Court of 21 May 1987. *Albako Margarinefabrik Maria von der Linde GmbH & Co. KG* v. *Bundesanstalt für landwirtschaftliche Marktordnung*, Case 249/85, ECLI:EU:C:1987:245.
[46] *See* Court of Justice: Judgment of the Court of 19 November 1975. *Douaneagent der NV Nederlandse Spoorwegen* v. *Inspecteur der invoerrechten en accijnzen*, Case 38-75, ECLI:EU:C:1975:154.
[47] TFEU, *supra* note 27, Article 280.
[48] EUR-Lex: Access to European Union law. The direct effect of European Union law, available on: https://eur-lex.europa.eu/EN/legal-content/summary/the-direct-effect-of-european-union-law.html. Accessed February 1, 2024. Direct effect has two components: a vertical component and a horizontal component. In the interactions between individuals and the state, vertical direct effect applies, i.e. this implies that people can use a clause of EU law against the state. Horizontal direct effect has an impact on interpersonal relationships, i.e. this implies that one person may use a clause of EU legislation against another individual.
[49] *See* Opinion of the Court of 14 December 1991. Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area. Opinion 1/91, para. 21. Available on: https://eur-lex.europa.eu/resource.html?uri=cellar:efe0bbc1-9bd7-4058-9b08-bfcbdf60d43f.0002.06/DOC_1&format=PDF. Accessed February 2, 2024.

court would have to apply the Treaty in accordance with the Dutch Constitution. Since Article 12 forbade increases in customs duties between Member States, it would have to decline to apply the new Dutch law and preserve the existing rate of tax. In response, the Court of Justice outlined the requirements for direct applicability and stated that "Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect."[50]

However, the fact that EC Law can produce direct effects was not the major doctrinal novelty of this case, as self-executive provisions of international conventions were known phenomenon before 1963, for instance, many states with monist legal orders such as the United States since 1829 recognized the possibility of national courts to directly apply provisions of international conventions.[51] Nevertheless, the reason why the Dutch court asked for a preliminary ruling is that the Dutch Constitution specified that treaty provisions might, though depending on its terms, be self-executing within the legal order of Holland, so the domestic court wanted to hear from the Court of Justice itself whether Article 12 EEC was this kind of self-executing provision or not.[52] In fact, the crucial novelty of this case was affirmation whether some specific EC Treaty's provisions could have a direct effect had to be decided by the ECJ and not by domestic courts according to their views and their distinct methods of legal interpretation, thus ECJ has monopolized interpretative power on this particular matter.[53]

1.3.1. Evolution of the Direct Effect

Many more judgements followed on direct effect by which the ECJ has expanded its application[54], for instance, when an EU legal rule is sufficiently explicit, unconditional, and clear to be applied by public authorities, whether courts or administrative authorities, it must be applied in the relevant cases without the need for national legislature or regulatory authority intervention, according to *Van Gend en Loos*, which has been reinforced over time by numerous other judgements.[55] The opinion of Advocate General Roemer clarified that the direct

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[50] *See* Court of Justice: Judgment of the Court of 5 February 1963. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v. *Netherlands Inland Revenue Administration*, Case 26-62, ECLI:EU:C:1963:1, para. 5 of summary.

[51] Luis Miguel Poiares Pessoa Maduro and Loic Azoulai, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (United Kingdom: Hart Publishing, 2010), p. 10.

[52] *Ibid*., p. 11.

[53] *Ibid.*

[54] *See e.g., - Politi* v. *Ministero delle finanze* judgement clarified that according to Article 288 of the Treaty on the Functioning of the European Union, hereinafter TFEU, regulations have direct effect since they are immediately applicable in the Member States, but in keeping with the general principles, this is only applicable if the regulations are sufficiently explicit, detailed, and pertinent to the particular litigant's circumstances. *See Politi* case, *supra* note 43. *Van Duyn* v. *Home Office* case clarified that the ECJ acknowledges that a directive can have a direct effect on safeguarding individual rights in specific circumstances, thus a directive has direct effect where its terms are unconditional, sufficiently clear, and precise, and when the Member State has not adopted the directive by the deadline. *See* Court of Justice: Judgment of the Court of 4 December 1974. *Yvonne van Duyn* v. *Home Office*, C-41/74, ECLI:EU:C:1974:133. Though, according to the *Ratti* judgment, directives can only have a direct vertical effect, i.e. while Member States must follow directives, they cannot be cited by Member States against individuals. *See* Court of Justice: Judgment of the Court of 5 April 1979. Criminal proceedings against *Tullio Ratti*, C-148/78, ECLI:EU:C:1979:110. According to *Hansa Fleisch* v. *Landrat des Kreises Schleswig-Flensburg* case decisions that designate a Member State as the addressee may have direct effect; as a result, the Court only acknowledges direct vertical effects in case of decisions. *See* Court of Justice: Judgment of the Court (Second Chamber) of 10 November 1992. *Hansa Fleisch Ernst Mundt GmbH & Co. KG* v. *Landrat des Kreises Schleswig-Flensburg*, C-156/91, ECLI:EU:C:1992:423. Following the same standards outlined in the *Van Gend en Loos* case, the Court acknowledged the direct effect of certain international agreements in its *Demirel* v. *Stadt Schwäbisch Gmünd ruling. See* Court of Justice: Judgment of the Court of 30 September 1987. *Meryem Demirel* v. *Stadt Schwäbisch Gmünd*, C-12/86, ECLI:EU:C:1987:400.

[55] Policy Department, *supra* note 10, p. 22.

application of EC Law can conflict with a Member State's internal legal regulations.[56] Combining these two pieces of case law, following the *Costa* v. *E.N.E.L.* ruling, suggested that primacy against domestic law could only be asserted in the presence of a directly applicable written rule, such as primary legislation, secondary legislation, EU international agreement, or a ECJ judgement that had become final, i.e. the authorities shall set aside the domestic rule in favour of the European.[57]

The ECJ progressively established the duty to interpret national law in accordance with EU legislation through case law, which dates from *von Colson* ruling, in situations where the requirements for direct applicability are not satisfied.[58] This means that Member State authorities must employ an interpretation that avoids conflicting with EU legislation when a national legal provision is subject to many interpretations. However, the *contra legem* interpretation—that is, an interpretation that is at odds with the exact wording of the national law—must not be adopted.[59] The Court of Justice clarified for the first time that the requirement to interpret national law by EU law was also a result of primacy with its ruling in the *Popławski* case.[60] The Court concluded that regarding the primacy principle, a national court exercising its jurisdiction to apply provisions of EC Law is obligated to give full effect to those provisions when it is unable to interpret national law by the requirements of EU Law, so if necessary, the court may refuse to apply any conflicting provisions of national legislation, even if they were adopted later, therefore the principle of EU Law's precedence cannot be interpreted in a way that compromises the crucial differentiation between EU Law provisions that have direct effect

[56] *See* Opinion of Mr Advocate General Roemer delivered on 12 December 1962. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v. *Netherlands Inland Revenue Administration*, Case 26-62, ECLI:EU:C:1962:42. Available on: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A61962CC0026. Accessed February 9, 2024.

[57] Policy Department, *supra* note 10, p. 23.

[58] *See* Court of Justice: Judgment of the Court of 10 April 1984. *Sabine von Colson and Elisabeth Kamann* v. *Land Nordrhein-Westfalen*, C-14/83, ECLI:EU:C:1984:153.

[59] *See* Court of Justice: Judgment of the Court (Grand Chamber) of 15 April 2008. *Impact* v. *Minister for Agriculture and Food and Others*, C-268/06, ECLI:EU:C:2008:223, para 100. *See also* Court of Justice: Judgment of the Court (Grand Chamber), 24 January 2012. *Maribel Dominguez* v. *Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, C-282/10, ECLI:EU:C:2012:33, para. 25. *See also* Court of Justice: Judgment of the Court (Grand Chamber), 15 January 2014. *Association de médiation sociale* v. *Union locale des syndicats CGT and Others,* C-176/12, ECLI:EU:C:2014:2, para. 39.

[60] *See* Court of Justice: Judgment of the Court (Fifth Chamber) of 29 June 2017. *Daniel Adam Popławski*, CC-579/15, ECLI:EU:C:2017:503. In this instance, an Amsterdam court was asked to issue a judgment about the use of the European arrest warrant. The court concluded that the European arrest warrant Framework Decisions 2002/584/JHA and 2008/909/JHA contradicted Dutch law, however, framework decisions have been specifically exempted from direct effect under the Maastricht Treaty, therefore, the Dutch court asked the ECJ the following question:

> If the executing judicial authority cannot interpret the national provisions implementing a framework decision in such a way that their application leads to an outcome in conformity with the framework decision, must it then, in accordance with the primacy principle, disapply those national provisions not in conformity with that framework decision? (*Poplawski* case, para 34.)

See Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584. Accessed February 9, 2024. *See* Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 5.12.2008. Available on: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008F0909. Accessed February 9, 2024.

and those that do not, thereby establishing a uniform set of guidelines for national courts to apply all EU Law provisions.[61]

However, the exact link between the principle of primacy and the direct effect is still under debate by academics. For instance, some have defended the vision that indirectly effective EU provisions do not have the effect of primacy as the duty to interpret national law in consistency with EU Law would stem from EU Law effectiveness requirements rather than the primacy principle.[62] This is particularly relevant to EU framework decisions which directly affect the EU Member States that have been explicitly excluded under the former Article 34 of the EU Treaty.[63] On the other hand, some authors had argued based on the "radiation effect" that framework decisions shall have similar effects leading, among other things, to framework decisions having also exclusionary effect.[64] However, the ECJ has never answered this question in conclusive, surprisingly, even in the *Melloni* case, which concerned conflict between the European Arrest Warrant framework decision and the Spanish Constitution.[65]

This chapter can be concluded by saying that *Costa* v *E.N.E.L.* is considered to be a revolutionary judicial decision, which together with *Van Gend en Loos* has changed the EU, transforming it from an international organization to a sort of constitutional one as it has constitutionalized the Treaties and consequently its application *vis-à-vis* Member States.[66] Legal and political science academics are still debating on whether those two decisions were a silent judicial *coup d'état*.[67] While some academics consider primacy as the main characteristic of EU Law which distinguishes it from ordinary international law, others suggest reading this principle as just a "creative development of international law."[68]

While a very limited number of EU Member States accept it unconditionally, others put the primacy principle within the pluralist constitutional system of interpretation whereby limiting it through different means and ways, which will be discussed in subsequent chapters.

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[61] Anne Pieter van der Mei, "The European Arrest Warrant System: Recent Development in the Case Law of the ECJ," *Maastricht Journal of European and Comparative Law* 24, no. 6 (December 2017): pp. 895-896. *See also* Bruno de Witte, "Direct Effect, Primacy, and the Nature of the Legal Order," in *The Evolution of EU Law*, ed. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press 2021): pp. 206-207.

[62] Chalmers and Arnull, *supra* note 24, p. 183.

[63] *Ibid.*

[64] *Ibid*. But the author refers to the following works: Koen Lenaerts and Tim Corthaut, "Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law" 31 *English Law Review* 287(2006); Christian Timmermans, "The Constitutionalization of the European Union" *Yearbook of European Law* 21-1 (2001-2002); Alicia Hinarejos, "On the Legal Effect of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-Executing, Supreme?" *European Law Journal* 14 (2008).

[65] *See generally* Court of Justice: Judgment of the Court (Grand Chamber), 26 February 2013. *Stefano Melloni* v. *Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107. However, *see* Leonard Besselink, "The Parameters of Constitutional Conflict after Melloni" *European Law Review* 531 (2014): pp. 1-26, accessed April 26, 2024, available on: https://www.eu-hub.eu/sites/default/files/2019-11/The%20Parameters%20of%20Constitutional%20Conflict%20after%20Melloni_1.pdf.

[66] Chalmers and Arnull, *supra* note 24, p. 181

[67] *Ibid. However, see also* Morten Rasmussen, "Revolutionizing European Law: A History of van Gend en Loos judgement" *International Journal of Constitutional Law* 12-1 (2014): pp. 136-163, accessed April 27, 2024, available on: https://academic.oup.com/icon/article/12/1/136/628616; Anne Boerger and Morten Rasmussen, "Transforming European Law: The Establishment of the Constitutional Discourse from 1950-1993" *European Constitutional Law Review* 10 (2014): pp. 199-225; Alec Stone Sweet, "The Judicial Coup d'état and the Problem of Authority" (2007) *German Law Journal* 8 (2007); pp. 915-928.

[68] Catherine Barnard and Steve Peers, *European Union Law* (Oxford: Oxford University Press, 2014), p. 187.

2. EARLY DEVELOPMENTS: FUNDAMENTAL CONSTITUTIONAL PRINCIPLES AS RESTRICTION OF EC LAW PRIMACY PRINCIPLE

Throughout time, national courts refused to recognize the principle as absolute and began developing their legal doctrines to restrict the principle. Those doctrines originated from the idea that the constitution of a Member State is the highest authority of the state, thus provisions of EU Law cannot overrule the essence of the nation-state – which is its constitution. However, states are reluctant to state that the whole constitution is higher than the rule of EU Law but rather some specific fundamental principles that are enshrined inside take precedence in this conflict. But what are those constitutional fundamental principles?

2.1. The Notion of Fundamental Constitutional Principles

Constitutional fundamental principles derive from the provisions that form the said constitution. These are the principles that form the overall narrative of how the state functions - from political structure to the relation with individuals, from foundational values of a state to rights conferred upon individuals and governmental institutions. These principles are different in each state as constitutions that define states are also different, however, legal scholars had numerous attempts to define some common fundamental principles which are attributable to the groups of states that share similarities in their political system. For instance, European Law Institute has initiated the project on defining fundamental constitutional principles of a European democracy deriving them from the constitutions of European states with the liberal democratic political system and found that there are seven groups of fundamental constitutional principles natural to a European liberal democracy, and which are (a) liberal democracy in itself, for instance expressed in liberal democratic values such as freedom of the media, majoritarianism and representative democracy, (b) the rule of law, (c) judicial independence, (d) checks and balances, (e) dignity and equality, (f) protection of fundamental rights, and (g) constitutional integrity.[69]

However, the issue is that the EU does not consist of only states with liberal democratic political systems, thus fundamental constitutional principles of these states widely differ, for instance, one would certainly agree that France and Hungary are two completely different states. Nevertheless, as was stated above, states recognize that only certain constitutional fundamental principles can overrule the application of the EU Law, and the first to state that was the *Bundesverfassungsgericht* with its decision in the *Solange* case regarding the protection of fundamental rights enshrined in *Grundegesetz*.

2.2. German "*Solange*" Doctrine

The *Solange* case law, which is also called the *Solange* doctrine represents a particular type of interaction between the national constitutional courts of the Member States and ECJ, or between the legal orders of the EC/EU and the Member States.[70] The doctrine deals with the specific

[69] On February 2024 the project is still ongoing, however, the draft is already available. *See* European Law Institute. *Fundamental Constitutional Principles of European Democracy*. Available on: https://www.biicl.org/documents/11831_fcp_report_24_5_23.pdf. Accessed February 17, 2024.

[70] Cedric Ryngaert, Ige F. Dekker, Ramses A. Wessel, Jan Wouters, eds., *Judicial Decisions on the Law of International Organizations* (Oxford: Oxford University Press, 2016), accessed February 17, 2024, https://opil.ouplaw.com/display/10.1093/law/9780198743620.001.0001/law-9780198743620-chapter-20 - law-9780198743620-chapter-20-note-466.

issue of constitutional protection of fundamental rights which, as was described above, forms part of constitutional fundamental principles.

2.2.1. *Solange I* Decision: Fundamental Rights Review

In the first *Solange* case, the legal matter presented to the *BVerfG* was essentially whether Germany had to adopt EC Law that contradicted the GG's fundamental rights guarantees. The well-known Mainz law professor Hans Heinrich Rupp had claimed that national constitutional law and EC Law were fundamentally incompatible, preventing EC Law from taking precedence.[71] It seemed like the *BVerfG* took some of his criticism to heart stating that the portion of the *Grundegesetz* that addresses fundamental rights is an element of the law's constitutional framework and is an unalienable, fundamental component of Germany's legitimate Constitution, and without reservation, Article 24 GG prohibits it from being qualified.[72] In this regard, the Community's level of integration was very significant, as the Community still lacked a legally binding democratically elected Parliament that is chosen by universal suffrage, has legislative authority, and is ultimately accountable to the Community's political bodies, and, specifically, the Community still lacked a codified list of fundamental rights.[73] Thus, a German Court may refer to the *BVerfG* in judicial review proceedings after receiving a ruling from the European Court under Article 177 (nowadays, Article 267 TFEU) of the Treaty, provided that the German Court views the relevant Community Law rule as inapplicable in the European Court's interpretation, insofar as it conflicts with a fundamental right in *Grundegesetz*, and provided that the integration process has not advanced to the point where the Community also receives a catalogue of fundamental rights decided upon by a Parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in *Grundegesetz*.[74]

The ruling served as something of a wake-up call, especially for the ECJ, so Luxemburg had attempted to appease Karlsruhe when the handed down its ruling in the *Nold* two weeks before the *Solange I* stating that the general principles of law include fundamental rights, whose compliance it guarantees, so since the Court must preserve these rights while taking into account the common constitutional traditions of Member States, it is unable to maintain policies that conflict with the fundamental rights that those States have recognized and guaranteed by their constitutions, therefore Member States should feel secure in the knowledge that the EC would not and could not violate the basic rights contained in their constitutions.[75]

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[71] Bill Davies, "Dealing with the Fallout: German and European Responses to the Solange Decision," *Michigan Law Review* 63 (1964), pp. 1-36, accessed February 17, 2024, http://aei.pitt.edu/59185/1/ACESWP_Davies_2011.pdf.

[72] *See Bundesverfassungsgericht* [*BverfG*] [Federal Constitutional Court], *Solange I,* 37, 291, 29 May 1974. *See Grundegesetz*, *supra* note 25, *see* Article 24.

[73] *Ibid., See also* Maria Eduarda Gomes de Andrade, "Solange doctrine – its development and relevance today," *Faculty of Law, University of Maribor*, pp. 1-11, accessed February 17, 2024, https://pf.um.si/site/assets/files/6238/andrade_solange_doctrine.pdf.

[74] *Ibid., See also* Bill Davies, "Pushing Back: What Happens When Member States Resist the European ECJ," *Cambridge University Press* (August 2012); p. 424.

[75] *Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], Solange II,* 73, 339, 22 October 1986. *See also* Court of Justice: Judgment of the Court of 14 May 1974. *J. Nold, Kohlen - und Baustoffgroßhandlung* v. *Commission of the European Communities*, C-4/73, ECLI:EU:C:1974:51.

2.2.2. *Solange II* Decision: Expanded Fundamental Rights Review

In *Solange II*, the answer of the *Bundesverfassungsgericht* to the decision of ECJ in *Wűnsche Handelsgesellschaft* alleviated the threat to the primacy of European Law to the next level.[76] In the domestic case[77], the *Bundesverfassungsgericht* was requested to make a review of the Court of Justice's ruling in *Wünsche Handelsgesellschaft* v. *Germany*[78] from a preliminary ruling in the case pending before the Supreme Administrative Court of Germany.[79] In *Wünsche Handelsgesellschaft* v. *Germany*, the ECJ ruled that Council and Commission legislation regarding the import of preserved mushrooms from third countries had sufficient justification.[80] However, *Wünsche* stated that ECJ had violated particular constitutional provisions enshrined in *Grundgesetz*, in particular the right to a hearing as the company considered that ECJ did not properly weigh important considerations that the German company had submitted, as well as argued that the Court should refer the case to the *Bundesverfassungsgericht*.[81]

However, *BVerfG* found that the appeal was not well founded, referring to the developments in the EC since its decision in *Internationale Handelsgesellschaft* stating that, in fact, basic rights were properly safeguarded.[82] Based on its confidence that EC properly safeguarded the basic rights enshrined in *Grundgesetz*, the *BVerfG* stated that given those developments, it is necessary to hold that *BVerfG* would no longer exercise its jurisdiction to determine the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of Germany, and it will not review such legislation by the standard of the fundamental rights contained in *Grundegesetz*, so given that the EC, and in particular in the case law of ECJ, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities, the *BVerfG* will no longer exercise its jurisdiction to make such decisions.[83] The *BVerfG* recognized ECJ as "*gesetzlicher Richter*" in the view that it possesses the right to provide definitive rulings, strengthening the integrity of the ECJ, however as Frowein noticed it is evident that *BVerfG* neither renounced its authority nor declared the absence of such authority.[84] It just declares that it will not exercise its jurisdiction as long as the current circumstances surrounding the European Court's protection of fundamental rights continue to exist.[85] The *Bundesverfassungsgericht* accepted the supremacy of the EC Law, though its acceptance was conditional upon ECJ corresponding to the rights enshrined in the Constitution.[86] In doing so, the *Bundesverfassungsgericht* states that *Kompetenz-Kompetenz* remained with Germany.[87]

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[76] Mark Killian Brewer, "The European Union and legitimacy: time for a European Constitution." *Cornell International Law Journal* 34 (2001): p. 571.
[77] Case 2 BvR 197/83, Re the Application of Wunsche Handelsgesellschaft, 3 C.M.L.R. 225 (*BVerfGE* 1987)
[78] *See* Court of Justice: Judgment of the Court (Second Chamber) of 6 May 1982. *Wünsche Handelsgesellschaft* v. *Federal Republic of Germany*, C-126/81, ECLI:EU:C:1982:144.
[79] *See* Case 7 C 87.78, 1 Dec. 1982 EuR 67, (*BVerwGE* 1983) (F.R.G.).
[80] C-126/81, *supra* note 78. *See also* E. R. Lanier, "Solange, Farewell: The Federal German Constitutional Court and the Recognition of the ECJ of the European Communities as Lawful Judge," *Boston College International and Comparative Law Review* 11 (1988): pp. 1-30.
[81] *BVerwGE* 1983, *supra* note 79.
[82] Mary Frances Dominick, "Toward a Community Bill of Rights: The European Community Charter of Fundamental Social Rights," *Fordham International Law Journal* 14, no. 3 (1990-1991): pp. 639-668.
[83] Michelle Iodice, "Solange in Athens," *Boston University International Law Journal* 32 (2014): p. 543.
[84] J.A. Frowein, "B. National Courts: Solange II (BVerfGE 37, 339). Constitutional Complaint Firma W," *Common Market Law Review* 25 (1988): pp. 203-205, accessed February 25, 2024, https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals%5CCOLA%5CCOLA1988008.pdf.
[85] *Ibid*.
[86] Brewer, *supra* note 76, p. 573.
[87] Frowein, *supra* note 84, pp. 203-204.

2.2.3. *Maastricht* (*Solange III*) Judgement: Establishment of *Ultra Vires* Review

The third *Solange* case concerned the Maastricht Treaty by which the most extensive revision of EC Law was implemented.[88] The Treaty established the EU with significantly expanded powers and reinforced supranational characteristics.[89] There was no universal praise for this development because some felt that it was an excessive intrusion on national sovereignty.[90] Those concerns became apparent in Germany, where many saw the Treaty's construction of a Monetary Union as a step backwards from the hard currency system that the D-Mark had painstakingly established.[91] At the political level, the German people overwhelmingly ratified the Maastricht Treaty: both the Bundesrat and the Bundestag did so.[92] However, Germany was unable to ratify the Maastricht Treaty as a federal act ratifying the Treaty was the target of multiple complaints.[93] Manfred Brunner and four German Green Party members of the European Parliament filed the accusations claiming that the Maastricht Treaty's adoption led to changes to the *Grundegesetz* and the legislation that made the treaty national law breached several constitutional articles.[94]

The *Bundesverfassungsgericht* expressed some misgivings only concerning Article 38 of *Grundegesetz*, which guarantees every German voter's subjective right to participate in the election of members of the German Bundestag.[95] Ultimately, this complaint was likewise deemed baseless since the *BVerfG* did not discover any violation of the democratic principle as the Germany transferred sovereignty through Articles 23, 24 of *Grundegesetz*, though the *BVerfG* took advantage of the chance to clarify the boundaries of European integration from the perspective of German constitutional law.[96] The Constitutional Court decided that under Article 79(3), in conjunction with Article 20 (1), (2) of *Grundegesetz*, the principle of

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[88] *See Bundesverfassungsgericht* [*BverfG*] [Federal Constitutional Court], *Solange III (Maastricht),* 89, 155 12 October 1993.

[89] *See* Treaty on European Union (Maastricht Treaty), OJ C 191, 29.7.1992. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A11992M%2FTXT. Accessed February 26, 2024. *See also* Finn Laursen, eds., *Designing the European Union: From Paris to Lisbon*," (*Palgrave Studies in European Union Politics* (2012): pp. 147-180, accessed February 26, 2024, https://ir101.co.uk/wp-content/uploads/2018/10/book-laursen-designing-the-european-union.pdf#page=163.

[90] Michael J. Baun, "The Maastricht Treaty as High Politics: Germany, France, and European Integration." *Political Science Quarterly* 110, no. 4 (1995): pp. 606-616.

[91] *Ibid.*

[92] Joachim Wieland, "Germany in the European Union - The Maastricht Decision of the Bundesverfassungsgericht," *European Journal of International Law* 5, no. 2 (1994): p. 259.

[93] Ryngaert, *supra* note 70.

[94] Stephan Hobe, "The German State in Europe after the Maastricht Decision of the German Constitutional Court*,"* *German Yearbook of International Law* 37 (1994): pp. 116-117.

[95] *Solange III* case, *supra* note 88. *See Grundagesetz,* supra note 25, *see* Article 38. *See also* Christian Joerges, "States Without Market? Comments on German Constitutional Court's Maastricht Judgement and a Plea for Interdisciplinary Discourse," *European Integration online Papers (EIoP)* Vol. 1 (1997): p. 7, accessed March 2, 2024, https://eif.univie.ac.at/EIoP_Archive/pdf/1997-020.pdf. These concerns stemmed from an overly expansive understanding of both the democratic principle and the right to vote as the German Federal Constitutional Court was unwilling to rule out the possibility that the right to vote could be impacted by the Parliament's broad transfer of competencies to another institution, so in light of this, the complainant's right under Article 38 of *Grundegesetz* may be violated if the German Parliament's exercise of its responsibilities is transferred extensively to one of the governmental institutions of the EU or the EC formed by the national governments, so that the bare unalienable standards of democratic legitimacy under Article 20, paragraphs 1 and 2 of *Grundegesetz* along with Article 79, paragraph 3 of *Grundegesetz* pertain to the sovereign's authority to which citizens are subject can no longer be met. *See* Joachim Wieland, supra note 92, pp. 256-259.

[96] *Ibid., See also* Karl M. Meessen, "Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany," *Fordham International Law Journal* 17, no. 3 (1994): pp. 511-530. *See also Grundagesetz*, *supra* note 25, *see* Articles 23 and 24.

democracy is declared to be inviolable.[97] Accordingly, Article 38 *Grundegesetz* prohibits the weakening, within the meaning of Article 23, of the legitimacy of State power gained through an election, as well as its impact on the use of such power, through a transfer of the responsibilities and duties of the Federal Parliament.[98] Germany is free to join a supranationally structured compound of states without violating the democratic concept, nonetheless, maintaining the legitimacy and power that come from the people within an alliance of States is a need for membership.[99] A legislation which binds the German legal system to the direct validity and application of EC Law violates Article 38 of the German Constitution if it does not provide a sufficiently detailed description of the assigned rights to be exercised and of the envisaged programme of integration.[100] This implies that the Act of Consent to ratify this Treaty will no longer apply to any further significant changes to the integration programme authorized by the Maastricht Treaty or to its permissions to act, therefore the *Bundesverfassungsgericht* is required to investigate whether or not the legal mechanisms of European organizations and governmental structures may be considered to stay within the bounds of the sovereign rights granted to them.[101] Thus, the ratification of the Maastricht Treaty does not obligate Germany to follow an unpredictable and uncontrollable path that will inevitably lead to monetary union; rather, it merely sets the stage for the European Community's continued, progressive integration as a community of laws, and every step further down this path depends either on the Parliament meeting already-foreseen conditions or on additional permission from the Federal Government, which is influenced by the Parliament.[102]

Later, in the so-called *Banana* judgement,[103] the German Court clarified its *Maastricht* decision. The *BVerfG* stated that the 1993 judgement was not to be interpreted as a declaration

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[97] *Ibid.,* More on principle of democracy under Article 38 of *Grundegesetz*, *see* Steve J. Boom, "The European Union after the Maastricht decision: Will Germany be the Virginia of Europe?" *American Journal of Comparative Law* 43 (1995): pp. 182-185. *See also Grundagesetz, supra* note 25, *see* Article 79(3), Article 20 (1), (2).

[98] *Ibid. See Grundagesetz, supra* note 25, *see* Articles 38 and 23.

[99] *Ibid., See also* Matthias Herdegen, "Maastricht and the German Constitutional Court: Constitutional Restraints for an Ever Closer Union," *Common Market Law Review* 31 (1994): pp. 235-249.

[100] *Ibid., See also* Stephan Hobe, "The Long and Difficult Road towards Integration: The Legal Debate on the Masstricht Treaty in Germany and the Judgment of the Constitutional Court of October 12, 1993," *Leiden Journal of International Law* 7, no. 1 (Spring 1994): pp. 23-42. *See also Grundagesetz*, *supra* note 25, *see* Article 38.

[101] *Ibid., See also* Gerhard Wegen, Christopher Kuner, "Germany: Federal Constitutional Court decision concerning the Maastricht Treaty," *International Legal Materials* 33 (1994): pp. 388-444.

[102] *Ibid., See also* Wolf D. Gruner, "Is the German Question – Is the German Problem Back? The Role of Germany in Europe from a Historical Perspective," *Rivisita di Studi Politici Internazionali* (2017): p. 361. In other words, the Constitutional Federal Court of Germany expanded its jurisdiction in two ways and reasserted its authority over the relationship with the ECJ as, first of all, this power was expanded more broadly to include the legislative authority of the European Community rather than being restricted to fundamental rights in the old, stricter sense, and, secondly, Union acts should now be also included in this control power. It derives from the judgement that the German Federal Constitutional Court now granted itself a right to analyze all EC/EU legislation on the subject of whether the EC/EU acts *ultra vires*, in other words, whether the EC/EU acts beyond competencies granted to it by Germany. In the context of constitutional fundamental rights, this grants Germany a freeway not to comply with EC/EU law if the latter breaches those constitutional rights, as, ultimately, in the view of Germany it would act ultra vires. Legal doctrine has strongly criticized the second claim since it simply suggests that a national constitutional court will have control over all EU legislation, so the idea that EU law must be applied uniformly across all member states and its priority thus has been compromised. The third *Solange* case suggested further that the European Communities and in particular the ECJ remained under the ultimate control of the Member States. *See* Ryngaert, *supra* note 70. *See also* Kevin D. Makowski, "Solange III: The German Federal Constitutional Court's Decision on Accession to the Maastricht Treaty on European Union," *University of Pennsylvania Journal of International Law* (Spring 1995): pp. 155-179.

[103] *Bundesverfassungsgericht* [*BverfG*] [Federal Constitutional Court], *Banana* Judgement, 102, 147, 7 June 2000. *See also* Julia C. Kupfer, "How the European Community's Banana Regulation Brought Back Solange II: The

that the *BVerfG* would explicitly exercise its power of review once more in violation of the *Solange II* ruling, even if it did so in conjunction with ECJ.[104] It has stated that the *BVerfG* had cited the *Solange II* decision's words in the *Maastricht* ruling, indicating that it only partially exercises its jurisdiction.[105] Although *BVerfG* has not completely given up its claim to be able to assess secondary EU legislation for potential violations of the fundamental rights protected by the *Grudegesetz*, it has stated that it is extremely improbable that it will do so in the future.[106] Although the *Maastricht* judgement linked it to a cautionary tale to the EU not to overextend its authority, following *Lisbon*, this power of review has become something like a safety net against an *extrema ratio* scenario.[107] There is now an assumption that the EU's protection of fundamental rights is similar to that of *Grundegesetz*, and this assumption also applies to any future expansion of the EU's protection of fundamental rights.[108] Given the notable declaration of the Charter of Fundamental Rights, the *BVerfG* has upheld the assumption in the *Lisbon* ruling of 2009.[109] Moreover, the *BVerfG* stated in *Honeywell* that it will only conduct an *ultra vires* assessment in cases where the EU authorities' violations of their jurisdiction are sufficiently serious.[110] This necessitates a blatant abuse of authority that harms Member States,

German Constitutional Court's Decision of June 7, 2000," *Columbia Journal of European Law* 7, no. 3 (Fall 2001): pp. 405-422. The so-called Banana judgement of the Constitutional Federal Court of Germany concerned Regulation No. 404/93. The regulation created a common import regime for bananas and substantially restricted imports from dollar areas while promoting trade from the EC and ACP regions. *See* Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas, OJ L 47, 25.2.1993, (No longer in force, Date of end of validity: 31/12/2007). Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31993R0404. Accessed March 10, 2024. Due to the need to reorganize their commercial relationships, German banana traders experienced significant welfare losses. *See generally* EUI Working Paper 2001/03. "Banana Splits and Slipping Over Banana Skins: The European and Trans-Atlantic Politics of Bananas.," pp. 20-30. Accessed March 10, 2024, https://cadmus.eui.eu/bitstream/handle/. The ECJ dismissed individual complaints brought by German banana traders because the complainants were unable to show that the Community had violated its own rules by flagrantly and seriously exceeding its authority. *See* Court of Justice: Judgment of the Court of First Instance (Fourth Chamber) of 11 December 1996. *Atlanta AG, Atlanta Handelsgesellschaft Harder & Co. GmbH, Afrikanische Frucht-Compagnie GmbH, Cobana Bananeneinkaufsgesellschaft mbH & Co. KG, Edeka Fruchtkontor GmbH, International Fruchtimport Gesellschaft Weichert & Co. and Pacific Fruchtkontor GmbH* v. *Council of the European Union and Commission of the European Communities*, Case T-521/93, ECLI:EU:T:1996:184, paras. 83-84. German banana operators belonging to the Atlanta group subsequently filed a case with the Supreme Administrative Court, which was referred to the *BVerfG*, claiming that the banana single market order violated the German Constitution's fundamental rights provisions, in particular with Article 14(1), 12(1), 3(1) of Basic Law. *See Grundagesetz*, *supra* note 25, *see* Articles 14(1), 12(1), 3(1). The submission was deemed inadmissible by the court, as according to the *BVerfG*, this submission was made based on an incorrect interpretation of the *Maastricht* ruling. *See* Miriam Aziz, "Sovereignty Lost Sovereignty Regained? Some Reflections on the Bundesverfassungsgericht's Bananas Judgment," *Columbia Journal of European Law* 9, no.1 (Fall 2002): p. 120. *See also* Yiannos S. Tolias, "Has the Problem Concerning the Delimitation of the Community's Competence been Resolved since the Maastricht Judgement of the Bundesverfassungsgericht," *European Business Law Review* (2002): pp. 275-278, accessed March 10, 2024, https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals

[104] *Ibid*., *See also* Peter Hilpold, "So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European 'Popular Spirit,'" *Cambridge Yearbook of European Legal Studies* (2021): p. 170, accessed March 10, 2024, https://www.cambridge.org/core/services/aop-cambridge-core/content/view.

[105] *Ibid., See also* Ryngaert, *supra* note 70.

[106] Ryngaert, *supra* note 70.

[107] *Ibid.*

[108] *Ibid.*

[109] *See generally Bundesverfassungsgericht* [*BverfG*] [Federal Constitutional Court], *Lisbon* Judgement, 30 June 2009–2 BvE 2/08.

[110] *See generally Bundesverfassungsgericht* [*BverfG*] [Federal Constitutional Court], *Honeywell* Judgement, 2 BvR 2661/06, 6 July 2010.

though, in any event, the ECJ should be given the chance to weigh in on the matter before the Court makes any declarations regarding impending *ultra vires* act.[111]

The *Solange* case law represents a continuous conversation between the two conflicting levels of jurisprudence. However, it should be kept in mind that only a select few member states, primarily, Luxemburg and the Netherlands have acknowledged the total and unconditional primacy of EU Law, while another group has embraced a dualist strategy such as Italy.[112] No court has yet produced case law that has become as well-known on its own in addressing this issue—only the Italian *Corte Constituzionale* with its "*controlimiti"* doctrine may have approached close to *Bundesverfassungsgericht* in this regard.

2.3. Italian "*Controlimiti*" Doctrine

Italian Constitutional Court just like the German one also has a continuous complex relationship with Community norms and the ECJ. The evolution of the Constitutional Court's rulings regarding the issue of the relationship between national and Community norms demonstrates the slow and incremental character of Italy's compliance with the requirements of membership in the European Community.[113]

The Court's initial remarks about this issue were wholly at odds with both the Treaty and ECJ case law as in the well-known *Costa* v. *E.N.E.L.* case from 1964, *Corte Constituzionale* argued that the link between national norms and community standards was the same as the relationship between two national sources of law with equal binding authority.[114] The Court did not see any justification for giving European law a higher legal status, and as a result, the Court decided that, in the event of a discrepancy between national and EC norms, the more up-to-date norm should take precedence over the earlier ones, regardless of when they originated.[115] After almost a decade, the Italian Court changed its position to more closely resemble the stance taken by ECJ as the *Corte Constituzionale* largely renounced its earlier ruling in the 1970s when it proposed a process for reviewing statutes that did not follow a Community standard that had already been passed.[116]

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[111] Sebastien Platon, "The Equivalent Protection Test: From European Union to United Nations, from Solange II to Solange I," *European Constitutional Law Review* 10, no. 2 (September 2014): p. 250.

[112] Giuseppe Martinico, "Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts," *European Journal of International Law*, Volume 23, Issue 2 (May 2012): Pages 404-405, accessed March 10, 2024, https://academic.oup.com/ejil/article/23/2/401.

[113] *See* Marta Cartabia, "The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community," *Michigan Journal of International Law* 173 (1990): pp. 173-203, accessed March 10, 2024, https://repository.law.umich.edu/mjil/vol12/iss1/7.

[114] Judgment of Mar. 7, 1964, *Corte Costituzionale*, Italy, 9 *Giurisprudenza Costituzionale* [*Giur. Cost*.] 129

[115] *Ibid.* This implied that Italy, and the Italian Parliament in particular, was totally free to implement laws that were in direct opposition to Community law and that would have greater binding power under Italian law. In fact, the European ECJ addressed the Italian Court's approach by explicitly articulating the theory of Community law's supremacy over national law during its re-examination of the *Costa* v. *E.N.E.L.* case, demonstrating how deeply concerned the Community was about this subject. *See* Cartabia, *supra* note 113, p. 177.

[116] Cartabia, *supra* note 113, p. 177. The matter was to be re-referred to the Constitutional Court for judicial review if a national norm that violated Community law came into effect after the Community norm that had been violated.[116] In the event that the Court concluded that the norms in this instance were in fact conflicting, it would deem the national norm invalid for violating Article 11 of the Constitution, thus, the primacy of Community laws within the Italian legal system was ensured in two ways: in cases where the violated Community norm was more recent than the National norm, the Community norm would take precedence over the Community norms only after a finding of unconstitutionality; in other cases, the violated Community norm would prevail in accordance with the principle of "*lex posterior derogat priori*." *See e.g.*, Judgment of October 30, 1975, *Corte Constituzionale*, Italy, 20 *Giurisprudenza Constituzionale* [*Giur. Cost*.] I 2211; Judgment of July 28, 1976, *Corte Constituzionale*, Italy, 21 *Giurisprudenza Constituzionale* [*Giur. Cost*.] 1 1292, 1293; Judgment of July 28, 1976, *Corte*

2.3.1. *Granital* and *Frontini* Decisions: Rights and Constitutional Principles Review

The Italian Constitutional Court completely conformed its theory in this area to that of the ECJ only with the *Granital* decision of 1984. In *Granital*, the Court specifically examined its previous rulings on disputes between national and EC norms and disregarded the practice requiring courts to bring legality disputes involving statutes at odds with earlier Community rules to the Constitutional Court as it acknowledged that, regardless of when they were enacted, judges should always apply Community standards that have direct effect over national norms, however the Court emphasized that, strictly speaking, national rules cannot be rendered invalid or nullified by Community norms.[117]

Nevertheless, the Court has been refining its second stream of case law in Community matters which is very similar to the German one, and which originates from the idea of limitation of sovereignty, which was the cornerstone of Italian membership in the EC as stated in Article 11 of the Italian Constitution.[118] According to the Court's interpretation of the doctrine of limitation of sovereignty in the *Frontini*, the Community has been granted some of the State's previously held legislative, judicial, and executive authority, and as long as community protocols and guarantees are followed, any activity of a subject falling under its purview is legitimate, however, in its opinion, community institutions lack the authority to violate human rights or constitutional principles, and it would be practically impossible for Italy to maintain its sovereignty if the Community were to have any influence over these rights and principles as Article 11 of the Constitution does not grant such the authority to revoke Italian sovereignty.[119] According to this theory, the Court stated that it could examine the Italian Ratification Act, which put Italy's acceptance of the Treaty into effect inside the Italian legal system, and not every single European standard due to the separation of the two legal systems, consequently, the Court has maintained its authority to become involved in Community issues when Community institutions pose a threat to the fundamental principles or rights contained in the Italian Constitution.[120]

Constituzionale, Italy, 21 *Giurisprudenza Constituzionale* [*Giur. Cost*.] 1 1299; Judgment of December 29, 1977, *Corte Constitutzionale*, Italy, 22 *Giurisprudenza Constituzionale* [*Giur. Cost*.] 1 1524, 1525.

[117] Judgement of 22 October*, Corte Constituzionale,* Italy, Giurisprudenza Constituzionale [*Giur. Cost.*], 232/1975 1975, IT:COST:1975:232. *(Granital.)* The Court in this case essentially views the Italian municipal and community legal systems as coexisting, with the community legal system taking precedence over the municipal system in contentious situations. *See* Diletta Tega, "The Italian Constitutional Court in its Context: A Narrative," *European Constitutional Law Review* (2021): p. 383, accessed March 12, 2024, https://www.cambridge.org/core/services/aop-cambridge-core.

[118] *See* Bruno de Witte, "Sovereignty and European Integration: The Weight of Legal Tradition," *Maastricht Journal of European and Comparative Law* 2, no. 2 (1995): pp. 145-173. See also The Constitution of the Republic of Italy. Available on: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf. Accessed April 29, 2024. *See* Article 11.

[119] Judgement of Dec. 27, 1973, *Corte Constituzionale*, Italy, 18 *Giurisprudenza Costituzionale* [*Giur. Cost.*] I 2401. (*Frontini*.) *See also* Matteo Godi, "Re-Framing Sovereignty: The Italian Legal Order and the European Human Rights Regime," *Penn Undergraduate Law Journal* 2, no. 2 (Spring 2015): p. 90-91. *See also* Nausica Palazzo, "Law-making power of the Constitutional Court of Italy" in *Judicial Law-Making in European Constitutional Court,* ed. Monika Florczak-Wątor. (London: Routledge 2020): pp. 46-70. *See also* TRiSS Working Paper Series (2020). "The Role of the German and Italian Constitutional Courts in the Rise of EU Human Rights Jurisprudence: A response to Delledonne & Fabbrini," p. 5. Accessed March 14, 2024, https://www.econstor.eu/bitstream/10419/226792/1/TRiSS-WPS-2020-02.pdf. *See also* Lucia Serena Rossi, "Recent Pro-European Trends of the Italian Constitutional Court," *Common Market Law Review* 46 (2009): pp. 319-331, accessed March 14, 2024, https://kluwerlawonline.com/api/Product/CitationPDFURL?file.

[120] *Frontini* case, *supra* note 119.

2.3.2. *FRAGD* Decision: Expansion of Italian Constitutional Court's Jurisdiction

Later, the *Corte Constituzionale* was asked to rule on the legitimacy of the act of Parliament ratifying the EC Treaty in the *FRAGD* case of 1989, notably the section of the act that ratified Article 177 of the Treaty.[121] The ECJ's interpretation of Article 177, which grants the ECJ the authority to render future decisions in preliminary procedures, was the specific topic of discussion as it was considered that the Court could prevent the judicial finding of invalidity from impacting any legal problems that preceded the decision, including those involving the parties to the case before the Court, by employing those preliminary judgements.[122] It was claimed that since the parties' dispute should be governed by the standards stated in the ECJ's preliminary ruling, such preliminary rulings would abridge the fundamental right to judicial protection guaranteed by Article 24 of the Constitution to the primary legal proceedings.[123] In this case, the constitutionality question appears to be primarily about whether the ratification of the entire Treaty is consistent with fundamental rights guaranteed by Italian Constitution, rather than whether the Community's specific offending action is constitutional, in particular the ECJ's interpretation of Article 177 in this case, and from its rulings in *Frontini* and *Granital, Corte Constituzionale* had jurisdiction over these particular kinds of cases.[124] The Court reserved the right to determine whether the Treaty is compatible with fundamental principles when it described the constitutional rights and basic constitutional principles as "counter-limits" (*controlimiti*) to the restriction of national sovereignty set in favour of the Community system in the *Frontini* and *Granital* cases.[125]

According to the used in *Granital* and *Frontini* doctrine of "counter-limits" to limitations of sovereignty, the Court would only rule against Community norms if the law of ratification, taken as a whole, violated the fundamental principles and rights contained in the constitutional system of the state.[126] However, in *FRAGD*, the Court redefines its jurisdiction as the authority to confirm the validity of any treaty provision as interpreted and implemented by Community institutions through judicial review of the treaty's ratification act.[127] The Court granted itself the authority to rule on matters involving specific interpretations or applications of Treaty provisions, in addition to cases involving the evolution of the EC when it is incompatible with the fundamental principles of the Italian constitutional system, so should any interpretation or application of a Treaty article be subject to Italian legal review, then every Community norm might theoretically be reviewed by *Corte Constituzionale*.[128] Hence, after *FRAGD*, the entire ratification statute has been replaced with specific Community provisions, which means that the Court's role in deciding cases involving constitutional fundamental principles has

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[121] Judgement of Apr. 21, 1989, *Corte Constituzionale*, Italy, 34 *Giurisprudenza Costituzionale* [*Giur. Cost.*] I 1001 (FRAGD.) *See also* Henry G. Schermers, "The Scales in Balance: National Constitutional Courts v. ECJ," *Common Market Law Review* 27 (1990); pp. 97-105, accessed March 17, 2024, https://kluwerlawonline.com/api/Product/CitationPDFURL?file.

[122] Giorgio Gaja, "New Developments in a Continuing Story: The Relationship between EEC Law and Italian Law," *Common Market Law Review* 27 (1990): pp. 94-95, accessed March 17, 2024, https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\COLA\COLA1990005.pdf.

[123] *Ibid.* See also Italian Constitution, *supra* note 118, *see* Article 24.

[124] Cartabia, *supra* note 113, p. 182.

[125] *See Frontini* case, *supra* note 119. *See Granital* case, *supra* note 117.

[126] *Ibid., See also* European University Institute Working Paper (1995)."The European Court and National Courts, Doctrine and Jurisprudence: Legal Change in its Social Context, Report on Italy," p. 26. Accessed March 17, 2024, https://cadmus.eui.eu/handle/1814/1405.

[127] *FRAGD* case, *supra* note 121.

[128] *Ibid., See also* Adelina Adinolfi, "The Judicial Application of Community Law in Italy 1981-1997," *Common Market Law Review 35* (1998): pp. 1323-1324, accessed March 17, 2024, https://kluwerlawonline.com/api.

dramatically changed.[129] In this sense, *FRAGD* of *Corte Constituzionale* is similar to the *Maastricht* judgement of *Bundesverfassungsgericht* as in both decisions Courts granted themselves the right to review any EC norms on the subject of the compliance with their constitutional principles, and by assigned competencies to the EC, analyzing whether EC/EU and ECJ decisions are *ultra vires*. However, later, the issue of protection of constitutional rights and fundamental principles evolved into the protection of constitutional identity, which is being discussed in subsequent chapters.

3. CURRENT DEVELOPMENTS: CONSTITUTIONAL IDENTITY

3.1. The Notion of Constitutional Identity

Neither a widely acknowledged definition nor a well-defined range of applicability exists for constitutional identity.[130] Constitutional identity, as an analytical notion, asks what makes a constitution unique when seen as a socio-political and cultural instrument, so in this sense, a polity's fundamental self-understanding is explained by its constitutional identity, so the relationship between a country's culture and its constitution is the main emphasis of constitutional identity in this instance.[131] A community's fondness for the values expressed by and institutionalised in a constitutional system is fostered by the actions of jurists, legislators, and the general public, according to scholars who have the idea of constitutional identity.[132] Jacobsohn argues that there will always be multiple incompatible interpretations of constitutional principles and commitments because of varying political aspirations, thus, the constitutional system is distinguished by the way that actors both inside and outside the legal system resolve these differences, leading it to a continuous social and historical evolution.[133] According to Rosenfeld, the interaction between the characteristics of the constitution that change over time while being the same and those that survive over time, creates the essence of constitutional identity, so there will always be debate on constitutional identity.[134]

Constitutional identity can also be thought of as a normative idea that can influence or constrain constitutional actors and interpreters.[135] Constitutionalism and constitutional identity

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[129] See Cartabia, *supra* note 113, p.185. If the ratification statute is the subject of judicial review in its whole, as it appeared to be in *Frontini* and *Granital*, the Court may either recognize the primacy of community law in its current form or declare the ratification act unlawful in its entirety, basically, either Italy must accept Community law despite its inconsistency with the fundamental principles of the Italian Constitution, or it must leave the European Communities. However, under *FRAGD* rationale, the declaration of unconstitutionality would only invalidate certain articles, interpretations, or implementations of the Treaty, not the ratification law as a whole, so following this line of thinking, the Court was seeking to maintain Italy's participation in the EC while removing Community regulations that are at odds with fundamental constitutional principles from the Italian legal system.

[130] Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies of the Union. *The notion of constitutional identity and its role in European integration*, p 11. Available on: https://www.europarl.europa.eu/RegData/etudes/STUD/2024/760344/IPOL_STU. Accessed April 28, 2024.

[131] *Ibid.*

[132] *Ibid., see e.g.* Klaus Eder, "A Theory of Collective Identity: Making Sense of the Debate on a European Identity," *European Journal of Social Theory* 12 (2009): pp. 1-20, accessed April 28, 2024, https://www.researchgate.net/profile/Klaus-Eder/publication/. *See also* Andrew M. Siegel, "Constitutional Theory, Constitutional Culture," *Journal of Constitutional Law* 18(4) (2016): pp. 1067-1128, accessed April 28, 2024, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1600&context=jcl.

[133] *Ibid.,* p. 12*., but see generally* Gary Jeffrey Jacobsohn, eds., *Constitutional Identity* (Massachusetts: Harvard University Press, 2010), accessed April 28, 2024, https://books.google.lv/books?hl=en&lr=&id=8quX8M1QF.

[134] *Ibid., See generally* Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (UK: Taylor & Francis, 2009). Available on: ProQuest database. Accessed April 29, 2024.

[135] *Ibid.*

are related in this way, though the term "constitutionalism" has been understood differently, it is generally referred to as a theory that limits, restrains, and controls state power in a meaningful way to preserve individual liberty and prevent abuse of authority.[136] According to this perspective, constitutionalism protects individual rights, and this path towards constitutionalism aligns with a crucial legal aspect of constitutional identity, specifically the constraints placed on the powers that have been formed.[137] In particular, normative cores are necessary for constitutional identity and must always be shielded from political influence, thus, one of the most significant normative uses of the concept of constitutional identity, according to legal literature, is the imposition of substantive constraints on the powers that have been formed.[138] Unchangeable components of a constitution do embody their "general spirit" or *raison d'être*.[139] These fundamental components may be seen as belonging to the substantive constitution, which comes before any amendments to the constitution, so amendment must therefore always be in line with the original meaning of the constitution.[140] If not, changes to the constitution would be fundamentally at odds with the text as a whole, then, a constitutional amendment would be equivalent to a new constitution being ratified, so this would be considered to be going over the constitutional bounds.[141]

Certain provisions of the constitution contain explicit limits, for instance, changes to the Norwegian Constitution must follow "particular provisions which do not alter the spirit of the Constitution."[142] There are also specific limitations on the constitutional legislator found in the constitutions of France and Italy.[143] Conversely, implicit constraints are not associated with any positive-law constitutional provision.[144] It's possible that some ideals and concepts have unique constitutional standing, which suggests that altering these fundamental components could go against the constitution's design, central idea, or spirit, for instance, the form of governance such as republic, monarchy; or the structure of state such as federal state.[145] India's basic structure doctrine is a prominent example of implicit limitations as in 1793, the Indian Supreme Court declared that certain features and elements of the Indian Constitution were unamendable, citing their fundamental importance for the integrity of the constitutional edifice and structure.[146] Second, there are broad legal principles that are thought to be implicit in the Constitution because they are so obvious and have constitutional significance as the existence,

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[136] *See* Andras Sajo, *Limiting Government: An Introduction to Constitutionalism* (New York: Central European University Press, 1999), p. 9.
[137] The notion of constitutional identity and its role in European integration, *supra* note 130, p. 12.
[138] *Ibid., see e.g.* Monika Polzin, "Constitutional Identity as Constructed Reality and a Restless Soul," *German Law Journal* 18 (2017): pp. 1597-1598.
[139] Yaniv Roznai, "Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Identity," *Oxford University Press* (2013): pp. 657-719.
[140] Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford: Oxford University Press, 2019), p. 82.
[141] *Ibid*., pp. 61-82.
[142] The Constitution of the Kingdom of Norway. Available on: https://lovdata.no/dokument/NLE/lov. Accessed April 29, 2024. See Article 121.
[143] The Constitution of 4 October 1958 (France). Available on: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf. Accessed April 29, 2024. *See* Article 89; The Constitution of the Republic of Italy, *supra* note 118. *See* Article 139.
[144] The notion of constitutional identity and its role in European integration, *supra* note 130, p. 13.
[145] *Ibid.*
[146] *See* Supreme Court of India, judgement of 24 April 1973, *Kesavananda Bharati* v. *State of Kerala* (1973) 4 SCC, para. 225. Available on: https://indiankanoon.org/doc/257876/. Accessed April 29, 2024.

operation, and upkeep of the legal system depend on these moral guidelines, for instance, the rule of law, and the separation of powers.[147]

Constitutional identity can also serve a comparable purpose in the relationship between different legal orders.[148] According to this perspective, the goal of constitutional identity is to shield national constituent power decisions from intrusions by supranational organizations such as the EU.[149] The basic rationale of the argument is that only the constituent power, acting as the political community's representative, has the authority to create a constitution that specifies the overall shape and organization of political unity while acting beyond the parameters of a certain revision procedure, so when the constituted authorities act outside the bounds of the constituent subject, the constitution is essentially replaced since the derived constituent authority alters the core principles or spirit of the document.[150] In the European context, constitutional identity can result in the obligation of the supranational organizations to interpret and use their transferred powers so that each country's constitutional character is respected.[151]

3.1.1. Sources of Constitutional Identity

The primary source for determining a Member State's constitutional identity is its national constitution; it will be simpler to ascertain a Member State's constitutional identity if its constitution identifies the greatest ideals of the constitutional order.[152] One of the prominent examples of this, is Article 3 of the Croatian Constitution, which lists the values of the highest value and importance to Croatia.[153] Features that are included in the preamble or the title of the constitutional text can also be used to indicate that these components are a part of the identity of the constitution as preambles frequently include statements of a nation's historical, social, political, and religious achievements in addition to its ambitions for the future.[154] National constitutions, however, frequently do not identify the principles that comprise the constitutional fundamentals or do not make a distinction between lower and higher values, so this is where eternity clauses that uphold particular principles should be taken into account.[155] In addition, any distinctive feature of the Member State's constitutional framework that influenced the drafting and implementation of the constitutional text may be taken into account as these are

[147] Alessandro Ferrara, *Sovereignty Across Generations: Constituent Power and Political Liberalism* (Oxford: Oxford University Press, 2023), pp. 261-264.
[148] The notion of constitutional identity and its role in European integration, *supra* note 130, p. 14.
[149] *Ibid.*
[150] *Ibid., but see also* Joel Colon-Rios, "Introduction: The Forms and Limits of Constitutional Amendments," *International Journal of Constitutional Law* 13 (2015): pp. 567-574.
[151] *Ibid*., p. 15.
[152] *Ibid.*
[153] The Constitution of the Republic of Croatia. Available on: https://www.sabor.hr/en/constitution-republic-croatia-consolidated-text. Accessed April 29, 2024. *See* Article 3.
[154] Liav Orgad, "The Preamble in Constitutional Interpretation," *International Journal of Constitutional Law* 8 (2010): pp. 715-738.
[155] Armin von Bogdandy, Stephan Schill, "Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty," *Common Market Law Review* 48 (2011): pp. 1431-1432, accessed March 29, 2024, https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\COLA\COLA2011057.pdf. Accessed March 29, 2024. For instance, the eternity clause found in the Constitution of the Czech Republic under Article 9(2). *See* Constitution of the Czech Republic of 16 December 1992 Constitutional Law No. 1 / 1993 Coll. as amended by Act No. 347/1997 Coll. 300/2000 Coll., 448/2001 Coll. 395/2001 Coll., 515/2002 Coll. and 319/2009 Coll. Available on: https://public.psp.cz/en/docs/laws/constitution.html. Accessed April 29, 2024. Accessed April 29, 2024. *See* Article 9(2).

components that originate from a historical identity or aspirations that stem from a projected identity, and they were etched at original or derived constituent moments.[156]

Texts of constitutions do not always contain the content of a constitutional identity, so it is necessary to infer certain aspects of constitutional identity from other sources for constitutional orders without a formal, written constitution.[157] The prime example is the UK. It has been suggested that constitutional statutes, or laws that are harder to implicitly change or repeal and call for explanation, are an essential component of the UK's constitutional identity because the country does not have a written constitution.[158]

3.2. Constitutional Identity Concept under Article 4(2) TEU

The Lisbon Treaty entered into force on December 1, 2009.[159] According to the preamble of the Treaty, the EU is attempting to strengthen the solidarity of its nations and respects their historical, and cultural traditions.[160] It also follows from Article 167 TFEU that the EU respects the national and regional differences between its Member States, and similar wording is contained in the preamble to the Charter of Fundamental Rights which says that the EU respects the diversity of European national cultures and traditions and the national identities of Member States.[161] Taking into account abovementioned, the attention should be directed to Article 4(2) TEU that introduces the concept of national identity which is "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."[162] The Article states that the EU shall respect the national identities of the EU Member States, therefore, this article becomes a limitation of the primacy principle, meaning that as soon as EU Law contradicts the national identity of the EU Member State, EU Law should be disregarded.

However, there are countless conflicting arguments on the meaning of constitutional identity and the aspects to which the identity clause can relate due to its ambiguous phrasing and reference to the "national" rather than "constitutional" identities of Member States. Regarding how much "national identity" and "constitutional identity" overlap or diverge, academics and judges cannot come up with one conclusive decision. Some contend that these ideas should be distinct because a nation's lived identity and its constitutional ideals don't always align.[163] Nonetheless, the ECJ, the majority of Member States' courts, and legal researchers have used the terms "national" and "constitutional identity" interchangeably in the context of dialogue on national constitutional provisions between the various EU national

[156] Philippe Gerard and Willem Verijdt, "Belgian Constitutional Court Adopts National Identity Discourse. Belgian Constitutional Court No. 62/2016, 28 April 2016," *European Constitutional Law Review* 13 (2017): pp. 201-202.
[157] The notion of constitutional identity and its role in European integration, *supra* note 130, p. 16.
[158] Paul Craig, "Constitutional Identity in the United Kingdom: An Evolving Concept," *Cambridge University Press* (2019): p. 288, accessed April 29, 2024, https://ora.ox.ac.uk/objects/uuid:76740067-01be-46ac-847c-f7da49a11bd7/files/r3n203z89k.
[159] *See generally* Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007. Available on: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF. Accessed April 29, 2024.
[160] *Ibid., see* Preamble.
[161] TFEU, *supra* note 27, *see* Article 167.; *See* Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016P/TXT. Accessed April 29, 2024. *See* Preamble.
[162] Treaty of Lisbon*, supra* note 159*, see* Article 4(2).
[163] See *generally e.g.* Elke Cloots*, National Identity in EU Law* (Oxford: Oxford University Press, 2015).

constitutional regimes and the application of Article 4(2) TEU.[164] Nevertheless, only the components ingrained in the "fundamental structures, political and constitutional" of the Member States are taken into consideration, according to the wording of Article 4(2) TEU.[165]Accordingly, characteristics of a country's identity are only admissible if they manifest themselves within a constitutional meaning and have a vital constitutional standing.[166]

In addition to the abovementioned, one may think of the founding EC/EU treaties as having a constitutional character and effect. Koen Lenaerts, currently serving as the President of the ECJ shares this view. In one of the books edited by the former Advocate General, Miguel Poiares Maduro, prominent supporter of constitutional identity under Article 4(2) TEU, and the former Legal Secretary of ECJ, Loic Azoulai, Koen Lenaerts analyzing a groundbreaking ECJ judgement of *Les Verts* v. *European Parliament*, agrees with the Court that EEC has a basic constitutional charter, - the Treaty (referring to the Treaty of Rome).[167] The President even compares the judgement with the famous opinion of Chief Justice Marshall in the case of the U.S. Supreme Court, - *McCulloch* v. *Maryland*, in which the Chief Justice proclaimed that "we must never forget that it is a constitution we are expounding."[168] In the words of the current ECJ President, *Les Verts* made obvious that ECJ shall take into account the similar remark in its "expounding" of the Treaty as in his opinion, the case of *Les Verts* highlighted the special character of the Treaty and the fact that it can ultimately serve as Constitution of EEC in both functional and substantive sense.[169] In his view, such opinion is supported by the fact that EEC's legal order contains all classical functions of the ordinary constitution in terms of the vertical division of powers between the Member States and the Community, horizontal division of powers between European institutions, protection of fundamental rights which is being conducted by ECJ.[170] So, under this view, all founding EC/EU treaties beginning from the Treaty of Rome should be regarded as having constitutional character, as every subsequent EC/EU Treaty had only expanded the competencies of the EC/EU. If EC/EU order is constitutional in its nature, then the identity clause under Article 4(2) TEU acquires constitutional character as well. Moreover, if EC/EU Treaties are of constitutional nature they do not merely supplement the domestic legal order of the EC/EU Member State, they may become the part of constitutional order of the state. In this sense and interpretation, the identity clause in Article 4(2) TEU should subsequently encompass the constitutional identity of Member States.

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[164] The notion of constitutional identity and its role in European integration, *supra* note 130, p. 18. *See e.g.* Joined opinion of Mr Advocate General Poiares Maduro delivered on 20 September 2005 in *Cristiano Marrosu and Gianluca Sardino* v. *Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*, C-53/04, ECLI:EU:C:2005:569, para 40. Available on: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62004CC0053.

[165] Lisbon Treaty, *supra* note 159, *see* Article 4(2)/

[166] Gerhard van der Schyff and Christian Calliess, eds., *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge: Cambridge University Press, 2020), p. 326, accessed April 30, 2024, https://books.google.lv/books?id=Fe2BxQEACAAJ&printsec=frontcover&hl=lv&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

[167] Koen Lenaerts, "The Basic Constitutional Charter of a Community Based on the Rule of Law," in *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, ed. Miguel Poiares Maduro and Loïc Azoulai (Oxford: Hart Publishing, 2010), p. 298. *See also* Court of Justice: Judgment of the Court of 23 April 1986. *Parti écologiste "Les Verts"* v. *European Parliament*, C-294/83, ECLI:EU:C:1986:166.

[168] *Ibid. See also* Supreme Court of the United States. *McCulloch* v. *State of Maryland et al*. 17 U.S. 316 1819.

[169] Koen Lenaerts, *supra* note 167.

[170] *Ibid.*

3.2.1. The Stance of EU Member States: Identity Review

After the Lisbon Treaty came into force, the majority of Member States, started using Article 4(2) TEU as the limitation to the primacy principle, establishing so-called identity reviews. Such reviews, *per se*, entail that Constitutional Courts are entitled to review EU legislation on the subject of its conformity with Member States' constitutional identities.

German case law regarding German constitutional identity is an excellent example to look at how a constitutional court may interpret and apply its constitutional identity review against EU norms. So, if we take the example of Germany, the term identity of the constitution, as opposed to identity of Germany, was regularly employed by *Bundesverfassungsgericht* already in its *Lisbon* ruling.[171] There is only one instance of the latter phrase, so in this sense, identity appears to be synonymous with state sovereignty.[172] The *BVerfG* stated that the EU clause in Article 23(1)[173], the third sentence of *Grundegesetz*, and the eternal clause under Article 79(3)[174], both contain the inviolable fundamental content of the German constitutional identity.[175] Article 79(3) prohibits the legislators from altering certain fundamental clauses, such as Article 1[176] (which upholds the inviolability of human dignity and demands respect for human rights) and Article 20[177] (which, among other things, establishes Germany's federal, democratic, and social nature, as well as the principles of judicial review and popular sovereignty).[178] Thus, even the authority to change the constitution is constrained by the *Grundegesetz* to its fundamental principles.[179] Therefore, EU Law must provide an equivalent level of protection against encroachment on the inviolable fundamental content of the constitution, as guaranteed by the eternity clause, consequently, *Grundgesetz*'s identity is "integration-proof."[180] It leads to the fact that the ratification of a new constitution by a referendum is the necessary legal procedure for any constitutional identity shift brought about by European integration.[181] Moreover, the *Lisbon* case law emphasized that Karlsruhe Court was responsible for verifying, in addition to the customary check with the national standard of protection of fundamental rights (*Solange*), that the EU Treaties comply with the German constitutional identity (*Identitätskontrolle*), therefore it involves determining which constitutional topics and assets are outside the purview of EU competences and that the full supremacy of EU Law cannot be recognized in those areas without endangering the constitutional identity.[182] With the use of this method, the traditional Italian doctrine of *Controlimiti* and the German *Solange* have advanced, greatly expanding the scope of their

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[171] *Lisbon* case, *supra* note 109, para 208.
[172] Tímea Drinóczi, "Constitutional Identity in Europe: The Identity of Constitution. A Regional Approach," *German Law Journal* (2020): p. 108, accessed March 29, 2024, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/.
[173] *Grundegesetz*, supra note 25. *See* Article 23(1).
[174] *Ibid., see* Article 79(3).
[175] *Lisbon* case, *supra* note 109.
[176] *Grundegesetz*, *supra* note 25, see Article 1.
[177] *Ibid., see* Article 20.
[178] *Ibid., see* Article 79(3).
[179] *Lisbon* case, *supra* note 109.
[180] *Ibid*., para 235. *See also* Julian Scholtes, "Abusing Constitutional Identity," *German Law Journal* 22 (2021): pp. 534-556, accessed March 29, 2024, https://www.cambridge.org/core/journals/german-law.
[181] *Ibid.*
[182] *See generally Lisbon* case, *supra* note 109. In this regard, the case's paragraph 252 is critical because it enumerates the sensitive topics: substantive criminal and court decisions; the monopoly of power, which influences the police's decisions within national borders and with the use of military force abroad; the fundamental decisions regarding income and expenditure taxes, as well as social policy; the primary decisions regarding social status and choices of living conditions in terms of social status options; the culturally sensitive decisions regarding family law, the education system, the school system, etc.

original application,[183] from fundamental constitutional rights and principles towards constitutional identity. In a similar vein, the Czech,[184] Polish,[185] Belgian,[186] and Hungarian[187] Constitutional Courts have implemented their constitutional identity discourses to stave off European influence.[188]

In contrast, Latvian *Satversmes Tiesa* interprets Article 4(2) TEU differently: in a way that it guarantees that, although the EU is a supranational organization, Member States, their constitutional structures, values, principles, and fundamental rights continue to exist after a Member State has become part of the EU.[189] Thereby, in conjunction with the Latvian constitutional fundamental principles that the EU cannot violate which the Latvian Court further specified in the concerned case, and among which are fundamental rights and values, democracy, state and nation sovereignty, separation of powers, and the rule of law[190] it has defined the preliminary scope of Latvian constitutional identity. On the other hand, the same principles which has defined the Latvian Constitutional Court allow Latvia to participate in the EU, as exactly the Latvian nation through referendum has chosen to become part of the EU, making its choice obligatory for Latvia under the principle of democracy and nation sovereignty. This leads to the following argumentation – by transferring some of the competencies to the EU, the Latvian state does not restrain its sovereignty but exercises its sovereignty given by the nation as it is bound by the social contract with the Latvian nation which authorized under the principle of democracy the Latvian participation in the EU.

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[183] RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law. *The concept of sovereignty in the EU – past, present and the future.* (2020), p. 75. Available on: https://iris.luiss.it/bitstream/11385/200539/1/D4.3%20def.pdf. Accessed March 29, 2024.

[184] Czech Constitutional Court established a "material core" of the Constitution by beginning with the eternal clause found in Article 9(2) of the Czech Constitution. The Court affirmed that the constitutional order of the Czech Republic, in particular its material core, must prevail in case EU Law and the Czech Constitution conflict. *See* Ústavní soud České republiky (ÚS) [Decision of the Constitutional Court of Nov. 26, 2008], sp. zn. 19/08, para. 85; *See also* Ústavní soud České republiky (ÚS) [Decision of the Constitutional Court of Nov. 3, 2009], sp. zn. 29/09. *See* Constitution of the Czech Republic, *supra* note 155. See Article 9(2). *See also* David Kosař & Ladislav Vyhnánek, "Constitutional Identity in the Czech Republic: A New Twist on an Old-Fashioned Idea?," in (eds.) *Constitutional Identity in a Europe of Multilevel Constitutionalism* ed. Christian Calliess, Gerhard van der Schyff (Cambridge University Press, 2019): pp. 85-113, accessed March 29, 2024, https://books.google.lv/books?hl=en&lr=&id=uaCsDwAAQBAJ&oi=fnd&pg. *See also* Jiří Přiban, "The Semantics of Constitutional Sovereignty in Post-Sovereign "New" Europe: A Case Study of the Czech Constitutional Court's Jurisprudence," *International Journal of Constitutional Law* 180 (2015): pp. 180-199.

[185] *See e.g.*, Polish Constitutional Tribunal, K 32/09, 24 November 2010, p. 23. In this ruling, the Polish Constitutional Tribunal heavily cited the example set by the German Federal Constitutional Court and similarly cited Article 4(2) of the TEU. It develops its understanding of constitutional identity by arguing that it expresses the "matters which constitute 'the heart of the matter,' i.e. are fundamental to the basis of the political system of a given state," and that as such, it is the expression of Polish sovereignty. *See generally* Anna Śledzińska-Simon and Michał Ziółkowski, "Constitutional Identity of Poland: Is the Emperor Putting on the Old Clothes of Sovereignty?" in (eds.) *Constitutional Identity in a Europe of Multilevel Constitutionalism* ed. Christian Calliess, Gerhard van der Schyff. (Cambridge: Cambridge University Press, 2019): pp. 1-22, accessed March 29, 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract. *See also* Anna Śledzińska-Simon, "Constitutional Identity in 3D: A Model of Individual, Relational, and Collective Self and Its Application in Poland," *International Journal of Constitutional Law* 124 (2015): pp. 124-155, accessed March 29, 2024, https://academic.oup.com/icon/article.

[186] *See Cour Constitutionnelle* (C.C.) [Constitutional Court] (Belgium), Apr. 28, 2016, nr 62/2016.

[187] *See* Hungarian Constitutional Court's Decision MK.22/2016 Nov. 30, 2016. Alkotmánybíróság (AB).

[188] Scholtes, *supra* note 180.

[189] Satversmes tiesas 2009. gada 7. aprīļa spriedums lietā Nr. 2008-35-01 "Par likuma "Par Lisabonas līgumu, ar ko groza Līgumu par Eiropas Savienību un Eiropas Kopienas dibināšanas līgumu" atbilstību Latvijas Republikas Satversmes 101. Pantam," para. 16.3. [The judgement of the Latvian Constituional Court dated April 7, 2009 in case No. 2008-35-01 on Compliance of Law on Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community with Article 101 of the Constitution of the Republic of Latvia], para. 16.3.

[190] *Ibid*., para. 17.

Moreover, as per Article 48 TEU, all countries shall agree with the amendments of the founding EU Treaties, what countries would do only if such amendments were consistent with their perspective constitutional order, therefore Latvians do not lose their right to object directly or through legitimate representatives to changes envisaged in the EU, including those which may even not comply with *Satversme*.[191]

Constitutional identity has become, with some variation, a general standard for national constitutional reviews of EU Law—a kind of red line.[192] However, constitutional identity has continued to be a significant boundary for EU Law - not only as a theoretical alternative but as a real standard of review.[193] For instance, the *BVerfG* asserted in its 2014 *OMT* preliminary reference judgement that it might investigate whether the *OMT* ruling violated constitutional identity as guaranteed by Article 79(3), even if the ECJ found the *OMT* decision to be compliant with EU Law as it contended that giving up budgetary authority by the Parliament would be a violation of democracy, which is an essential part of *Grundegesetz*'s identity, as a result of the *Lisbon* judgement.[194] In the *Gauweiler,* the ECJ held that there was no *ultra vires* act involved in the *OMT* judgement and further stated that the ECJ's decision in the preliminary ruling process was legally binding.[195] In fact, the *BVerfG* did not take the promised steps in response to this ECJ ruling, but, conversely, it rejected a subsequent constitutional complaint against the *OMT* decision by citing the *Gauweiler* ruling.[196] This case represents an interesting example of interpretative contamination, whereby the *Bundesverfassungsgericht* interpreted the law and *Grundegesetz* based on the assessments provided by the ECJ, while the ECJ attempts to interpret the OMT system in light of the cautions formulated by the German Federal Constitutional Court.[197] Another instance where the German Court was applying its identity review, was when the *BVerfG* declined to execute EAW because it would have violated the individual's human dignity in contravention of Articles 79(3) and 1(1) of *Grundegesetz*, as the Court determined that the Italian restrictions were irreconcilable with the criminal law principle of personal liability—a principle that is essential to defining the Germany's constitutional identity, so it accepted responsibility for the refusal to execute the arrest warrant without requesting a preliminary ruling from the ECJ, reasoning that such interpretation was the only one compliant with constitutional identity.[198]

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[191] *Ibid*. *See also* Lisbon Treaty, *supra* note 159, *see* Article 48.
[192] *See, e.g.,* Stefan Theil, "What Red Lines, If Any, Do the Lisbon Judgments of European Constitutional Courts Draw for Future EU Integration?" *German Law Journal* 15.4 (2014): pp. 599-635.
[193] Scholtes, *supra* note 180.
[194] *Bundesverfassungsgerich*t [*BverfG*] [Federal Constitutional Court], Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13 (*Outright Monetary Transactions* case), *see* paras. 29, 102, 103. For the analysis of the case, *see* Mattias Wendel, "Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference," *European Constitutional Law Review* 10 no. 2 (2014): pp. 263-307.
[195] *See generally* Court of Justice: Judgment of the Court (Grand Chamber) of 16 June 2015. *Peter Gauweiler and Others* v. *Deutscher Bundestag*, C-62/14, ECLI:EU:C:2015:400. *See also Grundagesetz*, *supra* note 25, *see* Article 79(3).
[196] *See generally, OMT* judgement, *supra* note 194.
[197] RECONNECT, *supra* note 183.
[198] *Bundesverfassungsgericht* [*BVerfG*] [Federal Constitutional Court], Case No. 2 BvR 2735/14, (Dec. 15, 2015). For the analysis of the case, *see* Simon Röß, "The Conflict Between European Law and National Constitutional Law Using the Example of the European Arrest Warrant", (2019), *European Public Law* 25, Issue 1 (2019): pp. 26-33, accessed March 30, 2024, https://kluwerlawonline.com/JournalArticle. *See also Grundagesetz*, *supra* note 25, see Articles 79(3) and 1(1).

3.2.2. The Stance of Court of Justice

National courts are not the only ones that can interpret constitutional identity. Article 4(2) TEU's identity clause is a component of EU Law and the ECJ is qualified to interpret and evaluate the application of the clause in light of other EU legal norms and principles as the ECJ is tasked with ensuring that EU Law is applied consistently, even though it is widely acknowledged that the EU cannot decide what constitutes state's constitutional identity,[199] this is, nevertheless, compliant with Article 19 TEU.[200] This is particularly true concerning the concepts of direct effect and the primacy of EU Law[201] as ECJ must uphold constitutional identity since it allows for the limitation of the influence of EU legislation in areas that Member States deem essential.[202] Although the concept of identity has been established in the case law of several national courts, the ECJ has only considered the identity concept with Article 4(2) in a small number of instances.[203] In each of these judgements, it seems that ECJ did not understand identity as a stand-alone concept of EU Law that had to be applied consistently and identically throughout all EU States[204] as ECJ has either recognized or rejected several constitutional elements that were proposed as essential to national identity and worthy of protection, such as nationality criteria,[205] fundamental rights,[206] public policy,[207] language.[208]

Regarding language, interesting developments occurred between the Latvian Constitutional Court and the ECJ. In *Boriss Cilevičs and Others* case, the ECJ has elucidated and validated the conformity of Latvian laws mandating higher education establishments to

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[199] Opinion of Advocate General Kokott of 15 April 2021 in case *V.M.A.* v. *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, ECLI:EU:C:2021:296, paras. 70-73. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CC0490. Accessed April 28, 2024. *See also* Opinion of AG Collins of 4 May 2023 in case *OP* v. *Commune de Ans*, C-148/22, ECLI:EU:C:2023:378, para. 45. Available on: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CC0148. Accessed April 28, 2024. *See also* Opinion of AG Emiliou of 8 March 2022 in case *Cilevičs and Others*, C-391/20, ECLI:EU: C:2022:166, para. 86. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62020CC0391. Accessed April 29, 2024.

[200] The notion of constitutional identity and its role in European integration, *supra* note 130, p. 46. *See also* Lisbon Treaty, *supra* note 159, *see* Article 19.

[201] *Ibid., See also* Opinion of AG Wahl of 8 June 2017 in *Global Starnet Ltd* v. *Ministero dell'Economia e delle Finanze and Amministrazione Autonoma Monopoli di Stato*, C-322/16, ECLI:EU:C:2017:442, paras. 59-60. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/. Accessed April 28, 2024.

[202] *Ibid. See also* Opinion of AG Kokott, *supra* note 199, para. 86.

[203] *Ibid., See* the following instances, where ECJ mentioned the identity concept: Court of Justice: Judgment of the Court (First Chamber) of 14 October 2004. *Omega Spielhallen- und Automatenaufstellungs-GmbH* v. *Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02, ECLI:EU:C:2004:614, para. 32; Court of Justice: Judgment of the Court (Second Chamber) 1 March 2012. *Dermod Patrick O'Brien* v. *Ministry of Justice, formerly Department for Constitutional Affairs*, C-393/10, ECLI:EU:C:2012:110, para. 49; Court of Justice: Judgment of the Court (Fifth Chamber), 24 October 2013. *European Commission* v. *Kingdom of Spain*, C-151/12, ECLI:EU:C:2013:690, para 37; Court of Justice: Judgment of the Court (Third Chamber), 12 June 2014. *Digibet Ltd and Gert Albers* v. *Westdeutsche Lotterie GmbH & Co. OHG*, C-156/13, ECLI:EU:C:2014:1756, para. 34; Court of Justice: Judgment of the Court (Fourth Chamber) of 18 June 2020, C-329/19, ECLI:EU:C:2020:483, paras. 46-48; Court of Justice: Judgment of the Court (Second Chamber) of 2 June 2016. *Nabiel Peter Bogendorff von Wolffersdorff* v. *Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe.* Request for a preliminary ruling from the Amtsgericht Karlsruhe, C-438/14, ECLI:EU:C:2016:401, para. 73.

[204] Ana Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford: Oxford University Press, 2022), pp. 157-170.

[205] *See e.g.* Court of Justice: Judgment of the Court of 2 July 1996. *Commission of the European Communities* v. *Grand Duchy of Luxemburg*, C-473/93, ECLI:EU:C:1996:263.

[206] Court of Justice: Judgment of the Court (Grand Chamber) of 5 June 2018. *Relu Adrian Coman and Others* v. *Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, C-673/16, ECLI:EU:C:2018:385.

[207] *See e.g.* Court of Justice: Judgment of the Court (Third Chamber) of 21 December 2016. *Remondis GmbH & Co. KG Region Nord* v. *Region Hannover*, C-51/15, ECLI:EU:C:2016:985.

[208] *See e.g.* Court of Justice: Judgment of the Court of 28 November 1989. *Anita Groener* v. *Minister for Education and the City of Dublin Vocational Educational Committee*. C-379/87, ECLI:EU:C:1989:599.

foster and advance the nation's official language with EU Law as the issue pertains to a request for a preliminary ruling made by the Latvian Constitutional Court regarding the conformity of national laws with Articles 16 of the Charter, and 49 and 56 TFEU.[209] With a few exceptions, the relevant legislation mandates that higher education institutions only offer courses in the official national language.[210] The Latvian Constitutional Court proclaimed the protection of the official language as part of the Latvian identity. To justify a restriction on the freedom guaranteed by Article 49 TFEU, the ECJ first determines whether there is a compelling reason for public interest; then it determines whether the restriction is appropriate to ensure the achievement of the desired goal; and finally, it determines whether the restriction is necessary and proportionate.[211] When determining whether there is a compelling reason for public interest, the Court believes that encouraging and promoting the use of a Member State's official language forming part of Latvian national identity under Article 4(2) is a legitimate goal that, in theory, can support a restriction on the requirements that accompany the freedom of establishment guaranteed by Article 49 TFEU.[212] Regarding whether the restriction is appropriate to ensure the attainment of the desired outcome, the Court believes that it cannot strip the relevant legislation of its coherence with EU Law given the particular goal that higher education establishments pursue and its narrow scope, as well as the existence of provisions allowing some of these establishments to benefit from a deviation about the cooperation provided for by EU programmes or international agreements.[213] Lastly, the Court notes that derogations must permit the use of a language other than Latvian to avoid going beyond what is required for that objective, at least when it comes to courses offered in the context of European programmes involving language and culture other than Latvian.[214] Taking into consideration the preliminary ruling, the Latvian Court, concluded that protecting their official language is a legitimate aim since language forms part of Latvian identity, however, as per ECJ inquiry, actions achieving this aim should be proportionate, thus the Latvian Court concluded that laws prohibiting the usage of foreign languages in educational institutions are constitutional as so far as it there is no prohibition of official EU languages, as Latvia being the EU Member inherits and shares the same values as other EU states.[215]

The idea of constitutional identity has been used by several Advocates General to ECJ to define what is protected under Article 4(2) TEU.[216] For instance, Advocate-General Maduro in

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[209] EU Law Live. ECJ clarifies compatibility of Latvian rules protecting national official language with EU law, available on: https://eulawlive.com/court-of-justice-clarifies-compatibility-of-latvian-rules-protecting-national-official-language-with-eu-law/ Accessed April 30, 2024. See Charter, supra note 161, see Article 16; *See* TFEU, *supra* note 27, *see* Articles 49 and 56.

[210] *Ibid.*

[211] Court of Justice: Judgment of the Court (Grand Chamber) of 7 September 2022. Proceedings brought by *Boriss Cilevičs and Others*, C-391/20, ECLI:EU:C:2022:638, paras. 65-87.

[212] *Ibid.*

[213] *Ibid.*

[214] *Ibid.*

[215] *See generally* Satversemes tiesas 2023. gada 9. februāra spriedums lietā Nr. 2020-33-01 "Par Augstskolu likuma 5. panta pirmās daļas trešā teikuma, 56. panta trešās daļas un pārejas noteikumu 49. punkta atbilstību Latvijas Republikas Satversmes 1. un 105. pantam." [The judgement of the Latvian Constitutional Court dated February 9, 2023, in case No. 2020-33-01 on Compliance of the Third Sentence of the First Section of the Article 5, Third Section of the Article 56, and Transitional Rule of Point 49 with Articles 1 and 105 of the Constitution of the Republic of Latvia].

[216] *See* Elke Cloots, "National Identity, Constitutional Identity, and Sovereignty in the EU," *Netherlands Journal of Legal Philosophy* 45, no. 2 (2016): p. 82. *See, e.g.*, Joined opinion of Mr Advocate General Poiares Maduro, supra note 164, para 40. *See also* the Opinion of Mr Advocate General Poiares Maduro delivered on 8 October 2008 in *Michaniki AE* v. *Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias*, Case C-213/07, ECLI:EU:C:2008:544, paras 31-33. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri. Accessed March 27, 2024. *See also* the Opinion of Mr Advocate General Bot delivered on 2 October 2012 in *Stefano Melloni*

case C-213/07 stated that national identity under Article 4(2) TEU encompasses constitutional identity as well, however, as Maduro clarified in a later statement in the same opinion, upholding the distinct constitutional identities of each Member State does not mean blindly following every national constitutional law; in fact, if that were the case, national constitutions could act as legal frameworks that allowed Member States to ignore Community legislation in specific circumstances, so constitutional law must conform to the requirements of the Community legal order because, as Community law takes into account the national constitutional identities of the Member States, discrimination amongst Member States based on the provisions of their national constitutions may result from it.[217] From the statement of AG, it seems that ECJ recognizes that Article 4(2) TEU includes in itself the concept of constitutional identity though restricting it to the fact that constitutional identities shall derive from only constitutional law that conforms with Community Law.

4. METHODS OF ACHIEVING THE BALANCE BETWEEN APPLICATION OF THE EU LAW PRIMACY PRINCIPLE AND PROTECTION OF CONSTITUTIONAL FUNDAMENTAL PRINCIPLES

After discussing the position of the ECJ and Constitutional Courts of EU Member States regarding the boundaries of the principle of primacy of EC/EU law within the cases where constitutional fundamental principles of Member States are concerned, it is now the time to analyze how well or poorly their positions and subsequent doctrines, that they established, balance the protection of fundamental constitutional principles and application of the EU Law primacy principle. Finally, this chapter will reveal the best method to achieve the equilibrium in this collision of the two legal principles and provide an answer to the research question of this thesis which is "How should the national courts apply the EU Law primacy principle to simultaneously safeguard the constitutional fundamental principles, while still adhering to the primacy principle?"

4.1. Impossibility of Full Absoluteness of EU Law Primacy in Constitutional Matters

It is logical to start with the stance of the Court of Justice which is a full absoluteness of the primacy principle of the European Union Law. As it is already evident from the two previous chapters of this thesis, Constitutional Courts of EU Member States do not accept this position in any way. Even the two EU Member States - Germany and Italy, which stood among the prominent founding states of the European Communities (EC), do not accept this position, which speaks for itself. Besides the Federal Republic of Germany and the Republic of Italy, there are numerous other Member States of the European Union such as the Czech Republic,[218]

v. *Ministerio Fiscal*, Case C-399/11. ECLI:EU:C:2012:600, paras 137-138, and 142. Available on: https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62011CC0399. Accessed March 27, 2024. *See also* Opinion of Advocate General Cruz Villalón delivered on 14 January 2015 in *Peter Gauweiler and Others* v. *Deutscher Bundestag*, Case C-62/14, ECLI:EU:C:2015:7, para 59. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CC0062. Accessed March 27, 2024.

[217] *Ibid.*, (Opinion of AG Maduro in *Michaniki*), para. 33.

[218] For instance, the Czech Constitutional Court implemented sort of its own *controlimiti* in 2012 after concluding that it could not abide by a ruling made by the Luxembourg Court. *See* Ústavní soud České republiky (ÚS) [Decision of the Constitutional Court of Jan. 31, 2012], PI. US 5/12 (Slovak Pensions XVII case.) The Czech Constitutional Court emphasized in 2003 that Czech citizens would have been entitled to reimbursement that would have taken money out of the Czech budget if the treaty governing the dissolution of the Federation of

Portugal,[219] Spain,[220] Poland,[221] Denmark,[222] that defined their boundaries through Constitutional Courts decisions, however this list is not exhaustive. It should be noted that it does not mean the fact that position of Constitutional Courts is right, as it is clearly established in jurisprudence of ECJ that EC/EU law prevails over national law, even the preliminary rulings of ECJ are binding upon national courts. This makes the principle of primacy of EC/EU law, in fact, absolute. However, what is the rationale behind Constitutional Courts' decisions to depart from full absoluteness of the primacy principle?

The answer lies with sovereignty concerns Member States and *Kompetenz-Kompetenz* - the question of jurisdiction to determine whether EU law had crossed the line and invaded a reserved area of national competence—as well as whether the law had invaded a sacred area of national competence that was an inviolable part of a state's so-called constitutional identity—is

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Czechoslovakia had prevented them from having as much retirement as they would have liked. The Court decided that it was its duty to uphold the fundamental right of Czech citizens to be treated equally under the law, to which there could be no exceptions. *See* Ústavní soud České republiky (ÚS) [Decision of the Constitutional Court of June 3, 2024], II. ÚS 405/02. The constitutional court's position was not shared by the Czech Supreme Administrative Court, which held that international law should always take precedence, and this approach, in this particular case, best preserved the state budget's stability. *See* the judgment of the Supreme Administrative Court of 31 August 2011, ref. no. 6 Ads 52/2009-88, and the judgment of the Regional Court in Hradec Králové, Pardubice branch, of 29 January 2009, ref. no. 52 Cad 35/2008-40. The preliminary ruling resulted from the inability to reconcile the two positions. Assigned the case, the ECJ mostly agreed with the supreme administrative judges' position, finding incompatibility with EU law in the compensatory option put forth by the national Constitutional Court's ruling. *See* Court of Justice: Judgment of the Court (Fourth Chamber) of 22 June 2011. *Marie Landtová* v. *Česká správa socialního zabezpečení*, C-399/09, ECLI:EU:C:2011:415. The national Constitutional Court issued an extremely scathing opinion following the preliminary ruling, declaring the EU Court's judgement *ultra vires* with very strong justification in *Slovak Pensions XVII* case. (*See Slovak Pensions XVII* case).

[219] *See* Portuguese Constitutional Court, judgment 187/2013 (to be read in conjunction with Court of Justice: Order of the Court (Sixth Chamber) of 7 March 2013. *Sindicato dos Bancários do Norte and Others* v. *BPN – Banco Portuguese de Negócios SA*. Request for a preliminary ruling, C-128/12, EU:C:2013:149); *See also* LUISS Guido Carli Working Paper 4/2014. "The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal," pp. 1-11. Accessed April 1, 2024, https://iris.luiss.it/retrieve/handle/11385/95388/1146/WPG_04-14_Cisotta_Gallo.pdf.

[220] *See* Spanish Supreme Court judgement 459/2019 (to be read in conjunction with Court of Justice: Judgment of the Court (Grand Chamber) of 19 December 2019. Criminal proceedings against *Oriol Junqueras Vies*, C-502/19, EU:C:2019:111). For the analysis of the case, *see generally* Victor Torre de Silva, "Enlarging the Immunities of European Parliament's Members: The *Junqueras* Judgement," *German Law Journal* 22 (2021): pp. 85-101, accessed April 2, 2024, https://www.cambridge.org/core/services/aop-cambridge.

[221] *See* Polish Constitutional Tribunal, Case K 18/04, Poland's EU Membership. *See also* K 32/09, *supra* note 185.

[222] The well-known Danish case *Ajos (Dansk Industri)* is yet another illustration of a blatant clash between a national supreme jurisdiction and the EU. *See Ajos (Dansk Industri)* case, Danish Supreme Court, judgement of 6 December 2016, no. 15/2014. The Danish Supreme Court decided on December 6, 2016, to depart from the ECJ's interpretation in the case C-441/14 of April 19, 2016. *See* Court of Justice: Judgment of the Court (Grand Chamber) of 19 April 2016. *Dansk Industri (DI), acting on behalf of Ajos A/S* v. *Estate of Karsten Eigil Rasmussen*, C-441/14, ECLI:EU: C:2016:278. *See generally* Elena Gualco, "Clash of Titans 2.0. From Conflicting EU General Principles to Conflicting Jurisdictional Authorities: the ECJ and the Danish Supreme Court in the Dansk Industri case," *European Papers* Volume 2, No. 1 (2017): pp. 223-229, accessed April 1, 2024, https://www.europeanpapers.eu/it/europeanforum/clash-of-titans-2-0-from-conflicting-eu-general-principles-to-conflicting-jurisdictional-authorities. The case, to put it briefly, dealt with the primacy of the law against age discrimination, as established by the ECJ in the renowned *Mangold* case concerning internal policies and procedures. *See* Court of Justice: Judgment of the Court (Grand Chamber) of 22 November 2005. *Werner Mangold* v. *Rüdiger Helm*, C-144/04, ECLI:EU:C:2005:709. The Danish judges held that the Union Court's solution could not be accepted since it did not identify specific and unequivocal reasons under the treaties, consequently, the Danish Court concluded that it was not required to uphold a fundamental right that originated from the ECJ case law. This decision was made following the country's legal tradition, which has historically placed a strong emphasis on the application of positive law and the avoidance of undue jurisprudential liberty. (Danish Supreme Court in *Ajos*; RECONNECT, *supra* note 183, p. 77.)

at the heart of the dispute.[223] If Member States would agree upon the full absoluteness of primacy principle, then in this case, national courts would have an obligation to fully subordinate themselves under decisions passed by ECJ. This would essentially mean that the states would have no possibility to restrain ECJ even in cases where it ultimately acts *ultra vires*, i.e. their decisions would go against assigned competencies from Member States under the treaties. In this case, member states would have only hope in good faith of ECJ.

Thus, by the decisions such as *Maastricht*[224] of the German Court and *FRAGD*[225] of the Italian Court, they have established a sort of unique system of checks and balances whereby the Member States check whether ECJ acts *ultra vires*, while ECJ checks whether the national law of Member States comply with EU Law.

This sovereignty concern is also proved by the fact that member states were demanding the right of withdrawal from the EU, in case they realize that participation in the Union was no longer beneficial for them and harmed their sovereignty, that is why Article 50[226] was included in the Treaty on the EU as a last resort option.[227] Furthermore, this resistance against full absoluteness of EU Law primacy, and fight for the protection of national constitutionalism is proved by the fact that the Treaty establishing the Constitution for Europe failed as citizens of France and the Netherlands showed their disagreement with this treaty, as well as during this time, the Constitutional Treaty's Articles 1-5 were declared to not affect the French Constitution's position as the head of the domestic hierarchy by the *Conseil Constitutionnel* in 2004,[228] what led to de-ratification of this treaty in Member States such as in Latvia, and establishment of the new Lisbon Treaty.[229] Bearing in mind the degree of resistance of Member States, it is just silly to assume that all states would someday put their sovereignty under ultimate subordination of ECJ through acceptance of full absoluteness of the primacy principle.

4.2. Criticism of Constitutional Restrictions of Primacy Principle

Putting constitutional restrictions on the primacy principle in any form is already a violation of EU Law, as EU Law without dispute is higher on the hierarchical legal scale than national law. Requiring ECJ to take into consideration different fundamental constitutional principles harms the unformal application and interpretation of EU Law across all Member States. Furthermore, declaring ECJ judgement as *ultra vires*, would violate the *pacta sunt servanda* principle and consequently the primacy principle as well since ECJ decisions are binding upon states. On this background, the concept of constitutional identity has infamously been proclaimed as an EU Law circumventing tool, which is evident in Hungarian and Polish cases.

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[223] Gunnar Beck, "The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There Is No Praetor," *European Law Journal* 17, no. 4 (July 2011): pp. 470-494.
[224] *See Solange III* (*Maastricht*), *supra* note 88.
[225] *See FRAGD* case, *supra* note 121.
[226] Lisbon Treaty, *supra* note 159, *see* Article 50.
[227] Martijn Huysmans, "Enlargement and Exit: The Origins of Article 50," *European Union Politics* 20 (2019): pp. 161-162, accessed April 3, 2024, https://journals.sagepub.com/doi/10.1177/1465116519830202#sec-4.
[228] Decision of the *Conseil Constitutionnel* of 19 November 2004, No. 2004-505 DC, para. 10. *See also* Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52003XX0718%2801%29. Accessed April 3, 2024.
[229] Viktorija Soņeca, "Jēdziena "nacionālā identitāte" tvērums pārākuma principa kontekstā," [Scope of the concept "national identity" in the context of the principle of supremacy], *The 7th International Scientific Conference of University of Latvia* (2019): p. 514, accessed April 3, 2024, https://doi.org/10.22364/iscflul.7.45.

4.2.1. Constitutional Identity as Instrument of Legal Abuse

The policies on refugees and asylum law have been a source of frustration for Hungary under Orban's leadership during the migration crisis, as the EU began requiring all Member States to accept migrants from the Middle East; however, Hungary chose not to abide by EU law, passing multiple anti-migration laws, holding an illegal referendum, and attempting to amend its constitution to legitimise their xenophobic policies.[230] To go around EU Law's primacy, the Hungarian Constitutional Court employed the principle of constitutional identity in its ruling.[231] In this case, *inter alia*, the Court was debating whether or not Hungarian institutions and bodies were allowed to facilitate the transfer of a group of foreign nationals without first assessing each person's particular situation, obtaining their consent, and using objectively defined standards Articles E and XIV of the Fundamental Law of Hungary.[232] The Court decided that it is likely that the joint exercise of competencies violates human dignity, fundamental rights, Hungary's sovereignty, or its constitutional identity based on the historical constitution, so it may look into the existence of alleged violation in the course of its review.[233]

When the Hungarian Constitutional Court upholds Hungary's current constitutional identity while avoiding involvement in the cooperative European solution to the refugee crisis, it violates the requirement of sincere cooperation under Article 4(3) TEU as this was done under the pretence of defending asylum seekers' rights against collective expulsion.[234] It evident that it promotes national constitutional identity without recognising the constitutional discipline required by the European legal order.[235] Constitutional identity can only be used when a Member State refuses to apply EU law in situations where a significant national constitutional responsibility exists.[236] Hungarian constitutional abuse is nothing more than national constitutional parochialism, an attempt to separate Hungary from the common constitutional framework of all of Europe.[237]

As required by Article 19(1)(2) TEU, the Polish Constitutional Tribunal ruled that certain provisions of the Treaty of European Union (TEU) that permitted national courts to maintain the supremacy of EU Law and its effective judicial protection did not align with the Polish Constitution.[238] This decision needs to be understood in the larger context of the EU's

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[230] EUI Department of Law Research Paper No. 2017/08. "Nationalist Constitutional Identity? Hungary's Road to Abuse Constitutional Pluralism," pp. 1-16. Accessed February 29, 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2962969.

[231] *See* Hungarian Constitutional Court's Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E (2) of the Fundamental Law. *See also* the Constitution of the Republic of Hungary, 2011, revisited 2016. Available on: https://www.constituteproject.org/constitution/Hungary_2016. Accessed March 1, 2024. *See* Article E(2).

[232] *Ibid.*

[233] *Ibid.*

[234] Gabor Halmai, "Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law," *Review of Central and East European Law* 43, no. 1 (2018): pp. 23-42. *See also* Treaty of Lisbon, *supra* note 159, *see* Article 4(3).)

[235] *Ibid.*

[236] *See* Mattias Kumm and Victor Ferreres Comella, "The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union," *International Journal of Constitutional Law* 3, no. 2-3 (May 2005): pp. 491-492.

[237] Halmai, *supra* note 234, page 41. *See also* Mattias Kumm, "Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism", in *Constitutional Pluralism in the European Union and Beyond* ed. Matej Avbelj and Jan Komdrek (Hart Publishing, London, 2012), p. 51.

[238] The Polish Constitutional Tribunal (PCT) held that Article 19(1) TEU was incompatible with the following articles of the Polish Constitution: Articles 2, 7, 8(1) in conjunction with Articles 8(2), 91(2), 90(1), 178(1), 190(1), 144(3)(17), and 186(1). *See* Polish Constitutional Tribunal, Case K 3/21, Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union, 7 October 2021. *See also* Treaty of Lisbon, *supra* note 159, *see* Article 19(1)(2). *See also* the Constitution of the Republic of Poland of April 2, 1997.

reaction to the Polish judiciary's reforms that came about after 2016. In several cases, the ECJ found that some aspects of Poland's judicial reforms, such as the establishment of a Disciplinary Chamber and the lack of judicial review for judge nominations, violated several provisions of the EU Treaties, most notably Article 19 TEU.[239] It should come as no surprise that the Polish government has supported legislative changes that, in line with the Commission's diagnosis, have allowed the legislative or executive branches to systematically meddle significantly in the composition, power, administration, and functioning of these bodies and authorities by citing the doctrine of constitutional identity.[240] Citing the Polish constitutional identity as the subject matter, the Court argued that the question of the organisational structure of courts falls under Poland's exclusive authority.[241] This assertion has been made by the Tribunal before on several occasions, most notably in case 7/20, which served as a model for Decision K 3/21 and in which the Tribunal determined in Decision P 7/20 that several TEU sections allowing the ECJ to impose temporary remedies in cases of constitutional violations were invalid.[242] The Tribunal mentioned Polish constitutional identity in justification for its decision, pointing out that although Poland has long practised interpreting EU Law in a way that is advantageous to it, this approach has its limitations when constitutional identity is endangered.[243]

Constitutional identity is such a broad and vague concept, that the Constitutional Courts may put almost anything they consider forms part of their constitutional identity, what exactly becomes a catalyzer for the abuse of this concept as shown in examples of Hungary and Poland. However, the question arises, is everything contained in the state's constitution protected by Constitution identity? If we consider the national jurisprudence of Polish and Hungarian Constitutional Courts, then definitely yes (if the Court wishes so). However, in the context of constitutional identity and Article 4(2) TEU, this is not the case. It should be recalled that the very Article narrows down the notion of constitutional identity as it refers to identity, which is found within fundamental constitutional structures, so deriving from the wording - "fundamental structures," it is already suggestive that in the context of the Article 4(2) not every constitutional element is protected under the identity clause.

Even though the concept of constitutional identity is prone to abuse by authoritarian regimes, it is not the guilt of the concept itself. Member States still hold an obligation to comply with EU Law, and in particular with Article 2 TEU which provides the most fundamental values of EU Member states as well as with the obligation for sincere cooperation, which is the basis for healthy conversation between states and the EU.[244] It also follows from the two pieces of ECJ case-law - *Poland* v. *Parliament and Council and Hungary* v. *Parliament and Council*, that

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Available on: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm. Accessed March 1, 2024. *See* Articles 2, 7, 8(1) in conjunction with 8(2), 91(2), 90(1), 178(1), 190(1), 144(3)(17), and 186(1).

[239] *See* Court of Justice: Judgment of the Court (Grand Chamber) of 5 June 2023. *European Commission* v. *Republic of Poland*, C-204/21, ECLI:EU:C:2023:442. *See also* Court of Justice. Press Release No 89/23: Rule of Law: the Polish justice reform of December 2019 infringes EU law, 5 June 2023, available on: https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-06/cp230089en.pdf. Accessed April 4, 2024.

[240] European Commission. *Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland*, COM(2017) 835 final, 20 December 2017, para. 173. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52017PC0835. Accessed April 4, 2024.

[241] Case K 3/21, *supra* note 238.

[242] Polish Constitutional Court, Case P 7/20, The obligation of an EU Member State to implement interim measures pertaining to the organizational structure and functioning of constitutional authorities within the judicial branch of government of that Member State, 14 July 2021.

[243] Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski, "Is It Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland," *European Constitutional Law Review* 19, no. 1 (2023): p. 175, accessed April 4, 2024, https://doi.org/10017/S1574019622000396.

[244] *See* Treaty of Lisbon, *supra* note 159, *see* Article 2.

according to the Court's view, values, *inter alia*, under Article 2 TEU, especially the rule of law, forms its own very identity of EU as a part of common legal order.[245] In this regard, such a statement not only supports the view of Koen Lenaerts that EC/EU Treaties are of constitutional character but also puts a limitation on states' constitutional identities as they should comply with EU identity deriving, *inter alia*, from values enshrined in Article 2 TEU. Nevertheless, the question still stands - how should national courts protect their constitutional fundamental principles and still adhere to the primacy of EU law principle?

4.3. Constitutional Pluralism and Double Preliminary Rulings

The *Maastricht* ruling gave rise to the constitutional pluralism idea.[246] The notion of constitutional pluralism was developed by scholars in an attempt to resolve the conflict between the ECJ and national constitutional courts regarding who should have the last say in issues on the boundaries of the EU's legal authority.[247] Constitutional pluralism was developed by scholars as a ploy to prevent a courtroom battle over who would have the final say in disputes about the boundaries between national and EU constitutional law because there was a significant possibility of legal disagreement due to the assertions of *Kompetenz-Kompetenz* by both the ECJ and constitutional courts.[248] The theory holds that *Kompetenz-Kompetenz* disputes should remain unresolved in favour of a non-hierarchical system in which the parties would engage in ongoing dialogue, exercise self-control, and reach a compromise rather than the national constitutional courts or the ECJ asserting authoritative primacy on Kompetenz-Kompetenz disputes.[249] Applying this theory would essentially mean that Constitutional Courts shall give up on their idea to assess whether the judgements of the ECJ are *ultra vires*, moreover, declaring the judgement *ultra vires* would essentially mean that the Constitutional Court wholly disregards the primacy principle as ECJ preliminary rulings are binding upon national courts.

One of the prominent examples, where the Constitutional Court declared ECJ preliminary ruling as *ultra vires*, due to incompatibility with its constitutional identity was the *PSPP* judgement of *Bundesverfassungsgericht*. The Federal Constitutional Court of Germany rendered its decision in the case pertaining to the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB).[250] In this ruling, the *BVerfG* holds for the first time that ECB

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[245] *See generally* Court of Justice: Judgment of the Court (Grand Chamber) of 26 April 2022. *Republic of Poland* v. *European Parliament and Council of the European Union*, C-401/19, ECLI:EU:C:2022:297; *See also* Court of Justice: Judgment of the Court (Full Court) of 16 February 2022. *Hungary* v. *European Parliament and Council of the European Union*, C-156/21, ECLI:EU:C:2022:97.

[246] EUI Working Paper RSCAS 2007/13. "The Legacy of the Maastricht-Urteil and the Pluralist Movement,", pp. 1-26. Accessed April 4, 2024, https://cadmus.eui.eu/handle/1814/6760. *See also* Miguel Poiares Maduro, "Three Claims of Constitutional Pluralism," *Constitutional Pluralism in the European Union and Beyond* 67 (2012): p. 2, accessed March 5, 2024, https://cms.wzb.eu/system/files/docs/tsr/cgc.

[247] Daniel Kelemen and Laurent Pech. *Why Autocrats Love Constitutional Identity and Constitutional Pluralism: Lessons from Hungary and Poland*. Working Paper No. 2 — September 2018, p. 5. Available on: https://reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf. Accessed April 4, 2024.

[248] *Ibid.*

[249] *See* Neil MacCormick, "The Maastricht-Urteil: Sovereignty Now," *European Law Journal* 1, no. 3 (November 1995): pp. 259-266; *See also* Neil Walker, "The Idea of Constitutional Pluralism," *Modern Law Review* 65, no. 3 (May 2002): pp. 317-359; *See also* Ingolf Pernice, "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?" *Common Market Law Review* 36 (1999): pp. 703-750. Available on: https://kluwerlawonline.com/api/Product/Citation. Accessed April 5, 2024.

[250] *PSPP* case, *supra* note 3.

and ECJ had overreached their jurisdiction and that the ensuing *ultra vires* acts.[251] The *Weiss*[252] ruling of the ECJ regarding the legality of decisions made by the ECB was deemed to lack the minimum of democratic legitimation' required by the *Grundegesetz*, and as such, the *BVerfG*'s *PSPP* decision declared it to be unenforceable within Germany.[253] *BVerfG* has interpreted the Constitution to contain an individual right to democracy that extends beyond the statutory right to participate in elections in several previous rulings on European integration, beginning with its *Maastricht* decision.[254] *BVerfG* claims that this right is either breached when the EU receives an excessive amount of power, so diminishing the authority of the Bundestag, or when EU institutions clearly go beyond their authority.[255] *BVerfG* gave the following justification: *Grundegesetz* also safeguards "the basic democratic contents of the right to vote,"[256] when it states in Article 38[257] that every individual has the right to take part in elections of the members of Bundestag.[258] *Grundegesetz* stipulates that "any act of public authority exercised in Germany can be traced back to its citizens,"[259] by implying that all state power originates with the people in Article 20(2).[260] This connection between the citizens' will as stated in the act of approval and the EU's exercise of power is broken when EU institutions operate beyond the authority that has been delegated to them, thus, individual constitutional right to democracy is violated.[261] Furthermore, according to the *BVerfG*, the EU cannot acquire unlimited authority since GG's eternity clause mandates that "indispensable elements of the constitutional principle of democracy"[262] remain at the national level.[263] Furthermore, *BVerfG* has discovered that the Bundestag's budgetary authority is part of fundamental democratic powers that might not be undermined by giving the EU more authority.[264] The right to democracy is also seen to be violated by *BVerfG* if a transfer of authority to the EU or the use of that authority by EU bodies takes away from this fundamental principle of democratic legitimation and thereby impacts the German constitutional identity.[265]

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[251] *Ibid., See also* Uwe Kischel, "A Step Forward for Europe – the German Constitutional Court's Decision on PSPP," *Περιμένοντας τους Βαρβάρους. Law in a Time of Constitutional Crisis* (Verlag CH Beck, 2021): p. 301, accessed April 7, 2024, https://web.archive.org/web/20220204043959id_.

[252] *See* Court of Justice: Judgment of the Court (Grand Chamber) of 11 December 2018. Proceedings brought by *Heinrich Weiss* and Others, C-493/17, ECLI:EU:C:2018:1000.

[253] *PSPP* case, *supra* note 3. *See also* Sara Poli, "The German Federal Court and its first ultra vires review: a critique and a preliminary assessment of its consequences," *Eurojus* N.2 (2020): pp. 224-240, accessed April 7, 2024, https://rivista.eurojus.it/wp-content/uploads/pdf/.

[254] *See Solange III* (*Maastricht*), *supra* note 88.

[255] Isabel Feichtner, "The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe," *German Law Journal* 21, no. 5 (2020): pp. 1090–1103, accessed April 8, 2024, https://doi.org/10.1017/glj.2020.60.

[256] *PSPP* case, *supra* note 3, para 99.

[257] *Grundegesetz*, *supra* note 25, Article 38.

[258] Feichtner, *supra* note 255. *See also* Franz C. Mayer, "The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP Decision of 5 May 2020," *European Constitutional Law Review* 16, no. 4 (December 2020): pp. 736-737.

[259] *PSPP* case, *supra* note 3, para 99.

[260] *Grundegesetz*, *supra* note 25, Article 20(2).

[261] Feichtner, *supra* note 255. For criticism of this argument, *see* Jacques Ziller, "The Unbearable Heaviness of the German Constitutional Judge on the Judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 Concerning the European Central Bank's PSPP Programme," (2020): pp. 8-9, accessed April 8, 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3598179.

[262] *PSPP* case, *supra* note 3, para 104.

[263] *Grundegesetz*, *supra* note 25, Article 79(3).

[264] *See generally PSPP* case, *supra* note 3. *See also* Maria Kordeva, "The PSPP Judgment of the German Federal Constitutional Court: The Judge's Theatre according to Karlsruhe," *Hungarian Yearbook of International Law and European Law* (2021): pp. 193-211.

[265] *PSPP* case, *supra* note 3, para 101.

However, the clash between *BVerfG* and ECJ in this case could have been avoided if *BVerfG* adhered to the theory of constitutional pluralism and did not declare *Weiss* judgement *ultra vires*. Constitutional pluralism theory as was stated above prescribes continuous dialogue between ECJ and national courts. The *BVerfG* could have asked ECJ for a second preliminary ruling, stating all of its reasons why it does not agree with the previous one. This method is called – a double preliminary ruling, which was established for the first time by *Corte Constituzionale* in its *Taricco* saga.[266] In *Taricco I*, the ECJ ruled that the Italian statutes of limitations on VAT fraud were invalid and should be disregarded, as they compromised Member State obligations under Article 325 TFEU[267] to combat fraud that jeopardizes the Union's financial interests.[268] The *Corte Constituzionale* may have declared the verdict *ultra vires*, following *BVerfG*'s example in *PSPP*, however, the Italian Court chose to send the ECJ another preliminary referral. The national court questioned whether disapplication was required even in cases, where doing so would contradict with fundamental principles of the Member State's constitutional order or with inalienable human rights recognized under the Constitution.[269] In response to the queries in *Taricco II*, changed its position. The ECJ justified this re-examination of the interpretation of EU Law by claiming that in its earlier preliminary reference, the Italian Constitutional Court had not provided all the necessary information, including requirements that are a part of Italy's core constitutional framework.[270]

So, if we apply this approach to *PSPP*, to maintain the primacy of EU Law, *BVerfG*, could have made a statement through the preliminary reference procedure asking whether their first decision would still be valid if it would contradict the "fundamental structures, political, and constitutional"[271] of the Member State as defined by Article 4(2). So, under Article 23(1), Article 20(1), (2), and Article 79(3) GG, the *BVerfG* might have informed the ECJ that the ECB Decisions were incompatible with the principle of democratic legitimation if such an approach had been used in the *PSPP*, and the ECJ could have ruled that adherence to Article 4(2) is a necessary prerequisite for EU Law to be enforceable.[272] The maintenance of primacy would result from the prior application of EU Law being deemed incompatible with both the Treaties and a national constitutional law, and if measures are deemed essential to guarantee adherence to domestic constitutional frameworks, like scrutinizing the rationale behind ECB Decisions as stipulated in *PSPP*, the ECJ maintains ultimate authority to issue such instruction, while the national court is at liberty to recommend appropriate measures to address the inconsistency.[273]

Moreover, this approach is supported by other ECJ case law. The identity clause cannot only result in the refusal to implement EU Law, as ECJ made this very clear in the *RS* case when it declared that, while the ECJ must take into account the national identities of Member States when determining whether those identities are subject to EU Law, the identity clause

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[266] *See* Court of Justice: Judgment of the Court (Grand Chamber) of 8 September 2015. Criminal proceedings against *Ivo Taricco and Others*, C-105/14, ECLI:EU:C:2015:555. *See* Court of Justice: Judgment of the Court (Grand Chamber) of 5 December 2017. Criminal proceedings against *M.A.S., M.B.*, C-42/17. (*Taricco II*).
[267] TFEU, *supra* note 161, Article 325.
[268] *Taricco I* case, *supra* note 266. *See also* Mikhel Timmerman, "Balancing effective criminal sanctions with effective fundamental rights protection in cases of VAT fraud: Taricco," *Common Market Law Review* (2016): pp. 779-796, accessed April 8, 2024, https://cadmus.eui.eu/bitstream/handle/1814/41344/2016_Timmerman.
[269] Corte Constituzionale. *Request for Preliminary Ruling to the ECJ of European Union, Order No. 24, year 2017*.
[270] *Taricco II* case*, supra* note 265.
[271] Lisbon Treaty, *supra* note 159, Article 4(2).
[272] Oliver Garner, "Squaring the PSPP Circle: How a 'declaration of incompatibility' can reconcile the supremacy of EU law with respect for national constitutional identity," *Verfassungsblog on Matters Constitutional* (2020), accessed April 6, 2024, https://verfassungsblog.de/squaring-the-pspp-circle/. *See Grundagesetz*, *supra* note 25, *see* Articles 23(1), 20(1), (2), and 79(3).
[273] *Ibid.*

neither aims nor has the effect of allowing a Member State's constitutional court to disregard obligations under Article 4(2), (3) and the second subparagraph of Article 19(1) TEU, to disapply a rule of EU law because it compromises the Member State's identity as defined by its national constitutional court.[274] The ECJ headed even more strongly by declaring that a domestic court must halt proceedings and refer a matter to the Court for a preliminary ruling under Article 267 TFEU to evaluate the legality of a secondary EU law provision in light of Article 4(2) if the Court finds that the provision violates the Member State's obligation to respect its identity.[275] The Court's ruling upheld the ECJ's sole jurisdiction to evaluate an EU act under Article 263 TFEU and, if it is determined to be invalid, to declare it void under Article 264 TFEU, and this is also applicable in cases where this action violates Article 4(2).[276]

Nonetheless, what emerges from the ECJ's reasoning is that the Court focuses primarily on maintaining national law within the classical limits derived from EU Law as from the EU's point of view;[277] what matters for it is that EU Law essentially takes precedence over national law.[278] On the other hand, this means that the ECJ will preserve constitutional identity after weighing it against the demands of integration and substantive EU norms, namely those about basic rights and market freedoms, so finding a solution that is suitable for both national and EU Law through this balancing effort has the advantage of ultimately preserving both the diversity of Member States constitutional identities and the precedence of EU Law.[279] This balancing exercise has been used by the ECJ on different occasions, for instance, in terms of integration and consistency, the ECJ seems to give the preservation of EU Law and fundamental rights precedence over the constitutional identities of Member States in areas where the EU legislation has fully harmonized the laws, thereby removing any room for discretion on the part of the Member States.[280] Cases involving substantive EU norms on market freedoms and EU fundamental rights, and which are outside fully harmonized areas appear to provide for greater discretion in applying EU Law, for instance, applying the proportionality principle under Article 5(4) TEU as a basis, the ECJ held on multiple occasions that while protecting identity is a justifiable goal, methods put in place were excessive.[281] In this regard, legal experts such as François-Xavier Millet view harmonization and uniformity as additional and an absolute limit to constitutional identity.[282]

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[274] Court of Justice: Judgment of the Court of 22 February 2022. Proceedings brought by *RS*, C-430/21, ECLI:EU:C:2022:99, paras. 69-70. *See* Lisbon Treaty, *supra* note 159, *see* Articles and 19(1).
[275] *Ibid*., para 71. *See also* TFEU, *supra* note 27, *see* Article 267.
[276] The notion of constitutional identity and its role in European integration, *supra* note 120, p. 52. *See also* TFEU, *supra* note 27, *see* Articles 263 and 264.
[277] François-Xavier Millet, "Successfully Articulating National Constitutional Identity Claims: Strait Is the Gate and Narrow Is the Way," *European Public Law* 27 Issue 3, (2021): pp. 574-575, accessed May 1, 2024, https://kluwerlawonline.com/journalarticle/European+Public+Law/27.3/EURO2021027. *See also* Court of Justice: Judgment of the Court (Grand Chamber) of 2 March 2010. *Janko Rottman* v. *Freistaat Bayern*. Reference for a preliminary ruling: Bundesverwaltungsgericht, C-135/08, ECLI:EU:C:2010:104, para. 41.
[278] Koen Lenaerts, Piet Van Nuffel and Tim Corthaut, eds., *EU Constitutional Law* (Oxford: Oxford University Press, 2021), p. 646, accessed May, 2024, https://www.google.lv/books/edition/EU_Constitutional_Law
[279] *Ibid*., pp. 576-583.
[280] *Ibid*., pp. 576-577. According to Millet, it is the usual case in secondary EU law as harmonisation moves forward and discretion decreases, which is seen in cases such as *Spiegel Online*, *Funke Medien NRW*, *Pelham and others*. Contrarily, EU primary law is frequently less precise and stringent, which may make claims based on identity more successful as seen in cases such as *Sayn-Wittgenstein* and *Remondis*.
[281] The notion of constitutional identity and its role in European integration, *supra* note 130, pp. 63-64. *See e.g.* Court of Justice: Judgment of the Court (Grand Chamber), 16 April 2013. *Anton Las* v. *PSA Antwerp NV*, C-202/11, ECLI:EU:C:2013:239. *See also* Lisbon Treaty, *supra* note 159, *see* Article 5(4).
[282] Millet, *supra* note 276, p. 582.

CONCLUSION

The thesis has begun with the EU motto – "United in diversity."[283] While this motto excellently expresses the true nature of the EU, this is also a perfect description of the problem here discussed and its final solution. Indeed, the rationale behind the decision of EU Member States to limit the EU primacy principle is their fear of losing their sovereign right to protect their diverse identities expressed in their unique fundamental constitutional frameworks that cover a wide scope of constitutional principles, from rights to values inherent in the essence of each different state.

Member States accepted the primacy principle and the direct effect as was established in ECJ jurisprudence of *Costa* v. *E.N.E.L.* and *van Gend en Loos*, however they were not ready to promise that the primacy would also cover some of their fundamental constitutional frameworks after the fact, when Court of Justice had already established primacy over national constitutional law in *Internationale Handelsgesellschaft*. Consequently, not long after that, the Constitutional Courts of Germany and Italy established their constitutional doctrines restricting the primacy principle. In Germany, the "*Solange*" doctrine has been established, by which the German judiciary ensured the protection of fundamental constitutional rights stating that it would only respect EC Law primacy as long as the European Community provides the same level of protection of rights as *Grundegesetz*. Italian Constitutional Court established a similar doctrine, however with a wider scope of application as in addition to the constitutional rights, it has also included principles of Italian constitutional order.

Later, both Germany and Italy with respective decisions in *Maastricht* and *FRAGD*, widened the scope of their doctrines – from the review of compliance of EC order on the protection of constitutional rights and principles to *ultra vires* review, whereby checking whether the Community acts outside the scope of competencies granted. In the context of fundamental constitutional principles, this meant, that as soon as decisions of ECJ would go against those constitutional principles as per the interpretation of constitutional courts, ECJ, in their view, would act *ultra vires* and, hence, national courts would not comply with binding ECJ rulings, thus violating EC/EU Law primacy.

Finally, the protection of constitutional fundamental principles evolved into the protection of constitutional identity, which is a highly vague concept. In the context of the EU, constitutional identity should be seen through Article 4(2) TEU. However, the issue is that it is not precisely known whether Article 4(2) encompasses "constitutional identity" as the concerned Article rather refers to "national identity," while academics in the field and judiciaries are in debate on this matter. However, after analysis of this issue, the author concluded that Article 4(2) TEU, nevertheless should include the notion of constitutional identity because EU Treaties themselves are of constitutional character, so, in such context, they partially replace the constitutional order of Member States in case of constitutional conflict, and the fact that in most CJEU jurisprudence Article 4(2) TEU is analyzed through constitutional provisions of Member States. The second issue is that due to its vagueness, Member States can put into it almost anything enshrined in their constitutions and what they consider important, which led to its abuse by Hungary and Poland. However, this concept should be seen within the limits of Article 4(2) TEU, which limits constitutional identity within fundamental constitutional structures. Moreover, constitutional identities of Member States should also

[283] EU Motto, *supra* note 1.

comply with Article 2 TEU, which lists the most fundamental values of the EU, this would eliminate the risk of domestic interpretation of constitutional identity in breach of EU Law.

Answering the research question of the present thesis, which is – "How should the national courts apply the EU Law primacy principle to simultaneously safeguard the constitutional fundamental principles while still adhering to the primacy principle," the author concluded that full absoluteness of the primacy principle is unfeasible in present circumstances as Member States are unlikely to accept it due to their sovereignty concerns. They perceive the primacy principle as restricting their sovereign right to protect their diverse identity within constitutional frameworks, therefore they rather have the possibility not to comply with ECJ decisions in case when they perceive that ECJ ultimately acts *ultra vires*, hence keeping *Kompetenz-Kompetenz* to themselves. Nevertheless, the author also considers that rendering the ECJ decision as *ultra vires* is not an option as it would ultimately mean - a violation of the primacy principle, and subsequently the EU Law. Constitutional courts and ECJ should engage in continuous dialogue and compromise, rather than fighting over the *Kompetenz-Kompetenz* issue, which is prescribed by constitutional pluralism theory. Following the example of the Italian Constitutional Court in the *Taricco* saga, if constitutional courts do not favour ECJ's preliminary ruling in a view that it contradicts their constitutional identity, courts should issue the second request for preliminary ruling to ECJ but now assessing the first ruling against requirement to respect identity under Article 4(2) TEU, rather than ultimately declaring the first ECJ's ruling as *ultra vires*. ECJ, on its part, should carefully balance the obligation to respect identity, enshrined in their constitutional structures with the need for integration and on the subject of legitimate aim, proportionality, and compliance with other EU norms as it did, for instance, in *Boriss Cilevičs and Others*. Ultimately, by fostering sincere cooperation and communication, Member States would be able to preserve European unity while protecting their diversity.

The research can be continued with the analysis of the common identity of the European Union as it would foster a deeper understanding of the issue at hand.

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