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# NATIONAL SOVEREIGNTY AND THE PRINCIPLE OF PRIMACY IN EU LAW

(PhD thesis)

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# SUPERVISOR'S EVALUATION OF THE DOCTORAL DISSERTATION

**“National Sovereignty and the Principle of Primacy in EU Law”**

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## Introductory remarks

I submit this review in support of the final doctoral dissertation of Judita Vadovics Juharová, entitled “National Sovereignty and the Principle of Primacy in EU Law.” It follows her successful preliminary defence (műhelyvita) and the subsequent revision of the manuscript in response to the reviewers’ comments. My assessment concerns the completed work submitted for public defence.

I have known Judita throughout her undergraduate, master’s and doctoral studies, and have therefore been able to observe her development over many years. The careful, conscientious student I first taught has become a researcher capable of formulating her own position, defending it through legal argument and reconsidering it in response to criticism. This dissertation reflects the considerable work behind that development. As her supervisor, I am proud both of the completed thesis and of the persistence with which she has brought it to this stage.

## Relevance and originality of the topic

The dissertation addresses the relationship between national sovereignty and the principle of primacy in EU law through the competing claims of the Union and its

Member States to constitutional authority. Its central question is well chosen: how can national constitutional autonomy be reconciled with the effective and consistent application of Union law? The candidate approaches this question through legal doctrine, constitutional theory and the experience of four Member States, rather than treating individual disputes in isolation.

The originality of the work lies principally in bringing these strands of analysis together. The dissertation connects the development of primacy in the case law of the Court of Justice with the constitutional responses of Germany, Italy, Poland and Slovakia, and evaluates those responses against the theoretical accounts of sovereignty, monism, dualism and constitutional pluralism. This provides a basis for the candidate's own argument concerning "structured constitutional pluralism" and the conditions under which judicial cooperation can accommodate competing constitutional claims.

The inclusion of Slovakia is particularly valuable. It gives the study a Central European dimension beyond the more familiar German and Italian examples and allows the candidate to draw on her knowledge of the Slovak legal system. The discussion of Slovak constitutional developments also gives the comparative analysis a practical relevance that I consider an important strength of the dissertation.

## Structure, methodology and scholarly craftsmanship

The manuscript proceeds from the research problem and its theoretical foundations to the development of primacy, the national case studies and the final assessment of the hypotheses. The chapters on sovereignty and the modern state establish the concepts used in the subsequent legal analysis. The historical and doctrinal chapters then explain how primacy developed and how its authority has been understood, before the comparative chapter examines its reception in the four selected jurisdictions.

The methodology is appropriate to the subject. The candidate combines doctrinal legal research with comparative constitutional analysis and theoretical reflection. She identifies her research questions and hypotheses, explains the selection of jurisdictions and acknowledges the limits of a qualitative study based on legal texts, judicial reasoning and academic commentary. The work is consequently assessed on the

quality of its interpretation and argument, rather than on claims of empirical representativeness.

The source base brings together the EU Treaties, national constitutional provisions, the jurisprudence of the Court of Justice and national courts, and the relevant scholarly literature. I particularly value the candidate's effort to connect the theoretical discussion of normative authority with the practical reasoning of courts. Her treatment of primacy as a possible rule of recognition, for example, gives the doctrinal analysis a broader conceptual basis and demonstrates her willingness to engage with questions beyond the immediate interpretation of individual judgments.

The comparative synthesis at the end of Chapter Six is an important part of the final manuscript. It compares the role of constitutional identity, the use of ultra vires review and the conditions under which primacy is accepted. These shared points of comparison help the reader identify differences between the national approaches and understand their significance for the dissertation's central argument.

## Substantive findings and analytical contribution

The dissertation's findings are organised around three hypotheses. I welcome the fact that the candidate does not present all three as simply confirmed, but distinguishes between rejection, affirmation and conditional affirmation. This makes her conclusions more informative and shows a willingness to qualify the propositions with which the research began.

The first hypothesis, concerning the insufficiency of the primacy doctrine to prevent recurring constitutional conflicts, is not affirmed in the final assessment. The candidate distinguishes the existence of constitutional disagreement from a failure of primacy as a legal principle. Her argument is that the persistence of such conflicts must also be understood in light of the continuing constitutional authority of the Member States.

The second hypothesis is affirmed. The candidate's analysis identifies national identity claims and constitutional review mechanisms as continuing challenges to an absolute conception of primacy. The third hypothesis is conditionally affirmed: a pluralist or cooperative model is presented as a more sustainable approach, provided that it

respects the constitutional authority retained by the Member States. These conclusions express the candidate's own normative position, which is developed through her reading of the doctrinal and comparative material.

The proposal of structured constitutional pluralism is the principal contribution of the dissertation. The candidate seeks to explain how the effectiveness of EU law and the constitutional autonomy of the Member States might be maintained through judicial dialogue, preliminary references and proportionality-based reasoning. The value of the proposal lies in the connection it makes between constitutional theory and the legal mechanisms through which courts address disagreement.

The comparative synthesis also distinguishes forms of constitutional resistance rather than treating them as interchangeable. Its discussion of Germany, Italy, Poland and Slovakia considers differences in legal reasoning, institutional practice and the use of constitutional identity. This gives the candidate's conclusions a firmer comparative basis and provides useful material for further research on the relationship between constitutional safeguards and compliance with EU obligations.

## Revision following the preliminary defence

The successful preliminary defence was an important stage in the completion of this dissertation. The candidate subsequently considered the reviewers' observations and incorporated their substantive recommendations into the final manuscript. She approached this work with the same seriousness and discipline that characterised our cooperation throughout her doctoral studies.

The final text gives a clear account of the research problem, the questions guiding the inquiry and the methodological choices on which the analysis rests. The theoretical discussion provides the basis for the examination of primacy, while the country studies supply the material against which the broader argument is assessed. The comparative synthesis makes the relationship between the four jurisdictions explicit, and the conclusion returns separately to each of the three hypotheses.

I particularly appreciate the attention given to the comparative dimension and to the explanation of the research results. The concluding comparison of constitutional

identity, ultra vires review and acceptance of primacy helps bring the national studies together. The separate assessment of the hypotheses enables the reader to identify what the candidate concludes, where she qualifies her initial expectations and how she understands the implications of her findings.

The candidate's response to the review process deserves recognition in its own right. She has been willing to return to difficult parts of the argument, consider alternative readings and explain the reasons for her final choices. As a supervisor, I regard this capacity to work seriously with criticism as an essential part of independent scholarship. I am grateful to the reviewers for their careful engagement with the dissertation and for the contribution their comments have made to its completion.

## Particular strengths of the dissertation

The dissertation's main strengths are its sustained engagement with the relationship between sovereignty and primacy, its combination of theoretical and doctrinal analysis, and its comparative treatment of four national legal systems. The candidate maintains a recognisable research focus across material that could easily have become a series of separate national accounts. The final synthesis is especially useful in drawing those accounts back to the common constitutional question.

The Slovak analysis is a further strength. It adds material that is directly relevant to the candidate's research environment and gives the dissertation a distinct contribution within its chosen comparative scope. Her treatment of sovereignty also benefits from the effort to distinguish its internal and external dimensions and to connect those distinctions with questions of democratic legitimacy and the exercise of public authority.

I also value the candidate's readiness to state and defend an independent scholarly position. The dissertation does not stop at describing the arguments of courts and commentators; it develops a view of the constitutional relationship under examination. That view provides a sound basis for discussion at the public defence and for subsequent academic publication.

## Reflection on the supervisory cooperation

Having followed Judita's work over several stages of her education, I can speak with confidence about the progress she has made as a researcher and writer. She has become more precise in identifying legal problems, more assured in working with complex sources and more independent in developing her conclusions. The completed dissertation is the result of that progress and of a consistently strong work ethic.

Our cooperation has been productive and rewarding. She has come to consultations prepared, with drafts, concrete questions and considered responses to earlier feedback. She has accepted criticism constructively while also learning to defend her own analytical choices where she has good reasons for doing so. This combination of receptiveness and independence has been particularly evident during the final revision of the thesis.

I am grateful for the care, reliability and determination she has brought to our work together. Completing a dissertation requires sustained effort beyond the moments visible at examinations and defences, and Judita has shown that commitment throughout the process. I believe she has the discipline and intellectual curiosity needed to continue contributing to scholarship in European and comparative constitutional law.

## Concluding recommendation

In my assessment, the final dissertation fulfils the requirements of doctoral research. It addresses a clearly defined legal problem, employs an appropriate methodology, engages with primary legal materials and relevant scholarship, and presents the candidate's own reasoned conclusions. The manuscript demonstrates her capacity to conduct independent academic research and to respond constructively to scholarly evaluation.

Taking into account the successful preliminary defence, the subsequent revisions and the quality of the completed work, I unreservedly recommend the dissertation "National Sovereignty and the Principle of Primacy in EU Law" by Judita Vadovics Juharová for public defence. Following a successful defence, I recommend that she be awarded the degree of Doctor of Philosophy (PhD).

I further recommend that the dissertation be developed for publication as a monograph or through a series of scholarly articles. Its comparative findings, particularly the Slovak analysis, and its argument concerning structured constitutional pluralism provide a worthwhile basis for that further work.

**In Bratislava, 15 September 2026**



**doc. PhDr. JUDr. Lilla Garayová, PhD., LL.M.**

Supervisor and author of the evaluation

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# INTRODUCTION

The relationship between national sovereignty and the principle of primacy in European Union law constitutes one of the most profound constitutional controversies of modern Europe. Since the judgment in Costa v ENEL, the Court of Justice of the European Union has asserted that Union law enjoys precedence over conflicting national provisions, including those of constitutional rank. This claim, later reinforced in decisions such as Internationale Handelsgesellschaft and Simmenthal, was not expressly codified in the Treaties but developed through judicial interpretation as a structural requirement of integration. In doing so, the Court articulated a constitutional doctrine that profoundly reshaped the distribution of authority within Europe.

The emergence of primacy marked a decisive departure from the traditional model of international cooperation. Classical international law rests on the consent and continued sovereignty of states, which remain the ultimate masters of their constitutional order. The doctrine of primacy, however, places Union law above domestic law even where the latter reflects the highest expression of democratic will embodied in a national constitution. This development is not merely technical. It raises a fundamental question about the location of ultimate authority within the European legal space. If constitutions represent the supreme expression of a political community's self-determination, can they be subordinated without undermining the very foundation of democratic legitimacy?

The constitutional architecture of the European Union is based on the transfer of competences from the Member States. Those competences are limited, conferred, and defined by the Treaties. Sovereignty, in this understanding, is not extinguished but exercised through delegation. Yet the practical operation of primacy appears to extend beyond a simple mechanism of coordination. By requiring national courts to disapply conflicting constitutional norms, the Court of Justice has effectively positioned itself as the final arbiter of the limits of Union authority. This judicially constructed hierarchy invites scrutiny. It challenges the principle that the scope of delegated powers must ultimately remain subject to the constitutional order from which they originate.

National constitutional courts have consistently resisted the notion of unconditional supremacy. Through doctrines of constitutional identity, ultra vires review, and the protection of fundamental rights, courts in Germany, Italy, Poland, and other Member States have insisted that integration does not amount to constitutional dissolution. Their jurisprudence reflects a persistent conviction that certain core principles, including democracy, human dignity, and the rule of law as defined domestically, cannot be displaced by external authority. What began as cautious reservations has, in recent years, evolved into more assertive forms of constitutional resistance. The tension between Luxembourg and national capitals now reveals a deeper structural disagreement about the nature of sovereignty itself.

This dissertation proceeds from the premise that sovereignty remains the foundational source of constitutional legitimacy within the European order. The Union derives its authority from the will of its Member States as expressed through their constitutional processes. It does not constitute an autonomous sovereign. Accordingly, the principle of primacy must be understood within the limits of delegated powers and constitutional consent. Where primacy is interpreted as absolute and unconditional, it risks severing itself from its democratic foundation. The central concern of this research is therefore whether the existing formulation of primacy adequately reflects the sovereign basis of the Union, or whether it has evolved into a doctrine that exceeds the boundaries of constitutional delegation.

The significance of this inquiry is both theoretical and practical. Theoretically, the sovereignty and primacy debate engages core questions of constitutional theory, including the nature of ultimate authority, the relationship between law and democracy, and the legitimacy of judicial constitutionalisation. Practically, the unresolved conflict has direct implications for legal certainty, uniform application of Union law, and the stability of the European integration project. Recent confrontations demonstrate that primacy cannot be sustained through judicial assertion alone. Its durability depends on continued constitutional acceptance within Member States. If that acceptance erodes, the coherence of the supranational legal order is placed at risk.

The purpose of this dissertation is to provide a comprehensive and critical examination of the relationship between national sovereignty and the principle of primacy. It seeks

to analyse the historical development of the doctrine, the jurisprudential responses of national constitutional courts, and the theoretical frameworks that attempt to reconcile competing claims of authority. Particular attention is devoted to the argument that sovereignty remains the ultimate constitutional reference point, and that primacy must be reconceived as conditional upon the continued consent of Member States.

The study adopts a doctrinal and comparative methodology, examining key judgments of the Court of Justice alongside landmark decisions of national constitutional courts. It engages with constitutional theory to assess whether models such as constitutional pluralism or cooperative constitutionalism sufficiently safeguard sovereign legitimacy, or whether a clearer reassertion of constitutional limits is required. The analysis is not intended to reject integration as such. Rather, it aims to clarify the constitutional foundations upon which integration can legitimately rest.

At a time of renewed emphasis on constitutional identity and democratic self-determination across Europe, the future of the Union depends on its capacity to respect the sovereign structures that brought it into existence. Primacy cannot be an instrument of silent constitutional transformation detached from democratic consent. It must remain anchored in the principle that ultimate authority resides in the constitutional orders of the Member States. This dissertation argues that a sustainable European constitutional settlement requires a recalibration of primacy, one that recognises it as a delegated and conditional authority rather than an autonomous source of supremacy. Only through such recalibration can the balance between integration and self-government be preserved, ensuring both the effectiveness of Union law and the continued legitimacy of national constitutional sovereignty.

This work is based in part on the author’s earlier research, including the master’s thesis and selected prior publications. All such materials are properly referenced, and any reused or developed content is clearly indicated in line with academic conventions.

# 1 RELEVANCE AND PURPOSE OF THE RESEARCH

The tension between national sovereignty and the principle of primacy in European Union law lies at the very core of the European constitutional project. Since the foundational jurisprudence of the Court of Justice of the European Union, the doctrine of primacy has served as a constitutional axiom of the supranational legal order, requiring Member States to give precedence to Union norms even over conflicting national constitutional provisions. The emergence of this doctrine was not merely a technical legal innovation, but a fundamental shift in Europe's constitutional landscape: it placed supranational law above traditional sources of state authority, thereby redefining the meaning of sovereignty within an integrated legal space. The relevance of this research is twofold. First, the primacy doctrine has become increasingly contested in recent years, as several national constitutional courts have re-asserted their role as the ultimate guardians of constitutional identity. German, Polish, Italian and Hungarian jurisprudence illustrates a growing willingness to resist Luxembourg when core constitutional principles - such as fundamental rights, democratic self-determination or ultra vires concerns - are perceived to be at risk. This trend has transformed what was once a largely theoretical debate into an existential challenge for the coherence and authority of EU law. Second, the unresolved clash between primacy and sovereignty has profound implications for legal certainty, the uniform application of Union law, and the broader legitimacy of European integration. If primacy is not uniformly accepted and applied, the very idea of a functioning supranational legal order may be undermined.

The purpose of this dissertation is therefore to offer a comprehensive and critical examination of the relationship between national sovereignty and the principle of primacy. The research seeks to uncover why constitutional conflict has intensified, whether the current legal framework can accommodate plural understandings of ultimate authority, and how a sustainable balance might be constructed. The study intends not merely to describe existing jurisprudence, but to contribute to the ongoing scholarly debate by offering a structured, comparative and conceptually coherent

analysis. By doing so, it aims to illuminate whether primacy can continue to function as a cornerstone of integration in an era of resurgent constitutional nationalism.

The inquiry is especially relevant at a moment when the Union faces centrifugal political pressures, increasing ideological fragmentation, and declining mutual trust among Member States. The resurgence of sovereignty discourse demonstrates that primacy cannot be sustained through judicial doctrine alone; it must be grounded in a legitimate and mutually accepted constitutional settlement. This dissertation thus positions itself at the intersection of constitutional theory and legal practice, seeking to clarify not only what the law is, but what it must become if the Union is to preserve both its effectiveness and its constitutional credibility.

## 1.1 Actual State of Research and Research Gap

The doctrinal and scholarly discussion surrounding the relationship between national sovereignty and the principle of primacy in EU law has generated a vast body of literature since the 1960s. The early stage of this debate was dominated by the Court of Justice's assertion of absolute and unconditional primacy. In *Costa v ENEL* and *Simmenthal*, the Court conceived primacy as indispensable to the uniform application and effectiveness of Union law, reasoning that any contrary national act must be disapplied by domestic courts irrespective of its hierarchical rank.[1] In this period, the scholarship largely focused on establishing and systematising the normative foundations of EU supremacy, treating it as a functional necessity of the integration process rather than a constitutional controversy.[2]

From the 1990s onwards, however, academic attention shifted from mere doctrinal affirmation to constitutional tension. The rise of constitutional pluralism - as articulated by authors such as Neil MacCormick, Miguel Poiares Maduro and Mattias Kumm - challenged the monist, hierarchical conception of legal authority.[3] Pluralists argued that primacy should be understood as a principle of dialogue and coordination

[1] *Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629.*
[2] R Schütze, *European Constitutional Law* (Cambridge University Press 2012) 45–50.
[3] N MacCormick, *Questioning Sovereignty* (Oxford University Press 1999); M P Maduro, *We the Court* (Hart 1998); M Kumm, 'The Jurisprudence of Constitutional Conflict' (2005) 11 *European Law Journal* 262.

rather than unconditional supremacy.[4] In parallel, national constitutional courts began articulating their own limits to primacy: the German Federal Constitutional Court through its *Solange* and *Maastricht* jurisprudence, the Italian Constitutional Court through *Frontini* and *Granital*, and later the Polish and Hungarian courts through identity-based review.[5] These developments inspired an abundant comparative literature that analyses the constitutional identities of Member States and their interaction with supranational law.[6]

Yet despite this extensive body of work, certain analytical gaps persist. Much of the existing scholarship remains state-centric: it examines conflicts as isolated bilateral confrontations between the CJEU and individual national courts. Less attention has been paid to the systemic dimension of these conflicts − how multiple instances of constitutional resistance collectively reshape the constitutional equilibrium of the Union. Likewise, there is limited inquiry into the normative implications of the recent *PSPP* and Polish Constitutional Tribunal judgments, which have arguably marked a qualitative departure from earlier, cooperative pluralism toward open defiance.[7] Furthermore, few studies integrate doctrinal, comparative and political perspectives into a unified analytical framework that could explain not only the legal but also the institutional and legitimacy consequences of these tensions.

Recent scholarship increasingly recognises that the old binary of "primacy versus sovereignty" fails to capture the evolving constitutional reality of the Union.[8] The gap therefore lies in developing an updated conceptual model capable of explaining how primacy can coexist with constitutionally entrenched national identities without collapsing into constitutional fragmentation. Addressing this research gap requires a comprehensive examination of the interplay between legal doctrine, constitutional theory and judicial practice across Member States - a task this dissertation seeks to undertake.

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[4] N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 Modern Law Review 317.
[5] *Internationale Handelsgesellschaft (Solange I) (BVerfGE 37, 271 [1974]); Frontini v Ministero delle Finanze [1974] 2 CMLR 372; Polish Constitutional Tribunal, K 3/21 (2021).*
[6] M Cartabia, 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community' (1995) 12 *Italian Yearbook of International Law* 133.
[7] BVerfG, *2 BvR 859/15 (PSPP)* [2020]; Polish Constitutional Tribunal, *K 6/21* [2021].
[8] A von Bogdandy and I Venzke, 'On the Functions of International Courts' (2013) 26 *Leiden Journal of International Law* 49; J H H Weiler, 'Epilogue: Towards a Common Constitutional Discourse' in A-M Slaughter and others (eds), *The European Court and National Courts* (Hart 1998) 417.

## 1.2 Research Questions and Objectives

The central problem that motivates this research is how the European Union can maintain the effectiveness of the principle of primacy while simultaneously respecting the constitutional identities and sovereign prerogatives of its Member States. This tension raises a broader theoretical dilemma: can a supranational legal order claim ultimate authority without eroding the democratic legitimacy and constitutional self-determination of the states that constitute it? The purpose of articulating clear research questions is to delineate the scope of inquiry and to provide a framework for coherent analysis throughout the dissertation.

The main research question guiding this study is therefore:

1. How can national sovereignty and the principle of primacy in EU law be reconciled in a manner that preserves both constitutional identity and the effective functioning of the Union's legal order?
2. This overarching question is unpacked through a series of subsidiary questions designed to structure the investigation:
3. What are the legal, historical, and philosophical foundations of the primacy doctrine within the EU constitutional framework?
4. How have the CJEU and national constitutional courts defined and limited the concept of primacy in their jurisprudence?
5. What conceptual models exist for understanding and mediating conflicts between EU law and national constitutions - hierarchical supremacy, constitutional pluralism, or cooperative constitutionalism?
6. To what extent can the principle of sincere cooperation (Article 4(3) TEU) serve as a functional mechanism for resolving sovereignty-based conflicts?
7. Is there a need for formal reform - through Treaty amendment or interpretative evolution - to clarify the constitutional limits of primacy and ensure the legitimacy of the EU legal order?

The objectives of the research derive directly from these questions. First, the dissertation seeks to map the doctrinal evolution of primacy from the early

jurisprudence of the CJEU to the most recent constitutional confrontations.[9] Second, it aims to compare national constitutional responses, particularly those of Germany, Italy, Poland, and Slovakia, as they represent distinct models of constitutional engagement with EU authority.[10] Third, the research intends to evaluate the adequacy of existing theoretical frameworks - especially constitutional pluralism and identity review - in explaining and potentially reconciling these conflicts.[11] Finally, the study aspires to propose a normative model that balances supranational coherence with constitutional diversity, identifying pathways toward a stable coexistence between primacy and sovereignty.

These objectives are both analytical and normative: analytical in that they dissect the structural interaction between national and EU legal systems, and normative in that they seek to suggest a principled approach for maintaining constitutional equilibrium. The anticipated contribution of this research is to refine the discourse on constitutional pluralism by integrating recent jurisprudential and political developments, thereby offering a more dynamic understanding of how the Union's constitutional order evolves under stress. In doing so, the study aspires to bridge the current divide between theoretical abstraction and practical constitutional reality.[12][13]

## 1.3 Hypotheses

The relationship between national sovereignty and the principle of primacy in EU law has long oscillated between accommodation and confrontation. The present research proceeds from the assumption that this tension is structural and enduring, not merely circumstantial or political. Considering the questions and objectives previously

[9] *Case 6/64 Costa v ENEL [1964] ECR 585; Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629.*
[10] *Internationale Handelsgesellschaft* (Solange I) (BVerfGE 37, 271); *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372; Polish Constitutional Tribunal, *K 3/21* [2021]; Hungarian Constitutional Court, Decision 22/2016 (XII.5.).
[11] M Kumm, 'The Jurisprudence of Constitutional Conflict' (2005) 11 *European Law Journal* 262; N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; A von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Authority' (2012) 49 *Common Market Law Review* 1427.
[12] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art 4(3).
[13] J H H Weiler, *The Constitution of Europe* (Cambridge University Press 1999) 253–260.

identified, the study formulates three interrelated hypotheses that will guide the analysis.

*H1. The current formulation of the primacy doctrine is insufficient to prevent recurring constitutional conflicts within the Union.*

The CJEU's jurisprudence, though internally consistent, rests upon an abstract notion of autonomy that neglects the constitutional diversity of Member States.[14] While primacy ensures uniformity of EU law, it does not provide an effective legal mechanism for addressing claims of constitutional identity or ultra vires review. The Court's insistence on absolute supremacy, without explicit textual grounding in the Treaties, has generated a legitimacy gap that allows national courts to reinterpret the doctrine according to their domestic constitutional traditions.[15] The hypothesis presumes that without a redefined or contextualised understanding of primacy, conflicts like the PSPP judgment or the Polish Constitutional Tribunal's 2021 decisions will persist and potentially proliferate.

*H2. National identity clauses and constitutional review mechanisms will continue to challenge absolute notions of EU primacy unless the Union develops clearer legal limits or procedural frameworks for dialogue.*

Article 4(2) TEU enshrines respect for national identities, but the boundaries of this clause remain undefined.[16] National constitutional courts increasingly invoke it as a legal justification for limiting the reach of EU law, particularly where questions of democratic legitimacy or fundamental rights are at stake.[17] This hypothesis posits that the vague and open-ended nature of identity review creates a space of constitutional uncertainty that undermines the predictability of EU law. The research will test whether cooperative mechanisms - such as preliminary reference procedures, judicial dialogue, or structured proportionality analysis - can reconcile these competing claims to final authority.

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[14] *Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.*
[15] M P Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart 1998) 34–39.
[16] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art 4(2).
[17] BVerfG, *2 BvR 859/15 (PSPP)* [2020]; Polish Constitutional Tribunal, *K 6/21* [2021].

*H3. A pluralist or cooperative constitutional model can offer a more sustainable balance than rigid hierarchical supremacy.*

This hypothesis challenges both monism and dualism, suggesting that the future of European constitutionalism lies in mutual accommodation rather than unilateral assertion.[18] Constitutional pluralism, if properly constrained by principles of proportionality and mutual respect, may provide a normative framework that preserves the integrity of both legal orders. The research will explore whether this pluralist approach is compatible with the rule of law and the uniformity of EU law, or whether it risks descending into constitutional fragmentation.[19]

Collectively, these hypotheses express a conceptual shift from absolute hierarchy to conditional authority - where primacy is not denied but reinterpreted as a principle of structured cooperation. The testing of these hypotheses will not rely on empirical data but on systematic doctrinal and comparative analysis. The validity of each will be assessed against both the evolution of case law and the broader theoretical debate on European constitutionalism. Ultimately, the research anticipates that the findings will confirm the necessity of reconceptualising primacy considering plural sovereignty, rather than in opposition to it.

## 1.4 Methodology and Sources

The methodological approach of this dissertation is primarily doctrinal, but it is complemented by comparative and theoretical dimensions to achieve a holistic understanding of the relationship between national sovereignty and the principle of primacy. Because the research concerns the structural interaction of constitutional orders rather than empirical social phenomena, the use of a qualitative, interpretative legal methodology is both appropriate and necessary. The study thus seeks to construct normative and analytical arguments through the examination of primary legal materials, judicial decisions, and academic commentary.

[18] M Kumm, 'The Jurisprudence of Constitutional Conflict' (2005) 11 *European Law Journal* 262, 284.
[19] N Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373.

### 1.4.1 Doctrinal Legal Method

The core of the analysis relies on **doctrinal legal research**, which involves the systematic study of the sources of law and judicial reasoning to clarify the content, scope, and implications of the principle of primacy.[20] This method is particularly suited to EU constitutional law, where the authority of legal norms derives largely from jurisprudence and interpretative practice rather than explicit constitutional text.[21] The doctrinal approach allows the researcher to trace the development of primacy through key judgments - from *Costa v ENEL* to *PSPP* − and to examine how national constitutional courts have responded to or resisted these interpretations. The focus is not merely descriptive: the study aims to evaluate the coherence, consistency, and legitimacy of the competing doctrines of authority that have emerged.

### 1.4.2 Comparative Constitutional Analysis

To capture the diversity of constitutional responses to primacy, the research adopts a comparative methodology.[22] Four Member States are selected as case studies - Germany, Italy, Poland, and Slovakia − because they exemplify distinct trajectories of constitutional engagement with EU law. The German Federal Constitutional Court provides the archetype of conditional acceptance through the *Solange* and *Maastricht* jurisprudence; Italy represents a cooperative model rooted in constitutional dialogue; Poland and Slovakia illustrate more recent forms of constitutional resistance grounded in claims of national identity.[23] By comparing these systems, the study seeks to identify common patterns and structural divergences in how national sovereignty is reconciled (or fails to be reconciled) with the primacy doctrine.

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[20] T Hutchinson, 'Doctrinal Research: Researching the Jury' in D Watkins and M Burton (eds), *Research Methods in Law* (Routledge 2013) 7.
[21] *Case 6/64 Costa v ENEL [1964] ECR 585.*
[22] K Zweigert and H Kötz, *An Introduction to Comparative Law* (Oxford University Press 1998).
[23] *Internationale Handelsgesellschaft* (Solange I) (BVerfGE 37, 271 [1974]); *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372; Polish Constitutional Tribunal, *K 3/21* [2021]; Hungarian Constitutional Court, Decision 22/2016 (XII.5.).

### 1.4.3 Theoretical and Normative Framework

In addition to doctrinal and comparative analysis, the research draws upon **constitutional theory** to interpret the broader implications of sovereignty–primacy conflicts. The frameworks of constitutional pluralism, legal monism, and dualism serve as theoretical lenses through which judicial practice is examined.[24] The aim is not to advocate one model uncritically, but to assess their respective capacities to accommodate the realities of European integration. The normative dimension of the research emerges through this theoretical reflection: the study ultimately seeks to propose a model of "structured constitutional pluralism" that preserves the functional integrity of EU law while recognising the constitutional autonomy of Member States.

### 1.4.4 Sources

The study utilises a wide range of **primary and secondary sources**. Primary sources include:

- Treaties: The Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), and the Charter of Fundamental Rights.
- Case law: judgments of the CJEU (e.g., *Costa v ENEL*, *Simmenthal*, *Melloni*, *PSPP*) and leading decisions of national constitutional courts (BVerfG, Corte Constituzionale, Polish and Hungarian Constitutional Tribunals).
- Institutional documents: Commission communications, Council opinions, and European Parliament resolutions addressing rule of law and constitutional identity issues.

Secondary sources comprise academic monographs, journal articles, and commentaries from leading scholars such as J.H.H. Weiler, Miguel Poiares Maduro, Armin von Bogdandy, and Monica Claes.[25] The combination of these sources ensures

[24] N MacCormick, *Questioning Sovereignty* (Oxford University Press 1999); N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317.
[25] J H H Weiler, *The Constitution of Europe* (Cambridge University Press 1999); M P Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart 1998); A von

both depth and breadth of analysis, facilitating a multidimensional exploration of the primacy – sovereignty nexus.

### 1.4.5 Research Design and Limitations

The research design follows a **qualitative, interpretative structure** rather than a hypothesis-testing empirical framework. Conclusions are derived from logical reasoning, textual interpretation, and comparative evaluation. Although the approach does not employ quantitative data, it maintains scientific rigour through transparency in the use of sources and consistency in analytical reasoning.[26] Limitations are acknowledged, especially regarding the subjectivity inherent in normative interpretation, but these are mitigated through the systematic referencing of authoritative jurisprudence and academic consensus.

## 1.5 Scope of the Research and Limitations

This dissertation confines its analysis to the constitutional and legal dimensions of the relationship between national sovereignty and the principle of primacy in European Union law. Its scope is deliberately defined to maintain conceptual coherence while ensuring sufficient depth to address the core research questions. The study does not aspire to provide an exhaustive account of every doctrinal variation across the Member States; rather, it focuses on selected jurisdictions and key jurisprudential developments that are most illustrative of the sovereignty-primacy conflict.[27]

Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say' (2008) 6 *International Journal of Constitutional Law* 397.
[26] Epstein L and King G, 'The Rules of Inference' (2002) 69 *University of Chicago Law Review* 1.
[27] Claes M, *The National Courts' Mandate in the European Constitution* (Hart 2006) 12–14.

### 1.5.1 Substantive Scope

The research is primarily concerned with the constitutional interaction between the European legal order and national legal systems. It examines how the doctrine of primacy, as developed by the CJEU, interfaces with the constitutional principles, identity clauses and judicial doctrines of the Member States.[28] The analysis encompasses the historical emergence of primacy, its doctrinal consolidation through landmark cases such as Costa v ENEL, Simmenthal, and Melloni, and the subsequent resistance posed by national constitutional courts in decisions such as Solange, Frontini, PSPP, and the Polish Constitutional Tribunal's 2021 rulings.[29]

While these cases are situated in differing constitutional contexts, they collectively exemplify the central legal dilemma of this dissertation: whether and how supranational primacy can coexist with national constitutional sovereignty.[30] The research therefore, focuses on the structural and normative aspects of this tension, avoiding purely political or sociological explanations that, while relevant, fall outside the legal-theoretical focus of the work.[31] Political science analyses of integration, theories of federalism, or empirical studies of compliance are acknowledged but not explored in detail, except where they directly inform the legal interpretation of sovereignty or legitimacy.

### 1.5.2 Geographical and Jurisdictional Scope

The comparative component of the dissertation is confined to four Member States - Germany, Italy, Poland and Slovakia - selected for their representative constitutional positions. Germany and Italy illustrate the "classical" constitutional dialogue tradition, in which national courts have asserted conditional acceptance of

[28] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art 4(2); *Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.
[29] *Case 6/64 Costa v ENEL [1964] ECR 585; Case C-399/11 Melloni EU:C:2013:107; BVerfG, 2 BvR 859/15 (PSPP) [2020]; Polish Constitutional Tribunal, K 6/21 [2021].*
[30] M Kumm, 'The Jurisprudence of Constitutional Conflict' (2005) 11 *European Law Journal* 262.
[31] J H H Weiler, *The Constitution of Europe* (Cambridge University Press 1999) 243–248.

EU law while remaining committed to integration.[32] Poland and Slovakia, by contrast, represent a more recent and assertive posture of constitutional resistance, often justified through appeals to identity, democracy, or constitutional self-defence.[33] The inclusion of these jurisdictions allows for a meaningful comparative spectrum: from cooperative constitutionalism to defensive sovereignty.

Although other Member States, such as France or Denmark, have also contributed to the jurisprudential landscape of primacy, their omission here reflects a necessary methodological limitation rather than a substantive oversight.[34] The focus on four case studies ensures analytical depth and coherence while preventing excessive dispersion of argumentation.

### 1.5.3 Temporal Scope

The temporal range of the research extends from the foundational period of European integration, the early 1960s, when the Costa v ENEL judgment was delivered, to the most recent constitutional confrontations of the 2020s.[35] This longitudinal approach allows for the identification of patterns and transformations in both the CJEU's and national courts' reasoning, thereby situating current developments within a broader historical and conceptual continuum.

### 1.5.4 Limitations

Every research design entails certain limitations, and this study acknowledges them explicitly. First, the reliance on doctrinal and comparative analysis necessarily limits empirical verification; the conclusions drawn are interpretative and normative rather

[32] *Internationale Handelsgesellschaft (Solange I) (BVerfGE 37, 271 [1974]); Frontini v Ministero delle Finanze [1974] 2 CMLR 372.*
[33] Hungarian Constitutional Court, Decision 22/2016 (XII.5.); Polish Constitutional Tribunal, *K 3/21* [2021].
[34] Danish Supreme Court, *Ajos Case* [2017] 1 CMLR 45.
[35] *Case 6/64 Costa v ENEL* [1964] ECR 585 to BVerfG, *2 BvR 859/15 (PSPP)* [2020].

than statistically demonstrable.[36] Second, while the research endeavours to represent national jurisprudence accurately, translation, contextual variation and differing constitutional terminologies may affect interpretative precision. Third, the study focuses primarily on the judicial and legal-theoretical dimensions of the sovereignty - primacy relationship, leaving aside non-judicial political dynamics such as public opinion or party politics. Finally, as the jurisprudence of both the CJEU and national courts continues to evolve, some findings may require future revision considering new developments.[37]

Nevertheless, these limitations do not undermine the validity of the analysis. On the contrary, by delineating clear boundaries, the study enhances its methodological transparency and theoretical coherence. The scope of this dissertation thus remains purposefully calibrated to enable a rigorous and conceptually consistent exploration of the legal and constitutional dimensions of sovereignty and primacy.

[36] T Hutchinson, 'Doctrinal Research' in D Watkins and M Burton (eds), *Research Methods in Law* (Routledge 2013).
[37] A von Bogdandy and I Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press 2014) 5–9.

# 2 STATE SOVEREIGNTY AS A FUNDAMENTAL PILLAR OF INTERNATIONAL RELATIONS

The foundation of sovereign states is rooted in contemporary international law, yet the notion of "sovereignty" is a relatively recent development. During the fourteenth century, the Upper-Italian city-states rejected the then-dominant hierarchical feudal worldview, which placed the Pope, the Roman/German Emperor, or both at its pinnacle through divine right. These city-states asserted their independence from higher authority, driven primarily by their burgeoning economic success.[38] It is significant to note that economic factors were the main impetus behind this assertion of sovereignty.[39] Despite the growing acceptance of the concept, the debate over sovereignty continued for centuries, often fuelled by religious conflicts.[40] It was not until the Treaties of Westphalia in 1648 that the principle of state equality, defined by the territory ruled by each state, was solidified as a cornerstone of international law.[41] Consequently, sovereignty became a defining feature of the modern political landscape, and the presence of sovereign states is an assumed premise of international law.[42]

But what does sovereignty involve? It is generally understood as exercising supreme authority over a specific territory and its people by an autonomous entity representing the state's will.[43] This concept encompasses two key dimensions: external independence and internal supremacy.[44] Although sovereignty signifies an exclusive source of authoritative actions, it does not define a state's power scope, which can vary over time and across different ideologies.[45] Sovereignty is often described as the ultimate political authority that underpins the modern international system, endowing

[38] P Anderson, *Lineages of the Absolutist State* (Verso 1974) 32–34.
[39] Q Skinner, *The Foundations of Modern Political Thought, Volume 1: The Renaissance* (Cambridge University Press 1978) 13.
[40] F H Hinsley, *Sovereignty* (Cambridge University Press 1986) 82–83.
[41] A Osiander, *The States System of Europe, 1640–1990: Peacemaking and the Conditions of International Stability* (Oxford University Press 1994) 63.
[42] S D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 4.
[43] D Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton University Press 2001) 16–17.
[44] R H Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge University Press 1990) 27–28.
[45] S D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 5.

states and governments with their powers.[46] This term has posed numerous challenges regarding its application, definition, defence, understanding, and utility among scholars, practitioners, policymakers, jurists, and lawyers.[47] At its core, sovereignty can be seen as the ultimate control over both people and territory, typically held by a government or a set of institutions tasked with managing state affairs.[48]

The term "sovereignty" serves as a compelling example of how language functions as a dynamic tool that shapes and transforms human reality. Examining this term from a linguistic standpoint is crucial because language has the power to represent, create, and alter our understanding of reality.[49] It also influences the collective consciousness of society, making language a tool for molding social perceptions.[50] Thus, shifts in the meaning of "sovereignty" reflect broader social changes over time. In literature, this term is often used synonymously with the idea of a state's ability to act as it wishes within its own territory, free from external constraints or interference.[51]

Jean Bodin is recognized as a key figure in the development of the concept of sovereignty. In his seminal work, *Six Livres de la République*, he introduced the idea of sovereignty, emphasizing its highest, absolute, and perpetual nature within a Commonwealth over its citizens and subjects.[52] From his perspective, two fundamental characteristics of sovereignty emerge: its absoluteness and its perpetuity.[53] He argued that sovereignty entails no restrictions in terms of authority, duration, or power.[54] Such sovereignty arises from the distinction between ruler and subject; if a ruler were to share power with the subjects, they would forfeit their sovereign status.[55] Bodin also addressed the role of customs, noting that while some claim customs hold nearly the same legal force as laws, they are only legally effective if acknowledged by the sovereign prince, who may choose to legislate them by adding his endorsement.[56] The approval of subordinate bodies is unnecessary, as ultimate

[46] H Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press 1977) 8–10.
[47] S D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 5.
[48] Ibid 4-5.
[49] Q Skinner, *The Foundations of Modern Political Thought, Volume 1: The Renaissance* (Cambridge University Press 1978) 13.
[50] J L Austin, *How to Do Things with Words* (Clarendon Press 1962) 11–12.
[51] F H Hinsley, *Sovereignty* (Cambridge University Press 1986) 119-120.
[52] J Bodin, *Six Livres de la République* (Jacques Du Puys 1576) 123–125.
[53] Ibid 126-128.
[54] Ibid 130.
[55] Ibid 133-134.
[56] Ibid 137.

authority resides with the sovereign at the top of the authority pyramid, most appropriately represented by a monarch.[57]

The definition of "domestic sovereignty," strongly advocated by Hobbes and Bodin, refers to the actual control and authority a government wields within its state.[58] "Interdependence sovereignty," a more contemporary concept advocated by globalization supporters, refers to a government's ability to manage the movement of goods, capital, people, diseases, ideas, and environmental factors.[59] The third form, "international legal sovereignty," involves a state being recognized by other governments and granted legal rights associated with statehood, such as equality before the law, diplomatic immunity, and membership in international organizations.[60] This type of sovereignty is a frequent focus for international law scholars.[61]

The Montevideo Convention on Rights and Duties of States, established in 1933, provides a widely accepted definition of sovereignty. Article 1 outlines four criteria for an entity to be considered a state: (a) a permanent population, (b) a defined territory, (c) a government, and (d) the capacity to engage in relations with other states.[62] This definition is recognized as the most commonly accepted interpretation of statehood, despite the Convention's limited signatory status.[63]

Sovereignty is a fundamental principle of international law, signifying a state's absolute power and autonomy within its borders. It encompasses the right to self-governance over its citizens, assets, and decision-making processes.[64] The core elements of sovereignty include statehood, non-interference, and state equality.[65] Sovereignty underpins international law by ensuring that all states are treated equally, regardless of their size, population, or economic power.[66] This principle guarantees that states can equally participate in international forums, treaties, and legal agreements.[67] Emmerich de Vattel, a prominent international law scholar, asserted that

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[57] Ibid 139.
[58] T Hobbes, *Leviathan* (Penguin Classics 1982) 176–178.
[59] S D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 10–12.
[60] Ibid 13.
[61] Jackson 31-32.
[62] Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (Montevideo, 26 December 1933) art 1.
[63] Jackson 29.
[64] Bull 12-14.
[65] Ibid 13.
[66] Philpott 30.
[67] Hinsley 147.

"Every nation, every sovereign and independent state, deserves consideration and respect because it is an integral part of the human society, independent of any earthly power, and represents a collective of individuals greater than any single person. The sovereign embodies the nation's collective majesty. No individual, regardless of their freedom or independence, can be equated with the sovereign, who represents a unified multitude. Nations and sovereigns, therefore, are obliged to uphold and respect their dignity, which is crucial for their safety and tranquillity".[68]

Several characteristics define state sovereignty. Firstly, it is embodied by the principle of state equality, which means that states have equal legal standing and rights under international law, irrespective of their size, economic strength, or population.[69] This principle is foundational for diplomatic relations, negotiations, and the establishment of international organizations.[70] Secondly, state sovereignty includes the principle of non-interference, which protects states from external influence in their internal affairs, allowing them to manage their social, political, and economic systems independently.[71] The third aspect is the exclusive authority of states, which grants them the power to exercise legal, political, and administrative control within their borders.[72] This includes decision-making, resource allocation, and law enforcement, enabling effective governance and protection of citizens' rights and interests.[73] Carl Schmitt described sovereignty as the ability of the sovereign to produce and guarantee the situation, controlling the most recent decisions.[74] The essence of sovereignty lies in defining it legally as a monopoly of decision-making rather than merely a monopoly of compulsion or leadership.[75]

Moreover, the implications of state sovereignty extend to several additional aspects. As a fundamental principle of international law, sovereignty is expressed through legal frameworks that allow states to enter into agreements, treaties, and conventions voluntarily.[76] This facilitates cooperation, dispute resolution, and the pursuit of

[68] E de Vattel, *The Law of Nations* (J Newbery 1760) 8.
[69] Jackson 33.
[70] Hinsley 156.
[71] Ibid.
[72] Krasner 14-16.
[73] Ibid.
[74] C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 1985) 5.
[75] Ibid 6-7.
[76] Bull 15-16.

common goals like human rights, trade, and environmental protection.[77] National identity is another crucial aspect, enabling states to preserve their unique cultures and values.[78] Sovereignty also provides states with the ability to self-determine, allowing citizens to choose their political future and pursue their collective goals.[79] Furthermore, sovereignty forms the foundation of international relations, where interactions among states are governed by the principle of sovereign equality.[80] This principle fosters stability, order, and the peaceful resolution of disputes on the global stage.[81] Despite the challenges and limitations faced by sovereignty in the interconnected world of today, the balance between maintaining sovereignty and participating in global governance remains a complex and evolving issue in international relations.[82]

The *Blackwell Encyclopaedia of Political Thought* defines state sovereignty as a power or authority possessing supreme attributes, whether held by an individual or a group, which allows for definitive decision-making and dispute resolution within the political hierarchy.[83] A person or entity is deemed sovereign if they are free from external control, have absolute authority over their internal affairs, and hold dominance within their jurisdiction.[84] To fulfil these criteria, several characteristics must be met: supreme power, which implies the right to issue final decisions; final power, referring to the capacity to make ultimate decisions in the hierarchy of sovereign power; the impact of decisions, which is the general outcome of such decisions; and autonomy, meaning decisions are made independently without external influence.[85] Sovereignty allows each state to independently determine its governance, population, constitutional organization, and interactions with other entities.[86] The relativity of sovereignty is historically rooted, as states have always had some degree of sovereignty in certain areas while remaining less sovereign in others; this relativity arises from the fact that

[77] Philpott 43.
[78] Ibid 45.
[79] Krasner 19.
[80] Jackson 36.
[81] Ibid 38.
[82] Bull 17.
[83] D Miller (ed), *The Blackwell Encyclopaedia of Political Thought* (Blackwell Publishing 1987) 518.
[84] Ibid 519.
[85] Ibid 520.
[86] Ibid.

sovereignty has never been fully practiced in its ideal form.[87] Indicators of sovereignty or sovereign power include:

1. Independence from other state powers or public authorities of other institutions;[88]
2. The presence of a unified state power or exclusivity;[89]
3. Unrestricted applicability.[90]

Thus, sovereignty represents the highest authority within a specific territory, embodying its most crucial dimension.[91] Each aspect of this definition underscores a vital component of understanding sovereignty. Primarily, the bearer of sovereignty wields power, which includes both the right to command and the expectation of compliance.[92] The concept of "right" here signifies legitimacy, derived from accepted sources such as natural law, divine right, inheritance, constitutional law, or international law.[93] If sovereignty pertains to power, it represents the ultimate form of power, not merely ordinary power.[94] Territoriality is a key element of sovereignty, defining the membership of a community within specific borders.[95] This concept of "membership" may not always align with personal identification, as a sovereign state's borders do not necessarily define a nation, which might encompass various identities.[96]

In the modern context, sovereign entities exercise absolute authority within their defined territories.[97] However, state sovereignty does not imply absolute arbitrariness.[98] F. Weyer suggests that state sovereignty is expressed through the domestic legal system, where the law binds the state and necessitates adherence to legal norms, reflecting the rule of law.[99] Despite this, states must also adhere to international legal standards.[100] According to Pavlíček, power sovereignty is the most

[87] Ibid 521.
[88] Ibid.
[89] Ibid 522.
[90] Miller 65.
[91] Ibid.
[92] Hinsley 167.
[93] Ibid 169.
[94] Ibid 171.
[95] Ibid 172-173.
[96] Ibid 174.
[97] Krasner 23.
[98] Ibid 25.
[99] F Weyer, *Constitutional Theories of State Sovereignty: A Study in the History of Political Ideas* (CUP Archive 1929) 45-46.
[100] Ibid 47.

significant form of power among others, with the state's sovereign power being the highest and most authoritative within its jurisdiction.[101] State sovereignty stands as the supreme power, requiring all other powers within its territory to recognize and respect it.[102]

## 2.1 Stronger state for a stronger international cooperation?

International law is fundamentally based on consent. No state can be held accountable for a rule of international law (except ius cogens) unless it has consented to the rule via a treaty or by its actions and public declarations. We denote partnerships in which consent is expressed as sovereign party connections. The sovereign must consent to adhere to a certain international legal norm.[103]

The fundamental principles underlying contemporary international law, encompassing its theories and practices, are the notions of sovereignty and statehood. These two concepts are essential for international law, as its foundation is in the self-established regulations among sovereign states. International law delineates inter-state law, when a state is seen as a sovereign territorial unit. The contemporary theory of international law has an insurmountable challenge in coherently and rationally defining the concepts of state and sovereignty.[104]

What constitutes a state? This is arguably the most debated subject among legal scholars, alongside "What is law?". These inquiries are profoundly interrelated because, as asserted by legal positivists, the state is both the origin of law (i.e., a fundamental legislator) and the subject of law, as it is subject to its governance. This assertion is applicable to the relationship between international law and the state. If the legal community governed by the rule is a state, such evidence is essential to ascertain if the rule is international. To answer the question definitively, we must first ascertain if the pertinent regulation is global. The definition of "state" is interconnected with the definition of "international law," which is characterized by the term "state."

[101] V Pavlíček, *Theory of State Sovereignty* (Charles University 1998) 23–24.
[102] Ibid.
[103] R A Brand, 'External Sovereignty and International Law' (1995) 18(5) *Fordham International Law Journal* 1685.
[104] G Distefano, *Fundamentals of Public International Law: A Sketch of the International Legal Order* 89.

Consequently, a circular definition would be self-referential. The outcome is that the definition is devoid of content regarding the subject.[105] Certain scholars employ the tradition of state personification to address the challenging endeavour of defining a state. In his book "Law of Nations" ("Prawo narodów"), Polish professor Ludwik Ehrlich elucidates the personification of states as a fundamental occurrence in international law. Ehrlich posits that the state is fundamentally regarded as a natural person endowed with free will and the capacity to exercise it within its jurisdiction. The sovereign king was supplanted by the state. The human mind often conceptualizes the state as a superhuman being, like to Leviathan, rather than as an abstraction. Interactions among states are frequently perceived as relationships between sentient beings.[106] Max Weber saw the state as comprising three fundamental elements: territory, population, and sovereignty, with sovereignty serving as the foundational principle that assumes the state's exclusive authority to wield force.[107]

Numerous conflicting theories in international law aim to elucidate the relationship between international law and domestic law. These theories specifically seek to determine whether legal standards, international or national, should prevail in cases of conflict between these norms. Proponents of the dualistic approach argue that international and domestic law are distinct legal systems, lacking any direct link. The two legal systems possess distinct sources, subjects − primarily states and international organizations for international law, and private individuals, as well as natural and legal persons for national law - and different regulatory objects, namely interstate relations for international law and intrastate relations for national law. The dualistic approach, favoured by international legal specialists, does not explicitly address whether legal rules, whether international or national, should be applied in the event of a dispute between them. Theoretically, there cannot be a contradiction between international law and national law, as they represent two independent legal systems governing different social relations. Conversely, proponents of dualism would argue that only national legislation, including constitutional provisions, can facilitate the application of international law within the framework of national law. The monistic approach

[105] A Ross, *A Textbook of International Law: General Part* 12.
[106] O Merezhko, 'The Mystery of the State and Sovereignty in International Law' (2019) 64(1) *Saint Louis University Law Journal* 25.
[107] K Newton and J W van Deth, *Foundations of Comparative Politics: Democracies of the Modern World* 22.

posits that international and national law constitute a singular legal system, represented by a hierarchically structured pyramid of legal rules. The primary concern is determining which category of international or local law should occupy the apex of the legal hierarchy. Kelsen's legal philosophy integrates international and domestic legal systems, prioritizing international legal principles. Kelsen posits that within this hierarchy of legal norms, subordinate legal norms derive their validity from superior legal norms, resulting in a singular fundamental standard that is "hypothetical" rather than "real." The precise nature of the "basic norm" remains ambiguous, as Kelsen initially positioned "pacta sunt servanda," a fundamental principle of international law, at the apex of the legal hierarchy before formulating the illogically circular "basic norm," which asserts, "States ought to act as they have traditionally acted." Nevertheless, the constitution functions as "the basic norm" for national court judges, even within legal systems deemed "monistic," where national law takes precedence in instances of conflict between international treaties and domestic legislation.

The United Nations maintains a longstanding perspective on national sovereignty, as seen in its founding charter and numerous resolutions. The UN acknowledges state sovereignty as a core principle in international relations, highlighting the equality and autonomy of all member nations.[108] The UN Charter, established in 1945, functions as the principal document of the United Nations. Article 2(1) of the Charter asserts: "The Organization is founded on the principle of the sovereign equality of all its Members."[109] This article asserts that all UN member nations possess equal sovereignty and have an equivalent influence in the organization's decision-making procedures. Article 2(4) underscores the significance of state sovereignty by asserting that member states must abstain from threatening or employing force against the territorial integrity or political independence of any state.[110] The UN Declaration on concepts of International Law regarding Friendly Relations and Cooperation among States delineates essential concepts that regulate state interactions, notably the notion of state sovereignty. It underscores that each state has the freedom to determine its political, economic, social, and cultural systems free from foreign intervention. The

[108] A Abhulimhen-Iyoha, 'Humanitarian Intervention and Territorial Sovereignty: Two Incompatible Principles in International Law' (2020) 1 *Law and Social Justice Review* 16.
[109] Charter of the United Nations Art 2(1).
[110] Ibid Art 2(4).

declaration emphasizes the significance of non-interference in the internal matters of other nations.[111]

A fundamental concept underpinning the enhancement of contemporary international law is undoubtedly national sovereignty. Mazilu acknowledged that, per contemporary international law, state sovereignty ought to serve as the political and legal foundation of a state's international personality. Regardless of size, strength, or developmental stage, it is the prerogative of all states. The sovereignty of the state is the paramount element of its authority, necessitating both internal and exterior dominance. The adage, "Some freedom ceases where the freedom of others commences," underscores the necessity for competing sovereignties to ensure legal equality of sovereignty in international relations, stemming from the principle that each state must possess equivalent sovereign authority in managing international affairs.

Despite initial appearances of contradiction, enhancing state sovereignty can be advantageous for international cooperation, since it can promote and sustain such collaboration among states. Primarily, it influences mutual respect and consent. The principle of mutual respect among sovereign states is reinforced by robust national sovereignty.[112] A nation that possesses confidence in its sovereignty and governance of domestic affairs is more predisposed to engage in cooperation with other nations founded on mutual agreement and advantage. Consequently, it influences the state's voluntary engagement in foreign matters. Reinforcing national sovereignty guarantees that governments participate in international collaboration willingly. When states voluntarily engage in collaborative initiatives, they are more inclined to commit to the success of those efforts and actively offer their resources and skills. Robust and autonomous states are essential for equitable partnership. Upholding national sovereignty strengthens the concept of equitable collaboration in global cooperation.[113] Every sovereign state is considered an equal participant in the global community, irrespective of its size or economic strength, promoting inclusivity and equity in cooperative endeavours. Robust national sovereignty enables nations to formulate and execute strategies customized to their specific needs and contexts. This

[111] United Nations General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States* (1970) UN Doc A/RES/2625(XXV) https://undocs.org/A/RES/25/2625 accessed 15 June 2023.
[112] D Mazilu, *Dreptul Internațional Public/Public International Law*, vol I 130.
[113] J Maftei, 'Sovereignty in International Law' (2015) 11(1) *Acta Universitatis Danubius Juridica* 56.

adaptability allows them to engage in international collaboration without relinquishing their own interests or undermining their home agendas. Enhanced sovereignty enables states to negotiate more effectively in international forums.[114]

Their capacity to articulate their rights and preferences can facilitate more collaborative and productive conversations, culminating in accords advantageous to all parties concerned. Nations can effectively tackle internal concerns, thereby aiding in the resolution of global challenges. Nations proficient in governing their internal matters are more adept at cooperating on common challenges, like climate change, terrorism, and public health emergencies. Robust national sovereignty can also stimulate regional collaboration. When adjacent nations honour each other's autonomy and sovereignty, they are more inclined to participate in regional initiatives to tackle shared challenges and foster regional stability. The approach of reinforcing national sovereignty also influences the acknowledgment of varied viewpoints. It recognizes the variety of values, cultures, and political systems globally. This acknowledgment cultivates an atmosphere of tolerance and comprehension, vital for effective international collaboration. Respecting state sovereignty helps avert unneeded tensions and conflicts that may come from perceived outsider intrusion. Although enhancing national sovereignty may facilitate international cooperation, it is crucial to maintain equilibrium and acknowledge that certain challenges necessitate collective action and collaboration. Countries must devise methods to participate in international initiatives while preserving their sovereignty and maintaining their national interests.[115]

As previously said, reinforcing state sovereignty continues to be a paramount concern for numerous nations today. Enhancing or pursuing a state's sovereignty presents distinct advantages. The protection of national interests must be prioritized above all else. Countries can more effectively safeguard their national interests and tailor policies to align with the specific needs and aspirations of their populations by strengthening state sovereignty. This sovereignty allows nations to make suitable decisions for their cultural, economic, and political contexts.[116] Moreover, robust state

[114] J Goldsmith, 'Sovereignty, International Relations Theory, and International Law' (2000) 52(4) *Stanford Law Review* 959–986.
[115] A Lorca, 'Sovereignty Beyond the West: The End of Classical International Law' (2011) 13(1) *Journal of the History of International Law* 61.
[116] Goldsmith 959-986.

sovereignty aids in safeguarding a nation's identity and cultural heritage. It enables nations to preserve their languages, customs, and historical legacies, cultivating a sense of togetherness and pride among their citizens. Robust state sovereignty empowers governments to implement programs effectively and with credibility.

Consequently, exemplary governance, political stability, and effective decision-making processes can be achieved. Enhancing state sovereignty facilitates the establishment and preservation of robust defence capabilities to protect territorial integrity and national security. It enables them to address external threats while preserving internal cohesion. Domestic industries may receive support, trade can be restricted, and economic policy can foster self-sufficiency. This financial independence can diminish reliance on external entities while concurrently enhancing resilience to economic disruptions. Countries possessing significant state sovereignty can establish targeted economic and social development initiatives. It enables them to concentrate on objectives such as education, healthcare, and infrastructure to attain sustained success. Moreover, a robust sense of sovereignty empowers a nation to participate in international negotiations from a position of strength. This negotiating leverage can provide advantageous results in trade agreements, diplomatic relations, and other global interactions. It also enables nations to refuse external interference in their internal matters. It allows them to uphold their national principles and interests while preserving autonomy. State sovereignty is essential for the advancement of democratic governance. This will enable individuals to participate in decision-making, assert their political rights, and hold their governments accountable without external interference. Ultimately, adherence to state sovereignty fosters reciprocal respect and harmonious coexistence among nations. It fosters peaceful dialogue, diplomacy, and conflict resolution, all of which enhance global stability.[117]

A comprehensive plan that acknowledges the benefits of international cooperation while preserving a nation's identity, interests, and autonomy is essential for enhancing state sovereignty. Countries must address the challenges of a globalized world while maintaining sovereignty and implementing policies that advantage their citizens. It is important to recognize that certain areas are generally "shared," indicating they cannot

[117] P Czubik, 'The Protection of Cultural Heritage in International Law' in A Raisz (ed), *International Law from a Central European Perspective* 105.

be solely entrusted to the state. An illustration of this is the governance of cyberspace and cybersecurity. State sovereignty in cyberspace can be preserved by enhancing cybersecurity capabilities and instituting data protection regulations; however, collaborative efforts with international organizations are essential, as these matters transcend territorial and governmental boundaries, extending beyond the jurisdiction of individual States.[118] A state can enhance its influence by adopting a stable approach to international relations, allowing it to articulate its interests while remaining receptive to collaboration. Consequently, nations can participate effectively in regional and global forums while upholding their core national ideals and values.

[118] R Kwiecień, 'In Defence of the Idea of State Sovereignty in International Law' (2004–2005) 27 *Polish Yearbook of International Law* 101–103.

# 3 KEY ATTRIBUTES OF THE MODERN STATE VIEWED THROUGH THE LENS OF SOVEREIGNTY

The modern state is described by several attributes, such as democratic, constitutional or social. These concepts, however, complement one another. A state governed by the rule of law may above all be regarded as a state in which law stands above the state, and state power is exercised by lawful means and within the limits of the law. In the literature,[119] we can also encounter an understanding according to which a state governed by the rule of law is "such a system of government in a country within which the state and state bodies may act only on the basis of law and only in a manner laid down by law." The sources of the concept of the state governed by the rule of law are the theories of the social contract and the natural rights of man.

Law is determined by state power and is an expression of the rational will of the state. Modern legal theory denotes state power as sovereignty. Thus, if we speak of state power, we also mean sovereignty. In the literature[120] state power is in this connection also referred to as the most important kind of power. Law is a formally published social normative and regulative system, which is created or recognized by the state to achieve certain social purposes and to assert and protect certain general social interests, and its norms are enforceable by state power. The principle of legality, that is lawfulness, is ranked among the basic principles of a state governed by the rule of law. The question of legitimacy and illegitimacy of state functions is at the same time a question of the quality of such a state.[121] The application of the principle of legality is a factor that shapes the character of state power. In a state governed by the rule of law, the legitimacy of power should be fulfilled above all through the processes of the creation and application of law.

In the case of legality, it is therefore a question of the principle of the general binding force of law. In a modern democratic society, the requirement of compliance with the law should be observed, and this requirement should also apply to state authorities, including those that create law. Parliament is the highest representative of the sovereignty of the state, legitimized by elections. In making laws, Parliament should

[119] A Nesvadba and A Zachová, *Teória štátu a práva* (Akadémia Policajného zboru 2005) 71.
[120] E Ottová, *Teória práva* (Heuréka 2006) 67.
[121] J Pinz, 'Právnost štátních funkcí v moderním právním státe' (2006) 77(3) *Právny obzor* 283.

comply with the constitution and procedural regulations, which is a requirement formulated as the principle that state bodies are bound by valid law.[122] Law is created by state bodies, and after it has been created it in a sense emancipates itself from its creator. Nonetheless, we may attribute to law a certain autonomy and separateness from the state, which manifest themselves in the fact that a legal norm formally persists even when the body that adopted it has changed or ceased to exist. State bodies must be bound by strict legal rules even in the implementation of coercion. They cannot, at their own discretion, apply any coercion at any time whatsoever, but only such coercion as is carried out in cases laid down in advance by law and in a manner prescribed by law. In this way, law guarantees a sphere of freedom into which it is not possible to intervene by any coercion that is not based on law.[123] From this it follows that the power of the state stems from and is based on political legitimacy and on the legality of the exercise of that power. Political legitimacy rests on the recognition of the authority of a given subject of politics by society, and at the same time expresses the trust that fills the relationship between the subject of power and society.

In this chapter we will attempt, from among the multitude of publications dealing with the modern state and its features, with state power and sovereignty and its development, to select for the purposes of our topic those key milestones in the history of law that are essential in terms of content. The first part of this chapter is devoted to the features of the modern state, and the second part presents a historical overview of sovereignty, focusing on stages in the development of modern sovereignty and a brief analysis of the most important connections.

## 3.1 Features of the Modern State

The states of Western Europe changed, by their constitutions and legislation, the content of the institution of ownership, the content of the owner's entitlements, and enforced, in place of the property controlling and egoistic profit-making purpose of ownership, its social functions, so that it would at the same time serve the owner's profit. Precisely in this there was a systemic, not revolutionary but evolutionary,

[122] D Krošlák and D Šmihula, *Základy teórie štátu a práva* (IURA Edition 2013) 95.
[123]Krošlák and Šmihula 95.

revolutionary leap also from the point of view of the welfare of society and the public good. In these legal forms, civilization entered the trajectories of the transition from an industrial society to a post-industrial and postmodern society. It was a development from political democracy to its extension into the economic and social fields.[124] Society and the state in our territory have, in the course of their existence, undergone diverse changes that have influenced the entire legal system of our country, as well as the formation of state power and the state itself as such. At present we are living in the era of the information society, also described as a globalizing or modern society, which bears the traits of a state governed by the rule of law and of a democratic state. In a democratic state, power is derived from the people, from the citizens, who are understood as the constitutionally enshrined source of power in the given state.

At the end of the eighteenth and in the first half of the nineteenth century, the concept of the state governed by the rule of law was elaborated on the European continent. The father of the theory of such a state is considered to be Immanuel Kant (1724–1804), despite the fact that he did not actually use the term "state governed by the rule of law." The modern theory of the rule of law state, however, derives from him. The ideas of such a state in nineteenth-century Germany were developed mainly by jurists, especially R. von Mohl and O. Bähr. They perceived the state governed by the rule of law as a safeguard against strong power. A state that has such power as to be able effectively to protect its citizens is also strong enough to oppress them. Their theories place the rule of law state in opposition to the police state and emphasize the idea that state bodies are bound by law and that the state may interfere in the life of individuals only on the basis of the constitution and laws.[125]

The political concept of democracy includes popular sovereignty and the principle of majority rule, as well as human and civil rights. At the same time, it does not provide the individual with either stability or moral certainty. Democracy, however, requires rules and boundaries, because otherwise it may develop tendencies toward the despotism of a democratic mass society. The principle of popular sovereignty implies the idea of the superiority of the citizen over the state, in the form of constitutional

[124] BEŇA, J. 2009. K vývoju práva na Slovensku v rokoch 1948 – 1989. In Zborník z teoretického seminára konaného 26. novembra 2009 v Bratislave. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2009, s. 9.
[125] Krošlák and Šmihula 91.

codifications of human and civil rights. The principle of sovereignty has become a categorical requirement of the formal legal system of modern society. In the past, these rights were considered mostly as natural rights or rights of man. The issue of human and natural rights was already indirectly addressed from the standpoint of ethics and philosophy by Greek thinkers such as Plato and Aristotle. Natural law schools proceeded from the assumption of the existence of unwritten and immutable law, whose origin was connected either with God and divine revelation or with the nature of human reason.[126] Sovereignty in federal forms of state differs from classical sovereignty, because it involves the functional division of sovereignty among the member states, the federation, and in some cases also among supranational integration groupings.[127] From the perspective of international law, a sovereign state means the complete independence of state power from other states. In this context we may mention the observation of J. Grospič, cited by Adamová,[128] that in today's highly internationally organized world, when almost every state, besides being a member of the United Nations, is also a member of many other international organizations, the pure model of the independence of a state's power seems to be only a theoretical fiction.

Internal sovereignty of the state is also possible because in such a state various other subjects determining the behaviour of the individual, toward which he was obliged to show loyalty, have ceased to exist. The position of the state was confirmed by the Peace of Westphalia in 1648, when the state began to be understood as the only sovereign in internal and foreign political matters.[129] Another concept is popular sovereignty, which is expressed through the sovereignty of parliament. Popular sovereignty in democratic states means that citizens, who are the source of power, form the sovereign.[130] In connection with the sovereignty of the people and the effort to develop civic, state and supranational activities for the preservation of vital conditions of humankind, there arises the need to clarify the relationship between the sovereignty of the individual elements of civil society and the sovereignty of the state. Legal theory explains state sovereignty as the supremacy and independence of state power from any

[126] K Adamová, *Úsvit moderního konstitucionalismu* (Avenira 2007) 33.
[127] D Šmihula, *Štát a medzinárodný systém* (Veda 2005) 49.
[128] Adamová 37.
[129] O Krejčí, *Mezinárodní politika* (Ekopress 2001) 234.
[130] Ottová 112.

other power.[131] Parliament, representing the people, is the highest body of legislative power.[132]

The principle of popular sovereignty presupposes strict observance in the functioning of the relations between civil society and the state. It assumes that all parts of the social system, including the state, are bound by law, which means the constitution, statutes, generally binding acts of international law and international legal acts recognized by the state. It also assumes that social decision making is based on democratic principles and procedures and therefore involves pluralism, consensus, legal certainty and legitimacy. It presupposes the coherence of legal norms and morality, which implies truthfulness, tolerance and mutual respect. It includes the principle of civic solidarity and humanism. Finally, it requires that general co responsibility for the protection and creation of conditions for a healthy environment be ethically, socially and legally enshrined.[133] The relationship between the state, society and the individual is multifaceted. The concept of the individual human person is one of the greatest achievements of civilization and is a source of economic success as well as intellectual productivity.[134] At the level of civil society, the ideological basis of any link with democratic state systems is the principle of popular sovereignty, which consists in the political and legal recognition of the superiority of the citizen over the state in the form of a constitutional code of human and civil rights, electoral legislation and guarantees of minority rights.[135]

The aim of the modern constitution is to establish such a form of state as is described by the legislator in the constitution.[136] The principle of democracy is the basis of constitutionality and in its conceptual definition the features of the modern state are completed. Together with the principles of legitimacy and legality, it forms the core of Slovak constitutionalism. For their realization it is necessary to secure legal instruments, among which are elections and the mechanisms of direct democracy, which make it possible that in a parliamentary republic the legitimacy of the holders of public power is derived from the will of the citizens and from their decision, which

[131] Adamová 37.
[132] D Šmihula, *Štát a medzinárodný systém* (Veda 2005) 49.
[133] Adamová 37.
[134] Šmihula 57.
[135] Adamová 37.
[136] J Prusák, *Teória práva* (Univerzita Komenského, Právnická fakulta 1995) 107.

in democratic terms means the fundamental expression of the principle of popular sovereignty and the principle of free elections.

In principle, the state should consist of three basic elements: territory, population and a power administrative apparatus, and it is incorrect to identify the state only with one of these elements.[137]

The modern state can be characterized by several features. State power is exercised by a qualified and trained bureaucracy. The state has a permanent and combat ready army. The state power apparatus and the constantly growing number of state and public institutions and organizations significantly expand the scope of their activity and intervene in all spheres of life, for example in education, health care and culture. All these institutions and the people who work in them are maintained by the state through regular financial expenditures and salaries. The state claims a very high share of the domestic economic product of the whole society, often between forty and sixty percent. In the state there is a high degree of centralization in the management of state bodies and organizations. State bodies are largely depersonalized and the exercise of power is not perceived as power in the name of specific persons, but in the name of impersonal offices and institutions acting on behalf of the state. The modern state tries to base the exercise of state administration and politics on a scientific foundation, which is why state studies, economic and political sciences, statistics, geography, cartography and similar disciplines develop. The objectives pursued by the state have a materially rational character, such as the material wellbeing and happiness of citizens, the growth of wealth, territory and population, scientific and technical progress and the strengthening of the power of the state in comparison with other states, rather than ideological goals like the victory of the true faith. The state is no longer perceived as the property of the monarch and the dynastic house but as an expression of the will of the population of the given country, and even a monarch becomes only the highest official. The inhabitants of the state have weakened their ties to other communities of which they were or are members and only the bond to the state and the nation remains, so that a political nation emerges. Social and ethnic differences are, at least formally, largely levelled, which is expressed in social democracy and the national state. The importance of nationalism grows along with the need to draw every

[137] Šmihula 48.

citizen into the efforts of the state, so that the national state is understood as the state of the whole nation or people. The state takes upon itself social care for the needy and no longer relies on charity and non-state corporations. Within the state there exists a more or less unified legal system, and in internal politics the state has no real power competitor, so that state sovereignty triumphs.[138]

## 3.2 State Power and Sovereignty

The concept of state power, as well as the concept of sovereignty, is quite frequent and appears in many different contexts, but it is rarely precisely defined. It is understood as a notion with a wide range of meanings that are continually evolving. State power is constitutionally legitimized to intervene and to regulate wherever the quality of democracy, especially the freedom of man and citizen, would be endangered.[139] We may also mention the principle of territoriality, according to which state power applies to everyone within the territory of the state. State power is defined as the legitimate, legally sanctioned ability of the state to influence the behaviour of members of society, even against their will, that is, with the possibility of coercion.[140]

State power is assessed according to several criteria. First, legitimacy and its acceptance by society as power that is justified and rightful, where the source of acceptance is law, but also tradition, dynastic succession and, in democratic conditions, the derivation of power from the citizens and from regular elections. Legitimacy represents one of the links between power and law, it is both the source and the instrument of power, it is the conviction that someone is entitled to change the behaviour of another and it contributes to that person's ability to change such behaviour or may itself establish this ability.[141] Second, legality, which expresses the conviction that state power has been formed on the basis of a reason recognized by society. This reason does not always have to be legal, it may also be the authority and charisma of a leader in a revolutionary situation or the final goal in the case of a

[138] Šmihula 48.
[139] J Blahož, 'Právní stát a právnesociologický výzkum' (1990) 1990(9) *Právník* 886.
[140] R Kučera, *Základy práva* 2nd edn (Masarykova univerzita 2006) 16.
[141] E Bárány, *Moc a právo* (Veda 1997) 19.

national liberation movement.[142] Legality means that power has been instituted in accordance with the legal order and partly overlaps with legitimacy, since it also includes that power rules in accordance with the law of the state.[143] Third, effectiveness, which is the degree to which state power can realize its aims and influence the behaviour of people under its authority. This depends not only on voluntary respect for power but also on the ability to enforce intentions through state coercion.[144] Fourth, sovereignty, since state power should be sovereign power, independent of other power both within and beyond the borders of the state.

The state is also regarded as a power political organization of society, which develops certain activities through which it fulfils the functions of the state. State power is realized through law. Law regulates relations between people and lays down rules for the relationship between the state and its inhabitants. Law plays the role of a source and instrument of power most visibly in the form of legal capacity, which consists in the ability, by one's own legally relevant behaviour or by the behaviour of other subjects of law, to change the distribution of sources and instruments of power among others. The subjects of power are therefore all legal and natural persons acting with varying intensity in the life of society, and from this follows the omnipresence of power wherever there is law.[145] Through law, the state exercises its power. In order to do this, it must in every system possess a broad state mechanism in the form of the relevant institutions. The exercise of power is to be carried out by public administration. The exercise of public administration, that is the legal regulation of social relations within the state, is not dependent on any decision standing outside state power. We may therefore add that, in connection with sovereignty, the state is the only political power institution in the given territory and that sovereignty is a property of state power.

The limitation of state power in relation to citizens is enshrined in the constitutions of democratic states in such a way that citizens are allowed to do everything that is not

[142] K Klíma, *Státověda* (Vydavatelství a nakladatelství Aleš Čeněk 2006) 34.
[143] Ottová 114.
[144] Prusák 70.
[145] Bárány 70.

prohibited by law, whereas bodies of public power may act only on the basis of the constitution, within its limits, and to the extent and in the manner laid down by law.

### 3.2.1 Understanding Sovereignty in Different Contexts

With the emergence of the state governed by the rule of law there is a shift in thinking about the content and limits of the operation of state sovereignty.[146] The concept of the sovereignty of the state, or of state power, is the subject of current expert discussions and is based on the fundamental principle of the independence of state power from any other power. sovereignty must be understood as a theoretical construct. It cannot be understood as the absolute domination or arbitrariness of the state. It is desirable to understand it in the sense that state power, in performing its functions, is not limited by any other power or any other power centre, and not in the sense that it is not limited by laws.[147] Traditional state theory understands sovereignty as a property of state power, as its independence from any other power, both in the sphere of international relations and in internal affairs. It is the property that distinguishes state power from other kinds of power in a given society. It is sovereign because, of all conceivable political powers, it is the strongest and is fundamentally independent.[148]

Sovereignty of power means several properties, internally as well as externally. It implies independence, in the sense that a sovereign state, in exercising state power, is not subordinate to any other state or any other subject either within or outside the state structure. It implies unlimitedness, in the sense that the state exercises state power over its entire territory, over the whole of society and in all matters that it considers necessary to regulate. It implies exclusivity, meaning that no other subject exercises public power on the state's territory if that power is not derived from the state. Finally, sovereignty does not undermine the fulfilment of obligations arising from international law, because these obligations are voluntarily accepted by the state and are in fact an

[146] Adamová 38.
[147] Šmihula104-105.
[148] Adamová 38.

expression of its legal personality in international law and its respect for the sovereignty of other states.[149]

From all this it follows that state sovereignty is understood as the independence of state power from any other power. From foreign literature we may mention Schmitt's concept of sovereignty, which is close to Weber's conception based on the monopoly of legitimate violence. Weber defines state power from within, while Schmitt defines it from outside and presupposes the existence of an international community of modern nation states. Schmitt's idea is that the enemy exists within the nation and is basically equivalent to Weber's argument that the state has a monopoly on legitimate violence and that private violence thus becomes illegitimate.[150]

Sovereignty can refer to a range of different phenomena, including the source of authority within the domestic system of government norms, that is public order and in particular the rules about what counts as a legitimate use of force on the territory of the state, the normative attributes of full membership in the international system based on the sovereign equality of states, the empirical capacity of the state, measured by the tools of social science, to protect its internal affairs and to determine its own internal and external policy regardless of the preferences of external actors, and the domestic making of policy, which is linked to the need to preserve or introduce unilateral control of the state over a given area of activity.146 Krasner describes four ways in which the concept of sovereignty is commonly used. Domestic sovereignty refers to the organization of political authority within a state and the level of control exercised by the state. Interdependence sovereignty deals with the issue of control, for example the ability of the state to control movements across its borders. International legal sovereignty establishes the status of a political entity in the international system and treats the state as an actor on the international level like the individual on the national level. Westphalian sovereignty is understood as an institutional arrangement for organizing political life that is based on territoriality and on the exclusion of external factors from domestic structures of authority. Westphalian sovereignty is violated when external factors influence or determine the internal structure of authority. It can be breached by intervention, but also by invitation, when the state voluntarily subjects

[149] R Kučera, *Základy práva* 2nd edn (Masarykova univerzita 2006) 17.
[150] N Geping, 'A Model of the Modern Nation State: A Methodological Approach' (2010) 6 *Core Ethics* 328.

its internal structure of organs to an external framework or constraint.[151] Experts have long considered Westphalian sovereignty as real, with almost unlimited sovereign rights, but it is increasingly obvious that the Westphalian system has fundamentally changed. The idea of the completely free will of individual states seems inadequate even in theory, because the scope of internal sovereignty is legally narrowed particularly as a result of international agreements, including those concerning human rights, and by already established models and traditions of state behaviour. Concrete definitions of sovereignty today reflect the approach of the particular author. Most literature understands sovereignty as supreme authority within a territory. Every specific use of the concept reflects the philosophy of a given epoch, so sovereignty cannot be understood without some qualifying adjective. The first modern form of sovereignty was absolute sovereignty, as developed by Bodin, Hobbes and Grotius.[152]

J. Bodin was the first to define sovereignty as absolute power. Medieval limitations, such as basic laws of the land and respect for natural and divine law, formally remain, but there are exceptions in cases of necessity and there is essentially no right of resistance. It is also possible that Bodin sought with a strong theory of state power to oppose the arbitrariness with which feudal lords exercised power among themselves and especially toward their subjects. Truly absolute power of the state or the ruler remained in the period of absolutism mainly on the ideological level, while legally speaking power was limited and in reality often ineffective and unable to achieve its aims. The police state extended the reach of state power into many details of everyday life, but even so the actual exercise of power remained incomplete and full of gaps.[153]

Traditional understanding of sovereignty as independence and supreme authority is linked to Bodin's definition of sovereignty as the absolute and perpetual power of the state. According to him, sovereignty primarily means the absolute and exclusive power to create law within the territorial borders of the state and the refusal to tolerate any other law creating authority above the state. He argued that sovereignty, as the highest power in the state, cannot be limited except by divine and natural law and that no

[151] J H H Jackson, 'Sovereignty – Modern: A New Approach to an Outdated Concept' (2003) *American Journal of International Law* 782.
[152] S H Hashmi, *State Sovereignty: Change and Persistence in International Relations* (Pennsylvania State University Press 2010) 19.
[153] M Šejvl, *Idea právního státu v dějinách filozofie* (Vydavatelství a nakladatelství Aleš Čeněk 2014) 241.

constitution can restrict sovereignty, so the ruler stands above positive law. By contrast, most authors in the sixteenth century believed that sovereignty can be limited by the constitution and positive law.[154] In the seventeenth century, Hobbes, as a theorist of absolute power, presented the first truly elaborate form of the social contract, which he saw as the only instrument for legitimizing state power. The social contract is based on the concept of natural rights, which began to be understood as a limitation of state power. In Hobbes, natural rights at first glance appear reduced to the right of every citizen to self defence against the sovereign as representative of the state, but some interpretations suggest that he elaborated a fairly complete theory of the right to resist the state. A second element of the rule of law state that Hobbes mentions is the idea that the behaviour of the state must take the form of law, which makes him a theorist of a formal conception of the rule of law state.[155]

Locke can be linked with several elements that we identify as characteristic of the rule of law state, such as the liberal idea of limiting state power to the protection of natural rights, the idea of the separation of powers and the right of resistance. Locke's theory of the social contract may be understood as government of laws secured by the separation of powers, while also pursuing the public good, which he mainly identifies with the security of property. To secure this, he mentions instruments that go beyond the strict framework of government of laws, such as the prerogative of the ruler and the right of resistance. The concept of prerogative also partly undermines his own scheme of the separation of powers. Locke is a thinker of his time who constructs the state in sharp contrast to common law lawyers, who uphold the myth of an ancient law that best protects the rights of the individual and of the English nation against the will of the king, which is more a continuation of medieval ideas. This myth appeared to have been overcome in England by the end of the seventeenth century, when parliament proclaimed itself the protector of human freedoms and moved toward the sovereignty of the king in parliament and later toward the doctrine of parliamentary sovereignty, which Dicey formulated most clearly in connection with the idea of the rule of law that underpins English constitutional law. Dicey argued that one essential meaning of the rule of law is not only that power is exercised in conformity with law, but also that state officials and citizens are subject to the same courts, and that judges

[154] Hashmi 20.
[155] Šejvl 241-242.

and their precedents better protect the rights and freedoms of individuals than by long charters of natural rights.[156] How to reconcile unlimited parliamentary sovereignty with the idea of judicial review is one of the major themes for constitutional theorists of the twenty first century, but this goes beyond the scope of the present work. Montesquieu is another theorist who explains the separation of powers. He did not understand it as a universally applicable concept, but as a description of a concrete constitution, in many respects inexact and idealized.[157] Nonetheless, his conception can be taken as a starting point, and he also offers an alternative image of a legally limited French monarchy.

We should also distinguish between internal and external sovereignty, which are not different types of sovereignty but rather complementary aspects of supremacy. Being the highest authority within a territory means not only internal sovereignty but also immunity to external interference. External sovereignty of the state is what international lawyers designate as independence and what the United Nations Charter refers to as political independence and territorial integrity. When a state is the private property of a ruler, its external sovereignty does not surpass the legal status of its owner. External sovereignty is also what international lawyers and political scientists have in mind when they describe the international system as anarchic, although this does not necessarily mean chaos or rebellion. Compared to internal sovereignty, external sovereignty remains relatively constant.[158]

### 3.2.2 The Development of Sovereignty

The twentieth century brings deepening, direct application, universalization, internationalization and expansion of the concept of human rights, together with instruments for their more effective protection in both constitutional and international adjudication. It elaborates the concept of the separation of powers, influenced by American thought, and the hierarchy of legal norms, building on previous thinkers. It broadens the concept of the rule of law state by integrating the idea of democracy and

[156] Šejvl 242.
[157] Ibid.
[158] Hashmi 20.

attempts to balance democracy and the rule of law so as to prevent the despotism of the people, which Aristotle and Kant feared.[159] In this way we only wish to indicate that the development of sovereignty and its understanding is an unfinished process that is always transformed in relation to the particular country.

Pinz writes that in the structure of Czech and Czechoslovak statehood, sovereignty is, from a historical perspective, a political idea that later became a legal category. From the autarky of the state, through the theory of the two swords and the natural law teaching on the sovereignty of the people, we arrive at the modern era in which sovereignty is understood as a conceptual property of the state alongside population and territory. Pinz understands sovereignty as the non-existence of a higher power above the power of the sovereign, as its independence from other powers and non-subordination to other powers, and as the impossibility of deriving the legal order of the sovereign from the legal order of another subject. This leads him to the conclusion that the concepts of sovereignty and state power practically coincide and that the sovereign state is a fully fledged state.[160]

J. Messner, in his work Das Naturrecht, places the first signs of claims to sovereignty in the modern sense already in the bull of Pope Boniface VIII from 1302, and according to Heydt the emergence of sovereign states dates between 1250 and 1350.[161] The Renaissance emphasized the importance of the individual in contrast to earlier religious and social ties. In the Middle Ages, sovereignty was primarily associated with the person of the ruler, the monarch, who was called the sovereign. Another contribution to the concept came from Protestantism with its critical stance toward the unifying culture of the Middle Ages and with the transfer of religious authority to territorial lords in the spirit of the principle cuius regio, eius religio. In the nineteenth century nationalism brought a new understanding of sovereignty in the form of popular sovereignty and the possibility of asserting new objectives. At this time sovereignty was already linked to the state and to state power. Sovereignty has thus gone through a wide range of definitions. Today the exercise of state power is linked to the will of the people, expressed in legal consciousness. Since the sixteenth and seventeenth centuries we traditionally identify eight attributes of sovereignty: the right to legislate,

[159] Šejvl 243-244.
[160] Pinz 286.
[161] M Spirit, *Úvod do studia práva* (Grada Publishing 2010) 187.

the right to declare war and conclude peace, the right to appoint the highest officials, the right of supreme jurisdiction, the right to grant pardon, the right to demand loyalty and obedience, the right to mint money and the right to levy taxes.[162]

From the international perspective, Friedmann distinguishes between the classical system of international law of coexistence and the new international law of cooperation, which he dates to the period between the First and Second World Wars. From the standpoint of the development of society this is of enormous significance for the principles and structures of international law. At the same time, the concept of sovereignty remains ambiguous. The formation and development of European states in the modern era emerged from conflicts associated with dual processes. Over the centuries conflicts grew out of complex economic relations and were grounded in military, political and religious or ideological questions. The emergence of the concept of sovereignty presupposed the need to legitimize the power of states that had triumphed in these struggles.[163] Theoretically, J. Bodin and Thomas Hobbes were the first to formulate the concept of sovereignty. According to them, power should be concentrated in a single source, without external or internal limitations. This was intended to demonstrate the necessity of a strong authority located in the state itself that would undermine the claims of competing centres of power, and it can be called the doctrine of state sovereignty.[164] Later theories were closely connected with the doctrine of legal sovereignty. Its main exponent was John Austin, who argued that all laws are commands of the sovereign. These commands are binding because the sovereign has the power to impose sanctions, whereas no external subject has the power to sanction the sovereign. This doctrine of legal sovereignty was extremely influential, both as a justification of state power and as a basis for opposition to supranational ideas.[165]

Sovereignty is often associated with democracy. Even though Locke's notion of the people was rather restricted, he expressed the democratic idea that it is for the people to decide on the institutional form through which the state is governed. This

[162] D Šmihula, *Štát a medzinárodný systém* (Veda 2005) 47.
[163] M Newman, *Democracy, Sovereignty and the European Union* 2nd edn (Hurst & Company 1997) 6.
[164] Ibid.
[165] Ibid.

understanding of sovereignty can be called the doctrine of popular sovereignty.[166] The relationship between the doctrines of state sovereignty and popular sovereignty was ambiguous. The notion of popular sovereignty, developed more fully in the work of Rousseau, could threaten state sovereignty by setting the claims of the people against the claims of the state. In the case of the regime of Napoleon III, state power was legitimized by combining arguments underlying both doctrines, and this combination was so strong that a different term had to be used to distinguish it from its two sources. The result was a doctrine claiming that the unity of state and people was so complete that no separate institutions were needed to represent the people.[167]

Various problems of national sovereignty are linked to changes in society and in the world. Grinin proposes a typology of the transformation of sovereignty.[168] In the Western world he distinguishes a European type of supranational community, with several subtypes, a great power type, and a type of new countries, that is young or in some way damaged European states that need international recognition, such as some of the former Yugoslav republics, the Baltic states or other states of the former Soviet Union and of the former socialist bloc. In the non-Western world he sees the type of a former superpower, such as Russia, which keeps its ambition to play the role of a second or third superpower despite reduced capacities and at the same time quickly gives away parts of its sovereign authority, an oscillating type represented by some authoritarian states of the former Soviet Union that move between Russian influence and that of other powers, such as the United States, China or the Muslim world, regional leaders such as India, Pakistan or Iran, a type regulated by globalization, in which states seek to enter into economic globalization in order to gain economic advantages while trying to minimize external influences, as in the case of China, a civilizational or regional type, which aspires to geographical, cultural or ideological regionalism and is willing to sacrifice sovereign rights only within particular regional frameworks and sectors but not under the pressure of the United States or Western countries, as in parts of Latin America or Africa, and finally a closed type, consisting of states that insist on full sovereignty in order to preserve a particular ideology or regime, such as Cuba, North Korea or some Islamic states, which change only under

[166] Newman 6.
[167] Ibid.
[168] L E Grinin, 'State Sovereignty in the Age of Globalization: Will it Survive?' in L E Grinin and others (eds), *Globalistics and Globalization Studies* (Uchitel Publishing House 2012) 224–226.

strong pressure of circumstances or powerful countries. There are many factors that influence the transformation of state sovereignty, including technological and economic changes, efforts to prevent wars, the existence of global problems that unite countries, regional integration processes, the rapid growth of all kinds and levels of contacts between the populations of different states, the need to solve complex problems and disputes and the growing number of democratic regimes in the world.[169]

### 3.2.3 Internal and External Sovereignty

Within this topic it is necessary to distinguish between internal and external sovereignty of the state. Organizations of public power gradually arise above the state, which means that they cover a larger territory than individual states but usually deal with a smaller range of state tasks, except for the European Union. International organizations are in most cases not classified as subjects of public power, but respect for this traditional view is increasingly problematic in light of their law-making activity, whose results are often addressed to states as well as directly to natural and private legal persons. The priority position of the citizen influences the content of both internal and external sovereignty. Internal sovereignty means that the state has full legal capacity in the sphere of international law and that its independence externally is limited only by the sovereign rights of other states, into which it is not allowed to interfere, and by international obligations that the state has assumed.[170]

Internal sovereignty also means that the state is the exclusive, independent and supreme power on the territory it controls and that no act of foreign state power can be carried out there without its consent. This sovereignty emerged at the turn of the Middle Ages and the modern era in the conflicts between the monarch and other power centres, such as the Church, great feudal lords and rebellious estates. Even in a state governed by the rule of law, such state power is still bound by law. State sovereignty is also manifested in law making, although the state itself is bound by the law it creates.[171] The internal sovereignty of a democratic state governed by the rule of law

[169] Grinin 218.
[170] K Adamová, *Úsvit moderního konstitucionalismu* (Avenira 2007) 39.
[171] Šmihula 105.

is limited by human rights and by democratic control from the side of citizens.[172] Based on a certain social agreement, expressed for example in the constitution, there exists in states that are neither absolutist nor totalitarian a natural extent of state involvement in the life of society, which depends on tradition, political ideas, law and views of expediency.[173] Certain areas, such as family life, sexual life, fashion, culture or religion, are usually regarded as lying outside the authority of state power. Sovereign power is therefore the highest power but not unlimited or absolute.[174]

External sovereignty manifests itself in sovereign equality, voluntariness and reciprocity in relations with other states. It is more an expression of a formally declared concept than of the real state of international politics. State power of a given state should not be dependent on the power of any other state. Every state is, however, bound by international law, by the duty to respect the rights of other states and by its treaties with them. These treaties bind the state in the future to follow the obligations contained in them and not to act solely according to its own discretion.[175] From direct ancient democracy there later developed, in the larger Greek city states, representative democracy, which was adopted also by the Roman Republic and can be compared to democracy in modern Europe.[176] In the pre globalization period the modern state developed in parallel with socio economic development and was understood as a stable territorial power unit with central authority. Its essential feature was an emphasis on territorial integrity and loyalty to the geographical space it controlled and regulated, and within which it developed and applied economic nationalism in the sense of citizens sharing a common economic space and submitting to social norms with economic content.[177] A sovereign state, in terms of the empowerment of civil society, determines its own state and social system, has full freedom in arranging internal affairs and controls its state territory. From a humanistic and ethical political perspective, E. F. Smidak also considers the present and future relationship of people to nature and to global social inequality. From this point of view his understanding of freedom, justice, legitimacy, legality and statehood is closest to the concept of the

[172] Ottová 111.
[173] K Klíma, *Státověda* (Vydavatelství a nakladatelství Aleš Čeněk 2006) 36.
[174] Šmihula 105.
[175] Šmihula 106.
[176] M Kočan, 'Deficit demokracie v EÚ' in *Milníky práva v stredoeurópskom priestore I* (Univerzita Komenského v Bratislave 2012) 61.
[177] M Šikula, 'Minimalizácia alebo modernizácia štátu?' (2011) 59(8) *Ekonomický časopis* 769.

social state.[178] The emergence of the social state, which actively engages in the social sphere, is associated with Bismarck's social legislation. Its development was stimulated by the catastrophic consequences of the Second World War and by memories of the Great Depression. During the war the English economist W. H. Beveridge had already produced the first comprehensive plan of social policy. In most Western European states a European social model gradually developed in various forms. These forms differed mainly in degree and scope but shared similar core elements.[179] Today we increasingly hear the view that, unlike in international law, the concept of sovereignty is losing its importance in real international relations. The sovereignty of the nation state is regarded as the absolutization of its own interest and does not correspond to the demands of global integration and of the world community, without whose interests it is impossible to solve structural problems such as the arms race, underdevelopment and poverty in most of the world or global ecological threats, which E. F. Smidak draws attention to in his Principles. Nor is it possible otherwise to address current conflicts, such as regional and civilizational clashes, terrorism, religious intolerance or racism.[180]

### 3.2.4 Sovereignty and Democracy

In recent times the concepts of sovereignty and democracy have acquired specific substantive content. They no longer describe only the form of the exercise of public power but are increasingly understood in their interconnection and in relation to the system of human rights.

Democracy is most often understood as rule by the people. The concept of the people must be interpreted in connection with the constitution. Among the concrete mechanisms designed to protect the principles of democracy against efforts to remove them are the constitutional declaration of the inviolability of these principles, the right of citizens to resist anyone who attempts to overthrow the democratic order and the

[178] Adamová 39-59.
[179] Šikula 775.
[180] Adamová 39.

connection of the principles of democracy with human and civil rights protected by mechanisms of international law.[181]

Debates about democracy have been going on since the first half of the fifth century before Christ. The concept of democracy still cannot and should not be defined in a single, definitive way. Perhaps the most effective approach is to define democracy through law and its role in securing a certain degree of democracy or a certain certainty of democracy, by embedding democratic principles into a rule of law framework.[182] Weber also tried to derive democracy from the redirection of charisma, although this is one of the less developed parts of his political sociology. A less direct connection arises from his reflections on the prospects of charismatic leadership in parliamentary democracies and in organized political parties.[183] In modern constructions of sovereignty we can point to the relationship between sovereignty, democracy and the rule of law state. Popular sovereignty initially appeared as the democratic legitimacy of state sovereignty. This is fully expressed in the Declaration of the Rights of Man of 1789, which states that sovereignty resides in the people and that no body and no individual may exercise authority that does not explicitly emanate from the people. After overcoming various one sided approaches, contemporary political, legal and state theories generally recognize that the basic starting point of modern sovereignty, as a property linked to all subjects of civil society and its state, is the individual and, globally, humankind. The rule of law state is therefore based on democratic values and procedures of political power and should not be tied either to any exclusive political ideology or to any religious doctrine. Alongside the principle that both the state and every citizen are bound by law, a characteristic of the rule of law state is the rule that everything that is not prohibited is allowed. This rule, however, applies only to citizens and not to state bodies. From a procedural point of view an essential feature of the rule of law state is the principle of due process of law, which means that regular legal procedures must be respected. The functioning of such a state presupposes legitimate government and a consistent respect for citizens as sovereign personalities and basic elements of the political system.[184]

[181] R Kučera, *Základy práva* 2nd edn (Masarykova univerzita 2006) 104.
[182] E Ottová, *Teória práva* (Heuréka 2006) 152, 156.
[183] J P Arnason, 'Max Weber jako klasik civilizační analýzy: komparativní pohledy na souhru kultury a moci' (2012) 44(5) *Sociológia* 558.
[184] K Adamová, *Úsvit moderního konstitucionalismu* (Avenira 2007) 38.

Sovereignty has been discussed as a concept for more than three centuries, and there is still uncertainty about whether it is an old or a new concept. Some authors argue that it is much older and reaches back to Roman times. Goodman views sovereignty as a relatively new concept for humankind that has developed through long negotiations and changes.[185] Its ideology was created to strengthen authority. In Roman times only the Roman Catholic Church could claim to exercise jurisdiction over Europeans. As nation states acquired the status of sovereign rulers, essentially above the law, they became central to the organization of international relations and national political systems. The usefulness of sovereignty lay in its role in organizing competing interests when dealing with public tasks required by society, such as defence against enemies, production, trade and public works.[186] Some historical arguments suggest that democracy is divisible, meaning that the interest in maintaining and spreading democracy defended by advanced democracies has not always been connected with the emergence of democracy in countries of the global South such as Kenya, Serbia or Azerbaijan.[187] Democracy, by virtue of its pluralist flexibility and its crucial role in preserving adaptability, represents a desirable political basis for societies open to change. At the same time societies and citizens must be able to respond to local changes. Democratic pluralism is the best way to achieve this goal, since it allows competition and active participation in political decision making about the allocation of resources and opens society to changes in politics, economics and social life.[188] In the contemporary world, state sovereignty is limited in order to support dynamic interdependence. To facilitate this interdependence, it is helpful if states follow similar rules at the international and domestic level. In domestic politics these rules are expressed in democratic arrangements adapted to local history and culture. As more states apply democratic procedures globally, it becomes easier, even from the perspective of national interest, to support democracy in other countries. In the future, the main question should not be whether a state will ignore sovereignty and intervene in the affairs of others in order to support democracy. The issues surrounding international interventions in Guatemala, Haiti, Peru, Somalia and Bosnia in 1993

[185] L W Goodman, 'Democracy, Sovereignty, and Intervention' (1993) 9(1) *American University International Law Review* 27–28.
[186] Ibid 27-28.
[187] Ibid 29.
[188] Ibid 30.

reflect a centuries long social construction of the concept of sovereignty.[189] Traditionally, sovereignty has been described as the independence and supreme authority of the state. For this reason, sovereignty is often conceived as an absolute concept, which would mean that states are completely independent in relation to all other states and stand above the rules of international law. It is clear, however, that authors of international law do not consider state sovereignty to be absolute and unlimited. In this context it makes sense to speak about the need for sovereignty without adjectives, which expresses the basic intention to establish its functional mechanisms. The rationality of sovereignty should be supported and shaped by institutions.

[189] Goodman 30.

# 4 THE PRINCIPLE OF PRIMACY IN EU LAW AND ITS THEORETICAL DIMENSION

To understand the evolution of European integration, it is essential to revisit the historical path that led from limited, voluntary cooperation between sovereign states to the current claims of a supranational legal order. The notion of a "principle of the primacy of EU law" is often presented as an established and unquestionable fact. Yet, a closer examination reveals that this so-called principle was never clearly enshrined in the founding treaties, nor explicitly accepted by the Member States as a true transfer of legal supremacy. What is frequently described as the "primacy" of EU law emerged largely from the reasoning of the Court of Justice of the European Union, rather than from any democratic or constitutional mandate. Its legitimacy, therefore, remains open to debate − especially given that national constitutions continue to affirm the ultimate sovereignty of their peoples and institutions. In the following chapters, we will retrace the historical and political developments that supposedly led to the establishment of this principle, questioning whether it represents a genuine legal reality or merely a judicial construction designed to advance the project of deeper integration at the expense of national autonomy.

## 4.1 The European Coal and Steel Community

The functionalist approach to European integration led to the creation of an international economic organization known as the *European Coal and Steel Community (ECSC)* − or informally, the *Montan Union*. It was signed on 18 April 1951 in Paris, hence the name "Treaty of Paris." The Treaty, concluded for a period of fifty years between six sovereign states − Belgium, the Netherlands, Luxembourg, France, Italy, and the Federal Republic of Germany − entered into force on 23 July 1952 following national ratifications. Its validity expired on 23 July 2002, after which the ECSC's remaining agenda was transferred to the European Community under the Treaty of Nice.[190] Mainstream narratives often portray the Paris Treaty as a "founding

[190] M Tomášek and V Týč and others, *Právo Evropské unie* (Leges 2013) 37.

act" of what would become the European Union − an agreement that allegedly united Western Europe during the Cold War and laid the "roots" of a shared European democracy.[191] However, it can also be seen as the first cautious step toward transferring limited economic competences from nation-states to a supranational body. The declared goal of the Treaty was to establish a *common market* for two commodities − coal and steel − allowing them to circulate freely among the signatory states. The Treaty also created a *High Authority*, a body based on the supranational principle. Although its members were formally appointed by the member states, they were required to act "independently" of their own governments − an early indication of the gradual detachment of decision-making from democratic national oversight. To balance this supranational structure, an *ECSC Council* was established on an intergovernmental basis, composed of national representatives. Each state held the presidency for three months, and the Council's consent was required for important decisions of the High Authority.[192] The ECSC also had an *Assembly* (the forerunner of today's European Parliament) and a *Court of Justice*, whose task was to ensure the "correct interpretation" of the Treaty and enforce it against the member states. The creation of this judicial body, empowered to interpret the Treaty independently of national courts, marked the first step toward the emergence of a self-proclaimed "supranational legal order." The Paris Treaty thus represented a compromise between federalist and functionalist visions of integration − a system that could be described as *sectoral federalism*. In this model, member states delegated only a narrow portion of their competences to a common authority, limited to specific economic sectors. Yet even this limited transfer introduced the principle that external institutions could make binding decisions for sovereign nations − a precedent whose implications would grow far beyond the original economic scope.[193]

## 4.2 The European Economic Community

[191] *Le traité de Paris, premier souffle de l'unité européenne (2021)* https://paris-europe.eu/le-traite-de-paris-premier-souffle-de-lunite-europeenne/ *accessed 30 November 2021.*
[192] M Tomášek and V Týč and others, *Právo Evropské unie* (Leges 2013) 37.
[193] P Fiala, O Krutílek and M Pitrová, *Evropská unie* (Centrum pro studium demokracie a kultury 2018) 20–24.

After the initial success of the ECSC, political leaders began to consider extending this model of coordination to other areas of economic, political, and social life. This rapid expansion of integration can be described as a "fuse effect," where the limited cooperation in one sector sparked an uncontrollable process of deeper entanglement among states. This new phase resulted in two further treaties: the *Treaty establishing the European Economic Community (EEC)* and the *Treaty establishing the European Atomic Energy Community (Euratom)* − both signed in Rome, hence known as the *Treaties of Rome*. These treaties laid the foundations of so-called *Community law*, which would later evolve into what is now referred to as *Union law*. The stated objective of the EEC Treaty was the creation of a common market based on the "four freedoms": free movement of goods, services, workers, and capital. The principle of non-discrimination on grounds of nationality was introduced, prohibiting any advantage or disadvantage between member states in these areas. Importantly, this principle applied only within the scope defined by the Treaty − it did not extend to other aspects of sovereignty such as migration or national identity. Institutionally, the EEC was designed as a delicate balance between *intergovernmental* and *supranational* principles. The *Commission* represented the supranational element, while the *Council* embodied the will of the member states. Over time, however, the Commission's exclusive right to initiate legislation became a tool for centralizing authority in Brussels, weakening the direct influence of national governments. During the 1960s, key developments shaped the character of Community law. In 1960, non-EEC states formed an alternative framework − the *European Free Trade Association (EFTA)* − to promote intergovernmental cooperation without surrendering sovereignty. Its success eventually encouraged the United Kingdom and others to seek EEC membership. A decisive moment came in 1964, with the *Costa v. ENEL* judgment of the Court of Justice. For the first time, the Court asserted that Community law had *primacy* over national law, claiming that the EEC Treaty had created "its own legal order."[194] This reasoning was not based on the explicit consent of the member states but on judicial interpretation − a unilateral act by a court seeking to extend its own authority. The notion that national laws could be invalidated by a supranational order represented a profound challenge to constitutional sovereignty.[195]

[194] *Case 6/64 Flaminio Costa v ENEL* EU:C:1964:66, para 3.
[195] Juharová, Judita, *Prednosť práva Európskej únie* (Master's thesis, Paneurópska vysoká škola v Bratislave, Faculty of Law and International Relations, 2022) 54.

Supporters of this view often point to the conditions for EU accession − geographical, legal, and factual − as proof of the "supremacy" of Union law. Yet this conditionality can equally be read as evidence of political pressure: states must accept the Union's rules wholesale to participate, leaving little room for genuine legal pluralism. Opt-out mechanisms (for example, Denmark's exclusion from the eurozone and Ireland's from the Schengen Area) demonstrate that even within the Union, full legal uniformity remains unattainable[196] − and that sovereignty, though constrained, persists where states assert it. In essence, the EEC and its successors transformed an initially pragmatic framework for cooperation into a complex system of supranational governance, where the concept of "primacy of EU law" is less a settled legal fact than a contested doctrine − a judicially constructed principle that continues to face legitimate scepticism from those who believe sovereignty resides with the nations of Europe, not with the institutions of Brussels.

## 4.3 The Single European Act

The term Single European Act (SEA) refers to the first formal revision of the founding treaties of the European Communities. It was signed by the member states in two stages – first on 17 February 1986 in Luxembourg by nine of the twelve states, and then on 28 February 1986 in The Hague by Italy, Greece, and Denmark. The Act represented the first significant amendment to the Treaty of Rome (EEC Treaty) and was presented as a step toward "completing the internal market." Its declared goal was to refine the system of fundamental market freedoms and to create a fully integrated internal market by 1 January 1993. In practice, the Single European Act introduced a range of institutional and legal changes designed to accelerate economic integration. It strengthened the legislative powers of Community institutions – particularly in the field of secondary legislation (directives and regulations) – effectively transferring more decision-making authority from the national level to Brussels. Supporters portrayed this as a necessary modernization of Europe's economic structure; critics, however, viewed it as a deliberate centralization of power under the guise of economic

[196] J Chrenšť and A Nesvadba, *Právo Európskej únie* (Akadémia Policajného zboru v Bratislave 2020) 110.

efficiency.[197] According to scholars such as Siman and Slašťan, the SEA formally established a structural dualism within the European framework: on one side stood the European Communities, and on the other, the European Political Cooperation (EPC) mechanism. The latter, notably, was not part of the founding treaties and therefore did not fall under Community (or later Union) law; it remained governed by principles of international law.[198] This dual structure revealed an underlying tension between intergovernmental cooperation and the growing supranational authority of Community institutions – a tension that would continue to define European integration in the decades that followed. The SEA not only amended and supplemented the existing founding treaties but also introduced new, "autonomous" provisions. Among these was the formal recognition and institutionalization of the European Council. However, its competences and powers were left undefined, allowing its role to evolve without clear constitutional boundaries. In practice, the European Council became a political forum for coordination among heads of state and government – but one that often served to legitimize decisions already shaped by the Commission and the Court of Justice. The creation of the "internal market" also required extending integration into new policy areas – social policy, technology, regional development, and environmental protection – fields traditionally reserved for national governments. The scope of European involvement thus broadened far beyond the original economic mandate, further entrenching the supranational logic of governance. A major component of this process was the Schengen Agreement, signed in 1985 – one year before the SEA – by only five states: Germany, Belgium, the Netherlands, Luxembourg, and France. Many others, wary of its implications, declined to join initially. Their caution reflected concern over the potential risks associated with weakening national border controls and the erosion of state sovereignty in matters of security, asylum, and immigration. Although the agreement's initial intention was limited – replacing border "controls" with more flexible "supervision" (in practice, allowing vehicles to cross at reduced speed without stopping) – its broader consequences soon became evident. The Schengen framework gradually expanded to encompass asylum policy, visa coordination, and police cooperation. [199]

[197] M Tomášek and V Týč and others, *Právo Evropské unie* (Leges 2013) 44.
[198] M Siman and M Slašťan, *Právo Európskej únie (inštitucionálny systém a právny poriadok Únie s judikatúrou)* (EUROIURIS 2012) 47.
[199] Juharová 34.

To manage these areas, a Schengen Information System (SIS) was established, enabling extensive cross-border data exchange between national authorities. While officially presented as a technical instrument for facilitating free movement, the Schengen system symbolized a deeper shift: the transfer of core sovereign functions – such as border management and internal security – from the hands of national governments to a supranational framework. In this sense, both the Single European Act and the Schengen Agreement can be seen not merely as milestones of integration, but as turning points in the steady redefinition of sovereignty within Europe. They mark the moment when the balance between cooperation and control began to tilt decisively toward supranational governance – raising the enduring question of whether "integration" still serves the peoples of Europe, or whether Europe itself has become an administrative project increasingly detached from its democratic and national foundations.

## 4.4 The Maastricht Treaty

In pursuit of establishing an Economic and Monetary Union, the European Council at its meeting of 26–27 June 1989 in Madrid declared that the first stages of this process should begin on 1 July 1990, and simultaneously initiated preparations for an intergovernmental conference intended to revise the founding treaties. In 1991, two parallel conferences began – each with different participants and objectives – aiming to draft and ratify a Treaty on European Union that would come into effect, together with the internal market, on 1 January 1993. The first conference dealt with economic and monetary policy, attended by central bank governors and finance ministers. The second addressed broader issues such as the role of the European Parliament, voting procedures in the Council, and common defence policy. Because the second conference involved direct negotiations among member states, progress was slower – national governments maintained differing positions on key matters, making consensus difficult. Eventually, agreement was reached, and on 17 April 1991 a draft Treaty on European Union was presented. This draft incorporated the existing Communities while introducing new areas of political union. The *Treaty on European Union*, also known as the *Maastricht Treaty*, was signed on 7 February 1992 in the

Dutch city of Maastricht and entered into force on 1 November 1993 following ratification – a process that proved particularly complex in France, Denmark, and Germany, where public and constitutional concerns reflected widespread unease about the scale of integration.[200] The newly created European Union was conceived as a structure resembling a *Greek temple*, consisting of three pillars. As Siman and Slašťan explain, "the most significant of these – the first – represents the European Communities, three international organizations with shared institutions and additional bodies, each possessing its own legal personality. The most important of them – the European Economic Community – was renamed, owing to its expanded competences, simply as the *European Community*." The remaining two pillars retained an intergovernmental character, covering the areas of the *Common Foreign and Security Policy* and *Cooperation in Justice and Home Affairs*. Beyond substantially amending the founding treaties, the Maastricht Treaty incorporated several provisions that had previously stood outside the Community framework, thereby elevating them to the status of *primary law* of the European Union. Its so-called three-pillar structure divided integration activities into three categories: the first (Community) pillar encompassing the existing European Communities – ECSC, EEC, and Euratom – and the second and third pillars dealing with foreign and security policy and with justice and internal affairs, respectively. The second part of the Treaty was the most extensive, as it amended and expanded the corpus of primary law and the existing treaties. The third part regulated the forms of intergovernmental cooperation – a sign that, despite growing supranational ambitions, member states were still attempting to preserve certain spheres of sovereignty. In addition to consolidating existing provisions and principles, the Maastricht Treaty introduced several notable innovations, among them the *principles of subsidiarity and proportionality* – often cited in Union law as safeguards ensuring that decisions are taken as closely as possible to the citizen. In practice, however, these principles have been invoked more as instruments of justification than as genuine limits on the Union's expanding competences. The Treaty also introduced the notion of *Union citizenship*, presented as a means of strengthening one of the fundamental freedoms – the free movement of persons. Yet critics have long argued that this concept blurred the distinction between citizens of sovereign states and a newly constructed "citizenship" that lacked a true democratic foundation,

[200] Siman and Slašťan 49.

thereby weakening the link between individual rights and national constitutional orders. Maastricht further established new and powerful financial institutions, including the *European Central Bank (ECB)* and the *European System of Central Banks (ESCB)*. Through these bodies, monetary policy was effectively transferred from national control to a supranational authority. This centralization – achieved without a single European fiscal policy or a unified political mandate – symbolized the most far-reaching limitation of economic sovereignty in modern European history.[201]

While presented as a step toward economic stability and political unity, the Maastricht Treaty marked a decisive moment in the transformation of the European project: from a community of cooperating nations into a union governed increasingly by supranational institutions. It remains a cornerstone of integration – but also a turning point that continues to raise fundamental questions about democratic legitimacy, accountability, and the future of national sovereignty within the European order.[202]

## 4.5 The Treaty Establishing a Constitution for Europe

Efforts to enshrine a Treaty establishing a Constitution for Europe were revived following a lecture delivered by the German Foreign Minister, Joschka Fischer, at the University of Hamburg. In that address, Fischer presented his vision of completing Robert Schuman's ideas through the creation of a European federation and the drafting of a constitutional treaty for Europe. His proposal was later endorsed by German Chancellor Gerhard Schröder, who, on 14 June 2001 at the European Council meeting, supported Fischer's initiative and emphasized the need to build a structured Union modelled on the federal systems of Germany or the United States. At the subsequent European Council session of 14–15 December 2001 in Laeken, Belgium, member states agreed that the founding treaties of the European Union should be unified and simplified. This resolution took the form of the Laeken Declaration, which called for the convening of a Convention on the Future of Europe. The Convention was

[201] Siman and Slašťan 49.
[202] Juharová 57.

composed of 105 members and 102 alternates and was tasked with preparing the groundwork for a future intergovernmental conference while providing a forum for debate on the future of Europe.[203] When the Convention began drafting the Constitutional Treaty, it notably did not establish a separate working group dedicated to the so-called principle of primacy of Union law – a subject that, unlike other thematic areas, was effectively excluded from detailed scrutiny.[204] The Convention's discussions culminated in the submission of the Treaty establishing a Constitution for Europe to the President of the Council on 18 July 2003. The document was approved at the sixth intergovernmental conference and signed symbolically in Rome on 29 October 2004 – echoing the earlier Treaties of Rome. The Constitutional Treaty was intended to enter into force on 1 November 2006. However, the ratification process collapsed following negative referenda in France and the Netherlands, where citizens decisively rejected the text.[205][206] This failure reflected widespread scepticism toward the deepening of supranational authority and a growing sense that the European project had moved beyond democratic consent. Consequently, the Constitutional Treaty was never ratified and therefore never entered into force. For the first time, the draft Constitution explicitly articulated the principle of the primacy of EU law – specifically in Article I-6. This provision asserted that Union law would take precedence over the law of the member states. The manner in which this principle was embedded provoked strong opposition from several national governments and constitutional actors, who viewed it as an overt attempt to formalize what had previously been only a judicial doctrine lacking treaty-based legitimacy. In reality, Article I-6 introduced no substantive innovation – it merely codified a concept long asserted by the Court of Justice through its case law and tolerated, often reluctantly, by national authorities. Yet the very decision to elevate this doctrine into the constitutional text exposed the underlying ambition of the European project: to transform a treaty-based community of sovereign nations into a constitutional polity governed by supranational norms. The political resistance it encountered – and the popular rejection that followed –

[203] J Mazák and M Jánošíková, *Lisabonská zmluva (Ústavný systém a súdna ochrana)* (Iura Edition 2011) 18.
[204] H Smekal, 'Europeanizace práva' in B Dančák, P Fiala and V Hloušek (eds), *Europeizace: Nové téma politologického výzkumu* (MPÚ 2005) 356.
[205] *Draft Treaty Establishing a Constitution for Europe (not ratified)* https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/draft-treaty-establishing-a-constitution-for-europe *accessed 2 February 2022.*
[206] Siman and Slašťan 61.

demonstrated that for many Europeans, the idea of transferring ultimate legal supremacy to a distant and unelected authority remains incompatible with the democratic sovereignty of their nations.[207]

## 4.6 The Lisbon Treaty and Its Impact on the Primacy of EU Law

The *Lisbon Treaty*, and indeed the path leading to it, had already been foreshadowed by the *Treaty of Nice*. This is evidenced by Declaration No. 23 on the Future of the Union, annexed to the Final Act of the Intergovernmental Conference at which the Nice Treaty was adopted. The declaration stated that, although the Nice Treaty laid the groundwork for enlarging the membership base and introduced the necessary institutional adjustments for that purpose, the debate on the future of the Union should not end there.

After the failed ratification of the *Treaty establishing a Constitution for Europe*, it became increasingly necessary to find a way out of the institutional and political crisis in which the Union had found itself. The answer to this problem came in the form of the *Lisbon Treaty*, also called the *Reform Treaty*. According to the mandate of the Intergovernmental Conference, the goal of this reform was to strengthen the Union's institutional position. However, this time, the process was approached differently than in the case of the Constitutional Treaty. The framers abandoned the idea of adopting a single constitutional document to replace the founding treaties, and instead focused on amending and revising the existing treaties.

One of the notable results of this revision was the change of name of the *Treaty establishing the European Community*, which was transformed into the *Treaty on the Functioning of the European Union (TFEU)*. In terms of substance, however, the Lisbon Treaty was strikingly similar to the failed Constitutional Treaty – a similarity that provoked widespread criticism. Many political observers and constitutional lawyers pointed out that the Lisbon Treaty seemed to be little more than an attempt to reintroduce the rejected Constitution under a new label – a case of "bringing in through the window what had already been thrown out the door."

[207] Juharová, 76.

By means of the Lisbon Treaty, the European Union became the legal successor to the European Community, while its former three-pillar structure was abolished – though this change was, in the area of Common Foreign and Security Policy, largely symbolic. All of these elements reflect the many features shared by the Constitutional Treaty and the Lisbon Treaty. Yet, the two also differed in certain aspects. From the Lisbon text, everything that carried an explicitly constitutional tone was removed – formal symbols and constitutional language such as "law," "constitution," "foreign minister," references to Union symbols, and, notably, the explicit clause on the primacy of EU law. This process, aptly described by Jean-Paul Jacqué as the *"de-constitutionalisation"* of the European Constitution, aimed to make the text appear politically less ambitious, even though substantively it preserved almost everything from the failed Constitution.[208] The most significant difference between the two documents lies in how they addressed the doctrine of primacy. Whereas the Constitutional Treaty contained a direct and unambiguous clause on primacy (Article I-6), the Lisbon Treaty pushed this issue to the margins – literally to the end of the text – in *Declaration No. 17*. As German constitutional scholar Hans-Jürgen Papier observed, "the Lisbon Treaty, out of fear of public resistance, refrained from expressly codifying the primacy of Union law, yet in essence reaffirmed it through a declaration appended to the treaty."[209][210]

The Lisbon Treaty also, for the first time, introduced provisions concerning the *withdrawal of a member state* from the Union – a right first exercised in practice by the United Kingdom in 2017. The Treaty itself was signed on 13 December 2007 in Lisbon and, following a complex and politically sensitive ratification process, entered into force on 1 December 2009.[211]

At its session on 21–22 June 2007, the European Council decided that the principle of the primacy of Union law would not be explicitly stated within the text of the Lisbon Treaty. Instead, member states would issue a separate declaration acknowledging this principle by reference to the existing case law of the Court of Justice. A detailed account of these discussions is recorded in Annex I of the *Conclusions of the*

[208] JP Jacqué, 'Le traité de Lisbonne. Une vue cavalière' (2008) *Revue trimestrielle de droit européen* 439.
[209] Mazák and Jánošíková 21.
[210] HJ Papier, 'Nové vystřízlivění Evropy: Lisabonská smlouva' http://www.obcinst.cz/nove-vystrizliveni-evropy-lisabonska-smlouva/ accessed 4 March 2022.
[211] Siman and Slašťan 61.

*Presidency* from the European Council meeting in Brussels on 21–22 June 2007, which clearly stated: "As regards the primacy of EU law, the Intergovernmental Conference will adopt a declaration recalling the existing case law of the Court of Justice of the European Union."[212]

The note attached to this conclusion also included the text of the declaration that the states were to adopt, acknowledging the primacy of EU law despite its omission from the main treaty text: "The Conference recalls that, in accordance with the established case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of the member states under the conditions laid down by that case law." Based on the European Council's decision, this *Declaration on Primacy* – specifically, *Declaration No. 17* – was annexed to the Final Act of the Intergovernmental Conference. The Declaration affirmed that, according to the case law of the Court of Justice, Union law enjoys primacy over the national law of the member states, subject to the conditions set out by that case law. Another part of the Declaration included the Council's statement of 22 June 2009, which read: "According to the case law of the Court of Justice, the primacy of Community law is a fundamental principle of the Community legal order. The Court has held that this principle is an inherent feature of the special nature of the European Community. At the time of the first judgment establishing this case law (judgment of 15 July 1964 in Case 6/64 *Costa v. ENEL*), the Treaty contained no express reference to the principle of primacy, and this remains the case today. The fact that the principle of primacy will not be included in the future Treaty will in no way alter the existence of this principle nor the existing case law of the Court of Justice."

The explanatory note attached to this declaration referred directly to *Costa v. ENEL*, stating that Union law constitutes an autonomous source of law and, given its special and original nature, should not be overridden by national legislation of any kind, as such an outcome would undermine the very character of Union law and the legal foundations of the European legal order. The use of the phrase "of any kind" is particularly revealing – it implies that EU law should take precedence even over national constitutional provisions. However, the cautious wording "should not" instead

[212] European Council, *Conclusions of the Presidency* (Brussels, 21–22 June 2007) EUCO 111/1/07 REV 1.

of “shall not” indicates that this is not a mandatory rule, but rather an interpretative suggestion. It is worth recalling that, according to the Treaties, only the Court of Justice possesses the authority to interpret Union law, and member states are not entitled to issue binding interpretations of their own. The concept of *primacy* illustrates well the nature of the relationship between national and Union law: in the event of a conflict between the two, EU law is to be applied first, effectively displacing national norms in the specific case.[213]

Nevertheless, the Lisbon Treaty adopted a different approach from the Constitutional Treaty’s Article I-6. The Declaration on Primacy is far less explicit and its language more conditional. For instance, according to the Declaration, Union law has primacy “under the conditions laid down by the case law” – a qualification absent from the Constitutional Treaty. This addition effectively subordinates the principle of primacy to judicial interpretation, rather than presenting it as an absolute rule. The Declaration also contains a statement that continues to provoke debate. In connection with *Costa v. ENEL*, it affirms that, due to the “special and original nature” of EU law, it “should not be overridden by national legal provisions of any kind.” This phrasing reveals an implicit intention by the drafters to suggest that EU law should even prevail over national constitutions. However, by using the subjunctive “should not” rather than the imperative “shall not,” the text stops short of declaring an explicit legal command – a subtle but telling reflection of political caution. It should also be noted that the Lisbon Treaty retained, nearly verbatim, *Article 4 of the Treaty on European Union* (originally Article I-5 of the Constitutional Treaty). This article reaffirms the principle of conferral and explicitly protects the equality of member states and their national identities, rooted in their fundamental political and constitutional structures. It obliges the Union to respect essential state functions – ensuring territorial integrity, maintaining public order, and safeguarding national security – the latter remaining the sole responsibility of each member state. The interpretation of the Declaration on Primacy must therefore be carried out in light of Article 4, which effectively limits the authority of the Court of Justice and moderates the scope of primacy.

Although the doctrine of primacy continues to derive exclusively from the jurisprudence of the Court of Justice, the Lisbon Treaty nonetheless introduced a

[213] Treaty of Lisbon, *Annex A, Declaration concerning the Primacy* (Point 17).

notable development. While the clause on primacy was relegated to a non-binding declaration, the fact that all member states signed it granted formal recognition to the Court's established case law, including the assertion of primacy even over national constitutional norms. In practice, the Court is expected to take this declaration into account when interpreting the Treaties, insofar as it does not contradict their explicit provisions – precisely because it represents the collective expression of the member states' consent to that interpretation. However, the Lisbon settlement does not so much resolve the question of primacy as it conceals it beneath layers of legal ambiguity. The Union, wary of popular opposition, avoided formalizing the principle within treaty law, yet simultaneously affirmed it through judicial doctrine and declaratory language. The result is a paradox: a legal order claiming supremacy without constitutional foundation, maintained not by the explicit will of the peoples of Europe, but by the continuing activism of the Court of Justice. Thus, while the Lisbon Treaty is often described as a pragmatic compromise, it also stands as a symbol of the ongoing tension between the sovereignty of nations and the supranational ambitions of the Union – a tension that remains unresolved at the very heart of the European project.

# 5 THE PRINCIPLE OF THE PRIMACY OF EU LAW AND ITS THEORETICAL DEFINITION

According to Article 4(3) of the Treaty on European Union: "The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union."

Member States are also obliged to assist the Union in carrying out its tasks and must refrain from adopting any measure that could jeopardize the attainment of the European Union's objectives. These provisions are based on the so-called *principle of loyalty* (or sincere cooperation) and are often compared to the principle of international law *pacta sunt servanda*.[214] From another perspective, this could be viewed as something that goes significantly beyond the classic obligation to honor treaties, because it imposes a far-reaching, ongoing duty of cooperation and self-restraint on states even in areas where their own constitutional responsibilities are directly affected. Member States also bear responsibility for the protection of the rights of individuals that arise for them from Union law.

In general, the doctrine developed by the Court of Justice asserts that no national legal provision – including constitutional norms – may endanger the autonomy of EU law or limit its effects. In this understanding, the *primacy of European Union law*, together with the *direct effect* of its norms, constitutes a fundamental characteristic of Union law. These two principles are supposed to ensure the effective application of EU law within the Member States. [215] Some scholars argue, however, that they also function as instruments by which the Union legal order claims precedence over democratically adopted national rules, often without explicit treaty text to that effect.

The precondition for both principles is the *immediate applicability* or *justiciability* of Union law, meaning that "a Union norm becomes part of the legal order of a Member State without the need to transpose its content into domestic law by means of a reception norm."

[214] Treaty of Lisbon, *Declaration concerning the Primacy* (Annex A, point 17).
[215] Siman and Slašťan 364.

In other words, the norm is intended to operate directly within the internal legal order of the state, bypassing the usual constitutional mechanisms of legislative incorporation.

The principle of the primacy of European Union law is not found in any provision of primary law in a clear, explicit form; it is an *unwritten* principle. In essence, we may conclude that this principle was created through the case-law of the Court of Justice – that is, it is a judicial construct rather than a democratically negotiated treaty rule. This is precisely what raises legitimate questions about its democratic legitimacy and its compatibility with national constitutional identity.[216]

## 5.1 Principles of Application of the Law

EU law is presented as an autonomous legal system, which came into being because the Member States, by the Treaties, agreed to limit part of their sovereignty and transfer certain powers to the Union. Through this transfer, the Community – later the Union – acquired law-making powers. At the same time, it should be stressed that EU law is not a homogeneous, coherent code, but rather a functional collection of legal norms of different types and legal qualities. Its effect manifests itself in two directions: toward the Member States themselves and toward the subjects within those states (natural and legal persons).

On the one hand, there is *primary law*, which by its nature resembles international treaties, particularly in the way it creates obligations for Member States and, indirectly, for individuals. On the other hand, *secondary law* – regulations, directives, decisions – is closer in character to domestic legislation. Within the territory of each Member State, two distinct legal systems therefore coexist: the *national legal order* of the state and the *EU legal order*, and both address the same addressees – the state itself and individuals.[217] As a consequence, it sometimes happens that these two legal systems regulate the same factual situation in different ways. Until the adoption of the Lisbon Treaty, the founding Treaties did not provide any explicit, written solution to such collisions. On the basis of the original Article 249 of the Treaty establishing the

[216] Juharová 65.
[217] V Týč, *Základy práva Evropské unie pro ekonomy* (Linde 2006) 99.

European Community, it could be stated that: “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”

A regulation thus does not require any national implementing act to be valid and applicable. The fact that the Treaties did not clearly resolve the question of priority in the event of conflict can be explained, among other things, by the reality that at the time of signing the EEC Treaty, the contracting states likely did not foresee the full extent of the practical impact of Community law. The political choice was to leave the resolution of these conflicts largely to the Court of Justice and, on the other side, to national constitutional courts – a choice that later became a source of continuous tension between the supranational and national levels.

In dealing with such conflicts, the Court of Justice first focused primarily on questions concerning the *nature* of Union law. The answer to the problem of collisions was therefore not sought in explicit positive law, but in the Court’s case-law. As a result of this judicial practice, two basic principles of the application of EU law were formulated: the *principle of primacy* of Community (later Union) law and the *principle of direct effect*. Both of these principles are derived from the supposed supranational character of the Community and the Union – a character that is itself not uncontroversial and not clearly rooted in the original intent of the Member States. The *principle of direct effect* is understood to mean that certain legal norms of EU law produce direct effects in the legal orders of the Member States and confer rights and obligations directly on individuals, without the mediation of any further domestic legal act. Such a norm simultaneously enjoys the status of a valid legal norm within the domestic legal order. Direct effect thus imposes immediate rights and obligations on subjects by means of Union norms, without the need for national implementation. Norms typically considered capable of direct effect include decisions, directives (under certain conditions), and regulations. A basic feature of direct effect is the possibility for individuals to invoke Union law before national authorities and courts. In the *Grad* judgment, the Court of Justice held that: “Particularly in cases where some or all Member States are obliged to adopt certain conduct, the useful effect of such a measure would be weakened if individuals could not, when necessary, rely on it before

their courts, and if national courts did not take it into account as part of Community law."[218]

Article 267 TFEU sets out the powers of the Court of Justice concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union. It also describes the circumstances in which a national court may refer a question to the Court of Justice for a preliminary ruling. Direct effect is also linked to Article 288 TFEU, which states: "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions… A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them."

In connection with interpretation, *indirect effect* (or the duty of consistent interpretation) is also recognised. Under this doctrine, parties to proceedings have the right to ask a court or administrative authority to interpret national law in conformity with EU law. Indirect effect is linked again to Article 4(3) TEU, which, under the principle of loyal cooperation, provides that the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. Member States must take all appropriate measures, general or specific, to ensure fulfilment of obligations arising out of the Treaties or resulting from acts of the institutions of the Union, and must refrain from any measure that could jeopardise the attainment of the Union's objectives. Legal norms thus create rights in favour of individuals, who may invoke those rights before courts and other state authorities. A legal norm that has direct effect is capable of regulating and affecting the legal status of subjects directly, without the need for reception by a domestic legal act. In *Van Gend en Loos*, the Court of Justice recognised the direct effect of Union law. The consequence of this case-law is that a norm of EU law is accorded a higher judicial force than any conflicting national legal norm. According to the orthodox view, this "privileged status" was not created to proclaim the general superiority of one legal

[218] *Case 9/70 Franz Grad v Finanzamt Traunstein* EU:C:1970:78.

order over another as a whole, but rather as a systemic requirement to ensure the effectiveness and uniform application of Union law. In practice, however, it operates as a de facto claim of superiority whenever the two legal systems collide. From a systemic perspective, this privileged position manifests itself in two directions: first, in the obligation of Member States to ensure that their domestic legal orders are consistent with EU law; and second, in the duty, in case of conflict between the two legal orders, to give precedence to the direct application of the Union norm over the conflicting national norm. Within the Member States, therefore, two distinct legal orders – the legal order of the European Union and the domestic legal order – may regulate the same legal relationship. In such situations, conflict arises. This means that the traditional interpretative rule *lex posterior derogat legi priori* (the later law overrides the earlier one) cannot simply be applied, because the conflict is not temporal but systemic and hierarchical.[219]

According to J. Čorba and co-authors, this conflict is resolved by judicial decision, in which the judge is required to respect the doctrine of primacy through four stages of enforcement of EU law:

1. interpretation of national law in conformity with Union law,
2. remedying a breach of Union law,
3. replacing the conflicting norm with one in conformity with EU law, and
4. non-application of the national legal norm that is incompatible with Union law.[220]

The essence of the principle of primacy is thus to "unblock" national legal provisions that diverge from Union norms in areas covered by EU law, where their application could otherwise lead to practical and legal problems across Member States. The principle of primacy is therefore regarded as the second fundamental principle of EU law. It is often emphasised that it does not mean the absolute superiority of Union law as a whole over the entire domestic legal order of a Member State. Rather, this principle applies where a specific national legal norm conflicts with a specific EU legal norm, and both norms regulate the same legal relationship. From this principle it

[219] R Procházka and J Čorba, *Právo Európskej únie* (Eurokódex 2007) 82.
[220] J Čorba, J Klučka, R Procházka and V Vávrová, *Európske právo na Slovensku: právny rozmer členstva Slovenskej republiky v EÚ* (Kalligram 2002) 16.

follows that, in the event of such a collision between national and Union law, all institutions, bodies and authorities of the Member State are obliged to apply Union law, giving it precedence over the conflicting national rule. However, it is precisely here that the tension becomes visible: a principle that was not explicitly agreed in the Treaties, but judicially developed, is used to displace norms enacted by democratically legitimised national organs, sometimes even at the constitutional level.

As stated in the previous sub-chapter, the principle of primacy is one of the core principles governing the application of EU law. This principle determines the relationship between national law and EU law and expresses what is meant by the *priority* of European Union law: in the event of a conflict between a specific provision of the national law of a Member State and a specific provision of EU law, the Union norm is to be applied in preference to the national one.[221]

As Karpat notes in his work: "According to the concept of primacy formulated in the case-law of the Court of Justice, every Union norm has greater legal force than any national norm, regardless of its territorial or temporal scope."[222]

The *application primacy* of Union law thus operates both in cases of direct and indirect collision between Union and national norms. Application primacy forms the core of the principle of primacy of EU law and is also understood as *primacy of Union law in the narrow sense*. From this principle flows, for Member States, the obligation – within the scope of their powers – not only to apply Union norms directly, but also to interpret their national norms in a manner consistent with EU law (Euro-conform interpretation). The Court of Justice presents the principle of primacy of Union law as a necessary condition for achieving the objectives of the European Union, which, in its view, follows from the "spirit and aims" of the founding Treaties. The effect of EU law, according to this doctrine, cannot be limited by any national legal provision, because Union law supposedly constitutes its own legal order, governed exclusively by its own rules. This, the Court argues, is the only guarantee for the full effectiveness of Union norms. However, this means that a judicially constructed doctrine is placed above democratically adopted national law, including constitutional provisions, without explicit, clear treaty-based consent by the Member States' peoples. The

[221] J Pogáčová, M Siman and M Slašťan, *Komunitárne právo na Slovensku – päť rokov „po"* (Slovenská asociácia európskeho práva 2009) 13.
[222] A Karpat, *Zásada lojality v práve Európskej únie* (rw&w Science & New Media 2021) 16.

precondition for the application of this principle is, therefore, the existence of a *conflict of norms*.[223] It is essential to emphasise here that the primacy of EU law cannot be understood as a synonym for the *superiority* of the entire Union legal order over the complete legal order of the Member State.[224] If the issue in EU practice were truly one of the *hierarchical superiority* of the EU legal order over the national legal order, this would concern the *legal force* of norms and would mean that certain national legal provisions would become *invalid* whenever they conflicted with EU law. EU law, however, was not adopted by national legislatures and does not form a uniform, integral part of the domestic legal orders of the Member States. These are *independent legal orders*. For this reason, the relationship between them is better described by the term *"primacy"* – which concerns application in cases of conflict – rather than by terms such as *"supremacy"* or *"hierarchical superiority"*. If two norms collide and one enjoys primacy, the subordinate norm becomes *inapplicable* in that specific case – it does not automatically become *invalid* in the abstract.[225] EU law itself does not explicitly define the principle of primacy. The task of formulating and elaborating this principle was therefore left to the Court of Justice. Nevertheless, the principle is usually derived from three characteristics of the Union legal system:

1. **Limitation and transfer of sovereign powers**
   The Member States have, in certain defined areas, limited their sovereign powers and transferred them to the European Union. The Union is said to be built precisely upon these limitations, and within those transferred competences it is described as *sovereign*. From this it is inferred that in those areas, it is EU law that should be regarded as "sovereign" and should replace national law. This argument is problematic, because it converts a limited, revocable transfer of competences into a quasi-irrevocable transfer of sovereignty and then uses this constructed "sovereignty" of the Union to justify primacy over national law.

2. **Autonomy of the EU legal order**
   EU law is considered immune to external challenge because it is described as an *autonomous* legal system. It is said not to be dependent on national law or

[223] L Tichý, R Arnold, P Svoboda and others, *Evropské právo* (C H Beck 2004) 308.
[224] Týč 99.
[225] Tichý and Arnold and Svoboda and others 308.

on general international law. From this asserted autonomy, the Court and many commentators conclude that neither the national constitutional orders nor classic international law can limit or override EU law. A sovereigntist reading would point out that this is a circular argument: the Union first declares itself autonomous, and then, on that basis, claims that national or international rules cannot control it.

3. **Uniform applicability in all Member States**
   EU law is intended to apply uniformly in all Member States. It is therefore characterised as a regionally codified legal order which, to preserve its meaning and effectiveness, must have primacy over conflicting national norms. Otherwise, it is argued, the uniform application of EU law would be compromised. The same rule must apply in every Member State with equal legal force and scope. From the standpoint of national sovereignty, this requirement of uniformity is precisely what often leads to friction: constitutional pluralism and national democratic choices are pressed into a single legal mould, and any deviation is treated as a breach of the Union's uniform order.[226]

Initially, the principle of primacy of Union law was perceived rather negatively by many Member States, with the partial exception of some more integration-friendly countries (for example, the Benelux states). Over time, however, as governments began to appreciate the economic benefits and legal certainty associated with a guaranteed uniform legal framework – especially in the context of the internal market – their official stance toward the principle became more accommodating. This evolution can also be read differently: not so much as a free and enthusiastic acceptance of primacy, but as a pragmatic adjustment to a reality shaped largely by the Court of Justice and by the political logic of integration. The fundamental constitutional question therefore is whether a judicially constructed principle can legitimately prevail over national constitutional norms?

[226] Karpat 19.

## 5.2 The Development of the Principle of Primacy of Law

As has already been noted, the jurisprudence of the Court of Justice – that is, its case-law – represents the *only formal source* of the principle of the primacy of European Union law. The founding treaties themselves contain **no explicit provision** defining this principle. Its existence has therefore been *inferred* from the alleged nature of the Union itself, particularly from the fact that candidate states, upon accession, transfer certain competences to the Union. From this transfer, the Court later deduced that Union law must necessarily prevail over national law within those areas. There are various explanations as to why this principle was never incorporated into the founding treaties of the European Communities. It seems evident that the political climate at the time – marked by strong national sensitivities and anti-federalist convictions among several founding states – would not have allowed for the explicit inclusion of such a far-reaching provision. A clause granting the supranational order precedence over national law would likely have jeopardized ratification altogether. Thus, the absence of any express rule of primacy was a *political compromise*, intended to reassure states that integration would remain limited in scope and grounded in treaty-based cooperation, rather than constitutional subordination. While this omission made the negotiation and ratification process considerably smoother, it created a legal vacuum that would later be filled not by democratic consent, but by judicial innovation. As the European legal system began to expand, the Court of Justice was faced with numerous conflicts between Community law and national law, often brought before it by national courts uncertain how to resolve such collisions. The Court, confronted with these challenges, took it upon itself to formulate a binding doctrine: that *Community law*, and later *Union law*, should take precedence over any conflicting national provision.[227]

The first significant judgment relevant to this development was *Van Gend en Loos* (1963). Although this case did not directly concern the principle of primacy, it established the notion that the creation of the European Community had also created *a new legal order of international law*, for the benefit of which the Member States had "limited their sovereign rights." The case was primarily concerned with the *direct effect* of Community law – the ability of individuals to rely directly on treaty provisions

[227] N Diaconu, 'Theoretical and practical aspects of the primacy of EU law' (2016) *Contemporary Legal Institutions* 9–16.

before national courts – but it laid the conceptual foundation for later claims of primacy.

The first judgment to explicitly address the issue of primacy was *Costa v. ENEL* (1964). Together, *Van Gend en Loos* and *Costa* provided the theoretical framework for what would become the doctrine of the primacy of Union law. In *Costa*, the Court declared that: "By creating a Community of unlimited duration, having its own institutions, its own legal personality and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights and thus created a body of law which binds both their nationals and themselves."

This statement marked a turning point: it transformed what had been a conventional international treaty system into a hierarchical legal order, where the Community's norms were to prevail over national law. From another perspective, this represented a profound reinterpretation of the Treaties – one that was never explicitly approved by the contracting states or their citizens. However, the application of the principle was not without difficulty. The Court's assertion of primacy quickly met with resistance, particularly from national constitutional courts, which viewed such judicial reasoning as a potential encroachment upon constitutional sovereignty. The Court therefore had to refine its position through subsequent judgments and opinions, seeking to reconcile its doctrine with the constitutional traditions of the Member States – though in practice, it rarely conceded any limitation to the principle. One of the most important cases to follow was *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970), in which a conflict arose between an EU regulation and the German Constitution (*Grundgesetz*). The question before the Court was whether a Union regulation could take precedence even over the constitutional norms of a Member State. The Court reaffirmed its earlier stance, holding that the validity of Community law "cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure."

The *Simmenthal* judgment (1978) further strengthened this line of reasoning. The case concerned the powers of national judges when faced with a conflict between a national statute and Union law. The Court held that a national court is *obliged to apply Union*

*law directly* and to set aside any conflicting national provision, *without waiting* for the domestic law to be formally repealed or declared unconstitutional. In effect, this decision placed national judges in the position of enforcers of EU supremacy, even against their own state's legislation – a notion difficult to reconcile with the principle of constitutional sovereignty. Taken together, these judgments gradually built the modern doctrine of primacy – not through treaty amendment or democratic consent, but through cumulative judicial interpretation. This development illustrates the transformation of the European project from an intergovernmental community of sovereign states into a supranational legal order whose hierarchy is asserted by judicial authority rather than explicit political mandate. In the decades that followed, this doctrine would continue to evolve and be contested – as national constitutional courts, particularly those of Germany, Italy, Poland, and the Czech Republic, began to push back against the absolute interpretation of primacy, reaffirming that constitutional identity and sovereignty cannot be judicially overridden without democratic legitimacy. The early case-law of the Court of Justice, however, remains the foundation upon which the EU's claim to legal supremacy continues to rest.

### 5.2.1 The *Van Gend en Loos* Judgment[228]

*Van Gend en Loos* is the earliest judgment that directly concerns the relationship between Union law and national law. The case related to what was then Article 12 of the EEC Treaty, which laid down a prohibition on customs duties and charges having equivalent effect on imports and exports between Member States, as well as on increases in such charges already applied in mutual trade.

The Court of Justice received the following preliminary question: "Is Article 12 of the EEC Treaty directly applicable within the territory of the Member States – in other

[228] The Dutch government increased the customs duty by transferring formaldehyde from one tariff category to another. The company Van Gend en Loos, a German importer of formaldehyde, argued that the Dutch government's action was contrary to Article 12 of the EEC Treaty, which prohibits increases in customs duties. The company also sought reimbursement of the disputed amount. Questions were referred to the Court of Justice by one of Amsterdam's special courts, which, under Dutch law, was the court of final instance in the case. These questions were controversial not only in light of the then still undeveloped Community law but also with regard to the legal framework arising from the customs union among the Benelux countries.

words, can nationals of such a state rely on individual rights on the basis of that article, and must those rights be protected by the courts?"

In this judgment, the Court expressed the view that the power to give precedence to provisions of the EEC Treaty over national law lies exclusively with national courts (with the exception of actions brought under Articles 169 and 170 of the Treaty). According to the Court, in order to answer the above question, it is necessary to examine the structure, nature, and wording of the relevant provisions. The Treaty, the Court held, is *something more than a mere agreement*, since classical treaties create only mutual obligations between contracting states. This conception follows from the preamble to the Treaty itself (which refers not only to the governments of the Member States but also to their peoples), and it is confirmed by the establishment of institutions endowed with public powers, the exercise of which binds both citizens and Member States. This formulation by the Court could be misinterpreted as suggesting that the EEC legal order was not simultaneously part of international law. In fact, however, at that time international law was already incorporated into the Dutch Constitution, and the law of the European Communities was still perceived merely as a *regional component* of international law.[229] In other words, at the time of the *Van Gend en Loos* judgment, Community law was still regarded as part of international law rather than as a completely separate legal order. Although the Court did not yet address the primacy of Union law over national law in this judgment, *Van Gend en Loos* is of key importance for the later definition of that principle, because it introduced the idea that certain Treaty provisions confer directly enforceable rights on individuals. Many authors therefore see it as the starting point of both the doctrine of direct effect and the later development of the doctrine of primacy. Others, however, emphasise that the Court's reasoning was strongly teleological and that the concept of a "new legal order" only gradually evolved into the notion of full autonomy and primacy of EU law.

[229] Týč 50.

### 5.2.2 The *Costa v. ENEL* Judgment[230]

The *Van Gend en Loos* judgment thus characterised European law as a legal system distinct from national law and laid the foundations for defining the relationship between the two. As a consequence of this judgment, national courts increasingly turned to the Court of Justice with questions concerning the procedure to be followed in the event of a conflict between Union and national norms. A doctrine of primacy had to be formulated before such conflicts could be resolved in a coherent way.

As Karen Alter notes in her work: "European law must be superior to national law if individual rights are to have any real meaning; otherwise, states could evade their obligations simply by adopting new national rules."[231]

In the *Costa v. ENEL* judgment, the Court no longer used the language of "international law" to describe the legal order of the EEC. Instead, it treated the legal order of the Community as a *new legal order* deriving from an autonomous source – the EEC Treaty. The reasoning of the Court in *Costa v. ENEL* is based mainly on a teleological interpretation.[232] The Court referred to the "spirit" of the EEC Treaty and to the objectives of the Community. As follows from the Court's own wording, a Community was created which has legal capacity and capacity to act at international level, as well as the capacity to perform legal acts. Its powers arise from a transfer of competences from the Member States and from a limitation of some of their sovereign powers in favour of the Community, thereby creating a legal system that applies both to the Member States themselves and to their nationals. By incorporating Community law into the legal orders of the Member States, it is intended to prevent states from

[230] Facts of the case *Costa v. E.N.E.L.*:
In 1962, Italy nationalized the companies that produced and distributed electricity, transferring their assets to a new organization called E.N.E.L. (Ente Nazionale per l'Energia Elettrica). An Italian lawyer, Flaminio Costa (who was also a shareholder in one of the nationalized companies), refused to pay his electricity bill of 1,925 lire (approximately €22 in 2022) and subsequently challenged the nationalization act that had created E.N.E.L., arguing that it bore the hallmarks of a state commercial monopoly. State monopolies of a commercial nature are prohibited under the EEC Treaty. The conciliatory judge in Milan sought to obtain two parallel rulings — one from the Italian Constitutional Court, which was to address the questions concerning Italian constitutional law arising from the case, and another from the European Court of Justice, which was to interpret specific provisions of the EEC Treaty.The admissibility of the request for a preliminary ruling was challenged by the Italian authorities.

[231] K J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003) 18.

[232] The teleological interpretation clarifies the meaning of legal norms by explaining the objectives that led to their creation. These objectives are most often expressed in the preambles of normative legal acts or, in some cases, in their general provisions.

subsequently adopting unilateral measures contrary to EU law. Such measures, the Court held, cannot be binding or effective within the Community legal order. It is also noteworthy that the Court stated that the Community legal order was created by the Member States themselves by transferring powers deriving from their sovereignty to the Community. Neither in *Van Gend en Loos* nor in *Costa v. ENEL* did the Court examine whether this limitation of sovereignty – that is, the transfer of genuine powers of the Member States to the Union – complied with the constitutional requirements of each individual state. This point has since become a central issue in the writings of many constitutional scholars and in the case-law of national constitutional courts.

In a further step in its reasoning, the Court again relied on a teleological interpretation of the EEC Treaty and asserted that, in the spirit of the Treaty, it is impossible for Member States to give precedence to national law rather than Union law. The same logic applies to the full effect of Union law, which is based on reciprocity: Member States are supposed to pursue integration and mutual cooperation as expressed in the aims of the Treaty, and refusal by a Member State to grant full effect to Union law would undermine those aims, since the same law would no longer apply uniformly to all states. The effectiveness and uniformity of Union law are therefore seen as indispensable requirements for the realisation of the specific objectives spelled out in the founding Treaties. When analysing the judgments of the Court of Justice, account must be taken not only of the explicit reasoning but also of what remains "unsaid". Great weight is thus placed on the underlying assumptions and implications – a feature that applies to Union law as a whole. The very concept of a customs union and a common market presupposes that common rules will be applied uniformly throughout the territory of the Community. According to the Court, *unity* is therefore a fundamental characteristic of Union law and constitutes a basic precondition of the EU legal order, a unity that must not be obstructed by national law. Another argument introduced by the Court is the *unconditional nature* of the obligations of Member States.[233] These obligations, according to the Court, should not be affected or called into question by national normative acts, and their application must not depend on domestic legislation. Many commentators regard *Costa v. ENEL* as the decisive turning point in the development of the principle of primacy. At the same time, the judgment has given rise to extensive scholarly debate: while some consider this

[233] P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press 2008) 346.

reasoning indispensable for safeguarding the uniform application of EU law, others criticise the Court for deriving far-reaching constitutional consequences from an essentially teleological and structurally implicit reading of the Treaties.

### 5.2.3 The *Internationale Handelsgesellschaft mbH* Judgment[234]

The *Internationale Handelsgesellschaft* judgment concerned a conflict between a provision of the German Constitution and an EU regulation. This case was therefore considerably more complex than the two earlier cases. The Court of Justice was asked to clarify the relationship between the highest national laws of the Member States (their constitutions) and EU law. The Court was in a particularly delicate position, as it was faced with a German court whose argumentation was based on an alleged incompatibility between the EU regulation and fundamental constitutional principles of the German *Grundgesetz*.

In its final ruling, the Court held that the effectiveness and uniformity of Union law would be endangered if the validity of Union acts could be assessed by reference to national rules or principles. The validity of EU acts must be assessed exclusively on the basis of EU law. The Court stated that EU law would lose its "Community character" if it were subordinated to national legislation; this would call into question the very legal foundations of the Communities. Accordingly, the validity of a Union act or its effects in a Member State should not be assessed based on whether it infringes that state's fundamental constitutional rights or structural principles of its constitution.

In its reasoning, the Court also addressed the issue of the conflict between EU law and national constitutions by stating that respect for fundamental rights forms part of the general principles of law protected by the Court itself. The protection of fundamental rights should, it held, be ensured by the Court of Justice, and although it draws

[234] Facts of the case *Internationale Handelsgesellschaft mbH*: The company *Internationale Handelsgesellschaft mbH* held a time-limited license to export 20,000 tons of cornmeal. The company did not fully use the license, and therefore the German authority responsible for the import and storage of grain and feed declared the license forfeited. The company appealed to the German administrative court, which, although it recognized the primacy of EU law, found that the EU regulation in question conflicted with the German Constitution - particularly with the provisions guaranteeing freedom of enterprise - because the purpose of the EU regulation did not concern the financial loss suffered by the company as a result of the forfeiture of its license.

inspiration from the common constitutional traditions of the Member States, it must be guaranteed within the framework of the structure and objectives of the Union. From this, the Court concluded that, even though EU law has primacy over national constitutional provisions and principles, Union acts must not undermine fundamental rights; rather, they must respect them. Scholarly reactions to *Internationale Handelsgesellschaft* are diverse. Some view the judgment as a necessary clarification to prevent Member States from unilaterally limiting the effect of Union law by invoking their constitutions. Others see in it the origin of the later "constitutional identity" defence developed by national constitutional courts, particularly the German Federal Constitutional Court, which insisted that certain core constitutional principles cannot be displaced by EU law and remain subject to national constitutional review.

### 5.2.4 The *Simmenthal* Judgment[235]

The *Simmenthal* judgment represents another important milestone in clarifying the *application primacy* of EU law. The Court of Justice was asked, in essence, whether a national provision that conflicts with an EU norm must be formally repealed, or what exactly happens to it in practice. In this judgment, the Court held that if a case is brought before a national court within its jurisdiction, that court has the duty to apply EU law and thereby protect the rights of individuals arising from EU law, even where a national provision exists that is incompatible with it. In such circumstances, the national provision must *not be applied*, even if it predates the relevant EU measure. The Court further ruled that a national authority applying Community law is obliged *of its own motion* to ensure the full effect of Community norms and to refrain from applying any national provision that conflicts with those norms – even if the national provision is subsequent to the EU norm – without first having to request its repeal by

[235] An Italian court submitted preliminary questions to the Court of Justice concerning the compatibility of certain provisions of EEC regulations and the EEC Treaty with Italian veterinary law. Following the Court's judgment, a fine was imposed on the Italian Financial Administration (*Amministrazione delle Finanze dello Stato*), which was required to refund certain fees for sanitary inspections of beef imported from France into Italy. These fees had been unlawfully collected, as they were imposed within the Community. The Financial Administration appealed the judgment, arguing that the judge should have referred the matter to the Italian Constitutional Court rather than to the Court of Justice. The subsequent preliminary questions therefore focused mainly on this argument raised by the Financial Administration.

legislative means or through a constitutional procedure.[236] Another argument advanced by the Court was that the principle of primacy of Community law operates on two levels. First, all national legal norms that are incompatible with Union law lose their applicability. Second, this principle also prevents the introduction of new national legislative acts that would be contrary to Union law. From this reasoning, it can be concluded that the principle of primacy automatically leads to the *inapplicability* of a national norm conflicting with EU law; it does *not* render such a norm formally invalid. The national judge has an immediate duty not to apply the conflicting national provision. There is thus no need to ask the competent national authority to declare the norm invalid in order for the EU norm to be applied in its place. This power of the judge stems from the judge's obligation to ensure the full application of Community law. Conversely, the adoption of a new national rule contrary to EU law is considered absolutely impermissible.

This judgment also highlights the fact that, in the context of the principle of primacy – that is, in a conflict between a European norm and a national norm adopted later in time – the principle *lex posterior derogat legi priori* does not apply. The Court described the scope of the primacy doctrine as extending to "any national provision of a law (…) irrespective of whether it was adopted earlier or later than the Community measure." This means that the decisive factor is not the time when the national norm was adopted, but its compatibility with Union law. The principle of primacy thus applies both to more recent national norms conflicting with older EU norms and vice versa. The date of entry into force of the respective acts is, in this context, irrelevant. *Simmenthal* could be seen as the practical consolidation of primacy in the day-to-day work of national courts. Others point out that this judgment significantly strengthened the role of national judges as "Union judges" and raised new constitutional questions about the balance between national constitutional mechanisms for reviewing legislation and the obligation to give immediate effect to EU law.

[236] D Simon, *Komunitární právní řád* (ASPI 2005) 425–426.

## 5.3 The Concept of Normative Authority in Relation to the Primacy of EU Law

The concept of *normative authority* exists on a similar theoretical plane as the concept of sovereignty. The legal philosopher John Austin argued that in every society there is a sovereign who appears in all matters – that is, whose sovereignty is *unitary*. In addition to being unitary, this sovereignty is *indivisible*: it cannot be split between several entities that would each have decision-making authority over different matters according to subject-matter criteria.[237] According to Austin, individuals obey this sovereign, and the sovereign is not in a position of subordination – he is not "in the habit of obeying" anyone else. The concept of sovereignty is linked to the assumption that the legal norms of a given legal system originate from a single sovereign and therefore share a common source. This sovereign either adopts the norms directly, or they are adopted by a subordinate authority to which the sovereign has delegated legislative powers. Austin's theory offers a relatively simple model of a single sovereign. However, it does not fully reflect the situation within the European Union, where there exist *multiple sovereign powers* that are at the same time *norm-creating authorities*. Alongside national law-making authorities there is also a supranational law-making authority in the form of the European Union itself. These two components coexist side by side, and it is not possible to derive the normative authority of one entirely from the other. The normative authority of the Member States cannot be fully derived from a "sovereign" normative authority of the Union, and conversely, the normative authority of the Union does not derive in its entirety from the sovereign normative authorities of the Member States. [238]

Legal positivism later subjected Austin's theory of a unitary and indivisible sovereign to considerable criticism. Joseph Raz, for instance, pointed out that the origin of a particular norm cannot be the sole criterion for identifying all valid law within a legal system. In his view, sovereignty can in fact be *divided* and *shared*. Sovereignty can be divided among several entities that do not have hierarchically subordinate law-making powers over different subject matters; and it can be shared among entities that do not have hierarchically subordinate powers over the *same* matters. Where valid legal

[237] J Austin, *The Province of Jurisprudence Determined* (Cambridge University Press 1995) 246.
[238] G Letsas, 'Harmonic Law: The Case against Pluralism' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 84.

norms within a single legal system are created by multiple, distinct "sovereigns", each possessing the highest normative authority in its domain, a different criterion for the validity of norms and the unity of the legal system must be found – one that does not rely solely on the identity of the law-making authority.

In the EU context, both the Court of Justice of the European Union and national constitutional courts hold views on the primacy of Union law and its limits. Both levels of courts – the Court of Justice and national constitutional courts – in practice claim a role in determining the boundaries of the preferential application of Union law. Although they possess this power, the objective of coherence between Union and national law implies that the limits once identified should, as far as possible, be mutually respected, irrespective of whether they originate at EU level or at the level of a Member State. It is also irrelevant whether these limits are set by a constitutional or a judicial body. What matters is that courts strive to follow *common* boundaries in order to ensure cooperation and legal certainty. The key question is therefore not which court, at what time, and in what form defines the boundaries, but whether courts collectively seek to observe them, not out of subordination to a "higher" authority, but in the interest of effectiveness and mutual cooperation. Cooperation between the Court of Justice and national constitutional courts follows both from positive law and from the founding Treaties. In particular, Article 4(3) TEU provides that: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives." Mutual cooperation between national constitutional courts, and between those courts and the Court of Justice, in determining the limits of the primacy of Union law is largely a factual and dynamic matter. This is well illustrated by comparative analyses of constitutional court case-law reviewing the compatibility of the Lisbon Treaty with national constitutions. Within this comparative context, a form of *judicial dialogue* has emerged. Constitutional courts of Member States have, in their decisions on the applicability of Union law, referred not only to the case-law of the Court of Justice, but also to the decisions of constitutional courts of other states.

Their conclusions have not always coincided. Particularly interesting in this respect is the case-law of the Czech Constitutional Court. When reviewing the constitutionality of the Lisbon Treaty, the Czech court drew inspiration from two decisions of the German Federal Constitutional Court: the *Solange II* judgment and the judgment reviewing the compatibility of the Maastricht Treaty with the German Constitution. The Czech court referred to the latter especially in relation to the possibility of reviewing whether Union institutions acted *ultra vires*, that is, beyond the competences transferred to the EU by the Czech Republic.[239] This example illustrates the need for constitutional courts, when addressing issues concerning the relationship between national and Union law, to take into account the case-law of other constitutional courts within the European legal space. The criteria of validity for legal norms defined by judicial practice are sometimes conceptualized in terms of H. L. A. Hart's notion of a *"rule of recognition"* – a customary judicial rule that identifies which norms count as valid law within a given legal system. In the EU context, this "rule of recognition" is being shaped not only by the Court of Justice, but also by the evolving jurisprudence of national constitutional courts and the dialogue – and sometimes tension – between them.[240]

## 5.4 The Primacy of EU Law as a Rule of Recognition

The question of what constitutes valid law within a legal system has long preoccupied jurists and philosophers of law. H. L. A. Hart's concept of the *rule of recognition* provides one of the most influential frameworks for understanding the foundation of legal validity within a legal system. According to Hart, every legal system rests upon a fundamental social rule that identifies the ultimate criteria by which norms are regarded as legally binding. This rule is not necessarily codified or expressly stated in legislation or a constitution; rather, it exists as a matter of shared social practice among officials who accept it from an "internal point of view".[241] The rule of recognition performs both a practical and a conceptual function. It operates as a meta-rule that unifies the various sources of law within a system, including statutory, judicial,

[239] Czech Constitutional Court, *Treaty of Lisbon I* (Pl. ÚS 19/08) (26 November 2008) paras 116–118.
[240] Letsas 85-100.
[241] Hart 95.

customary, or constitutional rules, by providing a common standard of validity.[242] It also defines the boundaries of the legal system itself, determining which norms belong to it and which do not. As Hart argued, this rule is a matter of social fact: it exists wherever there is a convergent practice of recognition among officials, regardless of whether the rule is formally expressed[4]. In the context of the European Union, many legal theorists have drawn parallels between Hart's concept and the principle of the primacy of EU law. The principle of primacy, developed by the Court of Justice of the European Union (CJEU) through its jurisprudence, functions as a supranational rule of recognition that determines the relationship between EU law and the national laws of the Member States. Even though the Treaties contain no explicit provision establishing the primacy of EU law, the CJEU's case-law, especially the judgments in *Costa v. ENEL*, *Internationale Handelsgesellschaft*, and *Simmenthal*, has consistently affirmed that EU law takes precedence over conflicting national provisions. This case-law effectively creates a judicially constructed rule of recognition. It instructs national courts to regard EU law as hierarchically superior in cases of conflict. The result is a supranational legal order whose validity does not depend solely on the constitutional traditions of its Member States but is sustained by a network of convergent judicial practices. In this sense, the CJEU's doctrine of primacy can be seen as an empirical rule of recognition, accepted and applied in practice by national courts that consider themselves bound by it. However, the relationship between the EU and national legal systems is more complex than a simple hierarchy. National constitutional courts, such as the German Federal Constitutional Court (Bundesverfassungsgericht), the Italian Constitutional Court, and others, have at times resisted an unqualified acceptance of primacy, asserting that their constitutions retain ultimate authority in matters of fundamental rights and constitutional identity. This has given rise to what scholars describe as constitutional pluralism, where multiple centers of constitutional authority coexist and interact.[243]

In this pluralist context, the rule of recognition is not a single, static rule but a dynamic product of judicial dialogue between the CJEU and national courts. Each court system contributes to defining the conditions under which EU law is accepted as binding. Legal theorists such as Neil MacCormick, Joseph Weiler, and Miguel Poiares Maduro

[242] R S Summers, 'Towards a Better General Theory of Legal Validity' (1985) 16(1) *Rechtstheorie* 69.
[243] Hart 256.

have emphasized that this dialogical process does not signify disorder, but rather a form of normative coordination among distinct yet interdependent legal systems.[244] Importantly, the EU rule of recognition primarily concerns priority of application, not validity in the strict sense. National norms conflicting with EU law are not formally void; they stay valid within their domestic legal orders but become inapplicable to the extent of the inconsistency. This approach allows both systems to coexist without one entirely subsuming the other, thus maintaining a functional balance between supranational uniformity and national sovereignty. The continuing acceptance and application of this rule, through judicial decisions, legislative practice, and administrative action, demonstrate that the principle of primacy has evolved into a cornerstone of the EU's legal and constitutional identity. Yet, as several scholars note, its authority ultimately depends on mutual recognition and cooperation between national and supranational institutions rather than on coercive hierarchy.

## 5.5 Conflict Between National Constitutional Law and EU Law

The relationship between EU law and national constitutional law represents one of the most intricate and contested aspects of European integration. The CJEU's early jurisprudence, particularly the landmark judgments *Costa v. ENEL*, *Simmenthal*, and *Internationale Handelsgesellschaft*, established the principle that EU law prevails over all forms of national law, including constitutional provisions. This position was grounded in the need to ensure the uniformity and effectiveness of the Union's legal order. However, national constitutional courts have never fully renounced their own claims to ultimate authority. Many of them, especially the German, Italian, and Polish courts, have emphasized that the acceptance of primacy is conditional on respect for certain fundamental constitutional principles, such as democracy, the rule of law, and the protection of fundamental rights. The German Federal Constitutional Court's *Solange I* and *Solange II* decisions famously articulated this view, asserting that while the primacy of EU law would generally be recognized, it could not override the essential content of the German Basic Law. This ongoing dialogue between national and supranational courts forms the core of what has come to be known as constitutional

[244] M C Dorf, 'How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition' (Cornell Law School Research Paper) 69.

pluralism. According to this view, the European legal space consists of overlapping constitutional orders that interact through principles of cooperation, proportionality, and mutual respect rather than through a rigid hierarchy. The constitutional identity of the Member States, now protected under Article 4(2) TEU, functions as a limit to the primacy of EU law. It encompasses the essential elements of statehood, including democracy, sovereignty, and fundamental rights protection. These values form what is sometimes referred to as the "immutable core" of the constitution. Although the content of constitutional identity may evolve over time, national courts continue to treat it as the ultimate boundary of European legal authority[16]. In resolving conflicts between EU law and national constitutional law, courts must therefore balance competing principles. On one hand lies the principle of effectiveness, the need to ensure that EU law is applied uniformly and effectively across the Union. On the other hand lies the principle of constitutional integrity, which safeguards the fundamental structures of the Member State's legal order.[245]

This balancing process is informed by the jurisdictional principles of EU law: subsidiarity, proportionality, and conferral. Together, they form what is sometimes called the principle of legality in EU law. These principles guarantee that the Union acts only within the limits of its competences and that its actions remain necessary and proportionate to its objectives. As legal scholars such as Ingolf Pernice and J. H. H. Weiler have argued, this dual system of legality, European and national, creates an ongoing constitutional dialogue rather than a confrontation between competing sovereignties.[246]

## 5.6 Exceptions to the Primacy of EU Law

Although the CJEU has consistently reaffirmed the primacy of EU law as an essential principle of the Union's legal order, it has also recognized limited exceptions and qualifications, both in the Treaties and in its case-law. These exceptions illustrate that primacy runs within a complex constitutional balance rather than as an absolute rule. The first exception derives from Article 351 of the Treaty on the Functioning of the

[245] R Benko, 'Rozprava o princípe prednosti práva Európskej únie – Vláda práva za hranicami štátu' (2015) *Studia Iuridica Cassoviensia* 138.
[246] Ibid.

European Union (TFEU).[247] This provision deals with international agreements concluded by Member States before their accession to the EU. It stipulates that the Treaties do not affect the rights and obligations arising from such earlier agreements, but that Member States must take all appropriate measures to eliminate any incompatibilities with EU law. If necessary, they may terminate or renegotiate those agreements. The Council Decision of 22 July 1974 established mechanisms for consultation and coordination to ensure that Member States' international commitments did not undermine the objectives of the Union. A more complex qualification emerged from the CJEU's criminal law jurisprudence, especially in the *Taricco* (2015) and *M.A.S. and M.B.* (2017) cases. In *Taricco*, the Court held that Italian rules on limitation periods, which effectively allowed serious VAT fraud to go unpunished, violated Article 325 TFEU and had to be disapplied. However, in *M.A.S. and M.B.*, the Court modified its stance, accepting that national courts are not required to disapply domestic criminal provisions if doing so would violate fundamental constitutional principles, such as legality and legal certainty. The Italian Constitutional Court had argued that retroactive application of the *Taricco* rule would breach the foreseeability of criminal law, a guarantee also protected by EU law itself and the European Convention on Human Rights.[248] This reasoning demonstrates that primacy is not absolute even within the CJEU's own case-law. It must operate consistently with the rule of law and fundamental rights, which are part of the constitutional fabric of both the EU and its Member States. As Karpat observes, the *M.A.S. and M.B.* judgment refined, rather than overturned, the principle of primacy by clarifying that it must be applied in harmony with broader principles of legality and proportionality.[249]

Another qualification was articulated in the *Diamantis* case, where the Court held that a national court is not required to give priority to EU law if doing so would cause disproportionate and serious harm to the legitimate interests of third parties, and if the party invoking EU law has another effective means of redress, such as a claim for state liability. This introduces a proportionality-based limitation to primacy, emphasizing that its application must not undermine equity or fairness.

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[247] Craig and de Búrca 352.
[248] Regarding the decision: The Italian Constitutional Court (*Corte Costituzionale*) submitted a request for a preliminary ruling concerning the interpretation of Article 325(1) and (2) TFEU, as interpreted in the judgment *Taricco and Others* of 8 September 2015. The *Taricco* judgment (similarly to the *M.A.S. and M.B.* judgment) concerned criminal offences related to value added tax (VAT) fraud.
[249] Karpat 131.

A further set of exceptions arises from the doctrine of abuse of EU law. This doctrine allows the CJEU to deny the protection of EU law where it is invoked in bad faith or for purposes contrary to the objectives of the Treaties. Early cases involved so-called "U-turn" situations, where individuals or companies sought to exploit cross-border rights solely to avoid stricter domestic regulation.[250] Over time, the doctrine has evolved to cover a wide range of contexts, including free movement, taxation, and company law. The Court has held that abuse has both a subjective element, an intention to gain an undue advantage, and an objective element, a result contrary to the purpose of the rule relied upon. Member States may adopt anti-abuse measures, provided they respect the principles of proportionality and the uniform application of EU law.[251] The assessment of whether abuse has occurred, however, ultimately lies with the CJEU on a case-by-case basis. In conclusion, while the principle of primacy remains fundamental to the coherence and uniformity of EU law, its application is not unqualified. The exceptions and limitations recognized in Treaty provisions and case-law, ranging from pre-existing international obligations to fundamental constitutional guarantees and prohibitions of abuse, illustrate the Union's complex constitutional structure. Rather than weakening primacy, these exceptions demonstrate the CJEU's effort to integrate it into a broader framework of constitutionalism that respects both supranational authority and national sovereignty.[252]

[250] See, for example: Judgment of the Court of Justice of 26 June 1988, *Sylvie Lair v Universität Hannover*, Case C-39/86, ECLI:EU:C:1988:322.
[251] R Král, *Zásady aplikace komunitárního práva národními soudy* (C H Beck 2003) 34–35.
[252] Juharová 40.

# 6 THE DOCTRINE OF THE PRIMACY OF EUROPEAN UNION LAW IN THE CONDITIONS OF THE MEMBER STATES

The principle of primacy consists of two dimensions resulting from its development. The first dimension is the theory created and developed by the Court of Justice of the European Union, which describes the full scope of this important principle. The second dimension concerns ensuring its acceptance and application by the Member States, both by incorporating this principle into their constitutions and by confirming it through their highest judicial authorities. From the outset, the principle of the primacy of EU law was one that divided European countries into two groups, which was also reflected in the (un)successful outcome of the Treaty establishing a Constitution for Europe. In essence, it can be stated that the position of individual states on the principle of primacy generally reflects their broader approach to international law. In some states, the acceptance of this principle caused almost no problems (for example, the Benelux countries), while in others it was accepted with various reservations. These reservations are essentially of two types: either procedural in nature (e.g. in the case of Italy) or relating to situations where European law is incompatible with fundamental human rights protected by a state's constitution (as in the cases of Germany and Italy).[253] In France, even the national judicial authorities did not perceive the principle of primacy uniformly, as one branch of the judiciary accepted it while others rejected it.[254] Ultimately, the Member States came to terms with this principle and accepted European law as directly effective law.

In the following subchapters, we will address several states in connection with their positions on this principle. It should be noted that the states mentioned do not by any means represent an exhaustive list of those Member States that have addressed this principle. They are merely some interesting cases that the author considers important to mention and which may help us understand the approach of EU countries to the doctrine of the primacy of EU law.

[253] M Cappelletti, *European Law and the Italian Legal System* (Stevens 1971; reprint 2000) 25–50.
[254] V Klokočka and E Wagnerová, *Ústavy států Evropské unie* (Linde 2004) 125.

## 6.1 Germany

Germany is one of the founding countries of the EU. The best-known and most frequently discussed position on the doctrine of the primacy of EU law is that of its constitutional court, particularly in comparison with courts of other states. This is related to the fact that Germany (together with Italy), after its defeat in World War II, provided its constitution with much more extensive protection of fundamental human rights than other Member States. Approximately one quarter of all requests for a preliminary ruling submitted to the Court of Justice were sent by German courts. In 1971, the Federal Constitutional Court of Germany became the first highest national court to confirm the primacy of EU law. Later, however, the position of German courts changed; they became more critical of the Court of Justice and more willing to limit the principle of primacy. Germany did not encounter major difficulties in accepting the primacy of EU law over ordinary German legislation; however, this did not apply to accepting the primacy of Union law over German constitutional norms. One of the best-known judgments of the Court of Justice, Internationale Handelsgesellschaft, addresses precisely the question of whether Union law has primacy even over national constitutions. Germany follows a dualist approach to international law, meaning it perceives international law as a separate legal system distinct from and operating independently of national law.[255]

The German judiciary accepts the doctrine of primacy, but this acceptance is not unconditional. There are two conditions that must be fulfilled for primacy to be accepted by the Federal Constitutional Court (and consequently by all German courts). First, European law must not conflict with fundamental human rights guaranteed by the German Constitution. Today, this condition applies largely in theory, since the protection of fundamental rights within the EU has developed to a level comparable to the standard guaranteed by the German Constitution.[256]

The second condition is that the European Union acts within the scope of its competences; that is, that it respects the limits of the powers conferred upon it when

[255] M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262.
[256] M Dani, J Mendes, A J Menéndez and M Wilkinson, 'At the End of the Law: A Moment of Truth for the German Constitutional Court' (2020) 21 *German Law Journal* 984.

adopting secondary legal acts. Under German law, the Federal Constitutional Court holds so-called “Kompetenz-Kompetenz” authority, meaning it has the power to review whether the Court of Justice or other European institutions act within the limits of their competences. According to German law, the Court of Justice does not possess such authority.[257]

Germany has been particularly critical of the ongoing evolution of the EU's supremacy theory and its assertion of Kompetenz-Kompetenz. The BVG is widely recognized for its refusal to completely acknowledge the absolute primacy of the ECJ regarding EU law.31 This reluctance to comply with the EU's establishment of its own overarching authority over national constitutions is obviously evident and best comprehended through the case law of the BVG. The inaugural case in which the BVG scrutinized the supremacy of EU law is Solange I; in this instance, the BVG was tasked with determining whether an EU law that violated fundamental rights enshrined in the German Basic Law (Constitution) possessed supremacy over those fundamental rights. If such an EU legislation became supreme, it would supplant national fundamental rights, so becoming citizens entirely dependent on the EU legal system for the protection of their rights. The BVG asserted that, as basic rights are an intrinsic component of the Basic Law, the authority to displace or diminish them cannot be legitimately delegated to the EU via the conferral of competences. The safeguarding of fundamental rights constituted an integral aspect of Germany's national identity and could not be relinquished through any legal measure. Consequently, any EU legislation that violates basic rights would be deemed invalid, and in instances of disagreement between German fundamental rights and EU law, the German rights would take precedence.[258] This was particularly true given that the BVG deemed the protection of fundamental rights at the EU level to be insufficient. The BVG determined that "so long as" this insufficient level of protection persisted, it would assert its jurisdiction to evaluate EU acts for conformity with the fundamental rights established in the German Basic Law. The BVG stated that it would only assert its jurisdiction in cases where the ECJ had previously been requested to interpret the relevant EU statute, and the ensuing

[257] Dani and Mendes and Menéndez AJ and Wilkinson M 984.
[258] Craig and de Búrca 54.

interpretation did not resolve any contradiction between the EU norm and German fundamental rights.[259]

The consequences of this action are both evident and significant. The BVG openly contested the idea of EU supremacy as established by the ECJ by asserting that an EU statute would not take precedence over a national constitutional provision, regardless of its significance within the domestic legal framework. Secondly, by positioning itself as a legal authority able to assess the compatibility of EU law with national provisions and potentially deeming that EU norm inapplicable within the national framework, the BVG was overtly disregarding the ECJ's determination that it possessed exclusive authority to invalidate EU law. The separate allegations stemmed from the underlying reality that the BVG perceived the relationship between the Member States and the EU in a manner distinct from that of the ECJ, as subsequent instances demonstrate.[260]

Despite significant apprehension regarding the BVG's ruling, the ECJ demonstrated a notable receptiveness to the critique that fundamental rights protection was deficient at the EU level and commenced efforts to rectify this shortcoming. Drawing from several international tools and the shared constitutional tradition of Member States, the ECJ significantly expedited the evolution of its common-law basic rights doctrine. The culmination of the developing process was that the EU treaties implicitly encompassed a "unwritten Bill of Rights" to which EU legislation and activities were mandated to conform. Thus, the ECJ was able to affirm the ongoing supremacy of EU law over conflicting national regulations, as the enhanced protection of fundamental rights precluded Germany (or any other Member State) from considering a case in which EU law contradicted the safeguarding of fundamental rights.[261]

Consequently, by advancing its fundamental rights jurisprudence, the ECJ circumvented any possible dispute with the BVG. Consequently, the BVG was never required to exercise the jurisdiction to review EU regulations that it had asserted in Solange I. In 1986, the BVG conclusively dispelled any question regarding its eventuality: in the case known as Solange II, the BVG assessed the ECJ's enhanced safeguarding of basic rights and asserted that these rights were now adequately

[259] Dani and Mendes and Menéndez AJ and Wilkinson M 984.
[260] Craig and de Búrca 56.
[261] Komárek J, 'European Constitutionalism and the National Constitutional Courts' (2007) 10 Croatian Yearbook of European Law and Policy 1.

protected at the EU level. The Court additionally asserted that the BVG will cease to exercise its jurisdiction to assess EU legislation or acts, provided that the EU consistently safeguards fundamental rights. The BVG explicitly said that the guarantees provided at the EU level do not have to be identical in every aspect to those guaranteed at the national level, provided they are commonly regarded as equal. By doing so, the BVG relinquished any need to evaluate and contrast the various theories of fundamental rights protections at each level, thereby negating the necessity for comprehensive oversight of EU law.[262]

While the BVG in Solange II created a legal precedent indicating it would largely refrain from reviewing EU actions or laws, it is crucial to acknowledge that the Court did not explicitly forfeit its assertion of jurisdiction over such matters. Instead, it opted not to exercise this jurisdiction as long as the EU sufficiently safeguarded fundamental rights. The BVG's ruling reaffirmed its authority to assess the legitimacy of EU regulations, considering the constraints of national constitutional mandates, and indicated that it might reestablish this competence at any moment should the EU not fulfill its obligations. Consequently, the claims articulated by the BVG in Solange I that the primacy of EU law is constrained by national constitutional provisions, along with the BVG's authority to oversee these constraints (which contradicts the ECJ's established case law), were tacitly upheld. The actions of the BVG since Solange II indicate that reactivating its authority in this domain would probably need a "significant regression" in the safeguarding of fundamental rights at the EU level. The current standard of proof necessary for anybody attempting to invoke the Court's jurisdiction in this domain is "universally acknowledged in academic literature as virtually insurmountable."[263]

[262] A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) 23.
[263] J Komárek, 'European Constitutionalism and the National Constitutional Courts' (2007) 10 *Croatian Yearbook of European Law and Policy* 11.

### 6.1.1 The Maastricht Judgment and the Emergence of Ultra Vires Review

In 1993, in the case known as Maastricht, the BVG faced a constitutional challenge regarding Germany's accession to the most recent EU Treaty, the Maastricht Treaty.[264] The BVG ultimately determined that the applicant's objections to the Treaty were unfounded; yet, this ruling revitalized other primacy discussions that had been inactive since Solange II.[265]

The preliminary segment of the ruling addresses admittance criteria and, for the examination of fundamental rights, effectively reaffirms the Solange jurisprudence, albeit with a subtle modification. In Solange I and Solange II, the BVG asserted that its authority to examine fundamental rights matters was limited to instances where a German entity enforced the violating EU legislation. Conversely, in Maastricht, the BVG emphasized that its authority encompassed any circumstance in which the application of EU legislation affected basic rights. The practical implications of this extension are negligible, as the BVG has reiterated the same impractical standard for the activation of its jurisdiction in this domain. The BVG effectively broadened a jurisdiction that it had previously rendered nearly impossible to assert. Nevertheless, in doing so, the BVG reaffirmed its theoretical capacity to scrutinize EU legislation.[266]

The primary component of the Maastricht decision centers on the EU's competencies as viewed through the lens of the BVG. The fundamental premise of the BVG posits that the Member States are the "Masters of the Treaties," indicating that the Member States govern the EU rather than being governed by it.[267]

The legitimacy of EU legislation in Germany derives from national legislative measures that establish and regulate its implementation within the local legal framework. The inherent implication of this comprehension of the relationship between the EU and the Member States is that EU law may be deemed supreme in instances of conflict with incompatible domestic norms; however, this supremacy is

[264] German Federal Constitutional Court, *Maastricht Judgment (Brunner v European Union Treaty)* (BVerfGE 89, 155) (1993).
[265] I Pernice, 'Multilevel Constitutionalism in the European Union' (2002) 27 *European Law Review* 51.
[266] Komárek 13.
[267] R Schütze, *European Constitutional Law* 2nd edn (Cambridge University Press 2016) 34.

contingent upon the national legislation that establishes its primacy. In other words, it is a dominance over the domestic laws that is wholly contingent upon those domestic laws. The ultimate outcome is that national laws are only supplementary on a voluntary basis.[268]

The notion that the EU is a creation of the Member States leads to a major alteration in the definition of EU competencies. Initially in Maastricht, the BVG endeavored extensively to refute the belief that the EU possessed the authority to determine the boundaries of its own competence (Kompetenz-Kompetenz).[269] The limitations on the granted powers are determined by the Member States, and the EU does not hold an exclusive authority for their definition. Expanding on this rationale, the BVG asserted that it, as a national court, possessed the authority to scrutinize EU competencies. According to the BVG, the EU possesses only those powers explicitly granted to it; hence, any EU actions exceeding those powers would lack binding authority in Germany. This applies not only to EU statutes or other secondary legislation but also to instances where judicial interpretation of the EU Treaty effectively broadens its scope beyond the constraints explicitly established by the Member States. Consequently, in Maastricht, the BVG affirmed that EU authority is constrained by national constitutions and the delegated authorities outlined in the EU Treaty, and that Member States possess the right to monitor and nullify any supra vires actions undertaken by the EU. These doctrines directly contradict accepted EU jurisprudence.[270]

The Maastricht ruling was poorly welcomed by both academics and practitioners. Nonetheless, akin to the repercussions of Solange I, the response at the EU level was somewhat subdued. Instead of explicitly confronting the challenge to its authority, the ECJ commenced to operate with increased caution in issues pertaining to Community authorities. By constraining its jurisprudence regarding EU competencies and restricting the leniency of its interpretive doctrines, the ECJ effectively initiated a process of self-regulation concerning EU acts.[271]

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[268] Schütze 43.
[269] A von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) *Common Market Law Review* 1417 47.
[270] D Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) *European Law Journal* 460 21.
[271] Ibid.

Analogous to its reaction to Solange I, the ECJ's conduct following Maastricht substantially diminished the potential for discord with the BVG, rather than pursue it. However, it is important to acknowledge that many historians contend that the ECJ's decisions were not a reaction to the BVG, but were instead determined autonomously. The legitimacy of the cause and effect in this situation cannot be definitively demonstrated; nonetheless, the timing of the ECJ's changing jurisprudence is, at the very least, questionable.[272]

### 6.1.2 The Lisbon Judgment and the Development of Constitutional Identity Review

Post-Maastricht, the BVG seemed disinclined to instigate a confrontation with the ECJ. The BVG, after conveying a "clear message" to the ECJ and EU institutions, did not execute its threat to annul EU legislation in any of its future cases. In this regard, the Court deliberately evaded direct and overt confrontation with the ECJ concerning these matters.[273] Certain pundits stated that the BVG became "all rhetoric and no substance. The vigorous extension of the 2009 Lisbon decision surprised many.[274]

In Lisbon, the BVG affirmed the constitutional conformity of the new Lisbon EU Treaty with the German Basic Law, while invalidating the domestic execution of that Treaty. However, as to Maastricht, the significance lay not in the final result of the constitutional challenge, but rather in the language and rationale employed by the BVG in its deliberation. The BVG's examination of the Treaty concerning the constraints of Germany's Basic Law was notably significant in many specific dimensions of Germany's legal association with the EU. The BVG reaffirmed and elucidated numerous stances from Maastricht. Lisbon reiterated that the Member States are the "Masters of the Treaties" and the definitive source of the EU's authority. The precedence of EU law over domestic law originates from the Basic Law rather than from the independent supremacy of the Treaty. Moreover, the EU can only operate

[272] F C Mayer, 'Rashomon in Karlsruhe: A Reflection on Democracy and Identity in the European Union' (2011) 9 *International Journal of Constitutional Law* 757 9.
[273] German Federal Constitutional Court, *Lisbon Judgment (Lissabon-Urteil)* (BVerfGE 123, 267) (2009).
[274] *Grundgesetz für die Bundesrepublik Deutschland* art 23, art 79(3) (Eternity Clause).

within the authorities granted to it, and the BVG reaffirmed its authority to assess whether EU actions are supra vires. Nonetheless, the BVG did more in Lisbon than merely reiterate and reinforce its previous perspectives on the legal relationship between the EU and Germany; it also broadened them. In examining the fundamental constraints established by the German Basic Law on the Lisbon Treaty, the BVG observed that the German legislature's constitutional authority to delegate sovereign powers to the EU is contingent upon the preservation of the sovereign statehood of a constitutional state, in accordance with an integration framework that adheres to the principle of conferral and respects the constitutional identity of the Member States.[275]

The EU is restricted to exercising only those powers explicitly granted by the Member States and cannot utilize bestowed powers that the Member States were constitutionally incapable of transferring. In Germany's situation, this includes the elements of its "non-transferable identity" protected by Article 79(3) of the German Basic Law. The BVG in Lisbon asserts that this encompasses determinations regarding: substantive and formal criminal law; the allocation of the monopoly on the use of force by the police domestically and by the military externally; essential fiscal decisions concerning public revenue and expenditure; decisions influencing the configuration of living conditions within a social state; and decisions of significant cultural relevance. The Court elaborates extensively in its ruling on the particular domains that are prohibited from European integration and reaffirms that “substantial freedom of action must remain reserved to the Member States” in these matters. The BVG reiterated its competence for ultra vires review and claimed in Lisbon the authority to evaluate whether EU policies violate Germany's national constitutional identity, rendering such activities unlawful.[276]

Lisbon was not met with quick approval. This is not unexpected, as the ruling was merely another in a "prolonged series of precedents" that had already faced severe criticism. The reaffirmation of the rationale in these previous judgments, along with the extension into further areas of scrutiny, served to further solidify the BVG's longstanding interpretation of the legal relationship between Germany and the EU. Nonetheless, Lisbon, while drawing on the BVG's previous rulings, redirected the

[275] *Case C-391/09 Runevič-Vardyn* EU:C:2011:291.
[276] D Halberstam and C Möllers, ‘The German Constitutional Court Says “Ja zu Deutschland!”’ (2009) 10 *German Law Journal* 1241 10.

BVG's focus towards German sovereignty.90 This transition is seen in the significantly heightened frequency of the German root term “souverän” (forty-nine instances) in the verdict, in contrast to its preceding occurrences in Maastricht (eight instances) and the Solange cases (none).The shift in emphasis to Member State sovereignty transformed the decision from a mere language modification to a matter about the constraints on the EU as dictated by the Treaty, focusing instead on the limitations imposed on the EU by the constitutional frameworks of the Member States. Consequently, while Maastricht addressed the EU's actions beyond its treaty-defined authorities (ultra vires), Lisbon referred to the EU's actions beyond the powers that Member States might constitutionally delegate (identity review).[277]

In this regard, Lisbon reflects the reasoning evident in Solange I, where, despite the absence of the term “souveränität,” the fundamental rights limitation imposed on the EU by the BVG constituted an external constraint stemming from an intrinsic element of Germany’s constitutional identity.[278] Lisbon's heightened emphasis on safeguarding Germany's sovereignty from EU intrusion was perceived as the BVG establishing definitive constraints on the further integration of the EU. From a pragmatic perspective, these constraints were met with skepticism: given that the BVG had consistently neglected to assert its jurisdiction over EU matters in previous instances, there was uncertainty over its future enforcement of these limitations.[279]

Although practical applications may be limited, the challenges associated with restricting the EU based on national identity are numerous and evident. The notion of 'identity' is profoundly challenging to quantify and define. The Dutch scholar Kossmann likens it to a "large jellyfish on the beach," which, upon reflection, should be left undisturbed due to its complexity, multifaceted nature, and variability. The term's malleability renders it susceptible to misuse by national courts. Indeed, the BVG's definition of national identity has become increasingly "elaborate" and "expansive." The broader the term, the greater the protection national laws and rights have against EU encroachment. The resultant protection also inevitably safeguards

[277] C Schönberger, ‘Lisbon in Karlsruhe: Maastricht’s Epigones at Sea’ (2009) *German Law Journal* 1201 10.
[278] von Bogdandy and Schill 48.
[279] C Tomuschat, *German Constitutional Law* 2nd edn (Oxford University Press 2015) 265.

unique national laws from overriding EU requirements, thereby obstructing the homogeneity of the EU legal framework.[280]

As a Member State's national identity is shaped by its domestic legislative framework, each national system will delineate its identity uniquely according to its internal prerogatives, hence further eroding uniformity within the EU context. This stands in sharp contrast to ultra vires review, wherein each national system would read and implement the identical articles of the EU Treaty in an apparently analogous fashion. Consequently, identity review presents an elevated risk of legal discrepancies among EU Member States, which, considering the significance attributed by the ECJ to the consistent interpretation and application of EU laws, would likely create a conducive environment for conflict between the ECJ and national courts, particularly the BVG.[281]

### 6.1.3 The Honeywell Case as a Milestone in Ultra Vires Review

Any uncertainty over the BVG's willingness to exercise its competence to assess the legitimacy of an EU legislation was, in certain respects, both quelled and intensified by the BVG's Honeywell case of 2010. The BVG at Honeywell was afforded its initial substantial opportunity post-Lisbon to evaluate an EU statute, which it undertook, albeit with caution. The BVG reaffirmed its "empowerment and obligation" to assess the legitimacy of EU acts. The BVG exercised its ultra vires jurisdiction and specifically delineated the criteria under which it would deem an EU statute to exceed the EU's authority. The outcome was that, according to the clarified criteria established by the BVG, the EU action in Honeywell was deemed not to be supra vires. Consequently, the BVG silenced certain critics by asserting its jurisdiction over EU acts, and strengthened others by failing to adhere to it.

The true significance of Honeywell resides in the norm articulated by the BVG about the circumstances under which it would deem an EU act extra vires. The BVG indicated that the ECJ must first have the opportunity to provide its legal opinion through a preliminary verdict. The BVG will not annul an EU action unless the ECJ

[280] C Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones at Sea' (2009) 10 *German Law Journal* 1201.
[281] Tomuschat 265.

has explicitly neglected to act on the matter.107 The BVG elucidated that only EU acts that are "manifestly" outside the "transferred competences" and "highly significant in the structural distribution of competences between the Member States and the Union concerning the principle of conferral and the binding nature of the statute under the rule of law" will be deemed ultra vires. Ultimately, from a strictly pragmatic perspective, the ECJ is permitted a "tolerance of error," whereby individual instances of error may not result in supra vires actions.[282]

The aggregate impact of these standards supports the criticisms of the BVG, as Honeywell facilitates the invocation of the Court's ultra vires jurisdiction (demonstrated by its application in Honeywell itself). However, due to the deferential language utilized by the BVG, the probable outcome is the affirmation of the EU act. The necessity of a clear violation of EU competencies, which the ECJ has deliberately chosen not to rectify when presented with the opportunity, constitutes a significant obstacle that is unlikely to materialize. Considering that the majority of structural changes within the EU integration process have transpired incrementally or in a piecemeal fashion, it is exceedingly improbable that a significant structural alteration in the competences between the Member States and the EU would exist, let alone be ascribed to definitive action by the EU itself. Consequently, the Honeywell criteria for a successful ultra vires appeal seem to mirror the impracticality of the standards for a fundamental rights appeal established in Solange II, a criterion that has yet to be satisfactorily fulfilled.[283]

There are valid justifications for the unavailability of this standard. Primarily, the challenge in meeting the conditions underscores the BVG's apprehension regarding national courts' capacity to invalidate EU measures. Consequently, an ultra vires determination should be an infrequent recourse of last resort, and the apparent impracticability of the Honeywell norm underscores this notion. Furthermore, the stipulation that an ultra vires conduct must be apparent renders the identification of such an act uncomplicated - an 'evident' breach of authority should be readily discernible and uncontentious. This consequently eliminates any ambiguity regarding

[282] Schönberger 10.
[283] G de Búrca and J H H Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2011) 323.

the final actions of the BVG, as the annulment of such a blatant error by the EU would be beyond criticism from the majority.[284]

Extending greater deference to the ECJ in its rulings fulfills the same objective. Furthermore, only a manifestly egregious ultra vires conduct by the EU would inflict sufficient harm independently to warrant the considerable detriment to the EU legal framework that an ultra vires ruling would entail. An ultra vires ruling would likely constitute a pyrrhic victory, defensible only if the EU were already significantly undermining itself.

### 6.1.4 The OMT Decision

In its January 2014 ruling on the Outright Monetary Transactions program, the BVG demonstrated an unforeseen readiness to jeopardize the entire system. In the OMT ruling, the BVG was squarely faced with the intricate systems designed to mitigate the European fiscal crisis. In a prior ruling from 2012, the BVG determined that Germany may engage in the European Stability Mechanism (ESM), which offered "loans and other financial assistance to distressed states," provided that the German Parliament maintained significant oversight over ESM operations. In 2012, the European Central Bank (ECB) released a public statement committing to support distressed Eurozone nations by purchasing their assets on the secondary market, referred to as the Outright Monetary Transactions program (OMT). The OMT was designed to fulfill the same function as the ESM: to stabilize the bond market adequately to alleviate pressure on the distressed States. The ECB news statement regarding the OMT achieved this outcome without the need for any actual monetary interventions. From the perspective of the BVG, the issue in the OMT case was whether Germany could engage in such a program, considering the absence of the requisite legislative oversight that was necessary for its involvement in the analogous ESM. Remarkably, the BVG established a precedent in OMT by submitting the inaugural preliminary reference in its history to the European treaties. Given that the Honeywell standard mandates that the ECJ be afforded the initial opportunity to adjudicate on the legitimacy, the BVG's preliminary reference regarding the legality of the ECB's actions was essential to

[284] Ibid 320.

address any potential ultra vires EU action. It is crucial to observe that the BVG did not raise any inquiries regarding potential problems with Germany's constitutional identity; indeed, it strongly suggested that an identity assessment would not necessitate a prior decision by the ECJ. Moreover, it is noteworthy that rather than awaiting a conclusive response from the ECJ about its ultra vires inquiries, the BVG provided a comprehensive, preliminary answer independently. The BVG asserted emphatically that the OMT scheme constituted an excess vires act and would be inapplicable in Germany. In other words, rather than opting for the path of least resistance and postponing the matter to the ECJ until it was imperative to address what it deemed an ultra vires act by the EU (a strategy consistent with the Court's historical hesitance to adjudicate the validity of EU actions), the BVG proactively addressed the substantive merits of the issue. It was probably even more astonishing that it subsequently determined the EU statute to be extra vires. The BVG did not lawfully deem the OMT to be excess vires in its ruling. It asserted that it deemed the OMT illegal according to its current understanding of EU law, however it did not exclude the possibility that the ECJ's view of that law or the OMT itself may potentially uphold the program's validity. In its comprehensive examination of the matter, the BVG offered a brief insight into the operational mechanics of ultra vires review as per the Honeywell standard. OMT provides evidence that the 'manifest' threshold is significantly contingent upon the explicit language commitment of powers inside the EU Treaty, rather than being unattainable. For example, in evaluating the potential visibility of the ECB's operations, the BVG underscored that these measures would influence the economic policies of the Member States, for which the responsibility "clearly resides with the Member States." Similarly, the BVG referenced the concept of a distinct separation of powers while observing that the OMT may potentially contravene a "explicit prohibition of monetary financing of the budget." A manifest infringement may occur when the EU operates in areas that are distinctly or explicitly within the jurisdiction of the Member States.

Moreover, OMT elucidates a possible reconfiguration of competencies as well. The BVG observed in its ruling that the ECB's actions would be "structurally significant" as they would "result in a substantial redistribution among the budgets and taxpayers of the Member States," domains that "constitute fundamental elements of the Member

States' economic policy responsibilities."[285] In summary, OMT suggests that the Honeywell criteria is met when an EU act infringes into a fundamental domain of Member State authority explicitly defined in the EU treaties. In other terms, as demonstrated by OMT itself, the Honeywell requirement is neither unattainable nor very challenging to fulfill.[286]

The practical applicability of the BVG's ultra vires criterion suggested in OMT, along with the BVG's evident readiness to employ it, may pose a considerable challenge moving ahead in light of the ECJ's recent ruling on the OMT referral. In Gauweiler, the ECJ, while avoiding any reference to the BVG's claim of ultra vires jurisdiction, effectively contradicted the BVG's evaluation of the OMT program's validity, determining that the establishment of such a program fell entirely within the EU's competence. The ECJ remitted the case to the BVG for further deliberation, disregarding the German court's apprehensions regarding the existence of an ultra vires act, thereby effectively satisfying the "failure to act" criterion required under Honeywell for the subsequent annulment of an EU law by the BVG. In simpler terms, if the initial referral in OMT indicated an unforeseen inclination from the BVG to radically challenge the system by declaring an EU act ultra vires, the ECJ in Gauweiler seemed entirely willing to provide the Federal Constitutional Court in Karlsruhe with the means to ignite such a confrontation.[287]

## 6.2 Italy

Italy was among the signatories of the Treaty of Rome in 1957, which established the European Economic Community. Notwithstanding initial opposition and the myriad challenges faced in the next years, the decision to embrace Europe was broadly accepted, becoming irrevocably ingrained in the national psyche.[288]

However, although other legal systems opted at different points in their European evolution to modify their constitutions by including a European provision, this did not

[285] Schütze 231–246.
[286] P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* 7th edn (Oxford University Press 2020) 320–338.
[287] Schütze 231–246.
[288] G Tesauro, *European Union Law and the Italian Legal System* (Il Mulino 2005) 45–70.

occur in Italy. Italy did not amend its Constitution upon joining the European Economic Community, nor has it done so after becoming a member of the European Union through the Maastricht Treaty, the adoption of the Treaty of Lisbon, or at any later stage of European integration.[289] The term "Community law" was included into the Constitution in 2001, following the reform of Title V, which modified the distribution of powers among the state, regions, and local authorities. In the absence of a EuropaArtikel, such as Article 23 of the German Grundgesetz enacted in 1992, the relationship between the Italian Constitution and Europe has been influenced by the Constitutional Court.[290] The interpretation of Article 11 of the Constitution, which establishes a general provision for the exercise of sovereign rights by foreign organizations, was conducted in a manner that encompasses the European project. The Constitutional Court evolved its jurisprudence through succeeding rulings, but with occasional challenges and contradictions; Italy's integration with Europe was certainly advantageous, yet it was not without difficulties.[291]

This chapter aims to succinctly delineate certain problematic aspects of the relationship between the Italian Constitution and Europe, given the issue's extensive extent. To achieve this, it is essential to succinctly outline the historical context, highlighting the fundamental principles of the Italian constitutional framework, particularly with the state's international relations.[292]

### 6.2.1 Italy's 1948 Constitution

The formulation of the Italian Constitution following the Second World War resulted from a restructuring of the Italian political landscape and an agreement among the political factions engaged in its drafting.[293] Alternatively – as is consistently stated in the literature – it originated from a compromise: this compromise enshrined in the Italian Constitution has undergone successive crises, without ever being fundamentally

[289] M Cappelletti, *European Law and the Italian Legal System* (Stevens 1971; reprint 2000) 25–50.
[290] V Cerulli Irelli, *The Italian Constitutional Court and the European Union* (Jovene Editore 2010) 50–55.
Ibid.
[291] Cappelletti 50.
[292] Tesauro 69–70.
[293] S Bartole, *Italian Constitutional Law* 2nd edn (Giuffrè 2012) 114–120.

and definitively resolved. The attributes of the Italian Constitution can only be fully understood in the context of the historical circumstances surrounding its adoption and subsequent implementation. The formulation of the republican Constitution by the Constituent Assembly, elected by the Italian populace on 2 June 1946, transpired in the wake of a two-decade dictatorship, the harrowing defeat in the war, and the Resistance, signifying the restoration and rejuvenation of democratic institutions. It was imperative to reconstruct Italy both materially and morally from the remnants of the fascist regime and the preceding liberal regime. The Italian Constitution represents the culmination of a political process initiated by the collapse of Fascism, during which the anti-fascist political parties, organized into the Committee of National Liberation (C.L.N.), emerged as key actors.[294] Despite their significant internal divisions, these factions collectively aimed to establish a state fundamentally opposed to the fascist regime and, in a broader sense, markedly distinct from the pre-fascist state. The fundamental values of the democratic state - freedom, equality, and solidarity - serve as the shared bedrock principles for the political factions represented in the Constituent Assembly, forming the conceptual basis for the new Constitution. It is universally acknowledged in literature that there is widespread agreement concerning international relations and participation in international organizations. The Italian Constitution, in promoting the principles of freedom and equality in international relations, can be categorized as one that is acutely aware of the state's foreign relations and particularly responsive to the necessity of establishing international legal frameworks. There was a unanimous agreement among all factions that both the disastrous fascist regime and the extreme nationalism of the past must be unequivocally rejected.[295] The context for Articles 10 and 11 of the Constitution necessitates consideration, as they were deliberately included among the “fundamental principles” designed to delineate the attributes of the new state, which the Constituent Assembly ratified without dispute. Article 10 establishes a mechanism for automatic alignment with general principles of international law, stipulating that “the Italian legal system conforms to the generally recognized principles of international law.” Tomaso Perassi, an internationalist and member of the Constituent Assembly, referred to a “permanent transformationist dynamic” that would facilitate the integration of all norms of this nature emerging at the international level. Article 11 states that “Italy rejects war as an instrument of

[294] Cerulli Irelli 50–55.
[295] Bartole 110–120.

aggression against the freedom of other peoples and as a means for the resolution of international disputes." Italy consents, under conditions of parity with other States, to the restrictions of sovereignty deemed necessary for a global order that guarantees peace and justice among Nations. Italy advocates for and supports international organizations that advance these objectives. This Article was originally designed as a mechanism for Italy's participation in the United Nations; nevertheless, as previously noted, it later served as the legal underpinning for European integration, providing a constitutional basis for that endeavor. It was evident to all political parties that the peoples of Europe had engaged in two extensive, fratricidal wars, consequently obliterating the political, economic, and social supremacy that Europe had formerly possessed globally, as emphasized in the speeches of Churchill, De Gasperi, and Schuman.[296] It was essential to avert the recurrence of such wars in the future. Nevertheless, aside from the shared characteristics of the political factions within the Constituent Assembly, it is crucial to acknowledge the markedly heterogeneous and profoundly diverse ideological composition of the deputies elected to the Assembly. Scholarly consensus affirms that the Italian Constitution is a product of a compromise among Catholic, Liberal, Socialist, and Marxist political forces. The discrepancy within the Constituent Assembly was apparent from the beginning about the initiation of the European integration process. For our current objectives, it is important to note that, despite widespread agreement on fundamental decisions and a willingness for international collaboration, the anti-fascist alliance disintegrated over the years 1947 and 1948. Changes in the international landscape, including compliance with the North Atlantic Treaty, foreign influences, and the outcomes of the initial parliamentary election, prompted significant transformations in the dynamics among national political parties. These events subsequently precipitated a crisis in the constitutional consensus that had underpinned these ties in the immediate post-war period, leading to a series of distortions and delays in the evolution of constitutional practice.[297]

The interdependence and ambiguity between international policies and domestic political ambitions intensified, resulting in distinct divisions among political parties and social groups, particularly about the process of European integration. This is not the suitable venue to examine the historical, political, and social dimensions of the

[296] Bartole 95.
[297] Ibid.

Italian crisis, which has been thoroughly analyzed by various researchers. The Communist Party, despite its exclusion from government, significantly opposed the European integration process, representing a substantial and influential faction among the opposition political parties.[298] In 1957, the Communist Party was the sole party to oppose the ratification of the Treaty of Rome. The Socialist Party abstained. The PCI's engagement with European integration was fraught, ultimately resulting in a full reversal of its stance over time. It was solely under Enrico Berlinguer, who assumed the role of National Secretary in 1972, that the Italian Communist Party wholeheartedly embraced the European concept, owing to his active involvement in the European Parliament. Opposition to Europe has consequently diminished, to the extent that European integration is no longer a contentious topic in Italian political discourse, notwithstanding occasional resurgence of historical ideological biases. It can be inferred that, although differences persist, they are not substantial enough to influence basic decisions and the underlying consensus.[299]

### 6.2.3 The Italian aspect of the Italian Constitution

Having outlined the political and constitutional environment from which Italy's participation in European integration sprang, we can now elucidate the European aspect of the Italian Constitution in depth. This discussion will examine the methods by which the Italian Constitution has addressed the influence of European law and how the European experience has shaped the structure and evolution of the Italian legal system.[300] Given the extensive array of institutional issues stemming from Italy's participation in European integration, we will concentrate on many of the most pertinent areas of EU legislation. Due to spatial constraints, we will not address the links between Italy, the ECHR, and the European Court of Human Rights, despite their enormous importance. We will specifically examine the extensive series of conflicts that have emerged about efforts to establish a coherent equilibrium between EU law and Italian law. These disputes have invariably encompassed the comprehensive spectrum of issues related to those relations, including the quest for a constitutional

[298] G Buonomo, *Italy and European Integration: Constitutional and Legal Perspectives* (Routledge 2015) 100–105.
[299] Cerulli Irelli 50–55.
[300] Buonomo 100–105.

foundation for Italy's involvement in the European Community, and subsequently the European Union, the constitutionality of the legislation ratifying the Community treaties, the interplay between EU law and national law, and the protection of the fundamental principles articulated in the Constitution, among others.[301]

These issues have emerged concurrently with the swift and significant development of Community law, particularly the establishment of the principle of the primacy of Community law over the legal frameworks of Member States, as well as the principle of the direct applicability of Community law within those legal systems. The Constitutional Court has played a significant role, with its case law increasingly aligning with the opinions of the Court of Justice, often diverging from its prior rulings. Nonetheless, as will be demonstrated, the Court of Justice has modified its own jurisprudence regarding basic rights, aligning more closely with the stance of the Italian Constitutional Court.

### 6.2.4 Italy's Embrace of Community Law: Article 11 of the Constitution and Its Constitutional Foundation

In nearly all Member States throughout Europe, membership in the European Community and the endorsement of its subsequent significant advancements have necessitated constitutional revision. This has not been true in Italy. Italy's compliance with the original Treaty establishing the European Economic Community, along with subsequent amendments and supplementary treaties - such as the Maastricht Treaty and the Treaty of Lisbon - has consistently been sanctioned and executed by regular legislation. Accession to the European Community and the acceptance of subsequent treaties occurred in accordance with Article 80 of the Constitution, which stipulates that "Parliament shall authorize by law the ratification of international treaties that are political in nature, necessitate arbitration or judicial resolution, involve alterations of borders, or impose financial obligations or legislative amendments." The sole legislation that officially "regulated" Italy's entry into the EEC was the law permitting the ratification of the Treaty of Rome (together with all subsequent treaties) and the

[301] Tesaur 45–70.

accompanying implementing order. The unique characteristic of the Italian legal system created certain tensions, necessitating a ruling by the Constitutional Court on the validity of Italy's involvement in European integration.[302]

The lack of a distinct "European clause" in the Constitution thus engendered a more extensive constitutional issue. International treaties, especially the Community treaties, have influenced the legislative authority of Parliament, both initially and progressively over time, by imposing restrictions not explicitly outlined in the Constitution and by broadening the scope of primary legal sources, despite that scope being conventionally considered exhaustively delineated by the Constitution itself. The inquiry thus emerged over whether primary legislation, devoid of constitutional authority, might legitimately facilitate a transfer or restriction of sovereignty. Can Community treaties and Community law provide constitutional effects even if they have been integrated only via ordinary legislation?

From the beginning, it was clear that European integration signified a significant advancement in international collaboration. The European Communities - specifically the EEC, ECSC, and Euratom - were not analogous to the numerous other international organizations that were developing during that era. This prompted significant discourse in academic literature over the suitable legal foundation and process for ratifying the Treaties that formed the European Communities and integrating them into Italian law. Scholars specifically questioned the necessity of a constitutional statute to authorize ratification and implementation. Perspectives were polarized. Some contended that ratification and implementation ought to transpire via constitutional law, as the treaties established the legal basis for substantial deviations from the Constitution and involved a restriction - if not a partial cession - of sovereignty. Some argued that standard legislation would be adequate, as long as a constitutional provision could be located to provide "constitutional coverage" for the ratifying and implementing law.

Notwithstanding many dissenting opinions, the matter was ultimately resolved by the Constitutional Court in its seminal ruling in Costa v. ENEL. The Court endorsed the latter approach in that instance. The Court invoked Article 11 of the Constitution, which stipulates that “Italy consents, under conditions of equality with other States, to

[302] Buonomo 80–89.

the limitations of sovereignty essential for a global order that guarantees peace and justice among Nations." This interpretation posits that Article 11 serves as the constitutional basis for both the ratifying legislation and the automatic applicability of Community law within the Italian legal framework, provided that Community law entails limitations of sovereignty acknowledged under conditions of equality with other States.[303]

In actuality, both the phrasing and the historical context of Article 11 suggest that it was initially designed for fundamentally different objectives. The clause was designed to allow Italy to engage in a reformed League of Nations, which later transformed into the United Nations.

Upon its adoption, Article 11 aimed to enhance the means by which the United Nations might ensure peace. The Constitutional Court opted to read Article 11 as a constitutional authorization allowing the transfer or restriction of aspects of national sovereignty to facilitate Italy's accession to the European Communities on equal terms. In doing so, it mainly overlooked the challenge of asserting that the European Community - having engaged in trade disputes and occasionally been criticized for favoring its own producers - was fundamentally established to promote peace and fairness among nations.[304]

The Court legitimized Italy's participation in the European Communities and the associated commitments and constraints by identifying a constitutional basis in Article 11. The exact procedure by which EC law provisions were integrated into the Italian legal system remained ambiguous. In other terms, there were no explicit constitutional regulations that dictated the link between Italian law and European law, and the vague phrasing of Articles 11 and 80 was evidently inadequate for that objective. Thus, the comprehensive framework of rules governing the relationship between Italian law and European law was established through constitutional jurisprudence. The explicit reference to "EC legislation" was included into Article 117 with the amendment of Title V of the Constitution in 2001.[305]

[303] Buonomo 89.
[304] Tesauro 65–70.
[305] Cerulli Irelli 30–35.

Consequently, any mention of a European aspect of the Italian Constitution requires an analysis of the Constitutional Court's jurisprudence and the subsequent phases of its interaction with European law. The Constitutional Court, through a progressive body of case law, redefined the relationship between the Constitution and EU law as a dialogue - albeit occasionally contentious - with the Court of Justice of the European Union.[306]

### 6.2.6 The Phases Contributing to the Development of the Community Aspect of the Italian Constitution

What happens when a national law provision contradicts a Community law provision? The Constitutional Court was frequently requested to adjudicate disputes between ordinary legislation and Community law. Over time, it offered diverse responses, employing distinct criteria to address these inequalities.

In its preliminary stance, expressed in the ruling of Costa v. ENEL, the Constitutional Court invoked the principle of lex posterior derogat legi priori, asserting that in cases of dispute between Italian law and Community law, the more recently adopted provision should take precedence. The Court determined that Community regulations possess a status comparable to that of standard national legislation, asserting that the interplay between these two legal sources should adhere to temporal criteria: according to the principle of lex posterior derogat priori, a subsequent norm would abrogate any conflicting earlier provision, without invoking constitutional concerns. To elucidate the issue, it is beneficial to succinctly revisit the facts of the case. The legal procedures were commenced by Mr. Costa, an Italian attorney and shareholder in the electrical firm Edisonvolta, which was impacted by Italian laws nationalizing the infrastructure for electricity generation and delivery. Believing himself negatively impacted, he declined to settle a tiny electricity bill owed to the newly established public entity, ENEL, contending that the nationalization law contravened certain stipulations of the

[306] Buonomo100–105.

Treaty of Rome. The conciliatory judge presiding over the case opted to get a preliminary ruling from the Court of Justice.[307]

The Constitutional Court, while adjudicating the merits of the legislation that established ENEL, determined that the Community treaties, having been ratified via ordinary legislation, were governed by the principle of lex posterior derogat priori and could thus be repealed or modified by subsequently enacted national laws. Consequently, while the Italian Constitution allowed for the limitation of sovereignty in favor of international entities like the EEC, the Court maintained that this did not preclude the application of the principle of lex posterior abrogat priori. As the Treaty of Rome was signed in 1957 and integrated into Italian law by legislation passed in 1958, it could not supersede the national statute nationalizing the power industry established in 1962. This solution was inherently unacceptable to the Court of Justice, which had committed to ensuring, under all circumstances, the supremacy of Community law.[308] The potential for a national law to "repeal" a Community regulation or a Community treaty would constitute a blatant infringement of Community law. Merely a few months subsequent to the Constitutional Court's ruling in the identical case, the Court of Justice countered by declaring that:

The enforcement of Community law must remain consistent among States, regardless of later domestic legislation, to avoid undermining the objectives outlined in Article 5(2) and to prevent the discrimination forbidden by Article 7.[309]

The Constitutional Court subsequently modified its stance in an attempt to achieve a compromise with the Court of Justice over the interplay between Community law and national law. It discarded the criterion of lex posterior and instead used the principle of lex superior derogat legi inferiori. This approach mandates that any Italian law conflicting with a preceding European regulation be contested before the Constitutional Court, asserting that it indirectly contravenes Article 11 of the Constitution by infringing upon the commitments and limitations of sovereignty that Italy accepted upon ratifying the treaties established under Article 11.[310]

[307] Tesauro 65–70.
[308] Buonomo 80–82.
[309] Tesauro 68–70.
[310] Buonomo 103–105.

In two rulings issued in the mid-1970s, the Constitutional Court recognized the supremacy of Community law while retaining the authority to adjudicate disputes between Community law and ordinary legislation. This approach posits that any national law provision that contradicts the treaties is illegal; nevertheless, such unconstitutionality must be affirmed by the Constitutional Court itself. Lower courts were explicitly prohibited from directly disapplying contradictory national legislation.[311]

The Court articulated that current domestic legislation, whether enacted by statute or equivalent binding instruments, does not grant an Italian court the authority to disobey it. It seems implausible to justify the contempt of subsequent domestic legislation based on a selection between Community and domestic law, which the Italian judge may occasionally determine according to their relative resilience. In this scenario, the Italian judge would effectively acquire the authority to determine the sole applicable provision, thereby acknowledging the judge's capacity to ascertain and declare the absolute lack of jurisdiction of the national legislature, albeit restricted to specific domains - a power that, under the existing legal framework, the judge does not possess.[312]

This solution, however, also demonstrated difficulties. Adopted in the 1970s, this time saw the Constitutional Court deeply involved in the sole criminal trial of multiple ministers implicated in the Lockheed crisis, while concurrently managing a significant backlog of cases. The practical outcome was that a Community regulation violated by national law may remain effectively suspended for years, awaiting a declaration of unconstitutionality. The approach outlined by the Court's mid-1970s rulings rendered the assessment of compatibility between national law and Community law extremely burdensome. Trial courts were mandated to submit inquiries to the Constitutional Court, which only held the power to declare laws unconstitutional.

This conclusion was evidently inconsistent with the notion of the direct effect of Community law, whose efficacy was diminished by a domestic court system that was impracticable and ineffective.[313]

[311] Cerulli Irelli 52–55.
[312] Tesauro 68.
[313] Cerulli Irelli 55.

The Court of Justice unequivocally contested this methodology. In its seminal Simmenthal ruling on 9 March 1978, the Luxembourg Court emphasized the necessity of ensuring the complete efficacy of Community law inside the legal frameworks of the Member States and further solidified its doctrine on primacy. The conflict that led to that ruling originated in Italy and pertained to a possible infringement of a fundamental principle of the EEC Treaty: the free circulation of goods. In collaboration with the referring Italian court, the Court of Justice utilized the occasion to elucidate unequivocally the principle of primacy within the Community legal framework.[314]

The ruling determined that a national court, when required to apply Community law within its jurisdiction, must fully enforce those provisions, even if it necessitates disregarding conflicting national legislation enacted subsequently, without needing to seek or wait for the prior annulment of such provisions through legislative or constitutional processes. The ruling in Simmenthal aimed to redefine the viewpoint of national courts, which were obligated to adhere to the decisions of the Court of Justice. The Court of Justice clearly established the supremacy of Community law in that ruling. The stance taken by the supreme European court had significant legal ramifications, necessitating a reevaluation of the hierarchy of legal sources within the Member States' legal systems.[315]

In this context, the Italian Constitutional Court issued its seminal ruling in Granital. This verdict marked a pivotal moment and initiated substantial alterations to the Court's jurisprudence regarding the interplay between Community law and national law. Two decades subsequent to its ruling in Costa v. ENEL, the Constitutional Court ultimately determined in Granital that any national law provision that conflicts with Community law must be directly disregarded by ordinary courts. By doing so, the Constitutional Court conformed its stance to that articulated by the Court of Justice in Simmenthal.[316] It explicitly acknowledged the Court of Justice as the exclusive authority qualified to interpret the interpretation, extent, and application of Community law. It specifically determined that, in cases of disagreement with national law, Community law - as construed in preliminary determinations by the Court of Justice - was directly applicable and required full enforcement. This ruling has been

[314] Tesauro 70.
[315] Buonomo 80–105.
[316] Cerulli Irelli 55.

characterized as the apex of the Constitutional Court's "surrender." In its 1984 Granital decision, the Court recognized that ordinary courts had the authority to assess the conformity of domestic legislation with Community law and, when warranted, to invalidate any national provision that contravened it. In a judicial system like Italy's, marked by centralized constitutional review and the essential function of incidental proceedings, this signified a significant transformation that conflicted with the conventional constitutional structure.[317]

For nearly two decades, the Italian Constitutional Court and the Court of Justice have been embroiled in a conflict on the appropriate relationship between Community law and national law. In S.p.A. Granital v. Amministrazione finanziaria, the Constitutional Court ultimately embraced a stance aligned with the Community Court's doctrine of primacy, so resolving a conflict that had endured from 1964 until 1984. The delay in reaching this conclusion exemplifies the impracticality of a system where Community legislation might be disapplied solely upon a prior declaration of unconstitutionality by the Constitutional Court. The Granital case originated from a conflict between an Italian company and the customs authority regarding tariffs owed on barley imports from Canada. The case presented intricate issues concerning the interpretation of European tariff regulations; however, the most notable aspect is the time factor: the disagreement began in 1972, although the Constitutional Court issued its ruling only in 1984 - twelve years subsequent to the pertinent events.[318]

From the Court of Justice's viewpoint, this option was unworkable. While the principle of lex superior derogat legi inferiori ostensibly protects the supremacy of European law, the delays characteristic of the Italian system have resulted in significant distortions in reality. Throughout the interval between the enactment of the pertinent Community regulation and the Constitutional Court's subsequent ruling of unconstitutionality regarding the conflicting Italian provision, the European regulation was rendered practically ineffective.[319]

Upon completion of this development, the Constitutional Court effectively "self-marginalized" from the direct adjudication of conflicts between national and

[317] Tesauro 65.
[318] Buonomo 105.
[319] Tesauro 45.

Community law, delegating the resolution of such matters to ordinary courts, which may refer questions directly to the Court of Justice when deemed appropriate.[320]

### 6.2.7 Counter-Limits: The Doctrine of Restrictions on Sovereignty Limitations

The Italian Constitutional Court, during its progressive alignment with Community law, devised several doctrinal instruments and argumentative methodologies that garnered interest both inside the European Community and elsewhere. One of the most important was the principle of "counter-limits." The Italian Court, echoing the ongoing conflict between the Constitutional Court and the Court of Justice, reaffirmed its stance from Frontini, similar to the approaches of other Member States, by asserting its authority to review Community law based on "the fundamental principles of our constitutional order and inalienable human rights." This perspective posits that the safeguarding of fundamental rights is an indispensable aspect of national sovereignty. This role became recognized as the theory of counter-limits. The Court elucidated that if a provision or act of EU law contravenes any of these fundamental principles or rights, ordinary courts must refer to the Constitutional Court regarding the constitutionality of the Italian legislation that enacts the European treaties, to the extent that it allows for such a violation.[321]

The idea of counter-limits was established as a final protection to defend the supreme principles and fundamental rights of the constitutional order from potential internal or external violations. The contours were gradually adjusted, especially in reaction to the deepening and development of European integration. This thesis posits that no restriction of sovereignty under Article 11 of the Constitution can legitimize the compromise of fundamental constitutional principles. The implementation of the counter-limits doctrine could substantially impact Italy's relationship with the European Union. The possible application of this doctrine emerged in the Taricco case, where the Italian Constitutional Court presented a preliminary reference to the Court of Justice, inquiring whether the latter's interpretation of specific European law

[320] Ibid.
[321] Buonomo, 105.

principles aligned with the fundamental tenets of the Italian Constitution, particularly the constitutional principle of legality and legal certainty in criminal matters as established in Article 25(2).[322] The "Taricco rule" mandated that Italian courts disregard specified provisions of Italian law regarding statutes of limitations in tax evasion cases related to value-added tax (VAT), contingent upon the fulfillment of particular criteria. The "Taricco rule" allowed some cases, which would have been barred by the statute of limitations under Italian law, to be prosecuted in Italian courts due to the disapplication of those laws.[323]

The Constitutional Court requested the Court of Justice of the European Union (CJEU) to reinterpret the Community regulation deemed in violation of the fundamental basis of Italian law established by Article 25(2) of the Constitution. The CJEU partially endorsed the arguments presented by the Constitutional Court in its response. The issue under scrutiny was critically important in the broader context of the relationship between constitutional courts and the CJEU: specifically, the decision to temper the concept of uniform application of EU law in favor of upholding basic rights.

The CJEU and the Constitutional Court seem to have established an equilibrium between the supremacy of EU law and the notion of counter-limits.[324]

### 6.2.8 The 2001 Constitutional Reform

Fifty years post-adoption of the Constitution, the reform of Title V, ratified in 2001, instituted a provision of significant relevance concerning interactions with external legal systems, despite its primary objective being the reconfiguration of relations between the State and the Regions. The relevant article is Article 117(1), which states: “Legislative authority shall be conferred upon the State and the Regions in accordance with the Constitution and the limitations imposed by EU legislation and international commitments.”[325] The new clause, which directly references Community law, serves as a confirmation of the framework established in prior case law. The Constitutional

[322] Cerulli Irelli 43.
[323] Tesauro 69-70.
[324] Cerulli Irelli 40-55.
[325] L Ferrajoli, *Rights and Guarantees in the Italian Constitution* (Laterza 2000) 80-85.

Court has determined that: “Article 117(1) of the Constitution explicitly reaffirms, in part, the obligations already delineated in Article 11 of the Constitution, including the responsibility of the State and regional legislatures to adhere to the constraints imposed by Community law.” Nonetheless, the restriction on the exercise of legislative authority established by Article 117(1) represents merely one facet of the interplay between domestic law and European Union law - a relationship that, when examined comprehensively and as articulated by this Court over recent decades, continues to possess a 'secure foundation' in Article 11 of the Constitution.[326]

All consequences arising from the constraints on sovereignty permitted solely under Article 11 - pertaining to both substantive and procedural aspects for the administration and judiciary, as well as restrictions on the legislature and the State's corresponding international accountability - persisted post-reform. The reform to Article 117 offered a conclusive resolution to the issue, after calls in several decisions for regulations to prevent regions from enacting provisions that contravene EU law, or to nullify any such previously implemented legislation.[327] This is the sole article of the Constitution that specifically references Community law. The Constitutional Court has predominantly shaped the European dimension of the Italian Constitution. The Italian Constitution, widely seen in scholarly discourse as a compromise, has undergone numerous crises without ever being fundamentally or conclusively resolved. The attributes of the Italian Constitution can only be thoroughly understood within the context of the historical events surrounding its adoption and execution.[328]

The Constituent Assembly, chosen by the Italian populace on 2 June 1946, drafted the republican Constitution in the wake of a twenty-year dictatorship, the harrowing defeat in the war, and the Resistance. It signified the reinstatement and rejuvenation of democratic institutions. Italy required reconstruction both materially and ethically following the devastation of the fascist government and the preceding liberal state. The Italian Constitution signifies the apex of a political process initiated with the collapse of Fascism. The anti-fascist political groups, organized within the Committee of National Liberation (C.L.N.), emerged as crucial actors. Their forces, deeply

[326] Tesauro 45-70.
[327] Cerulli Irelli 30-55.
[328] Ferrajoli 82-85

fragmented, together sought to establish a state essentially antagonistic to the fascist government and, in general terms, significantly distinct from the pre-fascist state.

The fundamental principles of the democratic state—liberty, equality, and solidarity - functioned as the common ground for the political factions within the Constituent Assembly, establishing the conceptual and foundational framework for the new Constitution. A widespread agreement existed concerning international relations and engagement in international organizations.[329] The Italian Constitution, by emphasizing the principles of freedom and equality in international relations, can be regarded as significantly responsive to the state's foreign affairs and particularly attentive to the evolution of international legal frameworks. A fundamental understanding existed that both the disastrous fascist regime and the extreme nationalism of the past must be unequivocally rejected. In this framework, Articles 10 and 11 of the Constitution were incorporated as “fundamental principles” delineating the attributes of the new state, ratified by the Constituent Assembly without dispute. Article 10 establishes a framework for automatic adjustment in accordance with the overarching principles of international law, stipulating: The Italian legal system adheres to the widely accepted norms of international law. Tomaso Perassi, an internationalist and member of the Constituent Assembly, referred to a "permanent transformationist dynamic" that would facilitate the integration of all standards originating at the international level.

Article 11 stipulates, that Italy denounces war as a tool of aggression against the liberty of other nations and as a method for resolving international conflicts. Italy consents, under circumstances of parity with other States, to the restrictions of sovereignty deemed necessary for a global order that guarantees peace and fairness among states. Italy advocates for and supports international organizations that advance these objectives. This page was originally designed to facilitate Italy's involvement in the United Nations. Nonetheless, it would subsequently establish the constitutional basis for European integration.[330] All political parties recognized that the peoples of Europe had engaged in two monumental, fratricidal wars, which obliterated the political, economic, and social supremacy Europe had formerly held, as highlighted in the speeches of Churchill, De Gasperi, and Schuman. Consequently, it was imperative to avert the recurrence of similar conflicts. Notwithstanding the shared characteristics

[329] Cerulli Irelli 53-55.
[330] Ferrajoli 82-85.

among the political factions inside the Constituent Assembly, it is crucial to acknowledge the markedly heterogeneous and ideologically varied makeup of its representatives. The literature unanimously acknowledges that the Italian Constitution is a compromise of Catholic, Liberal, Socialist, and Marxist political factions.[331]

This variety was apparent from the beginning, particularly concerning the initiation of European integration. Despite widespread agreement on international collaboration, the anti-fascist coalition began to disintegrate in 1947–1948. Changes in the international landscape, including compliance with the North Atlantic Treaty, foreign influences, and the outcomes of the initial legislative elections significantly transformed the dynamics among national political parties. These changes precipitated a crisis in the constitutional consensus formed in the immediate post-war era, leading to distortions and delays in constitutional practice. The interdependence and ambiguity between international policies and domestic political ambitions deepened, resulting in pronounced disagreements among political parties and social groups over European integration.[332] A comprehensive examination of Italy's historical, political, and social crises is beyond the scope of this discussion; however, it is important to acknowledge that the Communist Party, despite being excluded from government, initially opposed the process of European integration, representing a significant and influential segment of the opposition. In 1957, the Communist Party was the sole party to oppose the ratification of the Treaty of Rome, although the Socialist Party abstained from voting.

The Italian Communist Party's association with European integration was fraught for decades. Only under Enrico Berlinguer, who assumed the role of National Secretary in 1972, did the party fully dedicate itself to the European cause, owing to his direct involvement in the European Parliament. Resistance to Europe has diminished over time, rendering European integration a non-controversial topic in Italian political discourse, despite the occasional resurgence of historical ideological biases. Although disparities persist, they no longer influence essential decisions or the foundational agreement.[333] Having delineated the political and constitutional framework that precipitated Italy's engagement in European integration, we can now scrutinize the European aspect of the Italian Constitution in depth. This section examines the Italian

[331] Tesauro 45-70.
[332] Cerulli Irelli 53-55.
[333] Ferrajoli 82-85.

Constitution's response to the influence of European law and the impact of the European experience on the structure and evolution of the Italian legal system.[334]

This discussion concentrates on the most critical facets of EU legislation, considering the extensive institutional challenges stemming from Italy's involvement in European integration. This text will not examine the relationship between Italy, the European Convention on Human Rights, and the European Court of Human Rights due to space constraints. We will specifically analyze the extensive series of conflicts regarding the endeavor to establish a coherent equilibrium between EU law and Italian law. These disputes have addressed the full range of issues related to that relationship: from the constitutional foundation for Italy's involvement in the European Community (and subsequently the European Union), to the constitutionality of laws ratifying Community treaties, to the interplay between EU law and national law, and the protection of the fundamental principles enshrined in the Constitution.[335]

These difficulties have emerged concurrently with the swift and significant development of Community law, encompassing the affirmation of the primacy of Community law over the legal systems of Member States and the idea of "direct applicability" of Community law inside national legal frameworks. The Constitutional Court has significantly influenced this situation by progressively harmonizing its jurisprudence with the viewpoints of the Court of Justice of the European Union (CJEU), occasionally diverging from its prior rulings. The CJEU has also revised its jurisprudence on fundamental rights, aligning more closely with the perspective of the Italian Constitutional Court.[336]

[334] Cerulli Irelli 53-55.
[335] Tesauro 69-70.
[336] Cerulli Irelli 50.

### 6.2.8 Italy's Adoption of Community Law: Article 11 of the Constitution as the Constitutional Foundation

In the majority of European Member States, joining the European Community and the subsequent endorsement of its fundamental advancements were accompanied by constitutional revisions. Italy, however, did not pursue this course.[337]

Italy's compliance with the original Treaty creating the European Economic Community, along with subsequent agreements such as the Maastricht Treaty and the Treaty of Lisbon, has consistently been sanctioned and executed via regular legislation. Accession and treaty implementation are regulated by Article 80 of the Constitution, which states: „Parliament shall legislate the ratification of international treaties that possess a political character, necessitate arbitration or legal resolution, involve alterations of borders, expenditures, or new legislation."[338]

The sole legislation that officially governed Italy's entry into the EEC was the statute permitting the ratification of the Treaty of Rome and all following treaties, along with the implementing orders issued accordingly. This methodology has raised numerous constitutional inquiries, leading the Constitutional Court to adjudicate on the validity of Italy's participation in European integration.[339]

The absence of a distinct "European clause" in the Constitution allows foreign treaties to influence Parliament's legislative authority, both initially and progressively, by imposing unforeseen limitations and broadening the scope of main legal sources. This prompts the inquiry: may standard law, lacking constitutional authority, facilitate a transfer of sovereignty? Can Community treaties and Community law possess constitutional implications even if passed by standard legislative procedures?

From the beginning, it was clear that European integration signified a significant advancement in international cooperation. The European Communities - EEC, ECSC, and Euratom - were separate from other contemporary international organizations. As a result, the literature discussed the requisite form of law and procedure for ratifying the Treaties that established the European Communities and their incorporation into

[337] Ferrajoli 82-85.
[338] Tesauro 45.
[339] Cerulli Irelli 53-55.

Italian law. Some contended that ratification and implementation ought to transpire via constitutional law because the treaties significantly diverge from the Constitution and entail a partial abdication of power. Some argued that standard law was adequate, as long as a constitutional clause could grant "constitutional coverage" to the ratifying and implementing legislation.[340]

The Constitutional Court ultimately decided this debate in its landmark ruling in Costa v. Enel. The Court cited Article 11, which stipulates that: "Italy consents, under conditions of parity with other States, to the constraints of sovereignty deemed essential for a global order that guarantees peace and justice among Nations." The Court construed Article 11 as establishing a constitutional foundation for ratification and the automatic enforcement of Community law in Italy, as Community law imposes constraints on sovereignty under conditions of parity with other States.[341]

The language and historical context of Article 11 suggest it was first designed to facilitate Italy's involvement in a reformed League of Nations, subsequently the United Nations, and to enhance peacekeeping systems. Nevertheless, the Constitutional Court interpreted Article 11 as constitutional permission for the transfer of aspects of national sovereignty to integrate into the European Communities under conditions of parity. This interpretation validated Italy's participation in the European Communities along with the associated obligations and restrictions. Nonetheless, the method of incorporating EC law into Italian law remained ambiguous. The generic references in Articles 11 and 80 were inadequate to regulate the interaction between Italian and European law. As a result, the framework of regulations governing these ties was established by Constitutional Court jurisprudence. The reform of Title V of the Constitution in 2001 was the first instance in which Article 117 clearly mentioned "EC legislation," so offering clearer constitutional direction.

To comprehensively grasp the European aspect of the Italian Constitution, it is essential to analyze both the jurisprudence of the Constitutional Court and the phases of its interaction with European law. The Constitutional Court has progressively transformed the relationship between the Constitution and EU law into a "dialogue at

[340] Ibid.
[341] Tesauro 48.

a distance" with the Court of Justice of the European Union, a discussion marked by friction.

### 6.2.9 The Phases Contributing to the Development of the Community Aspect in the Italian Constitution

What occurs when a national law provision is in conflict with Community law? The Constitutional Court of Italy has been regularly solicited to adjudicate such disagreements, and over time, it has employed varying criteria to address inconsistencies.[342]

In its seminal ruling in Costa v. Enel, the Constitutional Court invoked the principle of lex posterior derogat legi priori, determining that in cases of dispute between Italian law and Community law, the more recently adopted statute should take precedence. The Court regarded Community law, especially regulations, as having a status comparable to ordinary national legislation, concluding that the relationship between these two legal sources should be evaluated according to their enactment dates: pursuant to the principle of lex posterior derogat priori, the later provision nullifies any conflicting earlier law, without invoking constitutional concerns.[343]

The Costa case pertained to an Italian attorney, Costa, who possessed shares in Edisonvolta, an electrical firm impacted by laws nationalizing Italy's electricity grid. Convinced that he had been adversely affected by this legislation, he declined to settle a minor invoice from the new national corporation (ENEL), contending that the nationalization contravened the stipulations of the Treaty of Rome. The judicial conciliation authority submitted the matter for a preliminary ruling to the Court of Justice of the European Union (CJEU).[344]

Simultaneously, the Constitutional Court, in its decision regarding the law that created ENEL, determined that because the Community treaties were ratified through ordinary legislation, they were governed by the principle of lex posterior derogat priori and

[342] P Caretti and U De Siervo, *Diritto Costituzionale Italiano* (Giuffrè 2014) 157–160.
[343] Cerulli Irelli 53-55.
[344] Tesauro 65.

could consequently be revoked or modified by later national legislation. Thus, although the Italian Constitution permitted the limitation of sovereignty in favor of international entities like the EEC, this did not preclude subsequent national legislation—such as the 1962 nationalization of the electricity sector—from superseding earlier treaties ratified in 1958.[345]

This answer, however, was inconsistent with the CJEU's attitude, which upholds the supremacy of Community law in all situations. A national statute that nullifies a Community regulation or treaty would be a breach of Community law. Subsequent to the Constitutional Court's decision, the CJEU underscored that the enforcement of Community law must remain consistent across all States, irrespective of later domestic legislation, to avoid undermining the Treaty's aims and preventing the discrimination banned by Article 7.[346]

The Constitutional Court aimed for a compromise by adopting the principle of lex superior derogat legi inferiori: Italian laws that contravene earlier European regulations may be contested before the Constitutional Court for indirectly infringing Article 11 of the Constitution, which pertains to Italy's obligations under a ratified treaty in accordance with Article 11. In the mid-1970s, the Court recognized the supremacy of Community law while retaining the authority to evaluate it in cases of disagreement with national laws.[347] Within this framework, any national law that contradicts the treaties would be deemed unconstitutional, but only the Constitutional Court possesses the authority to declare it as such; subordinate courts are not permitted to immediately invalidate conflicting laws. The Constitutional Court elucidated: "It does not grant an Italian judge the authority to disregard subsequent domestic legislation… nor permit them to select between Community and domestic law." The judge must identify the sole applicable clause, so establishing the restricted authority to declare national legislation void, a power the judge now lacks under existing law. Nonetheless, this approach demonstrated inefficiency. During the 1970s, as the Court dealt with prominent criminal cases and an increasing backlog, the method allowed for infractions of Community law to remain unaddressed for years pending a verdict from

[345] Cerulli Irelli 53-55.
[346] Ferrajoli 60–85.
[347] Cerulli Irelli 45.

the Constitutional Court. This onerous procedure compromised the idea of the direct effect of Community law.[348]

The CJEU conclusively addressed this matter in the Simmenthal ruling on 9 March 1978. The Court determined that national courts are obligated to fully implement Community law, regardless of any contradictory national legislation, without awaiting prior repeal or a determination from the Constitutional Court. In particular: A national court tasked with applying Community law must fully enforce such provisions, even if it requires disregarding any contradictory national legislation, including laws enacted subsequently, and without waiting for previous repeal through legislative or constitutional processes. The Simmenthal verdict unequivocally affirmed the supremacy of Community law, compelling national courts to reevaluate the hierarchy of legal sources in their domestic frameworks.[349]

Subsequently, the Italian Constitutional Court rendered the verdict two decades after Costa v. Enel. The Court determined that any national legislation that contradicts Community law shall be directly disregarded by the individual court. This harmonized Italian jurisprudence with the CJEU's stance in Simmenthal, acknowledging the CJEU as the exclusive authority for the interpretation and application of Community law. In instances of conflict with national legislation, Community law takes precedence automatically, so affirming Italy's dedication to the European legal framework.[350]

### 6.2.10 The Law as Interpreted by the Court of Justice and the "Granital" Ruling

The question of the direct applicability of national law in conflict with Community law was definitively resolved within the Italian legal system over several decades. The conflict represented the apex of what has been termed the Constitutional Court's "capitulation." In its 1984 ruling in Granital, the Court acknowledged that ordinary

[348] Ferrajoli 80–85.
[349] Cerulli Irelli 53-55.
[350] Tesauro 65.

courts possessed the jurisdiction to assess the conformity of national law with Community law and, if warranted, to invalidate any national provision that contravened Community law. In Italy's legal system, marked by centralized constitutional review and the essential function of incidental procedures, this constituted a notable deviation from prior practices and caused difficulties in harmonizing the new methodology with the overarching framework.[351]

For almost two decades, the Italian Constitutional Court and the Court of Justice of the European Communities have deliberated the appropriate connection between Community law and state law. In S.p.A. Granital v. Amministrazione finanziaria, the Constitutional Court ultimately conformed its stance with that of the CJEU, acknowledging the primacy of Community law. This effectively reconciled the enduring disparities between the methodologies of the Italian Constitutional Court and the European Court of Justice, which had existed from 1964 to 1984.[352]

The postponement of the Granital verdict exemplifies the inefficacy of a system where Community law may only be invalidated following a determination by the Constitutional Court. The lawsuit originated from a conflict between an Italian firm and the customs authority regarding tariffs on barley imports from Canada. The litigation commenced in 1972, although the Granital verdict was rendered in 1984—twelve years later. Although the principle of lex superior derogat legi inferiori theoretically established the superiority of European law, the practical delay resulted in the relevant European legislation being effectively overlooked for more than a decade. Ultimately, the Constitutional Court "self-excluded" from direct supervision of Community law, permitting regular courts to directly apply EU law and, where necessary, to send inquiries to the CJEU.[353]

### 6.2.11 Counter-Limits: The Doctrine Concerning Sovereignty Limitations

[351] Caretti and De Siervo 157–160.
[352] Caretti and De Siervo 157–160.
[353] Cerulli Irelli 48.

The Italian Constitutional Court, during its progression towards Community law, formulated several arguments and methodologies that garnered attention throughout Europe and beyond.[354] The theory of counter-limits is particularly significant. The Constitutional Court has consistently asserted its authority to evaluate Community law in light of the fundamental principles of the constitutional order and inalienable human rights, regarding fundamental rights as an indispensable aspect of national sovereignty. This principle is referred to as the theory of counter-limits. According to this approach, if an EU law or act contravenes a basic constitutional principle or right, regular courts are obligated to bring questions regarding the validity of Italian legislation that implements European treaties to the Constitutional Court.[355]

The counter-limits theory was created as a final measure to protect essential concepts and fundamental rights from any internal or external "aggression." Its importance has notably increased with the advancement of European integration. This thesis posits that no restriction of sovereignty under Article 11 of the Constitution may rationalize the relinquishment of fundamental constitutional rights. The implementation of the counter-limits doctrine may substantially affect the relationship between Italy and the European Union. An illustrative instance is the Taricco case, wherein the Italian Constitutional Court sought a preliminary ruling from the CJEU, challenging the compatibility of the Court of Justice's interpretation of European law with essential tenets of the Italian Constitution, specifically the constitutional assurance of legal certainty in criminal matters as delineated in Article 25(2).[356]

The Taricco rule mandated Italian courts to disregard specified provisions of Italian law related to statutes of limitations in tax evasion cases involving value-added tax (VAT), contingent upon the fulfillment of particular circumstances. The Taricco rule allowed for the prosecution of some matters that would have been time-barred under Italian law due to the disapplication of certain rules.[357]

[354] Caretti and De Siervo 154.
[355] Tesauro 66.
[356] Cerulli Irelli 52.
[357] Tesauro 67.

## 6.3 Poland

The legal position of the Constitution is crucial for the relationship between Polish national law and EU law. It results from the Preamble to the Polish Constitution, which indicates that the Constitution is established as "the basic law for the State," and from Article 8(1), which calls it "the Supreme Law of the Republic of Poland." Legal scholars refer to the latter as the principle of the supremacy of the Constitution. This principle means that all other legal acts that are binding and applied in the territory of Poland should conform to the Constitution. The Constitution also determines the position of EU law in the Polish legal order. Treaties establishing the EU – as international agreements ratified with consent granted by statute or in a referendum – are directly included in the national system of the sources of law. From a hierarchical perspective, their position in that system is specified by Article 188(1)–(2) of the Constitution, which places them below the Constitution and above statutes owing to their role in the review process. The rank of EU secondary legislation in the system of the sources of law – albeit indirectly restricted to application – is determined by Article 91(3) of the Constitution. Thus, from the perspective of the Constitution, EU law has been embraced in its entirety by the principle of supremacy.[358]

The EU law system lacks provisions positioning its sources vis-à-vis the national law of EU Member States. Only in the functioning of the EU are its Treaties considered "acts constituting the EU," whereas the EU law system is transformed into a quasi-federal one by the CJEU's case law. Though it does not have the formal feature of hierarchical supremacy over national law, including the national constitution, there is undoubtedly a growing tendency to perceive it this way. The premises that indicate such aspirations directly are as follows:

1) First, the principle of the primacy of EU law, which refers to the functional sphere, namely the primacy of application. However, the recognition that the hierarchy of the system whose norm should be applied in the event of a conflict is implicitly more important and needs to serve as a background for such primacy.

2) Second, the orientation of the formal dialogue between national courts and the CJEU. References for a preliminary ruling are addressed to the CJEU, and its response

[358] G Skąpski, *The Polish Constitution and European Integration* (C H Beck 2015) 40–65.

should be binding on the party making a reference. This construct unambiguously indicates the hierarchical importance of institutions and sources, thus also of the system.

3) Third, the alleged axiological domination of EU Treaties (European values), enforced by the CJEU in its case law, over the axiology of national systems.

### 6.3.1 Collisions between the legal systems and methods of solving the collisions

Norms of both legal systems are executed in the same State (Polish) territory. They regulate different contexts of the same factual situations, which often gives rise to serious functional problems manifesting in two dimensions: The binding force and application of the law. In the former, the problem pertains to the formally distinct systems of the sources of national and EU law. They are governed by their own principles. Though the integration process solidifies the coherence between EU and national law, that coherence is not perfect. Thus, the question concerns the mutual relations of specific legal acts in abstract (superiority–subordination).[359]

The second level of conflict concerns the application of law. It is related to the need to decide the source to be applied to and omitted in each case (primacy of the application of law). This makes it necessary to search for instruments that can eliminate possible collisions at both levels. Collisions at the level of the binding force are to be resolved a priori by the Treaty-based division of competences between the State and Union. The result is the independent existence of different legislators enacting separate legal acts in spheres assigned to them (the EU's exclusive competences and State's exclusive competences). In the case of shared competences, an organizing rule was established, allowing for the State's activity solely under specified circumstances.[360]

In practice, it is impossible to eliminate collisions entirely. Even if they do not emerge at the level of the binding force of law, they may manifest in the process of the application of the law. Thus, each system has appropriate rules for solving mutual

[359] K Lachmayer, *Polish Constitutional Law* 2nd edn (Wolters Kluwer 2016) 75–80.
[360] M Wyrzykowski, *Constitutional Law of the Republic of Poland* (LexisNexis 2013) 143–145.

collisions at this level. In Polish law, in reference to EU primary law, it is Article 91(2) of the Constitution, and in reference to EU secondary legislation, it is Article 91(3) of the Constitution. The former states that 'An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.' The primacy of such an act does not refer to collisions with the Constitution. Article 91(3) provides that the law established by an international organization is directly applied and has primacy in case of a collision with statutes. However, this rule has limitations in that: (1) it operates if this follows from the agreement constituting such an organization, which becomes binding on Poland by way of ratification; (2) primacy refers to statutes, so it literally concerns one of the facts contained in the catalogue of the national sources of law; and (3) it may be applied solely in reference to EU provisions directly applicable in the national legal order.[361]

In the EU system, the principle of primacy of EU law governs the conflict of laws. It embraces the obligation of an organ to apply a norm of EU law in the event of a collision between EU law and national law. Its construction corresponds to the solution contained in Article 91(2) and (3) of the Constitution, but there is a considerable difference between the said solutions vis-à-vis their scope. Whereas constitutional norms have a restricted scope, it is commonly known today that the EU requires the attribution of primacy to EU law over national constitutions. This is opposed by Article 8(2) of the Constitution. It contains the imperative to apply the Constitution directly unless it states otherwise. From the perspective of that provision read in conjunction with Article 8(1) of the Constitution, each constitutional provision that may be directly applicable should have primacy over EU law.

### 6.3.2 The Constitutional Tribunal as the guardian of the hierarchy of law

In accordance with Article 10(2) of the Constitution, the CT is an organ of judicial power. However, it does not administer justice, as under Article 175(1) of the

[361] Skąpski 65.

Constitution, the administration of justice is implemented by '(…) the Supreme Court, common courts, administrative courts and military courts.' Thus, the CT is not a court within the constitutional meaning, and the locus standi to refer to it is not an element of the guarantee of the right to a court as discussed under Article 45(1) of the Constitution. The scope of the powers of the CT embraces issues concerning the hierarchical conformity of law and specified matters of a systemic nature.[362]

The first case concerns adjudication vis-à-vis the conformity of: (1) statutes and international agreements to the Constitution; (2) statutes to ratify international agreements where ratification requires prior consent granted in statute; and (3) provisions of law enacted by central State organs to the Constitution, ratified international agreements, and statutes. As for the hierarchical review of law, the CT examines questions of law referred to by courts and constitutional complaints, and at the request of the President of the Republic of Poland, it adjudicates on the conformity to the Constitution of a statute before it is signed as well as on the conformity to the Constitution of an international agreement before it is ratified.

The CT settles disputes over the authority between central constitutional organs of the State, determines the existence of an impediment to the exercise of the office by the President of the Republic of Poland, and reviews the purposes or activities of political parties for conformity to the Constitution. The tasks of the guardian of the national legal system are performed by the CT through instruments that form part of its full scope of powers. This refers to the powers related to the hierarchical review of law, which include a review of the conformity of statutes and international agreements to the Constitution, regardless of its formula (whether an a priori or a posteriori review); the review of the conformity of statutes to international agreements ratified with consent granted by statute; the review of the conformity of legal provisions enacted by central State organs to the Constitution, and ratified international agreements and statutes. This catalogue may include settling disputes over authority among central constitutional organs of the State.[363]

The CT acts via its judgments. Their effects, the rules concerning their entry into force, and their substance are regulated by Article 190 of the Constitution. It follows from its

[362] Wyrzykowski 143-145.

[363] Skąpski 43.

content that the judgments of the CT have a universally binding character and erga omnes legal effects. Only the operative part of its decisions has a universally binding force. Erga omnes effectiveness means that judgment concerns all addressees of a challenged norm, irrespective of whether they participated in the proceedings before the Tribunal, and organs enacting and applying the law. Thus, judgments produce permanent effects in the system of the binding law. The CT's judgments are final, which means that they are not subject to review, and are thus irrebuttable and indisputable. There is no legal remedy against them. They may not be challenged, their correctness may not be examined, and procedures enabling such an action may not be established either. They may not be cancelled or changed. This prohibition applies to the CT and other organs. The subject of a judgment acquires the authority of res judicata, and the judgment triggers the operation of the principle ne bis in idem.[364]

The judgments of the CT, in accordance with Article 190(2) of the Constitution are subject to immediate promulgation in the proper journal of laws. Such an action is not a technical act (publishing), but it fulfils an important guaranteeing function. It makes it possible for one to familiarize oneself with an amendment of the law and to adjust to one's conduct or actions. Moreover, if, under Article 190(3) of the Constitution, a judgment of the CT takes effect from the day of its promulgation, the act of promulgation is necessary for the production of legal effects, that is, for the confirmation or denial of constitutionality. A derogatory effect in the case of judgements concerning unconstitutionality is the reason the CT – as the guardian of the system of the law in force – is called a negative legislator, that is, it creates by virtue of its judgments a specific situation in the system of the sources of law.[365]

The settlement of a dispute over authority results in the determination of the jurisdiction or lack of proper power of an organ indicated by the Tribunal in its judgments. The judgments of the CT have a future-facing effect. However, they do not have an annulling effect, which means that they do not annul determinations delivered by other organs based on the provisions that were subsequently held unconstitutional, even in cases instituted through a constitutional complaint. As we read in the jurisprudence of the CT, 'the Constitutional Tribunal is not a court of facts or a court adjudicating in instance proceedings. Constitutional complaint is not an instrument of

[364] Wyrzykowski 143–145.
[365] Lachmayer 52.

review directed against State organs applying law (…).' The CT solely assesses legal norms (normative acts) based on which a final determination in the complainant's case was delivered. Thus, a judgment concerning unconstitutionality will not automatically lead to the rebuttal of a given determination. As long as, in accordance with Article 190(4) of the Constitution, an interested party does not undertake such an action based on procedures for rebutting final determinations delivered based on an unconstitutional norm, the final determination in his/her case is valid. The exercise of the rights arising from Article 190(4) of the Constitution takes place outside the CT. A mere revision of such a case does not have to lead to a satisfactory result for the complainant. Sometimes, to fully organize a legal situation, the intervention of the legislator may be necessary. The Constitution does not determine the form in which the CT delivers its rulings. In accordance with the rules adopted in the Polish legal system, the rulings of the CT may take the form of a judgement or decision, whereas the former are attributed to situations in which a ruling involves an authoritative determination of the State. Thus, judgements are delivered in the name of the Republic of Poland.[366]

### 6.3.3 The Supreme Court as the guardian of the application of law in the justice system

In accordance with Article 10(2) of the Constitution, the SC is an element of the judicial power. However, as opposed to the CT, it is – within the framework of such power – one of the elements of the justice system. It plays a crucial role that is confirmed by the fact that it occupies the first place in the catalogue contained in the proper provision and by the specificity of powers ascribed to it. The scope of the powers of the SC at the constitutional level is specified under Article 183 of the Constitution. In accordance with this, the SC exercises supervision over common and military courts as regards adjudication and performs other activities specified in the Constitution and statutes.[367]

Supervision has a judicial character. It extends to the direct implementation of the administration of justice in specific cases and concerns indirect activities that involve

[366] Skąpski 44.
[367] Ibid.

guaranteeing the correctness and unification of jurisprudence within the State's jurisdiction. The realization of judicial supervision in the direct and indirect forms is implemented by: (1) examining judicial remedies of an extraordinary character against judicial decisions and other remedies in line with procedural law; (2) adopting resolutions containing determinations of points of law that give rise to serious doubts concerning the interpretation of provisions serving as the basis for the delivered determination; and (3) adopting resolutions aiming to settle points of law in the event of discrepancies in the jurisprudence of common and military courts and the SC vis-à-vis the interpretation of legal provisions. This supervision is initiated by extraordinary remedies to which the following actors are entitled: Common and military courts (questions of law), parties to proceedings or other subjects, such as the Commissioner for Human Rights, Minister of Justice (cassation appeal – kasacja, cassation complaint – skarga kasacyjna), or – in certain situations – by way of its own instruments enabling the clarification of legal provisions whose application has led to discrepancies in the interpretation of law.[368]

Jurisdiction has a real character, as in a situation where the substance of proceedings makes it possible, the SC may interfere with the content of final determinations. However, this activity must consider other provisions of the Constitution referring to the organs of judicial power (autonomy of courts and independence of judges). The additional powers of the SC arise from the Constitution and ordinary statutes.[369]

As is the case with the CT, the role of the guardian is fulfilled by parts of numerous instruments ascribed to the SC. They are the powers by which the SC guarantees legal safety and the certainty of law applied (as part of implementing the administration of justice) within the territory of the Republic of Poland. Those instruments embrace judicial supervision, and the adoption of resolutions resolving points of law and institution of extraordinary appeal (Pl. skarga nadzwyczajna), introduced to the legal system through the new Supreme Court Act. The purpose of that appeal is the protection of the conformity of jurisprudence to constitutional value, that is, the principle of a democratic State ruled by law implementing the principles of social justice. The direct requirements making it possible to apply extraordinary appeal embrace an infringement of the constitutional principles and the rights and freedoms

[368] Lachmayer 53.
[369] Wyrzykowski 143–145.

of persons and citizens, a gross infringement of law, or a contradiction between the court's findings and evidence collected. This way, extraordinary appeal complements, within a certain scope, the mechanism for reviewing constitutionality (constitutional complaint) in the sphere of the application of law.

Judicial supervision does not comprise the jurisprudence of administrative courts, which are subordinate to the Supreme Administrative Court. While serving as the guardian of the system, the SC adjudicates in the name of the Republic of Poland. This feature is ascribed to determinations including an authoritative imperative. This concerns the power related to implementing the administration of justice. Therefore, adjudicating in the name of the Republic of Poland concerns judgements delivered in appeal proceedings and in relation to extraordinary remedies. The judgements of the SC do not have a universally binding character, although they are final. They have an inter partes character. Where the SC does not end proceedings conclusively, it delivers an order in its own name.[370]

The determination of the points of law is a unique instrument for the fulfilment of the function of the guardian of the system. Decisions delivered in the course of such proceedings take the form of resolutions of the SC. Their content does not embrace the attribute of a State act (in the name of the Republic of Poland) but constitutes an act of judicial power because of their role and character. The findings contained in them may have the rank of a legal rule. However, in the case of resolutions adopted by a full bench of the SC, by benches comprising the joined and full chambers, the decisions gain the force of a legal rule at the time of their adoption. In the case of a resolution adopted by a bench comprising seven judges, the bench may decide to attribute such a force thereto. A legal rule is binding on the different levels of the Supreme Court based on the level at which it was adopted. If any bench of the Supreme Court intends to depart from a legal rule, the legal issue is to be resolved by a bench comprising an entire chamber. A departure from a legal principle adopted by a chamber, joined chambers, or a full bench of the Supreme Court requires a new determination in the form of a resolution adopted by the proper or joined chambers, or a full bench of the Supreme Court. If the bench of one chamber of the Supreme Court seeks to depart from a legal rule adopted by another, a determination takes the form of a resolution of

[370] Skąpski 45.

both chambers. The chambers may refer a point of law to a full bench of the Supreme Court.[371]

Although a legal rule does not formally bind common and military courts, it directly affects their jurisprudence. If such a principle is ignored at that level, the judgement will be quashed in the course of appellate proceedings or at the level of the Supreme Court upon the application of extraordinary remedies. The guardian of the system will act. Resolutions that have gained the force of legal rules are published with a statement of reasons in the Bulletin of Public Information on the Supreme Court website.[372]

### 6.3.4 Administrative courts as guardians of the legality of the operation of public administration

The next guardian of the system in Poland is the administrative judiciary. It comprises the voivodship administrative courts and Supreme Administrative Court (SAC). This arrangement is different from that of the common judiciary and Supreme Court. The power of the Supreme Administrative Court is identical to that of the voivodeship administrative courts. However, there is a difference in that it is the "supreme" court within that judiciary. The administrative judiciary is separate from and independent of the common and military judiciary and Supreme Court. However, together with them, a unique part of the justice system is discussed under Article 175(1) of the Constitution.[373]

The role of the guardian of the system in the case of the administrative judiciary was indicated through the proper formulation of tasks. At the constitutional level, they are defined as "control over the performance of public administration." This means that its function is to protect – within the context of the exercise of the right to a court – individuals' rights in the event of their violation by public administration, and to guard the legal order. This may, but does not have to, be related to a direct infringement of individuals' rights by organs of public administration. All the more so administrative courts are not courts of the first choice in the exercise of the constitutional right to a court. Under Article 177 of the Constitution, there is a presumption of the power of common courts vis-vis implementing the administration of justice. This systemic

[371] Lachmayer 54.
[372] Skąpski 47.
[373] Ibid.

requirement results in the adequate model of the adjudication of administrative courts, that is, annulling adjudication.[374]

Administrative courts review acts of public administration organs – from the perspective of their powers, including the existence of a legal basis as well as the lack of infringement of the hierarchical order of norms in the selection of the said basis (apart from the assessment of the constitutionality of statutes) – as well as procedures for action and substantive-law issues to the proper binding legal standard. Acts constitute the subject of review and a legal standard derived from the higher-level norm. The result is the possible annulment of an act inconsistent with the law. The catalogue of acts and activities that may be the subject of an administrative appeal lodged with an administrative court is broad. Since 2002, it has embraced the classical acts of the application of law (administrative decisions). In the literature, the power under discussion refers to all forms and almost all spheres of action of public administration.[375]

Additionally, administrative courts have two powers: (1) The partial possibility to adjudicate on the substance. This mainly concerns the power to indicate in the judgment how an issue is to be resolved by an organ of public administration, or the possibility to deliver a judgment stating the existence or non-existence of a right or obligation. Although an ambiguous approach is expressed in the legal scholarship in this regard, it is still considered to conform to Article 184 and, by way of exception, to Article 10 of the Constitution. Administrative courts rarely apply provisions allowing for reformative adjudication; and (2) "signalization" rights. When an administrative court determines a vital infringement of a right or circumstances giving rise to infringement, it may inform the proper or superior organs of those infringements through an order. An organ is obliged to examine that order and inform the court about its stance.[376]

From the perspective of the function of the guardian of the system, the literal exposition in the Constitution – within the sentence "control over the performance of public administration" – of adjudication by administrative courts on the conformity to statutes of resolutions enacted by organs of local self-government and normative acts

[374] Lachmayer 55.
[375] Skąpski 48.
[376] Ibid.

of territorial organs of government administration is noteworthy. This is a power to conduct an abstract review of the acts of local law indicated. In the first case, this indication is specified vis-à-vis the kind of legal act concerned (resolution). It embraces all kinds of resolutions (normative ones and those that are acts of the application of law, and internal and non-legal acts). Thus, it is broad in relation to the ratione materiae scope because it goes beyond the review of normative acts (acts of local organs of public administration which are sources of local or internal law). The review of other kinds of authoritative acts of local organs of public administration is conducted but derives from a general constitutional power of administrative courts to 'control the activities of public administration organs.'[377]

The higher-level norm for review indicated in the Constitution is a statute. Legal scholarships extend to contain the Constitution, ratified international agreements, and acts enacted by an international organization, as discussed under Article 91(3) of the Constitution. The view that dominates in the jurisprudence notes that local law should conform to regulations. The ratione materiae scope of review embraces the powers of an organ enacting a legal act, the conformity of the scope of an act to the content of authorization, and the review of the enactment procedure. The function of the guardian of the system is fulfilled by administrative courts in an incidental manner. Based on Article 166(3) of the Constitution, they settle jurisdictional disputes between units of local self-government and government administration.[378]

The role of administrative courts as a guardian of the system, as opposed to the Constitutional Tribunal and Supreme Court, is strengthened by the construction of the mode of proceedings. As the principle of the accusatorial procedure applies in the sphere of the administrative judiciary, those courts adjudicate within the limits of a case, but in a different way than both remaining guardians, as they are not bound by the challenges and requests contained in an appeal, or by the invoked legal basis.[379]

The Supreme Administrative Court plays an exceptional role among administrative courts, which are the guardians of the national legal system. As the "supreme" court, it performs the task of jurisprudential supervision over voivodeship administrative

[377] Lachmayer 57.
[378] Skąpski 50.
[379] Lachmayer 57.

courts not only as an organ settling cases in the second instance, but also in a general manner, as regards the interpretation of law (points of law).

Administrative courts deliver decisions in the form of judgments and decisions. Judgments refer to authoritative determinations and are delivered in the name of the Republic of Poland. Decisions are delivered where the legislator did not envisage the delivery of a judgment in a given course of proceedings. Based on the character of the non-conformity to the law of an administrative act with an individual character, a judgment may quash it or declare its invalidity or infringement of law. This results in the loss of the binding force of such an act. Judgments are announced by courts.

The determination of the illegality of acts of local law results in the determination of their invalidity, or their enactment in breach of law if provisions do not envisage the determination of invalidity. Such a judgment has an ex nunc effect. Acts of the application of law enacted based on such local law continue to be valid. They may be rebutted only in accordance with modes of procedure specified in the law. Judgments in that regard are announced in a voivodeship journal of laws. A final decision is binding on the parties and the court that delivered it, and on other courts and State organs, and in cases envisaged in the statute also on other persons.[380]

As regards points of law, the Supreme Administrative Court adjudicates through resolutions that are passed on a bench comprising seven judges, or a full bench of a chamber or of the Supreme Administrative Court. There are two kinds of resolutions: (1) Those concerning the clarification of legal provisions whose application has led to discrepancies in jurisprudence (general, abstract resolutions); and (2) Those containing the determination of points of law giving rise to serious doubts in a specific case (specific resolutions). General resolutions are adopted at the request of organs entitled thereto by the law. Specific resolutions are adopted at the request of the bench adjudicating in a specific case. All resolutions are binding on administrative courts. No adjudicating bench of any administrative court may resolve an issue embraced by the scope of a resolution in breach of that resolution until the interpretation of a specific provision is changed by another resolution. If a court does not share the stance adopted

[380] Skąpski 54.

in a resolution, it may only refer an issue to the proper bench of the Supreme Administrative Court.[381]

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[381] Ibid.
[382] Skąpski 44.

in a resolution, it may only refer an issue to the proper bench of the Supreme Administrative Court.[383]

### 6.3.5 Relations concerning the institutions and powers of the guardians of the systems

In accordance with the Constitution and EU Treaties, the Constitutional Tribunal, Supreme Court, and administrative courts do not remain in a hierarchical relationship with the CJEU. The CJEU does not remain in a hierarchical relationship with the Constitutional Tribunal, Supreme Court, or administrative courts. This follows from the fact that these bodies have separate legal authority to act and that different functional roles are attributed to them. Thus, in principle, these organs may not formally control each other's activity or quash their decisions.[384] Simple proceedings instituted by the Constitutional Tribunal, Supreme Court, or administrative courts on the CJEU's decisions would constitute an infringement of their constitutional powers. If the CJEU simply (hierarchically) dealt with the jurisprudence of the Constitutional Tribunal, Supreme Court, or administrative courts, it would violate both the EU Treaties and the sovereignty of the Member States.[385]

However, the unique nature of European integration and the scope of powers of these organs lead to the conclusion that at the level of the application of law (exercise of powers), there may arise indirect situations that depart from these premises. The most glaring example among them is the competence of the CJEU to examine an infringement of the EU Treaties by a Member State. As "Member State" is understood to mean the State as a whole, that is, all organs and subjects performing State tasks, any activity or failure to act is attributed to the State. In this way, the scope of the CJEU's competence theoretically embraces the activities of the Constitutional Tribunal, Supreme Court, and administrative court, as adjudication by the CJEU is based on an examination of facts. The CJEU may deliver a judgment assessing a judgment delivered by any of these organs. Nevertheless, this is an abstract assessment that does not have direct impact on the assessed judgments and does not change their

[383] Lachmayer 58.
[384] Skąpski 45.
[385] Lachmayer 59.

content. It will possibly be the State's task to take action to eliminate an infringement that emerged as a result of those judgments, which seems impossible given the constitutional guarantees related to the proceedings and decisions of the Constitutional Tribunal, Supreme Court, and administrative courts.

The Constitutional Tribunal is competent to examine the constitutionality of EU primary law. The provision concerns ratified international agreements, but a treaty is a treaty. The Constitution discusses all international agreements and does not envisage procedural immunity for EU Treaties. The Constitutional Tribunal has also developed, in its jurisprudence, the conception of examining EU secondary legislation. It derived this from the interpretation of the provisions regulating its powers. It also inferred the possibility to review the jurisprudential activity of the CJEU. It derived this from the specificity of judgments delivered by international courts as acts that not only resolve a matter in a specific case, but also – from the procedural perspective – attribute specific content to a provision of international law by inferring from it a specified legal norm. This refers to the entire case law of the CJEU, and not only to preliminary judgments, although they seem to be the most predestined for examination given their interpretative specificity.[386]

In such a case, a decision of the CJEU is not examined directly. A provision (norm) whose content is created by such a decision is formally examined. An examination may embrace two aspects: the conformity of the substantive content of a norm to the Constitution; and the examination of the CJEU's competence to shape the specific content of legal norms from the perspective of the boundaries of the conferral of competences or principle of conferral.[387]

If the Constitutional Tribunal states that the content of a norm does not conform to the Constitution or was created by the CJEU's activity beyond the boundaries of conferral, it eliminates it from the legal order of the Republic of Poland by making it impossible for national organs to apply it. The principle of the primacy of EU law does not operate in this case. The Tribunal may do this because the Constitution is the Supreme Law of the Republic of Poland, and sovereign Member States are the masters of the Treaties

[386] A Wróbel, *Poland and European Union Law: Integration and Constitutional Limits* (Springer 2014) 90-95.
[387] Skąpski 46.

as their creators. A State organ or another subject will infringe on the Constitution if it applies an unconstitutional norm.[388]

There is less mutual convergence between the case law of the CJEU and the activity of the Supreme Court. The substantive sphere of the Supreme Court's activity (civil, criminal, and labor laws) embraces issues whose substance is regulated outside EU law, which limits the CJEU.[389]

Administrative courts seem predestined to collaborate with the CJEU from the perspective of their competences in relation to executive power. If a part of Poland's legal order is regulated by EU law and these are the spheres in which State organs act by applying EU law (environmental and competition law, common market, etc.), then, where a case related to the activity of administrative organs is examined by administrative courts, a reference for a preliminary ruling seems to be a natural part of the proceedings. This is more typical of administrative courts than of the Supreme Court. It conforms to the Treaty-based imperative directed at the State to establish effective legal protection in spheres embraced by EU law.

As the dialogue with the Supreme Court and administrative courts takes place via references for a preliminary ruling, this formula excludes any possibility of a review of the case law of the CJEU. If a court makes a reference for a preliminary ruling, it is obliged by the Treaty to proceed in a case based on a norm interpreted in keeping with the content of the preliminary judgment. In the administrative judiciary, there has been no divergence in that regard; there have been disparities in the Supreme Court concerning the assessment of the role and significance of preliminary judgments.[390]

### 6.3.7 Solving conflicts in jurisprudential practice

Given that the catalogue of conflict of law rules remains limited, conflicts related to the application of law are eliminated by legal instruments created to serve that purpose, allowing for a dialogue among competent organs. In keeping with the EU Treaties, the fundamental measure of dialogue with the CJEU is a reference for a preliminary ruling.

[388] Lachmayer 60.
[389] Wróbel 90-95
[390] Skąpski 49.

The court of a Member State is competent to make a reference. The first question that may arise is whether the Constitutional Tribunal of the Republic of Poland has such power. Foreign legal scholarship states that the power (obligation) to make a reference for a preliminary ruling is attributed to all constitutional courts of Member States, yet the Constitutional Tribunal is different from most constitutional courts of the EU Member States. It is not a court from national and European standpoint. Jurisprudential practice will not help find an unambiguous answer. In the history of its adjudication, the Constitutional Tribunal once made a reference for a preliminary ruling in a particular case, and the CJEU responded with a judgement. The Constitutional Tribunal did not have a chance to give effect to (or to refuse to give effect to) that judgement because the national applicant withdrew the application, and the case was discontinued.[391]

The Constitutional Tribunal has not made a reference for a preliminary ruling in any other case. It refrained from doing so in cases in which it adjudicated on the nonconformity of Polish national law to EU law. This restraint follows from the features of the Constitutional Tribunal's activity. The Constitutional Tribunal does not apply EU law in the common sense, that is, it does not deliver individual acts based on it. It may only adjudicate on its constitutionality or apply it as a higher-level norm for review (EU Treaties) to evaluate national law other than the Constitution. The Constitutional Tribunal needs to understand a specific legal provision to recreate the content of a norm which will be subsequently examined from the perspective of the Constitution. It also uses EU law as a higher-level norm to examine the conformity to it of the content of a provision contained in an act of a lower rank.[392]

The situation of the Supreme Court is different. From the constructional and functional perspective, it is a court of national and EU law. It has applied the instrument of a reference for a preliminary ruling, although this practice was initially rare. The number of references for a preliminary ruling has increased since 2015 as a result of the reform of the justice system.[393] This was triggered by the fact that the European Commission instituted proceedings against Poland under Article 7 of the TEU. The Supreme Court considered a reference for a preliminary ruling the perfect tool to shape the reforms

[391] Lachmayer 73.
[392] Skąpski 49.
[393] Ibid.

with the help of the EU. Based on the information on the Court's website, it made 60 references for preliminary rulings between 2008 and 2022.[394]

However, in the case of the Supreme Court, the problem arises at a different point. In light of the Treaties, a court is entitled to make a reference for a preliminary ruling. Yet only a court against whose decisions there is no judicial remedy under national law is obliged to do so. In Polish law, this concerns a court of last instance and not courts that deal with extraordinary remedies. The Supreme Court is a court of last instance within a limited scope. One may consider it a disciplinary court for judges of common courts. It provides extraordinary remedies and adjudicates upon systemic matters. This raises the question of whether it can make references for a preliminary ruling. If it were obliged to do so, it would mean that such an obligation does not apply to a court of second instance. There may not be two levels of courts obliged to make a reference as courts against whose decisions there is no judicial remedy. This leads to the conclusion that the Supreme Court is at liberty, but has no obligation, to make a reference.[395]

Another problem concerns the doubt around whether the Supreme Court may make a reference for a preliminary ruling in a sphere of its activity other than the application of EU law, that is, for example, while adopting resolutions on the interpretation of national law in abstract. If this is not related to the application of EU law, the answer to this question should be negative. Otherwise, an unauthorized reference and – as a result of it – unlawful interference of the CJEU's case law with the Polish legal order ensues.[396]

The position of the Supreme Administrative Court is different. This court is part of the two-instance administrative judiciary. As regards the realization of administrative cassation appeal, it is a court against whose decisions there is no legal remedy within the meaning of the relevant EU law. Thus, if the subject of examination comprises the activity of organs of public administration based on EU law, then making a reference for a preliminary ruling is justified. From 2005 to January 2023, administrative courts made 103 references for a preliminary ruling to the CJEU.

[394] Wróbel 90-95.
[395] Lachmayer 74.
[396] Skąpski 45.

### 6.3.8 Constitutional identity as a boundary of dialogue

The Treaty-based obligation of the EU to respect the national identity of the Member States is an instrument indicating the boundaries of the federalizing effects of the principle of the primacy of EU law. National identity is defined by means of "constitutional structures," that is, the substance of systemic statehood and sovereignty provided for in the highest legal act of the State. From the perspective of national law, constitutional identity is the functional counterpart of the Treaty-based construct of national identity. It has been shaped by the jurisprudence of tribunals and constitutional courts of EU Member States. This way, the obligation, deriving from EU law, to respect national identity implies respect for the constitutional identity of the Member States.[397]

The constitutional identity of each State has an individual character. To learn more, it is necessary to refer to the constitutional provisions of a given State, specified by the jurisprudence of the proper organ, which, in Poland, is the Constitutional Tribunal. It defined constitutional identity in a case reviewing the constitutionality of the Treaty of Lisbon. According to the Constitutional Tribunal:

a) The sovereignty of Poland implies the primacy of the Polish Nation to determine its fate. The Constitution is the normative expression of that principle, especially its Preamble and relevant articles.[398]

b) Constitutional identity blocks the possibility of conferring on the EU authority over, based on the Constitution, matters fundamental to the political system of the State (the hard core), and protecting the collection of the fundamental principles of the Constitution (the principles of statehood, democracy, a State ruled by law, social justice, and subsidiarity) or provisions referring to the rights of the individual. It also embraces prohibitions against the conferral of power to amend the Constitution and determine competences.

c) The Constitution guarantees the preservation of the constitutional identity of the Republic of Poland. It is applied in the event of each amendment to the Treaty provisions constituting the foundation of the EU; also, if amendments are implemented

[397] Skąpski 50.
[398] Lachmayer 75.

in a manner other than by virtue of an international agreement if they lead to the conferral of competences on the EU.[399]

The rules inferred in this case were confirmed by the Constitutional Tribunal in a subsequent case, which concerned Poland's obligation to give effect to the interim order of the CJEU by referring to the system and jurisdiction of and the procedure before Polish courts. The Constitutional Tribunal referred, in its statement of reasons, to the concept of constitutional identity, which, in its opinion, includes the "Polish judiciary."[400]

This way, the Constitutional Tribunal defined constitutional identity from the perspective of the preservation of sovereignty. The State was recognized as its possessor. The construction of constitutional identity formulated this way, together with the parallel Treaty-based obligation imposed on the EU, that is, on its organs, to respect the said identity, constitutes a boundary for the dialogue between the Constitutional Tribunal, the Supreme Court, and the courts, and the CJEU.[401]

### 6.3.9 The K3/21 Ruling

The Constitutional Tribunal, in its ruling on Case K 3/21 dated 7 October 2021, determined that Article 1 TEU, in conjunction with Article 4(3) TEU, along with Article 2 TEU and Article 19(1) TEU, is incompatible with the Polish Constitution. The case primarily addressed the jurisdiction of the CJEU and the premise of the primacy of EU law. The aforementioned principle, not explicitly stated in the EU Treaties, originates from the 1964 ruling in Costa v ENEL, wherein the Court of Justice asserted that in instances of conflict between a provision of Community law and domestic law, Community law shall take precedence. From the perspective of the Court of Justice, the principle of primacy is essential for maintaining the homogeneity of EU legislation throughout the Union; yet, Member States have encountered difficulties in aligning this principle with their respective constitutional traditions. The German Federal Constitutional Court has consistently examined the principle of

[399] E Łętowska, *Principles of Polish Constitutional Law* (C H Beck 2012) 60–85.
[400] Lachmayer 75.
[401] Skąpski 52.

primacy and its boundaries, beginning with the renowned Solange cases and culminating in last year's ruling that annulled a CJEU judgment concerning the ECB's Public Sector Purchase Programme, which the Polish Prime Minister frequently cited in his appeal to the Constitutional Tribunal.[402]

The Polish Constitutional Tribunal has consistently denied the supremacy of EU law over the Constitution. In its ruling in K18/04, issued in May 2005, shortly after Poland's EU accession, the Tribunal affirmed the preeminence of the Constitution, clarifying that any potential conflict between a constitutional norm and an EU law provision cannot be resolved by presuming the supremacy of the EU norm. In October 2021, the judge-rapporteur of the Constitutional Tribunal cited the relevant section of the 2005 ruling in the oral rationale of the most recent decision.[403]

In its October 2021 ruling, the Tribunal determined that the first and second subparagraphs of Article 1 TEU have facilitated a new phase of European integration, wherein EU institutions operate beyond the competencies delineated in the Treaties and delegated by Poland pursuant to Article 90 of the Polish Constitution. The Tribunal specifically contested the second subparagraph of Article 1, which characterizes the TEU as signifying 'a new step in the process of establishing an even closer unity among the peoples of Europe.' The judgment asserts that a new phase of integration, wherein the CJEU's authority exceeds that granted to the EU, results in the Polish State's loss of sovereignty, which is inconsistent with Articles 2 and 8 of the Polish Constitution, stipulating that the Republic of Poland is a democratic state and that the Constitution is its paramount law.[404]

The Tribunal has additionally determined that Articles 2 and 19(1) TEU are incompatible with the Polish Constitution to the extent that they permit subordinate national courts and the Polish Supreme Court to disregard the Constitution, to annul the decisions of the Constitutional Tribunal, and to scrutinize the legality of the judicial appointment process, which the Tribunal asserts falls beyond the jurisdiction of the EU. The Tribunal contends that by interpreting Article 19(1) TEU to establish a power

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[402] Polish Constitutional Tribunal, *Assessment of the Conformity to the Polish Constitution of Selected Provisions of the Treaty on European Union* (K 3/21) (Judgment of 7 October 2021).
I Kucina, 'Polish Constitutional Tribunal's Judgement Regarding Supremacy of the Polish Constitution Over EU Law: The Next-Level Debate on the "Last Word"' *Journal of the University of Latvia. Law*.
[404] Skąpski 54.

to scrutinize the organization and structure of a Member State's judicial system, the CJEU has effectively conferred upon itself a new authority. The Tribunal says that this competence cannot be deduced from Article 2 TEU, which only enumerates values of 'axiological relevance' rather than establishing definitive regulations.[405]

## 6.4 Slovakia and the Primacy of EU Law

The Slovak Republic joined the EU on May 1, 2004, along with nine other countries. From that day, the original treaties and acts adopted by the institutions of the European Communities and the EU became binding for Slovakia.[406]

The relationship between Slovak and international law is defined in Article 1, paragraph 2 of the Constitution of the Slovak Republic: "The Slovak Republic recognizes and observes general rules of international law, international treaties by which it is bound, and its other international obligations." Some authors consider this provision to be a basic rule of reception, although most do not agree with this view. This provision plays an important role in the interpretation of other constitutional legal norms, as well as the norms of other legal regulations.[407]

Even before Slovakia's accession to the EU, a major amendment to the Constitution was adopted with the aim of ensuring the cooperation of national and EU law. This amendment included changes important for the approximation of Slovak law to the legal order of the EU. The constitutional treaty introduced a new article allowing the Constitutional Court to decide on the conformity of negotiated international treaties, which require the consent of the National Council of the Slovak Republic, with the constitution or constitutional laws. Based on this article, the Constitutional Court can exercise preventive control of constitutionality over such treaties.

[405] 'Poland's Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls' *European Law Blog.*
[406] M Hulej, *Slovakia and the European Union: Constitutional and Legal Perspectives* (Springer 2013) 54-55.
[407] M Dubovec, *Slovak Constitutional Law* 2nd edn (Wolters Kluwer 2015) 79-80.

The most significant contribution of this amendment was Article 7, paragraph 2 of the Constitution, which states: "The Slovak Republic may, by an international treaty that has been ratified and promulgated in the manner prescribed by law, or on the basis of such a treaty, transfer the exercise of part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and the European Union take precedence over the laws of the Slovak Republic. The adoption of legally binding acts requiring implementation shall be conducted by law or by government regulation." Remarkably similar provisions can be found in the constitutions of other European countries. This provision therefore clearly states the precedence of EU law over Slovak legislation. However, it does not provide a solution for conflicts between EU law and the Constitution itself. Interestingly, based on the wording "legally binding acts of the EC and EU," this provision can be applied only to secondary EU acts. The Slovak Constitution thus regulates primary EU law and secondary EU acts separately. The application of primary law is governed by the general provisions of Article 7, paragraph 5 and Article 144 of the Constitution, which deal with the direct application and precedence of international treaties that have been promulgated and entered into force after July 1, 2001.[408]

The Constitutional Court of Slovakia accepts the doctrine of precedence, and all public authorities (including general courts) are obliged to apply the principle of the precedence of EU law in the manner established by the case law of the Court of Justice, which means that in the event of a conflict between the norms of these two legal systems, the national regulation becomes inapplicable. General courts should verify their legal opinion by submitting a preliminary question to the Court of Justice.[409]

The latest constitutional novella represents one of the most significant recalibrations of the Slovak constitutional order since the pre-accession amendment of 2001. While earlier reforms were primarily integration-driven and designed to facilitate Slovakia's accession to the European Union, the most recent amendment is sovereignty-conscious in nature. Its objective is not to reverse integration, but to clarify the constitutional

[408] Dubovec 46.
[409] P Cserne and M Bobek (eds), *The Slovak Legal System and European Integration* (Routledge 2016) 60 - 85.

limits within which integration operates. In this respect, it constitutes a qualitative shift from adaptation to consolidation.[410]

The amendment must be understood in its broader European context. Across the European Union, constitutional courts and national legislatures have increasingly emphasized constitutional identity, the limits of conferred competences, and the protection of fundamental constitutional structures. Although Slovakia has not experienced direct constitutional conflict with EU institutions, the constitutional legislator chose to provide a clearer normative framework in anticipation of potential tensions. The novella therefore functions both as a declaratory reaffirmation of constitutional supremacy and as a preventive safeguard mechanism.[411]

At the doctrinal level, the amendment strengthens the interpretative force of Article 1(1) and Article 1(2) of the Constitution. Article 1(1) establishes the Slovak Republic as a sovereign, democratic state governed by the rule of law. Article 1(2) declares that the Slovak Republic recognizes and observes general rules of international law and international treaties by which it is bound. Prior to the novella, scholarly debate centered on whether Article 1(2) implied a broad openness toward international and supranational law that might support an expansive understanding of primacy. The new amendment clarifies that openness toward international law is constitutionally conditioned. Recognition and observance occur within the framework of constitutional supremacy; they do not displace it.[412]

The novella also affects the interpretation of Article 7(2), which permits the transfer of the exercise of part of state competences to the European Union. The transfer mechanism has always been understood as derivative and limited. However, the amendment reinforces the notion that transferred competences are not alienated irrevocably but remain constitutionally framed. The Slovak Republic does not cease to be sovereign; rather, it exercises sovereignty in a differentiated manner. The constitutional authorization to transfer competences is therefore neither unlimited nor self-executing. It is contingent upon continued compatibility with the core principles of the Constitution.[413]

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[410] P Šefčovič, *European Union Law and Slovak National Law* (IURA Edition 2012) 40–65.
[411] Hulej 34.
[412] Šefčovič 42.
[413] Cserne and Bobek 65.

A central feature of the novella is its emphasis on constitutional identity. Although the Constitution does not provide a detailed catalogue of immutable principles, it implicitly protects fundamental structural characteristics of the state: sovereignty, democracy, the rule of law, separation of powers, and the protection of fundamental rights. The amendment strengthens the interpretative position that these elements form a substantive constitutional core. Consequently, any interpretation of EU obligations must respect this core.[414]

This clarification has significant implications for constitutional adjudication. The Constitutional Court of the Slovak Republic, as the guardian of constitutionality, is placed in a more defined role regarding potential conflicts between EU law and constitutional principles. Although the Court has traditionally adopted a cooperative stance toward EU law and has not articulated a doctrine of ultra vires or identity review comparable to some other European constitutional courts, the novella provides textual support should such review become necessary. It strengthens the Court's competence to assess whether the exercise of transferred powers remains within constitutionally permissible limits.[415]

Importantly, the amendment does not alter the practical functioning of EU law within Slovakia in everyday adjudication. General courts remain bound to apply EU law with precedence over ordinary legislation. They must continue to disapply conflicting statutory provisions and, where appropriate, submit preliminary references to the Court of Justice of the European Union. The principle of loyal cooperation under EU law remains intact. The novella does not introduce an automatic review of EU acts by the Constitutional Court, nor does it establish a mechanism for systematic constitutional filtering of EU norms. Its effect is structural rather than operational.[416]

The normative hierarchy following the novella can therefore be described with greater precision. The Constitution and constitutional laws occupy the apex of the domestic legal order. International treaties ratified and promulgated in accordance with Article 7(5), including the EU founding treaties, enjoy precedence over statutes but remain constitutionally grounded. EU secondary legislation has precedence over ordinary laws pursuant to Article 7(2). However, this precedence does not extend to the

[414] Dubovec 56.
[415] Hulej 34.
[416] Šefčovič 43.

Constitution itself. The Constitution thus serves as the ultimate normative framework within which all other sources of law operate.[417]

From a theoretical perspective, the novella strengthens a constitutional pluralist conception of the relationship between national and EU law. Instead of embracing an absolute hierarchical supremacy of EU law, the Slovak constitutional order adopts a model of conditioned primacy. EU law is supreme in its own legal order and functionally superior to national statutes, but its domestic effectiveness ultimately depends on constitutional authorization. The source of validity within the Slovak legal system remains the Constitution.[418]

The political and symbolic dimensions of the amendment should not be overlooked. Constitutional amendments serve not only technical but also expressive functions. By reaffirming constitutional primacy, the legislator communicates that participation in European integration does not dissolve statehood or constitutional identity. This message is particularly relevant in periods of intensified debate about the distribution of competences between the European Union and its Member States. The novella thus contributes to constitutional stability by clarifying the foundational hierarchy of norms.[419]

At the same time, the amendment leaves open important questions for future development. It does not define the exact procedural path that would be followed in the event of a direct and irreconcilable conflict between an EU act and a constitutional norm. Nor does it specify whether such a conflict would justify disapplication, constitutional amendment, or political negotiation at the EU level. These questions remain within the domain of constitutional interpretation and judicial practice. The absence of explicit procedural detail may be deliberate, preserving flexibility and space for dialogue between national and European institutions.[420]

The historical evolution of the interaction between international, and later European, law and the Slovak Republic's Constitution deserve a quick overview.

Effective October 1, 1992, the Slovak Republic's Constitution addressed the question of its interaction with foreign treaties in a number of ways and through a number of

[417] Cserne and Bobek 67.
[418] Hulej 35.
[419] Šefčovič 44.
[420] Cserne and Bobek 67.

articles (e.g., Articles 11, 86(e) and (k), 102(a) and (k), 125(e), and 144(2)). It did not, however, definitively address the basic issue of how international treaties relate to the local legal system. Specifically, unlike many democratic constitutions in Europe, the original text of the Constitution lacked a so-called general reception clause that would have made legitimate international treaties and international law norms directly applicable to Slovak domestic law. A dualist understanding of the interplay between domestic and international law, or a doctrine of the internal sovereignty of the Slovak legal system, could be inferred from the original constitutional framework. Article 11 of the Constitution, which states that "international treaties on human rights and fundamental freedoms that the Slovak Republic has ratified and that were promulgated in the manner prescribed by law shall take precedence over its laws, provided that they ensure a greater scope of fundamental rights and freedoms," was an exception—and a rather ambiguous one in this regard. The Constitutional Act No. 23/1991 Coll., which established the Charter of Fundamental Rights and Freedoms as a constitutional act of the Federal Assembly of the Czech and Slovak Federative Republic, contained this clause nearly exactly.[421]

The status of international treaties and their relationship to Slovak sources of law changed with the adoption of the so-called Euro amendment to the Slovak Republic's Constitution by Constitutional Act No. 90/2001 Coll. of 23 February 2001, which went into effect on July 1, 2001. This included a new regulation of the relationship with the European Union's and European Communities' sources of law. Constitutional studies of Article 7(2), perhaps in combination with Article 7(5), became especially important in the context of European integration and the Slovak Republic's entry into the EU on May 1, 2004.[422]

The status and implementation of the Europe Agreement, which established an association between the European Communities and their Member States on the one hand, and the Slovak Republic on the other, also known as the Association Agreement, took on special significance from the standpoint of Slovakia's aspirations for integration. All parties to the contract signed it on October 4, 1993, in Luxembourg, and it became operative on February 1, 1995, in accordance with Article 123(2). However, because it was promulgated in the Slovak Republic's Collection of Laws on

[421] Cserne and Bobek 67.
[422] Hulej 36.

June 10, 1997, before the Euro amendment to the Constitution went into effect on July 1, 2001, it only gained domestic legality about two and a half years after it entered into force under international law. The relationship Agreement, which specifically set a framework for the Slovak Republic's gradual integration into the Community, created a relationship between the Slovak Republic and the European Community and its Member States. Article 1(2) of the Association Agreement stated that the Slovak Republic had to strive toward meeting the requirements in order to achieve this. In this regard, it is also feasible to highlight Slovakia's constitutional commitment, as stipulated in Articles 69 and 70 of the Association Agreement, to work toward ensuring the progressive harmonization of its laws with those of the European Communities in specific domains.[423]

In the end, the Euro amendment changed the fundamental connection between international treaties, European law, and the Slovak Republic's legal system, including its constitutional order. The Slovak Republic acknowledges and abides by general rules of international law, international treaties by which it is bound, and its other international duties, as stated in the amended wording of Article 1(2) of the Constitution. Article 7 stipulates:

(1) The Slovak Republic may join other states in a state union based on its own free will. When deciding whether to join or leave such a union, a constitutional act must be passed and approved by a referendum.

(2) The Slovak Republic may transfer the exercise of some of its rights to the European Communities and the European Union through an international treaty that has been ratified and issued in accordance with the legal procedures, or on the basis of such a treaty. The laws of the Slovak Republic are superseded by legally obligatory acts of the European Union and European Communities. According to Article 120(2) of the Constitution, laws or government regulations must be in place to implement legally obligatory acts that need to be transposed.

(3) The Slovak Republic may join an organization of mutual collective security for the aim of preserving peace, security, and democratic order, subject to the terms specified in an international treaty.

[423] Šefčovič 48.

(4) International treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military nature, international treaties from which the Slovak Republic becomes a member of international organizations, international economic treaties of a general nature, international treaties whose implementation necessitates a law, and international treaties that directly establish rights or obligations of natural persons or legal entities must be ratified with the approval of the National Council of the Slovak Republic.

(5) International treaties that directly establish rights or obligations of natural persons or legal entities, treaties whose implementation does not require a law, and treaties on human rights and fundamental freedoms that have been ratified and promulgated in accordance with the law's prescribed procedures supersede laws.[424]

Article 7(5) of the Constitution states that an international treaty takes precedence over statutes. This means that if the provisions of a valid international treaty that has been approved by the Slovak Republic's National Council and duly ratified and promulgated in the required manner conflict with those of a statute, the authority enforcing the law will apply the international treaty instead of the statute.[425] However, it makes sense that the principle of precedence can only be used to international treaties that may be applied directly, that is, only to treaties whose implementation does not necessitate the passage of legislation or other legally obligatory regulations. Although it is not required to specify particular rights and obligations of natural persons or to be a treaty that does not call for implementing legislation, an international treaty on human rights and fundamental freedoms supersedes Slovak Republic laws. This precedent stems from a Slovak Republic National Council decision, subject to the requirement that it be a human rights and freedoms pact. International treaties on human rights and fundamental freedoms typically recognize these rights and freedoms and require the contracting parties to guarantee and uphold them for all those to whom they apply, rather than establishing particular rights and obligations of natural persons. These treaties outline the fundamental rules that determine the status of particular topics and that state authorities must adhere to in all of their legislative, executive, and judicial actions. The Constitutional Court of the Slovak Republic has adopted the only logical interpretation in its decision-making process when evaluating other international

[424] Hulej 37.
[425] J Mazák, *The Slovak Constitutional Court and EU Law* (LexisNexis 2014) 75–100.

conventions on human rights and fundamental freedoms: that where an international treaty establishes a positive obligation of the state to secure a particular right for specified persons, there exists a corresponding human right of such persons.[426]

### 6.4.1 The European Union as a Non-State Entity and the Decision of the Constitutional Court of the Slovak Republic, Case No. II. ÚS 171/05, 27 February 2008

The inaugural decision that prominently engaged the Constitutional Court of the Slovak Republic in the discourse on the nature of the EU and the impact of European law was the Euro-constitution case. The Constitutional Court of the Slovak Republic significantly advanced the development of Slovak constitutional doctrine concerning European integration.[427]

On July 8, 2005, thirteen complainants submitted a constitutional complaint asserting a breach of their rights under Article 30(1) of the Constitution, which guarantees the freedom to engage in the administration of public affairs. The purported infringer was the National Council of the Slovak Republic, and the infraction was claimed to have transpired through the endorsement of the Constitutional Treaty (Resolution of the NR SR No. 1596). The complainants contended that the adoption of the Constitutional Treaty would result in Slovakia entering a state union, which, per Article 7(1) of the Constitution, necessitates enactment through a constitutional statute validated by a referendum. They substantiated the state-union thesis with numerous prominent arguments, including the acknowledgment of the EU's legal personality, the explicit regulation of the supremacy of European law over national law, the augmentation of the EU's powers and the domains subject to majority voting, the flexibility clause, and the incorporation of the Charter of Fundamental Rights of the Union into the Constitutional Treaty.[428]

The complainants assert that the conditions of Article 7(1) of the Constitution (pertaining to admission into a state union) were met, and the absence of a mandatory

[426] Šefčovič 50.
[427] Hulej 38.
[428] Mazák 80.

referendum constitutes a violation of their freedom to engage in the administration of public affairs.[429]

The verdict in the case was declared after nearly three years, on February 27, 2008, while the written document was published on the Constitutional Court's website in June 2008. At that point, the Constitutional Treaty initiative was already defunct, rendering the Constitutional Court's verdict practically "obsolete."[430]

The Constitutional Court, in ruling file no. II. ÚS 171/05 dated February 27, 2008, asserted that the Constitution of the Slovak Republic does not define the legal meaning of the word "state union," neither in Article 7(1) nor in any other clause. The Constitutional Court of the Slovak Republic observed that the legal nature of the European Union, particularly following the prospective enactment of the Treaty establishing a Constitution for Europe, is highly intricate from various viewpoints, encompassing both international and domestic dimensions.[431]

The Constitutional Court asserted that the evolution of the European Union is undeniably progressing towards a state-like structure, specifically a state union; nevertheless, it is presently impossible, according to the Court, to ascertain the exact timing of this eventuality. Evidence presented in the proceedings indicated that the European Union presently displays some traits and functions that, according to established legal theory, can be ascribed to the essential attributes of a state union, a fact not contested by the complainants themselves. Conversely, even if the Treaty establishing a Constitution for Europe were to be enacted, disparities and distinctive characteristics of the EU's legal status would persist, including the framework for exercising its powers under the Treaty. These factors collectively pose substantial challenges to the complainants' assertion that the EU would solely represent a state union following the Treaty's ratification (e.g., decision-making beyond EU institutions, the notion of EU territory impacted by the treaty only in restricted domains, and the absence of a legally unified territory akin to a state union, among others).[432]

[429] Hulej 39.
[430] Dubovec 57.
[431] Mazák 82.
[432] Dubovec 57.

The Constitutional Court determined that no other provision of the Treaty establishing a Constitution for Europe suggests that the treaty would establish a joint state among EU members or that the EU, as a political and economic association of member states, would assume the characteristics of a state union following the treaty's adoption. The Constitutional Court asserts that the Slovak Republic cannot independently confer this status to the EU. This decision can solely be taken by the EU institutions with the unanimous assent of all member states. Considering all the aforementioned facts, the Constitutional Court determined that, in the context of the case, it does not find the complainants' principal assertion - that the EU will transform into a state union following the Treaty's ratification - to be substantiated.[433]

Moreover, the Constitutional Court asserts that Article 7(2) of the Constitution possesses an independent character in connection to Article 7(1). The Treaty of Accession of the Slovak Republic to the EU is an international treaty that was ratified and enacted in accordance with legal provisions. The Constitutional Court asserts that all actions and measures undertaken by Slovakia within the pertinent associations with the European Communities and the European Union must adhere to the constitutional standard outlined in the initial clause of Article 7(2) of the Constitution during the approval process. This remains unchanged even if the act substantially modifies the parameters of collaboration among the association's members, as is exemplified by the Treaty.[434]

Consequently, irrespective of the nature of the European Union, Slovakia's membership in the EU or any subsequent actions taken by either the EU or Slovakia cannot establish a situation that is causally linked to the intent and substance of Article 7(1) of the Constitution. The National Council's implementation of the provision in the first sentence of Article 7(2) of the Constitution, in this case, does not preclude the option of conducting a nationwide referendum - though not mandatory, it remains a discretionary referendum - since granting approval to the Constitutional Treaty evidently represents a matter of public interest. The setting of the constitutional laws defining the conditions for referenda precludes the possibility of a facultative referendum among Slovak nationals about agreement to the Constitutional Treaty.[435]

[433] Hulej 39.
[434] Mazák 78.
[435] Ibid.

Additionally, the second section of the Constitutional Treaty encompasses the Charter of Fundamental Rights. This is a normative document that does not reference the international treaties on human rights and freedoms approved and promulgated by Slovakia in its Collection of Laws. The Charter of Fundamental Rights delineates a distinct catalog of fundamental rights and freedoms, encompassing numerous newly created rights and liberties. The second section of the Treaty addresses fundamental rights and liberties. Article 93(3) of the Constitution stipulates that this section of the Treaty is exempt from any referendum, whether mandatory or optional.[436]

### 6.4.2 Fundamental Impacts of European Law on the Jurisdiction of the Slovak Republic as per the Constitutional Court of the Slovak Republic

Article 19 of the Treaty on European Union stipulates that adherence to European Union legislation is monitored by the Court of Justice of the European Union and the courts of the Member States, including constitutional courts, so encompassing the Constitutional Court of the Slovak Republic. The Court of Justice of the European Union is tasked with upholding the autonomy of the Union's legal order as established by the treaties, while the judicial systems of the Member States, in alignment with the principle of loyal cooperation articulated in Article 4(3) TEU, are primarily responsible for the comprehensive application and observance of EU law within their jurisdictions.[437]

The primary issue in implementing European law within EU Member States, including the Slovak Republic, is when there is a clash between EU law and national law. The systemic principle of supremacy of European law over national law is applicable here. This norm is established by the Court of Justice of the EU but is not routinely or willingly adopted by the constitutional courts of Member States. This is a rule of application. It fails to consider the issue of domestic validity regarding contradictory or competing norms. The existing foundation treaties do not explicitly state the priority of Union law, in contrast to the unratified Treaty creating a Constitution for Europe,

[436] Dubovec 60.
[437] M Smolka, *Slovak Constitutionalism and International Law* (PWN 2011) 50–75.

which stated affirmed the primacy of Union law over the legal systems of Member States in Article I-6. The existing Treaty on the Functioning of the European Union does not explicitly include such a provision in its language. The supremacy of Union law over Member State law is solely addressed in Declaration No. 17 on Primacy, which is appended to the Final Act of the Intergovernmental Conference that ratified the Lisbon Treaty. The declaration asserts, "The Conference acknowledges that, pursuant to the established jurisprudence of the Court of Justice of the European Union, the treaties and the legislation enacted by the Union based on these treaties take precedence over the laws of the Member States as stipulated in the aforementioned jurisprudence of the Court of Justice of the EU."[438]

The declaration includes the Opinion of the Council Legal Service dated 22 June 2007, which asserts, among other points, that "the absence of an explicit statement regarding the principle of primacy in a future treaty does not impact the validity of this principle or the established case law of the Court of Justice." Nonetheless, the affirmations appended to the Final Act lack legal binding force. They signify merely a political commitment by the Member States, although they may, under some conditions, be utilized for the interpretation of primary law.[439]

The supremacy of Union law derives implicitly from the treaties, akin to the direct effect of primary and secondary law, excluding regulations. The lack of an explicit clause regarding the supremacy of Union law in the foundational treaties is mostly a political rationale. It typically does not influence the application by domestic authorities of Member States, maybe with the exception of constitutional courts.[440]

The case-law of the Court of Justice establishes that Union law supersedes even the constitutional norms of Member States, including fundamental principles of constitutional law, such as the concept of equal treatment, which is likewise upheld at the Union level. The link and potential inconsistency between Union law and the constitutional provisions of Member States is, however, the last issue in the application of the principle of primacy of Union law.[441] The case law of the highest and constitutional courts of Member States complicates matters by occasionally regarding

[438] Hulej 40.
[439] Dubovec 65.
[440] M Švec, *Slovak Constitutional Review and European Integration* (Wolters Kluwer 2011) 40-45.
[441] Smolka 76.

the transfer of powers or their exercise by Union institutions as secondary to fundamental constitutional principles. Consequently, it is essential to underscore that the constitutional courts of Member States progressively and often with considerable difficulty acknowledge the precedence of Union law over their constitutions, notwithstanding its logical derivation from the standpoint of Union law.[442]

The Constitutional Court of the Slovak Republic, in its decision sp. zn. PL. ÚS 3/09, dated 26 January 2011, examined a request from a cohort of 49 members of the National Council of the Slovak Republic pursuant to the procedure for assessing the conformance of legal regulations as stipulated in Article 125 of the Constitution. This analysis specifically assessed the compliance of Sections 15(6) and 86d of Act No. 581/2004 Coll. concerning health insurance companies, healthcare oversight, and amendments to certain laws, with various constitutional provisions, Article 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14 of the Convention, and relevant EU law provisions, particularly Articles 18, 49, 54, and 63 of the Treaty on the Functioning of the European Union. A comparable suggestion from the District Court Bratislava I was likewise linked to this process, without contesting the stipulations of EU law.[443]

The simultaneous execution of concrete and abstract constitutional review of national law concerning the Constitution, international law, and EU law presented a novel problem for the Constitutional Court of the Slovak Republic.[444]

It is important to acknowledge that each EU Member State will face this circumstance. This pertains not only to Slovakia but also to other nations possessing constitutional courts that may accede in the future. The Constitutional Court of Slovakia could juxtapose its freshly formulated perspectives with the prior jurisprudence of adjacent constitutional courts, such as the Constitutional Court of the Czech Republic. Numerous pivotal rulings of the Czech Constitutional Court are pertinent in this regard.[445]

On 8 March 2006, the Czech Constitutional Court issued its inaugural landmark ruling (Sugar Quotas II, Pl. ÚS 50/04), determining that the legal regulation enacted pursuant

[442] Dubovec 65.
[443] Hulej 45.
[444] J Dvořák, *Constitutional Law of the Slovak Republic and EU Membership* (Springer 2014) 70–75.
[445] Smolka 68.

to EU law (§16 of Government Regulation No. 364/2004 Sb. regarding specific conditions for implementing measures of the common organization of markets in the sugar sector, and §3 of Government Regulation No. 548/2005 Sb.) was incompatible with the Czech Constitution. The Court initially asserted that it lacks the authority to evaluate the legality of Community law principles. These issues are solely within the competence of the European Court of Justice. According to Community law, as previously defined by the European Court of Justice, Community law principles have precedence over the legal systems of Member States. The CJEU's jurisprudence asserts that when exclusive regulation by Community law is present, such law takes precedence and cannot be overridden by criteria established by domestic law, including those at the constitutional level.[446]

Nonetheless, the Czech Constitutional Court stated, "While not needing to define its position on this ECJ doctrine, it cannot overlook the subsequent circumstances." Additional conditions and arguments must be considered. Notably, numerous supreme courts of the original Member States of the EC, including founding members such as Italy and Germany, along with later entrants like Ireland and Denmark, have not entirely subordinated themselves to the doctrine of absolute primacy of Community law over all constitutional law, instead allowing some latitude in interpreting principles such as the democratic rule of law and the safeguarding of fundamental rights and freedoms. The Constitutional Court recognizes that these matters underpin the constitutional interpretation of the whole Community and possess both legal and political ramifications. These inquiries may significantly impact the future evolution of judicial practice within the Community and potentially the progression of the Community or Union itself. Consequently, it is the responsibility of the Constitutional Court of a newly acceding Member State to resolve these issues in its jurisprudence.[447] A crucial issue is whether Czech constitutional law, specifically the fundamental components of a democratic rule of law under Article 9(2) of the Constitution, permits an international organization, to which the Czech Republic has ceded a portion of its sovereignty, to enact laws that take precedence over the entire Czech constitutional framework.[448]

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[446] Dubovec 65.
[447] T Ruman, *The Slovak Constitutional Court and EU Integration: Jurisdictional Limits* (Springer 2018) 35.
[448] Dvořák 52.

As said, when Community law regulates a common market organization, specifically the agricultural commodities market, the Community wields complete authority. Nonetheless, this does not signify a definitive responsibility for the Community to address every issue pertaining to the region. Conversely, in accordance with the principle of subsidiarity, the Community must exercise restraint and allocate certain competencies to Member States, or, after assuming full competence, may delegate some back to the Member States, particularly for the implementation of general policy objectives or the administration of overarching legal regulations of Community law.[449]

Consequently, when Community legislation permits Member States to address specific issues (i.e., in the absence of express Community law provisions) or reassigns authority to them, it is incumbent upon the Member States to enact and implement national legislation. However, it cannot be asserted that EU law is devoid of impact in these domains. In such instances, when Member States execute Community policy through national legal mechanisms, their discretion is constrained by the fundamental principles of Community law, including the safeguarding of fundamental rights.[450]

A crucial aspect of the Sugar Quotas II ruling is the assertion by the Czech Constitutional Court that, "In specific instances, the Community reassigns authority to the Member States to execute a particular Community law act or permits certain issues to remain unregulated, enabling Member States to adopt specific measures for the implementation of European law." In such instances, the Czech Republic continues to be obligated by the tenets of European law. Simultaneously, as this pertains to domestic legislation, it must also adhere to the Czech constitutional framework. The Constitutional Court is thus persuaded that, while the pertinent legislation is domestic and should be evaluated within the Czech constitutional framework, it is essential to acknowledge that this issue stems from Community law, a system established by an international organization to which the Czech Republic has ceded a portion of its state sovereignty pursuant to Article 10a of the Constitution. Consequently, this method has become directly enforceable inside the Czech Republic's domestic legal framework. Consequently, while the review framework of the Constitutional Court adheres to Czech constitutional law, it cannot entirely exclude the influence of Community law on the formulation, implementation, and interpretation of domestic law in areas

[449] Smolka 70.
[450] Dubovec 66.

directly associated with Community law. The Constitutional Court interprets constitutional law in relation to principles deriving from Community law. Constitutional courts cannot see Community law solely as a comparative subject that produces indirect arguments about domestic legislation. Currently, Community law integrates into the Czech constitutional framework when applied to matters of Community law.[451]

### 6.4.4 Constitutional Review Concerning European Law and the Ruling of the Constitutional Court of the Slovak Republic, Ref. No. PL. ÚS 3/09 dated January 26, 2011

The Constitutional Court of the Slovak Republic, in its decision Ref. No. PL. ÚS 3/09, addressed an objection regarding the incompatibility of the provisions of Act No. 581/2004 Coll. on Health Insurance Companies, oversight of healthcare, and amendments to certain laws, with various articles of the Constitution of the Slovak Republic, the European Convention on Human Rights, and specific provisions of EU law, namely Articles 18, 49, 54, and 63 of the Treaty on the Functioning of the European Union.[452]

A contingent of National Council of the Slovak Republic members contended that the disputed legal provisions were incompatible with the EU treaty articles, which constitute EU core law. They asserted that basic EU law is founded on international treaties that directly bestow rights or obligations upon natural or legal people, so superseding Slovak legislation. They contended that the Constitutional Court, pursuant to Article 125(1)(a) of the Constitution, possesses the authority to assess the compliance of laws with international treaties that constitute fundamental EU law, which they deemed a specific derogatory criterion relevant to constitutional analysis.[453]

The Constitutional Court initially observed that its prior jurisprudence had not encountered a scenario necessitating the exercise of its authority concerning a purported conflict between a domestic legal norm and an international treaty becoming

[451] Dvořák 53.
[452] Cserne and Bobek 68.
[453] Hulej 45.

part of fundamental EU legislation. The Court deemed it essential to elucidate its powers in broad terms. Article 125(1)(a) of the Constitution stipulates that the Constitutional Court assesses the compliance of legislation with the Constitution, constitutional laws, and international treaties sanctioned by the National Council and ratified in line with legal provisions. This indicates that the Court's jurisdiction is confined to foreign treaties sanctioned by the National Council and ratified in accordance with legal protocols. Constitutional amendments were made to Article 7(2) of the Constitution, stipulating that the Slovak Republic may cede certain powers to the European Communities or the European Union via an international treaty, and that the legally binding acts of these entities supersede Slovak legislation. The Court affirmed that "legally binding acts" encompass the Treaty on the Functioning of the EU. Effective July 1, 2001, the Constitution established a distinct subclass of foreign treaties to which the Slovak Republic has delegated a portion of its authority. This subcategory does not alter the Court's authority under Article 125, as the treaties continue to be international treaties sanctioned by the National Council and ratified in accordance with the law.[454]

The National Council ratified the Accession Treaty of the Slovak Republic to the European Union and acknowledged its supremacy over Slovak legislation. This treaty encompassed modifications to the Treaty establishing the European Community and the Treaty on the European Union. Subsequently, the National Council ratified the Lisbon Treaty, which revised and rebranded the Treaty establishing the European Community as the Treaty on the Functioning of the EU, affirming its supremacy over Slovak legislation.[455]

The Constitutional Court determined that treaties, including the Accession Treaty, the Treaty establishing the European Community, the Treaty on the EU, and the Lisbon Treaty, are classified as international treaties under Article 7(2) and satisfy the criteria outlined in Article 125(1) of the Constitution. This finding ignited a controversy among Slovak legal doctrine, with some contending that main EU law should possess a more extensive applicability than merely Slovak legislation. The Court cited established EU jurisprudence, underscoring the concept of the primacy of EU law,

[454] L Kováčová, *Slovakia and European Law: Sovereignty, Primacy, and Jurisdiction* (IURA Edition 2017) 20.
[455] Cserne and Bobek 70.

which mandates that directly relevant EU provisions prevail over conflicting national legislation without necessitating additional legislative or constitutional measures. National courts are required to uphold the full efficacy of EU law and may seek a preliminary ruling from the Court of Justice of the European Union when deemed essential.[456]

The Constitutional Court determined that, pursuant to existing legislation, it possesses the authority to examine proceedings initiated by National Council members to ascertain whether domestic law is in conflict with an international treaty that delegates powers to the EU, including the Treaty on the Functioning of the EU, in accordance with the principle of EU law supremacy. If the Court determines that a statute is in conflict with the Constitution or constitutional law, it is typically superfluous to assess its alignment with EU law, as the results and legal implications would be identical. A distinct situation occurs only when a claimant contests a statute exclusively for its incompatibility with a treaty under Article 7(2); in such instances, the Court is obligated to examine the purported contradiction, utilizing EU case law or submitting a query to the Court of Justice. If a statute is determined to be constitutional yet potentially conflicts with a treaty under Article 7(2), the Court must adjudicate the matter if it cannot be reconciled through EU-compliant interpretation. This may also prompt inquiries regarding the necessity of a constitutional amendment, which is beyond the Court's jurisdiction.[457]

### 6.4.5 Preliminary Ruling Procedure and Preliminary Questions in the Jurisprudence of the Constitutional Court of the Slovak Republic

The duty of loyal cooperation requires national courts to work with the Court of Justice to ensure the full application of EU law in all member states and judicial protection of the rights derived from it. Cooperation between national courts and the Court of Justice in interpreting and applying EU law is a fundamental part of the Union’s judicial system. This cooperation takes place through the preliminary rule under Article 267 of the Treaty on the Functioning of the European Union (TFEU). Article 267 TFEU grants

[456] Hulej 46.
[457] Cserne and Bobek 72.

the Court of Justice the power to rule on questions concerning the interpretation of EU treaties and acts of the EU institutions, as well as their validity.[458] The main aim of this power is to ensure uniform application of EU law by national courts, achieved through cooperation, mutual trust, and judicial dialogue.[459]

The Constitutional Court of the Slovak Republic has acknowledged that it may find itself in a situation where it has a duty to refer a preliminary question to the Court of Justice. National courts are the entities entitled to submit preliminary questions if they consider such a referral necessary for issuing their decision. If no appeal is available against their decision under national law, they are obliged to do so. The Court of Justice has repeatedly ruled in cases where national law restricted the ability of national courts to refer preliminary questions, consistently supporting the broadest possible opportunity for national courts to submit questions regarding interpretation or validity of EU law. The decision to refer a preliminary question is generally at the discretion of the judge handling the case. However, a party to the proceedings may request such a referral if it believes that an answer would confirm an inconsistency of national law with EU law, enforce the principle of EU law supremacy, apply indirect effect in interpreting national law, or address the alleged invalidity of an EU act. The judge must consider these arguments and determine whether an interpretation of EU law via a preliminary question is necessary. Any refusal to refer must be justified; otherwise, the decision may be considered arbitrary and a violation of the right to a fair trial under Article 6(1) of the European Convention on Human Rights.[460]

Current practice confirms that the Court of Justice is part of the judicial hierarchy, and, in appropriate cases, forms part of the right to a lawful judge. In interpreting EU law, the judge of the national court and the EU judge are both competent, with the EU judge's authority derived from EU law. Preliminary ruling procedures may also create potential conflicts between national constitutional courts and the Court of Justice. In the joined cases C-188/10 and C-189/10, the Court of Justice examined whether a French law requiring national courts to first refer questions about constitutional compatibility to the Conseil constitutionnel could hinder application of EU law. The Court clarified that any national law or practice weakening the effectiveness of EU law

[458] Ruman 47.
[459] Kováčová 29.
[460] Ruman 49.

by restricting a national court's ability to do everything necessary to ensure full effect of EU norms is incompatible with EU law. This includes situations where resolving a conflict between EU law and a subsequent national law is assigned to a body other than the court applying EU law.[461]

The Court of Justice ultimately held that a national court handling an EU law dispute cannot be exempted from the duty to submit preliminary questions even if the national law provision might be declared unconstitutional only by a constitutional court. The effectiveness of EU law would be at risk if mandatory constitutional proceedings prevented the national court from referring questions to the Court of Justice to determine whether the national law is compatible with EU law. The Constitutional Court of the Slovak Republic is considered a dependable partner of the Court of Justice. According to its case law, if a Slovak national court fails to submit a preliminary question when it is obligated to do so, this may, under certain circumstances, engage state liability for breach of EU law. A general court of the Slovak Republic, against whose decision no appeal is available, must submit a preliminary question to the Court of Justice whenever the conditions for referral are met.[462]

### 6.4.6 The Latest Constitutional Amendment in the Slovak Republic and Its Impact on the Primacy of EU Law

Slovakia adopted a significant constitutional amendment in 2025 that directly addresses the relationship between national constitutional authority and the primacy of European Union law. The reform, enacted by the National Council, must be understood not as an isolated legal modification, but as part of a broader constitutional reorientation toward the reaffirmation of sovereign self-government within the framework of European integration. While Slovakia remains a committed Member State of the European Union, the amendment reflects a deliberate effort to clarify the constitutional limits of delegated powers. It signals a constitutional insistence that participation in the Union does not entail the erosion of foundational state authority in

[461] Ruman 48.
[462] Kováčová 34.

matters regarded as essential to national identity, democratic legitimacy, and cultural continuity.[463]

The Slovak Constitution has long provided, in Article 7, for the transfer of certain competences to the European Union. This transfer was conceived as a sovereign act of the Slovak people, exercised through their constitutional institutions. From a classical constitutional perspective, such delegation does not extinguish sovereignty; it presupposes it. The state remains the source of the authority it delegates. The 2025 amendment revisits this foundational premise. It clarifies that the transfer of competences to the European Union cannot be interpreted as unlimited or irreversible. Rather, it is bounded by the Constitution itself, which remains the supreme legal act within the Slovak legal order. In effect, the amendment codifies the principle that constitutional sovereignty precedes and conditions supranational authority. This position stands in contrast to the expansive understanding of primacy articulated by the Court of Justice of the European Union since Costa v ENEL and reaffirmed in Simmenthal. According to that jurisprudence, Union law must prevail over all conflicting national laws, including constitutional provisions. The Slovak amendment does not deny the binding nature of EU law within conferred competences, but it rejects the notion that such primacy is absolute or detached from constitutional consent.[464]

A central feature of the amendment is its emphasis on national identity and core constitutional values. The reform underscores that in areas deemed fundamental to the moral, cultural, and institutional character of the Slovak state, constitutional norms retain ultimate authority. These domains include questions of family law, ethical regulation, and constitutional structure. From a conservative constitutional perspective, this development reflects an effort to preserve the integrity of the political community. A constitution is not merely a procedural document; it embodies the historical experience, cultural traditions, and moral convictions of a people. Where supranational interpretation risks reshaping these foundations without direct democratic mandate, constitutional self defense becomes a legitimate concern. The amendment therefore introduces a clearer constitutional framework for reviewing the

[463] 'Slovak parliament approves constitutional change giving national law precedence over EU law' (AA News, 2025) https://www.aa.com.tr/en/europe/slovak-parliament-approves-constitutional-change-giving-national-law-precedence-over-eu-law/3700283. Accessed 7 May 2026.
[464] Ibid.

domestic application of EU law. It strengthens the position that Slovak courts, particularly the Constitutional Court, retain the authority to assess whether Union acts remain within the bounds of competences that Slovakia has validly transferred.

The debate surrounding primacy is not purely technical. It touches upon the democratic source of legal authority. The European Union derives its competences from treaties ratified by Member States according to their constitutional procedures. It does not possess an original constituent power comparable to that of a sovereign state. From this standpoint, the judicial development of an unconditional doctrine of primacy raises questions of legitimacy. The Treaties themselves do not explicitly establish an unlimited constitutional hierarchy. Instead, primacy has emerged through case law, most notably beginning with Costa v ENEL. The Slovak amendment can therefore be read as a corrective response to what some view as gradual judicial constitutionalisation beyond the explicit text of the Treaties. By reasserting constitutional supremacy in defined areas, Slovakia seeks to restore a clearer balance between integration and democratic self-government. The amendment affirms that participation in the Union is grounded in the continuing will of the Slovak constitutional order. Delegation remains conditional upon respect for constitutional identity and the limits of conferred powers.

The European Commission initiated proceedings under Article 258 TFEU, expressing concern that the amendment may undermine the principles of primacy, autonomy, and uniform application of Union law. From the perspective of EU institutions, any constitutional clause that conditions the application of EU law risks fragmenting the legal order and weakening its coherence. However, it is important to note that the Union relies on the constitutional systems of its Member States for its authority and enforcement. If those systems express constitutional limits, the appropriate response may be dialogue and clarification rather than automatic denunciation.[465]

The Slovak case thus highlights a broader constitutional question. Is European integration to be governed by a model of rigid hierarchical supremacy, or by a model

[465] 'EU opens case against Slovakia over constitutional change' (Reuters, 2025) https://www.reuters.com/world/eu-opens-case-against-slovakia-over-constitutional-change-2025-11-21/. Accessed 7 May 2026.

of structured constitutional cooperation in which sovereignty remains the ultimate reference point?[466]

The Slovak amendment should not be interpreted as a rejection of European integration. Rather, it represents an attempt to recalibrate that integration within a framework of constitutional conservatism. It affirms three core principles:

I. Sovereignty remains the foundational source of all transferred powers.
II. Constitutional identity cannot be overridden without explicit democratic consent.
III. The primacy of EU law operates within, not above, the constitutional order that enabled it.

This development may contribute to a broader rethinking of European constitutionalism. Eventually, the Union may be compelled to clarify the limits of primacy more explicitly.

The 2025 constitutional amendment introduces several foundational changes. It defines parenthood in explicitly biological and binary terms, establishing that a child's parents are a mother (woman) and a father (man). This codification reinforces a traditional heteronormative model of family law and aims to constitutionally entrench a specific understanding of family structure. Garayová notes that this provision is presented by its proponents as a stabilizing measure in family law, but it also excludes alternative legal and social conceptions of parenthood. The amendment further prohibits surrogacy, elevating an already implicit statutory prohibition to constitutional status. Surrogacy had long been effectively excluded under Slovak family law through the principle that the birth mother is the legal mother, rendering surrogacy contracts void. By constitutionalizing this rule, the amendment removes remaining ambiguity and solidifies it as a matter of public order. The justification offered by Slovak authorities emphasizes the protection of women and children, prevention of commodification of reproduction, and avoidance of exploitative cross-border surrogacy arrangements. Critics, however, interpret this as a restrictive intervention in reproductive autonomy and cross-border family formation.

[466] 'Do the September 2025 Amendments to the Slovak Constitution Violate International and European Law?' (2025) Ordo Iuris https://ordoiuris.pl/en/analyses/do-the-september-2025-amendments-to-the-slovak-constitution-violate-international-and-european-law/. Accessed 7 May 2026.

In addition, the amendment restricts adoption rights primarily to married heterosexual couples, with limited exceptions for single persons. Since marriage is constitutionally defined as a union between a man and a woman, this provision effectively excludes same-sex couples from adoption. While this reflects continuity with existing legal structures, its constitutional entrenchment strengthens the exclusionary effect and reinforces a heteronormative model of family formation as the constitutional default. A further key element of the reform is the explicit constitutional recognition of only two genders, male and female. The introduction of Article 52a establishes a strict biological binary and excludes legal recognition of transgender and non-binary identities. Garayová situates this within a broader constitutional framework that had already implicitly assumed binary gender categories, but emphasizes that the amendment transforms an implicit assumption into an explicit constitutional rule with significant legal consequences for identity recognition and legal status.[467]

Perhaps the most constitutionally significant change concerns the relationship between Slovak law and EU law. The amendment revises Article 7 to strengthen the role of national sovereignty in matters of constitutional identity, allowing Slovak authorities to assess the applicability of EU law and prioritizing the Constitution over international law in defined areas. Garayová presents this as an attempt to delineate "red lines" of sovereignty in cultural and ethical matters, particularly family law and gender regulation. This raises a direct normative tension with the principle of EU law supremacy. The adoption of the amendment in September 2025 generated strong political and legal reactions. Domestically, it was defended by the Slovak government as a sovereign act of constitutional self-determination, aimed at protecting national identity from external ideological influence. Internationally, it was criticized as discriminatory, particularly against LGBTQ+ persons, and as potentially incompatible with Slovakia's obligations under EU law and the European Convention on Human Rights. The Venice Commission issued an urgent opinion warning that references to national identity cannot justify deviations from EU law obligations or lead to discrimination. Additionally, members of the European Parliament expressed concern

[467] L Garayová, 'Infringement proceedings against the Slovak Republic for Constitutional Law 255/2025: Primacy of EU law vs. Constitutional Identity' (9 March 2025) https://doi.org/10.63189/BFLU7994.

that the amendment conflicts with Article 2 TEU and the Charter of Fundamental Rights.

The European Commission subsequently initiated infringement proceedings (INFR(2025)2208), arguing that the constitutional amendments may breach fundamental EU principles, including the primacy, autonomy, effectiveness, and uniform application of EU law. The Commission stressed that even constitutional provisions must comply with EU law and cannot be used to circumvent obligations arising from the Treaties. Slovakia was given a deadline to respond and remedy the alleged incompatibilities. The Slovak government rejected the Commission's position, framing the amendment as a legitimate expression of constitutional identity and democratic sovereignty. It argued that EU law itself recognizes national identity under Article 4(2) TEU and that constitutional interpretation remains within domestic judicial competence, particularly that of the Slovak Constitutional Court. The Ministry of Justice further supported this position by referencing CJEU jurisprudence acknowledging national identity considerations, arguing that any conflicts should be resolved through proportionality rather than automatic EU supremacy. Garayová situates the legal dispute within the broader doctrinal framework of EU law supremacy, which has been established since early CJEU case law. While EU treaties require respect for national identity, the Court has historically interpreted this narrowly, allowing limited deference but not permitting Member States to disapply EU law obligations. Cases such as Melloni illustrate the Court's tendency to preserve the uniformity and effectiveness of EU law even in the face of constitutional conflict at national level.[468]

At the current stage, the infringement procedure remains in its administrative phase, with no referral yet to the Court of Justice. The process may proceed to a reasoned opinion and eventually to litigation before the CJEU if Slovakia does not adjust its position. Given the entrenched positions of both sides, judicial resolution appears likely, and the outcome may reaffirm the primacy of EU law over national constitutional provisions.[469]

[468] Garayová https://doi.org/10.63189/BFLU7994..
[469] Ibid.

Finally, the analysis places the Slovak case within a wider structural tension in the EU legal order between integration and sovereignty. It reflects a recurring debate over whether the EU constitutes a constitutional legal order with absolute primacy or a union of states retaining ultimate authority over core moral and cultural questions. This dispute is not isolated but part of a broader pattern in which Member States invoke constitutional identity to resist perceived encroachments by EU law in sensitive policy domains. The Slovak amendment thus becomes a focal point for examining the limits of constitutional pluralism in the EU and the enduring question of who holds ultimate authority in conflicts between national constitutions and the supranational legal order.

## 6.5 Comparative Synthesis: Germany, Italy, Poland, and Slovakia

The constitutional systems of Germany, Italy, Poland and Slovakia illustrate four different ways of dealing with the structural tension between the supremacy of EU law and national constitutional identity. All four jurisdictions recognize in principle the integrative character of the European legal order, but they differ sharply with regard to the limits of European power and the role of domestic constitutional constraints. Three analytical dimensions enable systematic comparison: (1) the function of constitutional identity; (2) the presence and intensity of ultra vires review; and (3) the conditions under which the primacy of EU law is accepted.

The German model is the most evolved and institutionally sophisticated model of constitutional resistance in the EU legal order. The Federal Constitutional Court (Bundesverfassungsgericht) has developed a structured doctrinal system in its Solange jurisprudence, which accepts the applicability of EU law, conditionally, as long as the EU ensures protection of fundamental rights on an equivalent level. Moreover, through landmark rulings such as Maastricht, Lisbon and PSPP, the Court has established an explicit ultra vires control mechanism, giving it the power to review whether EU institutions have acted beyond their powers. Constitutional identity, based on Article 79(3) of the Basic Law, functions as an absolute constitutional limit and represents an unamendable core which cannot be overridden even by EU law.

Conversely, the Italian model is characterized by a more cooperative and dialogical approach. After the Frontini ruling and later in cases such as Taricco, the Italian Constitutional Court has accepted the primacy of EU law while upholding the so-called controlimiti doctrine. Under the so-called doctrine of "constitutional identity", EU law cannot prevail over the fundamental principles of the Italian constitutional order. However, in practice Italy has tended to approach tensions through judicial dialogue with the Court of Justice of the European Union, preferring interpretative accommodation rather than direct constitutional confrontation.

Poland is a more conflictual trajectory. In particular, the verdict of the Constitutional Tribunal in 2021 was a turning point in asserting the supremacy of the Polish Constitution over certain elements of the EU law. In this model, constitutional identity has been turned into a politically loaded tool for a selective denial of EU legal obligations. The argument is not so much a technical jurisdictional review, but rather a more general challenge to the hierarchical authority of EU law based on sovereignty, that is, the ultra vires argument. This has led to a structural clash with the EU legal order especially in the field of judicial independence and rule of law standards.

Indeed, Slovakia has created a hybrid and emerging model, particularly with the enactment of Constitutional Law No. 255/2025. On the one hand, it formally upholds its obligations under EU membership and does not expressly reject the principle of supremacy of EU law. In opposition, it constitutionally centralizes national sovereignty and identity in culturally sensitive areas like family law, gender and adoption. By elevating these issues to the constitutional level, and by making explicit references to biological gender and traditional family structures, Slovakia creates potential structural conflicts with EU fundamental rights law. However, Slovak constitutional thinking on conflict resolution within the EU is still in its infancy, and its practical effects are only beginning to emerge, as opposed to Germany or Italy.

Despite these differences, all four systems are based on the same structural assumption, that is, the supremacy of EU law is not absolute in a theoretical sense, but must be understood in a constant interplay with national constitutional frameworks. The difference is not about the existence of limits but about the manner in which these limits are understood, justified, and practiced.

| *Country* | ***Role of constitutional identity*** | ***Ultra vires review*** | ***Acceptance of EU Law primacy*** |
|---|---|---|---|
| *Germany* | Strong, constitutionally entrenched (Art. 79(3) GG) | Explicit and highly developed (BVerfG doctrine) | Conditional (Solange doctrine) |
| *Italy* | Limited, tied to fundamental principles (*controlimiti*) | Implicit and dialogical | Generally accepting, cooperation-oriented |
| *Poland* | Politicised, sovereignty-centred | Formally asserted, highly contested | Selectively rejected |
| *Slovakia* | Emerging, identity-based constitutionalisation | Potential but not yet fully developed | Formally accepted with identity-based reservations |

The comparative analysis shows three constitutional logics in the EU legal order. The German model institutionalizes resistance via structured legal doctrines, thus embedding the constitutional conflict in a rule-based framework. The Italian model stresses judicial dialogue and systemic accommodation, reflecting a cooperative pluralist conception of constitutional authority. The Polish model, in contrast, turns constitutional identity into an instrument of political sovereignty, leading to direct normative conflict with EU law. The Slovak model is in between and still evolving. It combines formal acceptance of the obligations stemming from EU membership with a growing constitutional embedding of identity-based limitations.

In the end, the differences between these systems do not challenge the existence of EU law supremacy as such but rather its contested nature in practice. The real point of divergence is not whether EU law is supreme, but how that supremacy is mediated, resisted, or reinterpreted in national constitutional frameworks. It establishes the European legal order as a dynamic system of constitutional pluralism where authority

is constantly negotiated between national constitutional courts and the Court of Justice of the European Union rather than a rigid hierarchy.

# CONCLUSION

This dissertation has undertaken a comprehensive examination of the relationship between national sovereignty and the principle of primacy in European Union law, tracing its evolution from the foundational jurisprudence of the Court of Justice of the European Union to contemporary constitutional confrontations. The study demonstrates that primacy, while historically essential to ensuring the uniform application and effectiveness of EU law, cannot be understood as an absolute or unconditional principle in a Union composed of multiple, constitutionally autonomous Member States. Judicial resistance - manifested in Germany, Italy, Poland, and Slovakia - reveals structural and normative limits to the current formulation of primacy, highlighting persistent tensions between supranational authority and national constitutional identity.

The analysis conducted here underscores that the doctrine of primacy, in its classical monist formulation, is insufficient to accommodate the constitutional pluralism inherent in the European legal order. Early CJEU jurisprudence, from *Costa v ENEL* to *Simmenthal*, established primacy as a functional necessity of integration, emphasizing the uniformity and effectiveness of EU law. Yet this jurisprudence, rooted in an abstract vision of supranational legal authority, did not account for the deeply entrenched constitutional identities of Member States. Over time, national constitutional courts have progressively articulated limits to this authority, employing identity clauses, fundamental rights protections, and ultra vires reasoning as mechanisms to assert domestic constitutional primacy. Such developments, whether in the form of the German Federal Constitutional Court's *Solange* and *Maastricht* decisions, Italy's cooperative dialogue through the *Frontini* and *Granital* judgments, or the more assertive interventions by the Polish and Slovak constitutional tribunals, collectively illustrate that sovereignty is not merely a theoretical construct but a legally enforceable and politically resonant boundary.

By employing a multi-dimensional methodology that combines doctrinal legal analysis, comparative constitutional study, and theoretical reflection, this research has sought to integrate these judicial responses into a systemic understanding of EU constitutional dynamics. The comparative analysis of four Member States

demonstrates both convergence and divergence in how national courts approach primacy: Germany and Italy exemplify conditional acceptance and cooperative engagement, while Poland and Slovakia reflect a more confrontational stance grounded in the protection of national identity. This spectrum of judicial behaviour indicates that the European legal order is increasingly characterised by negotiated authority rather than unilateral hierarchy, underscoring the practical and normative necessity of a pluralist approach to constitutional governance.

The theoretical reflections advanced in this dissertation further illuminate the conceptual implications of these developments. Constitutional pluralism, as both a descriptive and normative framework, provides a lens through which the competing claims of national sovereignty and EU primacy can be understood and mediated. Unlike rigid hierarchical models, pluralism recognises that multiple constitutional orders coexist within a shared legal space, requiring mechanisms of dialogue, mutual respect, and proportionality to prevent fragmentation. The findings suggest that such structured pluralism can reconcile the legitimacy concerns of Member States with the functional demands of supranational governance, offering a path toward sustainable coexistence without undermining the uniform application of Union law. Moreover, the analysis highlights that cooperative mechanisms - such as preliminary reference procedures, judicial dialogue, and principled proportionality review - are essential instruments for operationalising this pluralist model. Without these mechanisms, the European legal order risks a recurrent cycle of constitutional conflict that could erode both legal certainty and public trust in supranational institutions.

The normative contribution of this dissertation lies in articulating a reconceptualised understanding of primacy as conditional authority, embedded within a framework of structured constitutional pluralism. Such an approach recognises that the legitimacy and effectiveness of EU law cannot rest solely on doctrinal assertion but must be grounded in the acceptance of Member States' constitutional identities. This reconceptualisation has practical implications for both judicial practice and institutional design, suggesting that the Union's legitimacy depends on proactive engagement with constitutional diversity, transparent procedural safeguards, and a shared commitment to dialogue rather than coercion. At a time when ideological fragmentation, populist pressures, and legal contestation challenge the coherence of

the Union, adopting such a model may be essential for preserving both the authority and credibility of the European legal order.

Methodologically, this research demonstrates the value of combining doctrinal, comparative, and theoretical approaches in the study of EU constitutional law. Doctrinal analysis allows for precise mapping of jurisprudential developments; comparative analysis situates these developments within a broader institutional and political context; and theoretical reflection provides the conceptual tools necessary to understand their normative significance. Together, these approaches yield insights not only into the evolution of primacy doctrine but also into the structural tensions that will shape the future of European constitutionalism. The study also acknowledges the limitations inherent in this design: reliance on qualitative and interpretative methods means that findings are contingent upon current jurisprudence and doctrinal interpretation, and the focus on four Member States necessarily limits generalisability. Nonetheless, the integrated framework developed here offers a robust foundation for understanding the broader dynamics of sovereignty and primacy across the Union.

In conclusion, the dissertation confirms that the tension between national sovereignty and EU primacy is structural, persistent, and increasingly salient. While absolute hierarchical models are no longer tenable, the emerging paradigm of structured constitutional pluralism offers a viable alternative that respects national constitutional identity while maintaining the functional integrity of Union law. Primacy can continue to function as a cornerstone of European integration - but only if it is reconceived as conditional, dialogical, and mutually negotiated. By bridging doctrinal analysis, comparative jurisprudence, and normative theorisation, this study contributes to a deeper understanding of the evolving European constitutional landscape and offers a pathway for balancing integration with sovereignty in a manner that is legally coherent, politically legitimate, and normatively defensible. The research therefore not only clarifies the current state of the sovereignty–primacy debate but also provides a framework for future scholarly inquiry, judicial reasoning, and institutional reform in pursuit of a resilient and legitimate European constitutional order.

The interaction between national sovereignty and the principle of primacy is central to debates on European constitutionalism. While the doctrine of primacy has long been recognized as essential for ensuring the uniform application and effectiveness of EU law, its authority is neither absolute nor uncontested. Member States retain constitutional powers that allow them to review and, when necessary, limit the application of Union law, particularly in areas that involve fundamental rights, democratic principles, or other core constitutional norms. This situation raises the question of whether the current formulation of primacy is sufficient to maintain the coherence of the EU legal order and how Member States' constitutional identities interact with supranational authority.

Within this context, three hypotheses guide the analysis. The first hypothesis (H1) examines whether the existing doctrine of primacy is capable of preventing recurring constitutional conflicts within the Union. The second hypothesis (H2) explores the extent to which national identity clauses and constitutional review mechanisms challenge EU supremacy and whether these challenges reflect legitimate constitutional safeguards. The third hypothesis (H3) evaluates whether pluralist or cooperative constitutional models offer a sustainable framework for balancing national authority with the uniformity of EU law and under what conditions such models can function effectively.

The evaluation of these hypotheses combines doctrinal analysis, comparative examination of national jurisprudence, and normative reasoning. It considers landmark rulings by the CJEU and national constitutional courts in Germany, Poland, and Slovakia, alongside theoretical perspectives on constitutional pluralism and judicial dialogue. This approach allows for a nuanced understanding of both the strengths and limits of EU primacy, showing that Member States' constitutional interventions are not obstacles but legitimate expressions of legal and democratic authority.

By addressing H1, H2, and H3 in a structured manner, the analysis clarifies the conditions under which EU law can operate effectively while respecting national constitutional boundaries. It also identifies how structured cooperation and judicial dialogue can reconcile supranational objectives with domestic constitutional sovereignty, offering insights into the future evolution of the European legal order.

**Hypothesis 1 (H1)**

**"The current formulation of the primacy doctrine is insufficient to prevent recurring constitutional conflicts within the Union."**

H1 is **not affirmed**. The conflicts observed in Germany, Poland, and Slovakia do not indicate a failure of the primacy doctrine itself, but rather reflect the exercise of legitimate constitutional authority by Member States.

National courts intervene when EU law appears to overstep its mandate, particularly in areas touching upon fundamental constitutional principles, democratic governance, or the protection of citizens' rights. These interventions are consistent with the legal responsibility of Member States to preserve the integrity of their constitutions. In this sense, the recurring tensions are not a deficiency of EU law but a natural consequence of the coexistence of national constitutions with a supranational legal order.

**Hypothesis 2 (H2)**

**"National identity clauses and constitutional review mechanisms will continue to challenge absolute notions of EU primacy unless the Union develops clearer legal limits or procedural frameworks for dialogue."**

H2 is affirmed. Provisions such as Article 4(2) TEU, which enshrine respect for national constitutional identity, provide essential legal justification for Member States to review and, where necessary, limit the application of EU law. The PSPP decision by the German Federal Constitutional Court and the 2021 rulings of the Polish Constitutional Tribunal illustrate that national courts will act to uphold core constitutional principles whenever they perceive potential overreach by EU institutions.

These mechanisms are a legitimate safeguard, ensuring that the exercise of EU authority remains consistent with constitutional and democratic norms within Member States. Challenges to EU primacy in these contexts are therefore not obstacles to the functioning of the Union but are necessary checks on its legal reach, preserving both legitimacy and predictability in the application of Union law.

**Hypothesis 3 (H3)**

**"A pluralist or cooperative constitutional model can offer a more sustainable balance than rigid hierarchical supremacy."**

H3 is conditionally affirmed. Models of pluralism or cooperative constitutionalism can contribute to a functional balance, provided they respect the ultimate authority of national constitutions. Where Member States retain the right to enforce constitutional limits, dialogue and cooperation can allow EU law to operate effectively without undermining fundamental domestic legal norms.

Historical experience demonstrates that cooperative engagement - such as through preliminary reference procedures or proportionality-based reasoning - works best when it acknowledges national courts' authority to intervene in matters of constitutional significance. Conversely, when supranational law is treated as inherently superior, conflicts arise, as evidenced in recent decisions by Poland and Slovakia. A model of structured cooperation is therefore viable only if it maintains the primacy of national constitutional authority while facilitating practical coordination between EU and domestic legal systems.

# Synthesis

- **H1**: Not affirmed. The primacy doctrine is legally coherent; conflicts arise from the legitimate assertion of national constitutional authority, not from any deficiency in EU law.
- **H2**: Affirmed. National identity clauses and constitutional review mechanisms are essential to preserving constitutional integrity and democratic legitimacy.
- **H3**: Conditionally affirmed. Pluralist or cooperative approaches are sustainable only if they recognize and respect the importance and stance of Member States' constitutions.

Overall, the findings suggest that EU primacy operates effectively **only within the limits established by national constitutional law**. The exercise of constitutional authority by Member States is not a challenge to the Union's legal order, but a

necessary component of maintaining legitimacy, legal certainty, and respect for fundamental constitutional principles.

# Summary of thesis titled “National Sovereignty and the Principle of Primacy in EU Law”

This PhD dissertation examines the relationship between state sovereignty and the principle of the primacy of European Union law, focusing on how EU Member States reconcile constitutional autonomy with obligations arising from European integration. The research is situated within the broader theoretical and constitutional debate concerning the transformation of sovereignty in the context of supranational governance and legal pluralism.

The dissertation begins by establishing the relevance of the topic through an analysis of the current state of research, identifying a gap in comparative constitutional scholarship concerning the practical and theoretical limits of EU law primacy. It formulates research questions and hypotheses centered on whether the primacy of EU law fundamentally limits state sovereignty, or whether constitutional mechanisms within Member States preserve sovereign authority through doctrines such as constitutional identity and ultra vires review. The methodological framework combines doctrinal legal analysis, comparative constitutional analysis, and normative legal theory, drawing upon constitutional texts, jurisprudence of the Court of Justice of the European Union, and national constitutional court decisions.

The theoretical foundation of the dissertation is built on an examination of sovereignty as a core principle of international relations and statehood. The research traces the historical evolution of sovereignty, distinguishing between internal and external sovereignty and exploring its relationship with democracy, constitutionalism, and state power. It argues that sovereignty in the modern European legal order is no longer absolute, but increasingly shared, exercised, and negotiated between national and supranational institutions.

A substantial part of the dissertation is devoted to the development and theoretical foundations of the principle of primacy of EU law. The study traces the evolution of European integration from the European Coal and Steel Community through the Lisbon Treaty, demonstrating how the legal and constitutional structure of the EU progressively strengthened the authority of EU law. Particular attention is paid to landmark CJEU judgments, including Van Gend en Loos, Costa v. ENEL,

Internationale Handelsgesellschaft, and Simmenthal, which established direct effect, autonomy, and primacy as foundational principles of the EU legal order. The dissertation further analyzes primacy through theories of normative authority and Hart's concept of the rule of recognition, assessing whether EU law derives its authority autonomously or through constitutional acceptance by Member States.

The dissertation then examines conflicts between EU law and national constitutional law, including possible exceptions to primacy. Through comparative analysis, it demonstrates that while Member States generally recognize the primacy of EU law, constitutional courts have developed safeguards intended to preserve constitutional identity, democratic legitimacy, and core sovereign functions.

The comparative section analyzes the constitutional approaches of Germany, Italy, Poland, and Slovakia. Germany's jurisprudence is examined through the Maastricht, Lisbon, Honeywell, and OMT decisions, highlighting the emergence of ultra vires and constitutional identity review. Italy's constitutional development is explored through Article 11 of the Constitution, the doctrine of counter-limits, and the evolution of the "community aspect" of the Italian constitutional order. Poland's constitutional framework is analyzed with particular focus on institutional conflicts, constitutional identity, and the controversial K3/21 ruling concerning the relationship between the Polish Constitution and EU law. Slovakia's constitutional experience is examined through the jurisprudence of the Constitutional Court of the Slovak Republic and constitutional amendments affecting the domestic application of EU law.

The dissertation concludes that the relationship between state sovereignty and the primacy of EU law is best understood not as a hierarchical elimination of sovereignty, but as a dynamic constitutional dialogue between national and supranational legal orders. Although EU law claims primacy, Member States continue to assert constitutional boundaries designed to protect essential constitutional structures and democratic legitimacy. The research argues that constitutional pluralism remains the most accurate framework for understanding the contemporary European legal order, where sovereignty is transformed rather than abolished, and where the balance between integration and constitutional autonomy continues to evolve through judicial and political interaction.

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# Statement

In accordance with the provisions of the Regulation on the Use of Artificial Intelligence of University of Miskolc and the Guidelines for the Use of Artificial Intelligence of the Deák Ferenc Doctoral School of Law, I, undersigned Judita Vadovics Juharová, declare that I have used artificial intelligence in my doctoral dissertation and thesis booklets.

In the case of the use of artificial intelligence (hereinafter: AI), I declare the following:

1. The name of the AI tool used: ChatGPT (OpenAI); Grammarly (AI-assisted writing tool)

2. The URL and the version number of the AI tool used:

https://chat.openai.com - GPT-5.3
https://www.grammarly.com - AI writing assistance tool (web-based application)

3. The exact date of production of the generated content (year, month, day):

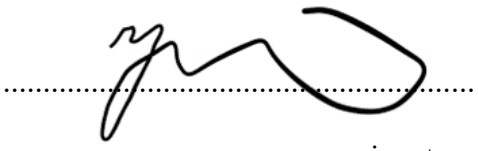
Used intermittently during the preparation and drafting process of the thesis (2022–2026).

4. The purpose and extent of use (describing in detail which part of the dissertation and to what extent the use of AI affects, and for which sub-task the AI was used):

AI tools were used in a strictly supportive and auxiliary capacity in the preparation of the thesis. Their use included language and stylistic proofreading, assistance with text refinement, orientation in legal literature, formatting of citations, and organisation of the bibliography. It is expressly emphasized that these tools were not used for the substantive academic content of the thesis. In particular, all legal analysis, argumentation, formulation, and evaluation of hypotheses, as well as the conclusions and normative recommendations, are entirely the result of the author's independent intellectual work.

I acknowledge that according to the Guidelines for the Use of Artificial Intelligence of the Deák Ferenc Doctoral School of Law, *„The use of AI is prohibited for the formulation of theses, research results, conclusions, inferences and analyses. Any thesis or paper prepared in this way is not admissible."*

Miskolc, 7 May 2026



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signature