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„We regret to announce the death of our most reputable colleague Professor Peter Mankowski from Germany. We are thankful for his efforts invested in our common project. His personality and wisdom will be deeply missed by the whole editorial team."

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Tereza Profeldová

Relationship between the EU Law and Constitutional System of Member States - Did EU Cross the Line?

Key words:
EU Law | Primacy of the EU Law | Constitution | Constitutional Systems of Member States | Court of Justice of the European Union | Treaty on the Functioning of the European Union | Treaty on European Union | Preliminary ruling | Competences of the EU | Supremacy of National Constitutional Law | Sovereignty

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Abstract *| EU law is based on the principle of its primacy. It is argued that by voluntarily acceding to the EU, the Member States agreed to limit their sovereignty and to transfer certain powers to the EU. Such principles were undisputed as long as they concerned the interpretation and application of EU secondary law concerning specific rights and obligations that should take their full effect in every Member State. From this perspective, the autonomous and uniform interpretation of EU law seems to be fully accepted.*

Over the years, the EU took the stance that not only does EU law takes precedence over the national laws of the Member States, but cannot be repealed even by the constitutional systems of the Member States. The CJEU ruled that where the constitutional systems of the Member States collide with EU law, the national courts should not rely on the respective provisions of constitutional law.

This stance prompted a reaction from national constitutional courts. Examples can be found of decisions that clearly refuse the interference of EU law with elementary principles and values that form the core of their constitutional system. It is to be noted that they did so without generally refusing the primacy of EU law, and reserved the right to review the interpretation provided by the CJEU in exceptional circumstances where fundamental constitutional principles are at stake.

The debate became more heated when it moved from a strictly legal (jurisdictional) perspective. Recently, by relying on the primacy of EU law, EU

institutions have begun to interfere with decisions taken by the Member States (especially Poland and Hungary) that clearly fall outside the scope of EU competences. They did so by relying on Articles 1, 2 and 19 TEU. Should such interpretation of the powers of the EU be confirmed, it would lead to the ability of the EU to control any political decision of its Member States.

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I. Introduction

5.01. The relationship between the EU and its Member States has never been an easy one. The entire system of EU law is based on the principle of primacy of EU law over national legal systems. The principle is not so much of a problem when it comes to the interpretation of Regulations1 (as a legal instrument that is binding and directly applicable throughout the EU) and Directives.2

5.02. That is not to say that the decisions rendered by the Court of Justice of the European Union (CJEU) within its authority and concerning the interpretation and application of the aforementioned legal acts are universally accepted and do not create controversy. However, preliminary rulings with regard to such questions raised before the court of a Member State[3] are, as a general rule, not challenged as to their binding effect and the CJEU's authority to give them.

5.03. Where disputes between the EU and its Member States begin is when the CJEU exercises its authority with regard to the interpretation of the Treaties stipulated in Article 267 TFEU. The Member States increasingly see the CJEU´s rulings as interference in their constitutional order and as an attack on their sovereignty. This is mainly caused by the impression that, apart from using the undisputed powers vested in the CJEU, the EU tries to control policies and fundamental principles on which the society of the Member States is built. By using general and, up to a certain extent, declamatory provisions of

[1] Article 288 of the Treaty on the Functioning of the European Union (TFEU), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/TXT&from=CS (accessed on 24 March 2022).

[2] Also Article 288 TFEU, which describes Directives as legal acts that are binding upon the respective Member States as to the result to be achieved, but that leave to the national authorities the choice with respect to the form and methods for how to achieve said result.

[3] Article 267 TFEU.

the Treaties,[4] the CJEU establishes its jurisdiction with regard to the examination of the compliance of national law (including constitutional law) with the values based on which the EU is based.[5]

5.04. The possibility to rely on these fundamental principles opens the door for the review of basically any legislation, and even the political decision that results in the enactment of such legislation, regardless of whether or not it falls within the scope of the Treaties. While it is undisputed that the Member States are not in a position to override or repeal EU law, to apply EU law inconsistently or to apply provisions of national law that are incompatible with EU law, it is questionable whether the primacy of EU law should exceed the adherence to substantive provisions that stipulate specific rights and obligations and that include the interpretation of and compliance with general democratic values.

5.05. The stance taken by the EU is often based on the argument that EU law amounts to more than just a body of legal regulations that is to be interpreted and applied by the national courts. One speaks of the creation of a completely new legal system, which the Member States voluntarily (by accessing the EU) accepted and thereby themselves limited the scope of their sovereignty.[6]

5.06. Examples can be found of Member States that fully accepted the primacy of EU law and the consequences thereof.[7] The majority of Member States, on the other hand, defend the supremacy of their constitutional norms over the entire (national) legal system, including EU law. As will be demonstrated below, while the problematics may be presented as a purely legal (jurisdictional) one, this is hardly the case. In fact, there is probably no universal answer. Apart from the clear political dimension and the fact

[4] See also the TFEU and the Treaty on European Union (TEU), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016M/TXT&from=CS (accessed on 24 March 2022). See Article 1 TEU.

[5] See Article 2 TEU, which refers to the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. It is stressed that those values are common to the Member States, which should strive for a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

[6] While statements like this would be rejected by many without further consideration, it is not so much the fact that EU law cannot be regarded and treated as a set of international (founding) treaties independent of the national legal systems of the Member State that is the core of the dispute. Nor is there a dispute as to the fact that EU law is an autonomous legal system with its own concepts and their interpretation. The real question concerns the scope and borders of EU competences. The need to draw a line between the competences of the EU and its Member States stems from Article 4(1) TEU, according to which competences not conferred upon the EU in the Treaties remain with the Member States. Moreover, the use of the competences conferred upon the EU is governed by the principles of subsidiarity and proportionality (Article 5 TEU). Where the opinions of the EU (CJEU) and the Member States differ is the scope of the competences transferred to the EU.

[7] Such as Estonia or Netherlands. See Michał Jerzy Dębowski, *EU and National Law: Which Is 'superior'?*, NEW EASTERN EUROPE (2021), available at: https://neweasterneurope.eu/2021/08/10/eu-national-law-which-is-superior/ (accessed on 24 March 2022).

that the CJEU seems to take on the role of defining the values referred to in Article 2 TEU, the case law usually referred to when discussing the conflict between EU law and the constitutional systems of the Member States concerns individual and at times incomparable situations. Thus, the question arises as to whether generally valid conclusions can really be drawn from it.

II. Relationship between EU Law and Constitutional Order of Member States

II.1. Position Taken by EU

5.07. The fact that the EU can only act within the scope of the competences conferred upon it seems to be implicitly confirmed by the wording of Article 4(2) TEU, which stipulates respect for the equality of Member States, as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

5.08. In other words, the Treaties seem to aim at a balance between the need for the primacy of EU law and its autonomous and universal interpretation in line with the common values and aims that the EU is striving to achieve, and the sovereignty of the individual Member States.[8]

5.09. However, from the very beginning, the EU and its institutions reiterated the notion that the founding treaties create a completely new legal system, and that a national law as a subsequent legislative act of the treaties´ signatories (Member States) cannot call into question the rights and obligations established under the treaties.[9] While the conclusions drawn

[8] The reference to the right of the Member States to have their national identity respected as stipulated in Article 4(2) TEU is reaffirmed in the CJEU judgment of 22 December 2010, C-208/09. The CJEU further stated in this decision (paragraph 91) that it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected, and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another Member State. See also the case law mentioned therein, as well as the CJEU judgment in joined cases C-58/13 and C-59/13 of 17 July 2014 (paragraph 54).

[9] See also the judgment of the European Court of Justice (ECJ, which is the former designation of the CJEU) of 15 July 1964 in case C-6/64, where the following was held (quote): *By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane 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, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to*

in the aforementioned judgment seem to be clear, a distinction needs to be made between decisions such as this, where a call for the primacy of EU law and its consistent interpretation and application throughout all Member States is with regard to a specific provision of EU law,[10] and cases where EU law should play a decisive role and overrule the interpretation and application of general constitutional principles in the fields where the EU has no specific competencies.

5.10. Similarly, the Kreil case[11] concerns Council Directive 76/207/EEC of 09 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Under Article 2(1) of the Directive, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly, by reference in particular to marital or family status. Therefore, when the ECJ rules on the compliance of the German national law with the prohibition of any discrimination laid down by the Directive, its decision concerns the application of EU law to which the Member States voluntarily agreed to adhere. The considerations of the ECJ do not necessarily interfere with the competences that remain with the Member States.

5.11. It is correct that the limited access for women to military posts in the Bundeswehr stemmed from Article 12a of the German constitution (Grundgesetz für die Bundesrepublik Deutschland) in the wording effective at that time, which barred women outright from military posts involving the use of arms and which only allow women access to the medical and military-music services. Taking this fact into consideration, it would be easy to draw a conclusion that the ECJ took on the role of overruling the constitutional system of a Member State, but the interpretation of the judgment is not as simple as that.

5.12. Apart from the fact that – as explained above – the subject of the judgment is the implementation of very specific obligations arising from EU law, and not the examination and assessment of abstract constitutional values and the application thereof throughout a national legal system, it does not deal with the constitutional issue, or rather the precedence of EU law over

another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.

[10] The E.N.E.L. case mentioned above concerned the prohibition of discrimination as stipulated by Article 7 of the Treaty establishing the European Economic Community (the Rome Treaty or the EEC Treaty). This provision specifically refers to the prohibition of discrimination within the field of application of the EEC Treaty, and does not provide the EU with the power to make decisions and if necessary to take measures outside the scope of the competences conferred upon the EU.

[11] ECJ Judgment of 11 January 2000, C-285/98.

national constitutional system at all. It simply discusses the content of all relevant provisions of the German law (i.e. not exclusively the constitution), without suggesting that the EU has the authority to force changes to the national constitutional regime.

5.13. Moreover, the Directive in question does not require the Member States to provide women with instant access to any occupation, regardless of the potential underlying principles and values that their society may be based on.[12] Where appropriate, the Directive provided for the discretion of the Member States to let the national law provide for certain exceptions to the Directive, if and where considered appropriate (reasonable). It is clear that such exceptions may vary depending on the cultural and constitutional traditions and specific values on which their society may be based, as well as the individual circumstances of each Member State. Should the national legislature make use of the right to limit the scope of application of the Directive, it should be noted that such exception might impair the binding nature of EU law and its uniform application. This is just another argument against the notion that the judgment could be read as a clear declaration of the primacy of EU law over the constitutional systems of the Member States.

5.14. What the ECJ ruled is that when determining the scope of any derogation from a fundamental right, such as the equal treatment of men and women, the principle of proportionality, as one of the general principles of EU law, must also be observed.

5.15. In this particular case, it was held that an exclusion that applies to almost all military posts cannot be regarded as a derogating measure justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out. The breach of EU law was not found due to the limited access of women to military posts *per se,* but rather because of the general exclusion of women from military posts involving the use of arms without providing any reasoning and justification for this measure and limiting them to specific posts. Nevertheless, it clearly shows that collisions between EU law and the constitutional orders of the Member States exist.

[12] According to Article 2(2) of the Directive, it shall be without prejudice to the right of the Member States to exclude from its field of application occupations (as well as the training leading thereto) for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.

II.2. Reaction of National Law of Member States

5.16. Courts of the Member States took the (logically) opposite approach and argued in favour of the supremacy of the constitutional orders of the Member States. The most famous example is the constitutional court of Germany, which issued a decision[13] in which it retained its right to examine CJEU judgments as far as the protection of fundamental rights and freedoms is concerned, since the protection granted to individuals on the EU (then Community) level is not as strong as the protection provided by the constitutional system of Germany, until the EU guarantees a sufficient level of protection that will be maintained and that will provide German people with at least the same fundamental rights and freedoms afforded to them under the German constitution.

5.17. The aforementioned decision is presented in academic discussions as an act of defiance against the primacy of the EU. However, looking at its reasoning, it is yet another example of a decision that effectively defines the borders between the competences of the EU and its Member States, but rather from a practical perspective. The issue is not the jurisdiction of the CJEU, but a doctrine according to which EU law cannot deprive German individuals of the fundamental rights and freedoms that they currently exercise under the German constitutional system.

5.18. Even if the end effect is still the same, the argumentation is quite different to claiming that, regardless of the circumstances, the German Constitutional Court is generally not bound by EU law. The Solange I decision seems to suggest the direct opposite, and to imply that once it is satisfied that EU law guarantees the same fundamental rights and freedoms as German law, it will accept the primacy of EU law and the CJEU judgments.[14]

5.19. At least from the side of the German Constitutional Court, there is no sign of defiance against the growth in the powers of the EU. In fact, it calls for closer integration of the EU and a defined list of fundamental rights and freedoms that would be interpreted and applied by EU institutions. It is therefore somehow paradoxical that the Solange I judgment is seen as inspiration for other constitutional courts that maintained the doctrine of supremacy of national constitutional law.[15]

[13] Resolution of the German Constitutional Court (Bundesverfassungsgericht) of 29 May 1974, No. 2 BvL 52/71, known as Solange I.

[14] Compare also the judgment of the German Constitutional Court of 12 October 1993, No. 2 BvR 2134, 2159/92, which deals (among others) with the constitutionality of the delegation of certain powers to the EU.

[15] See also the Italian Constitutional Court in its judgment, No. 288/2010, of 04 October 2010, referenced in Michał Jerzy Dębowski, *EU and National Law: Which Is 'superior'?*, NEW EASTERN EUROPE (2021),

5.20. In its decision known as Solange II,[16] the German Constitutional Court acknowledged the development of EU law and its institutions as far as the protection of fundamental rights and freedoms is concerned, and stated that the conditions laid down in the Solange I decision had been met. As a result, it ruled that there is no further need for the review of the interpretation of EU law provided by the CJEU from the (national) constitutional point of view. This does not preclude the German Constitutional Court from returning to its former position expressed in the Solange I decision and taking back the right to review the CJEU judgments as far as their conformity with the German constitutional system is concerned.

5.21. Considering that, following the entry into force of the Lisbon Treaty in 2009, the Charter of Fundamental Rights of the European Union also became effective, which renders (at least from the German perspective) the return to the Solange I doctrine unlikely, if not impossible.[17]

II.3. Further Development of CJEU Case Law

5.22. Despite the fact that none of the decisions of the (national) state courts mentioned above directly refused to respect the CJEU´s decisions having constitutional aspects, the CJEU considered it necessary to repeatedly reaffirm the primacy of EU law, even if it contradicts the constitutional system of a Member State. To this effect, see the judgment of the CJEU of 26 February 2013 in Case C-399/11.[18]

available at: https://neweasterneurope.eu/2021/08/10/eu-national-law-which-is-superior/ (accessed on 24 March 2022) or the decision of the same court, No. 183/73, of 27 December 1973 (see Mart Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community*, 12(1) MICHIGAN JOURNAL OF INTERNATIONAL LAW (1990). Similarly, the decisions of the Czech Constitutional Court, No. Pl. ÚS 50/04 of 08 March 2006 and No. Pl. ÚS 19/08 of 26 November 2008. Despite the refusal of the interference of EU law with the very core of the Czech constitutional system, the direct effect and primacy of EU law is not directly called into question. It is held that, to the extent that the Czech constitutional law can be interpreted and applied in a way consistent with EU law, a duty exists to do so. At the same time, it can be seen that, should EU law – based on the individual circumstances – undermine the primary elements of the Czech constitutional system, the Czech Constitutional Court can overrule it. For a further comparison of the decisions rendered in this respect, see the decisions rendered by the Irish Supreme Court of 19 December 1989 (*Society for the Protection of Unborn Children (Ireland) Ltd.* v. *Grogan*) and of 05 March 1992 (*Attorney General* v. *X.*), judgment of the Polish Supreme Court of 29 May 2019, No. III CSK 209/17, and the decision of the Danish Supreme Court of 06 April 1998, No. I-361/1997.

16 Resolution of the German Constitutional Court No. 2 BvR 197/83 of 22 October 1986.

17 This conclusion cannot be interpreted too broadly and to the effect that the German Constitutional Court fully accepted the primacy of EU law over the German constitution and the CJEU´s role as the decisive body when it comes to the interpretation of the EU law, as well as the determination of the conformity of the national laws of the Member States with it. In fact, it is the German Constitutional Court that recently rendered a decision in which it retained the right to refuse any decision or other legal act issued by any of the EU institutions, should it exceed the scope of competences conferred upon the EU.

18 The following was held – paragraph 58 ff (quote): *That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules that are fully in compliance with the Charter where they infringe the fundamental rights*

5.23. Yet another decision dealt with a different situation, specifically with the obligations of the national courts - when it comes to a conflict between EU law and national rules that are contrary to the Charter of Fundamental Rights of the European Union – to disapply national norms that are contrary to the Charter.[19] It was held that the court´s duty to set aside national legislative provisions cannot be made conditional upon that infringement of the Charter being clear from its text or the case-law relating to it. It was argued that such requirement would withhold from the national court the power to fully assess (or in cooperation with the CJEU) whether the provision in question is compatible with the Charter. To withdraw these powers from the national court would then prevent EU law from having full force and effect.

5.24. The judgment does not specifically mention that this obligation of the national courts also comprises the need to disregard any of their constitutional norms. Such interpretation and conclusion to this effect can, however, be drawn tacitly from the judgment's wording. Considering the unambiguous declaration of the priority of the Charter, there is little doubt that it also takes precedence over any constitutional norms.

5.25. Another interesting point on the issue was (also implicitly) expressed in the CJEU judgment of 05 April 2016 in joined Cases C-404/15 and C-659/15 PPU. It does not explicitly confirm the primacy of EU law over the national legal systems of the Member States, including their constitutional law. Maybe even unintentionally, it opens some questions, mainly concerning the relationship between provisions of EU law that would form part of the constitutional system, had they been adopted by a Member State.

5.26. The case concerned Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. In short, the application of the Framework Decision is dependent on the court of the executing state being satisfied that the person who is the subject of the European arrest warrant won´t - following the surrender of that person to the issuing Member State - run

guaranteed by that State's constitution. It is settled case-law that, by virtue of the principle of the primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, paragraph 21, and Opinion 1/09 [2011] ECR I-1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, inter alia, Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, paragraph 3, and Case C-409/06 Winner Wetten [2010] ECR I-8015, paragraph 61).

[19] See the CJEU judgment of 26 February 2013, C-617/10.

a real risk of being subjected in the issuing Member State to inhuman or degrading treatment.[20]

5.27. Generally, the executing judicial authority must rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies. The question was whether the German authorities on their own have the authority to make a determination as to whether the conditions in the issuing state comply with the requirements set in Article 6 TEU, or whether the execution state must make the decision on the permissibility of surrender conditional upon assurances that detention conditions are in compliance with Article 6 TEU.

5.28. This question is not only a practical one. It goes to the point of whether the constitutional court of the executing state can on its own examine whether the person who is the subject of the European arrest warrant will be (following the surrender) detained in conditions that guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level, or whether it needs to request additional information from the issuing state as to the conditions in which it is envisaged that the individual concerned will be detained.[21]

5.29. While at first, an impression may arise that by giving the power to ultimately decide on the adherence to Article 6 TEU to the courts of the executing Member State without the issuing Member State being able to intervene, the CJEU would have accepted the role of the national constitutional system and its prevalence over EU law, such interpretation would be clearly wrong.

5.30. Even if the courts of the executing Member Stets were able to make the determination on their own, they would still be bound not to apply any constitutional doctrines that developed with

[20] This principle stems from Article 1(3) of the Framework Decision, according to which it is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in Article 6 TEU (this provision refers to the Charter of Fundamental Rights of the European Union, which in Article 4 prohibits the use of inhuman or degrading treatment or punishment). The rights guaranteed under Article 4 of the Charter correspond to Article 3 ECHR (European Convention on Human Rights, as one of the most important instruments developed on the platform of the Council of Europe) and are considered to be absolute. By virtue of Article 52(3) of the Charter, it therefore has the same meaning and the same scope as the legal framework (regulation) provided by the ECHR (see the Explanations relating to the Charter of Fundamental Rights - OJ 2007 C 303, et. 17).

[21] Under Article 15(2) of the Framework Decision, authorities of the issuing state are entitled to do so if they find the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender. In the end, the CJEU confirmed that the aforementioned provision is to be applied and that the issuing Member State needs to be provided with the possibility to provide evidence that, in the individual case at hand, there is no danger of a breach of Article 6 TEU.

regard to the prohibition of inhuman or degrading treatment or punishment. Article 51(1) of the Charter expressly provides that its provisions are addressed to the Member States, and that they are obliged to adhere to them only (sic!) when they are implementing EU law. Since, in this case, the priority of the Charter is expressly provided for, the conflict between EU law and the constitutional systems of the Member States does not even arise.[22]

5.31. Disregarding the above, the decision can be seen as confirmation of the tendency of the German courts expressed in the Solange I decision to apply their own constitutional standards, should they feel that by adhering to the otherwise applicable law (including EU law) the standard of protection guaranteed to individuals would not reach that required by the German constitution.

5.32. In a way, the decision shows some similarities to the judgment in the Kreil case. Both concern the application of principles that form part of the constitutional system, and in both situations, the need to apply them is based on a specific provision of EU law, rather than on the general requirement of adherence to the national constitutional system. In this respect, the decision only confirms the previous stance that, where EU law prescribes a certain course of action, the state courts cannot disregard it by referring to their own constitutional principles.

5.33. This is where the similarity ends and where the CJEU began to deal with issues that the German Constitutional Court provided in its answer in the Solange I decision. While the German courts, by relying on national law,[23] argued that once the court is satisfied that the rights of a person who is the subject of the European arrest warrant guaranteed by Article 4 of the Charter are jeopardized, no additional steps need to be taken and the person in question cannot be surrendered, the CJEU reiterated the principle of the primacy of EU law, regardless of the content of the national law.[24]

[22] In this particular situation, any such conflict could only be theoretical, because all 47 Member States of the Council of Europe, including all EU Member States, are signatories to the ECHR. Article 4 of the Charter is identical to Article 3 ECHR, and is to be interpreted in the same manner. From a practical point of view, the institutions of the EU Member State are bound to come to the same result, regardless of the form in which the aforementioned provisions will be formally applied.

[23] The Framework Decision was transposed into the German legal system by Sections 78 to 83k of the Law on international mutual legal assistance in criminal matters (Gesetz über die internationale Rechtshilfe in Strafsachen).

[24] Which – as far as the protection of fundamental rights and freedoms is concerned – is more favorable. From this perspective and unlike in the Kreil case, the German law was in compliance with the EU law but provided for a more favorable treatment to the individuals.

II.4. Charter of Fundamental Rights of European Union

5.34. What should further be taken into account is that, since the Charter became effective, the EU has a codified set of fundamental rights and freedoms, and the inevitable question arises as to the relationship between the Charter and the national constitutional systems. A strong case was made by the Members States when they claimed the superiority of the constitutional principles over EU secondary law.

5.35. The Charter is composed of the same fundamental rights and freedoms that are also part of the national constitutional systems. This could give the wrong impression that there is no actual clash between the two systems. Nothing could be further from the truth. The problem is not the set of rights that are protected, because they indeed overlap. Despite the insistence that these rights and freedoms are universally shared among all Member States,[25] this may to some extent be correct when it comes to the identification of the rights and freedoms *per se*. None of the Member States denies the need for the protection of principles such as the prohibition against discrimination or against the use of inhuman or degrading treatment, etc.

5.36. But every single national constitutional system may ascribe slightly different meaning to these rights, and may guarantee their protection in a different scope and using different tools. This means that one and the same right may be applied significantly differently in various Member States.[26] This is why the distinction between the competences of the EU and its Member States is so important. The application of one and the same right may vary depending on whether the interpretation by the CJEU or the one done by the state courts is considered to be decisive.

5.37. EU law specifically deals with this situation and stipulates limits within which the Charter, as an instrument providing for the guarantee of fundamental rights and freedoms, can be

[25] This is one of the reasons why the author is very critical to the concepts such as the EU *public ordre* and the attempt to create an EU constitution. The differences between the values on which the societies in the individual Member States are based are simply too big in order for them to be just disregarded. Much of the friction between the Member States comes down to the Member States´ understandable desire to keep their sovereignty and to be able to interpret and apply their constitutional systems autonomously and without any interference from the EU.

[26] An area where the differences are most significant is family law / family relationships. The concepts of what constitutes family and the view on other issues in connection herewith vary and show that the idea of universally shared values and principles on which society is based is an illusion used for political purposes, such us promoting and enhancing unity and federalization of the EU. Strangely enough, this is also an area where the sovereignty of the Member States and the acceptance of the differing views on family relationships has never been questioned, and the EU is purposefully avoiding the inclusion in its laws of specific rules on this matter, to which the Member States would have to adhere.

used.[27] Taking into account the clear wording of the respective provisions, a conclusion could be drawn that the Charter was never intended to be used outside the scope of the competences of the EU.

5.38. This, on the other hand, would suggest that with regard to areas where the EU law does not play any role, the Charter should not be applied and the state courts are to proceed in accordance with their national constitutional systems.

5.39. Areas in which the EU exercises its competences fall clearly within the scope of the Charter, which prevails over the national constitutional system. This is a matter of fact, because arguments can still be made that the principle of state sovereignty is inextricably linked with modern constitutional theory. The Charter does not (at least formally) possess any special effect that would enable it to override national constitutional systems, nor does it take such place within the hierarchy of the legal system that would justify its prevalence over the constitution (constitutional system) of the Member States. The idea that the EU constitution could potentially give rise to a discussion concerning the relationship between the national constitutional system and unified constitutional system of the EU was strictly rejected by the Member States - with reference to the principle of sovereignty, which would be severely impaired by the establishment of the EU´s own constitutional system.

5.40. Based on the above, and from a legal point of view, the existence of the Charter does not settle the ongoing dispute concerning the relationship between EU law and the constitutional systems of its Member States. On the other hand, the debate is academic. It is widely recognised in practice that the Charter takes precedence over national constitutional systems within the scope of its applicability.

5.41. The situation is remotely similar to the one that was the subject of examination in the Kreil case, i.e. the EU guarantees in its law that the Member States are bound to apply certain rights that have a constitutional dimension in the national legal system. Considering the Member States´ obligation to apply EU law, there is little doubt that the Charter is to be applied within the scope of competences of the EU.

5.42. This creates little problems if EU law simply provides for new rights and freedoms of the individuals not foreseen by the

[27] See Article 6(1) TEU, specifying that the provisions of the Charter shall not extend in any way the competences of the EU as defined in the Treaties. The same is stated in the Charter itself. Article 51(2) thereof provides that the Charter does not extend the field of application of EU law beyond the powers of the EU, and does not establish any new power or task for the EU. The same applies for any modification of powers and tasks as defined in the Treaties.

national legal system. While it gets a little more complicated if the new right or freedom collides with an existing national norm that does not form part of the constitutional system of the Member State, the primacy of the EU law is generally accepted. The real problem arises if a specific right provided for by EU law directly contradicts the national constitutional system, or if it guarantees a lesser standard than the national constitutional system.

5.43. This is where the Member States revert to their sovereignty and question the primacy of EU law. Based on the nature of EU law, the CJEU does not deviate from its argumentation and insists that EU law needs to take precedence over the national constitutional system even in these situations. The position of the Member States also did not change. They still reject that the EU can overrule their constitutional systems, at least with regard to issues that the Member States consider crucial and forming the core of the constitutional system.

II.5. Application of EU Law in Case It Falls Outside Powers Conferred upon EU

5.44. The German Constitutional Court recently issued an interesting decision[28] in which it reserved the right to review EU law and to refuse to apply it, despite the principle of primacy,[29] if it comes to the conclusion that the act to be applied is to be considered *ultra vires*. The reason behind this conclusion is the persuasion that if fundamental interests of the Member States are affected, it is imperative that the division of competences between the EU and its Member States be respected as a measure safeguarding the principle of democracy.

5.45. As a result, and in addition to the insistence that EU law cannot lower the level of protection provided by the German constitution,[30] the German Constitutional Court held that the primacy of EU law and the role of the CJEU under Article 19 TEU in its interpretation of the acts of the EU institutions cannot lead to the erosion of Member States´ competences and

[28] Judgment in the joint cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16 of 05 May 2020.

[29] As is illustrated by the decision of the German Constitutional Court, it has never questioned the principle of the primacy of EU law. It identifies situations in which it feels justifiable (even taking into account EU law) to disregard this principle and to rely on the national constitutional principles.

[30] The coming into effect of the Charter has put the application of this principle to a test. As has been explained, the Charter needs to be interpreted and applied autonomously and can in certain instances provide a lesser degree of protection that the German Constitution. So far, it seems that Germany accepted the CJEU´s role in the interpretation of the Charter and the supremacy of the CJEU´s rulings in this respect – see also the aforementioned judgment of the CJEU of 05 April 2016 in joined cases C-404/15 and C-659/15 PPU.

to the silent conferral of additional powers on EU institutions. It was further held that in the event of a manifest and structurally significant exceedance of competences by institutions, bodies, offices and agencies of the EU, the constitutional organs must make use of the means at their disposal to actively take steps seeking to ensure adherence to the division of competences and respect for its limits. They should work towards the rescission of acts that fall outside the scope of competences of the EU,[31] and take suitable action to limit the domestic impact of such acts to the greatest extent possible.

5.46. The aforementioned should in no way undermine the primacy of EU law or the CJEU´s role. To this effect, the German Constitutional Court confirmed that when assessing the validity or the interpretation of a measure taken by the EU institutions, it should base its review on the understanding and the assessment of such a measure provided by the CJEU.

5.47. At the same time, it was concluded that the CJEU exceeds its judicial mandate given to it by Article 19 TEU when an interpretation of the Treaties is not comprehensible and must thus be considered arbitrary from an objective perspective. Such decisions are no longer covered by Article 19(1). As far as the position of such acts in Germany is concerned,[32] a conclusion was reached that these decisions lack the minimum of democratic legitimation necessary for them to stand the review of the Constitutional Court. The German institutions are also not permitted to participate in the development, nor in the implementation, execution or operationalisation of *ultra vires* acts.

5.48. In case a question concerning the interpretation of the competences conferred upon the EU arises, the German Constitutional Court expressed its opinion that it is not sufficient to simply accept positions asserted by the respective EU institution without closer scrutiny. The broad discretion afforded the EU institutions, together with the limited standard of review applied by the CJEU, fails to give sufficient effect to the principle of conferral[33] and opens the door for the competences

[31] Here specifically, the EU integration agenda. The decision in question concerned the Decision of the Governing Council of the European Central Bank of 22 January 2015 and Decision (EU) 2015/774 of the European Central Bank of 04 March 2015 (ECB/2015/10) on a secondary markets public sector asset purchase programme in conjunction with (i) Decision (EU) 2015/2101 of the European Central Bank of 03 September/05 November 2015 (ECB/2015/33), (ii) Decision (EU) 2015/2464 of the European Central Bank of 03 December/16 December 2015 (ECB 2015/48), (iii) Decision (EU) 2016/702 of the European Central Bank of 10 March/18 April 2016 (ECB/2016/8) and (iv) Decision (EU) 2017/100 of the European Central Bank of 08 December 2016/11 January 2017 (ECB/2017/1), all amending Decision (EU) 2015/774.

[32] This conclusion will vary depending on the constitutional system of each individual Member State and cannot be seen as universal. The consequences can thus be different than in Germany.

[33] As one of the fundamental principles of the functioning of the EU.

of the Member States to be undermined. The principle of proportionality and the overall assessment and appraisal that it entails are of great importance with regard to the respect for democracy and the principle of sovereignty. Disregarding these requirements could potentially shift the bases for the division of competences in the EU, undermining the understanding of how the competences between the EU and the Member States are divided and the will of the Member States to confer certain competences upon the EU.

5.49. The German Constitutional Court, however, specifically emphasized that the aforementioned conclusions do not impact in any way the finality and legitimacy of the European integration agenda. In fact, it is implied that the adherence to the principal of conferral is necessary for the successful completion of further integration of the EU.

5.50. While it is clear that the decision does not aim to undermine the position of the EU and its integration,[34] it makes an interesting and in fact important point. It more or less confirms that when it comes to the assessment of the legitimacy of the acts of the EU institutions, the CJEU is not necessarily to be seen as impartial, and its considerations cannot be held to be reliable as far as its conclusions are concerned.[35]

5.51. The decision probably cannot be read as a direct declaration of supremacy of the national constitutional system over EU law, but then the author is of the opinion that such conclusion cannot be drawn from the Solange I decision either. And maybe it´s exactly the concept of the coexistence and cooperation between the two legal systems[36] applied by the German Constitutional Court that makes the decisions more or less acceptable and unchallenged (at least not openly).

5.52. In any case, it brings us to the actual question, which becomes more imminent every day. The discussion concerning the

[34] As just mentioned, the decision is purposefully worded so that the conclusions of the German Constitutional Court can actually be presented as being in the interests of the EU and being made with the aim of promoting the acceptance of the integration agenda. It can be inferred that the respect for the division of powers is a precondition for a successful integration. One can agree with this statement if it is understood as a general notion, but it seems to be a little out of place considering the context in which these allegations were made.

[35] Of course, when one reaches such a conclusion, the logical question is whether it only concerns the control exercised in order to ensure that the EU institutions don't overstep their competencies, or whether it applies universally. The politicization of the CJEU´s decision-making process has been the subject of discussion for a long time. It can definitely be said that the observations by the German Constitutional Court exceed the decision in which they were made. At the same time, it would be wrong to undermine the role of the CJEU by rejecting any and all decisions ever rendered. The achievements of the CJEU in the unification of the interpretation of EU law are both undeniable and indispensable to the functioning and application of EU law as a whole.

[36] As opposed to trying to pit them against each other and concluding the definite and overall supremacy of one over the other.

relationship between EU law and the national constitutional system can only remain factual and based on legal arguments if the principle of conferral is respected by the EU institutions, as well as the Member States. But can we still say that this is the case?

III. Poland

5.53. The EU recently took an extremely proactive approach with regard to certain political decisions taken by its Member States. The interference by the EU institutions opened a completely new chapter in the discussion of whether a Member State has the right to disregard pieces of EU law if it comes to the conclusion that they are contrary to their constitutional system. Poland in particular has been embroiled in a dispute with the EU institutions with regard to the interpretation of some aspects of EU law.

5.54. Herein actually lies the first problem. The dispute is often presented as an attempt by the Polish (and also Hungarian) government to challenge the EU´s rule of law ideal by claiming that different interpretations of it are possible, and that illiberal democracies can co-exist with liberal ones within the EU constitutional framework.[37] Such description suggests that there is indeed only one universal interpretation of the values listed in Article 2 TEU. As mentioned several times, this is a misconception that causes most of the disputes.

5.55. It could probably be said that the Member States share the general concept of each of the aforementioned values; it in no way means that they are interpreted in exactly the same way when it comes to the particularities. The purpose of this article is not to judge whose interpretation is correct or better serves the ideal pursued by the EU. It should highlight the attempts to use these differences as a means to intervene with political decisions and laws of Member States outside the scope of the EU´s competencies.[38]

5.56. From the very beginning, Poland has been one of the Member States that refused to subject its constitutional principles to

[37] Michiel Luining, *The EU's rule of law: work is needed*, ACADEMIA (2021), available at: https://www.academia.edu/45681054/The_EUs_rule_of_law_work_is_needed (accessed on 24 March 2022).

[38] I.e. exactly what the German Constitutional Court rejected in the judgment concerning the joint cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16 of 05 May 2020. The difference is that while the German judgment challenged specific decisions made by the ECB, in the case of Poland, the question is much broader and concerns the use of the CJEU´s interpretation of the values listed in Article 2 TEU as a criterion for the determination of the adherence of acts of the Polish government to EU law. Both situations deal with the question of whether decisions rendered by the CJEU when exceeding the competences conferred to it by Article 19 TEU can be subject to review by the (constitutional) courts of the Member States.

the power of the EU institutions.[39] Soon enough, some of the political decisions taken by the polish government became a point of controversy. Again, the point of this article is not to scrutinize the position that Poland took with regard to certain issues. The point to be made is that these disputes escalated, especially with regard to the judicial reform that Poland decided to implement. The disputes began on several fronts. On 03 April 2019, the Commission launched an infringement procedure on the grounds that the new disciplinary regime for judges undermines the judicial independence of Polish judges and does not ensure the necessary guarantees to protect judges from political control.[40]

5.57. The CJEU rendered a judgment in the matter on 15 July 2021.[41] It was argued by the Commission that, while in general terms the intervention of an executive body in the process for appointing judges does not, in itself, affect the independence or impartiality of those judges, the combination and simultaneous introduction of various legislative reforms prepared by the Polish government have given rise to a structural breakdown, which no longer makes it possible either to preserve the appearance of the independence and impartiality of justice and the trust that the courts must inspire.[42]

5.58. It was argued that the requirement of independence derives from Article 19(1) TEU, and must be met by national courts since they have to interpret and apply EU law. Therefore, it is necessary that the rules governing the disciplinary regime applicable to the judges who make up those courts provides for the involvement of bodies that themselves meet the requirements inherent in effective judicial protection.[43]

[39] In fact, the first decision in which the Polish Constitutional Court refused the full effects of the primacy of EU law was already rendered in May 2005 (see judgment K 18/04 released on 11 May 2005, English summary available at: http://www.proyectos.cchs.csic.es/euroconstitution/library/documents/Polish%20Constitutional%20Tribunal_Judgment%20Polands%20accession%20to%20the%20EU.pdf (accessed on 24 March 2022)), in which it was asked to rule on the constitutionality of Poland's accession to the EU. The Polish Constitutional Court held that the Accession Treaty does not infringe the provisions of the Polish Constitution, and specifically emphasized that recognition of the Constitution as the supreme Polish law, which is not undermined by the accession to the EU. In this respect, it was concluded that the Constitution enjoys the precedence of binding force and the precedence of application. It was further confirmed that a possible collision between a constitutional norm and a provision of EU law may under no circumstances be resolved by assuming the supremacy of EU law (see Marta Lasek-Markey, *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 (2021), available at: https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/ (accessed on 24 March 2022).

[40] See the Commission´s press release - Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070 (accessed on 24 March 2022).

[41] Case C-791/19.

[42] CJEU Judgment of 15 July 2021, C-791/19, paragraph 64. See also paragraphss 56 ff of the judgment.

[43] CJEU Judgment of 15 July 2021, C-791/19, paragraph 64.

5.59. Finally, it was held that the preliminary ruling procedure provided for in Article 267 TFEU forms a key part of the judicial system, and provides sufficient scope of discretion for the national courts in referring matters to the CJEU.[44] It was held that national law (including rules under which judges are exposed to disciplinary proceedings when they have made a reference for a preliminary ruling to the CJEU) cannot prevent a national court from exercising that discretion or complying with that obligation to refer a preliminary question to the CJEU.[45]

5.60. Based on all the above, the CJEU concluded that Poland failed to fulfil its obligations under Article 19(1) TEU and Article 267 TFEU.[46]

5.61. Even before that, a request to issue a preliminary ruling concerning the disputed judicial reform was referred to the CJEU by Polish courts dealing with disputes with some judges affected by the judicial reform. On 19 November 2019, the CJEU rendered a judgment in joint cases C-585/18, C-624/18 and C-625/18 that already answered the questions mentioned above and effectively served as the basis for all future judgments in the matter, including the CJEU Judgment, of 15 July 2021, C-791/19.

5.62. The (so far) final judgment of the CJEU in the matter was rendered on 02 March 2021 in Case C-824/18. Apart from the repeated criticism of the judicial reform, it once again reiterated the principle of the primacy of EU law, and explained it as binding on all the bodies of a Member State, without, inter alia, provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, being able to prevent that.[47]

5.63. Further, the CJEU argued that the principle of primacy of EU law must be interpreted as requiring national courts to disapply any rules of national law being contrary to EU law, whether they are of a legislative or constitutional origin.[48] This reaffirms

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44 CJEU Judgment of 15 July 2021, C-791/19, paragraphs 222 and 223.

45 CJEU Judgment of 15 July 2021, C-791/19, paragraphs 225 ff.

46 In the meantime, a further infringement procedure was initiated by the Commission on 29 April 2020. The Commission proceeded by requesting that the CJEU impose interim measures on Poland. This request was granted by an order dated 27 October 2021 in Case C-204/21 R. Because the Commission further concluded that Poland did not take measures necessary in order to implement the conclusions reached by the CJEU in its judgment in Case C-791/19 of 15 July 2021, on 07 September 2021, the Commission took the decision to request that financial penalties be imposed on Poland in order for it to comply with the aforementioned CJEU judgment ordering interim measures. Further, the Commission decided to send a letter of formal notice under Article 260(2) TFEU to Poland for not taking the necessary measures needed in order to fully comply with the judgment. For more details on this development, see the Commission´s press release - Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070 (accessed on 24 March 2022).

47 CJEU Judgment of 02 March 2021, C-824/18, paragraph 148.

48 See the CJEU Judgment of 02 March 2021, C-824/18, paragraph 150.

the position that EU law prevails even over the constitutional systems of the Member States.

5.64. The judgment resulted in an application to the Polish Constitutional Court, which on 07 October 2021 decided (Ref. No. K 3/21) that Articles 1, 2 and 19 TEU are partially unconstitutional insofar as they enable the EU institutions to act outside the scope of the competences conferred upon them, to promote the primacy of EU law over the Polish constitution, and to restrict Polish sovereignty as a result. It was held that Article 19 TEU in particular cannot be applied in order to allow the national courts to bypass the provisions of the Polish constitution by referring the matter to the CJEU and allowing the CJEU to rule on the legality and effectiveness of the procedure for appointment.

5.65. Apparently, when limiting the procedure for a preliminary ruling, the Polish Constitutional Court even exceeded the application by the Polish Prime Minister by challenging the preliminary ruling procedure laid down in Article 267 TFEU, and opened the door for the Polish courts to disregard the judgments rendered by the CJEU.[49]

5.66. While the latter clearly is a step too far that can only escalate the conflict, it is clear from the reasoning of the CJEU´s judgments that the EU is indeed using the aforementioned provisions of the TEU in order to be able to rule on issues that fall outside the scope of its competences and interfere with the political decisions of the Member States. What can further be seen is a double standard, since the EU (CJEU) only seems to revert to these alleged powers in case it disagrees with the steps taken by the Member State. The notion that the Member states voluntarily subjected themselves to the interpretation of the values and rights listed in Article 2 TEU provided by the EU and agreed to suspend the application of their national constitutional system has never been properly argued, and the EU (CJEU) simply takes it as a given fact.

5.67. The withholding of billions of euros of aid for post-pandemic rebuilding in Poland by the EU over concerns that the rule of law is being degraded in the country[50] also does not help. In this specific case, both sides have long ceased to use proper legal

[49] Marta Lasek-Markey, *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 (2021), available at: https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/ (accessed on 24 March 2022).

[50] Poland's top court rules against primacy of EU law, available at: https://www.dw.com/en/polands-top-court-rules-against-primacy-of-eu-law/a-59440843 (accessed on 24 March 2022).

arguments and have made the collision between EU law and the constitutional systems of the Member States a political one.

5.68. This is exactly what hinders the possibility of reaching a solution that would respect the relevant positions of both sides. While it is clear that the member States cannot cherry-pick the pieces of EU law that they like and disregard any rules to which they have reservations, it is similarly unacceptable[51] for the EU to use the primacy of EU law for its own purposes and in order to obtain additional powers that were not conferred upon it.

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Summaries

FRA [***Les rapports entre le droit de l'UE et les systèmes constitutionnels des États membres : l'UE a-t-elle dépassé les limites ?***]

Le droit de l'UE est fondé sur le principe de sa primauté. Un argument fréquent est qu'en adhérant à l'UE, les États membres ont volontairement accepté la restriction de leur souveraineté et le transfert de certains de leurs pouvoirs à l'UE. Ces principes sont incontestables dans la mesure où ils concernent l'interprétation et l'application du droit dérivé de l'UE en matière de droits et obligations concrètes qui doivent prendre effet dans tous les États membres. Dans cette perspective, le principe d'une interprétation autonome et uniforme du droit de l'UE paraît pleinement acceptable.

Au fil des années, l'UE est parvenue à la conclusion que le droit de l'UE non seulement prévaut sur le droit national des États membres, mais aussi ne peut être restreint par l'ordre constitutionnel d'un État membre. La CJUE a jugé que lorsque le système constitutionnel d'un État membre est en conflit avec le droit de l'UE, les juridictions nationales doivent faire abstraction des dispositions pertinentes du droit constitutionnel.

Cette position a provoqué une réaction de la part des cours constitutionnelles nationales. On peut trouver des décisions qui rejettent catégoriquement l'ingérence du droit de l'UE dans les valeurs et principes fondamentaux qui sont à la base du système constitutionnel. Il convient toutefois de noter qu'en adoptant cette position, les cours constitutionnelles n'ont pas rejeté la primauté du droit de l'UE en tant que telle : elles se

[51] Not mentioning the detrimental effect that it has on the reputation of the EU within the general public of the Member States and any potential attempts for further integration.

sont seulement réservé le droit d'examiner son interprétation par la CJUE dans des circonstances exceptionnelles, lorsque des principes constitutionnels fondamentaux sont en jeu.
Cette discussion est devenue particulièrement animée au moment où elle a dépassé le cadre juridique relatif à la question de compétence. Les institutions des Communautés européennes, invoquant le principe de la primauté du droit de l'UE, ont récemment commencé à interférer dans les décisions des États membres (en particulier la Pologne et la Hongrie) qui ne relèvent pas nécessairement de la compétence de l'UE, et ce sur le fondement des articles 1, 2 et 19 du TUE. Si une telle interprétation des compétences de l'UE devait être confirmée, l'UE serait dotée de la capacité de contrôler l'ensemble des décisions politiques de ses États membres.

CZE [***Vztah práva EU a ústavních systémů členských států - překročila EU hranice?***]
Právo EU je založeno na principu své nadřazenosti. Argumentuje se, že dobrovolným vstupem do EU souhlasily členské státy s omezením suverenity a přenosem určitých svých pravomocí na EU. Tyto zásady byly nesporné, dokud se týkaly výkladu a aplikace sekundárního práva EU ohledně konkrétních práv a povinností, jež by měly nabýt plných účinků ve všech členských státech. Z tohoto pohledu se zdá být zásada autonomního a jednotného výkladu práva EU plně akceptovaná.
Během let přistoupila EU k pozici, podle níž nejenže má právo EU přednost před národním právem členských států, ale nemůže být omezeno ani na základě ústavního pořádku členského státu. SDEU vydal rozhodnutí, podle něhož v případě, kdy ústavní systém členského státu koliduje s právem EU, národní soudy by se neměly opírat o příslušná ustanovení ústavního práva.
Tento postoj vyvolal reakci ze strany národních ústavních soudů. Lze nalézt příklady rozhodnutí, která jednoznačně odmítají zásah práva EU do základních principů a hodnot tvořících základ ústavního systému. Je nutné poznamenat, že ústavní soudy takto postupovaly bez toho, aniž by obecně odmítly přednost práva EU a vyhradily si právo přezkoumat jeho výklad provedený SDEU za výjimečných okolností, kdy jsou v sázce stěžejní ústavní principy. Tato diskuze se vyostřila v okamžiku, kdy došlo k jejímu přesunu z čistě právní perspektivy týkající se pravomoci. Instituce ES zaštiťující se principem přednosti práva EU začaly v nedávné době zasahovat do rozhodnutí členských států (zvláště Polska a Maďarska), která jednoznačně nespadají pod pravomoci EU. Učinily tak s odkazem na čl. 1, 2 a 19 SEU. Pokud by se měl takový výklad pravomocí EU potvrdit, vedlo by to ke schopnosti

EU kontrolovat veškerá politická rozhodnutí svých členských států.

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POL [***Stosunek prawa UE i systemów konstytucyjnych krajów członkowskich – czy UE przekroczyła granice?***]
Teoria konstytucyjna, według której konstytucję należy bezwzględnie postrzegać jako nadrzędną wobec wszystkich pozostałych przepisów prawa, mających zastosowanie w konkretnej sytuacji, przez wiele lat była niepodważalna. Jednak wraz z powstaniem prawa UE zasada nadrzędności konstytucji zaczęła być stopniowo kwestionowana. TSUE wielokrotnie potwierdzał prymat prawa UE i orzekł, że musi on być stosowany bez względu na ewentualne kolizje z krajowym porządkiem konstytucyjnym. Na początku ta dyskusja dotyczyła stosowania konkretnych zasad prawa UE, jednak późniejsza argumentacja TSUE stała się środkiem wykorzystywanym przez UE do wpływania na decyzje polityczne i legislacyjne krajów członkowskich i wymuszania własnej wykładni podstawowych praw i wartości wskazanych w art. 2 TUE.

DEU [***Zur Beziehung zwischen dem EU-Recht und den Verfassungssystemen der Mitgliedsstaaten – ist die EU zu weit gegangen?***]
Über lange Jahre hinweg galt die Verfassungstheorie als unanfechtbar, wonach die Verfassung eines Staates notwendigerweise als allen übrigen auf die jeweilige Situation anzuwendenden Rechtsvorschriften übergeordnet zu betrachten war. Mit der Entstehung des EU-Rechts wurde allerdings dieses Prinzip des absoluten Vorrangs der Verfassung schrittweise untergraben. Der EuGH hat wiederholt den Vorrang des EU-Rechts bestätigt und beschlossen, das EU-Recht müsse seine vollen Wirkungen ungeachtet einer etwaigen Kollision mit dem Verfassungsrecht des jeweiligen Mitgliedsstaats entfalten. Anfangs betraf diese Diskussion die Anwendung konkreter Regeln des EU-Rechts, doch wurde die Argumentation des EuGH später zu einem Mittel der Beeinflussung politischer und gesetzgeberischer Entscheidungen der Mitgliedsstaaten seitens der EU, insofern als sie eine eigene Auslegung der in Art. 2 des Gründungsvertrags erwähnten Grundrechte und Werte erzwingt.

RUS [***Отношения между правом ЕС и конституционными системами государств-членов: перешел ли ЕС границы?***]
В течение длительного времени не подвергалась сомнению конституционная теория, согласно которой конституцию следует считать выше всех других законов, применяемых в той или иной ситуации. Однако с появлением права ЕС принцип верховенства конституции начал терять свое безусловное значение. Суд Европейского союза (СЕС) неоднократно подтверждал верховенство права ЕС и выносил решения, что оно должно действовать независимо от возможного конфликта с национальным конституционным порядком. В то время как вначале данное обсуждение касалось применения конкретных правил права ЕС, позже аргументация СЕС стала средством, с помощью которого ЕС оказывает влияние на политические и законодательные решения государств-членов, навязывая свое толкование основных прав и ценностей, перечисленных в Статье 2 Договора о Европейском союзе.

ESP [***¿Proporciona la jurisdicción incuestionable de los árbitros a las partes litigantes un mecanismo de control efectivo por parte de los tribunales nacionales?***]
El lugar del arbitraje como criterio principal para distinguir entre el arbitraje nacional y el extranjero no solo determina la lex arbitri aplicable, sino que también influye en el alcance de la jurisdicción de los tribunales en relación con el arbitraje. En una número creciente de casos, se hace necesaria la intervención (el ejercicio de funciones auxiliares) de los tribunales de otro Estado. La relación entre los tribunales nacionales y el arbitraje extranjero no siempre es sencilla. Además, las diferencias entre los regímenes nacionales de lex arbitri hacen que no exista una norma uniforme para ellos. Por lo tanto, es importante que las partes litigantes del arbitraje sean conscientes de los problemas prácticos a los que se pueden enfrentar, así como del impacto de la elección del lugar del arbitraje en el alcance de la jurisdicción de los tribunales.

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