THE RELATION BETWEEN EU LAW AND THE CONSTITUTIONS OF MEMBER STATES IN THE CONTEXT OF NATIONAL IDENTITY

Frane Staničić[1]

ABSTRACT

The question on the relation between EU law and the constitutions of Member States is and has been a crucial question in the interplay or collaboration between national Constitutional Courts. The Court in Luxembourg maintains its doctrine on overall supremacy of EU law, but some constitutional courts disagree. The author will show, especially with regard to selected countries, like Croatia, how some constitutional courts elaborate their stand on the matter. For example, the Croatian Constitutional Court only briefly stated that the Constitution is above EU law, without any explanation. Other constitutional courts dealt with this issue more methodically and through various decisions through time. There are serious issues regarding the principle of supremacy and the relation of EU law and constitutional provisions of the constitutions of Member States, especially in those cases in which the respective constitutional court established its constitutional identity doctrine. Therefore, the author will try to show what is (or should be) the argumentation on this matter.

KEYWORDS

principle of supremacy
EU law
constitutions of Member States
hierarchy of norms
legal systems

1. Introduction

When applying law, it is sometimes necessary to establish the hierarchy of legal norms which make a legal order. In the past, this task was considerably easier, as legal orders were predominantly comprised of norms originating in a specific country, without much outside influence and/or interference. However, today's legal systems and legal

1 | Judge of the Constitutional Court of the Republic of Croatia; Full Professor, Faculty of Law, University of Zagreb; Croatia; frane.stanicic@unizg.pravo.hr; ORCID: 0000-0001-8304-7901.

https://doi.org/10.55073/2025.1.179-193

orders are much more complex and intertwined. Maybe a good example of how the legal orders of national States became more complex is the implementation (or incorporation) of international treaties into domestic legal orders. This phenomenon started especially after the Second World War and the UN Conventions. Maybe the best example in the European context, before the emergence and consolidation of EU law, is the European Convention for Human Rights and Fundamental Freedoms (ECHR) which has had a tremendous impact on legal systems of every single Member State of the Council of Europe. This has been particularly a result of the establishment of the European Court of Human Rights (ECtHR) whose judgements are binding for all Member States. Currently, the same applies to EU law and the judgements of the Court of Justice of the European Union (CJEU). This is because of the principle of supremacy which dictates that the norms of a) international treaties, b) EU law, etc. are of a higher legal standing than domestic legal norms. This is usually not considered controversial, as many constitutions contain norms concerning the higher legal standing of such legal norms. However, it has always been presumed that all norms of a given legal system must be aligned with the constitution. After several judgements of the CJEU (see infra), this has not been considered as 'set'. Namely, the CJEU formed its doctrine of supremacy of EU law even with regard to national constitutions of Member States. This doctrine, however, is not accepted by all constitutional courts of the Member States. Therefore, this paper will show the development of the relation of EU law in the context of the hierarchy of legal norms in a legal system with the constitutions of Member States.

2. Legal system and the hierarchy of norms

As Guastini states, it can be assumed, although this is debatable, that a legal order is a set of rules (or norms).[2] The components of a legal system are independent and dependent rules. Independent rules are those whose existence does not depend on the previous existence of other rules (such are constitutional rules). All remaining rules are dependent since they have been issued by a subject invested with law-making authority by a pre-existing rule or since they derive inferentially from pre-existing rules.[3] In the second place, a distinction has to be made between expressed and unexpressed rules. Expressed rules are those rules which are explicitly stated or formulated in a legal provision, and unexpressed rules are those unstated rules which are derived from expressed rules either by logical inference or by persuasive juristic arguments.[4] Thirdly, a distinction has to be made between primary and secondary rules. Primary rules are rules of conduct addressed to legal subjects and secondary rules are power-conferring rules addressed namely to State organs, regulating the production and application of primary rules of conduct.[5]

It is said, as a rule, that for a legal rule (norm) to be a part of a legal system the main criterion is its validity. However, the highest legal rule in the hierarchy of sources – the

2 | Guastini, 2024, p. 203.
3 | Guastini, 2024, p. 204.
4 | Ibid.
5 | Guastini, 2024, p. 205.

constitution – cannot be neither valid nor invalid as there is no source above it. That is why we should say that every legal system is composed not only of valid rules, but also of independent rules, neither valid nor invalid as the constitution.[6] Secondly, there are many legal rules that are *de iure* invalid as they are either unconstitutional or unlawful (bylaws), but they also make a certain legal system until they are declared as such. Therefore, Guastini concludes that validity is not the criterion of adherence of the rules to the legal system, but the criterion should be simple 'existence', namely the actual enactment by a 'prima facie' competent normative authority.[7]

Following the determination of the characteristics of a legal system, it is now obvious that it is comprised of many different norms, it must be stated (although it is obvious) that not all these norms are of an equal hierarchical standing. Namely, all legal systems are hierarchical by nature.[8] Kelsen states that there is only one kind of hierarchy – the relationship between the rules which regulate law creation and the rules created according to them.[9] However, modern legal theorists find that this kind of hierarchy cannot exist today as there are, for example, 'super-constitutional' principles which cannot be modified or derogated not even by means of the procedure of constitutional amendment (eternity clause[10]).[11] Guastini therefore recognises four hierarchical structures: formal hierarchy (between secondary rules which regulate the creation of law and the primary rules created according to them); substantive or material hierarchy (a first rule R1 is materially higher-ranked than a second rule R2, while a third rule R3 states that R2 may not contradict R1); logical hierarchy (between rules and meta-rules – for example, between a derogatory rule and the derogated one (R1 is hereby derogated); axiological hierarchy (this is a hierarchy regarding the value of the rules concerned and are derived from the value-judgements of interpreters).[12] From all this, it must be concluded that a legal system presents a pyramidal structure. A logical question is, then, how the pyramid is formed, which rule(s) is (are) on the top of the pyramid and so on. Perhaps the best answer can be found through the material hierarchy according to which a lower standing norm is not allowed to take a form which would conflict with the content of a higher standing norm. Material hierarchy often reflects the formal hierarchy.[13] As a rule, it is common to refer to the constitution as the basic norm, as Kelsen stated – at the top of the system there is a *Grundnorm* – a basic norm[14] (the German Constitution is referred as the (*Grundsgesetz* or Basic Law). Or as Hart stated, at the top of every legal system there is a 'rule of recognition' which defines the validity or membership of all the remaining rules of a legal system at hand.[15] Therefore, it is valid to say that it is (was) commonly accepted that the constitution

6 | Guastini, 2024, p. 206.
7 | Guastini, 2024, p. 207.
8 | Guastini, 2023, p. 219.
9 | Kelsen, 2012, p. 5.
10 | For example, the Italian Constitutional Court finds that certain 'supreme' principles of the Constitution are above all other constitutional norms and are exempted from the amendments of the Constitution despite the application of the constitution amendment procedure set forth in Article 138 of the Constitution. See Guastini, 2023, p. 225.
11 | See Guastini, 2024, p. 209.
12 | Guastini, 2024, pp. 209–210.
13 | Guastini, 2023, p. 222.
14 | Kelsen, 2015, p. 115; Kelsen, 2012, p. 196.
15 | Hart, 1994, p. 101.

is on the top of the pyramid which makes a given legal system. However, this began to change after 1963. Namely, the claim on the EU as a new, autonomous legal order was subsequently developed as a central point of myths which were further used for ideological purposes.[16] The principle of supremacy of EU law was forged *ex nihilo* and it was also presented as a mechanism for ensuring unity and effectiveness of Community law and the equality of Member States (Costa, see infra).[17] This principle was further strengthened when it was interpreted as referring also to the constitutions of all Member States in 1970 (*Internationale Handelsgesellschaf*, see infra). Therefore, as a result, the CJEU tipped the scale in favour of EU law, demolishing the pre-established pyramid of legal system. It should be highlighted that the principle of primacy is not yet embodied in positive EU law (meaning that it is not encompassed neither in the TFEU nor in the TEU).[18]

3. The principle of supremacy of EU law in the practice of the CJEU with special regard to national constitutions

The principle of supremacy (also referred to as 'precedence' or 'primacy') of European Union (EU) law is based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU Member State (national law), EU law will prevail. If this were not the case, Member States could simply allow their national laws to take precedence over primary or secondary EU legislation, and the pursuit of EU policies would become unworkable.

The principle of supremacy of EU law has developed over time by means of the case law (jurisprudence) of the CJEU. It is not enshrined in EU Treaties, although there is a brief declaration annexed to the Treaty of Lisbon in this regard.[19] As the CJEU stated in its famous judgment *van Gend & Loos*, the EU constitutes a new legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.[20]

In *Van Gend en Loos v Nederlandse Administratie der Belastingen*[21], the CJEU declared that the laws adopted by EU institutions were capable of creating legal rights which could be enforced by both natural and legal persons before the courts of the Member States. Therefore, EU law has a direct effect. According to the principle of supremacy of EU law, in case of a conflict between EU law and the law of the Member States, EU law prevails.

16 | Rasmussen, 2014, p. 136; Horvat Vuković, 2019, p. 250.
17 | Rasmussen, 2014, p. 13; Horvat Vuković, 2019, p. 250.
18 | Trstenjak, 2013, p. 72. Only a Declaration concerning supremacy annexed to the Treaty of Lisbon and adopted in 2007 by the Intergovernmental conference which adopted the Treaty of Lisbon, refers to this principle. The Declaration refers also to an Opinion of the Legal Service of the Council on the supremacy of EU law from 2007.
19 | European Union: Primary of EU law (precedence, supremacy) Summaries of EU legislation. [Online]. Available at: https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html (Accessed: 16 November 2024).
20 | Trstenjak, 2013, p. 71.
21 | Case 26/62 *Van Gend en Loos*, ECLI:EU:C:1963:1.

However, this principle does not mean that the CJEU can invalidate the national law, which conflicts with EU law. It rather means that in case of a conflict between national law and directly effective EU law, which cannot be solved by consistent interpretation of national law, national courts of the Member States must apply EU law instead of the national law.[22]

In *Costa v ENEL*[23], the Court further built on the principle of direct effect and captured the idea that the aims of the treaties would be undermined if EU law could be made subordinate to national law. As the Member States transferred certain powers to the EU, they limited their sovereign rights, and thus in order for EU norms to be effective they must take precedence over any provision of national law, including constitutions. This view of absolute primacy of EU law has been echoed through the CJEU's case law ever since.[24] In the narrative of the CJEU, the doctrine of supremacy was laid down in *Costa v ENEL* in 1964, but was part of EU law from the outset.[25] However, supremacy in fact became a reality when it was accepted by national courts, and different national courts accepted it at different times, with uniform acceptance not being achieved until the early 1990s.[26]

Further examples of cases in which the CJEU affirmed the supremacy of EU law include *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*[27], *Amministrazione delle Finanze dello Stato v Simmenthal SpA*[28], *Marleasing SA v La Comercial Internacional de Alimentacion SA*[29].

In these cases, the CJEU clarified that the primacy of EU law must be applied to all national acts, whether they were adopted before or after the EU act in question. Where EU law takes precedence over conflicting national law, the national provisions are not automatically annulled or invalidated. However, national authorities and courts must refuse to apply those provisions as long as the overriding EU norms are in force. The principle

22 | Trstenjak, 2013, p. 72.
23 | Case 6/64 *Costa,* ECLI:EU:C:1964:66.
24 | Bruggeman and Larin cite Case C-119/05 *Lucchini*, ECLI:EU:C:2007:434, para 61; C-213/89 *Factortame*, ECLI:EU:C:1990:257, paras 17–18; Case C-409/06 *Winner Wetten*, ECLI:EU:C:2010:503, para. 61.
The only two possible exceptions, i.e., where a relative interpretation of the primacy of EU law is used, could be seen in *Omega* and *Sayn Wittgenstein*. In these cases, the CJEU seemed to depart from the strict, unconditional hierarchy it maintained in its case law discussed above, and which was taken up again later. In *Omega*, the German Federal Administrative Court (*Bundesverwaltungsgericht*) asked the CJEU whether it could prohibit a laser gaming facility from providing services deemed to infringe the principle of human dignity as enshrined in the German Constitution, even if it were to restrict the free movement of goods and services in EU law. The Court found this prohibition to be justified based on public policy exceptions provided for in EU Treaties. In *Sayn Wittgenstein*, the question arose whether a law abolishing nobility as an expression of the constitutional principle of equality in Austria posed a legitimate restriction to the free movement of persons in EU law. The CJEU explicitly relied on Article 4(2) TEU in justifying the derogation based on public policy grounds. In both cases, the Court allowed for limitations to the EU's fundamental freedoms, but not stemming (only) from domestic constitutional principles, but based on policy objectives, it deemed legitimate in EU law. Brugeman and Larin, 2020, p. 22.
25 | Nagy, 2024, p. 72.
26 | Ibid.
27 | Case 11-70 *Internationale Handelsgesellschaft mbH*, ECLI:EU:C:1970:114.
28 | Case 106/77 *Simmenthal SpA*, ECLI:EU:C:1978:49.
29 | Case C-106/89 *Marleasing SA*, ECLI:EU:C:1990:395.

of supremacy therefore seeks to ensure that people are uniformly protected by EU law across all EU territories.

It should be noted that the supremacy of EU law only applies where Member States have ceded sovereignty to the EU – in fields such as the single market, environment, transport, etc. However, it does not apply in areas such as education, culture or tourism.[30]

Some scholars argue that the notion of 'constitutional identity' is used by various constitutional courts (some of which are less and less politically independent) to carve out ever-larger areas of 'constitutional identity' by themselves and thus undermine the supremacy of EU law. Namely, national constitutional and supreme courts as well as other Member State institutions play a crucial role in both cooperating with and in counterbalancing the CJEU.[31] However, the CJEU further expanded its powers after the entry into force of the Charter of Fundamental Rights because this enabled the CJEU to act as a constitutional court. Its slow broadening of powers with special reference to *Fransson*[32] erodes the functioning of national courts even in situations which are only 'in the reach' of EU law.[33]

4. The practice of the ECtHR with regard to the relation of the ECHR and national constitutions

In this part of the paper, the ECtHR's *Sejdic Finci v. Bosnia and Herzegovina* judgement[34] will be presented to illustrate that the ECtHR once considered a constitutional provision in violation of the European Convention, therefore conferring a higher status to the Convention than to the constitution of a Member State of the Council of Europe.

In this judgement, the ECtHR ruled that Bosnia and Herzegovina violated Article 14 of the Convention, taken in conjunction with Article 3 of Protocol No. 1 as regards the applicants' ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina. Specifically, the Constitution of Bosnia and Herzegovina is, in reality, an international agreement (the Dayton Agreement). The Constitution of Bosnia and Herzegovina is an annex to the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina ('the Dayton Agreement'), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. As part of a peace treaty, the Constitution was drafted and adopted without the application of procedures which could have provided democratic legitimacy. It constitutes the unique case of a constitution which had never been officially published in the official languages of the country concerned but was agreed and published in a foreign language, English. The Constitution confirmed the continuation of the legal existence of Bosnia and Herzegovina as a State, while modifying its internal structure (see paragraph 6 of the judgement). The Constitution makes a distinction between 'constituent peoples'

30 | European Union: Primary of EU law (precedence, supremacy) Summaries of EU legislation.
31 | Bruggeman and Larik, 2020, p. 21.
32 | C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.
33 | Horvat Vuković, 2019, p. 254.
34 | *Sejdic Finci v. Bosnia and Herzegovina, Grand Chamber, application nos. 27996/06 and 34836/06, 22 December 2009.*

(persons who declare affiliation with Bosniacs, Croats and Serbs) and 'others' (members of ethnic minorities and persons who do not declare affiliation with any particular group because of intermarriage, mixed parenthood, or other reasons). In the former Yugoslavia, a person's ethnic affiliation was decided solely by that person, through a system of self-classification. Thus, no objective criteria, such as knowledge of a certain language or belonging to a specific religion were required. There was also no requirement of acceptance by other members of the ethnic group in question. The Constitution contains no provisions regarding the determination of one's ethnicity: it was seemingly assumed that the traditional self-classification would suffice (see paragraph 11 of the judgement). Only persons declaring affiliation with a 'constituent people' are entitled to run for the House of Peoples (the second chamber of the State Parliament) and the Presidency (the collective Head of State).

The applicants of the case describe themselves to be of Roma and Jewish origin respectively. Since they do not declare affiliation with any of the 'constituent peoples', they are ineligible to stand for election to the House of Peoples (the second chamber of the State Parliament) and the Presidency (the collective Head of State).

The first question the ECtHR had to resolve was whether the respondent State may be held responsible. Although the Constitution of Bosnia and Herzegovina is an annex to the Dayton Agreement, itself an international treaty, the power to amend it was, however, vested in the Parliamentary Assembly of Bosnia and Herzegovina, which is clearly a domestic body. In those circumstances, leaving aside the question of whether the respondent State could be held responsible for putting in place the contested constitutional provisions, the Court considered that it could nevertheless be held responsible for maintaining them (see paragraph 30 of the judgement).

The ECtHR stated that this exclusion rule pursued at least one aim which was broadly compatible with the general objectives of the Convention, as reflected in the Preamble to the Convention, namely the restoration of peace. When the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and 'ethnic cleansing' (see para 45. of the judgement). The ECtHR asserted that it did not need to decide whether the upholding of the contested constitutional provisions after ratification of the Convention could be said to serve a 'legitimate aim', the maintenance of the system in any event did not satisfy the requirement of proportionality (see paragraph 46 of the judgement). Thus, the ECtHR concluded that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacked an objective and reasonable justification and therefore breached Article 14, taken in conjunction with Article 3 of Protocol No. 1. Secondly, the ECtHR also found that the impugned precondition for eligibility for election to the Presidency constituted a violation of Article 1 of Protocol No. 12.

Therefore, the Grand Camber of the Court had no doubts that a constitutional norm could be found in violation of the Convention and that it was the duty of the respondent Member State to rectify the situation – i.e. to amend its Constitution (how this was realistic with regard to Bosnia and Herzegovina shows the fact that today, in 2024, the judgement has not yet been implemented). There are two dissenting (one of which is partly concurring and partly dissenting) opinions with the judgement. I will cite from judge Bonello's dissenting opinion:

> 'the Court has almost unlimited powers when it comes to granting remedies to established violations of Convention-acknowledged human rights – and that surely is as it should be. But do these almost unlimited powers include that of undoing an international treaty, all the more so if that treaty was engineered by States and international bodies, some of which are neither signatories to the Convention nor defendants before the Court in this case? More specifically, does the Court have jurisdiction, by way of granting relief, to subvert the sovereign action of the European Union and of the United States of America, who together fathered the Dayton Peace Accords, of which the Bosnia and Herzegovina Constitution – impugned before the Court – is a mere annex?'

This reveals that the question raised was not whether a constitution can be found in violation of the Convention, but whether the ECtHR has the power to undo an international treaty. Therefore, it is the stand of the ECtHR that the Convention has supra-constitutional strength. When one sees, for the example, the practice of the Croatian Constitutional Court which gave the Convention quasi-constitutional strength as it found that a violation of the Convention also means, by itself, the violation of the Constitution, one can truly say that perhaps the Convention is really above all other sources of law in Council of Europe Member States when it comes to the protection of human rights and fundamental freedoms. However, no other cases in which the ECtHR weighed the provisions of another constitution against the Convention occurred, so the answer is still vague, but it can be said that similarly to the CJEU' earlier example, the ECtHR, with *Sejdic Finci*, also tipped the scale in favour of Convention law, demolishing the pre-established pyramid of a legal system.

5. The standpoint of national constitutional courts with regard to the relation of EU law and national constitutions

The legal theory divides Member States into three groups according to their position on the supremacy of EU law in relation to the national constitution: Member States that acknowledge full supremacy, Member States that acknowledge limited supremacy of EU law in relation to the national constitution, and Member States that principally assume supremacy of the national constitution over EU law.[35] It should also be highlighted that Article 4(2) TEU stipulates that the Union shall respect the 'national identities, inherent in their fundamental structures, political and constitutional' of the Member States. It should also be mentioned that the Maastricht Treaty bound the Union to respect the 'national identities' of Member States (see Article F 1.), which the Lisbon Treaty tried to autonomously define national identities, inherent in the State's 'basic structures, political and constitutional'.[36] For this reason, the concept of 'national' identity is equalised in the literature with 'constitutional' identity – as national identities function as a border for *intra vires* actions of EU bodies.[37] Interestingly, contrary to constitutional identity, which

35 | Trstenjak, 2013, p. 74.
36 | Horvat Vuković, 2019, p. 256.
37 | Ibid.

has a clear textual basis (Article 4(2) of the TEU), the doctrine of supremacy has never been codified in EU Treaties.[38]

It should be highlighted that some national constitutional courts contested the notion of supremacy of EU law with regard to national constitutions, especially with regard to the protection of human rights. The first was the famous *Bundesverfassungsgreicht* (BVerfGE) as early in 1967 when it invoked its right to control EU law in this sense, and the second was the Italian Constitutional Court which established its *controlimiti*[39] doctrine in 1973.[40] This prompted the CJEU to incorporate guarantees of fundamental rights in its *Nold* judgement[41] in 1974. However, the BVerfGE rejected the supremacy of EU law over constitutional norms guaranteeing fundamental rights and freedoms in its famous *Solange I* judgement.[42] This prompted an interesting interaction between the CJEU and the BVerfGE, in which the CJEU convinced the BVerfGE to remain neutral, as long as it was convinced that EU law provided effective protection which was significantly similar to that stemming from the Grundsgesetz and that protected their essential meaning, what BVerfGE did in its equally famous *Solange II*[43] judgement.[44] The CJEU overcame this problem by reading human rights into EU law as general principles of law. In 2000, these general principles of law were codified in the EU Charter of Fundamental Rights and became a cornerstone of the European constitutional architecture.[45] Therefore, the problem of accepting the supremacy of EU law in matters related to the protection of human rights and fundamental freedoms was settled by court dialogue. There has

38 | Nagy, 2024, p. 68.
The Constitutional Treaty aimed to resolve the issue by providing in Article I-6 that '[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States'; however, the Treaty was not adopted. When it was converted into the Lisbon Treaty, this provision was specifically rejected as having the very constitutional character that was disallowed by the European *pouvoir constituant*. This rejection might potentially give rise to *a contrario* arguments. Article I-6 was replaced with Declaration 17 on Primacy attached to the Lisbon Treaty. Although the Declaration may be interpreted in such a way that the Member States signed up for the CJEU's narrative of supremacy, it is ambiguous how much legal weight national constitutional courts will give to 'recall[ing]' the CJEU's case law. More importantly for the present analysis, however, the Declaration gives no hint as to interpretive primacy. Ibid.

39 | The Italian Constitutional Court, in its 1973 *Frontini* judgement, started developing its *controlimiti* doctrine, a version of which has remained actual to this day. The Court reasoned that Italy's participation in European integration brought about certain limitations of Italian sovereignty. However, these limitations themselves must find their limits within core principles of the Italian constitution. The transfer of sovereignty to the European Community (EC) does not 'give the organs of the EEC an unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of man'. See Corte costituzionale (Corte cost.) [Constitutional Court], 18 December 1973, n. 183, G.U. 1973 (It.). The Court subsequently further developed its doctrine in the *Granital* and *FRAGD* cases. See Corte costituzionale (Corte cost.) [Constitutional Court], 5 June 1984, n. 170, G.U. 1984 (It.); Corte costituzionale (Corte cost.) [Constitutional Court] 21 April 1989, n. 232, G.U. 1989 (It.). Scholtes, 2021, pp. 536–537.

40 | See Horvat Vuković, 2019, p. 253.

41 | C 4/73 *Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, ECLI:EU:C:1974:51.

42 | *Solange I*, BVerfGE 37, 271 (2 BvL 52/71), p. 280.

43 | *Solange II*, BVerfGE 73, 339 (2 BvR 197/83), pp. 378–381.

44 | Horvat Vuković, 2019, p. 253.

45 | Nagy, 2024, p. 73.

been no documented case where a national constitutional court has refused to honour a CJEU judgment for breaching nationally protected fundamental rights. The 'Solange' compromise has worked effectively, resulting in two distinct and parallel fundamental rights regimes. On the one hand, national constitutional courts have deactivated their constitutional review powers, but have reserved the right to use them, if necessary.[46]

Later, the BVerfGE's 1993 Maastricht judgment, for instance, framed national limitations to the reach of EU law as a matter of sovereignty as Kompetenz-Kompetenz, or the capacity to decide who is competent.[47] The now famous ruling of the BVerfGE with regard to the *Weiss* case[48] in which the German court found the ruling of the CJEU *ultra vires*, also shows the problems with the CJEU's interpretation of the principle of supremacy of EU law.

The Italian Constitutional Court invited, in *Taricco*[49], the CJEU to 're-interpret' its ruling and indicated that otherwise it would be compelled to pronounce it *controlimiti*, following the Italian version of the Solange principle.[50] In this case, the court held that Italian legislation concerning VAT was not aligned with EU law. However, the Italian Constitutional Court found that compliance with the ruling of the CJEU would result, from the perspective of Italian law, in a violation of the prohibition of retroactive application *in peius* of criminal law.[51] The Italian Constitutional Court admits that European law and decisions of the CJEU may not only prevail over national legislation but also derogate from the Constitution. Nevertheless, when the implementation of EU law results in the violation of the fundamental principles of the Constitution, the Constitutional Court claims to maintain jurisdiction and competence to intervene in protection of the core principles of the Italian Constitution.[52] This prompted the so called 'Tarrico saga' in which the Italian Constitutional Court, after the *Tarrico* decision, referred three new questions[53] to the CJEU.

46 | Nagy, 2024, p. 85.
47 | Scholtes, 2021, p. 537.
48 | Case C-493/17 *Weiss*, EU:C:2018:1000.
The CJEU found that the measure in question, although more economic than monetary policy, was still covered by the European Central Bank's monetary competence. In turn, the BVerfGE found the ruling *ultra vires* and, hence, concluded that it was to be ignored. It established that it could not rely on the CJEU's judgment, as its central part was 'simply not comprehensible' and 'objectively arbitrary' and took the interpretation of the relevant provisions of EU law into its own hands. Its 'independent' interpretation concluded that the ECB decisions 'manifestly' violated 'the principle of proportionality'. See in Nagy, 2024, p. 78.
49 | C-105/14 *Tarrico and Others*, EU:C:2015:555.
50 | Nagy, 2024, p. 75.
51 | Capelli, 2023, p. 94.
52 | Capelli, 2023, p. 95.
53 | To begin with, the Constitutional Court asked the European Court of Justice whether Article 325(1) and (2) TFEU were to be interpreted as requesting criminal courts to disregard national limitation periods rules even in cases where (1) a sufficiently precise legal basis for setting aside such legislation lacks and when (2) limitation is part of the substantive criminal law in the Member State's legal system and is as such subject to the principle of legality. Finally, the Italian Court interrogated the CJEU as to whether the judgment in *Taricco I* was to be interpreted as requiring the criminal courts to disregard national legislation concerning limitation periods even when the setting aside such legislation would contrast with the supreme principles or with the inalienable human rights recognised under the Constitution of the Member State. Capelli, 2023, p. 99.

In response to the request for a preliminary ruling on behalf of the Italian Constitutional Court, the CJEU delivered a conciliatory decision in which it accepted that, with the view of ensuring the respect of the principle of legality as understood by the Italian Constitutional Court, the national judges could apply the Italian provisions concerning the statute of limitations even if this would result in a violation of the Member States' duty to protect the financial interests of the Union (the *Tarrico II* case[54]). However, in the *Tarrico II* decision the CJEU continued to uphold the doctrine of the supremacy of EU law but gave Member States discretion with regard to ongoing criminal cases in a procedural field of law, namely limitation periods, provided that the matter had not yet been harmonised by EU law. Thus, the CJEU in *Taricco II* refuses to attenuate or to allow any exception to the primacy of EU law but shows itself conciliatory. At the same time, the Court avoids a direct confrontation over whether and how to resolve a discrepancy between EU law and national constitutional law principles.[55] The response of the Italian Constitutional Court came[56] shortly after and the Court affirmed that, while the Court of Justice had the sole authority to interpret EU law uniformly and determine whether it had direct effect, it was also undeniable that, as recognised by the *M.A.S. and M.B.* judgement, the Italian legal system could not accept an interpretive result that violated the principle of legal certainty in criminal matters.[57]

Both the Spanish and the French Constitutional Courts read the clause contained in Article 4(2) of the TEU as 'containing an implicit limit to the primacy of European law whenever that law would affect national constitutions, or at least their fundamental structures'. The Spanish Constitutional Tribunal, in the course of the ratification of the Constitutional Treaty, argued that Article I-5 directly incorporated into the Treaty the reservations to supremacy that national constitutional courts had been making for years.[58] The French *Conseil Constitutionnel* came to a similar conclusion. It found that, despite the express inclusion of a supremacy clause in the CT, because Article I-5 shows that the Treaty 'has no effect upon [...] the place of [the French Constitution] at the summit of the domestic order'. In 2006, the *Conseil* went further in practically developing a constitutional identity doctrine for the first time. It found that the transposition of European directives must not run counter to principles of French constitutional identity 'unless the constituent [power] has agreed to this'. From this, the *Conseil* has effectively developed a doctrine of constitutional identity that must prevail over community law.[59]

Also, the Polish Constitutional Court and the Romanian Constitutional Court have each expressly pronounced a CJEU ruling non-binding for being *ultra vires*.[60]

It is interesting to mention how the Croatian Constitutional Court 'solved' the problem of absolute supremacy of EU law. In a 2015 decision[61] the Court stated:

> 'The Constitutional Court lastly finds that there is no need to question, in this constitutional procedure, the material alignment of the referenda question with EU law *as the Constitution*

54 | Case C-42/17 *M.A.S. and M.B.*, ECLI:EU:C:2017:936.
55 | Capelli, 2023, p. 101.
56 | Judgement No. 115/2018.
57 | Capelli, 2023, p. 102.
58 | Scholtes, 2021, p. 537.
59 | Scholtes, 2021, p. 538.
60 | Nagy, 2024, p. 75.
61 | U-VIIR-1159/2015, 8 April 2015, Official gazette 43/2015.

> *is, by its legal strength, above EU law* (highlighted by the author). In other words, with regard to items I. and II. of the ruling of this decision, there are no reasons to conduct the examining with regard to the law which is in force in the Republic of Croatia on the basis of the Treaties and in the light of Article 141.c of the Constitution.'

This decision represents the only decision of the Croatian Constitutional Court with regard to the principle of supremacy of EU law. The Court did not, in any way, explain why it held that the Constitution is, by its legal strength, above EU law. It just stated this as a matter of fact. It is almost as the Court was, at the time, oblivious of the importance of the question it just, so laconically, resolved and the ongoing debate between the CJEU and other constitutional courts of the Member States. This was also highlighted by Horvat Vuković who wrote that 'such laconic dismissal of EU law supremacy must be taken as a reckless omission of the Court to clarify the boundaries of effects of EU law in the context of preservation of specific Croatian constitutional identity'.[62]

With this in mind, it must be concluded that the Croatian Constitutional Court did not, in any way, set the 'rules of the game' when discussing the relation of EU law, principle of its supremacy and the Constitution. With its laconic wording, the Court summarily dismissed the long-standing CJEU case law on the principle of supremacy. Therefore, the only possible conclusion is that the Croatian Constitutional Court does not recognize the principle of supremacy with regard to the Constitution.

We can clearly see the emergence of a more pronounced constitutional identity and an equivalent concept. While the founding States we studied have been examples of constitutionally formulating the limits to which they have adhered in the supranational legal order for decades, the content and name of these limits have also changed over time. German examples have been referred to several times, from the *Solange I* decision to the Own Resources Decision, through which we can see the search for the way in which these specificities have been formulated. At the same time, the protection of the 'inner core' of the constitution in the regime-changing States emerged at a time when a more streamlined constitutional court doctrine was available, which may be attributed to the more uniform language of the courts in the use of concepts. In this sense, constitutional identity is linked to the protection of the Constitution and to the value of the primacy of the Constitution.[63]

6. Conclusion

The pivotal question, when talking about the relation of EU law and national law, including Member States' constitutions, is the question of the principle of supremacy of EU law. This principle does not exist in legal texts forming EU law. It was introduced by the CJEU in *Costa* in 1964. However, the CJEU needed to go through several obstacles[64] in order to enforce this new principle. The first was perhaps the easiest – to establish that this principle is indeed a 'real' legal principle that Member States need to obey. The

62 | Horvat Vuković, 2019, p. 262. See, also Bačić, 2023, p. 130.
63 | Berkes, 2023, p. 403.
64 | See Nagy, 2024, p. 71.

second was the problem of protecting human rights in the application of EU law, which was found by several constitutional courts as lacking. This problem was solved through a dialogue between the CJEU and the constitutional courts, especially with the BVerfGE, as constitutional courts accepted that adequate protection of human rights in EU law exists. There has been no documented case where a national constitutional court has refused to honour a CJEU judgment for infringing nationally protected fundamental rights. The 'Solange' compromise has worked effectively, resulting in two distinct and parallel fundamental rights regimes.[65] However, the third problem shows to be difficult to solve and it is linked with CJEU *ultra vires* actions according to the Member States' constitutional courts. In such cases, the constitutional courts were forced to block the implementation of a CJEU ruling (the cases of the BVerfGE and the Polish and Romanian constitutional courts) or seek, through dialogue, that the CJEU backtracks (the *Tarrico* saga). It is obvious that at least some constitutional courts are not ready to give the CJEU carte blanche in the interpretation of EU law with regard to its implementation in a manner which could violate their constitutions, or at least their constitutional identity. When such problems occur, they appear to be insolvable because both courts 'in conflict' 'claim to be 'to be right' and as 'border organs' operating at the threshold between law and politics, they both are advocating Kelsenian 'basic norms' that are mutually not reconcilable'.[66] This is why Graser advocates for a new institution: a European court that could be invoked when Member States see a violation of interests of the kind described above; a court that would be composed of Member State judges delegated to that institution only on the occasion of such disputes, and of some judges, in addition, of the European Court of Justice; an institution, hence, which would not just avoid any suspicion of an integrationist bias, but also be able to transcend the particularistic national views.[67]

65 | Nagy, 2024, p. 85.
66 | Hilpold, 2021, p. 190.
67 | Graser, 2023, p. 45.

Bibliography

Bačić, P. (2023) 'On Croatian Constitutional Identity and European Integration' in Varga, Zs. A., Berkes, L. (ed.) *Common Values and Constitutional Identities—Can Separate Gears Be Synchronised?*. Miskolc–Budapest: Central European Academic Publishing, pp. 105–133; https://doi.org/10.54237/profnet.2023.avlbcvci_4.

Berkes, L. (2023) 'Comparative Analysis: The Shells that Embrace Constitutional Identity' in Varga, Zs. A., Berkes, L. (ed.) *Common Values and Constitutional Identities—Can Separate Gears Be Synchronised?*. Miskolc–Budapest: Central European Academic Publishing, pp. 391–412; https://doi.org/10.54237/profnet.2023.avlbcvci_10.

Bruggeman, R., Larik, J. (2020) 'The Elusive Contours of Constitutional Identity: *Taricco* as a Missed Opportunity', *Utrecht Journal of International and European Law*, 35(1) pp. 20–34 [Online]. Available at: https://doi.org/10.5334/ujiel.489 (Accessed: 16 November 2024).

Burckhardt, D. (2017) 'Belittling the Primacy of EU Law in Taricco II', *Verfassungsblog*, 7 December. [Online]. Available at: https://verfassungsblog.de/belittling-the-primacy-of-eu-law-in-taricco-ii/ (Accessed: 16 November 2024).

Capelli, T. (2023) 'Article 4(2) TEU: The respect for national identity in the context of European integration', *Astrid Rassegna,* 2023(16), pp. 1–131.

Graser, A. (2023) 'The Dilemma of the Presumptuous Watchdog: Constitutional Identity in the Jurisprudence of the German Federal Constitutional Court' in Varga, Zs. A., Berkes, L. (ed.) *Common Values and Constitutional Identities—Can Separate Gears Be Synchronised?*. Miskolc–Budapest: Central European Academic Publishing, pp. 13–49; https://doi.org/10.54237/profnet.2023.avlbcvci_1.

Guastini, R. (2023) *Sintaksa prava (Law Syntax)*. Zagreb: Naklada Breza.

Guastini, R. (2024) 'Legal System' in Burazin, L., Himma, H., Pino, G. (eds.) *Jurisprudence in the Mirror The Common Law World Meets the Civil Law World*. Oxford: Oxford University Press, pp. 203–224; https://doi.org/10.1093/9780191964718.003.0033.

Hart, J. (1994) *The Concept of law*. Oxford: Clarendon Press.

Hilpold, P. (2021) 'So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European 'Popular Spirit', *Cambridge Yearbook of European Legal Studies*, 2021(23), pp. 150–192 [Online]. Available at: https://doi.org/10.1017/cel.2021.3 (Accessed: 16 November 2024).

Horvat Vuković, A. (2019) 'Ustavni sud Republike Hrvatske kao "europski" sud i očuvanje nacionalnih standarda zaštite temeljnih ljudskih prava i sloboda', *Zbornik Pravnog fakulteta u Zagrebu*, 69(2), pp. 249–276 [Online]. Available at: https://doi.org/10.3935/zpfz.69.2.04 (Accessed: 16 November 2024).

Kelsen, H. (2012) *Čista teorija prava (Pure Theory of Law)*. Zagreb: Naklada Breza.

Kelsen, H. (2015) *Opća teorija normi*. Zagreb: Naklada Breza.

Nagy, C.I. (2024), 'The rebellion of constitutional courts and the normative character of European Union law', *International and Comparative Law Quarterly*, 73(1), pp. 65–101 [Online]. Available at: https://doi.org/10.1017/S0020589323000519 (Accessed: 16 November 2024).

Scholtes, J. (2021) 'Abusing Constitutional Identity', *German Law Journal*, 22(4), pp. 534–556 [Online]. Available at: https://doi.org/10.1017/glj.2021.21 (Accessed: 16 November 2024).

Trstenjak, V. (2013) 'National Sovereignity and the Principle of Primacy in EU Law and Their Importance for the Member States', *Beijing Law Review*, 4(2), pp. 71–76 [Online]. Available at: https://doi.org/10.4236/blr.2013.42009 (Accessed: 16 November 2024).