| Chapter 1 |

In the Shadow of Legal Imperialism: The Supremacy of EU Law Over the Member States

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ABSTRACT

The primacy of EU law over the domestic law of the Member States is a matter of course. Nonetheless, the precise boundaries of EU law are often disputed between the Member States and the EU: while the Court of Justice of the EU draws those boundaries pursuant to the autonomy (sovereignty) of the EU legal order (i.e., from the inside), the national constitutional courts define the same boundaries pursuant to their own national constitutions (i.e., from the outside). The parallel jurisdiction of the Court of Justice and of the constitutional courts has exposed the tensions between the rule of law and democracy, and between the legal sovereignty of the European legal order and the popular sovereignty of European nations. Insofar as these tensions are resolved only according to the rule of law, without democratic processes, legal imperialism will impose itself.

KEYWORDS

conflict of jurisdictions, constitutional identity, democracy, European legal order, pluralism, primacy, rule of law, sovereignty, supremacy, *ultra vires*.

Introduction

Legal tensions between the institutions of the European Union (EU)[1] and the organs of the Member States exercising governmental powers have recently reached a level that has probably never been seen before.[2] One of the sources of those tensions is the question about the boundaries of the powers of the EU: to what extent can the

1 I will use the term "EU" regardless of the current terminology (European Communities, Community, Union).

2 By way of example, it is worth mentioning, on the one hand, from a legal perspective, the decision of the German Federal Constitutional Court given in the Public Sector Purchase Program (PSPP) case, according to which a concrete judgment of the European Court of Justice (CJEU) is *ultra vires*, and from a political perspective, Resolution no. 2021/2935 of the European Parliament on the rule of law crisis in Poland, which, according to which the Polish Constitutional Tribunal is illegitimate.

Metzinger, P. (2022) 'In the Shadow of Legal Imperialism: The Supremacy of EU Law over the Member States' in Osztovits, A., Bóka, J. (eds.) *The Policies of the European Union from a Central European Perspective.* Miskolc–Budapest: Central European Academic Publishing. pp. 13–54. https://doi.org/10.54171/2022.aojb.poeucep_1

Union influence the acts of the governments, of the legislators and of the courts of the Member States—and, vice versa, to what extent can the Member States restrict the functioning of the Union?

The EU is not a pure intellectual concept; there are wills behind that hold it. By rephrasing Schopenhauer (*Die Welt als Wille und Vorstellung*), I argue that the EU is, on the one hand, an idea represented by the Court of Justice of the EU (CJEU),[3] promoting the rule of law, and, on the other hand, it is a bundle of wills, represented by the national constitutional courts, promoting democracy. Alternatively, while the CJEU usually follows a pure, Kelsenian theory of law,[4] the national constitutional courts do not want to detach themselves so strictly from the social reality.[5] It seems that the CJEU, based on the rule of law, has transformed the autonomy of the European legal order into a real sovereignty (*infra*, Sections 2.2 and 3.4), and that legal sovereignty sometimes contradicts the popular sovereignty of the Member States, protected by the national constitutional courts (*infra*, 2.4 and 3). Although I am not arguing here for constitutional pluralism,[6] I am not convinced that the primacy of EU law over the national laws of the Member States would necessarily imply that the CJEU should have the last word in every single question which is intelligible to EU law. My hypothesis is that if we accept that the CJEU has been given absolute jurisdiction over the constitutional courts of the Member States as well, then democracy is necessarily subordinated to the rule of law, and society—at least potentially—surrenders to legal imperialism (*infra*, 1.9). I think conflicts between the CJEU and the constitutional courts should not be conceived as a purely legal dilemma to be resolved either by the CJEU or by "the great minds of EU law scholarship." Quite the contrary, those conflicts are the necessary accessories of a real (legal and political, European) pluralism.[7] It is not worth eliminating that pluralism for the serenity of some public lawyers and/or European bureaucrats. The result of pluralism (i.e., plurality) is sometimes a mess, but it is an absolute supposition by democracy, and cannot be set aside by the rule of law. The title of this paper is metaphorical: legal imperialism has not yet been imposed, but some aspects of the autonomy of EU law may cast a shadow over the European democracies (*infra*, 1.8, 3.4).

3 The expressions Court of Justice of the European Communities, European Court of Justice, Court of Justice of the EU, etc. are all used with the abbreviation CJEU.

4 The CJEU's understanding of EU law seems to be an illustration of Kelsenian theory in judicial practice (Eckes, 2020, p. 5). However, the Kelsenian Grundnorm implies a legal polytheism (Irti, 2011, pp. 10–11).

5 If the CJEU were a commercial and/or administrative court, then its Kelsenian method could not be called into question. But the CJEU has public international law and constitutional law competences as well, in which the law must be confronted with the other subsystems of society.

6 According to constitutional pluralism, the question of who is the ultimate judicial authority—which court has Kompetenz-kompetenz—need not be resolved if only we adopt a pluralist vision of the European constitutional order (Kelemen, 2016, p. 145). In my view, 'constitutional pluralism' is a simple matter of fact in the EU.

7 Although the unity of the legal system is an indispensable requirement to complete the identity of the system (Bifulco, 2018, p. 168), European law—even if conceived as an independent legal system—is made to be used by several legal systems, i.e., plurality is inherent in EU law.

Because of the complex nature of the issue, I apply several approaches: constitutional law, public international law, and European law viewpoints are all necessary, and—to avoid legal blindness—they need to be confronted with considerations of political philosophy,[8] since the questions at hand concern fundamental ruptures on the whole European policy, of strategic social importance.[9] The comparative method is also indispensable:[10] I will use the case law of the Italian Constitutional Court[11] (ICC) as a reference for the interpretation of the decisions of the Hungarian Constitutional Court (HCC); some landmark decisions of the Czech, Danish, German, and Polish Constitutional Courts will also be dealt with. However, since the legal literature[12] has already dealt with this topic in multiple ways, my goal is not to supply a further analysis of the well-known case law,[13] but rather to expose the intellectual tensions between the rule of law and democracy in the interaction of the EU and the Member States.[14] This paper is a piece of legal epistemology.[15]

8 In the same way, some academics note that the question of establishing the principles of EU public tort law is not merely a technical issue, but a political one, as it touches upon fundamental questions of distributive justice and the form of government in the Union, and therefore should be the subject of democratic debate (Letelier, 2009, pp. 291–292).

9 Political philosophy deals with the most fundamental questions of the social existence of human beings (Lánczi, 1997, p. 14). The case law of the CJEU regarding the legal order of the EU can be conceived as an unacknowledged political theology hiding behind the modern concepts of law (cf. Dubouchet, 2009, p. 39).

10 Pursuant to Art. 4(2) of TEU, the Union shall respect the constitutional structures of Member States, and the CJEU draws inspiration from the constitutional traditions common to the Member States: Opinion of the CJEU (Full Court) of 18 December 2014, Opinion pursuant to Art. 218(11) TFEU, Case Opinion 2/13, ECLI:EU:C:2014:2454, (hereinafter: Opinion, C-2/13, ECLI:EU:C:2014:2454.) para. 37.

11 We may draw a methodological parallel between the provisions of the Italian Constitution (Art. 10 of the Italian Constitution sets forth that the Italian legal order shall comply with the generally accepted rules of international law, and pursuant to Art. 11 Italy shall accept—under the same conditions as the other States—the restriction of its sovereignty insofar as it is necessary for a legal order guaranteeing the peace and justice among nations, and shall promote international organizations established for that purpose), and Arts. E) and Q) of the Hungarian Basic Norm.

12 It is obviously impossible to discuss the entire body of legal literature on the topic. As the basic Hungarian work of a systematic and theoretical approach, see Kecskés, 2020; for the application of EU law by Hungarian courts, see Osztovits, 2014; and for a critical analysis of the practice of the HCC, see Vincze and Chronowski, 2018. For an easily available and very sound summary, see Chronowski, 2019.

13 The law-developing, law-making case law of the CJEU shaped the legal nature of European integration. However, the Member States have a Union, the Union has a legal system and a Court—not vice versa.

14 In the EU, the importance of the rule of law is much higher than that of democracy, and it is not by accident that the democratic deficit of the EU is abundantly discussed by legal scholars (see e.g., Craig, 2011a), while the 'deficit of the rule of the law' has not even been mentioned. Democracy (and/or the democratic deficit) is usually not contrasted with the rule of law by academic writers.

15 See Atias, 2002, p. 23. Legal epistemology deals with the subject matter of the activity of (European) lawyers, especially of judges.

Chapter 1 will attempt to define the topic at the highest level of legal abstraction. Within that abstract framework, Chapter 2 will analyze the tensions between EU law and national laws from the perspective of international public law, EU law, and constitutional law. Chapter 3 will finally pose the question, "How does that relationship work in the practice?" and will reflect on the collision between the legal sovereignty of the Union (as an idea) and the popular sovereignty in the Member States (as a will). I will finally draw some temporary conclusions.

1. Democracy *versus* the Rule of Law

Both the Treaty on the European Union (TEU)[16] and the Hungarian Basic Norm[17] recognize democracy and the rule of law—both deriving from human dignity—as fundamental values (axioms for the organization of the society). While democracy, by its very nature, is based on pluralism (and the plurality of values can be extremely chaotic), the rule of law needs and promotes certainty, uniformity, order, and hierarchy. Hence, those two basic values of our European world are not always on the same page.

1.1. The equal dignity of the individuals forming an organized community (a system) implies certain principles for the organization of the community. Both democracy and the rule of law recognize the principle of popular sovereignty: only those rules may be binding on the individuals belonging to a given State community that have been set forth either directly by that community or by the representatives elected—in a democratic way, respecting the equal freedom of the individuals—by the community. The drafter of the community's general rules must have democratic legitimacy.[18]

1.2. The fundamental method for the operation of democracy and the rule of law is the separation of powers.[19] In the European integration, the separation of powers is not simply the horizontal separation of the State powers, it has a vertical aspect as well: the powers are divided among the institutions of the Union and of the Member

16 Art. 2 TEU.

17 Basic Norm, Art. B)(1) and Art. II.

18 In the case law of the HCC the exercise of the public power is democratic if it can be traced back to the sovereign people (Vincze and Chronowski, 2018, p. 44). Berke went further: popular sovereignty and democracy under the rule of law imply that the citizens of the State are the guardian of the existing social order (Kecskés, 2003, p. 21).

19 In a democracy, under the rule of law there is no unlimited or unrestrictable power, and therefore certain powers necessarily restrict other powers (Decision No. 28/1995 (I. 19.) of the HCC. Basic Norm, Art. C) para. (1). As the CJEU has pointed out: in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive (Judgment of the CJEU (Grand Chamber) of 19 November 2019, A. K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy, Joined Cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, para. 124.)

States,[20] as well as among the institutions of the Union.[21] The separation of powers implies that the independence of the judge is detached from the State liability for the activity of the judge.[22]

1.3. The State is an organized community of the individuals forming it, having a legal personality separated from those individuals.[23] States may form further (inter-state or super-state) communities which may have their own legal personality.[24] The (external) sovereignty of each State represents its legal–ontological basis in public international law,[25] and human dignity defines the place of individuals in a democracy under the rule of law.[26] Self-determination is the cornerstone of human dignity and of State sovereignty as well. The necessarily equal sovereignty of the States[27] implies that their community—recognizing democracy and the rule of law—must consider its members, both theoretically and actually, as the single State considers the individuals that form it, with a fundamental difference: while the dignity of individuals is absolute,[28] the sovereignty of the State—with its consent—may be restricted.[29]

1.4. Regarding EU law, from the perspective of the Member States, we may conclude that: (i) one of the fundamental values of the Union is democracy, thus EU law may be binding on the Member States (and on their individuals and other entities) only insofar as that law has been accepted by the Member States either directly (i.e.,

20 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 224.

21 At the EU level, the separation of the powers is less clear-cut than within many of the Member States (Rosas, 2007, p. 1034).

22 As the CJEU has pointed out in Köbler, (Judgment of the Court of 30 September 2003, Gerhard Köbler v. Republik Österreich, Case C-224/01. ECLI:EU:C:2003:513.) (hereinafter: Köbler, CJEU Judgment, Case C-224/01. ECLI:EU:C:2003:513) para. 42: As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.

23 More precisely: the State is a legal entity constituted by the union of three elements (population, territory, and political power), which is a legal person recognized by public international law (Cornu, 2013, p. 362).

24 The legal personality is not necessarily a statehood, just as in the case of the EU, *infra*, 2.1.2.

25 Public international law qualifies the situation of the State in the international community by the notion of sovereignty, and builds the international legal order on it (Bruhács, 1999, p. 23).

26 To avoid any misunderstanding: I am not suggesting that human dignity would coincide with the sovereignty of the State; I am, however, suggesting that from a methodological perspective human dignity is an absolute point of reference for the legislation on individuals as well as sovereignty is an absolute point of reference for the legislation (both in international and in European law) about the State.

27 Charter of the UN, Art. 2 Pt. 1 (Combacau and Sur, 1999, p. 229).

28 Dignity is the immanent quality of human life, indivisible and unrestrictable, and thus equal for everyone (Decision No. 64/1991. (XII. 17.) of the HCC, D) 2) b).

29 However, scholars have pointed out that a classic notion like sovereignty might be misleading regarding EU law (Ost and Kerchove, 2002, p. 65); according to Kecskés, Hungarian public lawyers started dealing with the European integration with a certain delay because of a rigid concept of sovereignty (Kecskés, 2003, p. 21). Still, it is a legal and political fact that EU law has been built on the sovereignty of Member States, and that sovereignty was restricted by the Member States in the Founding Treaties.

the law has been created by them), or indirectly (i.e., the law has been created by the institutions, in the scope of their powers and according to the procedural rules of the legislation as determined by the Member States);[30] and (ii) another fundamental value of the European Union is the rule of law, and so each Member State is entitled to challenge any obligations put forward against it before a tribunal established by the law, and obligations against a Member State may be enforced only through a fair trial.[31] A dispute over an obligation is never a problem under the rule of law, while its settlement, the process for its resolution (independently from its length and result) is a proof and the catalyst of the rule of law.[32] According to the CJEU, the European integration is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question of whether the measures adopted by them are in conformity with the basic constitutional charter—the Treaty.[33]

1.5. As a logical consequence of the rule of law, each dispute must be formally closed, that is to say, a judge will make a decision, and regardless of the recognition of the right to appeal, it can no longer be challenged by the parties:[34] the final judgment must be executed. The rule of law can live together with legally wrong single decisions as well, and some ill-founded judgments do not undermine either the existence or the quality of the rule of law. Quite the contrary, the evolution of the rule of law is partially based on the diverging and developing case law, i.e., on the fact that the subsequent decisions of the courts mutually consider wrong. Legal persons (individuals and States) are not entitled to rely on *ius resistendi* when they must perform a final judgment that—according to them—violates their rights. A given legal system, sticking to the rule of law and to legal certainty, will not be able to recognize the situation as a problem when a final judgment infringes the fundamental values of the system. The legal system can correct itself only to a certain level, and beyond that level it may only recognize external correctives mechanisms. That immanent character of the legal system under the rule of law is positive, since it is the cornerstone of legal certainty, but it is worrisome from a democratic perspective. In fact, if we expect the parties to

30 Accordingly, Art. 5 TEU sets forth the fundamental principle of conferral, *infra*, 2.3.

31 Either through an infringement procedure pursuant to Arts. 258–260 TFEU, or by an action for damages according to the Francovich judgment.

32 Judicial disputes touching on the rule of law are a perfect laboratory for studying the constitutional nature of EU integration, and serve to shed light on some of the most debated legal challenges that it currently faces (Lenaerts, 2019, p. 17).

33 Judgment of the CJEU of 23 April 1986, *Parti écologiste* "Les Verts" v. European Parliament, Case 294/83, ECLI:EU:C:1986:166. By the term 'Treaty(s)' I refer to the current Founding Treaty(s).

34 Köbler, CJEU Judgment, Case C-224/01. ECLI:EU:C:2003:513C-224/01, ECLI:EU:C:2003:513, para. 38: The importance of the principle of res judicata cannot be disputed. To ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question. Regarding the right to a fair trial the ECHR has decided: one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts have finally determined that their ruling should not be called into question, ECHR, Case of 28342/95 Brumarescu v. Romania 61 (Application No. 28342/95).

accept final judgments as absolute authorities even if those judgments infringe upon fundamental democratic values, then we pose the rule of law over democracy. Such a hierarchy cannot be deducted from the democracy under the rule of law, because the relationship between the value of the rule of law and the value of democracy is a horizontal (not vertical) one.

1.6. It is thus no surprise that, at a certain level of the evolution of the rule of law, the claim for external control has arisen: the judgment being final in a given legal system may be challenged—to remedy a serious harm (injustice) that occurred in that legal system and not remedied by the final judgment, or was even caused by it—before a forum established out of that system.[35] An example for such external control is provided by the European Court of Human Rights (ECHR), which is authorized to examine final judgments in the legal system of a Member State, from the perspective of the potential breach of the parties' human rights.[36] The ECHR is not empowered to directly remedy (annul) the act of the State (judgment, law) breaching the human right of the party, but it may order pecuniary compensation. Legal certainty and justice are so reconciled in a way that the public act causing the harm remains valid and enforceable, while the individual harm gets material compensation. The same compensatory principle lays beyond the liability of Member States in EU law,[37] with the difference that under EU law the compensation is awarded by the judiciary of the same legal system that infringed the right of the individual, upon a special action brought pursuant to EU law.

1.7. The rule of law is not the only value in the EU.[38] The tension between democracy (the political power—legislator and government—having democratic legitimacy)

35 A remote, methodological precursor of this solution was the evolution of equity in England, besides common law.

36 The method of the system of the international investment protection established by the Washington Convention of 1965 (promulgated in Hungary by the Law Decree no. 27 of 1987) is based on the possibility to challenge an infringement committed in the legal system of a given State before a forum established out of that system, aiming at compensation. It is very instructive how the institutions of the Union treat the Washington system of the settlement of international investment disputes, as noted below 2.2.5.

37 Köbler, CJEU Judgment, Case C-224/01. ECLI:EU:C:2003:513, para. 39. The recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as res judicata. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of res judicata. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of res judicata of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.

38 Art. 2 TEU mentions a series of values without establishing a hierarchy among them, and their order is the following: human dignity, freedom, democracy, equality, the rule of law and respect for human rights. The regulation 2020/2092 of the Parliament and of the Council on a general regime of conditionality for the protection of the Union budget sets forth as well that there is no hierarchy among the values of the Union, and the rule of law and democracy are mutually presupposed.

and the rule of law (the professional judiciary power, independent from the political powers) is given by the fact that those two principles restrict each other in organizing the society; this is the dynamic of democracy under the rule of law. That tension—the corollary of the checks and balances among the branches of power—is one of the fundamental guaranties of the democracy under the rule of law. It is about the question of who should be given the last word in a social dispute: the democratically elected political power (that can be voted out of office), or the professional, independent, and irrevocable supreme judicial forum? Should the belief of the inaugurated politician in his/her own wisdom overrule the professional skills of the impartial judge, or, vice versa, the judge should control the politician.[39] The issue is more complex in the EU because of a further question: where is the supreme judicial forum to be found—at the level of the EU, or at the level of the Member States? Alternatively, has the classic hierarchic model of the law (regarding both the sources and the judicial system)[40] been replaced by a new model of the network,[41] in which there is a permanent dialogue among the centers of (political and judicial) power? Moreover, can courts enforce only the positive law, or should they consider political values as well? (i*nfra*, Chapter 3.)

1.8. EU law and politics identify the problems of the rule of law in its scarce, defective functioning.[42] Independently of the reality of those problems, the functioning of the rule of law might reach a level which is beyond what is necessary for the proper functioning of a democratic society, when the rule of law becomes counterproductive. By legal luxury, I mean an exaggerated use of the rule of law, when its costs greatly exceed its gains, and when the class of legal professionals (officials, attorneys, professors, judges, etc.)—necessary, of course, for the proper functioning of the rule of law—subordinates the interests of the society to its own class interests, consequently and without criticism (but usually not in bad faith). The situation is even worse when the perverse exaggeration of the rule of law hinders democracy and keeps the popular

39 While Montesquieu subordinated judges to the legislator ('judges are no more than the mouth that pronounces the words of the law'), according to Géza Marton, the text of the law is blind, and it is the judge that make it able to see.

40 According to some authors, in any constitutional order worthy of the name some judicial authority must have the final say (Kelemen, 2016, p. 139). We may note that the EU is certainly not a single constitutional order.

41 While classic legal systems have followed the values of coherence, security, stability and obedience, the network follows the values of creativity, subtlety, pluralism, and continuous learning; while the basis of the pyramid model is mechanic, the basis of the network model is relativistic, related to intersubjectivity and communication (Ost and Kerchove, 2002, p. 18). Instead of 'hierarchy' in the European legal space, it is sometimes said that the relationship between the EU and national legal orders remains a 'heterarchical' one (Kwiecień, 2019, p. 28).

42 See e.g., the procedure pursuant to Art. 7 TEU, the rule of law framework, and the regulation (EU, Euratom) 2020/2092 of the Parliament and of the Council on a general regime of conditionality for the protection of the Union budget. OJ L 433I, 22.12.2020, pp. 1–10. On that Regulation see Osztovits, 2021, pp. 68–70. The Regulation was challenged by Hungary and Poland at the CJEU, C-156, 157/21. Case C-157/21: Judgment of the CJEU (Full Court) of 16 February 2022. OJ C 148, 4.4. 2022, pp. 8–9.

sovereignty from prevailing: that is legal imperialism. Legal imperialism is a certain aggressive legal blindness that occurs when lawyers neglect the fact that the legal system is only one of the many subsystems in the society.[43] Legal imperialism goes on the offensive when legal professionals, especially judges (forming an independent branch of government) and bureaucrats who operate the rule of law, either refuse the social and political criticism regarding their activity, or (perhaps unconsciously) select among the critics according to their political orientation, and declare that the critics they do not like are waging an attack on the rule of law. It is another risk of legal imperialism when legal professionals—by jeopardizing the separation of powers—put forward an absolute claim to have the last word in each social issue, denying that certain social questions need political and democratic answers (sometimes over and over again).[44] A European legal imperialism will be imposed when the authority of EU law, as established by the CJEU, is enforced to the detriment of the basic democratic values of the Member States.

2. The Supremacy of EU Law

The primacy[45] of EU law over the national laws of the Member States is dogma, and it is a basic principle for the organization of the European society. Still, for a proper assessment of that dogma, it is necessary to overview first the international law and EU law process leading to its establishment, then its evolution in EU law and the counter reactions by national constitutional laws. I think the fundamental question is not posed by the technical hierarchy between EU law and national laws, but rather by the relation between the sovereignty of the Union's legal order and the popular sovereignty of the European nations.

2.1. The Ontology of the EU Legal Order

2.1.1. The Union, by its genesis, is a legal reality: contrary to States, the legal existence of the Union is not an acknowledged fact[46] but a matter of law, created by the Member States with international treaties. This legal reality, of course, has become a political

43 A judge should be aware of the political context in which he/she is operating and the foreseeable consequences of their decisions (Rosas, 2019, p. 8).

44 The International Court of Justice—by wisely recognizing its own professional limits—has held in its opinion of 8 July 1996 that in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake. There are therefore intelligible legal questions that cannot be answered by the applicable legal system (which is a necessary consequence of Gödel's incompleteness theorem).

45 The diversity in terminology (precedence, primacy, supremacy) is indifferent here.

46 The genesis of the State is a pure matter of fact, and its recognition is a purely declarative act, Nguyên et al., 2003, p. 270.

reality as well, and the EU has its own political interests (to enhance the integration),[47] which may not always coincide with the interests of the Member States.

2.1.2. The EU is not a State;[48] it is not even a federal State.[49] It is therefore not a sovereign under international public law. The legal existence of the EU, and thus the existence of its legal order, are derivative: they exist only insofar as the Member States mutually restrict their sovereignty.[50] Hence the legal order of the EU is not the legal order of a sovereign State but a special system of international treaties, on the one hand, and a set of rules deriving from that system, on the other hand.[51] One of the corollaries of the restricted but reserved sovereignty of the Member States is the principle of conferral set forth in Art. 5 TEU. No matter how large the powers conferred on the EU are, that fact does not affect the sovereign statehood of the Member States.[52] Member States are the lords of the founding Treaties, they possess their sovereignty, the Union is only the tool to achieve common objectives.[53] In that respect, the HCC has laid down the presumption of reserved sovereignty: by joining the EU, Hungary did not waive its sovereignty; it allowed only the common exercises of some powers through the EU, so the reservation of the sovereignty of Hungary must be presumed when judging the common exercise of further powers not defined in the founding Treaties.[54]

47 It is the process of creating an ever-closer union among the peoples of Europe, pursuant to Art. 1 TEU. Legal literature notes that from the standpoint of the Union, in principle, the Member States are considered as 'constituent units' whose main purpose is to converge toward the Union (Mangiameli, 2013 p. 153). According to the CJEU the implementation of the process of integration is the raison d'être of the EU itself, Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 172.

48 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 156: the EU is, under international law, precluded by its very nature from being considered a State.

49 Despite of the fact that according to some scholars there are signs in the case law of the CJEU that affirm its position as the supreme court of an increasingly federal judicial system (Turmo, 2019). It has been raised also in public international law that the EU may be a pre-federation (Nguyên et al., 2003, p. 212).

50 The EU can be terminated by the Member States at any time, e.g., by withdrawing from it one by one according to their constitutional requirements, pursuant to Art. 50 TEU.

51 Accordingly, the CJEU has decided that EU law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States, Judgment of the CJEU (Grand Chamber) of 6 March 2018, Slowakische Republik v. Achmea BV. Case C-284/16. ECLI:EU:C:2018:158 (hereinafter: Achmea, CJEU Judgment, C-284/16, ECLI:EU:C:2018:158), para. 41.

52 Nguyên et al., 2003, p. 212.

53 Várnay and Papp, 2010, p. 183. However, there are views that if the Member States act as the "Masters of the Treaties' then that would another crack in the EU's rule of law and would not only be counter-productive, but also potentially disruptive for the supranational legal order as a whole (Casolari, 2021).

54 Decision No.22/2016. (XII. 5.) of the HCC, [60].

This complies with the theory of reserved powers of public international law,[55] acknowledged by the CJEU as well.[56]

2.1.3. Because of the values of democracy and of the rule of law, EU law may be binding on a Member State (and in a Member State) only insofar as that Member State has previously approved that binding force. Such an approval—its legal basis and genesis—fully depends on the (constitutional) law of that Member State.[57] It is impossible to have a Member State joined the EU against its sovereign will, and that sovereign will must be expressed according to the national law of that Member State.[58] However, joining the EU will *ipso facto* amend the constitutional structure of the Member State, because the former unity of its sovereignty (according to which the sovereignty was exercised by the organs of that Member State exclusively) has been broken by the accession.

2.2. The Nature of the EU Legal Order

2.2.1. The first question is whether the legal norms of the EU form an independent set of rules which is separated from the legal systems of the Member States, being mutually separated one from the others?[59] If EU law as a system is separated from the legal systems of the Member States, a question of collision arises: in a given case, which legal system—the European one or the national one—applies? At the same time, if EU law makes part of the legal systems of the Member States, then the problem of the hierarchy of norms appears.

2.2.2. The founding Treaties are treaties of public international law. The relationship between public international law and the domestic laws of sovereign States is a classic problem of public international law. It is well known that according to the dualist theory, on the one hand, public international law and domestic systems form two distinct systems, being different in terms of their subjects, objects, sources, and sanctions.[60] On the other hand, under the monist model, the legal system is an integrated one, and there are no borders between public international law and domestic

55 Nguyên et al., 2003, pp. 218–223.

56 Provided that the exercise of reserved powers cannot permit the unilateral adoption of measures prohibited by the Treaty. Judgment of the CJEU of 10 December 1969, Commission of the European Communities v. French Republic, Joined cases 6 and 11–69, ECLI:EU:C:1969:68 (hereinafter: Commission v. French Republic, CJEU Judgment, Joined cases 11–69, ECLI:EU:C:1969:68), para. 17.

57 Accordingly, the HCC has found that the basis for the application of EU law in Hungary is Art. E) of the Basic Norm, Decision No. 2/2019 (III. 5) of the HCC, operative part, no. 1.

58 However, this did not necessarily imply that the Constitution must have been amended because of Hungary's accession to the EU (Kecskés, 2003, p. 29).

59 The domestic laws of the Member States form mutually separate legal systems, independently of the fact that they are converging because of the integration process, and they have actually been interacting with each other regardless of the integration process as well (for that interaction see, e.g., the decision BH1999.465. of the Hungarian Supreme Court adopting the *Durchgriffschaftung* from Germany into Hungarian company law, and the HCC applies comparative methods not only in cases regarding EU law).

60 Bruhács, 1998, p. 83.

law. The monist model necessarily implies the question about primacy, supremacy, or precedence—that is, the task to decide which is subordinated to the other in the same system.[61]

2.2.3. The Treaties have not dealt with the nature of the EU legal order (they have dealt only with the process to make secondary law and with its binding force). The CJEU has laid first down in *Van Gen den Loos*, in 1963, that the Community constitutes a new legal order of international law for the benefit of which the States limited their sovereign rights in limited fields.[62] Then in *Costa,* in 1964, it added that the Treaty—by contrast with ordinary international treaties—has created its own legal system which, on the entry into force of the Treaty, has become an integral part of the legal systems of the Member States, which their courts are bound to apply.[63] In that respect, French legal literature has pointed out the paradox that the founders of the Community wanted to establish a domestic legal system built on the method of international treaties.[64] According to the CJEU, the Union therefore has its own legal system which becomes part of the legal systems of all Member States. That approach has always been kept and refined by the CJEU, and it has been summarized as follows: the EU has a new kind of legal order, the nature of which is peculiar to the EU, with its own constitutional framework and founding principles—a particularly sophisticated institutional structure, and a full set of legal rules to ensure its operation.[65]

2.2.4. This view of the CJEU on the nature of EU law has not yet convinced everyone. Only one and a half years after the judgment of the CJEU in *Costa*, the ICC took the view[66] that the legal order of the Community was an external one, fully independent of the domestic legal order of Italy.[67] Since then the ICC has always considered that the norms of the EU are not sources of international law, nor they are foreign law, and are not the domestic law of a single State.[68]

2.2.5. In addition, the concept about the nature of EU law accepted by some international forums of investment protection is in sharp contrast with the concept of the CJEU. While according to the CJEU, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law,[69] an arbitral tribunal under the regime of ICSID

61 Ibid.

62 Judgment of the CJEU of 5 February 1963, NV. Algemene Transport en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, Case 26-62, ECLI:EU:C:1963:1, II B.(hereinafter: Van Gend en Loos, CJEU Judgment, Case 26-62, ECLI:EU:C:1963:1, II B.

63 Judgment of the Court of 15 July 1964, Flaminio Costa v. E.N.E.L, Case 6-64, ECLI:EU:C:1964:66. (hereinafter: Costa, CJEU Judgment, Case 6-64, ECLI:EU:C:1964:66.), para. 3.

64 Cartou et al., 2002, p. 175.

65 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 158. This seems to be a statement of an unacknowledged political theology.

66 In a case brought by an Italian private person against the High Authority of the ESCC before Italian civil courts, upon the constitutional referral of the civil judge.

67 Sentenza No. 98/1965, ECLI:IT:COST:1965:98, para 2. *in diritto*.

68 Sentenza No. 183/1973, ECLI:IT:COST:1973:183, para. 7 *in diritto*.

69 Achmea, CJEU Judgment, C-284/16, ECLI:EU:C:2018:158, para. 33.

simply labelled EU law as international law.[70] I will get back to the conflict of jurisdiction between the judiciary of the EU and international investment forums later (see Section 3.4.4.).

2.2.6. The HCC has distinguished EU law from international law;[71] it has never treated the Treaties as norms of international law from the perspective of its jurisdiction, and has always considered the primary and secondary sources of EU law as making part of domestic Hungarian law since the accession to the EU.[72] According to the Hungarian Supreme Court as well the norms of EU law make part of the Hungarian legal order.[73] Thus, pursuant to the case law of both the HCC and the Supreme Court, EU law is a special, privileged source of the domestic legal system of Hungary.

2.2.7. While the single States join the EU according to their constitutional rules, it is not the national constitutions that are the foundation of EU law but the common will of the Member States themselves to give life to a common legal order on a permanent basis. EU law is based on this fundamental decision that is better called: the legal sovereignty of the European order.[74] A new sovereign was born as a result of the supremacy and if the direct effect of EU law.[75]

2.2.8. It is a settled case law of the CJEU that EU law enjoys autonomy in relation to the laws of the Member States and to international law,[76] and one of the objects of the judicial system—the keystone of which is the preliminary ruling procedure, established by the Treaties—is to ensure the autonomy of the European legal order.[77] At a minimum, the autonomy of the EU legal order, as construed by the CJEU, requires that national and international law and the interpretations offered by national courts and international courts and tribunals not interfere with the power division or legal

70 An arbitral tribunal constituted under the ICSID regime, in case ARB/15/49 (Adamakopoulos and others v. Cyprus) has held that EU law, in particular the rules set out in the relevant EU Treaties as interpreted by the relevant EU organs, is international law binding on EU Member States. The Tribunal cannot accept that EU law must necessarily override other principles of international law applicable between the parties. That may be true within the regime of EU law, and the Tribunal does not question that the decision of the CJEU in Achmea is a valid interpretation of EU law. If this Tribunal were constituted under EU law, then presumably it would be obliged to apply the Achmea decision and decline jurisdiction. But, the CJEU in Achmea did not purport to apply principles of international law in deciding that Arts. 267 and 34 TFEU overrode the provisions of the BIT; it explicitly decided the matter based on EU law. Thus, this Tribunal has to decide whether as a matter of international law the rules emanating from the EU Treaties constitute the applicable law to resolve the question of jurisdiction or whether the law of the BITs as agreed by the parties to those BITs is the applicable law. Under any way of looking at the matter, the question is one of a conflict of treaties.

71 The sovereignty-transfer under Art. E) of the Basic Norm, explained by the sui generis nature of the law of the Union, is different from international law, Decision No. 9/2018 (VII. 9.) of the HCC, [31]. That approach is shared by legal literature too, Vincze and Chronoski, 2018, p. 314.

72 E.g., Decision No.72/2006. (XII. 15.) of the HCC, III. 11.

73 EH2010.2130.

74 Mangiameli, 2013, p. 161.

75 Jakab, 2006a, p. 7.

76 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 170.

77 Opinion, C-2/13, ECLI:EU:C:2014:2454, paras. 174–176.

principles set out in the Treaties. However, the CJEU goes further: it bases its reasoning on an understanding of the EU legal order as self-contained, self-referential, and self-sufficient.[78] The law of the Union has been derivative in its origin, but it has then been converted by the evolutive (legislative) case law of the CJEU into a genuine, independent, and autonomous legal order[79] that has become its own basis, and the very essence of EU law is to ensure its own autonomy, against both international law and the domestic laws of the Member States. This means that it is not the Union that has a legal order, but the sovereign, European legal order that has institutions, and the main task of those institutions is the protection of the sovereignty of the European legal order. The legal order of the EU has thus been converted by the CJEU from an object into a subject: in the case law of the CJEU, there is no distinction between the legal nature of the EU as given by the Treaties and the legal nature of the EU as constructed by the CJEU (for a criticism, *infra*, 3.4.).

2.3. The Borders of EU Law: Intra v. Ultra Vires

2.3.1. The membership of a State in the EU depends on the domestic, constitutional law of that State.[80] However, once the accession has been duly approved by the domestic law of the Member State, then EU law is going to be enforced and developed according to its own rules, within that Member State too. By joining the EU, the Member States have not written a blank cheque, still, they have not created an exhaustive list of rules the institutions of the Union might enact.[81]

2.3.2. It is axiomatic that the EU has *attributed* competence:[82] the institutions of the Union may act only within the powers conferred on them by the Member States,[83] and they must respect the principle of subsidiarity[84] as well. As a consequence of the principle of conferral, the secondary law is null and void in so far as it has been made by the institutions by exceeding their competence. The CJEU has laid down at an early stage that if a measure of an institution has been taken in a sphere that belongs exclusively to the jurisdiction of a Member State, the Court must investigate it, even if the measure has become definitive, because it is a fundamental requirement of the

78 Eckes, 2020, p. 3.

79 Community law perceives itself as an original (not delegated) authority (Jakab, 2006b, p. 386). Still, the autonomy of the EU legal system remains an inherently fragile construction because the CJEU cannot demonstrate the aprioristic character of EU law (Eckes, 2020, p. 2).

80 The Treaties and European law are binding only on the grounds of the Hungarian Constitution, because the possibility of the execution of the Treaty of Accession—being a convention of international law—has been given by the Constitution (Balogh et al., 2003, p. 130).

81 According to the ministerial reasoning of the Act no. LXI of 2002—enacting the Accession Clause of the Constitution—it is about the restriction of its sovereignty when Hungary concludes an international agreement from which concrete obligations—unforeseeable at the moment of the conclusion—may arise without its further specific consent.

82 Craig, 2011b, p. 395.

83 Art. 5 TEU.

84 Art. 5(3) TEU, Protocol 2.

Community legal system that a measure lacking all legal basis[85] cannot produce legal effects.

2.3.3. Art. 4(2) TEU sets forth that in its conferred powers, the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. Thus, the identity of the Member States is given an undisputed importance as delimiting not only the powers of the Union but also the integration process itself, which cannot go as far as touching, modifying, damaging, or cancelling the identity of its Member States,[86] and the identity of Member States is binding on the interpretation of European primary law and on the validity of its secondary law.[87]

2.3.4. In the Maastricht decision, the German Federal Constitutional Court (GFCC) explained that the legal acts of the Union that exceed the competences outlined in the Treaty, as interpreted by the GFCC, will not be legally binding in Germany,[88] and the German State institutions will be hindered by the German Constitution from enforcing them.[89] The most important question about *ultra vires* concerns the forum: which forum can control it (*infra*, Chapter 3).

2.3.5. Behind the *ultra vires* question, there is a problem of logic: (i) the EU is created by sovereign Member States; (ii) the EU exists in the boundaries set forth by the Member States in primary EU law sources; (iii) the final interpreter of EU law is the CJEU; and (iv) if Arts. 4 and 5 TEU mean that it is the CJEU to also define the boundaries that national constitutional identities lay down against EU law, then (v) those identities are not real identities anymore, because they are not self-determined, but ascertained (imposed) from above, and (vi) the EU would define its own boundaries. Assertion (v) contradicts assertion (i), while assertion (vi) contradicts assertion (ii). From the perspective of the sovereign Member States, it seems absurd that their constitutional identities should not be defined by themselves (i.e., by their own constitutional courts), but should instead be defined by the court of a community (the Union) without sovereignty.[90]

2.4. The Collision between EU Law and National Laws

2.4.1. Insofar as the number of the potentially applicable norms is rising (EU law is produced by the European institutions in large quantities, as well as domestic norms

85 Commission v. French Republic, CJEU Judgment, Joined cases C-6 and 11–69, ECLI:EU:C:1969:68, paras. 12–13.

86 Mangiameli, 2013, p. 154.

87 Mangiameli, 2013, p. 155.

88 Boom, 1995, p. 177.

89 Vincze and Chronowski, 2018, p. 200.

90 As it is pointed out by an author: The constitutions of the Member States did not and, as long as the Members States retain the status of States or sovereign subjects of international law, will not occupy a lower position in the hierarchy of sources of law than the Union provisions (Kwiecień, 2019, p. 37).

are produced by Member States),[91] the probability of contradiction between norms becomes higher and higher, and rights and obligations might not be clearly ascertainable. The number of conflicts between norms may be reduced using the method of conform interpretation, which basically consists of constructing a legal instrument belonging to a set of laws in compliance, if possible, with the norms belonging to another set of laws.[92] The HCC as well has pointed out that, insofar as it is possible, the domestic law and the Basic Norm have to be construed in accordance with EU law.[93] The CJEU has ruled that the principle of primacy must be applied only where it is impossible for the national judge to interpret national legislation in compliance with the requirements of EU law.[94]

2.4.2. Legal certainty requires, among other things, the resolution of conflicts between norms according to pre-established methods: which rule must be applied among the contradictory ones (as well as rules to fill gaps).[95] The legal culture has therefore established a hierarchy of norms and the principles of *lex posterior derogat priori* and *lex specialis derogat generali* to resolve conflicts in the same system, on the one hand, while the conflict-of-law rules appoint the applicable legal system and the competent jurisdiction in international (private or tax) law cases.

2.4.3. As of today, the relationship between EU law and national laws means twenty-seven relationships. The very reason of the integration would be questioned if those twenty-seven relationships could materially diverge.[96] Moreover, if the domestic law of each Member State must relate to EU law in the same way, meaning that the relationship between EU law and the law of each Member State must be the same (at least generally), then that relationship must be defined by the law of the Union.

2.4.4. The relationship between primary EU law made by the Member States and domestic law of the Member States seems simple: if a Member State has participated in making a norm of EU law according to the rules accepted by that Member State,

91 Legal norms—just like any other good—are produced, legal workshops are working 24 hours a day all over in Europe (Irti, 2005, p. 7).

92 In all the legal systems the core of the judicial activity is shifting from the decision to the interpretation, and judges are required to be well-equipped in *ars interpretandi* even more then in ars decidendi (Cartabia, 2007, p. 42). The CJEU has laid down a fundamental principle of interpretation in Marleasing (Judgment of the CJEU (Sixth Chamber) of 13 November 1990, Marleasing SA v. La Comercial Internacional de Alimentacion SA., Case C-106/89, ECLI:EU:C:1990:395.) regarding the relationship between European law and domestic laws, according to which a national court is required to interpret its national law in the light of the wording and the purpose of the directive. Also, Art. 28 of the Hungarian Basic Norm contains a conflict-prevention rule of interpretation, and the Constitution and domestic law must be construed in a way that the generally accepted rules of international law be able to prevail (Balogh et al., 2003, p. 168).

93 Decision No. 2/2019. (III. 5.) of the HCC, [37]. This EU-friendly interpretation is accepted by the Czech Constitutional Court as well (Kühn, 2016, p. 186).

94 Judgment of the CJEU (Grand Chamber) of 24 June 2019, Criminal proceedings against Daniel Adam Popławski, Case C-573/17, EU:C:2019: 530, paras. 58 and 61.

95 One of the first and best-known phrasing for that has been given by Art. 4 of the Code civil, by prohibiting déni de justice.

96 There may be specific differences among the receptions of EU law by the Member States on the grounds of specific derogations.

then it cannot subordinate the application of that EU norm to its own domestic laws, created by itself independently of the other Member States, either before or after the EU norm at hand.[97] Conversely, if the secondary law created by the institutions of the Union contradicts the domestic law of a given Member State, it is not excluded for that Member State to take objection to that secondary law, since the European lawmaker is able to enact valid norms only in the competences conferred on it by the Member States in primary law, and if the European lawmaker exceeds that competence, then its act—as *ultra vires*—is null and void. The Member States are therefore entitled to challenge the sources of the secondary law that infringes upon primary EU law.[98] On the contrary, insofar as the secondary law complies with the primary one, the Member States cannot challenge it on the grounds that it contradicts its own domestic law. Indeed, if Member States were entitled to challenge the secondary norms of EU law on the grounds of their domestic laws, even though those secondary norms comply with the primary ones, then the rule of law (and the legal nature of secondary law) would be questioned (denied).

2.4.5. The supremacy of EU law over the domestic laws of the Member State—i.e., the hierarchy of norms that determines the European legal order—has been laid down by the CJEU in *Costa*: the law stemming from the Treaty cannot, because of its special and original nature, be overridden by domestic legal provisions without being deprived of its character as community law and without the legal basis of the Community itself being called into question.[99] The principle of the direct effect of EU law has then been decided by the CJEU in *Van Gend en Loos*: Community law may produce a direct effect and create individual rights which national courts must protect.[100] Further, the CJEU has also determined that administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of directly applicable EU law, and to refrain from applying provisions of national law which conflict with them.[101] Consequently, the relationship between the legal system of a Member State and EU law is understood by EU law according to the dichotomy of compliance and non-compliance.[102]

2.4.6. The case of *Costa* reached the ICC as well, and that Court, in its judgment of March 7, 1964, held that the Italian act (*legge*) promulgating the founding Treaty of the European Coal and Steel Community (ECSC) did not have any specific power that could hinder the principle of *lex posterior derogat priori* from applying, that is to say, a subsequent *legge* might contrast with it without infringing the Italian constitution.[103]

97 International treaty law—Art. 27 of the Vienna Convention on the Law of Treaties—has set forth the theorem that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

98 This has been dealt with by Art. 263 TFEU.

99 Costa v. E.N.E.L, CJEU Judgment, Case 6-64, ECLI:EU:C:1964:66, para. 3.

100 Van Gend en Loos, CJEU Judgment, Case 26-62, ECLI:EU:C:1963:1, II B.

101 Judgment of the Court of 22 June 1989, Fratelli Costanzo SpA v. Comune di Milano, Case C-103/88, ECLI:EU:C:1989:256, para. 33.

102 Varju, 2016, p. 143.

103 Sentenza No. 14/1964, *considerato in diritto* 6, ECLI:IT:COST:1964:14.

Nonetheless, the CJEU in 1978 found that a national court that is called upon, in the exercise of its jurisdiction, to apply provisions of Community law, is under a duty to give full effect to those provisions, if necessary rejecting its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting-aside of such a provision by legislative or other constitutional means.[104] The option of secession is there, but no other method of resistance is legitimate, and the supremacy of Union law should be accepted even over national constitutions.[105]

2.4.7. In 1984 the ICC—while keeping its starting point—functionally reached the same result in the *Granital* case[106] regarding the primacy of Community law, just as the CJEU: Community law and the domestic law are two autonomous and distinct systems that are necessarily coordinated according to the separation of powers laid down in the founding Treaties. Since the European legal system and the Italian one are separate systems, the question of the hierarchy of the norms is *ab ovo* excluded: the Italian judge must apply either the Italian norm or the European norm in a given case, provided that if the European norm is applied, then the application of the Italian norm is not an option.[107] A collision between European law and domestic law is therefore excluded in specific cases, insofar as the European norm is directly applicable. By contrast, if it is not about a concrete case, and an Italian norm does not comply with European law, then—upon a direct referral—the ICC will declare a breach of the Constitution and will annul the Italian norm, because the mere fact that that the domestic norm cannot apply in specific cases does not mean that the norms breaching EU law should not be removed from the domestic system.[108] Conversely, the HCC has held that it has no power to examine whether a Hungarian norm breaches EU law or not,[109] albeit a concurring opinion has already mentioned that the HCC is required to examine Hungarian norms that breaches EU law on the grounds of the principle of loyal cooperation laid down in Article 4(3) TEU.[110] Some scholars have urged the HCC to annul domestic norms that do not comply with EU law,[111] while others think that the constitutionality and the compliance with EU law are different categories.[112]

2.4.8. Before the accession to the EU the HCC took the view in the decision 4/1997. (I. 22.) that a Hungarian act promulgating an international agreement is an ordinary

104 Judgment of the Court of 9 March 1978, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, Case C-106/77, ECLI:EU:C:1978:49, para. 24.
105 Jakab, 2006b, p. 395.
106 Sentenza No. 170/1984 del 5 giugno 1984. ECLI:IT:COST:1984:170.
107 It is worth noting that the rapporteur of the case was Antonio Mario La Pergola, advocate general and judge of the CJEU at a later date.
108 Sentenza No. 94/1995, *considerato in diritto* 2, ECLI:IT:COST:1995:94, Sentenza No. 389/1989, *considerato in diritto* 4, ECLI:IT:COST:1989:389.
109 Decision No.3090/2016. (V. 12.) of the HCC, [37], Decision No.34/2014. (XI. 14.) of the HCC, [54].
110 Concurring opinion of judge Czine to the Decision No.3090/2016. (V. 12.) of the HCC, [60].
111 Vincze and Chronowski, 2018, p. 320.
112 Szabó, 2020, p. 16.

domestic act from the perspective of the control of constitutionality, it is thus not safe from constitutional review. That decision has been criticized by the legal literature,[113] albeit the methodology applied by the HCC has been progressive insofar as it has tried to resolve a domestic constitutional problem without a breach of the international obligations of Hungary, and for that purpose the political power has been given a considerable degree of latitude to act, envisaging the cooperation of the branches of government.[114]

2.4.9. Regarding the relationship between EU law and domestic law, the HCC has explained that the dualist model has been increasingly replaced by the monist model in the European legal evolution. According to the monist model, an international agreement makes part of the domestic system without a specific promulgation, it is directly applicable, and prevails over domestic norms: all that is compulsorily required by the European integration, in the view of the HCC.[115] The Hungarian Supreme Court has taken the position that Art. E) of the Basic Norm has opened a window from the closed order of domestic legislation to the law of the Union, and pursuant to the Treaty of Accession promulgated by the Act XXX of 2004 and the founding Treaties incorporated by the same Act into the national legal order, the national judge has become the judge of EU law as well. Accordingly, it is the CJEU that is to be found at the top of the hierarchy of interpretation in the application of EU law in concrete cases in the domestic legal order built on Kelsen's normative pyramid, and the decisions of the CJEU are indispensable for the interpretation of EU law by the national judge.[116]

2.4.10. Eventually, the principle of primacy—and only that, without any reference to the autonomy of EU law—has been expressly acknowledged by the Member States: according to Declaration 17 of TEU, it results from the case law of the CJEU that primacy of EU law is a cornerstone principle of EU law. According to the CJEU, this principle is inherent to the specific nature of the EU. At the time of the first judgment of this established case law (*Costa/ENEL*) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty not in any way change the existence of the principle and the existing case law of the CJEU.

2.4.11. While the sovereignty of the legal order of the Union is artificial, and has been imposed by the CJEU from above, the sovereignty of the people of each Member State is organic, and it has come from the bottom-up, having found shape

113 Because, according to the authors, the HCC conflated international law with European law (Vincze and Chronoski, 2018, p. 258).

114 The constitutionality of a domestic norm promulgating an international agreement may be reviewed by the HCC. However, if the HCC finds that the international agreement breaches the constitution, that cannot affect the international obligations of Hungary, and the legislator must ensure that international obligations comply with domestic law: Hungary must terminate the international agreement, or it must have it amended, or it must amend the Constitution. The HCC may suspend the decision to annul the domestic norm at issue until the compliance will be ensured. Decision No.4/1997. (I.22.) of the HCC, II.8.

115 Decision No. /1997. (I. 22.) of the HCC.

116 EH 2014.08.K30: Curia Kfv. IV. 35.166/2013.

in the national constitution. Opposing narratives are on the table when European legal sovereignty and the reality of the national constitutions are considered incompatible.[117] Contrapunctual law[118] is one of the potential methods to bring those narratives into harmony with each other, by obeying some basic rules: (i) recognizing the existence of other legal orders and at least the possibility of different viewpoints on the same norms (pluralism); (ii) vertical and horizontal discourse among courts in order to achieve consistency in the system (i.e., at least considering the point of view of the respective court from the other legal order in the judgments); (iii) 'universalisablity' (i.e., using only arguments that can also be used by the 'other side'). Yet, this is a solution only for preventing conflicts, so there is no answer to the question of how to solve conflicts that have already arisen.[119] The next chapter will deal with that issue.

3. Enforcing and Controlling Primacy

On the practical side—from the perspective of the implementation of democracy and of the rule of law—the actual enforcement of the principle of primacy is even more important than its declaration. The legal tensions between the Union and the Member States show up between the bureaucracy of the Union (the Commission) and the governments of the Member States before the CJEU on the one hand, and in the parallel case law of the CJEU and of the national constitutional courts on the other hand. From a legal perspective, the very basic question is about the jurisdictions of the CJEU and of the national courts regarding the enforcement of EU law; such a question does not simply concern the primacy of EU law over national laws, but rather whether the sovereignty of the legal order of the Union is able to get the better of the (mutually equal) sovereignties of European nations.

3.1. Asymmetry of Jurisdictions

3.1.1. The acknowledgment of the primacy of EU law does not answer the question who—either the court of the Union or the courts of the Member States—is authorized to have the final word in disputes where EU law contradicts a national law. Even before the Hungarian accession, Kecskés noted that a division of jurisdiction between the CJEU and the HCC was (or would have been) necessary to think about.[120]

117 Still, even the Polish Constitutional Tribunal has pointed in its decision K 3/21 (*infra*, 3.3.4.): in the doctrine of law, with reference to the jurisprudence of the Constitutional Tribunal, at times it is asserted that in the case of recognizing an irremovable conflict between EU law and the Polish Constitution, the following consequences are possible: amending the Constitution; changing EU law; or leaving the EU. Such an assertion may only be deemed admissible in academic rhetoric. Above all, an irremovable conflict occurs very rarely, if it at all exists outside of the theory of law.

118 Maduro, 2003.

119 Jakab, 2006b, p. 396.

120 Kecskés, 2003, p. 30.

In Hungary—as well as in many other Member States—there are four supreme courts: the Kúria (the Hungarian supreme court), the HCC, the CJEU, and the ECHR. Among those supreme courts, the Kúria's position is special, since it has been tasked with interconnecting the other three courts.[121] Still, the principle of primacy implies that if EU law appoints the court to hear such disputes, then the jurisdiction of that court must be accepted by the Member States.[122]

3.1.2. EU law has appointed both the CJEU and the national courts to settle conflicts that arise between national laws and EU law, and the activity of national judges is absolutely necessary for the enforcement of EU law (and of the principle of primacy). In its operation, the national judge is exempted—to some extent, to enforce EU law—from the national judicial hierarchy[123] and from national procedural law[124] as well.

3.1.3. The cooperation between the CJEU and national judges on the implementation of EU law does not mean that the CJEU and national judges would be equal partners. The CJEU cannot be considered as a superior court over the national judges[125] since the judgments of national judges cannot be appealed before the CJEU, but in questions about EU law, the CJEU is obviously stronger than national judges, because: (i) the interpretation of EU law given by the CJEU is binding on national judges; (ii) the national judge against whose decisions there is no judicial remedy under national law must lodge a request for a preliminary ruling with the CJEU;[126] (iii) secondary EU law

121 Varga, 2021, p. 8.

122 In his concurring opinion attached to the Decision No.22/2016. (XII. 5.) of the HCC judge Dienes-Oehm has noted that any disputes concerning a legal norm of the Union, included that about lack of competence, falls under the jurisdiction of the CJEU.

123 In Cartesio (Judgment of the CJEU (Grand Chamber) of 16 December 2008, Cartesio Oktató és Szolgáltató bt. Case C-210/06, ECLI:EU:C:2008:723.) the CJEU has held that the jurisdiction conferred on any national court or tribunal by the Treaty to make a reference to the Court for a preliminary ruling cannot be called into question by the application of national procedural rules. Also, in IS (Judgment of the CJEU (Grand Chamber) of 23 November 2021, Criminal proceedings against IS, Case C-564/19, ECLI:EU:C:2021:949, para. 82) the CJEU has held that Art. 267 TFEU must be interpreted as precluding the supreme court of a Member State from declaring, following an appeal in the interests of the law, that a request for a preliminary ruling which has been submitted to the Court by a lower court is unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings, without, however, altering the legal effects of the decision containing that request. The principle of the primacy of EU law requires that lower court to disregard such a decision of the national supreme court.

124 In Factortame (Judgment of the Court of 19 June 1990, The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others. Case C-213/89, ECLI:EU:C:1990:257.) the CJEU has held that Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.

125 However, the CJEU has been struggling to establish its position above the national supreme courts and to compensate for the lack of formal hierarchy in the Union's judicial system (Turmo, 2019).

126 With the exceptions defined in CILFIT (precedence, acte éclairé, acte clair).

can be annulled only by the CJEU;[127] and (iv) while the injured party is entitled to claim compensation if his/her human or European rights have been breached by the final judgment of the national court—not just in the legal system of that national court, and not only under the rules of that national system[128]— the CJEU (and the Union) cannot be sued except before the CJEU, and only under EU law, pursuant to Art. 340 TFEU.[129]

3.1.4. The cooperation between the CJEU and national courts is a matter of fact. The CJEU likes to call that cooperation a dialogue, and has emphasized in its declaration the importance of a constantly unfolding dialogue between itself and the national courts, a dialogue that pays due respect to their particular legal cultures and legal systems and the languages in which they operate.[130] Some scholars, however, question the method of dialogue between courts.[131] According to the division of tasks—division of jurisdiction—between the EU judicature and the national courts, the CJEU, when answering questions referred for a preliminary ruling, must take account of the factual and legislative context of the questions as described in the order for reference.[132]

3.1.5. The dialogue as a method is either dialectics aiming to find the truth (the art of questioning and answering), or it is eristic, purely aiming to convince the other party (or the forum) of a given position. The need for a dialogue is explained by the principle of sincere cooperation, according to which the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks that flow from

127 The CJEU has pinned down that national courts have no jurisdiction to declare that the acts of the EU Institutions are invalid, that falls under the exclusive competence of the CJEU as dictated by the requirement for EU law to be applied uniformly and for legal certainty, Foto-Frost (Judgment of the Court of 22 October 1987, Foto-Frost v. Hauptzollamt Lübeck-Ost. Case C-314/85, ECLI:EU:C:1987:452.) (hereinafter: Foto-Frost, CJEU Judgment, Case C-314/85, ECLI:EU:C:1987:452.). The Hungarian Supreme Court, by reference to Foto-Frost, has held that the quasi-constitutional court competence to declare a source of secondary law null and void belongs only to the CJEU, EH2014.K30: Kfv.IV.35.166/2013. [24]. Therefore, the invalidity of a secondary norm of EU law may take place only either as a result of a preliminary ruling under Art. 267 TFEU or of an action for annulment under Art. 263 TFEU.

128 In case of a breach of EU law the action—under Köbler, CJEU Judgment, Case C-224/01. ECLI:EU:C:2003:513 —is to be brought before the courts of the breaching Member State, with the potential intervention of the CJEU, and in case of a breach of human rights the action is to be brought before the ECHR.

129 See e.g., Plásticos Españoles v. European Union, represented by the Court of Justice of the European Union, (Judgment of the General Court (Third Chamber, Extended Composition) of 17 February 2017, Plásticos Españoles, SA (ASPLA) and Armando Álvarez, SA v. European Union, represented by the Court of Justice of the T-40/15, ECLI:EU:T:2017:105) where the Tribunal awarded compensation for the material damage suffered by the applicants as a result of the breach of the obligation to adjudicate in a reasonable time in the cases giving rise to the original judgments.

130 Declaration by the Court of Justice of the European Union on the occasion of the Judges' Forum organised to celebrate the 60th anniversary of the signing of the Treaties of Rome. https://curia.europa.eu/jcms/jcms/p1_315711/en/.

131 Some scholars criticize the idea of a judicial dialogue, contending that dialogue is a common practice in the political institutions, but is almost impossible among courts and judges (Cartabia, 2007, p. 5).

132 Judgment of the CJEU (Fifth Chamber) of 26 October 2017, Argenta Spaarbank NV. v. Belgische Staat, Case C-39/16, EU:C:2017:813, para. 38.

the Treaties.[133] Still, that wording does not tell us the final objective of the dialogue: to know which are the real tasks, or to perform some tasks. Nonetheless, the dialogue between the CJEU and the national courts is simple: the national judge poses a question to be answered by the CJEU, and by that answer the dialogue is usually closed, because the national judge must accept that answer. The dialogue between the European courts thus seems a matter of power, aiming at the unconditional enforcement of EU law, rather than an intellectual method searching for truth. The CJEU has laid down with a certain sincerity, that the judicial system established by the Treaties has as its keystone the preliminary ruling procedure, which, by setting up a dialogue between the CJEU and the courts of the Member States, has the object of securing the consistency, full effect, autonomy, and particular nature of EU law.[134] Constitutional Courts are in the best position to frame constitutionally sensitive questions through the preliminary reference mechanism to the CJEU to let the composite European Constitution work properly, and to allow national constitutional identities to be duly taken into account by the CJEU.[135] By complying with the requirement of a constitutional dialogue, the HCC accepts the interpretation of EU law as falling under the jurisdiction of the CJEU (and not the Constitutional Court).[136] In accordance with that, the ICC has held that the concrete decisions of the CJEU—as well as the European norms dealt with by them—are directly applicable in the domestic systems of Member States.[137] The Polish Constitutional Tribunal, in its decision of October 7, 2021, which kicked up a great deal of dust (see *infra*, 3.3.4.), emphasized the necessity of a mutual, sincere dialogue in the event of a conflict of norms, as it is an obligation arising from the principle of loyalty, which is characteristic for European legal culture.[138]

3.1.6. The European judicial dialogue is thus between unequal partners. According to some scholars, that dialogue should not lead the national courts to overestimate their autonomy in interpreting EU law and deciding when to refer preliminary questions, and the very fact that national courts are essential components of the Union's judicial system and indispensable partners of the CJEU also means that there must be some degree of oversight by the CJEU responsible for the uniform application and interpretation of Union law.[139] However, the legal literature notes that the first reason the CJEU should abandon its Cartesian style of judgments and move to a more discursive and conversational style, is precisely to encourage the constitutional dialogue with the national supreme and constitutional courts.[140]

133 Art. 4(3) TEU.
134 Opinion, C-2/13, ECLI:EU:C:2014:2454, p. 176.
135 Lupo, 2018, p. 186.
136 Decision No. X/477/2021 of the HCC, [64]. Still, the HCC has never lodged a request for a preliminary ruling with the CJEU.
137 Sentenza No. 284/2007, *in diritto* 3, ECLI:IT:COST:2007:284. The ICC submitted a preliminary question to the CJEU the first time by the Ordinanza No. 103/2008.
138 Polish Constitutional Tribunal, decision of 7 October 2021 in the case No. K 3/21, see below, 3.3.4.
139 Turmo, 2019.
140 Cartabia, 2007, p. 42.

3.1.7. While the dialogue between the courts sometimes seems to be a mere (nonetheless, spectacular) courtesy on the part of the CJEU,[141] sometimes the CJEU takes notice of the response made by the national court to the preliminary ruling previously given by the CJEU. In this latter case, the dialogue is real. A good example is set by the cases *Taricco*[142] and *M.A.S.*[143] In the first case, on September 8, 2015, the CJEU—upon the request for a preliminary ruling from an Italian tribunal—has held that the Italian rule in relation to limitation periods for certain criminal offences (insofar as prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the EU) must be disapplied by the national courts to give full effect to the Treaty. Because of the *Taricco* judgment, the Italians courts should have disapplied the limitation period set forth by the Italian Criminal Code in specific cases. However, the ICC has expressed doubt as to whether that approach is compatible with the overriding principles of the Italian constitutional order and with the observance of the inalienable rights of the individual, because, according to the ICC, that approach is liable to interfere with the principle that offences and penalties must be defined by law, which requires that rules of criminal law be precisely determined and cannot be retroactive. The ICC therefore referred the case to the CJEU for another preliminary ruling, and, as a result, the CJEU—in the judgment delivered on December 5, 2017—has changed its standpoint as expressed in *Taricco*:[144] if the national court were to come to the view that the obligation to disapply the provisions at issue in the national Criminal Code conflicts with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation.[145]

141 One of the best examples for that spectacular courtesy is given in Omega Spielhallen, C-36/02, ECLI:EU:C:2004:614, where the CJEU has held that fundamental values prevailing in the public opinion of a given Member State and enshrined in its national constitution may justify a restriction of the obligations imposed by EU law, even under a fundamental freedom guaranteed by the Treaty. By that judgment the CJEU has formally acknowledged that national constitutions may over rule EU law.

142 Judgment of the CJEU (Grand Chamber) of 8 September 2015, Criminal proceedings against Ivo Taricco and Others, Case C-105/14, ECLI:EU:C:2015:555. (hereinafter: Taricco).

143 Judgment of the CJEU (Grand Chamber) of 5 December 2017, Criminal proceedings against M.A.S. and M.B. Case C-42/17, ECLI:EU:C:2017:936. (hereinafter: M.A.S, C-42/17, ECLI:EU:C:2017:936.).

144 It is worth noting the reason the CJEU has changed (refined) its standpoint: according to the CJEU the constitutional principles raised by the ICC in the second case were not drawn to its attention in the first case in which the Taricco judgment was given, and so the CJEU needed to clarify the interpretation of Art. of the TFEU at issue.

145 M.A.S, C-42/17, ECLI:EU:C:2017:936, para. 61. It is worth mentioning that in the opinion of the advocate general fundamental rights do not allow the judicial authority of a Member State to refuse to fulfil the obligation identified by the CJEU in Taricco on the ground that that obligation does not respect the higher standard of protection of fundamental rights guaranteed by the national Constitution, as well as Art. 4(2) TEU does not allow the judicial authority of a Member State to refuse to fulfil the Taricco judgment on the ground that the immediate application to proceedings pending before it of a longer limitation period than that provided for by the law in force at the time when the offence was committed would be capable of affecting the national identity of that State.

3.2. Potential Conflict of Jurisdictions

3.2.1. What should be done when EU law materially contradicts the constitutional rule of a Member State, according to which that Member State has joined the EU? That question has never been tackled at the moment of accession of any of the Member States, either in domestic law or in EU law. While that question is considered by scholars as a constitutional paradox[146] or an unresolvable one,[147] it is answered by the CJEU. According to the CJEU, the claim of EU law to be enforced against the laws of the Member States is unconditional: the validity of a community law measure within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of national constitutional structure.[148] The CJEU has confirmed that the principle of the primacy of EU law cannot be subordinated to special domestic procedures, not even to constitutional ones.[149]

3.2.2. Against the position of the CJEU—considering itself omnipotent[150] in the EU—the national constitutional courts have identified the risk, at an early stage, that EU law might jeopardize, at least potentially, the sovereignty of Member States and the fundamental rights of individuals. The ICC has held, as early as 1973, that although the restriction of State sovereignty in the framework of the European integration is possible under the Italian Constitution for the benefit of the Community, having an autonomous and independent legal order,[151] and the legal order of the Community guarantees legal remedies for the infringements of the institutions of the Community, there is a possibility, even if very unlikely, that a regulation of the Community might breach the Italian Constitution in a civil, social-ethical or political domain, in which case the ICC shall be authorized to review the compliance of the founding Treaties with the fundamental principles of the Italian Constitution.[152] The GFCC has also emphasized in a series of decisions (*Solange I*, *Solange II*, *Maastricht*, *Bananenmarktordnung*) that (i) the Member States have remained the guardians of the Treaties; (ii) the GFCC shall be authorized to review the acts of the EU (especially their compliance

146 Blutman and Chronowski, 2007, p. 3.

147 Ost and Kerchove, 2002, pp. 67–68.

148 Judgment of the CJEU of 17 December 1970, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Case 11/70, ECLI:EU:C:1970:114, para. 3, (hereinafter: Internationale Handelsgesellschaft, CJEU Judgment, Case 11/70, ECLI:EU:C:1970:114).

149 Judgment of the CJEU (Third Chamber) of 19 November 2009, Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu, Case C-314/08, ECLI:EU:C:2009:719, para. 85.: the primacy of Community law obliges the national court to apply Community law and to refuse to apply conflicting provisions of national law, irrespective of the judgment of the national constitutional court which has deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force.

150 From the perspective of the CJEU—apart from the cases falling out the temporal, personal, territorial and objective scope of the legal act—the law of the Union is given an omnipotent claim to be enforced (Kovács and Völcsey, 2020, p. 1).

151 Sentenza No. 183/1973 del 27 dicembre 1973, para. 5 *in diritto*, ECLI:IT:COST:1973:183.

152 Sentenza No. 183/1973 del 27 dicembre 1973, para. 9 *in diritto*, ECLI:IT:COST:1973:183.

with the fundamental rights guaranteed by the *Grundgesetz*); however, (iii) the GFCC will not exercise that power, because the high-level protection of fundamental rights is guaranteed in the Union. These arguments are based on the sovereignty that is reserved by the Member States in the Union as well.[153] The GFCC, in its *Maastricht* decision, also explained that it will verify whether the institutions of the Union have acted *ultra vires* or not.[154] In a multilevel constitutional system, where the different levels complete and control each other, such an *ultra vires* review may make sense.[155] However, such un *ultra vires* review is the negation of the exclusive prerogative of the CJEU to rule as a sole arbiter on the invalidity of the acts of the EU institutions.[156] The temptation of being a final one, having the power to override any conflicting opinion, is too strong.[157]

3.2.3. The legal dilemma becomes actual when a final judgment of the CJEU is considered by a Member State as an *ultra vires* act (infringing the constitutional identity of that Member State), because, in the current legal order of the Union, there is no available remedy for such a situation. It is a fundamental principle of the EU legal order that the final judgment of the CJEU cannot breach EU law.[158] Accordingly, the mainstream of legal scholars affirms that the notion that a national court can simply override a CJEU judgment is inadmissible.[159] That view is not fully shared by the GFCC: as it explained in its *Lisbon* decision, insofar as European courts do not provide efficient remedy for *ultra vires* acts, the GFCC will review whether the institutions of the Union have respected their competence or not, and whether they have infringed the essence of the German constitutional identity or not.[160] The particularities of the *ultra vires* review have been further explicated by the GFCC in *Honeywell/Mangold*: such a review can apply only if a breach of competences on the part of the European bodies is sufficiently qualified (i.e., obvious), and the impugned act leads to a structurally significant shift to the detriment of the Member States in the structure

153 Jakab, 2006b, p. 389.
154 Vincze and Chronowski, 2018, p. 200.
155 Vincze and Chronowski, 2018, p. 252.
156 Anagnostaras, 2021, p. 804. This is true, but—as the GFCC has pinned down—if the Member States were to completely refrain from conducting any kind of *ultra vires* review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences. Though cases where EU institutions exceed their competences are exceptionally possible, it is to be expected that these instances remain rare due to the institutional and procedural safeguards enshrined in EU law. Nevertheless, where they do occur, the constitutional perspective might not perfectly match the perspective of EU law given that, even under the Lisbon Treaty, the Member States remain the "Masters of the Treaties' and the EU has not evolved into a federal state (cf. BVerfGE 123, 267 <370 and 371>).
157 Kühn, 2016, pp. 193–194.
158 If the judgment of the CJEU breaches human rights, then the victim is entitled to bring a new, separate action for compensation before the CJEU under Art. 340 TFEU. But the breach of the principle of conferral by the CJEU does usually not involve the breach of the human rights of individuals, and so European citizens cannot challenge it with an action for compensation.
159 Kelemen et al., 2020.
160 Vincze and Chronowski, 2018, p. 201.

of competences to the detriment of the Member States; furthermore, the CJEU must first be given the opportunity to rule on the validity and interpretation of the acts in question in the context of preliminary ruling proceedings, insofar as it has not yet clarified the questions that have arisen.[161] Accordingly, the GFCC submitted a request for a preliminary ruling to the CJEU in the *OMT* case.[162]

3.2.4. The judicial activism of the CJEU in the field of fundamental rights brought about new dangers for the constitutional equilibrium between the EU and the Member States, and, more importantly, altered the relationship between the common core of values shared all over Europe and the diverse and plural historical traditions.[163] When the CJEU takes decisions on fundamental rights—which often involve the most important, delicate and controversial constitutional issues—it is critical that such decisions emanate from a tribunal which is capable, and seen to be capable of comprehending the constitutional sensibilities of the Member States at issue and communicating that comprehension to its national counterparts.[164] The activism of the CJEU to enforce fundamental rights may turn into judicial colonialism: the case law of the CJEU on fundamental rights is dotted with signs showing a centralizing effect, gradually drawing the protection of human rights to the European level, and at the same time emptying the protections guaranteed by national constitutions and breaking the limits of jurisdiction in which the action of the Community institutions should be carried out. In this centralizing evolution lies the risk of "judicial colonialism": the national constitutional traditions run the risk of being forgotten and lost forever.[165]

3.2.5. The interaction of constitutional identity and acts of the EU has been dealt with by the HCC as well. In the decision 22/2016 (XII. 5) the HCC has held—based on comparative researches—that it is authorized to review, in exceptional cases, upon a specific motion, and as *ultima ratio,* respecting the constitutional dialogue among Member States, whether the human dignity, or the essence of other fundamental rights, or whether the sovereignty or constitutional identity of Hungary have been breached by the EU institutions. The subject matter of such a review of sovereignty and of identity, however, is not directly the act of the Union or its interpretation, and so the HCC will not pronounce a decision on the validity or invalidity of those acts.[166] This decision of the HCC has been criticized by scholars for not having been fully elaborated, and having left several basic questions open.[167] In my view, however, the very essence of this decision is that the issue at hand could not have been resolved

161 Vincze and Chronowski, 2018, p. 202.
162 Judgment of the CJEU (Grand Chamber) of 16 June 2015, Peter Gauweiler and Others v. Deutscher Bundestag, Case C-62/14, ECLI:EU:C:2015:400. However, the tone of the reference bordered on the vitriolic, and laid down a clear threat to the CJEU: should the CJEU not adhere to the GFCC's restrictive interpretation of the OMT program, it would ignore the CJEU's ruling and declare the OMT program inapplicable in Germany (Kelemen, 2016, p. 137).
163 Cartabia, 2007, p. 16.
164 Weiler, cited in Cartabia, 2007, p. 41.
165 Cartabia, 2007, pp. 16–17, 20.
166 Decision No. 22/2016. (XII. 5.) of the HCC, [56].
167 Vincze and Chronowski, 2018, pp. 296–304.

in Hungarian constitutional law. Indeed, not only pure questions of Hungarian constitutional law are to be tackled by a review of sovereignty and identity, and other players (branches of government) need to contribute to the solution. This is not about clear-cut legal questions, but political ones—questions that are not resolvable under the rule of law, since the solution may require democratic actions as well.

3.3. Actual Conflicts of Jurisdiction

3.3.1. The Czech Constitutional Court (CCC) was the first constitutional tribunal to explicitly declare a judgment of the CJEU *ultra vires*, in the well-known *Landtova* case. The issue was a very special, indirect dialogue between the CJEU and the CCC.[168] First, in 2005, the CCC decided in its judgment on how the Czech Authority must apply the 1992 international agreement on Social Security that was concluded between the Czech Republic and the Slovak Republic. In reply to that judgment, in 2011, the CJEU—upon a reference for a preliminary ruling from the Czech Supreme Administrative Court—established that the judgment of the CCC is discriminatory, infringing the free movement of persons.[169] Finally, as a replication, seven months later, the CCC declared the judgment of the CJEU *ultra vires*. The CCC did not struggle to explain why the CJEU was in conflict with the basic core of the Czech constitution; rather, it simply remarked that the CJEU's judgment was in conflict with the established case law of the CCC, then denounced the CJEU for ignoring European history, namely the specifics of the dissolution of the Czechoslovak Federation and its lack of connection to the calculation of pensions in the EU.[170]

3.3.2. At the end of 2016, the Supreme Court of Denmark (SCDK) disregarded a judgment[171] of the CJEU. More notably still, the SCDK used the occasion to set new boundaries to the applicability of the CJEU's rulings in Denmark: the SCDK delimited the competences of the EU through the lens of its interpretation of the Danish Accession Act, and the SCDK delimited its own power within the Danish Constitution.[172] In regard to the first point, it concluded that the judge-made principles of EU law developed after the latest amendments of the Accession Act, such as the general principle

168 The request for a preliminary ruling was not lodged with the CJEU by the CCC, still, the CCC submitted its written observations to the CJEU, but the CJEU did not consider them (Vincze and Chronowski, 2018, p. 252).

169 Judgment of the Court (Fourth Chamber) of 22 June 2011, Marie Landtová v. Česká správa socialního zabezpečení, Case C-399/09, ECLI:EU:C:2011:415. (hereinafter: Landtova, CJEU Judgment, Case C-399/09, ECLI:EU:C:2011:415), para. 49. According to some scholars the interpretation given by the CJEU in this case was erroneous (Vincze and Chronowski, 2018, p. 252).

170 Kühn, 2016, p. 191. It is funny that after the Landtova (CJEU Judgment, Case C-399/09, ECLI:EU:C:2011:415) judgment of the CCC the Czech Supreme Administrative Court lodged a new request for a preliminary ruling, essentially asking what to do when a national constitutional court disregards a binding judgment of the CJEU; then the Czech Government settled the basic issue, and consequently the reference was withdrawn, and the CJEU did not have to review the review of the CCC (Kühn, 2016, pp. 192–193).

171 Judgment of the CJEU (Grand Chamber) of 19 April 2016, Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen, Case C-441/14, ECLI:EU:C:2016:278.

172 Madsen et al., 2017, p. 4.

of non-discrimination on grounds of age, were not binding; with regard to the second point, the SCDK argued that it would in fact exceed its own judicial mandate within the Danish constitutional framework if it interpreted a national law, which violated the principle in question, in conformity with EU-law in a dispute between private parties, or disapply it.[173]

3.3.3. The GFCC, in reviewing the exercise of the competences of the institutions of the Union in the well-known PSPP decision,[174] has also held that the judgment given by the CJEU in *Weiss*[175]—upon a request for a preliminary ruling from the GFCC—was rendered *ultra vires*. The GFCC is therefore not bound by the CJEU's decision, and it is inapplicable in Germany.[176] By contrast, the HCC—in its decision in December 2021 in the case X/477/2021—has upheld its position that it cannot review a concrete decision of the CJEU based on constitutional considerations (of fundamental rights, of *ultra vires,* or of sovereignty), even if the motion has aimed to such a review.[177] Nonetheless, insofar as the Union would incompletely exercise some of its exclusive competences, and if that incompleteness breached the constitutional identity of Hungary, then the Hungarian State—according to the presumption of reserved sovereignty—would have both the right and the obligation to exercise that competence until the institutions of the Union take the necessary measures.

3.3.4. The Polish Constitutional Tribunal has gone much further: by its decision of October 7, 2021,[178] it has held that the TEU was partially incompatible with the Polish constitution. The decision did not formally reject the Treaties, and did not formally challenge the principle of primacy of EU law. Nonetheless, it declared that the Union

173 Ibidem.

174 BVerfG, Judgment of the Second Senate of 5 May 2020—2 BvR 859/15, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, paras. 1–237.

175 Judgment of the CJEU (Grand Chamber) of 11 December 2018, Proceedings brought by Heinrich Weiss and Others, Case C-493/17, ECLI:EU:C:2018:1000.

176 According to the GFCC German constitutional organs, administrative authorities and courts may participate neither in the development nor in the implementation, execution or operationalization of *ultra vires* acts. See further Kovács and Völcsey, 2020; Wendel, 2020. The CJEU issued a press release concerning the decision of the GFCC: a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings. To ensure that EU law is applied uniformly, the Court of Justice alone—which was created for that purpose by the Member States—has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty. Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect. That is the only way of ensuring the equality of Member States in the Union they created. Press release following the judgment of the German Constitutional Court of 5 May 2020. https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf.

177 The motion leading to the decision of the HCC was submitted by the minister of justice, seeking an interpretation of Art. E) para. 2 of the Basic Norm because, according to the minister, the implementation of the judgment given by the CJEU in the case C-808/18 would lead to a de facto alteration of the population of the country and so to a breach of the Basic Norm.

178 In the case No. K 3/21, on the assessment of the conformity to the Polish Constitution of some provision of the TEU.

has been acting outside the scope of the competences conferred upon it by Poland, and because of that, Poland may not function as a sovereign and democratic state.[179] The Polish Constitutional Tribunal has also declared that EU law—including the case law of the CJEU—is subordinated to the Polish Constitution,[180] and so it is subject to the assessment of the Polish Constitutional Tribunal. Still, in the light of the principle of sincere cooperation, dialogue, mutual respect, and mutual support, the Tribunal refrains from executing that competence.[181] However, if the practice of the CJEU's progressive activism—which consists, in particular, in interfering with the exclusive competences of Polish state authorities, in undermining the position of the Constitution as the supreme law in the Polish legal system, in challenging the fact that the judgments of the Constitutional Tribunal are of universally binding application and are final, and ultimately in questioning the status of judges of the Tribunal—is not refrained from, the Tribunal does not rule out that it will resort to exercising the said competence and will subject the CJEU's rulings to direct assessment of their conformity to the Constitution, including their elimination from the Polish legal order.[182]

3.3.5. Thus, to date, two constitutional courts from the *old* Member States and two constitutional courts from the *new* Member States have taken the view that a given judgment of the CJEU was not applicable in that Member State, denying so the supremacy of the CJEU's jurisdiction over themselves.[183] According to the mainstream of legal scholars,[184] if a national constitutional court deems that an EU act or CJEU judgment clashes with its constitution, it cannot simply deem the act or ruling inapplicable in its jurisdiction. This is correct,[185] but the mainstream argues further that national constitutional courts might seek to remedy the situation only by compelling their government either to amend their constitution, to seek to change the EU legal norm involved by working through the EU political process, or, if necessary, to withdraw from the Union altogether.[186] I think this position is a bit rigid, voluntaristic, and one-sided (as it sometimes happens to the mainstream): (i) it is rigid in that it considers a given legal situation as a final and permanent one (which is usually not

179 Well, if the assertion of the Polish Tribunal according to which the EU has been acting ultra vires is well-founded, then its conclusion—according to which Poland cannot function as a sovereign and democratic State—must be correct.

180 That position is hard (impossible) to defend, especially because Poland joined the EU when the principle of primacy had already been established, and Poland too ratified the TEU together with Declaration 17.

181 This seems to be a simple rephrasing of the method of the Solange II decision of the GFCC.

182 For the moment I do not know whether this is to be understood as a threat, a bluff, or a harsh invitation to the CJEU to a real dialogue.

183 Noting that the Romanian Constitutional Court stated on 23 December 2021 that national judges will be able to set aside Romanian law in favour of EU law only after the Romanian Constitution will be amended accordingly.

184 National Courts Cannot Override CJEU Judgments, A Joint Statement in Defense of the EU Legal Order, 26 May 2020.

185 Art. 4(3) para. 2 TEU.

186 Kelemen, 2016, p. 140. The HCC has proposed the same solution in its Decision No.4/1997. (I.22.), II.8, with a fundamental difference in terms of timing, supra, 2.4.8. and footnote 120.

the case in our postmodern world), *ab ovo* excluding the possibility that the conflict will be resolved in an organic way, by changing the pertinent case law either of the CJEU or of the national constitutional court; (ii) it is voluntaristic, because it wants to resolve semi-legal issues only by legal means; and (iii) it is one-sided, because it does not even consider the possibility that the CJEU's final judgment seriously breaches one of the fundamental values of the Union—democracy.

3.3.6. The *Kompetenz-kompetenz* principle[187] implies that both the CJEU and the national constitutional courts are able to decide on the limits of their respective jurisdictions over the interpretation and enforcement of EU law, and on the interpretation and enforcement of the national constitutions.[188] The *Kompetenz-kompetenz* principle has never been denied by EU law.[189] A general rule on jurisdiction—which would split constitutional issues belonging to the competence of constitutional courts and EU law issues belonging to the jurisdiction of the CJEU—is simply missing in the Treaties.[190] As a consequence, the same questions may be dealt with by the CJEU and the national constitutional courts in parallel and from different perspectives. We should not be afraid of that, even if those parallel jurisdictions may lead to parallel narratives of public law: the CJEU—in default of a European government, perhaps—has been much more categorical in telling its own narrative, while the national constitutional courts have usually been more restrained (with some exceptions).[191] In the constitutional dialogue, the national courts have left room for their governments and legislators, and have been restricting themselves based on EU law to a much greater extent than the CJEU has restricted itself based on the common constitutional tradition of the Member States. However, if duly circumscribed, constitutional courts' power to declare an act of the EU inapplicable in the concerned Member State does not jeopardize the primacy and the uniform application of EU law; instead, it enhances the guarantees of fundamental rights and the rule of law in the EU, contributing to

187 By that principle I mean the ability of each judge to decide on its own jurisdiction to proceed with a case. Conversely, some authors use the term *Kompetenz-Kompetenz* as the question of which court has the authority to rule on the boundaries of the EU's competences (Kelemen, 2016, p. 138).

188 In the operative part (point 2) of the Decision No.2/2019. (III. 5.) the HCC has declared that the authentic interpretation of the Basic Norm is given by itself, and its interpretation cannot be overruled by other bodies.

189 The principle according to which secondary sources of EU law cannot be annulled by national (constitutional) courts does not challenge the Kompetenz-Kompetenz principle.

190 The Foto-Frost, CJEU Judgment, Case C-314/85, ECLI:EU:C:1987:452. has simply pinned down that the courts of the Member States cannot establish that an act of the EU is invalid. Still, this does not exclude that a national judgment—pursuant to the national constitution—may contradict a judgment of the CJEU. Art. 4(3) TEU sets forth that the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. But this obligation of the Member States is limited by Art. 4(2) and 5 TEU. And, a national constitutional court cannot be expected to breach the very essence of the constitution it must protect.

191 The HCC considers the obligations deriving from the membership in the Union as well for the interpretation of the Basic Norm, Decision No.2/2019. (III. 5.) of the HCC, operative part, 2.

the creation of a European legal space where common values are cherished while national peculiarities are respected.[192]

3.4. The Self-Isolation of European Law

3.4.1. In the era of globalization, a given legal order has two options: either the mutual interaction with other (pre-selected) legal orders, and the receipt of some of their values and solutions, or the isolation from the other legal orders. The self-established sovereignty of the European legal order is a logical consequence of the fact that the Union is not a State, has no government, has no people, so it can lay its own foundation only on itself. According to Lenaerts, the constitutional autonomy of the Union does not have any purpose of isolation.[193] Nonetheless, the autonomy of EU law has been converted by the CJEU into autarchy: EU law has become self-sufficient.[194]

3.4.2. The influence of the laws of the Member States on EU law have been expressly acknowledged by the Treaties concerning constitutional values[195] and tortious liability.[196] The CJEU has also laid down that the EU legal order must consider the legal orders of the Member States, their constitutional traditions, and human rights. Still, such an acknowledgement is usually made on a rhetorical level.[197] However, the autarchy of the legal order of the Union implies a strategy of the CJEU that precludes the EU legal order from being affected by legal impulses outside the control of the CJEU. Fundamental rights as well must be ensured within the framework of the structure and objectives of the EU,[198] and must be applied within the EU in accordance with its constitutional framework.[199] Although national authorities and courts remain free to apply national standards of protection of fundamental rights, the primacy, unity, and effectiveness of EU law must not thereby be compromised.[200]

192 Paris, 2018, p. 205.
193 Lenaerts, 2015, p. 369.
194 By doing so, many critics have argued, the CJEU establishes an unjustified and illegitimate legal autarky to protect its own institutional powers (Eckes, 2020, p. 3). On the contrary, advocate general Bot, in his opinion delivered in the case Opinion 1/17, took the view that the preservation of the autonomy of the EU legal order is not a synonym for autarchy. Opinion of Advocate General Bot delivered on 29 January 2019, Opinion 1/17 Request for an opinion by the Kingdom of Belgium, ECLI:EU:C:2019:72, para. 59.
195 Art. 4(2) TEU.
196 The jurisdiction of the CJEU in tort cases against the EU is exclusive under Art. 268 TFEU, but the Court gives judgment in accordance with the general principles common to the laws of the Member States under Art. 340 TFEU.
197 Fundamental rights form an integral part of the general principles of law, whose observance the CJEU ensures, and for that purpose, the CJEU draws inspiration from the constitutional traditions common to the Member States, see e.g., Internationale Handelsgesellschaft, CJEU Judgment, Case 11-70, ECLI:EU:C:1970:114, para. 4, Nold v. Commission, 4/73,ECLI:EU:1974:51, para. 13, and Opinion, C-2/13, para. 37.
198 Internationale Handelsgesellschaft, CJEU Judgment, Case 11-70, ECLI:EU:C:1970:114, para. 4, Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 170.
199 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 177.
200 Judgment of the CJEU (Grand Chamber), 26 February 2013, Åklagaren v. Hans Åkerberg Fransson, C-617/10, EU:C:2013:105, para. 29.

3.4.3. It is a sign of methodological self-isolation if the CJEU does not apply the law to the Union as it applies it to the Member States. The CJEU has repeatedly been accused of double standards by legal scholars, e.g., the standards applied to Member State liability for normative acts are stricter than the ones applied to the EU,[201] and judicial decisions within particular areas treat EU action more leniently than Member State actions.[202]

3.4.4. As a step toward self-isolation, the Court has held that the requirements of efficient commercial arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the CJEU for a preliminary ruling.[203] By contrast, regarding international investment protection, the CJEU has held that Arts. 267 and 344 TFEU preclude a provision in an international agreement concluded between Member States, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[204] This is because—according to the CJEU—by concluding the BIT, the Member parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.[205]

3.4.5. It is a matter of fact that individuals and Member States, for the time being, have no access to legal remedies by which they could bring an action before a forum established out of the EU for an infringement committed by the institutions of the Union (e.g., by the CJEU), even if that infringement breaches either the sovereignty of the Member State or the fundamental rights of European citizens. The reason for that, regarding individuals, is the opinion of the CJEU given in the 2/13 case:[206] because of that opinion, the EU could not join the European Convention of Human Rights (hereafter, Convention). Consequently, if the institutions of the Union breach the human rights of European citizens, they can bring an action for damages only before the CJEU, according to the exclusive jurisdiction set forth by Art. 268 TFEU. However, if the CJEU gives a final judgment that, in the opinion of a given Member State, violates the essence of its sovereignty, that violation—from the perspective of EU law—is irremediable, because a violation of the sovereignty cannot be remedied by

201 Antoniolli, 2008, p. 238.
202 Craig, 2011b, p. 397.
203 Judgment of the CJEU of 1 June 1999, Eco Swiss China Time Ltd v. Benetton International NV. Case C-126/97, EU:C:1999:269, paras. 35, 36 and 40.
204 Achmea, CJEU Judgment, C-286/16, ECLI:EU:C:2018:158.
205 Achmea, CJEU Judgment, C-286/16, ECLI:EU:C:2018:158, para. 56. In 2015 the Commission asked the Member States to terminate their intra-EU bilateral investment treaties on the grounds that they were outdated and incompatible with EU law. https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5198.
206 Opinion of the Court, C-2/13, ECLI:EU:C:2014:2454.

an action for damages, and the supervision of the final judgments of the CJEU is not allowed. Thus, the CJEU enjoys full immunity[207] against the Member States.

3.4.6. The opinion of the CJEU given in the 2/13 case is emblematic of the procedural isolation of the EU legal order. The reasoning of the opinion has pushed the autonomy of the EU legal order to its outer limits, to save its own competence (power). Indeed, according to the CJEU, an external control over itself would be established by the accession of the EU to the Convention, but an international agreement may affect the powers of the CJEU only if the indispensable conditions for safeguarding the essential character of those powers are satisfied, and, consequently, there is no adverse effect on the autonomy of the EU legal order.[208] The procedural closure of the EU legal order is completed by the exclusive jurisdiction of the CJEU over itself.[209]

3.4.7. The fact that the CJEU vetoed the accession of the EU to the Convention—against almost all the Member States, the Commission, and the Parliament[210]—may be seen as an act of government of (constitutional) judges, taking over the legislators' and executives' responsibility. In addition, the following question may certainly be posed: if the Member States are required by the rule of law to accept an external control over themselves at least in the field of human rights, why is such a requirement missing against the EU?

3.4.8. The autarchy of the EU legal order as conceived and enforced by the CJEU seems to be an exaggeration of the rule of law. Indeed, in a democracy, under the rule of law, it is the exercise of (judicial) power that should be restricted by fundamental rights and popular sovereignty, not vice versa. Nonetheless, the CJEU recognizes fundamental rights only insofar as they are subordinated to the legal sovereignty of the EU, and the CJEU enjoys full immunity if it breaches Art. 4(2) TEU, i.e., the constitutional identity of Member States.

4. Temporary Conclusions

Currently, the basis of the legal order of the EU is given by the (mutually restricted) sovereignty of twenty-seven Member States. Thus, it is no surprise that the EU legal order is stronger than the distinct legal order of each single Member State. Certainly,

207 Immunity means a certain counterpoint of liability: irresponsibility (Kecskés, 2020, p. 707).
208 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 183.
209 In its Opinion given on CETA the CJEU has held that to determine the compatibility of the envisaged international mechanism with the autonomy of the EU legal order, it is necessary to be satisfied that the mechanism does not confer on the envisaged tribunals any power to interpret or apply EU law other than the power to interpret and apply the provisions of that agreement having regard to the rules and principles of international law, and the mechanism does not structure the powers of those tribunals in such a way that, while not themselves engaging in the interpretation or application of rules of EU law other than those of that agreement, they may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework. Opinion 1/17 of the Court, ECLI:EU:C:2019:341, para. 119.
210 Opinion, C-2/13, ECLI:EU:C:2014:2454, para. 109.

the sovereignties of the Member States have been fading in the Union, but they do still exist, and the impairment of State sovereignty cannot depreciate the democratic principle of popular sovereignty a jot.[211]

The case law of the CJEU has established the thesis that EU law must be given an absolute supremacy over the laws of the Member States. By contrast, national constitutional courts have formulated the antithesis, according to which they are the final guardian to enforce national constitutions, against the institutions of the Union (CJEU included) as well. The tension between parallel legal orders may be conceived as a dialogue. Judicial dialogues are not always pleasant and constructive, but in any case, participation in the procedure allows constitutional courts to make their views known.[212]

The primacy of EU law over the laws of the Member States is a dogmatic necessity. The obligation of national judges (constitutional judges included) to apply EU law (and to set aside their own national laws) according to the instructions of the CJEU is a technical feature of the application of EU law, which, as a general rule, does not breach the constitutional identity of the Member States, because the primacy of the provisions of EU law in concrete court cases becomes a part of the constitutional structure of each Member State by the accession.

The authority of the CJEU must therefore be recognized in the enforcement of EU law—but only in the scope of EU law. The rule of law implies that the limits to the scope of EU law are to be defined by the CJEU. Still, pursuant to Art. 4(2) TEU, the rule of law implies as well that the CJEU has no authority to define the constitutional identity of the Member States: on the contrary, it is the constitutional identity of each Member State that restricts the powers of the EU. I do not see any reason the constitutional identity of a Member State should not be defined by the constitutional court of that Member State, provided that the *Acquis Communautaire* being in force at the accession of the Member State and primary law can never be disregarded by constitutional courts.

The conflict between the interpretation of EU law rendered by the CJEU, and the interpretation of the constitutional identity of a Member State given by its constitutional court, can be resolved in a number of ways: improving EU law, amending the constitution of the concerned Member State, developing the case law of the CJEU, changing the case law of the concerned constitutional court, or leaving the EU—each option compatible with Art. 4(3) TEU. It is a further option to face legal pluralism and acknowledge that the conflict—for the moment—is unresolvable for the law. Such a

211 The substantial depletion of the sovereignty of Member States calls for a different and substantial homogeneity, which can only be sought through a renewed development of the democratic principle. To this end, the most appropriate route is imagining increasingly intense forms of participation of the European Parliament and Member States in decision-making processes and differentiation paths, thus allowing Member States to safeguard and merge their own identity against union public policies (Bifulco, 2018, p. 185).
212 Claes, 2016, p. 170.

legal pluralism may well infringe the rule of law,[213] while the absolute negation of that pluralism may weaken democracy.

The CJEU has recently been called upon to settle a number of issues that have been both difficult legally and sensitive politically.[214] In a democracy, under the rule of law, the best tool for resolving individual disputes is the court case. However, the court case is not an efficient way to resolve public debates that arise in society; public debates are to be resolved through democratic elections. While court cases are—must be—decided by reason, social debates are to be decided by the will (of the people). The assertion that law and judges must also have authority to resolve the strategic issues of the society will lead to legal ideologies that want to legitimate the exercise of power according to their own narrative, instead of democratic legitimation.[215] Shaping the relationship between the EU legal order and the Member States is a political (democratic) task as well, not only a legal issue, to prevent legal imperialism.

213 Some authors argue that legal (constitutional) pluralism is incompatible with the rule of law (Kelemen, 2016; Kühn, 2016, pp. 193–194).
214 Rosas, 2019, p. 7.
215 Ideology, compared to democracy, is an alternative form to legitimate the power (Lánczi, 1997, p. 25).

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