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THE ACHILLES' HEEL OF EUROPEAN INTEGRATION: THE POTENTIAL UNCONSTITUTIONALITY OF UNION LAW

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TABLE OF CONTENTS

INTRODUCTION 2

THE EUROPEAN UNION LEGAL ORDER 3

I. Basic notions 3

II. An autonomous system 6

III. The CJEU 8

INTERACTION BETWEEN EU LAW AND NATIONAL LAW 10

I. Principle of sincere cooperation 10

II. Principle of state liability 10

III. Principle of direct effect 11

IV. Principle of primacy 11

THE STRUGGLE FOR POWER BETWEEN UNION LAW AND MEMBER STATES CONSTITUTIONS 14

I. State practice: defying absolute primacy 14

II. Conflicts in the field of fundamental rights 17

III. National identities and counter-limits review 20

CONSTITUTIONAL DEFIANCES 24

I. The Case of Germany 24

II. The Case of Poland 30

A COMPARATIVE OVERVIEW 34

CONCLUSIONS 36

BIBLIOGRAPHY 39

INTRODUCTION

The present paper deals with the relationship between the European Union legal order and national constitutions of the Member States. The main reason laying behind the choice of this topic have been recent cases in which the constitutional tribunals of Germany and Poland have declared provisions of Union law incompatible with their fundamental norms. Considering that such allegations unambiguously compromise the legal foundations underpinning the EU, if there are indeed grounds that allow conflicts between constitutions and European law where the former prevail, an integration process characteristically based on law such as the European one, would find in it a great weakness, a veritable Achilles' heel. Therefore, I found interesting to go beyond the usual analysis and focus on how Member States constitutions, as the supreme national law, have to deal with another supra-national authority. For this aim, this work seeks to prove that there exist dysfunctions in the relations between the Community legal system and the domestic legal systems due to the irresolute articulation between them, which at the same time can lead such conflicts to occur in practice and, in turn, undermine the well-functioning of the Union.

In light of the above, questions have been raised such as "Which is supposed to prevail in the application, Community law or constitutional provisions?", "Can EU law actually oppose to constitutional law?", if so "Regarding what matters do those collisions tend to happen?", or "How do different countries deal with this overlapping of authority?". In order to be as exhaustive as possible in this analysis within the extent that this kind of work allows, the methodology used has mostly been literature review. Thus, books and academic articles have been consulted exploring the framework of the interaction between these two legal orders, as well as their limitations. In addition, jurisprudence of the CJEU has also been examined, as well as judgments of the courts concerned here. Finally, European Treaties, constitutional texts of Member States, and official documents and websites of European institutions have also been sources of reference.

Regarding the general structure of this paper, it is divided in five chapters plus the final conclusions. The first one explores what is the European Union legal order, putting into context the evolutionary process of European integration so that its current state can be understood, and the key features of Community law are explained. Then, the notion of the law of the Union as an autonomous legal system is developed. Thirdly, the role of the CJEU is presented, as it has influenced the construction of the current model of Union law and the fundamental function it performs in it.

In the second chapter, the most important principles of Community law governing relations between the former and the legal systems of the Member States are presented. Then, in the third chapter, it is examined how the previously presented framework of relations, as theoretically designed from European institutions, is actually regarded and operationalized at the national level, especially when it concerns constitutional law. The key points and arguments that give rise to discrepancies between them are also assessed.

In the fourth chapter, two case studies are analysed, those of Germany and Poland, where the practical application of the rhetoric behind the challenges to European law is tested. Focus will be put on the relevance of their study, the particularities of their approach to European law, and special attention will be paid to their recent jurisprudence and the criticisms raised.

Finally, the last chapter aims to compare very briefly the different approaches of the Member States to the relationship between their legal systems and the Community system, as well as their differences and similarities.

THE EUROPEAN UNION LEGAL ORDER

I. BASIC NOTIONS

The European Union is an international organisation of its own kind, to whom Member States have conferred certain competences to attain common objectives (art.1 TEU). It is characterised by a "transfer of powers to the Union institutions to a greater degree than in other international organisations, and extending to areas in which states normally retain their sovereign rights"[1], thereby obtaining a supranational status. In this organisation *sui generis, "*each national society renounces to decide unilaterally in certain aspects and accepts to decide commonly in order to achieve those objectives and grant respect to the supreme values*"*[2].

It must also be noted that the EU is a new stage in the process of European integration[3], not an end in itself. Neither has it been created *ex novo*, but has come into being as a heir of the achievements of the European Communities. Indeed, European integration has come a long path, ever since the first efforts to bring closer the peoples of the continent after the Second World War came up. Once the federal way was dismissed back in the 1948 Congress of the Hague—only leading to the creation of the Congress of Europe[4]—a new form of international cooperation appeared in scene. French political and economic advisor Jean Monnet brought froward the notion of a European Community, where coal and steel resources were to be managed in common under a High Authority so that war became "materially impossible"[5]. His ideas underpinned the Schuman declaration of 9th May 1950, in which French foreign affairs minister Robert Schuman declared that "*Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity*."[6]. The 1951 Paris Treaty was signed thereafter by France, West Germany, Italy, the Netherlands, Belgium and Luxembourg; and the European Coal and Steel Community was thereby created. It was properly assumed that bringing economic interests together would help enhance living standards and be the first step toward a more unified Europe, while membership remained open for more countries to join the ECSC. It inaugurated the "community" method, as in spite of it being a project framed within an international society organised around the sovereign state as a political unit, "these autonomous units came to the innovative conclusion that for the sake of the new organization they were launching and on the basis of shared values that inspired the necessary trust, the decisions that would shape the project they were undertaking would have to go beyond the canonical model of international cooperation in its traditional sense (...) to coin an unprecedented pattern: that of supranational integration."[7].

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[1]Borchardt, Klaus-Dieter. 2017. *The ABC of EU law.* Luxembourg: Publications Office of the European Union, p. 45.

[2] Mangas Martín, Araceli, and Diego J. Liñán Nogueras. 2014. *Instituciones y Derecho de la Unión Europea.* Madrid: Tecnos, p. 51.

[3] Article 1 of the consolidated version of the Treaty on European Union [2016] OJ C326/16, hereinafter TEU.

[4] Dehousse, Renaud. 2018. "Towards a New Constitutional Debate?" In *The History of the European Union. Constructing Utopia.*, by Giuliano Amato, Enzo Moavero-Milanesi, Gianfranco Pasquino and Lucrezia Reichlin, 509-531. Hart Publishing.

[5] Schumann, Robert. "Shumann Declaration of 9th May 1950." *Fondation Robert Schumann.* Accessed May 12, 2022. https://www.robert-schuman.eu/fr/declaration-du-9-mai-1950 .

[6] *Ibidem.*

[7] Díaz-Romeral Ruiz, Mario. 2015. "Los Caballos de Troya en el Proceso Europeo de Integración." In *Cuadernos de la Escuela Diplomática. Número 53. Selección de memorias del curso selectivo de funcionarios de la Carrera Diplomática. 2014*, by Escuela Diplomática España, 331-439. Madrid: Ministerio de Asuntos Exteriores y Cooperación.

Within the context of the Cold War, the six ECSC Member States pondered widening their collaboration to the military sector, once again at France's lead; and hence a treaty establishing a European Defence Community (EDC) was negotiated to that purpose[8]. Such initiative failed, however, when in 1954—NATO having already been created in 1949—the French National Assembly rejected the EDC after a heated public discussion, and the political community that would have been in charge of a European army crumbled as a result[9]. Nonetheless, the EDC failure paved the way for discussions on integration with the focus set on economic matters, such as the Messina conference held in 1955, which led to the signing two years later of the Treaties of Rome creating the European Economic Community (EEC) and the European Atomic Energy Community (EAEC or Euratom), treaties to which numerous adjustments were to be made in the following decades[10]. A decisive turning point came in 1965 with the so-called "Empty Chair Crisis", when the Common Agricultural Policy (CAP) funding method was under discussion. This, together with other measures, would entail a more powerful Commission in detriment of the Council, and therefore eroding the influence of individual states in the decision-making process within the EEC. Since this clashed with French president De Gaulle's conception of the Community, aimed at attaining close cooperation between states for their advantage but always retaining sovereignty (intergovernmental method), he refused the upcoming Qualified Majority Voting system as it would serve to foster supranationalism, and withdrew French representation in the Council of Ministers—which was holding the presidency at the time[11]. The crisis reached an end with the Luxembourg Compromise of 1966, stating that when essential issues were at stake, decisions would have to be taken again by unanimity, and so whenever Member States were not interested in using QMV, they could veto it[12].

Once De Gaulle got out of office, and following the economic recession that shook the world due to the oil crisis of the early 1970s, the integration project was relaunched through the adoption of the Single European Act in 1986, that introduced institutional reforms in order to complete the internal market by 1993[13]. Notably, it raised the number of circumstances in which the Council might make decisions by QMV, strengthened the European Parliament powers, introduced new Community competencies, and began the journey towards greater political integration[14]. Continuing down this path, when the Iron Curtain was lifted a significant amount of new applicants knocked at the doors of the Communities, both those released from the soviet yoke as well as those who had previously considered membership as taking a stand in the dualist opposition of the Cold War. As a result, the existing framework for European integration had to be strengthened, and so the Maastricht Treaty (Treaty on the European Union) was signed. The new entity was structured on three "pillars" representing different policy areas: the first one comprising the previous communities and being the "supranational" part of the EU; whilst the second and third pillars were "Justice and Home

[8] Dehousse, Renaud. 2018. Op. Cit.
[9] *Ibidem.*
[10] *Ibidem.*
[11] Caraffini, Paolo. 2015. "De Gaulle, the "Empty Chair Crisis" and the European Movement." *Centro Studi Sul Federalismo. Perspectives on Federalism*, 164-189.
[12] Notably, however, "the text only established a gentleman's agreement on the future behaviour of the Commission in its relation to the Council", and "there was no attempt to elevate the Luxemburg compromise into a binding document: the text of the press release has never been transformed into a binding instrument of primary law, and not even into a formal declaration"– Ziller, Jacques. 2017. "Defiance for European Influence - The Empty Chair and France." In *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, by András Jakab and Dimitry Kochenov, 422-435. Oxford: Oxford University Press., p. 428-429
[13] EUR-Lex. 2018. "The Single European Act." *EUR-Lex.* 4 April. Accessed May 5, 2022. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:xy0027.
[14] *Ibidem.*

Affairs" and the "Common Foreign and Security Policy", these featuring the intergovernmental approach[15]. Notwithstanding, the enlargement of the European Union towards the East posed more challenges. Although several enlargements had already taken place in 1973, 1981, 1986 and 1995, the increased number of participants that would now take part in the Union would exceed its functional limits and called for a restructuring that made it suitable to include additional states, making sure that enlargement did not come at the expense of effective policymaking. Thereupon, the Treaty of Amsterdam (1997) and the Treaty of Nice (2001) were signed for this purpose, containing a number of provisions dealing with the institutional effects, as well as reinforcing the CFP, the EP, or expanding the use of the QMV, but leaving the founding treaties untouched[16]. Henceforth, once these states had achieved sufficient reforms to proceed to negotiations, they acceded the Union in 2004, 2007 and the last in 2013—since there were substantial differences between the former Eastern bloc countries and EU countries, and among themselves, they could not all accede at the same time[17].

Finally, the last reform came with the Treaty of Lisbon, which was signed in 2007 and entered into force in 2009. Its origins date to a constitutional project which began in late 2001 with the Laeken declaration of the European Council, and that was watered down when and the Treaty establishing a Constitution for Europe adopted in 2004—whose aim was mainly to simplify in a single text the complex quagmire that conform the legal basis of the Union— was rejected in two referenda in France and the Netherlands in 2005[18]. Consequently, the European Council resolved to undergo a two-year reflection period that resulted in the drafting of the Lisbon Treaty. It reformed the founding treaties, introducing new features, outstanding among them the granting of full legal personality to the EU and the setting of a procedure of withdrawal from the organization.

As a result of this historical process of progressive construction of a system of European integration, and following the failure of the Treaty establishing a Constitution for Europe in 2004, the set of rules governing the nature and scope of action of the EU "…is still not laid down in a comprehensive constitutional document, as it is in most of the constitutions of its Member States, but arises from the totality of rules and fundamental values by which those in authority perceive themselves to be bound. These rules are to be found partly in the EU treaties or in the legal instruments produced by the Union institutions, but they also rest partly on custom"[19]. Hence, the EU finds its primary legal basis on the founding treaties (Treaty on the European Union and Treaty on the Functioning of the European Union) and the instruments amending and supplementing them, namely the Treaties of Maastricht, Amsterdam and Lisbon[20]. Moreover, ever since the latter entered into force, the European Charter of Fundamental Rights enjoys the same legal value as the treaties[21]. Additionally, "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*."[22].

[15] Hage, Jaap. 2020. Op. cit.
[16] *Ibidem.*
[17] De Munter, André . 2021. "Fact Sheets on the European Union. the Enlargement of the Union." *European Parliament.* Accessed May 5, 2022. https://www.europarl.europa.eu/factsheets/en/sheet/167/the-enlargement-of-the-union.
[18]García-Valdecasas, Ignacio . 2005. "El rechazo al proyecto de Constitución Europea: un análisis retrospectivo." *Real Instituto Elcano.* Accessed May 5, 2022. https://www.realinstitutoelcano.org/analisis/el-rechazo-al-proyecto-de-constitucion-europea-un-analisis-retrospectivo/.
[19] Borchardt, Klaus-Dieter. 2017. Op. cit., p. 43.
[20] *Ibidem*,, p. 90.
[21] Art. 6(1) TEU
[22] Art. 6(3) TEU

For German jurist Klaus-Dieter Borchardt, "What is entirely new about the EU and distinguishes it from earlier attempts to unite Europe is the fact that it works not by means of force or subjugation but simply by means of law."[23] It is based on law and pursues its objectives by means of law. Indeed, the Union has developed its own legal order, since based on the powers conferred to it "the Member States have thus not only created reciprocal obligations between States, but also a legal system autonomous of the national legal orders of the Member States, featuring its own legal personality, its own institutional setup and governing structures, as well as its own system of legal protection"[24]. It "is an organization that was created by means of legal sources (treaties) and that was developed through secondary EU law (law created by EU organs) such as regulations, directives, decisions and – last but not least – judgments of the European Court of Justice."[25]

II. AN AUTONOMOUS SYSTEM

The European Union has therefore construed an independent body of law of its own, the reason whereby it has become "a unique Community that goes further than any other international agreement"[26]. This new legal order is characterised by the principle of autonomy, since it is a separate order from those of the Member States, even if these are "from a historical perspective, the origin and very source of the Community legal order"[27]. As it was explained in the previous section, it is based and developed within the Union, finding its primary source in the Treaties and developed by the institutions.

It is, however, entitled to legislate only on those areas where states have conferred part of their sovereign functions[28] to the Union. This is known as the principle of attribution, laid down in Article 5 of the TEU[29], and article 2 of the TFEU, according to which "*it is not always the case that when the EU receives some competence, it was transferred by the Member States. It is also possible that Member States give some competence to the EU and at the same time also retain this competence themselves*"[30], thereby differentiating exclusive and shared competences. This attribution or "pooling of sovereignty" can be considered the origin of the legislative capacity of the Union.

Unlike the principle of attribution, the principle of autonomy and thus the existence of a "legal order of the European Union" as such is not stated in primary law. Instead, it was the ECJ who ascertained this, in the exercise of its role as interpreter of the Treaties—a matter that will be referred later on this paper. The principle of autonomy of Community law

[23] Borchardt, Klaus-Dieter. 2017. Op. cit., p. 89.
[24] Amtenbrink, Fabian , and Hans Hermann Bernard Vedder. 2013. "The European Union Legal Order: An Introduction to its Nature and Scope." In *The Influence of EU Law on National Private Law* , p. 13-38. Kluwer.
[25] Hage, Jaap. 2020. *European Integration: A Theme.* The Hague: Eleven International Publishing, p. 23-24.
[26] Stiernstrom , Martin. 2005. "The Relationship Between Community Law and National Law." *Jean Monnet/Robert Schuman Paper Series* 5 (33).
[27] Arnold, Reiner. 2004. "Conflictos entre ordenamientos y su solución. El ejemplo alemán." *Revista de Derecho Constitucional Europeo* 1: 97-114
[28] A difference must be noted here between the attribution of internal competences of states attached to their sovereign functions in favour of the EU, from the idea of transferral of sovereignty itself. According to Hage , "It is very unlikely that sovereignty, which has historically been strongly connected to statehood, can be transferred". See Hage, Jaap. 2020. Op. cit., p. 183.
[29] Art 5 TEU: "(1) *The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.* (2)*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.* (…)"
[30] Hage, Jaap. 2020. Op. cit., p. 182

was thus introduced in 1963 by the well-known *Van Gend Loos* sentence of the then Court of Justice of the European Communities. In this case, the Court stated that "*...the Community constitutes a new legal order of international law [...]. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage*"[31]. With this reasoning, the CJEC started to define the boundaries between Union law and other legal orders, establishing the notion that "Community law is a separate legal system, distinct from, though closely linked to, both international law and the legal system of the Member States"[32], a notion that would be reinforced consistently by later judgments of the Court.

For Arnold, in this regard the "Autonomy" of Community law "…presuposes the existence of a rule-making mechanism (instrumental aspect), of material normative powers specially attributed to these organs (material aspect), and a «Geltungsgrund» or validity reason (…) i.e. in a State, the will of the people as holder of the «pouvoir constituant»; in the Community, the will of the Member States"[33]. Nonetheless, the «Geltungsgrund» of Community law is not without controversy, as it will be reviewed in later chapters. Setting legitimacy polemics aside, the autonomy of EU legal order is confirmed in its formal aspects, as the Union enjoys "quasi-governmental bodies (the institutions) independent from the national public authorities and endowed with legislative, administrative and judicial sovereign rights"[34].

When trying to find the rightful place of this body of law in relation to national legal orders, "Union law must not be conceived as a mere collection of international agreements, nor can it be viewed as a part of, or an appendage to, national legal systems"[35]. It is, in fact, an autonomous set-up that interacts with the legal systems of Member States and yet it is not completely self-sufficient, as it is even dependent on them for its rules to be enforced[36]. In a much similar fashion to constitutions, "Treaties and rules constitute a set of rules which directly, without interference or intervention, impose obligations upon and create rights for the Member States or natural or legal persons within the Community"[37]. In this sense, for Weiler, what distinguishes European integration from integration in a federal state is that whilst there exists *de facto* a legal federalism at the continent level, where different legal systems coexist quite efficiently covered by the umbrella of Community law rather than a federal supreme law, there lacks, however, political federalism[38]. We are therefore faced with what he defines as "Sonderweg" or "the special way for Europe", where although lacking the formal sovereignty and authority of a single and united people characteristic of federal statecraft, the 27 Member States remain held together by the glue of law featuring a "principle of Constitutional Tolerance", i.e. achieving the level of material integration of advanced federal states while maintaining—even strengthening—the individual sovereign states that conform the EU[39].

Henceforth, it is a normative system that interacts with national law but still "is not confused with domestic law, nor does it obey in its formation or its effects the rules of

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[31] *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse* . 1963. 26/62 (Court of Justice of the European Communities, May 2).
[32] Stiernstrom , Martin. 2005. Op. cit.
[33] Arnold, Reiner. 2004. Op. cit.
[34] Stiernstrom , Martin. 2005. Op. cit.
[35] Borchardt, Klaus-Dieter. 2017. Op. cit., p. 133.
[36] *Ibidem,* p. 134.
[37] Stiernstrom , Martin. 2005. Op. cit.
[38] Weiler, Joseph H. H. 2000. "Federalism and Constitutionalism: Europe's Sonderweg." *The Jean Monnet Center for International and Regional Economic Law and Justice.*
[39] *Ibidem.*

the domestic regulatory procedure"[40]. This feature of European law is of fundamental significance when it comes to its application in the territory of Member States. On the one hand, as Borchardt argues, the autonomy of the EU legal order "is the only guarantee that Union law will not be watered down by interaction with national law and that it will apply uniformly throughout the Union"[41]. In this line, it can be concluded that since Union law is (at least in theory) not measured by national legislation or constitutional law but just by itself, it is thereby resisting subjugation to potential unilateral interests of Member States and embodying a truly independent source of law. On the other hand, for Arnold "only if Community law constitutes an autonomous legal system can there be a conflict with national law"[42]. Clashes between Union and national law can take place because Union law does not abide by domestic regulatory procedures, and hence is not subject to its internal hierarchy. If a rule within a national legal order is contrary to a norm of superior status, national legal provisions might, for instance, void the lower rule.

Indeed, it is the lack of such an specific hierarchical layout between EU law and national legal orders what, under certain circumstances, can lead to conflicts between them. Such an absence of concrete provisions is explained by the fact that the Treaties are not self-contained and the values they set have sometimes been interpreted by the institutions. As part of the evolutive nature of the European integration process, the EU legal order has been progressively developed (even created) by the jurisprudence of the ECJ. Neither the principle of autonomy nor most of the principles governing the relationship between domestic and Community law are enshrined in the Treaties, but rather have come into being as a result of the interpretations of the European Court of Justice.

III. The CJEU

An important milestone of Union law is to be found on the Court of Justice of the European Union. The legal order created by the Community has its primary, but not ultimate, source in the founding treaties, as they "lay down basic principles, which are either worked out in the Treaties themselves or implemented by acts of the institutions"[43]. Primary law is not self-contained, "the EU legal order cannot consist entirely of written rules: there will always be gaps which have to be filled by unwritten law"[44]. This unwritten law consists of general principles of law, mainly emanating from the common constitutional traditions of Member States, which "are given effect when the law is applied, particularly in the judgments of the Court of Justice"[45]. Moreover, the CJEU has, by interpreting the Treaties in the cases brought before it, even developed new principles of EU law, reason for which it has been critized "by going farther than barely interpretation of the Treaty and going into a sphere of policy-making"[46].

Since "there is no express recognition of these characteristic principles in the texts of the EU's founding treaties or in the constitutions of the Member States. This, in turn, highlights the importance of the Court of Justice of the European Union, whose

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[40] Mangas Martín, Araceli, and Diego J. Liñán Nogueras. Op. cit., p364
[41] Borchardt, Klaus-Dieter. 2017. Op. cit., p. 133.
[42] Arnold, Reiner. 2004. Op. cit.
[43] Stiernstrom , Martin. 2005. Op. cit.
[44] Borchardt, Klaus-Dieter. 2017. Op. cit., p. 96.
[45] *Ibidem.*
[46] Boomberg, Elizabeth and Alexander, Stubb. The European Union: How Does It Work, Oxford; New York: Oxford University Press, 2003, p. 62, as seen in Stiernstrom , Martin. 2005. Op. cit.

jurisprudential development has been decisive for the evolution of Community law."[47] Notably, such an outstanding role is not new in the current stage of the integration project, but "the involvement of the CJEU has been crucial right from the outset of European integration as the newly established supranational court almost immediately made work of dissecting those fundamental principles from the Treaties"[48]. "The Court of Justice of the European Communities was the highest court on matters of community law. Its role was to ensure that Community law was applied in the same way across all Member States and to settle legal disputes between institutions or states. It became a powerful institution, as Community law overrides national law."[49]

In light of the above, it is worth considering why the ECJ has taken over the task of defining the model of relationships between the EU and domestic legal orders and where do its powers arise from. For Azpitarte, when it comes to "the power of the ECJ to specify the model of relations between Union law and constitutional law, the key precept can only be Art. 220 ECT"[50]—current Art. 19 TEU—according to which: "*The Court of Justice of the European Union* (…) *shall ensure that in the interpretation and application of the Treaties the law is observed*". Such a difference made between the law and Treaties leads to the conclusion that "the provisions of the Treaty do not in themselves constitute a legal system, but that Community law must be a legal system"[51]. This is to say, that the ECJ is called upon to consolidate the EU legal order and to fill its gaps. In addition, Art. 344 of the TFEU excludes the submission of "*a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein*"[52]. Usually, such a method is provided by the preliminary ruling procedure referred to in Art. 267 TFEU, by means of which national courts may—and sometimes must—refer questions on interpretation of EU law to the ECJ when it comes across in cases brought before them. The ECJ does not give the final answer to the case, but national courts are then obliged to apply the interpretation given by the ECJ. Altogether, these provisions make the ECJ the sole and supreme interpreter of EU law, which at the same time preserves the uniform application of the latter, "for it would be wholly unacceptable for citizens and undertakings to be judged by different criteria—and therefore be treated unjustly"[53]. In fact, since the EU is an organisation sustained by law, whereby it keeps its members linked, and which allows it to exist and to advance, Luxembourg judges play a crucial role in the assertion and very survival of the authority of EU law, although it has always been beset with problems.

Henceforth, based on the above, "the ECJ has constructed a model of relations between legal orders characterized by the primacy and direct effect of Community law, the obligation to interpret domestic law in conformity with it and the responsibility, and consequent obligation to compensate, of the Member States for non-compliance with community law."[54]

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[47] Ferreyra, Leandro. 2012. "Límites Constitucionales Del Principio De Primacía Del Derecho Comunitario." *Derecho y Humanidades. Universidad de Buenos Aires.* (19): 297-316.
[48] Amtenbrink, Fabian , and Hans Hermann Bernard Vedder. 2013. Op. cit.
[49] Hage, Jaap. 2020. Op. cit., p. 27.
[50] Azpitarte Sánchez, Miguel. 2004. "Las Relaciones Entre El Derecho De La Unión Y El Derecho Del Estado A La Luz De La Constitución Europea." *Revista de Derecho Constitucional Europeo* 1: 75-95.
[51] Azpitarte Sánchez, Miguel. 2004. "Las Relaciones …." Op. cit.
[52] Art. 344 of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, hereinafter TFEU.
[53] Borchardt, Klaus-Dieter. 2017. Op. cit., p. 135.
[54] Azpitarte Sánchez, Miguel. 2004. "Las Relaciones …." Op. cit.

INTERACTION BETWEEN EU LAW AND NATIONAL LAW

I. PRINCIPLE OF SINCERE COOPERATION

Interaction between domestic legal orders and Union law is primarily constructed upon the principle of sincere cooperation set out in Article 4(3) TEU: "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*". According to Borchardt, this principle "was inspired by an awareness that the EU legal order on its own is not able to fully achieve the objectives pursued by the establishment of the EU (…) but relies on the support of the national legal systems for its operation"[55].

As a means to prevent clashes in those areas where the two systems complement each other, the ECJ developed the obligation to interpret national law in line with Union law. The Court argued that such obligation derived from Art 4(3) TEU, firstly introducing the notion in the *Von Colson and Kamann* case[56], and further developed with later jurisprudence such as in the *Pfeiffer* case, where it stated that "*The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it*"[57]. It should be added that "although the duty of consistent interpretation is most commonly applied in the context of directives, the duty also applies in relation to the EU Treaties, general principles of EU law, regulations and even recommendations"[58], and that the scope of the duty of consistent interpretation applies to all domestic legislation[59].

II. PRINCIPLE OF STATE LIABILITY

Notwithstanding, the obligation to interpret and apply domestic law in conformity with the purpose of Community law finds its limit in "the unambiguous wording of a national law which is not open to interpretation; (…) (as it) may not be interpreted *contra legem*"[60]. In such a case, the Community rule shall supersede the domestic rule, as it will be explained below. However, in the event of a resulting conflict between both legal systems, the uniform application of EU law and the effective legal protection that must be ensured by Member States[61] might be endangered. In order to ensure such legal protection, "The ECJ has developed a general principle of state responsibility for non-compliance with EU law. State liability derives from the fact that EU Member States are responsible for the creation and above

[55] Borchardt, Klaus-Dieter. 2017. Op. cit., p. 135.
[56] Case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891
[57] Joined Cases C-397/01 to C-403/01, *Bernhard Pfeiffer and Others. v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, ECLI:EU:C:2004:584, para.114
[58] Haket, Sim . 2015. "Coherence in the Application of the Duty of Consistent Interpretation in EU Law." *Review of European Administrative Law* (2).
[59] Case C-106/89 *Marleasing*, ECLI:EU:C:1990:395.
[60] Borchardt, Klaus-Dieter. 2017. Op. cit., p. 143.
[61] Art 19(1) TEU. "It is also codified in Art.47 of the Charter of Fundamental Rights, and is one of the fundamental legal principles resulting from the constitutional traditions common to the Member States" Borchardt, Klaus-Dieter. 2017. Op. cit.

all for the implementation and enforcement of EU law"[62]. This concept was introduced by the Francovich case and developed through later sentences to cover violations of any category of Community norm and by any branch of State power, having to be an intentional and a sufficiently serious breach[63]. In this line, Articles 258 and 259 of the TFEU provide for Treaty infringement proceedings against a Member State to be brought before the ECJ, which can then require the former to take the measures needed to conform[64]. If the state continues to disregard its obligations deriving from a judgment, a fine or penalty can be imposed on it after a second court ruling[65].

III. PRINCIPLE OF DIRECT EFFECT

A key intersection point between EU law and national law is given by the fact that they share common subjects of law, i.e. they both impose obligations and confer rights to the citizens of the Member States. This is known as the direct effect or direct applicability of Union law, introduced by the already mentioned *Van Gend & Loos* case in 1963, where the Court stated that "…*the Community constitutes a new legal order (...)the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to center upon them rights which come part of their national heritage. Those rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community*"[66].

IV. PRINCIPLE OF PRIMACY

As a result of the principle of direct effect, it might happen that a Union rule creating specific rights and obligations upon Union citizens on a certain matter conflicts with a domestic provision. Indeed, "The very existence of the "datum" is problematic, namely, the creation of an order that now competes with the constitutional order (…) in the distinction of the applicable rule"[67]. In order to solve such conflict, one rule may supersede the other. In light of what was explained previously in this paper, Community law is not part of any national order and thus cannot abide by its internal hierarchy or procedures. Neither is it regular international law—which is transposed into the national legal systems and ascribed an order of precedence in the domestic legal order—whose incompatibility with previously enacted domestic law provisions can be solved through the principle of *lex posterior derogat legi priori*[68]. Therefore, the principle of primacy is raised to clarify the order of precedence between the two autonomous legal systems, stating that Union rules must have primacy over national rules. Such configuration is underpinned by the idea that otherwise "Union rules could be set

[62]EurWORK. European Observatory of Working Life. 2011. *Eurofound.* 4 May. Accessed March 2022. https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/state-liability#:~:text=The%20European%20Court%20of%20Justice,and%20enforcement%20of%20EU%20law

[63] Lee, Ian B. . 2000. "Harvard Jean Monnet Working Paper no. 9/99." https://jeanmonnetprogram.org/archive/papers/99/990905.html#:~:text=The%20general%20principle%20of%20EU,they%20can%20be%20held%20responsible

[64] Arts. 258 and 259 TFEU

[65] Art. 260 TFEU

[66] Case 26/62, *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

[67] Azpitarte Sánchez, Miguel. 2004. "Las Relaciones …." Op. cit.

[68] Borchardt, Klaus-Dieter. 2017. Op. cit.

aside by any national law. There would no longer be any question of the uniform and equal application of Union law in all Member States"[69].

In spite of this apparently justifiable need, "The relationship between Community law and national legal systems is (and has been) a much discussed issue, since the Treaty of Rome has not regulated it and neither have the successive reforms. However, the CJEU has been responsible for doing so, based on its decisions on the primacy of Community law."[70]. The principle of primacy was hence introduced in the *Flaminio Costa v. ENEL* case, where the Court observed that: "*The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system*"[71]. Based on such reasoning, it was further argued the following: "*…the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail*"[72].

Henceforth, the Court made it clear that "…national courts are obliged to uphold and apply Community law"[73]. However, it did not specify what would happen in turn with the displaced national rule. As we refer to primacy of Union law, it means that Community provisions prevail and must be applied instead of incompatible domestic law, which does not entail, though, that the latter becomes instantly void. This matter concerning the actual praxis of the primacy principle was firstly addressed in the *Simmenthal II* ruling, where the ECJ held that "*in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member State on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions*"[74]. Accordingly, the national judge is obliged, within the scope of his jurisdiction, to undertake a conventionality control, i.e. to ensure the full effectiveness of the EU rule and to disapply the contrary national law, regardless of whether the latter was enacted prior to or after the former, and regardless of whether or not the power to disapply laws is recognized by their constitutional system[75]. They act therefore in a double capacity, both as domestic and European judges. Furthermore, Member States shall refrain from adopting new legislation that is contrary to existing EU law; and the rule applies not only to "national legislation which conflicts directly with a Community provision, but also

[69] *Ibidem*, p. 139.
[70] Ferreyra, Leandro. 2012. Op. Cit.
[71] Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585
[72] *Ibidem.*
[73] Stiernstrom , Martin. 2005. Op. cit.
[74] Case 106/77, *Amminstrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629
[75] López Escudero, Manuel. 2019. "Primacía del derecho de la Unión Europea y sus límites en la jurisprudencia reciente del TJUE." *Revista de Derecho Comunitario Europeo* (64): 787-825.

with national laws, which *encroach upon the field within which the Community exercises its legislative power*"[76], i.e. in any matter where Member States have agreed to loose jurisdiction to some extent, even if there is not an explicit conflict between norms. It is also important to note here that "The obligation to ensure the primacy of EU rules is not the exclusive task of national judges, but also applies to all authorities of the Member States"[77]. In addition, the obligation to interpret national law in line with Union law requires national courts to modify, if necessary, their settled case law if it is based on an interpretation of domestic legislation that is incompatible with the objectives of European norms[78].

For the purpose of this paper, mention must be made of the scope and extent of application of the principle of primacy. While in *Costa v. Enel* the Court only dealt with ordinary national law, it soon found "…that such a principle requires the national jurisdictional authorities to give precedence to the norms of the European Union over all national norms, even of constitutional nature"[79]. In the *Internationale Handelsgesellschaft* case of 1970, the Court held that EU law shall take precedence over any national legal provision, and that the "*validity of a Community measure or its effect 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 a national constitutional structure*"[80]. Indeed, "the CJEU does not reserve special treatment for national constitutional law or for constitutional judges"[81].

In spite of this clear stand of the ECJ, national constitutional courts have not always shared that same position with regards to the primacy of EU Law. While "there has been no major controversy about primacy with respect to ordinary domestic law, the scope of the characteristic in relation to constitutional law has not yet found a definitive delimitation at the state level"[82].

[76] Stiernstrom , Martin. 2005. Op. cit.
[77] López Escudero, Manuel. 2019. Op. cit.
[78] Case C-441/14 *Dansk Industri (DI)*, ECLI:EU:C:2016:278, Paragraph 33
[79] Martin, Sébastien. 2012. "L'Identité De L'État Dans L'Union Européenne : Entre « Identité Nationale » Et « Identité Constitutionnelle »." *Revue française de droit constitutionnel* 3 (91): 13-14.
[80] Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.
[81] Groppi, Tania. 2006. "La «Primauté» Del Derecho Europeo Sobre El Derecho Constitucional Nacional: Un Punto De Vista Comparado." *Revista de Derecho Constitucional Europeo* (5): 225-243.
[82] Ferreyra, Leandro. 2012. Op. Cit.

THE STRUGGLE FOR POWER BETWEEN UNION LAW AND MEMBER STATES CONSTITUTIONS

I. STATE PRACTICE: DEFYING ABSOLUTE PRIMACY

The coexistence in the same geographic scope of the European Union legal system and the domestic law of each of the Member States gives rise to conflicts between the rules of the two systems[83]. Against the absolutist doctrine created by the ECJ, national courts have been reluctant to accept the principle of primacy of European law over any, "however framed", national law. Whereas it has been widely accepted with regards to ordinary law, controversy arises when it comes to the supreme laws of Member States. In this regard, it is well known how some national Constitutional Courts (starting, historically, from the Italian and the German, to reach, recently, the Polish Court) have shown resistance to submitting their respective constitutions to the control of European legislation.

Four years after the ECJ confirmed the unrestrainable scope of the principle in *Handelsgesellschaft*, the *Bundesverfassungsgericht*— the German Federal Constitutional Court, hereinafter BVerfG—inaugurated a line of rebuttal against it with the Solange I case , where it ruled on the relationship between the Community and national legislation, based on the absence at that time of a catalog of fundamental rights at the Community level[84]. In that case, it was determined that the possibilities provided for in Community law were insufficient to guarantee adequate protection of the basic rights of citizens, and therefore, the Karlsruhe Court refused to recognize the primacy of Community law[85]. Even though the Solange II sentence changed the position to declare that as long as the European Communities and the ECJ ensured a sufficient protection of fundamental rights, the BVerfG would refrain from exercising its jurisdiction to decide on the application of secondary Community law[86], it remained clear that the national court assumed to be entitled to have the final say. According to Martin, "national jurisdictions have not ceased to contest this principle of Community primacy, opposing it to the principle of State sovereignty[…]"[87].

In fact, to greater or lesser extent, ever since the announcement of the primacy of EU Law, there have been cases overturning the ultimate authority of the European Luxembourg court insofar as it may have undermined, in different aspects, the supreme law of one of the Member States. Regardless of the magnitude of those conflicts, what it can be understood is that the principle of primacy does not apply, in reality, with regards to laws of constitutional nature in Member States. If indeed, the current state of the Community building allows for a dispute between the national and the Community standard, as a process sustained by law it would find in such quarrel a major weak point. This state of affairs might find its cause in different reasonings.

First and foremost, considering the theoretical framework governing relations between the European and domestic legal orders as seen in the previous chapters, the absence of normative provisions is significantly remarkable. Since principles governing the Community legal order are born out of jurisprudence and are not contained in primary law, nor explicitly recognized by legislation in most Member States[88], "while the legal order of the EU is based on the principle of primacy, effectiveness and unity of EU law, Member States decide through national legal arrangements if and to what extent Union law is applicable and is

[83] López Escudero, Manuel. 2019. Op. cit.
[84] Ferreyra, Leandro. 2012. Op. Cit.
[85] BVerfG, 29 May 1974, 37, 271 2 BvL 52/71- *Solange I*
[86] BVerfGE 73, 339 2 BvR 197/83 - *Solange II*
[87] Martin, Sébastien. 2012. Op. Cit.
[88] Azpitarte Sánchez, Miguel. 2004. "Las Relaciones …." Op. cit.

accorded precedence in the respective national legal order"[89]. Even if the EU legal order attempts to somehow define such relationship through the principle of primacy or the principle of sincere cooperation set out in Article 4(3) TEU, or Art. 344 of the TFEU, it still remains far from constitutional models such as Art. 9.1 of the Spanish Constitution, which clearly stipulates that "*The citizens and the public authorities are subject to the Constitution and the rest of the legal system*". Although to be precise, primacy is referred to in Declaration No. 17 annexed to the final act of the Intergovernmental Conference (IGC) that adopted the Treaty of Lisbon, such Declaration has not, however, binding force.

It is sober to think that this implicit silence arises from the idea that the jurisprudential model leaves room for the gradual adaptation of jurisprudential principles, and that if it works, why would we need to change it?[90]. Many are of the opinion that everything works as it should, just as for instance unlike in many Member States, there have been specific principles, procedures, and mechanisms in place since the Maastricht Treaty to ensure that the legislation and regulations produced by Union institutions are of the highest technical quality and adhere to the principles of proportionality and subsidiarity, this is to say, better regulation[91].

Conversely, as a heir of a historical process of integration, the EU drags a baggage that may be out of line with its current needs. The fact that such principles are not explicitly recognized and comprised in a single text— especially the primacy of Union law— subordinating without reservations national legislation and occupying the highest position in Kelsen's pyramid, responds to an initial focus on purely economic integration, but even more to the fundamental tension underlying the whole process of European integration: a "tension between the aspiration for an integration that results in unity (supranationalism), and, on the other hand, close cooperation in the promotion of national interests (intergovernmentalism)"[92]. From the recent evolution of this dualism outstands the foundering of the Constitutional Treaty precisely by two notably pro-European states, who knew that "it was only a Treaty, but it contained certain advances that Lisbon renounced to, and even though it was clearly only a Treaty, it seems that the states did not want to leave room for confusion"[93]. More recently, although the Treaty of Lisbon takes up most of the advances of this failed treaty as a reform of the treaties of Rome and Maastricht, the principle of primacy is very timidly included in its Declaration No. 17, which does not bind the signatory countries, and which takes a step back from the explicit recognition of such principle in article I-6 of the 2004 constitution[94].

Accordingly, for Lopez Escudero "the two main difficulties encountered by the CJEU have arguably been, on the one hand, the intrinsic difficulty in determining the scope of the principle of primacy and, on the other hand, the reluctance of some high national jurisdictions, especially constitutional courts, to accept the primacy of EU law over the provisions of national constitutions. Both difficulties have led, respectively, to the emergence

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[89] Dimitrakopoulos, Ioannis. n.d. "Conflicts between EU law and National Constitutional Law in the Field of Fundamental Rights." Accessed March 7, 2022. https://www.ejtn.eu/PageFiles/17318/DIMITRAKOPOULOS%20Conflicts%20between%20EU%20law%20and%20National%20Constitutional%20Law.pdf.

[90] Azpitarte Sánchez, Miguel. 2004. "Las Relaciones …." Op. cit.

[91] Ziller, Jacques. 2018. "The Acquis: European Union Law and So Many Laws." In *The History of the European Union. Constructing Utopia.*, by Giuliano Amato, Enzo Moavero-Milanesi, Gianfranco Pasquino and Lucrezia Reichlin, 171-183. Hart Publishing.

[92] Hage, Jaap. 2020. Op. cit.

[93] Díaz-Romeral Ruiz, Mario. 2015. Op. Cit.

[94] Article I.10 of the draft of the Treaty Establishing a Contitution for Europe: "*The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.*"

of internal limits and external limitations to the principle of primacy"[95]. As the Community legal order was to be granted precedence, "the problem [was] that the constitutional norm, too, [has not given up] its superiority over the international or European norm"[96]. This leads us to the fact that, secondly, the EU is not only not founded on a single text of a constitutional nature, but is also unlikely to achieve it. This situation arises from a conflict of legitimacy and authority which, in turn, produces a power struggle between the European order and the constitutional texts of the member states. The possibility of taking the constitutional path to obtain political unification in the continent has been at the centre of the integration discourse from its very beginning[97]. Notwithstanding, in this regard, "the supremacy of the Constitution, in its legal manifestation, indicates the material and formal subordination of all sources to the Constitution. (…) However, as constitutional theory affirms, this legal position is only possible because of the political supremacy of the Constitution: the Constitution enjoys a special political legitimacy—it is born out of a constituent moment"[98]. Following this line of thought, Weiler points out that whereas in federal states such constituent moment arises from the "constituent power" of a same *demos*—even if comprising several *demos*, the federal one unites them all as the most important one—, the EU simply lacks this constitutional authority both formally in law and socially speaking[99]. In fact, considering the second paragraph of Art. 1 of the TEU which states that "*This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen*.", it is sober to think that no matter how close that union might be in the future, the European integration project will always be between different peoples. Henceforth, Weiler argues that EU demands obedience to rules dictated by "other" constituent people, a prove of the "Constitutional Tolerance" that underpins the construction of the Union[100].

It is relevant to note here that even though there was indeed an attempt of adopting a Constitutional Treaty for Europe in 2004, such text was, as previously mentioned, nothing else than an international treaty. In other words, it did not succeeded in uniting the inhabitants of the continent under a single people nor did it crown itself as the European Grundnorm, source of legal validity and the last one standing in case of conflict. It was instead a realization of the subjective facet of the Community "Geltungsgrund"[101], i.e. the will of the then 25 Member States to bound themselves, replacing the *pouvoir constituant* of the people or the formal imposition to abide by a higher authority inherent in federal states[102]. Given these circumstances, it may be concluded that the issue of primacy –as will be developed below—, despite the textual advance of its Art. I-6, remained a matter of conflict in its political dimension.

In light of the above, it is worth wondering which prevails effectively in application, EU law or Member States constitutions. As Azpitarte explains, "the logic of any attribution presumes, in order not to undermine it, that the rules resulting from its exercise will prevail, otherwise the attribution of powers would be meaningless, but at the same time such an inference leads to the conclusion that the exercise of the powers conferred may not

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[95] López Escudero, Manuel. 2019. Op. cit.
[96] Martin, Sébastien. 2012. Op. Cit.
[97] Dehousse, Renaud. 2018. Op. Cit.
[98] Azpitarte Sánchez, Miguel. 2004. "Las Relaciones …." Op. Cit., p.94-95
[99] Weiler, Joseph H. H. 2000. Op. Cit.
[100] Weiler, Joseph H. H. 2000. Op. Cit.
[101] Arnold, Reiner. 2004. Op. cit.
[102] Weiler, Joseph H. H. 2000. Op. Cit.

contradict the Constitution, the source from which it originates"[103]; and adds that "if (the constitutions) were to recognize the primacy of union law over constitutional law, they would be invoking their own dissolution, but if they were to limit the primacy of the law of the Union vis-à-vis infra-constitutional law, they would explicitly weaken the bases of integration"[104]. On this matter, scholars have developed two approaches: the first one asserting that the founding treaties have eventually attained a somewhat constitutional nature; and the second one thoroughly standing for the supremacy of Member States constitutions over the treaties, as the legitimacy of the latter is rooted in the former[105].

Ultimately they embody the crowning text of each domestic order, and to find their rightful place with regards to a legal system referred to as supranational, without losing their supreme character, appears to be cumbersome. Consequently, the transfer of the exercise of powers to supranational organizations as a result of integration does not imply that the national authorities are no longer subject to domestic law, and henceforth the national judge, who has the ultimate say, is not barred from utilizing EU law, as interpreted by the CJEU, to assure adherence to the fundamental rules and principles of the constitutional legal system, from which his powers stem[106]. Indeed, as the conventionality control is combined with the control of constitutionality that courts may exercise, in the event of an incompatible domestic provision, there would be no practical need to re-evaluate the external norm against the criterion of a comparable set of constitutional rights, since the conventionality control would eventually displace the constitutionality control, undermining the latter's ultimate goal of ensuring the prevalence of constitutional dispositions[107]. Avbelj defends that although many are of the opinion that there is a widespread "habit of obedience to EU law" by Member States, this might be true as compared to international law at large, but there are reasons to doubt whether this perception derives from a limited focus on the surface of cases brought to the CJEU either by the Commission or by national courts asking for a preliminary ruling; while what happens behind, at the core of domestic justice, remains far more unknown[108]. In addition, even when the Court finds a direct violation and the liable Member State pays the fine, experience demonstrates that there is no guarantee that the formally complying Member State will, in practice, adapt its laws and procedures to conform with EU law requirements[109]. In a nutshell, the absence of specific provisions can grant national constitutional rules and principles as interpreted by national supreme courts the power to limit the applicability of EU legislation.

II. Conflicts in the field of fundamental rights

Beyond the possibility of a clearer hierarchy between orders, it seems worth to consider why is the concern about constitutionality so vital in the integration discourse. In words of former Advocate General Poiares Maduro, "European integration not only challenges

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[103] Azpitarte Sánchez, Miguel. 2004. "Las Relaciones …." Op. Cit., p. 77
[104] *Ibidem*., p. 77-78
[105] *Ibidem*.
[106] Dimitrakopoulos, Ioannis. n.d. Op. Cit.
[107] Negishi, Yota. 2017. "The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control." *The European Journal of International Law*, 457-481.
[108] Avbelj, Matej . 2017. "Pluralism and Systemic Defiance in the EU." In *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, by András Jakab and Dimitry Kochenov, 44-64. Oxford: Oxford University Press.
[109] *Ibidem.* The author notes here that "*Greece is thus often anecdotally quoted as a country which complies with the CJEU rulings by paying the court mandated penalties but without actually bringing its legislation in line with EU law.*"

national constitutions (…) it challenges constitutional law itself. (...) European integration also challenges the legal monopoly of States and the hierarchical organisation of the law (in which constitutional law is still conceived of as the 'higher law')."[110].

On the one hand, it does look a bit threatening for constitutions are not only the fruition of legal obedience and political power, but also reflect an identity of the society that engendered them, thus combining a moral commitment as well[111]. The European system of constitutional control devised by Kelsen has been adopted by most of the constitutions in force on our continent; and although the functions of the several constitutional courts might differ, there tends to be an *ad hoc* body, different from the ordinary jurisdiction, which forms a special jurisdiction to which the constitutional control of laws is attributed[112]. This sort of supervision, whether it is the North American *judicial review*, or the specialized and concentrated European constitutional control, has been beneficial for the democratic and social rule of law inasmuch as through the writ of amparo and other actions, they have been the main defenders of the fundamental rights of individuals by means of the interpretation and defence of the supremacy of the constitution, even against the legislator[113]. Laying down their norms, constitutional texts seek to protect the citizen, establish limits to the powers of the different branches of government and public institutions. Moreover, through the principles and values they contain, they shape and protect national identity. With this in mind, submitting them to the EU legal order without a proper Kelsenian charter at continental level that features those same characteristics can scare many, the rationale for these national specialized courts nowadays do not buttress the new construction of a EU legal order but rather pursue to protect their quintessential written law from Brussel's overreach[114].

This explains why constitutional courts such as those of Germany and Italy, for instance, while gradually accepting the consequences of the direct effect and primacy of EU law, have reserved for themselves the possibility of exercising a review of constitutionality in extreme hypothetical cases of contradiction of the Union's rules with basic constitutional principles, especially with fundamental rights. They have recently been joined by the courts of other Member States, as EU rules increasingly impinge on matters at the hard core of national sovereignty, such as criminal law and criminal procedural law[115].

On the other hand, it can also be argued that this exaltation and protectionism is somewhat overdrawn, and that we have developed a kind of "military patriotism" towards national constitutions[116]. At all events, in addition to the silence in the relations between both systems and the possible causes behind it—which seems to be the intrinsic reason for the potential conflicts between them, following the above analysis—, it is worth pausing to assess other key points in which this confrontation has also found its *raison d'être*. These are the two fields that domestic justice has staunchly sought to defend: constitutionally protected fundamental rights and the national identities inherent in them.

Presumably, about the former, one could infer that "the prominently economic nature of the original European Coal and Steel Community (...) did not lead its founders to think that there might be a risk of a collision between Community legislation and

[110] Poiares Maduro, Miguel. 1998. *We, The Court.* Oxford: Hart Publishing. p.175
[111] Weiler, Joseph H. H. 2000. Op. Cit.
[112] Monroy Cabra, Marco Gerardo. 2007. *Ensayos de teoría constitucional y derecho internacional.* Bogota: Universidad del Rosario.
[113] *Ibidem.*
[114] Weiler, Joseph H. H. 2000. Op. Cit.
[115] López Escudero, Manuel. 2019. Op. cit.
[116] Weiler, Joseph H. H. 2000. Op. Cit.

human rights"[117]. In those early days of the integration project, we can highlight the famous and already mentioned Solange saga, where the BVerfG spoke out for the first time against the European judicial authority, stating that, although it was not empowered to rule on the validity of European Community acts, it could rule on the inapplicability of Community legislation if there was a violation of fundamental rights[118]. Although in Solange II the Communities were given a wider vote of confidence on the matter, let us remember, however, that it was not until the Treaty of Lisbon, when the Charter of Fundamental Rights, proclaimed by EU institutions in the 2000 Nice Summit, gained binding force. Besides, the same article 6(3) of the reformed TEU also mentions from then on that the protection of fundamental rights "*as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*"; and yet while inferring general principles of Community legislation from national constitutional traditions promotes, at large, harmonization of EU and national constitutional law, it may also give rise to tensions between them, in the sense that the retroactive application of such unwritten principles, which have not been clearly established beforehand, may frustrate legitimate expectations and thus run counter to the essential principle of legal certainty[119]. Moreover, as the EU gained legal personality in 2009, it could now access the European Convention on Human Rights (ECHR) which made the EU and its institutions accountable to the European Court of Human Rights.

Still, according to Dimitrakopoulos, judge of the Council of State of Greece, the EU's legal order and those established by each of its Member States' national constitutions are diverse, and they may provide for different types and levels of fundamental rights coverage, hence triggering two basic types of potential conflicts: (i) whenever protection granted by primary or secondary EU legislation is higher than that afforded by national constitutional law—yet such protection is nonetheless denied—; and (ii) cases where domestic law provides for greater protection than European legislation, which rejects it because it has been unified in a specific field by means of secondary EU law in a way that cannot be tailored to the pertaining national standard, or because its efficacy would be harmed, for whatever reason, if this national standard were to be implemented[120]. On the first case, an example is to be found on judgment *Dansk Industri* of 19th April 2016, where the ECJ ruled that legal certainty and protection of legitimate expectations, which are not only key principles of national legal orders, but also general principles of EU law, could not exonerate the national judge from disapplying provisions of national legislation if they were incompatible with the general principle prohibiting discrimination on grounds of age by EU law, and which concerning this case was given concrete expression through Council Directive 2000/78/EC[121]. Regarding the second sort of conflicts, in judgment *Åkerberg Fransson* of 26th February 2013, in light of Member States' duty to impose penalties for violations of EU legislation on VAT, the ECJ held as a response to a preliminary ruling concerning the *ne bis in idem* principle, that Member States may apply domestic fundamental rights standards of protection as long as the unity, effectiveness and primacy of Community law are not thereby jeopardized, meaning that the combination of tax penalties and criminal penalties for the same tax violation could be

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[117] González Fernández, Sonia. 2014-2015. "Una Europa sin Constitución: Análisis de Cinco Años de Aplicación del Tratado de Lisboa." In *Cuadernos de la Escuela Diplomática Número 57. Selección de memorias de alumnos del Máster en Diplomacia y Relaciones Internacionales.*, by Escuela Diplomática España, 160-251. Madrid: Ministerio de Asuntos Exteriores y Cooperación.
[118] BVerfG, 29 May 1974, Op. Cit.
[119] Dimitrakopoulos, Ioannis. n.d. Op. Cit.
[120] *Ibidem.*
[121] Case *Dansk Industri (DI)* C-441/14, Op. Cit.

considered illegal, provided that the remaining sanctions succeed to be proportionate and dissuasive[122].

Additionally, Article 53 of the EU Charter confirms that, whenever an act of Union law requires national measures for its implementation, national authorities and courts remain free to apply national standards of protection of fundamental rights, but this is the case again "provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised"[123]. Even so, as the ECJ held in *Melloni*, such provision must not be understood as a *carte blanche* for Member States to apply and prioritize their own standard of protection of fundamental rights if that standard is higher than that recognized by the Charter, since this conception of Article 53 would run against the primacy principle of EU law[124].

III. NATIONAL IDENTITIES AND COUNTER-LIMITS REVIEW

With respect to the aforementioned identity issue, Article 4(2) of the TEU provides that "*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, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*". Several considerations must be noted concerning this article. Firstly, although the existence of certain essential characteristics of the states is recognized, there is nothing provided in primary law to determine the role of the institutions with regard to determining these essential characteristics, or even their juridical value and scope while enforcing Union law[125]. Moreover, it is not made clear exactly what these unique characteristics are. While for some scholars a Member State's "national identity" indisputably encompasses their constitutional identity[126], others argue that "within states, there is a national identity that is distinct from constitutional identity because the constitution alone cannot constitute the collective identity since the nation finds its foundations in constitutional pre-conditions"[127].

Secondly, Article 4(2) TEU offers a perspective on the link between EU law and home constitutional law by focusing on the core political and constitutional institutions of Member States, overcoming the idea of a hierarchical model between them and the notion of absolute primacy of the Community order[128] . Furthermore, current Art. 4(2), originally Art. F in Maastricht Treaty, is said to have been drafted as a response to the historical social and political context of the continent in 1992, for "the foundation of the European Union took place at the very moment of the rebirth of the nation-state in Europe, since in 1989 the Berlin Wall fell and led to the fall of the communist regimes in the East in the years that followed, becoming consequently a question of preserving the Member States"[129]. In fact, its incorporation into the

[122] Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105
[123] Case C-399/11, *Melloni*, EU:C:2013:107, para. 60.
[124] Dimitrakopoulos, Ioannis. n.d. Op. Cit.
[125] Martin, Sébastien. 2012. Op. Cit.
[126] Dimitrakopoulos, Ioannis. n.d. Op. Cit.
[127] Ponthoreau, Marie Claire. 2007. "Constitution européenne et identités constitutionnelles nationales." *VIIe Congrès mondial de l'AIDC.* Athens. As seen in Martin, Sébastien. 2012. Op. Cit.
[128] von Bogdandy, Armin , and Stephan W. Schill. 2011. "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty." *Common Market Law Review*, 1417 – 1453.
[129] Ponthoreau, Marie Claire. 2007. Op. Cit.

common provisions corresponds more to the need of replying to the concerns of certain Member States, and its significance is clearly rather political than legal[130].

Thirdly and finally, this clause can be interpreted as allowing domestic constitutional courts to invoke constitutional constraints to the primacy of EU law in certain limited circumstances[131]. Indeed, based on the notion that some inalienable constitutional rights, important values, and supreme principles enshrined in the constitution are beyond the reach of European integration, some states have developed the doctrine of the "counter-limits" review or limits to the transfer of competences, or limitations of sovereignty, made in favour of the European Union that, consequently, limit the scope of the primacy principle[132]. The CJEU's case law on this matter is limited, and it mostly concerns a Member State's ability to invoke a unique national feature as a valid public interest capable enough of justifying a domestic action that restricts one of the fundamental Union freedoms[133]. Thus, for example, the concept was initially used as a means of defence, when it burst onto the litigation scene in a dispute between Germany and the Commission concerning the sanctioning of all the Länder for shortcomings attributable to only three of them, the Member State argued that such a decision disregarded the constitutionally established political and administrative organization of the Federal Republic of Germany and would therefore not be compatible with the provisions of the Treaty referring to respect for the national identity of the Member States[134]. Similarly, the concept was also used in a case concerning tax measures adopted by Spanish Autonomous Communities that amounted to state aid[135]; and in the *Sayn-Wittgenstein* judgement, the ECJ ruled that the Austrian Law on the Abolition of the Nobility, which has constitutional status and implements the principle of equal treatment, is a component of national identity that can be considered when striking a balance between legitimate state interests and the right to free movement of persons provided by EU law, and is capable of substantiating a Member State's unwillingness to accept the surname of one of its nationals as it is recognized in another Member State when comprising an element of nobility[136]. In *Taricco II*, however, the Court chose to ignore the Italian Constitutional Court's argument that the constitutional principle prohibiting retroactive implementation of a regulation that extends the statutory limitations in criminal proceedings is an element of Italy's national or constitutional identity[137].

It can be understood that because the Union is a pluralist entity made up of autonomous units based on systems with a constitutional structure, competences, jurisdictions, and boundaries are of utmost importance; not only for the Treaties state so, but also because they constitute a guarantee and an assertion of respect for autonomous development: for true self-government[138]. Notwithstanding, for Poiares Maduro, although constitutional identity does embody such national identities, respect for the Member States' constitutional identities cannot be interpreted as an absolute responsibility to obey all domestic provisions of constitutional nature, since in such case national constitutions could become vehicles that would empower Member States to circumvent Community law in certain fields; and could even lead to discrimination between Member States depending on the respective terms of their

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[130] Martin, Sébastien. 2012. Op. Cit.
[131] von Bogdandy, Armin , et al. 2011. Op. Cit.
[132] Dimitrakopoulos, Ioannis. n.d. Op. Cit.
[133] *Ibidem.*
[134] Case C-473/93, *Commission of the European Communities v Grand Duchy of Luxemburg*, ECLI:EU:C:1996:263
[135] Martin, Sébastien. 2012. Op. Cit.
[136] Case C-208/09, *Sayn-Wittgenstein*, ECLI:EU:C:2010:806
[137] Dimitrakopoulos, Ioannis. n.d. Op. Cit.
[138] Avbelj, Matej . 2017. Op. Cit.

constitutions[139]. He adds that national constitutional law must be adapted to the necessities of the Community legal order, just as Community law takes into account the Member States' national constitutional identities[140].

At the same time, it can be argued that Article 4(2) TEU, in conjunction with Article 4(3) principle of sincere cooperation, integrates these constitutional limits in an institutional and procedural framework where domestic courts and the ECJ work together as part of a composite system of constitutional adjudication, for unlike the EU Constitution, the Lisbon Treaty does not address the link between the Constitution and EU law, so Article 4(2) offers a foundation for resolving conflicts[141]. Nonetheless, for those who sustained that the explicit recognition of the primacy principle in article I-6 of such draft treaty would have tackled the issue of the "counter-limits" review and that the various legal systems could no longer entrench themselves behind the gradual and predominantly jurisprudential model of European integration, it is important to note that respect for national identities was equally recognised in article I-5. Henceforth, not only did primacy fail to be truly absolute, but also the counter-limits doctrine succeeded in becoming similarly legitimized in the European legal system itself[142].

For its part, "the CJEU, relaxing its classic case law, has accepted an external limit to the operability of the primacy (...) (with) The *M.A.S. and M.B.* judgment (which) is a landmark judgment because it is the first time that the CJEU admits an external limit to the effects of the primacy of EU rules. In particular, the national court will not have to disapply the national rule contrary to an EU rule if it thereby infringes a fundamental right protected by its national constitution."[143], being in the case of *M.A.S. and M.B.* judgment of December 5, 2017, the principle of criminal legality protected by art. 25 of the Italian constitution [144].

As far as the role of national judges is concerned, in their ultimate duty to apply both European and domestic law, several options remain for them in case incompatibilities between systems are found: (i) to comply with the principle of interpretation of national law in line with Union law; (ii) to interpret EU law in line with national constitutional law, in the context of the "counter-limits" review doctrine or "constitutional identity"; (iii) to submit a preliminary reference in an attempt to convince the CJEU to change its existing rulings; and (iv) disobedience, relying on "counter-limits" review, *ultra vires* review, and/or legal certainty review[145].

On balance, the dramatic strife between EU law and national constitutional law is an insurmountable conflict from the logical point of view at the present stage of the integration process, and yet, according to theory, such clashes should not even be possible, since all the Member States have an explicit or implicit constitutional basis for membership of the EU, and therefore sufficient to allow the rules laid down by the EU in the exercise of its competences to prevail even over the provisions of the constitution itself; and on the other hand, because by means of the general principles of law common to the legal systems of the

[139] Opinion of Advocate General Maduro in case C-213/07, *Michaniki AE*, ECLI:EU:C:2008:544. Para. 31 and 33
[140] *Ibidem.*
[141] von Bogdandy, Armin , et al. 2011. Op. Cit.
[142] Groppi, Tania. 2006. Op. Cit.
[143] López Escudero, Manuel. 2019. Op. cit.
[144] Case C42/17, *M.A.S. y M.B.*, EU:C:2017:936
[145] Dimitrakopoulos, Ioannis. n.d. Op. Cit. On the last option mentioned, the author considers as an example Czech Constitutional Court judgment of 31st December 2012, Pl. ÚS 5/12, following CJEU ruling in *Landtová* case C-399/09, as it decided not to comply with this holding upon "national identity" and *ultra vires* review.

Member States, the law of the Union integrates the essential foundations of the national constitutional systems, which, as democratic States under the rule of law, share common values[146]. However, as the *M.A.S. and M.B.* case and the following cases that will be dealt with in this paper demonstrate, theory does not prevent a head-on collision between legal systems, which, in a European construction based on legal integration, is particularly serious. Such clashes may be defined as a "systemic defiance", as they are particularly grave for they harm the fundamental requirements of the EU which, "in the absence of a constitutional hierarchy and the related societal monistic glue, hold the Union together and call for a dual commitment: to the plurality (…), and to the common integrity of the EU—both at the same time"[147]. In words of Dimitrakopoulos, "Conflicts between EU law and national constitutional law in relation to fundamental rights may be relatively rare but, when they arise, they test the endurance of the European structure and the limits of European integration."[148].

[146] López Escudero, Manuel. 2019. Op. cit.
[147] Avbelj, Matej . 2017., p. 49
[148] Dimitrakopoulos, Ioannis. n.d. Op. Cit.

CONSTITUTIONAL DEFIANCES

I. THE CASE OF GERMANY

The present case study has been selected for a number of compelling reasons. Mainly, as previously seen throughout this paper, the German Constitutional Court has a long record of disputes with the Luxembourg Court. Moreover, not only is there an abundance of case law involving Germany, but also, as one of the six founding states of the ECSC, the former has evolved over the course of all the stages of the European project and is sufficiently developed. Thus, from the study of the case law involved in each phase, the very state of integration itself could be inferred. Moreover, the leading role that this Member State has played in the Union, both since the dawn of the construction of the Communities until today, seems indisputable. Therefore, what Karlsruhe says matters. Finally, de Miguel Bárcena notes that the systemic surveillance, which the BVerfG advocates for, has become the dominant doctrine in the jurisprudence of the main European high courts[149] .

Indeed, the BVerfG is characterized by having maintained a constantly vigilant attitude on the question of the validity of the European norm with respect to the standards provided for in its Basic Law—the 1949 German *Grundgesetz*, hereinafter GG, the Constitution of the Second German Republic—, especially as far as Fundamental Rights are concerned. This is because "fundamental rights are one of the hallmarks of German public law: they occupy a central place in the training of lawyers, permeate judicial activity and are the subject of numerous sophisticated legal studies. The German Federal Constitutional Court's jurisprudence on fundamental rights has helped to reinforce their impact on both the political process and the daily lives of citizens. It should therefore come as no surprise that the form and level of protection of fundamental rights within the European Union has been an extremely important issue for German public law, to which numerous works have been devoted."[150]. As consternation in the aftermath of the Nazi regime and the failures of the Weimar Republic may explain most features of current 1949 GG[151], such a staunch defense of fundamental rights might also be rooted in the same origins; although it allegedly justified as well a strong commitment and openness to a united Europe, a position that has repeatedly varied over time[152].

Whatever the case might be, the German Court has carried out a constitutionality control of European law sentence by sentence. This corresponds to a model of countries that admit primacy but with counter-limits, in which the constitutional judge is responsible for controlling the compatibility of the Union's norms with constitutional principles considered supreme and untouchable, and thus performing an ex-post rather than a preventive control, as will be seen to be done by other states[153]. Relatedly, the Karlsruhe Court— as well as the Italian Constitutional Court did— alleged that such control, in light of Article 4(2) of the TEU, is utterly compatible with primary EU law[154]. Determined to

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[149] De Miguel Bárcena, Josu. 2010. "La justicia constitucional en la teoría de la Constitución Europea." *Derecho Procesal Constitucional Americano y Europeo*, 1535-1561, as seen in Ferreyra, Leandro. 2012. Op. Cit.

[150] Arzoz Santisteban, Xabier . 2015. "Derecho de la Unión Europea y juicio de constitucionalidad: la práctica de los Tribunales Constitucionales europeos." *nstituto Nacional de Administración Pública (INAP)*, 41-66.

[151] Mayer, Franz C. 2017. "Defiance by a Constitutional Court - Germany." In *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, by András Jakab and Dimitry Kochenov, 403-421. Oxford: Oxford University Press.

[152] Hilpold, Peter. 2021. "So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European 'Popular Spirit'." *Cambridge Yearbook of European Legal Studies.*

[153] Groppi, Tania. 2006. Op. Cit.

[154] Dimitrakopoulos, Ioannis. n.d. Op. Cit.

distinguish where the unconstitutionality issue lies, this legal check operates in such a way that if the problem is found in the Union law being applied, it will be obliged to ask for a preliminary ruling; but, on the contrary, it may happen that the infringement is detected in the state rule or in the decision of the national judicial body within the margin for manoeuvre given to the Member States to apply Community measures, allowing the BVerfG to resolve the dispute without the need to raise a preliminary reference[155]. Notwithstanding, it appears clear that "the control of validity of the internal transposition rule is not possible on its own: a problem of validity of the internal transposition rule inexorably raises that of the European rule, which cannot be resolved by the domestic courts."[156].

The first legal source on which the BVerfG grounds its competence for the exercise of this review is Article 23 of the Basic Law, which provides the basis for the Federation's participation in the European Union subject to a number of material limits: democratic principles, the rule of law, social, federal, subsidiarity and a respect for fundamental rights comparable to that guaranteed by the Basic Law; to this end, the Federal Republic "*may transfer sovereign powers by a law with the consent of the Bundesrat*". Furthermore, the same article requires that the boundaries set forth in Art. 79(3) be applied in the reform of the founding Treaties. In this way, the limits created for constitutional reform are extended to the power of integration, with the intention that the Basic Law should act as a brake on developments of acts of the Union that could distort it, and German doctrine thus resorts to using terms such as immanent limits, constitutional core or constitutional identity, accepting in general terms that departing from these pillars would be equivalent to dismantling the *Grundgesetz* [157].

Relying on the above, the BVerfG has centered its assessment of Union law on the democratic principle, recognized in Article 38 GG, which ensures the provision of the Bundestag by means of general, direct and free elections, a right which, without being strictly fundamental, is guaranteed by Article 93.4.a of the Basic Law by means of an appeal to the BVerfG[158]. This has entailed that individuals and parliamentarians have been able to react to the judicial application of Community legislation, as well as allowing Karlsruhe to assume the power to judge any act of application of Union law, since the unconstitutionality appeal is aimed at any measure of public law; and it has also been the means used to verify the constitutionality of the law of attribution of competences[159]. But it is not only that this state-level court has developed a rhetoric that justifies its monitoring of the community norm, but it has taken it to the point of understanding that it has a responsibility to do so, i.e. the constitutional bodies must preserve the constitutional principles contained in Art. 20 GG when competences are transferred, and "even when participating in the implementation of the European integration agenda"[160], obliging them to protect citizens' right to democracy guaranteed in Art. 38, whereby these constitutional bodies have a duty to react in case the Union's measures transgress in a sufficiently marked manner their competences or affect the constitutional identity[161].

It is somewhat surprising that one of the states for which the integration project was promoted is so contentious. In the early days of European integration, however,

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[155] Azpitarte Sánchez, Miguel. 2016. "Integración europea y legitimación de la jurisdicción constitucional." *Revista de Derecho Comunitario Europeo*, 941-975.
[156] Arzoz Santisteban, Xabier . 2015. Op. Cit.
[157] Azpitarte Sánchez, Miguel. 2016. Op. Cit.
[158] *Ibidem*.
[159] *Ibidem*.
[160] BVerfG, Judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13 -, para. 164
[161] *Ibidem*, para. 166-169

the German Constitutional Court's only raised its voice to declare in 1963—in a less than defiant tone—that: the EEC Treaty was in a sense the constitution of the Community; the legal provisions enacted by the organs of the Community in the exercise of their powers constituted a separate legal order different from either national law of the Member States or international law; and that community law and the domestic law of Member States were two autonomous systems, different from each other[162]. Nonetheless, such a pro-European attitude would prove to be rather inconsistent, subject to constant mood changes upon external events like economic crises, or upon opinion leaders' individual influence[163]. Thus, in the early 1970s came the end of the "economic miracle" that had rebuilt Germany after WW2 along with the expansion of Euroscepticism in the country[164], and with them the notorious Solange saga, which, as it is well known, articulated the critical position of the constitutional jurisdiction, jeopardizing the doctrine derived from *Van Gend en Loos* and the very concept of primacy of EC law, while leaving no room for Luxembourg to effectively claim the role of main legal interpreter of this order[165]. Later on, as the CJEC had already transplanted the fundamental rights from the national orders into the Community system as 'general principles of EU law', whereas *Solange II* judgement seemed to entail the acceptance of the CJEC's case law precedence by the BVerfG, subsequent cases proved this impression wrong[166]. As the struggle for the last word on constitutional issues continued, it is sober to think that the real interests laying behind the Solange jurisprudence were beyond a simple safeguarding of fundamental rights, i.e. as the German Constitutional Court had succeeded in impressing its own perception continent-wide of what Community law should look like in the field of fundamental rights, it moved to other areas, in part to impose typical German values on the entire Community, in part to safeguard features of the German constitutional order against EC/EU harmonisation tendencies[167].

In light of the creation of the European Union, the BVerfG carried out a comprehensive examination of the compatibility of the Maastricht Treaty with German Basic Law. In the *Maastricht* judgment of 12th October 1993, the BVerfG expressed its fears that the Union would become a kind of supra-state, consequently trying to approach the new stage of European construction from a point of view more in line with traditional international law[168]. It did so by means of several considerations. First and foremost, it reiterated its willingness to safeguard fundamental rights in cooperation, but also against, the ECJ, what actually sounded as an intention to hold the 'final control', rather than as a cooperation offer[169]. Moreover, it insisted to name the new Union as a *Staatenverbund,* a compound of states, where these are 'the Masters of the Treaties' and retain their sovereignty and equal status[170]. It thereby introduced as well the democratic principle at continent level, arguing that Arts. 23 and 79(3) GG expressly aim at safeguarding its inviolable content, which shall be done as "the Treaty does not establish a European state on the basis of one sovereign European people; therefore, it is primarily incumbent upon the sovereign people of the Member States to provide, through their national parliaments, democratic legitimation regarding the exercise of sovereign

[162] Bainczyk, Magdalena . 2017. "Key European Communities and European Union treaties and accord in the case law of the German and the Polish Constitutional Tribunals." *Krakowskie Studia Miedzynarodowe.*
[163] Hilpold, Peter. 2021. Op. Cit.
[164] *Ibidem.*
[165] Arzoz Santisteban, Xabier . 2015. Op. Cit.
[166] Hilpold, Peter. 2021. Op. Cit.
[167] *Ibidem.*
[168] Bainczyk, Magdalena . 2017. Op. Cit.
[169] Hilpold, Peter. 2021. Op. Cit.
[170] BVerfG, 12 October 1993, Az 2 BvR 2134, 2159/92, BVerfGE 89

functions on the part of the European Union"[171]. In addition, it held that any Community act that exceeded the powers conferred to it would not be binding on the Federal Republic and could thereby be controlled by the BVerfG[172]. In this regard, it had no other option but to expand its control further from the area of fundamental rights, since EU competences had been broadened in such a way that infringements with core elements of the Basic Law order could take place regarding a vast array of fields not always attributable to the field of fundamental rights; and henceforth the defense of national legislative competences in general came into scene, thus developing the *ultra vires* review, justified only as far as fundamental breaches were implied[173].

The *Lisbon* judgement on 30th June 2009 was the German judiciary next significant attempt to reclaim control over the European integration process. The BVerfG broadened the scope of its assessment capacity with this ruling, adding the already known identity control. In this decision, it is conveniently cited the CJEU 2008 judgement in the *Kadi* case, where the latter held, concerning the validity of a United Nations Security Council Resolution, that the EU did not accept unconditionally any obligation emanating from an international agreement if such obligation would entail to run against the basic constitutional principles recognised by Union law, which include the principle that all Community acts must respect fundamental rights, this constituting a condition of their lawfulness, which the Court must review in the context of the Treaty's comprehensive system of legal remedies[174]. The BVerfG further construed that this is not just familiar in international legal relations referring to the *ordre public* as the boundaries of a treaty obligation, but it also related to the idea of political contexts non-hierarchically arranged[175]. Ultimately, as far as the limit of the application of Union law grounded on the protection of a constitutional identity justifiesçd by Art. 4(2) TEU is concerned, it can be argued that the BVerfG became thereby the final umpire with regards to political decisions in European integration, because if this judgment about the may concern only core German constitutional characteristics, it is up to the BVerfG to define such identity and breaches thereof[176]. Such an opinion is admittedly buttressed by the loose wording of Art.4(2) considered in the previous chapter.

In essence, although there have also been conciliatory rulings such as the *Bananas* case in 2000—in which the German Constitutional Court acknowledged that it lacked jurisdiction to decide on the protection of fundamental rights in Community acts before the jurisdiction of the Luxembourg Court, and reduced the counter-limits review to an extreme hypothesis, operating exclusively in cases of violations and systematic violations of fundamental rights[177]—; it is never a persistent trend, as proven by the ensuing *Lisbon* decision, or the order of 15th December 2015—whereby it refused to execute a warrant under Framework Decision 2002/584/JAI based on "constitutional identity" and disregarding the primacy of Union law[178].

Overall, though, whilst Karlsruhe - Luxembourg relations have almost never been smooth, no case has shaken the foundations of the union as much as the judgment of 5th

[171] Statement by the Press Office of the German Federal Constitutional Court. Press Release No. 39/1993 of 12 October 1993
[172] *Ibidem.*
[173] Hilpold, Peter. 2021. Op. Cit.
[174] Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation*, ECLI:EU:C:2008:461
[175] BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 -, para. 340
[176] Hilpold, Peter. 2021. Op. Cit.
[177] Groppi, Tania. 2006. Op. Cit.
[178] CJEU. 2016. "Reflets. Legal developments of interest to the European Union." Bulletin.

May 2020 concerning the "Public Sector Purchase Programme", a bond-buying program. Advocates of German monetary sovereignty, making use of their right of appeal to the BVerfG regarding the constitutionality validity of EU measures (developed in the German system as discussed earlier), filed complaints before the BVerfG claiming that this program was unlawful in light of Article 123 TFEU's prohibition on monetary financing of national budgets, that it was primarily an economic policy instrument that exceeded EU's and ECB's competences, and that it was harmful to specific German economic interests; so the BVerfG asked for a preliminary ruling on 18th July 2017[179]. Notably, this program was shaped by learning from the past experience of criticism on OMT—another program that although substantially different, was also heavily attacked from Germany—so the BVerfG could easily have dismissed those allegations, as indeed the CJEU did later in its preliminary ruling. In its *Gauweiler* judgment of 16 June 2015, the ECJ had already defined what were the conditions an asset purchase program had to fulfil in order to be in conformity with EU law—criteria that OMT met— and the judges in Karlsruhe used this case to see where Luxembourg's arguments were weak; the rationale for the BVerfG chose a different path in itspreliminary reference order: it no longer focused at the admissibility of the securities purchasing programmes *per se*, but at means for implementing them, so that it became easier for the BVerfG to impose their own criteria—in a sense of "core constitutional criteria"— for bond-buying programmes[180]. On this basis, a crucial conflict between legal systems arose and, subsequently, the German Constitutional Court ignored the preliminary ruling of the ECJ declaring the PSPP lawful, and issued its own ruling on the validity of the PSPP to be applied by the German institutions. It has already been pointed out how the German legal system has made use of the democratic principle to grant itself the capacity to review any act of application of Union law, in this case the PSPP being an act of the ECB.

Thus, the 5th May 2020 decision pivots around the well-known *ultra vires* review for the PSPP is said to go beyond the competences of the ECB, and identity review. To this end, special emphasis is put on the principle of proportionality, that the BVerfG argues to have been disregarded in this program for the purchase of government bonds, a monetary tool that might in practice have disproportional consequences in the area of economic policy [181]. The Court constructs the rhetoric of the found *ultra vires* acts upon the notion of proportionality, stating that the democratic principle is compromised when the latter is disregarded, and this even jeopardizes the principle of conferral and the division of competences between the Union and Member States, whose limits should take into consideration the principle of proportionality according to Art. 5 of the TEU[182]. It further holds that the extensive discretion granted to the ECB in conjunction with the CJEU's narrow standard of review on such institution manifestly entails an erosion of the principle of conferral and Member States competences[183].

Criticism on this judgement has been clear and harsh, primarily for it deliberately overlooks the binding force of the CJEU preliminary ruling as provided by the Treaties, a clear infringement of Union law that led the Commission to initiate an infringement proceeding against Germany in June 2021, as it was considered to have violated "fundamental principles of EU law, in particular the principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as the respect of the jurisdiction of the European

[179] Hilpold, Peter. 2021. Op. Cit.
[180] *Ibidem.*
[181] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 -, headnote 6(b)
[182] *Ibidem*. Headnotes 5-6
[183] *Ibidem*. Headnote 4

Court of Justice under Article 267 TFEU"[184]. Furthermore, against the BVerfG discourse, Ziller points out that: (i) Art.5 TEU does not provide the grounds to assert that ECB acts outside its sphere of competence, as a careful reading of such article reveals that it is the use of Union competences what is guided by the proportionality principle and not the limits of those competences, only said to be guided by the principle of conferral; (ii) it seems that the judges of the Second Senat tend to assume that the German method of interpretation concerning proportionality is genuinely shared by throughout the Union; and (iii) while their whole reasoning focuses on the difference between monetary policy, an exclusive Union competence, and Member States' competence in economic policy, the *Gauweiler* and *Weiss* case law proves how difficult it is to make such distinction[185].

In addition, the judgement establishes that the *Bundesbank*, an institution of the Federal Republic of Germany, had to stop purchases of bonds under the PSPP if the ECB Governing Council did not demonstrate within three months that the monetary policy objectives complied with the proportionality principle[186]; findings that undoubtedly hinder the uniform application of Union law. The Court also found that the Federal Government and the *Bundestag* had failed within their 'responsibility for integration', and had therefore to ensure that the ECB performed a proportionality analysis regarding the PSPP[187]; what according to critics would imply an attack to ECB's autonomy[188], and hence a direct incitement of the Second Senat to those German institutions to infringe EU law[189]. Finally, if the democratic principle arguments of this judgement—assuring that the incriminated matter would limit in excess the German Parliament powers in term of economic policy—were to be taken into account, then this same line of reasoning would justify Hungarian or Polish disregard of CJEU judgements condemning them for actions against the independency of the judiciary, relying on a wide majority in Parliament[190].

In light of the above, it must be understood that the BVerfG judgement of 5th May 2020 was indeed a major breach between Karlsruhe and Luxembourg without precedents, and which brought far-reaching systemic implications for Community law and the EU itself. Even though with its subsequent order of 29th April 2021 the BVerfG appeared to have stepped backwards, History demonstrates that this is only another tactic of the German Constitutional Court in its persistent escalation towards conflict. In fact, some scholars have argued that as it had similarly done through all its previous quarrels against the ECJ, in 2020 the BVerfG aimed at nothing else but imposing its own view on a certain matter of Union law, this time principles of the economic philosophy prevailing in that country in the context of a long-lasting debate on increased solidarity measures in favor of Euro Zone countries who were hard hit by the economic crisis—such measures having faced a fierce criticism by German public opinion[191]. But while attempting to conduct ECB policies direction, this sentence has also exposed the limits of the current legal framework[192].

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[184] European Commission. 2021. "June infringements package: key decisions." *European Commission.* 9 June. Accessed June 9, 2022. https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743.
[185] Ziller, Jacques. 2020. "The unbearable heaviness of the German constitutional judge. On the judgment of the Second Chamber of the German Federal Constitutional Court of 5 May 2020 concerning the European Central Bank's PSPP programme." *Rivista Interdisciplinare Sul Diritto Delle Amministrazioni Pubbliche (CERIDAP).*
[186] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 -, para. 235
[187] *Ibidem*. Para. 232
[188] Viterbo, Annamaria. 2020. "The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank." *European Papers.*
[189] Ziller, Jacques. 2020. Op. Cit.
[190] *Ibidem*.
[191] Hilpold, Peter. 2021. Op. Cit.
[192] Viterbo, Annamaria. 2020. Op. Cit.

II. The Case of Poland

The Polish case has been chosen mainly because of the controversy raised by the judgment of its Constitutional Court, the *Trybunał Konstytucyjny*—hereinafter TK—, of 7th October 2021. The study of the present case will be substantially shorter than the previous one, for the latter does not enjoy such a vast jurisprudential history of conflicts with the CJEU. However, it should also be noted that case law from the BVerfG serves as a prominent reference point for analogous institutions in other EU Member States, such as Poland[193]. Therefore, although these two countries respond to different models in terms of the way they envisage the framework of relations between legal systems, similarities are also expected to be found between them.

Unlike the German model, Poland belongs to a category of states that carry out a preventive control of international treaties, including the European founding Treaties and accession treaties, assessing beforehand the validity of such agreements and their conformity with their respective national constitutions[194]. Consequently, the issue of the constitutionality of the accession procedure was addressed in the TK judgment of 27th May 2003 (K 11/03). The Accession Treaty having been signed in Athens on 16th April 2003, and having passed that same year the approval via referendum that its constitution requires for this sort of procedures, Poland gained EU membership on 1st May 2004. It did so by virtue of Article 90 of the Constitution of the Republic of Poland, which provides that "*The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.*". Notably, such article, which dates back to the time of enactment of the constitution in 1997, was introduced foreseeing Polish accession to the EU[195].

Nonetheless, despite this early adaptation and the predisposition to incorporate the *acquis communautaire* in such a way that it could not result in conflicts of unconstitutionality, the legal status of the founding Treaties is not expressly defined in the Polish Constitution, as it is neither envisaged in the German Basic Law. Notwithstanding the well-settled case law of the CJEU that very soon started to define Community law and the EC as a new legal order of international law which does not respond to any traditional categorization in that field, neither the TK nor the BVerfG have adopted that doctrine, and have opted for ratifying the Treaties based on their constitutions and a separate legal qualification with a clear international law conception[196]. In light of this, in spite of the fact that international agreements and the laws created by the international organizations they may constitute shall have precedence over national statutes in case of conflict according to article 91(2) and 91(3) of the Polish Constitution, such precedence is not laid down with regards to laws of a constitutional nature, and as it will be seen below, neither has it been recognized through case law.

Beyond the 27th May 2003 judgement, the relationship between domestic law and EU law was later asserted by the TK concerning specific matters in several different occasions, none of which involved a revision of that relation in such a broad and fundamental manner—as the judges of the Court would state themselves on the judgement—as the ruling

[193] Bainczyk, Magdalena . 2017. Op. Cit.
[194] Groppi, Tania. 2006. Op. Cit.
[195] Granat, Miroslaw. 2014. "Remarks on the understanding of Article 90 of the Polish Constitution by the Constitutional Tribunal." *Studia Iuridica Lublinesa.*
[196] Bainczyk, Magdalena . 2017. Op. Cit.

of 11th May 2005 (K 18/04). It concerned the review on alleged incompatibilities of the contents of the Accession Treaty and founding Treaties with the Polish Constitution, as requested by three groups of Deputies from the *Sejm* (the Polish Parliament lower chamber) who were opposed to Poland's EU membership, accusing them of undermining the sovereignty of the Polish people and the supremacy of the Constitution, principles protected in their supreme law[197]. The TK dismissed those allegations and ruled, *inter alia*, that EU accession did not prejudice the supremacy of the Constitution nor the sovereignty of the Republic of Poland[198]. Most significantly among the findings of the Court, it held that in the new situation created by Union law, where the autonomous legal orders of the Member States and that of the EU co-exist simultaneously, a potential collision between Community and constitutional regulations is not excluded[199]. Henceforth, in the event of an insurmountable clash between them, "*Such a collision may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm. (...) the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland's withdrawal from the European Union.*"[200]. Moreover, rather than acknowledging any special status to Union law, similarly to the German case, in this decision the TK resorts to the "Maters of the Treaties" doctrine[201]. This is easily attested for it insists on highlighting that Member States remain sovereign under this "international agreement", and that the term "supranational organization" is neither envisaged by the constitution nor found in any European legal act[202].

Five years later, the problem of unconstitutionality would be solved one more time after the entry into force of the Lisbon Treaty, in the judgment of 24th November 2010 (K 32/09) —once again not as a preventive control but at the request of Deputies from the *Sejm* and senators— . The TK addressed again the legal nature of the Treaties, this time making a distinction between them and other international agreements, acknowledging the former a "presumption of constitutionality" that consequently prevents the TK from making judgements about the constitutionality of treaty provisions until all interpretations favoring the EU are deemed invalid[203]; thereby *de facto* self-restraining its own freedom of action[204].

This line of reasoning on the part of the Polish Constitutional Tribunal took a dramatic turn in 2021, when provisions of the EU Treaties were considered incompatible with the Polish Constitution. It should be emphasized that the judgment to be analysed below was born as the last response of the TK in a succession of struggles between Warsaw and the EU of a markedly political nature. As a matter of fact, ever since the Law and Justice party (PiS) gained power in 2015, a number of disputes between Poland and the European institutions on several matters—such as women rights, LGBT+ community rights, or the protection of the environment—have been taking place[205].

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[197] TK, Judgment of 11 May 2005, K 18/04.
[198] *Ibidem.*, para. 1
[199] *Ibidem.*, para. 12
[200] *Ibidem.*, para. 13
[201] Bainczyk, Magdalena . 2017. Op. Cit.
[202] TK, Judgment of 11 May 2005, K 18/04, para. 6
[203] TK, Judgment of 24 November 2010, K 32/09, Part III, para. 1.1.2. In his Dissenting Opinion to the Judgement, Judge Miroslaw Granat criticizes that this consideration on the legal nature of the Treaties "… *may suggest that a normative act enjoying such a presumption may not be deemed unconstitutional*".
[204] Bainczyk, Magdalena . 2017. Op. Cit.
[205] Lasek-Markey, Marta. 2021. "Poland's Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls." *European Law Blog.* 21 October. Accessed May 5, 2022.

As far as the quarrel on the independence of the judiciary and the rule of law is concerned, several infringements procedures were directed towards this Member State relating amendments to the functioning of the justice system in Poland, as Brussels considered, among other concerns, that the independence of its judiciary was threatened by the new disciplinary system, which also lacked the guarantees required to shield judges from political influence, henceforth incompatible with EU law as provided by Art. 19(1) TEU[206]. Had not Warsaw reversed the measures taken nor complied with Brussel's demands, Poland was imposed interim measures on 14th July 2021,whereby the ECJ called it to, *inter alia*, "suspend provisions preventing Polish judges from directly applying EU law protecting judicial independence, and from putting references for preliminary rulings on such questions to the Court of Justice"[207]. That same month, the TK ruled that the CJEU was acting *ultra vires*, since it is not competent to decide on the organisational structure and functioning of Polish courts and to the mode of proceedings before those courts, and thus declaring interim measures issued under Article 279 TFEU on the matter not to be binding[208]. Notably, when arguing that such EU institutions acts were incompatible with the constitutional law, besides holding that they were opposed to the supremacy of the Polish Constitution (Art. 8), the TK familiarly resorted to the democratic principle rhetoric, as it found that this run against Arts. 2, 7 and 4(1)[209] that precisely define Poland as a democratic state whose sovereign power is vested in its national people.

A further TK judgement on 7th October 2021 in response to a request filed by Prime Minister, Mateusz Morawiecki, seeking an interpretation of Articles 1, 2 and 19 TEU was the straw that broke the camel's back. Significantly, the 2020 PSPP judgement of the BVerfG was cited as reference by Morawiecki in such application[210]. The decision held that those Treaty provisions were partially unconstitutional. The Court ruled that according to Art.1 TEU the EU is in a new stage of integration where its institutions act beyond the competences conferred by virtue of Art. 90 of the Polish Constitution, prejudicing the sovereignty of the Polish State and the supremacy of its constitution[211]. Moreover, Art.19 and Art.2 TEU were also considered unconstitutional insofar as they might be interpreted to justify, in order to ensure effective legal protection in the fields under the scope of EU law, that national courts disapply or contradict constitutional provisions and rulings of the TK; and that these articles cannot be interpreted as granting the CJEU right to examine the organisation and structure of a Member State's judicial system[212].

Among the thorough criticism targeting this verdict, the fact that the compatibility of the treaties had already been examined, both in 2003 prior to accession to the Union and even more exhaustively in the judgment of May 11th 2005, stands out. Even though the principle of primacy—clearly scorned in the October 2021 judgement—has never been recognised and even neglected in case of an irreconcilable collision between legal systems as in the 2005 judgement, that same decision explains in its statement of facts that "*Pursuant to the Accession Treaty, Poland undertook to implement European Union law in its entirety* (…)

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https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/.

[206] European Commission. 2021. "Press release. Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal." *European Commission.* 22 December. Accessed June 12, 2022. https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070.

[207] *Ibidem.*

[208] TK, Judgment of 14 July 2021, P 7/20.

[209] *Ibidem.*

[210] TK, Proposal of the Prime Minister of 29 March, K 3/21

[211] TK, Judgment of 7 October 2021, K 3/21, para 1

[212] *Ibidem.*, para 2-3

Community law consists of the entire acquis communautaire, *including provisions of the Treaties* (…), *provisions issued by organs of the Communities* (…), *as well as the jurisprudence of the Court of Justice of the European Communities* (…) *and the Court of First Instance.*"[213]. Were this case law indeed formally recognized, so would the principle of primacy of EU law over national constitutional law and the duty of domestic courts to disapply the national norm as provided in *Costa v. Enel*, *Internationale Handelsgesellschaft,* or *Simmenthal* cases, among others, that introduced such principles well before the accession of Poland to the Union. Dissenting voices have also attacked the fact that while the TK uses article 188 of Polish Constitution as legal source of its powers in the 2021 ruling, this provision is only aimed as far as the validity of international agreements is concerned, not case law of international tribunals; and upheld that, henceforth, Warsaw seeks to disregard points of EU law or ECJ rulings at its convenience[214]. Moreover, the condemnations of the independence of the judiciary make the motivation of political interests laying behind this brawl even more evident.

At all events, it appears undeniable that with these rulings the Polish Constitutional Tribunal has *de facto* put in jeopardy the Community legal order, and with it the proper functioning of the European Union. Particularly, as it launched an infringement procedure against Poland in 2022, the Commission considered that the general principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as the binding force of CJEU rulings had been seriously compromised[215].

[213] TK, K 18/04, Op. Cit.
[214] Lasek-Markey, Marta. 2021. Op. Cit.
[215] European Commission. 2021. Op. Cit.

A COMPARATIVE OVERVIEW

In general terms, the problem of relations between legal systems is accentuated by the fact that not only are they not expressly and concisely articulated at the Community level, but each Member State comes to contemplate a different regulation. The conception of EU law and its position within the national legal system also depends on how it has been articulated within the system of each country.

In a brief attempt at classification, the first to be considered are those countries that openly recognize the primacy of European law. Such a categorization, however, is problematic. On the one hand, as some scholars have reasonably argued, only Austria recognizes in practice the primacy of Community law over domestic law in general, even over constitutional provisions, because the principle of primacy is accepted as part of the *acquis communautaire*, and because this is the most widespread approach[216]. However, although it has been assumed since accession to the EU that the law in Austria derives both from its constitution and from the law of the Union, the latter can never go beyond the basic constitutional principles[217].

On the other hand, Ireland can be considered as the only member state that expressly recognizes in its constitution the primacy of European law. Indeed, according to the Third Amendment of the Constitution Act of 1972—by virtue of which Ireland accessed the ECSC—part II, second sentence: "(…) *No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.*". Despite this, this is the state that almost managed to give the EU the biggest setback in its history (until the arrival of Brexit), since this same constitutional text establishes that its reform requires validation by referendum, a route by which the ratification of the Lisbon Treaty was rejected in 2008—although later approved in 2009—given the widespread religious traditions and the consequent fear of the advance of community regulation in some sensitive issues, such as abortion[218].

In this line, it is worth mentioning the case of the UK while it still belonged to the EU. Precisely because, although it is well known that the UK does not have a written constitution, the distinction between ordinary laws and "constitutional" laws (which either regulate the relations between the State and the people, or condition fundamental rights) that enjoy a superior consideration was contemplated after certain jurisprudence, the latter group including the European Communities Act of 1972[219]. Yet, in spite of this remarkable consideration of European law, we all know the fate that befell the United Kingdom in the Union: it was the first to renounce its membership.

Secondly, we can consider the states that provide for a preventive control of constitutionality over international treaties, including European treaties, thus accepting European law and its primacy by means of amending the constitution [220]. This group includes countries such as Poland, France and Spain. However, as we have already seen in the case of Poland, this control does not seem to be infallible. Art. 95 of the Spanish Constitution establishes that the signing of an international agreement that contradicts the fundamental law

[216] Groppi, Tania. 2006. Op. Cit.
[217] European e-justice. 2021. "National Legislation. Austria." *European e-justice.* Accessed June 15, 2022. https://e-justice.europa.eu/content_member_state_law-6-at-en.do?member=1.
[218] Ferreyra, Leandro. 2012. Op. Cit.
[219] *Ibidem.*
[220] Groppi, Tania. 2006. Op. Cit.

will require the reform of the Constitution; and, relatively similar to Art. 90 of the Polish Constitution, Art. 93 of the Spanish Constitution allows that "*By means of an organic law the conclusion of treaties by which the exercise of powers derived from the Constitution may be attributed to an international organization or institution may be authorized. It corresponds to the* Cortes Generales *or to the Government, as the case may be, the guarantee of compliance with these treaties and with the resolutions emanating from the international or supranational organizations holding the assignment*". The difference lies in the second sentence of the article, which in a very generic way intends to provide for the application of the law derived from these international organizations. However, the Spanish Constitutional Court has been no stranger to reticence. Having ruled twice on the scope of Art. 93 and the constitutionality of two European treaties, it declared in 1992 that this precept could not be used to justify the contradiction or rectification of provisions contained in the Constitution[221]. Although in 2004, in the light of the Treaty establishing a Constitution for Europe, it clearly accepted the primacy of the Union's rules, it did so without getting its own fingers burnt in a reasoning that, by means of a veritable legal pirouette, distinguished between the notion of primacy referring to Community law and its precedence in the areas of application that fall within the competence of the EU, and saved the concept of the supremacy of the Constitution[222]. In a somewhat more exhaustive manner, France has been adapting its constitution to the integration process, and thus contains its *Titre XV : De l'Union européenne*, which, however, does not expressly include the unlimited recognition of the principle of primacy, and which has not prevented this Member State from being exempt from reservations in this respect[223]. In addition, the Kingdom of the Netherlands, with one of the most open fundamental norms to international treaty obligations, recognizes that the latter can displace domestic non-constitutional norms, since when they require the repeal of a provision of the Constitution, this must be submitted to a vote in parliament[224].

Within a new category, we can include those states that admit the primacy of community law but with "counter-limits", since, as we have already studied, they recognize a core of their constitution of supreme principles that do not admit any reform. On the one hand, the review of EU law can be exercised through rulings of the constitutional court—as we have already seen in the German case, and which has been imitated to some extent in the Italian case[225]. On the other hand, the so-called counter-limits may be contained in the constitutional text itself, as is the case in Greece, Portugal or Sweden[226].

Finally, there are Member States that simply deny outright the primacy of Community law over their fundamental law. Such is the case of Denmark, where this seems to be the dominant approach, also taking into consideration the scarce jurisprudence on the subject and the limited catalogue of rights contained in its constitution[227]. This position is also shared by the three Baltic states, which with analogous historical vicissitudes have chosen to introduce "protectionist" norms, emphasizing the sovereignty of the nation, in their constitutions drafted in 1992, in the aftermath of decades of Soviet occupation[228].

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[221] Declaration of the Spanish Constitutional Tribunal 1/1991, of 1st July 1992.
[222] Declaration of the Spanish Constitutional Tribunal 1/2004, of 13th December 2004
[223] In its Decision n. 437125, of 17th December2021, para.5, the *Conseil d'État* declared that the French Constitution remains the supreme standard of national law and, consequently, it is up to it to verify that the application of European law, as specified by the CJEU, does not, in practice, compromise constitutional requirements that are not guaranteed in an equivalent manner by European law.
[224] Ferreyra, Leandro. 2012. Op. Cit.
[225] De Miguel Bárcena, Josu. 2010. Op. Cit
[226] Groppi, Tania. 2006. Op. Cit.
[227] *Ibidem.*
[228] *Ibidem.*

CONCLUSIONS

Taking all of the above into consideration, it is undeniable that conflicts between the European Union legal order and Member States constitutions can take place in practice. Although these conflicts tend to be more the exception than the rule, when they occur they test the limits of the legal framework that currently governs the relations between these systems. As has been shown, despite the forceful stance of the CJEU regarding the principle of primacy, the reality at state level is far from recognizing such primacy, in general terms, over its fundamental norms.

It can be inferred that behind this problem lies a lack of concise and foresighted structuring of the interactions between these systems, precisely because they are independent systems that do not respond to a hierarchical order. This silence can be understood by the historical process that the project has gone through, and which, responding to different needs at each moment, has given rise to what we know today. But there is also, both in practice and in theoretical reasoning, a struggle for authority between national constitutions and Union law. This power struggle, however, is reasonable. On the one hand, as discussed in the third chapter, sovereign states, having agreed to submit voluntarily to a common authority and having ceded part of their competences, will seek to ensure that the development of those competences collectively and the objectives pursued are carried out successfully and uniformly, by virtue of the legal principles they adopted when joining—or creating—the Union. On the other hand, the constitutions of the Member States are the crowning text of their legal systems, and it is complicated to find their rightful position on what is claimed to be a higher authority. Precisely, it is difficult to think that they would renounce that supremacy, since they have the legitimacy of having been created, according to constitutional theory, from a constituent moment by the people of the nation in whom sovereignty resides. At the Community level, however, no such single *demos* is said to exist, but instead various peoples of each nation. Consequently, a peculiar situation arises within the Union, in which it can be considered that there is *de facto* legal federalism, but there is no political federalism.

This unresolved conflict has given rise to positions such as counter-limits or identity review, which have allowed certain states to limit the application of the European standard. These are based on the defense of what is understood to be the supreme rule and the rights it contains, but also on the Union's own legal system. Thus, Art.4(2) gives legitimacy to these controversial trends. It is entirely proportionate and logical that, in a process of integration that does not seek to absorb its component units nor create a "supra-state", but rather an ever closer union among the different peoples of the continent, it is pursued to protect and maintain the unique characteristics of each of the 27, especially their constitutional identities, inasmuch as they defend the rights of individuals and uphold the rule of law. Notwithstanding, as with the rest of the framework of relations examined, Art. 4(2) is too ambiguous, not delimiting what comprises the national identities referred to nor who has the power to define them, leaving room for the more mischievous constitutional courts to entrench themselves behind their "national identity" to advance their own interests. All this, coupled with the predominantly jurisprudential nature of European legal principles which has allowed them to be more easily ignored than the provisions of the Treaties, means that the primacy of EU law in essence depends on the willingness of each state to bind itself, and ultimately on the path chosen by the national judge, who has the last word, and whose powers, in the end, stem from the domestic system.

As is well known, law is the cornerstone of the integration project, with which it was born in the 1950s, gained legal personality in 2009, holds the 27 Member States together and through its own secondary law the institutions pursue the common objectives. The

law allows the EU to exist and move forward, and for that it needs to be applied uniformly throughout the territory, something the judges in Luxembourg try to ensure. As a result, the Achilles' heel of a European construction based on legal integration is that, in the absence of a common Constitution, of political federalism, the 27 constitutions of the Member States take precedence over Community law. If the EU legal system can be attacked, as we have seen it can, then the whole European project can be foundered. That there is an unresolved conflict between the former and national constitutions demonstrates more than a weak point, it demonstrates the weight of political will and interests on the progress of integration, as well as the eminently political nature of the principle of primacy.

The scope of the consequences of this kind of challenges is demonstrated in the German and Polish cases, which, seeking the weaknesses of the European legal construction, manage to construct arguments that allow them to disregard the community norm at their whim. On the premise of safeguarding supreme constitutional principles—since these are the ones that must prevail if the Union does not protect them—they seek to impose their own position on the 27 or to disapply the common rule on their soil. Critically, divergences among Member State courts questioning the validity of EU legal acts might in fact have the potential to jeopardize the unity of EU law and undermine legal certainty. Although there has been no shortage of criticism and responses to the legal reasoning of the latest rulings of the BVerfG and the TK, and even if the EU decides to apply an iron hand in punishing the offending states, the problem of the struggle for power will remain unresolved and, in the absence of provisions that allow the problematic state to be expelled, it will remain there, noxiously. We have already witnessed how Germany has been making progress in its attempts to impose its own vision of certain matters of community law by means of sentences, or how its example has been spreading to other states such as Italy or recently Poland. It is not unreasonable to think, therefore, that those who need it may find the appropriate way to copy its example.

Consequently, it is sober to think that as far as resolving possible contradictions between constitutions and Union law is concerned, alternatives to the current primary law quagmire are needed. On the one hand, I would rescue the opinion of Poiares Maduro already mentioned in this paper to emphasize that, just as the European system attempts to adapt to national constitutions, these should also do the reverse. However, it is clear from the last chapter that finding the right model is a complex task, and that normative ease is not everything. The case of Ireland, the State formally most openly-geared towards Community law, helps to understand the difficulties that can arise in the same way, and which, together with the case of the Baltic countries, demonstrate the influence of historical and social peculiarities. In this line, the preventive control of European law by Poland on the conformity of the latter with respect to its fundamental norm has proved more than unsatisfactory; and the alleged specificity of the reforms introduced in the French text can be considered equally insufficient.

On the other hand, the possibility of reorganizing the founding Treaties must be contemplated, enclosing relations as much as possible in order to resolve disputes. Aware of the rejection of the failed Treaty of 2004, in assessing this option it should be borne in mind that the European integration project as we know it does not seek to tear the states down, but even to reinvigorate them. With this in mind, it can be found, with coherence and pragmatism, a regulation of the relations between legal systems that arranges them clearly and effectively, making it possible to settle the different European contexts in a common Community legal system. The evolution of the integration process has, after all, been guided by crises, so perhaps it is time to enter a new stage of integration. Moreover, it would even be appropriate to wonder whether we are perhaps facing a "constitutional moment" linked to a real political conflict that

affects the foundations of political organization and that would make it possible to move towards a political federalism, with an authentic Constitution for the European people. And if not, the debate may also be healthy for democratic legitimization in the EU and public opinion.

In sum, if the current legal framework is decided to be maintained in the long term, it has been demonstrated that the Member States that wish to do so have an Achilles' heel to shoot at.

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