

The Primacy of European Union Law over National Law Under the Constitutional Treaty

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A. Introduction

The primacy of Community law over national law of the EC/EU Member States was recognized as one of the constitutive principles of the Community legal order as early as before the signing of the Treaty establishing a Constitution for Europe on 29 October 2004. The primacy principle together with the principles of direct effect and of uniform applicability are believed to constitute not only the foundation of effectiveness of the Community legal order but also play the role of the pillars of the unofficial European Constitution. The primacy principle is even seen as the embodiment of actual transfer of constitutional power to Europe.¹

Article I-6 of the Constitutional Treaty states: “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.” The inclusion of this principle in Title I, Part I of the Treaty emphasizes its constitutive significance for the EU legal order. From this standpoint, it is recognized as reinforcing the position of the primacy principle in comparison with its role as an unwritten principle of primary Community law.²

The role of the European Court of Justice (ECJ) in giving prominence to the primacy principle of Community law cannot be overestimated. It is not accidental that the

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¹ J.H.H. WEILER, UN 'EUROPA CRISTIANA. UN SAGGIO ESPLORATIVO (2003) (Polish translation: J.H.H. WEILER, CHESCJANSKA EUROPA. KONTYTUCYJNY IMPERIALIZM CZY WIELOKULTUROWOSC? 102-104 (2003)). ALSO, see J.H.H. Weiler, *In Defense of the Status Quo: Europe's Constitutional Sonderweg*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, 7, 8 (J.H.H. Weiler & Marlene Wind eds., 2003)).

² See Mattias Kumm & Victor Ferreres Comella, *The Future of Constitutional Conflict in the European Union: Constitutional Supremacy after the Constitutional Treaty*, Jean Monnet Working Paper 5/04, 8-10, <http://www.jeanmonnetprogram.org/papers/04/040501-15.pdf>.

judgments in the *van Gend & Loos* and *Costa/E.N.E.L.* cases denote the real origin of Community law,³ which is why, if for no other reason, the case law of the ECJ deserves to be remembered. But there are also other reasons. In the light of Article IV-438(4) of the Constitutional Treaty:

The case-law of the Court of Justice of the European Communities and of the Court of First Instance on the interpretation and application of the treaties ... as well as of the acts and conventions adopted for their application, shall remain, *mutatis mutandis*, the source of interpretation of Union law and in particular of the comparable provisions of the Constitution.

Worth noting is also the Declaration of Intergovernmental Conference stating: "The Conference notes that the provisions of Article I-6 reflect existing Court of Justice case law." There is at least one more reason why we should remember the ECJ case law, perhaps the most important for legal theory. The issue concerns the grounds for the principle of primacy: is it determined by the Constitutions of EU Member States, international law (these two sources are emphasized by the national courts) or does it stem from the specific nature and autonomy of the Community legal order? The latter view is justified in the ECJ case law. Therefore the ECJ's and national courts' stands should be compared with each other. Although the interpretation of the primacy principle given by the ECJ did not raise any controversy in some EU Member States, in others, however, especially in Germany, Italy, Denmark, Spain and recently in Poland the unconditional primacy of Community law was rejected by the main judicial bodies. It would be too optimistic to think that the entry into force of the Constitutional Treaty would automatically change the often criticized, but not entirely unfounded approach of the national courts. Moreover, the relation between the primacy principle of Union law and provisions of national Constitutions that emphasize the supremacy of the State's constitutional law still remains ambiguous. The fourth part of the present study is devoted to these issues. The last part deals with the interpretation of the primacy principle in the light of the international legal status of the EU Member States, which is occasioned by some provisions of the Constitutional Treaty (Articles I-1(1), I-5(1) and I-11(1-2)). I believe that in the context of the Constitutional Treaty's principles of conferral (Articles I-1, I-11(1-2)) and inviolability of the State's legal identity (Article I-5(1)) one can adopt the interpretation of the primacy principle that would reconcile, on the one hand, the specificity of the Union's legal order and effective application of its provisions and, on the other hand, both the special position of State Constitutions and the international legal status of the Members

³ See Armin von Bogdandy, *Doctrine of Principles*, Jean Monnet Working Paper 9/03, 41 (2003), <http://jeanmonnetprogram.org/papers/03/030901-01.pdf>.

will be protected. A one-sided approach to the primacy principle, i.e. an approach based either on *in dubio pro communitate* or *in dubio pro republicae* principles unjustifiably challenges the significance of some of the legal orders and runs the risk of being accused of arbitrariness.

B. The Primacy of Community Law in the ECJ Case Law

Three principal arguments in the ECJ case law can be pointed out that justify the primacy of Community law: the international legal obligation to observe treaties, ensuring the efficacy and uniform application of Community law, and the autonomous character of the Community legal order.

In the comparatively little known decision on the *Humblet* case,⁴ the ECJ saw the *pacta sunt servanda* principle connected with ratification of the EEC Treaty as a grounds for the primacy of Community law over national law. The ECJ took a similar stance in the *San Michele* case.⁵

A preliminary decision that distinguishes between the Community legal order and the traditional international legal order is, in general opinion, one adjudicated in the *Van Gend & Loos* case.⁶ The ECJ recognized in it the EEC Treaty as “a new quality in the international legal order.” A year later, in what is perhaps the best known judgment in this context on the *Costa v. E.N.E.L.* case,⁷ the ECJ went a step further and, while speaking of the primacy of Community legal order, termed it as its “own legal system” and underlined its “special and original nature.”

Although the ECJ later emphasized the autonomous nature of Community law in many better or less known judgments, it did not, however, offer any basically broader theoretical explanations for its meaning. The ECJ simply treated the autonomy of Community law axiomatically.⁸ From the autonomy of the

⁴ Case 6/60, *Humblet v. Belgian State*, 1960 E.C.R. 559, 569 (English special edition). The importance of this decision was lately reaffirmed by Jan Wouters, *National Constitutions and the European Union*, 27 LEGAL ISSUES OF ECONOMIC INTEGRATION 25, 68 (2000). See also Bruno De Witte, “Retour à Costa”. *La primauté du droit communautaire à lumière du droit internationale*, 20 REVUE TRIMESTRIELLE DE DROIT EUROPEAN 425, 426-7 (1984).

⁵ The Order of the Court of 22 June 1965, in Case 9/65, *Acciaierie San Michele SpA v. High Authority of the ECSC*, 1967 E.C.R. 27, 30 (English special edition).

⁶ Case 26/62, *Van Gend & Loos*, 1963 E.C.R. 1, 12 (English special edition).

⁷ Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 585, 593-594 (English special edition).

⁸ See JEAN BOULOUIS & R.M. CHEVALLIER, *GRANDS ARRÊTES DE LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES* 140 (6th ed. 1994); Jan Wouters, *National Constitutions and the European Union*, 27 LEGAL ISSUES OF ECONOMIC INTEGRATION 25, 66 (2000).

Community legal order the ECJ inferred two significant consequences: 1) the validity of Community law can be judged exclusively in the light of this law and constitutes the competence of a Community court; and 2) Constitutions of the Member States cannot prejudice the primacy of Community law.⁹

The third argument in the ECJ case law justifying the primacy of Community law is the efficacy and uniform application of Community provisions. In the judgment on the *Walt Wilhelm* case,¹⁰ apart from stressing the distinctive nature of the legal system stemming from the EEC Treaty, the Court observed that “it would be contrary to the nature of such a system to allow Member States to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty.” In the *Simmenthal SpA* case¹¹ the ECJ stressed that, in accordance with the principle of primacy of Community law, the provisions of domestic law that run counter to it are automatically inapplicable. The primacy principle further excludes, in the ECJ’s opinion, the possibility of enacting by the State any new legislation that runs counter to Community law. Otherwise, this might lead to the “denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.”¹²

The primacy principle established by the ECJ results in the following obligations on the State: 1) the prohibition on national agencies to challenge the validity of Community law; 2) the prohibition to apply national provisions that are contrary to Community provisions; 3) the prohibition to enact provisions that are contrary to Community provisions; and 4) the obligation to rescind national legislation that is contrary to Community law.¹³

As has been said before, it is difficult to find in ECJ decisions any broader legal-theoretical analyses justifying the primacy of Community law. This leads us to a

⁹ See especially Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, para. 3; Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 1987 E.C.R. 4199, paras. 11-16.

¹⁰ Case 14/68, *Walt Wilhelm et al. v. Bundeskartellamt*, 1969 E.C.R. 1, para. 6.

¹¹ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629, paras. 17, 18.

¹² *Id.* at para. 18. See also Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727, para. 14.

¹³ In the ECJ’s opinion this obligation is valid even if these provisions were not actually applied, because their binding force would, in the Court’s view, create a condition of uncertainty for citizens undertaking actions in trust law. See Case 167/73, *Commission v. France*, 1974 E.C.R. 359, paras. 41-48.

view that for the ECJ the ultimate grounds for primacy are pragmatic considerations, namely the creation of a *sine qua non* condition for the existence of the Community legal order.¹⁴ In other words, primacy of Community law has been for the ECJ a necessary condition for direct effect of Community provisions. Effectiveness as an argument justifying primacy is certainly not a new one, because it provides the traditional justification for the primacy of international law obligations over State law. However, the ECJ's theses about the autonomy and independence of Community law ("own legal system," "special and original nature," "independent source of law") prompt us to ask the question whether the primacy of Community law can be really convincingly argued on grounds other than those stemming from international law.

C. The Distinctive and Autonomous Nature of EC/EU Law as Justification for its Primacy: Critical Remarks

Recognition of the autonomy of Union law denotes that this law does not derive its justification either from international law or from the legal orders of the Member States – it validates its importance by itself. Autonomy constitutes a fundamental condition that, in the view of the ECJ and part of legal science, enables constitutionalization of Community law, at least in the functional sense, i.e. as a set of principles investing their legal subjects with rights and obligations.¹⁵

There are, however, good reasons for challenging the autonomy of EU law in the sense in which the autonomy of the State legal order is understood. It is fitting to speak of the interpretative autonomy of Community law (with the ECJ remaining its upholder), yet objections might be raised as to the view of the primary (normative) autonomy of this law, i.e. autonomy characteristic of a legal order that does not derive its validity from another legal order.¹⁶ 'European monism' presented by the ECJ does not, in my view, reflect the situation *de lege lata*. It is contradicted by substantive borrowings by EU law from the Constitutions of the

¹⁴ Jan Wouters, *National Constitutions and the European Union*, 27 *LEGAL ISSUES OF ECONOMIC INTEGRATION* 25, 67 (2000).

¹⁵ See, e.g., NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH* 97-122 (1999); NEIL MACCORMICK, *THE NEW EUROPEAN CONSTITUTION. LEGAL AND PHILOSOPHICAL PERSPECTIVE* 42-44 (2003). MacCormick does not, however, exclude international law as the normative basis of EU law. See also studies by J.H.H. Weiler in note 1; and by J.H.H. Weiler & Ulrich R. Haltern, *Autonomy of the Community Legal Order – Through the Looking Glass*, 37 *HARV. INT'L. L.J.* 411 (1996).

¹⁶ See Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 *HARV. INT'L. L.J.* 389 (1996).

Member States and numerous references to them.¹⁷ Also the position of the Member States as 'the masters of the Treaties' is unquestionable. The mutual agreement of States or the international legal paradigm continues to be a major justification for the EU legal order because it is the Member States that remain the primary source of EU powers to a larger extent than their nations. For that reason it is not a convincing argument that the presence of the primacy principle in the Constitutional Treaty denotes the recognition by the Member States of Union law as one that self-justifies its primacy.¹⁸

From the standpoint of material sources of law, the Union legal order and constitutional legal orders of the Member States constitute complementary sets of legal norms and values embodied in them, which enables us to speak of 'European monism' on the descriptive level. This mutual link is called 'constitutional pluralism,'¹⁹ 'European legal pluralism,'²⁰ 'multicenter legal system,'²¹ 'multilevel constitutionalism' (*Verfassungsverbund*)²² or 'European unwritten social contract,'²³ whose consequence is the unwritten EU Constitution coordinating the operation of national law systems. It is emphasized that in such an approach to the relations

¹⁷ Jan Wouters, *National Constitutions and the European Union*, 27 LEGAL ISSUES OF ECONOMIC INTEGRATION 25, 34 (2000), speaks of "the large dependence of EU law on national constitutional law: without constitutional arrangements in the Member States there cannot be a European legal order."

¹⁸ The argument is advanced by Anneli Albi & Peter Van Elsuwege, *The EU Constitution, National Constitutions and Sovereignty: An Assessment of a "European Constitutional Order"*, 29 EUR. L. REV. 741, 751 (2004). See *Décision no. 2004-505 DC, Traité établissant une Constitution pour l'Europe* case, Conseil Constitutionnel, (Nov. 19, 2004); available at www.conseil-constitutionnel.fr/decision/2004/2004505/dc.htm. The Conseil Constitutionnel concluded that the Constitutional Treaty was an international treaty and its title was of no constitutional significance. Moreover, the primacy clause (Article I-6) in the view of the *Conseil* does not alter the nature of the Union or the scope of the primacy principle (item 13). For critical comment, see Editorial, *A Pre-emptive Strike from the Palais Royal*, 30 EUR. L. REV. 1 (2005).

¹⁹ NEIL MACCORMICK, *THE NEW EUROPEAN CONSTITUTION. LEGAL AND PHILOSOPHICAL PERSPECTIVE* 47 (2003).

²⁰ Miguel P. Maduro, *Europe and the Constitution: What if This Is As Good As It Gets?*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE*, 74, 98-101 (J.H.H. Weiler & Marlene Wind eds., 2003); Albi & Van Elsuwege, *supra* note 18, at 742.

²¹ Ewa Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, 4 PANSTWO I PRAWO 3 (2005).

²² Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, in WHI-PAPER 5/2002, available at <http://www.whi-berlin.de/pernice-constitutionalism.htm>; Franz C. Mayer, *The European Constitution and the Courts. Adjudicating European Constitutional Law in a Multilevel System*, Jean Monnet Working Paper 9/03, <http://www.jeanmonnetprogram.org/papers/03/030901-03.pdf>.

²³ PHILIP ALLOTT, *THE HEALTH OF NATIONS, SOCIETY AND LAW BEYOND THE STATE* 179 (2002).

between the European Constitution and national constitutional orders the hierarchy of sources of law is challenged, whereby the problem of supremacy regarding EU law and State Constitutions ceases to be the most important one. As a result the concept of supremacy (*Geltungsvorrang*) is rejected in favor of the concept of primacy in application (*Anwendungsvorrang*). Indeed, the ECJ has not used notions “superior legal order” and “inferior legal order” to emphasize the primacy of Community provisions, although these notions have been used by national courts. Doubtless, the principle of primacy as part of European legal pluralism cannot obviously be explained based on EU law only. Such an approach would depreciate the State legal order and would thereby challenge pluralism which assumes a mutually amicable relationship between national law and EU law.

However, the normativist point of view still remains to be considered. In the light of the Constitutional Treaty’s provisions concerning mutual relations between the EU and the Member States it should not be disregarded. In this interpretation the primacy principle cannot be considered in isolation from another principle of Community law – the principle of conferral of competences. According to the conferral principle the Member States remain ‘the masters of the Treaties’ because they possess *Kompetenz-Kompetenz*, within which they define their own competences and those of the Union.²⁴ Viewed from this perspective, the grounds for the primacy of EU law do not stem from the autonomous nature of Community law but from its international origins, that is from the consent of the States that entails unambiguous consequences in international law. In the light of the *pacta sunt servanda* principle, the explicit establishment of the principle of EU primacy in the Constitutional Treaty is not a new quality because an implied clause of primacy is contained in every international agreement. One can even argue that the connection of the primacy principle with the conferral principle undermines its significance since it clearly indicates the limits of the primacy of Union law.

One cannot be convinced by the thesis²⁵ that owing to the primacy principle EU citizens will identify with the European Constitution as their common supreme law. This view should be regarded as wishful thinking. People identify with a

²⁴ The importance of this principle is also stressed by the ECJ despite its pro-Community approach. In particular, the ECJ opposes the infringement of the conferral principle through too great a latitude in interpreting the flexibility clause from Article 308 (ex Article 235) of the Treaty establishing the European Community. See Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1996 E.C.R. I-1759, para. 4. On the issue of *Kompetenz-Kompetenz*, see Gunnar Beck, *The Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There Is No Praetor*, 30 EUR. L. REV. 42 (2005).

²⁵ It is advanced by Koen Lenaerts & Damien Gerard, *The Structure of the Union according to the Constitution for Europe: the Emperor Is Getting Dressed*, 29 EUR. L. REV. 289, 301 (2004).

national Constitution because they have a national consciousness. It is difficult, however, to judge whether there is 'European consciousness,' because of, *inter alia*, a democratic deficit. It is questionable therefore to assert that sovereignty shifts from the Member States to European nations.²⁶ I would be more inclined to share Joseph Weiler's pessimistic assessment about the authorities drifting away from EU citizens with successive institutional modifications of the EU, and thereby argue for the existing informal European constitutionalism.²⁷

Jeopardy to the primacy principle and thereby to the effectiveness of the EU legal order is undoubtedly posed by the conflict regarding the 'arbiter of constitutionality in Europe.' The origin of the conflict is connected with the lack of acceptance of the unconditional primacy of Community law by the most important national judicial agencies. Of assistance in working out the 'strategy of prevention' towards potential conflicts over the constitutionality of law in Europe can be the conclusions derived from the previous decisions of the national courts.

D. The Primacy of Community Law and the National Courts

The subjects of objections from the national constitutional courts against unconditional acceptance of the primacy of Community law have been essentially two matters: 1) the relation between constitutional principles, including fundamental rights protected therein, and Community law; and 2) delimitation of EU competences.²⁸

It is a known fact that the opposition of the national courts against unlimited acceptance of the primacy of Community law arose with particular intensity in the States that rejected the 'European monism' represented by the ECJ and accepted the dualist paradigm of implementation of international law in national law. The dualist paradigm was applied *mutatis mutandis* to determine the relations between national law and Community law. The best-known is still the stance of the German Federal Constitutional Court – the *Bundesverfassungsgericht* (BVerfG). Objections against Community law, resulting from the national Constitutions were also raised

²⁶ Thus argued, *e.g.*, by AMARYLLIS VERHOEVEN, THE EUROPE UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY 292 (2002); Albi & Van Elsuwege, *supra* note 18, at 755-759.

²⁷ Weiler, *supra* note 1.

²⁸ An impressive collection of decisions of the national courts relating to Community law can be found in THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE CASES (Andrew Oppenheimer ed., vol. I 1994 [hereafter: Oppenheimer I]; vol. II 2003 [hereafter: Oppenheimer II]).

by the Supreme and Constitutional Courts of Italy, Ireland, Denmark, Greece, Spain, and France.²⁹

I. The Grounds of the Primacy of Community Law under the Case Law of National Courts

The primacy of Community law, both primary and secondary, in relation to the ordinary legislation of the Member States has been widely accepted by the national courts, even despite the treatment of Community norms as ‘infra-constitutional.’³⁰ In the opinion of the national courts the relationship between a Community norm and a national one cannot be explained within the rule of *lex posterior derogat legi priori*. Thus, in this area the national courts have accepted the pragmatic approach of the ECJ. Nonetheless, a divergence between them emerged relating to the grounds for the primacy of Community law. Unlike the ECJ, the national courts comparatively seldom justified primacy by the autonomy of the Community legal order. If the issue of autonomy of Community law was raised in judgments of national courts, this argument underwent a substantial ‘international legal’ modification.

The grounds for the primacy of Community law were seen by the national courts in the “specific nature of international treaty law,”³¹ as a “result of the ratification of the EEC Treaty” and in the emergence of a “new legal order which has been inserted into the municipal legal order,”³² or even “by virtue of partial cession of sovereignty.”³³ Most often, however, the courts indicated the consent of the State

²⁹ Mayer, *supra* note 22, 29-30. Mayer does not exclude this in relation to courts in Belgium, Sweden, Austria, Portugal, and the UK as well as in relation to the courts of the new Member States. E.g., as stipulated by the 1997 Constitution of the Republic of Poland, the Polish Constitutional Tribunal is the only arbiter of constitutionality of law binding in Poland. Its previous decisions indicate an amicable legal interpretation towards the process of European integration. Case K 15/04, *In the judgment of 31 May 2004*, OTK-A 5/2003, item 43 (2003), the Constitutional Tribunal indicated: ‘constitutionally correct and preferable is such interpretation of the law that serves to implement the constitutional principle of favouring the process of European integration and cooperation between States.’ However, in *The Accession Treaty* case of 11 May 2005 (K 18/04) the Polish Tribunal strongly emphasized the position of the Polish Constitution as the “supreme law of the State”. There is an English summary of the judgment, available at http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf.

³⁰ See, e.g., the judgment of the Spanish Constitutional Court, *Electoral Law Constitutionality* case (1991), Oppenheimer I 702, 704-705.

³¹ See “Le Ski” case (1971), Belgium, Cour de Cassation, Minister for Economic Affairs v. SA Fromagerie Franco-Suisse. Oppenheimer I 245, 266; Luxemburg, Conseil d’Etat, Bellion et al. v. Minister for the Civil Service, Oppenheimer I 668, 670.

³² Germany, BVerfG, Alfons Lütticke GmbH, BVerfGE 31, 145.

³³ Spain, Supreme Court, Canary Islands Custom Regulation, Oppenheimer I 694, 697; Ireland, Supreme Court, Crotty v. An Taoiseach et al., Oppenheimer I 599, 603 (opinion of Judge Finlay).

Constitution or the accord of the national sovereign. This is especially characteristic of the case law of the courts in Germany,³⁴ France,³⁵ Italy,³⁶ Greece,³⁷ the UK³⁸ and Portugal.³⁹ The national courts thus reject the hierarchy of legal acts, within which the acts of national law, including the Constitutions, are subject to the supremacy of Community law. Having adopted the dualist paradigm of explaining the relationship between national law and Community law, the national courts derive the binding force of this law from the constitutional principle of observance of international law in good faith rather than from the distinctive nature of the Community legal order and its autonomy. Two important consequences follow therefrom. First, the courts and other State agencies are constitutionally obliged to apply Community law because failure to observe it constitutes a constitutional tort.⁴⁰ Second, national legal acts do not automatically cease to be operative because they are inconsistent with Community law.⁴¹ They are repealed in accordance with the national legislative procedures.

³⁴ BVerfG, *Internationale Handelsgesellschaft mbH v. Einfuhr - und Vorratsstelle für Getreide und Futtermittel* (Solange I), BVerfGE 37, 271; BVerfG, *Wünsche Handelsgesellschaft* (Solange II) case (1986), BVerfGE 73, 339; BVerfG, *Kloppenburg* case (1987), BVerfGE 75, 223. The *Bundesverfassungsgericht* spoke of the “unwritten rule of primacy of Community law which has been inserted into the municipal legal order by laws approving the Community Treaties taken in conjunction with Article 24 (1) of the Basic Law.”

³⁵ *Cour de Cassation, Administration des Contributions Indirectes et Comité Interprofessionnel des Vins Doux Naturels v. Ramel* case (1970), Oppenheimer I 279, 283. The court gave those acts of secondary Community law “the force of international treaties;” *Cour de Cassation, Administration des Douanes v. Société Cafés Jacques Vabre et Weigel et Compagnie* case (1975), Oppenheimer I 287, 309-310. Regarding the EEC Treaty the court waived the requirement of reciprocity applied to other international agreements on account of the Treaty’s established own procedure of dispute settlement in the event of failure to observe its provisions; *Conseil d’Etat, Nicolo* case (1989), Oppenheimer I, 335. Recently see *Décision no 2004-496 DC of Conseil Constitutionnel, Loi pour la confiance dans l’économie numérique* case, June 10, 2004, available at <http://www.conseil-constitutionnel.fr/decision/2004/2004496/2004496dc.htm>). The Conseil Constitutionnel recognized that implementation of directives in the French legal system was based on the constitutional approval.

³⁶ *Constitutional Court, Frontini v. Ministero Delle Finanze* case (1973), Oppenheimer I 629, 634; *Constitutional Court, Spa Grantial v. Amministrazione delle Finanze dello Stato* case (1984), Oppenheimer I 642, 646-647.

³⁷ *Council of State, Banana Market* case (1984), Oppenheimer I 576, 578; *Council of State, Mineral Rights Discrimination* case (1986), Oppenheimer I 581, 582; *Council of State, Karella v. Minister of Industry* case (1989), Oppenheimer I 584, 586.

³⁸ *House of Lords, Factortame LTD v. Secretary of State for Transport* case (1990) [judgment of Lord Bridge of Harwich], Oppenheimer I 882, 883.

³⁹ *Court of Appeal of Coimbra, Cadima* case (1986), Oppenheimer I 675, 679.

⁴⁰ *See, e.g. Kloppenburg* case, *supra* note 34.

⁴¹ *See, e.g. Spa Grantial* case, *supra* note 36, at 648-650.

II. The Relationship between Community Law and the Constitutional Law of the Member States

Another clear manifestation of the dualist approach of the national courts to Community law is simply jealous protection of the supremacy of national constitutional law. It manifests itself as early as at the stage of ratification of the treaties creating the primary law of the EC/EU. During the ratification process, the national courts examined the validity of the State's binding itself by the treaties in the light of constitutional provisions concerning the exercise of national sovereignty and constitutionally protected rights.⁴² An adverse judgment on this issue prompted constitutional amendments, whose objective was to create the legal grounds for ratification of the European treaties.

The protection of supremacy of the national Constitution manifests itself even stronger in the national Constitutional Courts' emphasis of their role as guardians protecting the Constitution against the constitutionally unfounded actions of international agencies and legal acts made by them. The basic principles of State legal orders and fundamental human rights present in the Constitutions constitute the limit to the unconditional acceptance of the primacy of Community law. Although an open conflict between the ECJ and the national Constitutional Courts has not occurred, the Constitutional Courts have shown a clear tendency to emphasize their autonomy in the national legal order and thereby not to recognize the ECJ as 'the arbiter of constitutionality in Europe.'⁴³ Well-known are the conditional reservations of the Constitutional Courts regarding a potential refusal to apply Community law in the event it does not meet the requirements and criteria for constitutionality.⁴⁴ Moreover, the national Constitutional Courts aspire to

⁴² See, e.g., the decision of the Irish Supreme Court, *Crotty case*, *supra* note 33, at 600-603; the decision of the German BVerfG *Maastricht Treaty Constitutionality case* (1993), BVerfGE 89, 155; the decisions of the French Conseil de Constitutionnel, *European Communities Amendment Treaty case* (1970), Oppenheimer I 276; *Treaty on European Union (Maastricht I) case* (1992), Oppenheimer I 385; *Treaty on European Union (Maastricht II) case* (1992), Oppenheimer I 399; *Treaty establishing a Constitution for Europe case* (2004), *supra* note 18; the decision of the Danish Supreme Court, *Carlsen et al. v. Rasmussen case* (1998), Oppenheimer II 175. In this context, of importance are also British decisions on account of the principle of Parliamentary sovereignty. See *Regina v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Lord Rees-Mogg*, Divisional Court (1993), Oppenheimer I 911.

⁴³ Mayer, *supra* note 22, at 34-36, where the author speaks of 'frictional phenomena.'

⁴⁴ BVerfG, *Solange I*, *supra* note 34; BVerfG, *Solange II*, *supra* note 34; BVerfG *Banana Market Organization Constitutionality case* (2000), BVerfGE 102, 147; *Spa Granital*, *supra* note 36; *Fragd v. Amministrazione Delle Finanze Dello Stato case* (1989), Oppenheimer 653, 657; *Frontini*, *supra* note 36, 640 (Italy); *Aepesco case* (1991), Oppenheimer 705, 706 (Spain); *Carlsen et al. v. Rasmussen*, note 42 (Denmark). See Mayer, *supra* note 22, at 29-32. Recently such reservations were also raised by the Spanish Constitutional Court in the *Statement no. 1/2004 of 13 December 2004* where the Court stated that "the

control the activities of the EU and its bodies within conferred competences. The decision of the BVerfG concerning the constitutionality of the Maastricht Treaty is well known as a spectacular manifestation of this tendency.⁴⁵

A similar standpoint was presented recently by the Polish Constitutional Tribunal in *The Accession Treaty* case of 11 May 2005.⁴⁶ The Tribunal remarked that the principle of interpreting domestic law in a manner “sympathetic to European law,” as formulated within the Constitutional Tribunal’s jurisprudence, had its limits. And below it stated:

The Member States maintain the right to assess whether or not, in issuing particular legal provisions, the Community (Union) legislative organs acted within the delegated competences and in accordance with the principles of subsidiarity and proportionality. Should the adoption of provisions infringe these frameworks, the principle of the precedence of Community law fails to apply with respect to such provisions.

III. Conclusions Arising from the Conflict Over “The Final Arbiter of Constitutionality” Within the EU

The controversy between the supreme national judicial organs and the ECJ proves first of all that both parties have kept their autonomy in their jurisdictional domains. This also challenges the thesis about the subordination of State law to EU law. Despite close connections between them, they do not remain in the relation of supremacy. In this sense European integration undermines the hierarchical understanding of the law.⁴⁷ In the present state of legal relations between the EU and the Member States (they will not be basically changed by the Constitutional Treaty), the issue of supremacy remains in fact insoluble.⁴⁸ Consequently, the postulates are unfounded that demand changes in the constitutional provisions

powers the exercise of which is transferred to the European Union could not, without a breach of the Treaty itself, be used as grounds for the European rulemaking the content of which would [be] contrary to the fundamental values, principles, or rights of our Constitution.” Quoted after Ricardo Alonso Garcia, *The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy*, 6 GERMAN LAW JOURNAL 1001, 1012 (2005).

⁴⁵ BVerfG, *Maastricht Treaty 1992 Constitutionality*, *supra* note 42.

⁴⁶ See, *supra* note 29.

⁴⁷ See Maduro, *supra* note 20, at 95-96.

⁴⁸ Frowein observes in this context: ‘As long as the Community system has not developed into a federal structure, questions of sovereignty or final priority as to sources of law have to be kept in suspense,’ Jochen A. Frowein, *Solange II*, 25 CMLR 201, 204 (1988). Also, see Beck, *supra* note 24, at 67, who underlines that ‘the issue of *Kompetenz-Kompetenz* is part of the resultant catalogue of unanswered questions.’

stressing the supremacy of the national Constitution in the Member States.⁴⁹ The Constitutions of the EU Member States did not and, as long as the EU Members retain the status of States or sovereign subjects of international law, will not occupy a lower position in the hierarchy of sources of law than the Union provisions. For as long as the States retain the position of subjects vested with *Kompetenz-Kompetenz*, certain constitutionally protected values will be exempt from the operation of the principle of primacy of EU law.⁵⁰ On the other hand, however, the obligation of the Member States to absolutely observe EU law is indisputable. Therefore, it would be inappropriate to say that Community norms occupy a position below the provisions of national law. The basic obligation of the State, already emphasized by the case law of the Permanent Court of International Justice, is to take actions in this area, by the legislative and executive and judicial authorities, which will ensure the effectiveness on its territory of provisions adopted under international obligations. Such actions are meant to protect the inviolability of the presumption of compatibility of national law with Community law. This presumption allows a mutually amicable interpretation. Taking into account, however, the possibility of the EU's legal actions outside conferred competences, the national court can be confronted with the aforesaid difficult dilemma: whether to refuse to apply Community law (which was supported by the BVerfG) or start the procedure by the State of invalidation of a Community measure before the ECJ. The former solution is difficult to accept from the standpoint of Community law, which contains its own mechanisms for solving problems of this type, which is confirmed by the ECJ case law.⁵¹ The latter solution may raise doubts in the light of the State's constitutional law, insofar as an international agency has exceeded the constitutional limits on its action within the State. We may therefore regard as well-founded the proposals that postulate the establishment of a neutral institution of judicial or quasi-judicial nature, authorized to express opinions in the event of a constitutional conflict within the EU.⁵²

⁴⁹ Such a postulate was voiced in reference to Article 8(1) of the Constitution of the Republic of Poland, which stipulates: 'Constitution shall be the supreme law of the Republic of Poland.' Stefan Hambura, *Wyjście jest tylko jedno: zmiana konstytucji*, RZECZPOSPOLITA of 27 May 2004, C2. For critical comments on this postulate see: Roman Kwiecień, *Konstytucja zmian nie wymaga*, RZECZPOSPOLITA of 2 June 2004, C2.

⁵⁰ See Carl U. Schmid, *The Neglected Conciliation Approach to the 'Final Arbiter' Conflict*, 36 CMLR 509, 512 (1999); Kumm/Comella (*supra* note 2), 24.

⁵¹ See especially case 314/85 *Foto-Frost*, *supra* note 9.

⁵² Schmid, *supra* note 50, at 513-514; Mayer, *supra* note 22, at 38-40 (and literature on the subject given therein).

Although the entry into force of the Constitutional Treaty probably will not conclude the 'final arbiter of constitutionality' controversy, a significant advantage of the Treaty appears to be the delimitation of limits within which the principle of primacy of Union law will operate. At issue is the protection of competences of the Member States, constitutive of their status in international law against the EU's actions not founded in the conferral principle.

E. The Limits of the Primacy Principle under the International Legal Status of the Member States

In its famous judgment on *Maastricht* case⁵³ the German Federal Constitutional Court stressed *inter alia* the sovereign status of Germany. This stance reflects the actual international legal status of the Member States despite the frequent and even fashionable tendency in the present-day theory of international and European law to challenge the importance of State sovereignty or at least to considerably relativize it. By means of new conceptual constructs, the legal doctrine strives to explain the unprecedented widespread fact of interdependence in exercising State functions by the Members within the EU. Thus, the concepts of "divisible sovereignty,"⁵⁴ "post-sovereignty,"⁵⁵ "sovereignty beyond the State"⁵⁶ are used. A view is even expressed that there "simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community."⁵⁷ Contrary to that, however, my view is that the old concept of sovereignty – despite its ambiguity – can still be a good means for analyzing the legal status of the Member States. It is obvious that the EU Members did not cease to be States, instead retaining their identity under international law,⁵⁸ thereby still remaining "the masters of the

⁵³ BVerfG, *Maastricht Treaty Constitutionality* case, *supra* note 42. Also there and in the earlier judgment on *Kloppenburg* case, *supra* note 34. The BVerfG used the well-known term to denote the EC/EU Member States as 'the masters of the Treaties.' The sovereign status of the Member States has recently also been emphasized by the courts of other Members. See, e.g. the Danish Supreme Court's *Carlsen et al. v. Rasmussen* case, *supra* note 42; the Spanish Constitutional Court's *Statement no.1/2004* case, *supra* note 44; the Polish Constitutional Tribunal's *The Accession Treaty* case, *supra* note 29.

⁵⁴ See Daniela Obradović, *The Doctrine of Divisible Sovereignty in the Community Legal Order*, in *STUDIES ON EUROPEAN LAW*, 26 (Michał Seweryński ed., 1996).

⁵⁵ MACCORMICK, *QUESTIONING SOVEREIGNTY*, *supra* note 15, at 132-142.

⁵⁶ ALLOTT, *supra* note 23, at 176-179. See *Abbi & Van Elsuwege*, *supra* note 18 *passim*.

⁵⁷ Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 *AM. J. COMP. L.* 205, 220 (1990).

⁵⁸ See Alan Dashwood, *States in the European Union*, 23 *EUR. L. REV.* 201, 202 (1998); Roman Kwiecień, *Sovereignty of the European Union Member States: International Legal Aspects*, in *THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION – GERMAN AND POLISH PERSPECTIVES* 339, 351-354 (Adam Bodnar *et al.* eds., 2003).

Treaties.” Accordingly, I share the view that it seems appropriate to describe the unique polity created by the European Treaties as “a constitutional order of States.”⁵⁹

The ECJ has consistently emphasized the “permanent limitation of sovereign rights” of the Member States, without, however, giving specific reasons for this thesis.⁶⁰ It is often adopted uncritically by the national courts that juggle with the concept of sovereignty and sovereign rights like a ball. There are even decisions, where we could find two mutually contradictory understandings of sovereignty.⁶¹ Therefore, it appears justifiable to approach the question of State sovereignty with caution and refrain from hasty judgments in this respect, at least until one can establish consistently rather than arbitrarily what sovereignty is today.

The phenomenon of interdependence is treated with caution by the Member States themselves. For example, the ‘Decision of the Heads of State or Governments concerning certain problems raised by Denmark on the Maastricht Treaty on European Union’ of 11-12 December 1992 asserted that the Treaty on the European Union “involves independent and sovereign States having freely decided, in accordance with the existing Treaties, to exercise in common some of their competences.”⁶² Of significance in this field is also Article I-1(1) of the Constitutional Treaty speaking about conferring competences to the EU by the Member States “to attain objectives they have in common.” One could speak about limiting the sovereignty of the EU Members, assuming that sovereignty is a sum of State competences. This interpretation of sovereignty cannot, however, find its justification in international law. In case law of international courts there is an established assertion that the capacity to undertake international obligations that even permanently orient the exercise of State functions is a manifestation rather

⁵⁹ ALAN DASHWOOD in WYATT & DASHWOOD’S EUROPEAN UNION LAW 151 (4th edition 2000).

⁶⁰ In the Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, 1991 E.C.R. I-6079, para. 21 (the ECJ stated that the Member States had “limited their sovereign rights in ever wider fields.”).

⁶¹ See *e.g.* the judgment of the Irish Supreme Court on *Crotty* case, *supra* note 33.

⁶² DOCUMENTS ON EUROPEAN UNION 285-286 (Anjo G. Harryvan & Jan Van Der Harst eds., 1997). A similar presentation of the problem is to be found in the French Constitution of 1958, where Article 88(1) states: “La République participe aux Communautés européennes et l’Union européenne, constituées d’Etats qui ont choisi librement, en vertu des traités qui les ont instituées, d’exercer en commun certaines de leurs compétences. Elle peut participer à l’Union européenne dans les conditions prévues par le traité établissant une Constitution pour l’Europe signé le 29 Octobre 2004,” available at <http://www.conseil-constitutionnel.fr/textes/c1958web.htm>.

than limitation of sovereignty.⁶³ In international law, sovereignty is the State's complete capacity to define the forms in which its functions are exercised.⁶⁴ This is why the primacy of Union law in the domain of conferred competences is fully justified because it stems from mutual international obligations undertaken by the Member States. On the other hand, the exceeding by the EU bodies of the limits of conferred competences suspends the operation of the primacy principle. Therefore, an important issue in the Constitutional Treaty is the division of competences between the Member States and the EU.

The primacy of EU law in the Constitutional Treaty encounters one more, not less important limitation. It is introduced by Article I-5(1) which emphasizes the legal position of the State more strongly than does the currently binding Article 6(3) of the EU Treaty.

There are clear analogies between the provision of Article I-5(1) of the Constitutional Treaty and the provisions of the United Nations Charter. The equality of the EU Members before the Constitution corresponds to the principle of sovereign equality of the Charter's Article 2(1); however, one should have in mind that it is just analogy owing to the special rights of permanent members of the Security Council. The duty of the Union to respect national identities and fundamental State functions or functions that international law attaches to the nature of State corresponds in turn to the provision of Article 2(7) of the UN Charter. Article I-5(1) thus establishes the 'domain reserved,' resulting from international law and exempt from appraisal by Union courts and its other agencies. This provision embodies values that are constitutive for the legal nature of States as sovereign subjects. Due to this status it is the EU Members that confer competences on the Union and not the other way around. The values that make up this status cannot be interfered with by Union law and that is why they are excluded from the primacy of this law.⁶⁵ Union legal acts aimed at the fields referred to in Article I-5(1) would certainly be *ultra vires* acts. For they would not find justification either in the light of the national Constitutions or international law or the Constitutional Treaty alone.

⁶³ Here especially worth noting is the first judgment of the Permanent Court of International Justice - Case of the S.S. Wimbledon (Great Britain *et al.* v. Germany), 1923 P.C.I.J. (ser. A) No. 1, at 25.

⁶⁴ Such an understanding of State sovereignty is justified more broadly, e.g. Jerzy Kranz, *Réflexions sur la souveraineté*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 183 (Jerzy Makarczyk ed., 1996); ROMAN KWIECIEŃ, *SUWERENNOŚĆ PAŃSTWA. REKONSTRUKCJA I ZNACZENIE IDEI W PRAWIE MIĘDZYNARODOWYM passim* (2004).

⁶⁵ Such a position was directly emphasized by the Polish Constitutional Tribunal in *the Accession Treaty* case. *See, supra* note 29.

F. Conclusions

The inclusion of the primacy principle in the Constitutional Treaty does not bring about a fundamental breakthrough in the existing legal order of the EC/EU. This principle, albeit with restrictions relating to the basic rules of national legal orders, has been accepted by the courts of the Member States as well as their governments. However, while the ECJ saw its grounds in the autonomy and specific nature of the Community legal order, the national courts justified it mainly by constitutional consent. The entry into force of the Constitutional Treaty basically will not change this perspective of viewing the grounds of the primacy of Union law. Nor will it, in my estimation, strengthen the primacy principle because its presence alone in the Treaty does not entail a stronger obligation to observe EU law than what is required by the international law principle of *pacta sunt servanda*.

In the context of the conferral principle and the EU's obligation to respect the nucleus of statehood of its Members, the primacy principle will function within more stable limits than until now, which surely underlines the position of EU Members as the masters of the Constitutional Treaty. This context forms a barrier against the 'Europeanization' of State law, without legitimacy recognized by law.