THE PRINCIPLE OF SUPREMACY OF EC LAW: THE IMPACT OF THE ENLARGEMENT AND THE CONSTITUTIONAL TREATY

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The Principle of Supremacy of EC Law: The Impact of the Enlargement and the Constitutional Treaty

AT Hukukunun Üstünlüğü: Genişlemenin ve Anayasal Antlaşmanın Etkileri

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Tez Danışmanının Adı Soyadı (İMZASI) : .....
Jüri Üyelerinin Adı Soyadı (İMZASI) : .....
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Toplam Sayfa Sayısı:

Anahtar Kelimeler (Türkçe)
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4) Genişleme
5) Alman Anayasa Mahkemesi

Anahtar Kelimeler (İngilizce)
1) Supremacy of EC Law
2) European Constitutional Treaty
3) Competences of the EU
4) Enlargement
5) German Constitutional Court

ABSTRACT

This dissertation explores the principle of supremacy that has long created tensions between the European Court of Justice and the national constitutional courts. The relevant general principles of the international law and the supranational nature of the European Community are also addressed in order to reflect on the evolution of the case law of the European Court of Justice on the principle of supremacy. Apart from the monist approach of the ECJ claiming the supremacy of EC Law over the conflicting national rules, the perspectives of the national courts are also analysed with a particular emphasis on the German Constitutional Court due to its rich body of case-law on the principle of supremacy. This dissertation later focuses on the problems posed by enlargement of the European Union to the recent Central and Eastern European Countries by citing the recent important judgments. The methods will be proposed to overcome the clash between the two national systems. The Treaty establishing the Constitution for Europe with its innovations particularly the mechanisms enabling the Community to accede to the European Convention on Human Rights is suggested as the leading alternative way to ease the clash between the two legal systems.

ÖZET

Bu tez çalışması Avrupa Topluluğu Adalet Divanı ve anayasa mahkemeleri başta olmak üzere Üye Ülkelerin ulusal mahkemeleri arasında tartışmaya neden olan Avrupa hukukunun üstünlüğü prensibini Avrupa Topluluğu Hukuku ve ulusal hukuk düzenleri çerçevesinde ele almaktadır. Avrupa Adalet Divanı'nın üstünlük prensibi konusundaki içtihatının gelişimini yansıtmak için uluslararası hukukun genel prensipleri ve Avrupa Topluluğu'nun uluslarüstü yapısı da ele alınmaktadır. Avrupa Adalet Divanı'nın ve Ulusal Mahkemelerin özellikle bu konuda geniş içtihata sahip olan Alman Anayasa Mahkemesi'nin Avrupa hukukunun üye devletler hukuku üzerindeki üsütünlüğü hakkında yaklaşımlarına yer verilmektedir. Bu tez çalışması daha sonra Merkez ve Doğu Avrupa ülkeleri genişleme süreciyle birlikte konu ile ilgili ortaya çıkan sorunları irdelemekte, çeşitli çözüm önerileri sunmaktadır. Özellikle Avrupa İnsan Hakları Konvansiyonuna Topluluğun katılımı yönünde getirdiği mekanizmalarla, Avrupa Anayasasını kuran Antlaşma öne çıkan bir çözüm önerisi olarak ortaya konulmaktadır.

PREFACE

I would like to thank my Master's Thesis supervisor, Asst. Prof. Dr. Harry Tzimitras for his contribution and guidance in this dissertation; my Master's Programme Director Mr. Emre Gönen for his guidance and encouragement to complete this work and to my mother, father and brother who always presented all their support.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ACP	:	African-Caribbean-Pacific countries
BVerfG	:	*Bundesverfassungsgericht* - German Constitutional Court
CEEC	:	Central and Eastern European Countries
CFSP	:	Common Foreign and Security Policy
CMO	:	Common Market Organization
EAW	:	European Arrest Warrant
ECJ	:	European Court of Justice
EC Law	:	European Community law
ECHR	:	European Convention on Human Rights
EU	:	European Union
EURATOM	:	European Atomic Energy Community
ECSC	:	European Coal and Steel Community
GATT	:	General Agreement on Tariffs and Trade
GG	:	*Grundgesetz* –German Basic Law
IGC	:	The Intergovernmental Conference
JHA	:	Justice and Home Affairs
TCE	:	The Treaty establishing a Constitution for Europe
QMV	:	Qualified Majority Voting
PCIJ	:	Permanent Court of International Justice
PJC	:	Police and Judicial Cooperation in Criminal Matters

INTRODUCTION

Compared to the inherent weaknesses of the other forms of international law and international courts in enforcement issues, the legal system that the European Union (hereinafter: the EU) has established can be described as one of the most effective and sophisticated legal systems in existence. In other international legal systems, a limited number of cases are heard in the courts and there are not sufficient enforcement procedures in case of violations of member states. Instead, the majority of the legal disputes are solved outside of those international legal mechanisms.

Contrary to this, the European legal system works almost like a national legal system where the violations are brought before the European Court of Justice (hereinafter: the ECJ) under the unique enforcement procedure and there is also exceptional influence of the judgments of the ECJ on the national systems. This system was not that effective in the early days of the Communities and it has been transformed through bold legal interpretations of the ECJ since 1950s and 60s.

One of these bold interpretations of the ECJ which has formed the European Community law (hereinafter: EC Law) as it is today is the principle of supremacy. This principle has no legal basis in the EC Treaty[1]. However, it is rather a result of teleological (purposive) interpretation of the ECJ in order to give full effectiveness to Treaty provisions with an aim of creating the common market. Following the ruling of the Court in *Van Gend en Loos* case[2], the ECJ developed this doctrine in the light of the "new legal order of international law" which was

[1] The Treaty of Nice is signed on 26 February 2001 and entered into force on 1 February 2003. By the Treaty of Nice, the former Treaty of the EU and the Treaty of the EC have been merged into one consolidated version.
[2] Case 26/62, *Van Gend en Loos v Nederlandse Administratie Der Belastingen*, [1963] ECR 1.

created by the establishment of European Communities. Later, the doctrine of supremacy of EC Law over the national laws of Member States has been reiterated by the ECJ. However, the different approaches pursued by the national courts and by the ECJ have often led to controversial judgments which paved the way for clash between two legal systems. The national courts base their claims on their Constitutions whereas the ECJ asserts that it is EC Law that decides for the matters under the competence of the Community and it has precedence over the national law. This may be the case where a Community legislative act, for example, is found to be contrary to a fundamental right protected under the constitution of a Member State.

Despite the monist approach of the ECJ (i.e. EC law takes precedence over national law), most of the Member States' national courts particularly the German Constitutional Court (hereinafter: BVerfG, the Bundesverfassungsgericht) assert that they have created the Community law based on their national legal systems and empowered the Court by their own constitutions. Thus, the authority that is attributed to the ECJ does not come from the EC as a sovereign entity but from their national legal systems. The natural conclusion of this approach is that national law takes precedence over EC law. Some Member States have been quite vocal concerning the principle of supremacy. The BVerfG claimed in its early decisions that in many respects the German Basic Law and German legal system are much more sophisticated in protecting fundamental rights than the EC legal system. This has resulted in the rulings before the national courts putting reservations to the ECJ's claim of supremacy and reclaim of their sovereign rights in protecting fundamental rights of their citizens. However, it is possible to claim that as a result of mutual understanding, Germany now has come to the point of embracing the idea that EC legal system is sufficient enough to protect fundamental freedoms as the BVerfG. This mutual understanding has developed owing to

consensus in many areas. The inclusion of European Charter of Fundamental Rights into the European Constitution especially in the section of economic rights by efforts of Germany is illustrative of the fact that at political level there have been many efforts to bring Germany into lines that it is now.

However, after the accession of the ten new Member States, constitutional problems have emerged in some of these countries which demonstrate the practical difficulties of aligning the national legal systems with EC Law. These legal systems are established on the experiences of the previous communist regimes and therefore, while setting up their new system in order to avoid the repetition of the past, the protection of fundamental rights and other national concepts of constitutionalism became a vital part of their systems. These concerns of national sovereignty and independence are also apparent in their accession debates. During the negotiations, certain references were made to the *Solange I*[3] *and Solange II*[4] cases and certain derogations were sought regarding supremacy of EC Law.[5] Yet in many instances, "European Clauses" were adopted in favour of the supremacy of EC Law. For instance, the Article 91(3) of Polish Constitution[6] states that "if an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws."

However, in practice, this acceptance may not mean a lot. In some other cases, such as in Hungary, these accession amendments on purpose avoided to take a stand regarding the supremacy of EC Law although government's official declaration states that in case of

[3] Case *Solange I*, 37 BVerfGE 271, English translation [1974] 2 CMLR 540 - *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* (Hereinafter: *Solange I*) case
[4] Case *Solange II*, 73 BVerfGE 339, [1987] 3 CMLR 225 - *the application of Re Wünsche Handelsgesellschaft* (Hereinafter: *Solange II*), pp. 375.
[5] András Sajó, "Learning Co-operative Constitutionalism the Hard Way: The Hungarian Constitutional Court Shying Away from EU Supremacy" *ZSE* 3/2004, pp. 353.
[6] The Constitution of the Republic of Poland [online] availale from http://bib.sejm.gov.pl/tek/txt/kpol/eng/kon1.html; Internet: Accessed on 28.05.2006.

conflict of laws, national courts must give precedence to EC Law.[7] The recent ruling of Hungarian Constitutional Court revealed this tension between the national supreme courts and the ECJ.

This dissertation adopts an inductive methodology whereby instead of depicting the picture with the use of the grand legal theories, it tries to reach the conclusion through addressing the different positions taken on the issue of supremacy of EC Law and attempts to give an account to the inner workings of the Community system and its interaction with the national legal systems. Therefore, it focuses on what happened and is happening in practice in the application of EC Law by the national courts and in the reaction of the ECJ to this implementation. However, this dissertation later will turn to the theoretical debate and discuss the implications of the Constitutional Treaty briefly and its impact on the supremacy debate.

The structure of the dissertation is as follows. The first chapter will focus on the development of the concept of supremacy of EC Law and try to contrast the unique approach of the ECJ to principles under the international law. The basic constitutional principles of the EC legal system will be analysed concurrently. In this chapter, a brief historical background of how and why the ECJ has developed the principle of supremacy in this way will be tackled through the evolution of its case-law.

In the second chapter, the perspectives of the national legal systems of Member States particularly the German legal system to the supremacy issue will be scrutinized. The monist and the dualist national legal systems will be briefly described. A particular emphasis will be

[7] Sajó, *supra* note 5, pp. 354.

given to German cases such as the *Solange I*, the *Solange II* due to the rich body of case-law that it has in order to exemplify for the clash between the ECJ and the national legal systems.

The third chapter will deal with the problem that is posed with the new enlargement and the impact of legacy of the authoritarian regimes on the newly acceded countries. Two of the new Member States, Poland and Hungary are chosen for the following reasons. First for the purposes of this dissertation citing all the relevant but similar cases from new Member States would not be possible due to the limitations in space. These countries and the corresponding national cases are chosen to be representative of the all new Member States having those authoritarian regimes. Moreover, from the perspective of their accession negotiation debates and the process of adoption of European clauses, they constitute somewhat two contrasts: while Poland was more benign in accepting the European clause, Hungary sidestepped the issue. Nevertheless, for the issue of supremacy of EC Law they took a similar stand at the end. Finally another German case, *Darkazanli* case[8] will finalize the chapter in order to demonstrate the debate is still vivid even in Germany, a Member State that is thought settled the debate. The implications on the problem of the relationship between EC law and German constitutional law will be analysed.

The fourth chapter will turn back to the theoretical debate on the doctrine of supremacy briefly and suggest certain methods to overcome the clash between the ECJ and the national courts on the issue such as the principle of consistent interpretation of EC Law, public international law and European Constitutionalism.

[8] BVerfG, *Neue Juristische Wochenschrift (NJW), 58 (2005), 2289* (Hereinafter: *Darkazanli* case) that was preceeded by an interim measure stopping complainant's extradition BVerfG, Europäische Grundrechte Zeitschrift, 32 (2005), 667.

The final chapter will concentrate on the Constitutional Treaty as a panacea to the debate with its innovations in several areas ranging from the mechanisms aiming at decreasing the democratic deficit, improvement of level of protection of fundamental rights through the inclusion of the Charter of Fundamental rights, simplifying of the decision-making procedures, clarifying the competences of the Community.

The conclusion is based on the fact that there may not be legal consensus among the national courts on the issue of supremacy of EC Law. Although mutual understanding can be reached overtime as in the case of the BVerfG this settlement may be accepted as illusionary as the new issues are coming under the competences of the Community. This is also the case for newly acceded Member States such as Poland and Hungary. Their authoritarian past shaped their newly established systems as more protectionist especially concerning fundamental rights. There are certain methods such as the principle of consistent interpretation of EC Law, public international law and European Constitutionalism. However in some respects there methods fall short of providing a satisfactory solution to the debate. Rather a political consensus will be needed at the European level. The Constitutional Treaty provides a favourable framework for the realisation of this political consensus through its innovative contributions such as the mechanisms it introduces to provide the assurance that the Community system is adequately sophisticated to give effective protection to the fundamental rights of European citizens.

CHAPTER I

THE EVOLUTION: THE PRINCIPLE OF SUPREMACY OF EC LAW

1. INTRODUCTION

The relation of national legal systems to the legal order of the European Union brings about interesting questions regarding the general principles to be used in case of conflict between the two systems. As many other systems of law, EC Law has an evolving structure and some of its general principles explaining its relation *vis-à-vis* national laws have been developed overtime in the light of the objectives of EC Treaty.

The legitimacy of the judicial process is essential for the existence of established legal bodies and for the respect for law. However, as in the case of most international legal systems, the European legal system had long suffered the weakness of its enforcement mechanisms and the poor compliance of the Member States. In the 1960s, there was a problem of compliance to the Treaty of Rome. There were numerous exceptions and violations of EC Law where the individual Member States were trying to protect their own market and to secure advantages for their workers and producers. Besides, the Member States were themselves violating EC Law by retaining the conflicting national rules. With the target of the EEC Treaty to establish the common market by the year 1970, the ECJ had become one of the most influential driving forces of European Integration by establishing its own principles in a context where the legal system of the EC was not properly functioning. Under the Community legal system established by the Treaty of Rome, only the Member States and the Commission could bring

lawsuit against the violations of EC Law before the ECJ. Member States were reluctant to bring an action against another state while the Commission preferred the problem to be solved without going to the Court. The only thing that the ECJ could do is to declare that a Member State has failed to fulfil its obligations. This method is not usually welcomed as it could be counter-productive due to its coercive nature.[9] Thus, the lack of effective enforcement mechanisms enforced the ECJ to develop its own general principles to fill out the legal lacuna. The principle of direct effect and the principle consistent interpretation of national law in the light of EC law are among those principles in order to bring more effective enforcement mechanism to the EC legal system. As a result of the application of those principles by the national courts, the effect of EC law in the national legal systems is governed according to the principle of supremacy of EC law over the conflicting national rules.

The principle of supremacy offers a solution to an uneasy question that may result from the concurrent existence of two legal systems: which legal order takes precedence when a conflict arises between the ECJ and national courts. The clash occurs usually when a provision of EC Law confers rights and imposes duties directly upon European citizens (i.e. direct effect of EC law) while it conflicts with a national rule. As in the case of direct effect doctrine, the doctrine of supremacy of EC Law is not expressly contained in any of the founding Treaties. Therefore it has no clear legal basis in the EC Treaty, although, maybe it would have been settled by the Treaty on the Constitution for Europe, where it was defined in art. I-6, had the Constitution not been rejected by the French and the Dutch referenda.[10]

[9] Karen J. Alter, "The Transformation of the European Law System and the Rule of Law in Europe," *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, (Oxford: University Press Oxford, 2001) pp. 217-218.
[10] Franz C. Mayer, "Supremacy Lost? Comment on Roman Kwiecien," *German Law Review* (2005) Vol. 06 No. 11 pp. 1499.

It is the aim of this chapter to present the evolution of the principle of supremacy as a result of teleological (purposive) interpretation of the ECJ in order to give full effect to Treaty provisions especially to those provisions that have an aim of creating a common market. Apart from this primary source of EC Law (Treaty provisions), the effect of secondary sources of EC Law particularly regulations will be analysed within the case law. The approach and the reasoning of the ECJ on the supremacy principle are defined by citing the landmark cases in this area.

This chapter follows a three-fold structure. The first section begins with a very brief overview of the historical background of the EC, its main objectives, its institutional structure, its decision-making instruments and its powers (i.e. competences) *vis-à-vis* the sovereign powers of the Member States. The second section deals with the general principles of international law to shed some light to the distinction between international law and EC law. The third part turns to the principal discussion on the evolution of the principle of supremacy in the jurisprudence of the ECJ.

2. THE FUNDAMENTAL CONCEPTS CONCERNING THE EC LEGAL ORDER

The end of the Second World War marked to an era that witnessed the appearance of several economic integration formations throughout the world with varying intensity and at different speed of progress. Europe was not an exception. The European integration process began with the signing of the Treaty of Paris in 1951, by which, the European Coal and Steel Community

(ECSC) was formed[11] with a view to pooling together the resources of Europe and establishing a common market for coal and steel (two vital sectors in Europe due to their military application). Within this organization, the Member States gave substantial decision-making powers to the "High Authority" (i.e. the supranational institution of the ECSC) for the specific arrangements in this particular economic area (i.e. setting the market prices without import or export duties or subsidies). The success realised in this sectoral integration subsequently gave an inspiration for the formation of the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) by the signing of Treaties of Rome in 1957[12]. In 1960s, the founding father of the European Community, Jean Monnet commented on the European Integration:

> "European Unity is the most important event in the West since the war, not because it is a new great power, but because the new institutional method it introduces is permanently modifying relations between nations and men. Human nature does not change, but when nations and men accept the same rule and the same institutions to make sure that they are applied, their behaviour towards each other changes. This is the process of civilization itself." [13]

In other words, the impetus for further European integration brought a new understanding of the concept nation state, the rule and the institutions in Europe. The supranational character of these organizations is a striking feature in the post Second World War Europe and differentiates these types of organizations from international organizations since the member

[11] The founding members of the ECSC are France, West Germany (i.e. East Germany and West Germany reunified in 1989), Italy, Belgium, Luxembourg and the Netherlands.
[12] The above mentioned developments resulted in the formation of the European Communities (EC) by signing of the Merger Treaty in 1967. The Treaty entered into force in 1969 and although the three Communities continued to exist, their executive structure became unique. In 1968, the original six founding members accomplished the "Customs Union" among themselves.
[13] Jean Monnet, "A Ferment of Change" *Journal of Common Market Studies*, 1(1)(1962) 203-211.

states of these organisations began to give some parts of their sovereignty in the areas regulated by these organisations.

Among the there Communities, the EEC (later renamed "the European Community" by the Maastricht Treaty[14]) is the most important one that formed the nucleus of the European Union. Modelled from the High Authority of the ECSC, under the EEC several institutions were established in order to ensure the realization of the tasks and activities that are substantiated in Article 2 and Article 3 of the EC Treaty (i.e. "establishing a common market and economic and monetary union" and "implementing common policies and activities" of the Community)

In order to implement these objectives specified under the EC Treaty (as a primary source[15] of EC Law) various decision-making instruments were invented as secondary sources of EC Law. Under the terms of Article 249 EC several forms of binding and non-binding secondary legislation have been specified. The *regulations* are binding and "directly applicable" within all Member States without any need for subsequent adoption of a national act for their transposition. Therefore as a result of their direct applicability the regulations become a part of national legal systems automatically. It is possible that Member States need to amend their national law in order to comply with the norms of the regulation. Thus, it is possible to rank them between primary sources and secondary of EC law. As it will be seen this nature and ranking of the regulations is the main reason of the clash between the EC and the national legal systems that is stemming from the EC secondary legislation. The *directives* provide more a flexible form of legal instrument. They differ from the regulation in two aspects. First,

[14] Treaty on European Union (consolidated text) *Official Journal C 325 of 24 December 2002*

[15] The Treaties establishing the European Communities and the Treaties amending them form the primary sources of EC Law. They are the ECSC Treaty, the Treaties of Rome establishing the EEC and EURATOM, the Merger Treaty, the Single European Act, the Treaty of Maastricht, Treaty of Amsterdam and Treaty of Nice as well as the Accession Treaties of the new Member States.

although they address to the Member States, this does not have to cover all Member States and are only binding as to the result to be achieved. The directives set a specific date for their adoption and in the meantime Member States choose the form and the method for their transposition into their national systems. The decisions are also binding in their entirety for the person or entity they address. Recommendations and opinions are non-binding legal instruments.[16]

Having established the main decision-making instruments within the EC legal system it is now time to define the powers assigned to EC law to issue these legal acts and regulate policy areas because the debate concerning supremacy of EC law revolves around the competences of the EC and the Member States. This is the question that is going to be dealt in this dissertation concerning who is the final arbiter in deciding the constitutionality rules of EC law. For most of the policy areas, the Member States and the EC have "shared competences" rather than exclusive competence of the EC. The EC have an "expressed internal competence" where the legal basis provided under the EC Treaty which allows the Community to take an action to regulate affairs internally on behalf of the Member States and an "expressed external competence" to act internationally on behalf of Member States.[17] Other than those expressed policy areas under the Treaty, there is also implied competence of the EC internally and externally. The reason of implied powers is "the existence of a given power implies also the existence of any other power which is reasonably necessary for the exercise of the former"[18] It is possible that implied external competence can be shared between the Member States and the Community or it can be exclusive as well. In *ERTA* case[19], the ECJ declared the concept

[16] Paul Craig and Gràinne De Búrca, *EC Law* Third Edition (Oxford: Oxford University Press, 2003), pp. 113-117.
[17] Such as Article 133 regulating the Common Commercial Policy.
[18] Trevor.C Hartley, *The Foundations of European Community Law* (Oxford University Press, 4th edn.,1998), pp. 102.
[19] Case 22/70 *Commission v. Council* [1976] ECR 263 para. 16-17.

of exclusive competence of the Community: whenever the Community adopts provision for a specific common policy, the Member States no longer have the right to undertake an external action in that area. In other words if the EC occupies the field internally it has also exclusive competence externally in order to ensure the unity of the Common Market and the uniform application of Community law.[20]

As a result if the Community enacts a legislative measure in a particular policy area, the Member States are barred from taking individual action to regulate those areas. Otherwise they are considered in breach of their obligations under the EC Treaty. As to the debate on supremacy, for instance, they cannot use the existence of its national legislation as a ground to claim that a Community measure breaches its national law as there should not be a conflicting national legislation in the first place. The point is tricky when it comes to the regulations that enters into force right after their promulgation and automatically become the part of national legislation.

In such areas which do not fall under the exclusive competence of the Community, the subsidiarity is the guiding principle which restricts the Community to use its powers in a non-proportional way. Under the terms of Article 5 of the EC Treaty, the Community acts "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by the reason of the scale or effects of the proposed action, be better achieved by the Community." The clash arises from the fact that the Community legislation contradicts with important national values or the act of the institution overreaches its limits and violates the principle of proportionality.[21]

[20] Craig and De Búrca, *supra* note 16, pp. 122-132.
[21] Theodor Schilling, Subsidiarity as a Rule and a Principle, or:Taking Subsidiarity Seriously, [online]; available from http://www.jeanmonnetprogram.org/papers/95/9510ind.html#IVC Internet: Accessed on 03.06.2006.

The main reason of this debate is that the delegation of competences between the Member States and the EC is not clearly defined under the Treaty as a catalogue. To the contrary, the competences are defined not in view of a specific field of legislation but to achieve certain objectives (enumerated in Article 2 and 3 of the EC Treaty). This simply means that in the Community law, the principle of supremacy functions according to the case-law of the ECJ without any restriction imposed on its interpretation. [22]

3. THE INTERNATIONAL LAW AND EC LAW

Having briefly examined the EC legal system, it is of use to elucidate the difference between EC Law and the public international law. The public international law, or commonly used as international law is the "body of law regulating the activities of entities having international personality"[23]. States and international organizations are subject to the rules of international law. EC Law, however, has evolved into a different form than international law in regulating the "activities" of its Member States since the EC is itself a supranational organization, not a mere international organization and certain "activities" of its Member States are attributed to the competence of the EC as it was described in the section above. Due to these peculiarities of the EC system, the case law of the ECJ evolved accordingly.

When EC Law was introduced in 1950s, there was insignificant difference in the way the national courts considered and ruled on cases consisting public international law and EC law considerations. As a whole, the national courts received all rules of international law

[22] *Ibid*.
[23] The definition of international law [online]; available from http://en.wikipedia.org/wiki/International_law Internet: Accessed on 03.06.2006.

regardless of whether it is the international law or EC law according to the same general principles of international law.

In this context, the basic principle is *pacta sunt servanda* which denotes that once signed the treaties must be observed in good faith. Moreover, the customary international law as it was codified in 1969 under the Vienna Convention on the Law of Treaties[24] stipulates in Article 27 that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." However, the doctrine of invocability of treaties in national courts as it is established by the Permanent Court of International Justice (PCIJ) *Danzig* case[25] was an undeveloped principle. Enforcement of international law is also limited in cases where the executive and legislative bodies of the State acted contrary to international law. These are dealt at international level except certain matters such as jurisdiction and immunities matters. In other words, the national courts are not influential in application and development of international law.[26]

However, this is not the case for the relationship between EC Law and the national laws[27] since this unique relation has been defined by the ECJ in a quite different way as the next section of the chapter attempts to demonstrate. The turning point is the ruling of the ECJ in *Van Gend en Loos* case[28] where EC law was differentiated from other ordinary international treaties and national courts are placed at the heart of enforcement of EC law through direct

[24] Vienna Convention on the Law of Treaties (1969), done at Vienna on 23 May 1969, entered into force 27 January 1980. United Nations, Treaty Series, vol. 1155, pp. 331.
[25] *Jurisdiction of the Courts of Danzig*, 1928 PCIJ Series B, No.15., pp.17-18.
[26] Geritt Betlem and André Nollkaemper, "Giving Effect to Public International Law and European Community Law before domestic courts. A comparative analysis of the practice of consistent interpretation" *EJIL* (2003), Vol. 14 No.3, pp. 570-571.
[27] Roman Kwiecień, " The Supremacy of European Union Law over National Law Under the Constitutional Treaty" *German Law Review* (2005) Vol. 06 No.11 pp. 1487.
[28] Case 26/62, *Van Gend en Loos, supra* note 2.

effect of Treaty articles. Another important judgment is the case *Costa v. ENEL*[29] where the ECJ substantiated the features of this new legal order by establishing that EC law has precedence over national rules in the event of conflict. There are two mechanisms deployed by the national courts in the Community legal system to ensure that EC law is effectively applied: the direct effect and principle of consistent interpretation.

The major difference between EC law and the international law indeed lies on these sophisticated and sometimes authoritative enforcement mechanisms of EC law. The direct effect entails and permits a national court to apply a rule of EC law as an "independent rule of decision in the national legal order" in cases that rule of EC law is not transposed or not transposed in full. When a rule of EC law is granted direct effect and invoked before the Courts of Member States, it is the autonomous basis of the court's decision (i.e. autonomous than national legal system). The EC legal system also has an authoritative notion of principle of consistent interpretation (which is also known as indirect effect). In the context of principle of consistent interpretation a rule of EC law is used to construe a rule of national law in the light of EC law. Under EC law, national courts are obliged to do so. In *Von Colson* case[30], the ECJ ruled that "all the authorities of the Member States" including courts must "interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law" in order to realise the objectives of Article 246 EC. The ECJ elaborated the principle of consistent interpretation in *Marleasing* case[31] and ruled that "in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret is required to do so, as far as possible, in the light of the wording and the purpose of the directive…" As a result this brings an

[29] Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585
[30] Case 14/83, *Von Colson and Kamann*, [1984] ECR 1891, para. 26 -28.
[31] Case C-106/89, *Marleasing*, [1990] ECR I-4135.

enforcement of EC law beyond the general principle *lex posterior derogat legi priori* of international law.

As a result, it is EC law not the national law that determines the effect of a rule of EC law within national legal systems. This is dictated by the ultimate objective that EC law is applied uniformly throughout the Community. On the other hand, the international law is silent about the validity and the effects of international law in national legal system. Thus, the effect of a rule of international law is determined by national law, not international law. Here depending on whether states have monist and dualist legal systems, this effect of international law is defined. For the monist systems it is possible to divide the international rights and obligations from national legal order and prevent their organs (national courts or other administrative bodies) from applying the rules of international law that is not become a part of national law yet. Therefore, the effect of international law depends on prior decision of states declaring their acceptance of the validity of international law.[32]

It is possible to conclude that these unique characteristics of EC law exist in international law too but in a less sophisticated and effective manner. As Charles Leben stated "Community law is 'successful international law', and …is thus a possible horizon of international law, indicating the route that international law must follow if it is to move forward."[33] The following section of this chapter illuminates the evolution of the case law of the ECJ on the matter of supremacy where this principle under international law is far less developed than EC law as it shall be seen below.

[32] Betlem and Nollkaemper, *supra* note 26, pp. 571-573.
[33] Charles Leben, "Hans Kelsen and the Advancement of International Law", 9 *EJIL* (1998) pp. 298.

4. THE EVOLUTION OF THE CASE-LAW OF THE ECJ

4.1 Van Gend en Loos

A standard overview of the evolution of the case law of the ECJ on supremacy has to begin with a case of 1963, *Van Gend en Loos*[34] which is also one of the landmark cases that underpins the very foundations of EC Law. With this judgment, the ECJ spelled out for the first time that with the establishment of European Communities a "new legal order of international law" was created.

Van Gend en Loos is a Dutch transport company and it brought a case before the national court against the Dutch customs authorities, who had charged the company with increased amount of custom duties on a product it was importing from the Federal Republic of Germany. The ECJ mainly analyzed the question whether individuals too can rely on Article 25 (ex Article 12) which clearly prohibits the introduction of new custom duties and increase of existing ones in the common market.

According to the observations submitted of the Belgian government[35] the ECJ could not answer the first question as the issue was of constitutional character and fell exclusively within the jurisdiction of the Dutch court.[36] The Belgian government indicated that:

> That court is confronted with two international treaties both of which are part of the national law. It must decide under national law- assuming that they are

[34] Case 26/62 *Van Gend en Loos, supra* note 2.
[35] It is possbile for other Member States to submit observations for the cases before the ECJ if the matter is of their interest in order to influence the final judgment by making their point clear.
[36] Case 26/62 *Van Gend en Loos, supra* note 2, pp. 6.

> in fact contradictory- which treaty prevails over the other or more exactly whether a prior national law of ratification prevails over a subsequent one.
>
> This is a typical question of national constitutional law which has nothing to do with the interpretation of an Article of the EEC Treaty and within the exclusive jurisdiction of the Netherlands court, because it can only be answered according to the constitutional principles and jurisprudence of the national law of the Netherlands.

The ECJ ruled that establishing a "Common Market" is the aim of the EEC Treaty and the functioning of this "Common Market" is of direct concern to the interested parties in the Community. According to the ECJ, this shows that the Treaty is more than an agreement which merely creates mutual obligations to the signatory states. The ECJ continued by giving one of the most outstanding statements in its case-law which have been repeated several times in subsequent cases.

> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.

As it can be seen from the judgment of the Court, EC Law is not an ordinary international legal system. Instead, the new legal order of international law has been created by the Member States who limited their sovereign rights in their respective territories on certain issues such as determination of custom duties and charges. That means that the provisions of

the Treaty regulating those matters, in this case Article 25 (ex Article 12), have supremacy over conflicting national law meaning that Member States cannot retain in force such national measures conflicting with EC law. Therefore, such conflicting national measures should be repealed from the national law subsequently. In *Van Gend en Loos*, the ECJ sidestepped the question of which law prevails over the other by simply emphasizing that European law should be distinguished from regular public international law. Having recognized the principle of direct effect of Treaty provisions, the possibility of conflict has been accepted by the Court. The ECJ in 1963 in the *Costa v. ENEL*[37] further clarified its stand on the issue of supremacy that EC Law prevails.[38]

4.2 Costa v. ENEL

Costa v. ENEL is the first case where the ECJ spelled out the principle of supremacy of EC law. The facts of the case are straightforward. An Italian citizen brought a case to the national court alleging that it was contrary to the EC Treaty to charge fees by Italian national energy company. Italian government asserts that the preliminary ruling question of Giudice Conciliatore (the national court) is "absolutely inadmissible" since as a national court it cannot avail itself of Article 177 (the preliminary ruling procedure) but it has to apply national law.[39]

As the EC Treaty does not directly state that EC Law has precedence in case of conflict with national law, the theoretical underpinnings of the principle of supremacy were enumerated in the ruling of the ECJ as follows.

[37] Case 6/64, *Costa v. ENEL*, *supra* note 29.
[38] Mayer, *supra* note 10, pp. 1497.
[39] Case 6/64, *Costa v ENEL, supra* note 29, para 8.

As the first reason, the ECJ repeated its judgment in *Van Gend en Loos* that differing from other international treaties the EEC has created its own legal system which became "an integral part of the legal systems of the Member States and which their courts are bound to apply."[40] In its reasoning in *Costa v. ENEL* the ECJ felt the necessity to distinguish between the Community Law and the public international law so that the Member States whose national legal systems require further national legislative act for the transposition of the international law would effectively recognize the supremacy of Community Law in their own national legal order. This pragmatic reasoning together with the principle of direct effect aims to give effectiveness to the EC Treaty.[41]

The second reason (directly related to the first one) focuses on the limitation of sovereignty of the Member States. The ECJ stated that Member States established a "Community of unlimited duration", with its institutions, its own legal personality, its own legal capacity and the capacity to represent them in the international arena. More importantly, Member States did so by delegating real powers and by limiting their sovereignty to the Community. The ECJ did not make any reference to the constitutions of Member States to show attribution of powers and limitation of sovereignty.[42] As it is explained above, in the areas that falls under the exclusive competence of the Community, only the EC has right to legislate internally and this internal exclusive competence implies the external competence of the EC.

The third reason for the supremacy of EC Law is that the resultant body of law of Community binds both the nationals and the Member States themselves. With this integration of provisions derived from the Community law into the laws of each Member State and

[40] *Ibid*. para 9.
[41] Jan Wouters, "National Constitutions and the European Union"*, Legal Issues of Economic Integration (LIEI)* 27/2000, pp. 42 where a reference was made to B. De Witte, ' "Retour à Costa". La primauté du droit communautaire à la luminère du droit international' *Revue trimestrielle de droit européen* (1984), pp. 425.
[42] Case 6/64, *Costa v ENEL, supra* note 29, para. 10.

according to the terms and the spirit of the Treaty, it is impossible for Member States to give the precedence to a national and another subsequent measure over European legal system. The "spirit of the Treaty" dictates to give full effectiveness to the Community legal system which Member States have accepted on the basis of reciprocity. This means that if one of the Member States tries to evade from its obligations under the Treaty based on its national legal system, other Member States who agree the same terms under Treaty and abide by their obligations would be in disadvantaged position. The existence of free riders without the principle of reciprocity of international law has a substantial potential to make the European integration project futile. When it comes to the aims of the Treaty, the obligations undertaken under the EC Treaty (towards integration and co-operation) would be deprived of their effectiveness if they can be called into question by the national legislations and interpreted differently under each national system. This reasoning is one of the first examples of the pragmatic and purposive (teleological) interpretation of the Treaty by the ECJ to secure the uniformity and the effectiveness of Community law.[43]

The fourth reason is explained by the ECJ with textual evidence. The Court stressed the fact that existence of Article 189 (now Article 249) proves the precedence of EC Law. Article 189 states that regulations are "legally binding" and "directly applicable in all Member States."[44] For the regulations to be qualified as unconditional acts as indicated in the article, they cannot be subject to national legislative acts. However, this explanation is rather weak because it only refers one sort of legislative act, namely the regulations and not inclusive to other types of legislation of EC law as a whole.

[43] *Ibid*., para. 11-12.
[44] *Ibid*., para. 13.

It is possible to conclude that the conceptual basis for this principle was established in *Van Gend en Loos* and *Costa v. ENEL.*[45] The first two theoretical reasonings of the ECJ in *Costa v. ENEL* are more open to debate than the last two practical explanations where the Court has used the purposive approach to establish the concept of supremacy of EC law reflecting the two major objectives: the uniform application of Community law throughout the Union and preservation of the effectiveness of EC Law. In the first two underpinnings the ECJ relied upon several premises such as Community law creating its 'own legal system', the 'permanent' or 'definitive limitation'[46] of sovereign powers of the Member States in certain areas, the Community law as an 'independent source of law' and 'its special and original nature'. After *Costa v. ENEL* the ECJ never further contemplated on these theoretical foundations. In following cases such as *Francovich*[47] the supremacy principle was taken for granted and it was used as a veiled theoretical background for the establishment of other principles stretching the principle from the duty of national courts to set aside the conflicting national law to the doctrine of State liability.

4.3 Internationale Handelsgesellschaft

The case concerns the validity of export licenses and of the deposit system attached to it as the system established by the Council Regulation[48] in question runs contrary to certain fundamental principles of German Basic Law, in particular the principles of freedom of action and disposition, of economic liberty and of proportionality.[49]

[45] Craig and De Búrca, *supra* note 16, pp. 278-279.
[46] Case 6/64, *Costa v ENEL, supra* note 29, para. 9.
[47] Joined Cases C-6/90 and C-9/90 *Francovich et al v. Italy* [1991] ECR I-5337 para. 31-36.
[48] Council Regulation No. 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (OJ Special Edition 1967, pp. 33). Another related legislation is Regulation No 473/67/EEC of the Commission of 21 August 1967 on import and export licences (OJ 1967, No 204, pp. 16)
[49] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125*,* para. 1-2.

The ECJ ruled that the uniformity and the efficacy of Community law would have been adversely affected if the validity of the acts of the Community institutions is reviewed through the recourse to the national rules. It is not relevant whether the national law at issue has constitutional character or not. The legal status of a conflicting national law was not relevant to the question whether Community Law should take precedence. The ECJ stressed that;

> In fact, the law stemming from the Treaty, an independent source of law, cannot be overridden by the rules of national law without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[50]

Thus, the ECJ once again asserted the supremacy of this time directly applicable EC Law. In *Costa v. ENEL* the contested measure was considered to be contrary to Treaty Articles such as Article 102, Article 93, Article 53 and Article 37.[51] The crucial point is the automatic application of regulations into the legal systems of the Member States. This time the national measure at issue was a fundamental rule protected under the national constitution. It is not only the provisions of the national constitutions but also administrative acts even having a minor importance are considered under the principle of supremacy of EC law.[52]

Internationale Handelsgesellschaft marked the beginning of the very controversial debate between the BVerfG and the ECJ. In each case the ECJ asserted the supremacy of EC Law by avoiding direct conflict with national courts.[53] The national dimension of the conflict between the ECJ and the BVerfG will be explained in the second chapter.

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[50] *Ibid*., *supra* note 50, para. 3.
[51] Case 6/64, *Costa v ENEL, supra* note 29.
[52] Case C-224/97, *Ciola v. Land Vorarberg* [1994] ECR I-2517, para. 24.
[53] Craig and De Búrca, *supra* note 16, pp.280.

4.4 Simmenthal

The *Simmenthal* case[54] is one of the landmark cases which tackled the question whether the conflicting national law must be set aside readily without waiting until it was abolished by the relevant constitutional authority. Simmenthal SpA was a company which brought an action before Pretore claiming that it was not compatible with EC Law for Italy to retain national laws requiring charges for veterinary and public health inspections on its imports of beef from France into Italy.[55] The ECJ held that the pecuniary charges in question in fact constitute measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 (now Article 28). Thus, the Pretore ordered the *Amministrazione delle Finanze dello Stato* (State Finance Administration) to repay the charges that had been illegally collected.[56] However, Italian State Finance Administration claimed that the Pretore could not reject to apply national law which is in conflict with EC Law and to declare such a law unconstitutional, the national court should bring the case before Italian Constitutional Court.

The ECJ started its ruling by reaffirming the full and uniform application of EC Law in all Member States through its direct applicability in national systems.[57] It continued:

> Furthermore, 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 Member States on the other is such that those provisions and measures not only by their

[54] Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.
[55] *Ibid*., para. 5.
[56] *Ibid*., para. 6.
[57] *Ibid*., para. 14.

> entry in 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.[58]

In *Simmenthal,* the ECJ again stresses the *effet utile* principle[59] and stated that accepting that a conflicting national law had any legal effect in the fields that the Community has competence would lead to "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"[60]

It means that every national court must "apply Community law in its entirety" and "set aside any provision of national law which conflicts with Community law" regardless of the priority of their adoption.[61] This is applicable to any legislative, administrative or judicial practice which may harm effectiveness of Community law. It does not matter that the solution of the conflict assigned to "an authority having its own discretion, other than the court called upon to apply Community law those requirements, even if such an impediment to the full effectiveness of Community law were only temporary."[62]

The *Simmenthal* case clearly spelled out the practical implications of the principle of supremacy as well as of direct effect for the Community legal order which dictates immediate

[58] *Ibid*., para. 17.
[59] *Effet utile* is a principle is one of the central principles of EC Law and denotes to principle of effectiveness of Community Law. This is one of the principles underlying the purposive approach of the ECJ.
[60] *Ibid.,* para. 18.
[61] *Ibid*., para. 21.
[62] *Ibid*., para. 23.

enforcement of clear and unconditional Community measure instead of any type of conflicting national law even provisions having constitutional character.

The ECJ ruled that even if the Constitutional Court is the only authority that can rule on the constitutionality of a national provision (in Italian system it is the Constitutional Court that can order the repayment of the fees collected not the Pretore, therefore, the conflict emerged), any other national court faced with the problem of conflict between national law and the European law must apply European law immediately. The *Simmenthal* is one of the first cases where the Community law requires in certain cases national courts to exercise powers beyond the limits that are described under national legal systems. This indirectly leads to a change in the jurisdiction of the national courts. [63] In the *Factortame* case, the ECJ further contemplated on this effect of Community law on the jurisdiction of national courts by ruling that the national rules (the UK Law) which prohibit national courts to give certain national remedies (in this case it was an interim relief for Spanish ship-owners) should be set aside. In many cases, the ECJ avoids direct confrontation and the principle of supremacy does not dictate national courts to rule on the "validity" of a provision of national law or to "annul" conflicting national provisions, instead, it requires not to apply that provision in case of the conflict with Community law.[64]

5. CONCLUSION

After briefly introducing the fundamental concepts of the EC and the perspective of international law, this chapter concentrated on the perspective of the ECJ on the issue of supremacy of the Community law and the evolution of its case law since 1960s. From the

[63] Craig and De Búrca, *supra* note 16, pp. 281-282.
[64] *Ibid*., pp. 282.

entry into force of the Treaty of Rome in 1952 until today, many Treaty amendments have been realized. Member States had several chances to revoke *Costa v. ENEL* by revising the treaties. As they had never done so, it follows that the principle of supremacy as contemplated by the ECJ has to be recognized as a part of *acquis communautaire* (the existing body of European law). Member States have to observe the reciprocity principle enshrined in the treaties meaning that they cannot change unilaterally the principle of supremacy.[65] After all, it is the conscious and voluntary decision on the side of the Member States to establish the European Communities or accede to the Union with the full member status. This reasoning is unwritten in the *Costa v. ENEL* judgment of the ECJ meaning that if Member States had voluntarily ratified the European Treaties, they must abide by their obligations according to the rules of the public international law principle (*pacta sunt servanda*, once signed the signatories of the international treaties must observe their obligations arising from those agreements in good faith).[66] It is not, however, possible to directly establish the concept of supremacy of the ECJ based on the principle of *pacta sunt servanda*.[67] For that reason, the ECJ enumerated several reasons demonstrating the unique nature of EC Law and its difference from the public international law. The new legal order has been established by the Member States with the aim of establishing a common market[68] and with corresponding limitation of sovereignty of Member States by delegating important powers to the Community institutions. This includes the fact that Community institutions can issue 'directly applicable' acts, namely regulations. The clashes between national and EC Law may result in different

[65] Mayer, *supra* note 10, pp. 1503.
[66] Wouters, *supra* note 41, pp. 68-70.
[67] It is rather a way to explain the relationship between national law and Community law by national courts that emerged as a result of rejection of Member States the hierarchy of legal acts and according to dualist system as will be explained in the next chapter binding force of Community law derives from the principle of *pacta sunt servanda*. See also Kwiecień, *supra* note 27, pp. 1488.
[68] Case 26/62, *Van Gend en Loos*, *supra* note 2, para. 23.

application of law in different parts of the Union thereby endangering the uniform application of EC Law and effective functioning of the Union.[69]

In practice, the possibilities for the Member States to get away from their obligations of the supremacy of EC Law are quite limited. Although there are areas under EC Law where the national courts are not under the obligation to assure the supremacy of EC Law, these are really restricted in scope. Article 307 (ex. Article 234), for instance, provides a derogation for the application of the principle of supremacy where the conflicting national provisions are result of obligations of State from the agreements with non Member States that dated back to the conclusion of the EC Treaty.[70] Thus, the principle of supremacy is applicable most of the time when the clash occurs.

After giving this brief evolution of the principle of supremacy under the jurisprudence of the ECJ, the next chapter will concentrate on the reception of the principle of the supremacy by Member States depending on different ways of transposition of provisions of EC Law mainly the monist and dualist systems.

[69] Wouters, *supra* note 41, pp. 70.
[70] Craig and De Búrca, *supra* note 16, pp. 283.

CHAPTER II

THE NATIONAL LEGAL SYSTEMS OF THE MEMBER STATES

1. INTRODUCTION

With its purposive interpretation in order to give effectiveness to EC Law, the ECJ has established the supremacy of EC law over national law. Practically, this means that if national courts follow the doctrine of supremacy as it was established by the ECJ, they have to accord precedence to EC law in their own application of law. According to this, national agencies are prohibited to challenge the validity of EC Law; there is a requirement to set aside national provisions that are contrary to Community provisions; the national legislatures are prohibited to enact provisions that are contrary to Community provisions; it is also required to abrogate national legislation that is contrary to Community law.[71]

This has marked one of the revolutions in the jurisprudence of the ECJ as well as in terms of international law since this challenged the traditional narrow interpretation of international treaties. Instead, the ECJ claimed to be in charge of filling the legal lacuna by creating individual rights based on the EC Treaty. Against the claims of Member States that it is not indicated in the Treaty that EC law has supremacy over the national law, the ECJ boldly asserted that the EC Treaty also does not say otherwise. This approach of the Court has created never-ending debates between the ECJ and the national courts.

[71] Kwiecień, *supra* note 27, pp. 1482. See case 167/73, *Commission v. France*, 1974 E.C.R. 359, paras. 41-48.

The first chapter attempted to describe the approach of the ECJ which is only the one side of the debate of supremacy. The ECJ has made it clear that EC Law takes the precedence over conflicting national law. This chapter attempts to shed the light to the other side of the dispute: the national legal systems. Having established the development of the principle of supremacy based on the jurisprudence of the ECJ, this chapter will concentrate on the brief description of the various national legal systems and their reception of the principle of supremacy (i.e. the monist and the dualist systems) as it has been established by the ECJ. A particular emphasis will be given on the unsolved debate between the ECJ and the BVerfG.

2. THE DIFFERENT METHODS OF TRANSPOSITION: THE CASE STUDIES

It is crucial to understand the different national systems and the ways of reception of these international rules. In the national systems, there are different methods of incorporation of the EC Treaty by the Member States into their municipal law. Some countries follow the monist doctrine and some others follow dualist doctrine. In monist systems both EC Law and national law is part of same legal order and in case of conflict EC Law takes the precedence whereas in dualist systems EC Law and national law are two separate legal bodies and EC Law can only become part of national law through domestic legislation where revocation or amendment of original law is possible. Therefore in monist systems, each system has supreme in its own sphere. The following chapter considers some case studies concerning the dualist and monist legal systems.

2.1 France

According to the provision of Article 26, Treaties duly ratified by the Head of State and published have the force of law even if they may be in conflict with French law 'without there being any need of resorting to any legislative measures other than those necessary to secure ratification. The 1958 Constitution which is in force today adopted this position and included Article 55 which further confirms the supremacy of Community law by stating that Treaties and Agreements' ratified and approved 'have an authority superior to that of laws'. Thus there is no need for further transposition of the international treaties into French national law as they are in force by the virtue of this Article of the Constitution in the internal legal order.[72] This is subject to reciprocity and the sovereign will of the French people and the EC Treaty Article 227 (ex Article 170)[73] which includes Community remedies to enforce the EC Treaty in case of a Member State failing to fulfil its obligations satisfies the reciprocity criteria.

2.2 Italy

Concerning the incorporation of treaties, the 1948 Italian Constitution remains silent. Article 11 of the Italian Constitution stipulates a delegation of national sovereignty to international organizations. It left open the issue of incorporation of international treaties. Thus, the hierarchy of legal rules is taken into account and if a treaty has an impact on a law, the treaty is executed in the form of a law; if it affects only administrative rules, a decree of the Executive deal with the issue. When it comes to the law of the ratification of the Treaties of Rome in 1957, Article 2 stated that 'the agreements specified in Article 1 will receive full and complete execution'. Therefore, the act of ratification turned into the act of incorporation of

[72] K P E Lasok, *Law and Institutions of the European Union,* Seventh Edition, Edinburgh: Butterworths, 2001 pp. 338.

[73] Article 227 EC sipulates that a Member State may bring a case before the ECJ against another Member State which fails to fulfil its obligations arising from the EC Treaty where a similar enforcement procedure is stated for the Commission in Article 226 EC.

the Treaties of Rome into Italian law. The principle of *lex posterior derogat priori* is deployed in case of conflict with national law.[74]

2.3 Germany

According to the German system the act of ratification contains the approval of treaty and its incorporation. Article 24 of the Federal Constitution arranges the transfer of sovereign powers to inter-governmental institutions. Article 25, on the other hand, states that 'the general rules of international law shall form part of federal law; they shall take precedence over the laws and create rights and duties directly applicable to the inhabitants of the territory of the federation'. It means that international treaties have the force of federal law. Federal law is equivalent only to ordinary law and not German constitutional law therefore international treaties can take precedence over only the federal law (or the law of the *Länder*) but cannot take precedence over a constitutional rule.[75]

In this dissertation, the interaction between the ECJ and the BVerfG was taken as the prime example for analysis because the BVerfG developed an elaborate and rich case-law over years which can also shed some light to our understanding towards the interaction of other national supreme courts with the ECJ especially the ones from the CEECs where in most of the time the BVerfG was taken as a model in establishing their constitutional courts.[76]

[74] K P E Lasok, *supra* note 72, pp. 338.
[75] K P E Lasok, *supra* note 72, pp. 339.
[76] Sajó, *supra* note 5, pp. 366.

Solange I

The case concerns a conflict between the German Basic Law (*Grundgesetz*) and Community Regulations establishing the system of export/import deposits in the *Internationale Handelsgesselshaft* case.

Article 24 of the German Constitution allows for the transfer of legislative power to the international organizations. The very first question arose with *Internationale Handelsgesselshaft*[77] regarding whether Article 24 allowed the transfer a power to an international organization, namely the European Community, outside the German constitutional system that is contrary to the system that the Constitution established for the protection of its basic principles.[78] The facts of the case as well as the judgement of the ECJ have been explained above in the first chapter.[79] At the national level, upon receiving the ECJ's ruling in that case, the German Administrative Court (*Verwaltungsgericht*) ruled that:

> This Chamber agrees with those who wish to test Community law against the fundamental principles of the Constitution, since a critical appraisal of the views set out above shows that the view that Community law takes precedence cannot be based on any legal foundation. The integration powers contained in Article 24 enable the Federal legislature to alienate its legislative monopoly in certain spheres in favour of international institutions. The Community organs have thereby obtained the power to enact law directly effective within the territorial scope of the Constitution without a separate writ of enforcement. However, since the effect of Article 24 cannot be equated with an amendment of the Constitution the Federal legislature could not, when ratifying the EEC

[77] *Solange I, supra* note 3.
[78] Craig and De Búrca, *supra* note 16, pp.289.
[79] Case 11/70 *Internationale Handelsgesellschaft, supra* note 49, para. 1-2.

> Treaty, disclaim the observance of elementary basic rights in the Constitution, within the scope of Article 24.
>
> ...
>
> [I]f Community law... is given precedence over any divergent constitutional provisions, and this European legal system is exempt from the obligations contained in Articles 19(2) and 79(3) of the Constitution, it would lead to a constitutional and legal vacuum. For constitutional law would be eliminated as the highest national check on a European legislation …without the institution of equivalent legal safeguards. The democratic constitutional state guaranteed by the Constitution will itself only be able with difficulty to remain faithful to its basic decisions in constitutional law if as a result of particular advancing integration processes crucial spheres are withdrawn from its jurisdiction and, with constant decline in the standing of the national legislature, placed under a supranational 'purely executive regime' which does not have to observe the fundamental principles laid down in Articles 19(2) and 79(3) of the Constitution in its measures.

According to this judgment, the German Administrative Court spelled out many concerns. If the principle of supremacy was accepted as the ECJ construed it would amount to a transfer of power to the Community more extensive than it was originally stipulated under the system existing at that day where there were no corresponding obligations on the part of the Community as under domestic legal system. Importantly, the Administrative Court pointed out the danger that with the integration process more and more fields come under the Community competence where the institutions are not bound to protect fundamental freedoms

as guaranteed by the German Constitution.[80] It is possible to expand this argument for example for the second and third pillar issues.

According to the ruling of the German Administrative Court, the deposit system infringed the basic principles of German constitutional law and the case was brought before the Federal Constitutional Court, the BVerfG. BVerfG gave its *Solange I* decision in 1974.[81]

> The part of the Constitution dealing with fundamental rights is an inalienable essential feature of the valid Constitution of the Federal Republic of Germany and one which forms part of the constitutional structure of the Constitution. Article 24 of the Constitution does not without reservation allow it to be subjected to qualifications. In this, the present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimated Parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level. It still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution....
>
> Provisionally, therefore, in the hypothetical case of a conflict between Community law and... the guarantee of fundamental rights in the Constitution

[80] Craig and De Búrca, *supra* note 16, pp. 290.
[81] Case *Solange I*, 37 BVerfGE 271, *supra* note 3.

> prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.[82]

This decision of the supreme German Court posed a danger towards the relationship between the national legal systems and the Community legal system. In this case, the BVerfG faced the problem of whether it is competent to review a secondary law of the EC due to its influence on the fundamental rights as protected by the German Constitution. On the part of the BVerfG, the main concern is not only jurisdictional problem. It is the absence of a charter for fundamental rights and a developed case-law of the ECJ for the protection of fundamental rights under the Treaty of Rome in 1950s and 1960s. The assessment of the principle of supremacy by the BVerfG shows that the inalienable feature of the Constitution is to protect fundamental rights. Although federal legislature permits transfer of powers to legislate to the EC, due to this concern of protection of fundamental rights the transfer of legislative powers under Article 24 is not definite.

The BVerfG concluded that the transfer of powers is restricted to the extent that it may not entail a change in the basic structure of the German Basic law. As a result, in case of conflict the protection of fundamental rights in the German Basic Law would prevail over the Community Law meaning that the BVerfG has jurisdiction over EC secondary legislation to the extent that it can declare regulations inapplicable if they breach fundamental rights as protected by the German Basic Law. This means that BVerfG did not accept the supremacy of EC law over German Constitution; instead it established supremacy of the German constitution over secondary EC law in case of infringement of fundamental rights.[83] The BVerfG is not the only Constitutional Court in Europe raising these concerns about adequate

[82] *Ibid*.
[83] Craig and De Búrca, *supra* note 16, pp. 291.

protection of fundamental rights within the national systems. For instance, in *Frontini* the inapplicability of an EC Regulation was asserted by the plaintiff before the Italian Constitutional Court and the Court ruled that it will continue to review the exercise of power of Community institutions so as to ensure that there would not be any infringement of fundamental rights or the basic principles of Italian Constitutional Order.[84]

Solange II

In 1986 *Solange II* case concerned a similar situation as in the *Solange I* case. A German trading company importing tinned mushrooms from third countries into Germany. According to the EC regulation, any importer of such products had to acquire an import license. This import license can be denied if the EC mushroom market required to be stabilized. The plaintiff company applied for the license but it was refused. Plaintiff claimed that the EC regulation infringes his rights to occupational and personal freedom according to Articles 12(1) and 2(1) of the German Basic law. ECJ ruled on the validity of the system. BVerfG ruled on its *Solange II* judgment partly qualifying and partly overruling its *Solange I.*

> In view of these developments, it must be held that, so long as the European Communities, and in particular the case law of the European court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation

[84] *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372.

> cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution.

This case is referred to *Solange* as it introduced 'so long as' rule. Once again it stated that the Community and the BVerfG follow different views on the supremacy of EC law[85]. Article 23(1) of the German Basic Law gives supremacy to EC law in conjunction with each specific German act which empowers the EC to legislate in that field[86]. In its view, it is not possible to derive supremacy from EC law itself. Article 23(1) stipulates that the structure of German Basic Law cannot be altered including the catalogue of fundamental rights[87]. This is the part qualifying the similar concerns of BVerfG as in *Solange I* case. *Solange II* differs from the *Solange I* case in that in the *Solange II* the BVerfG stated for the first time that the level of protection under EC law and German Basic Law is similar after having taken into account the developments in EC Law since 1974 including the development of case law of the ECJ on the protection of fundamental rights[88], democratic improvement in Community institutions and the fact that all Member States had acceded to the European Convention of Human Rights.[89]

Maastricht

The *Maastricht* decision of the BVerfG[90] in 1993 constitutes yet another reminder to the ECJ and Community institutions that the recognition of the principle of supremacy by the BVerfG

[85] Case *Solange II*, 73 BVerfGE 339, *supra* note 4.
[86] *Ibid.*
[87] *Ibid.*
[88] In the subsequent judgments, the ECJ ruled that it had accepted that fundamental rights form an integral part of the general principles of EC law inspired by the constitutional traditions common to the Member States and the ECHR. This issue will be dealt in the fifth chapter in detail. *Solange II*, *supra* note 4, at p. 378.
[89] Case *Solange II*, 73 BVerfGE 339, *supra* note 4.
[90] Case *Maastricht*, 89 BVerfGE 155, [1994] 1 CMLR 57 - Manfred Brunner et al v. The European Union Treaty.

depends on the abovementioned conditions. In this case, it was the constitutionality of Germany's ratification of the Treaty of the European Union that was challenged.[91] Legislative part of the ratification the Treaty on European Union were completed however before the formal instrument of ratification was signed by the Federal President; the plaintiffs brought the matter before the BVerfG and claimed that the act of approval breaches their fundamental rights as protected under German Basic Law. The main concern of the plaintiffs was that although the protection of fundamental rights under EC Law is insufficient, with the Treaty this area of law will be transferred to the EC and German court would lose their jurisdiction in that area.

The BVerfG affirmed its *Solange II* judgment stating that the ECJ provides similar guarantees for the protection of fundamental rights as against the infringements on the side of the Community[92]. It was reaffirmed that BVerfG is competent to guarantee general standard of the protection of fundamental rights *vis-à-vis* acts of the European institutions whereas the ECJ does so for the specific cases[93]. This was called as the 'cooperation' relation between the ECJ and BVerfG[94]. BVerfG is there to review whether Community acts do not infringe upon the structure established by the German Basic Law and to make sure that the Community does not exceed the competences that were assigned under German approval act[95].

As a result of the Maastricht judgment of the BVerfG made clear that it accepted the supremacy of EC law conditionally. The BVerfG asserted that it will continue to ensure that the Community does not go beyond powers that are attributed to its competence expressly by the Treaty. In other words, although the BVerfG accepted that EC law takes precedence over

[91] Craig and De Búrca, *supra* note 16, pp. 292-293.
[92] *Maastricht judgement, supra* note 90.
[93] *Ibid*.
[94] *Ibid.*
[95] *İbid.*

national law for the matters fall under the Community competence it will review the actions of European institutions including the ECJ to ensure that they act within the limits of their competences. This is the *ultra vires* control[96] or emergency competence of the BVerfG over the actions of Community institutions. These actions may be any decision at EU level or action exceeding the transfer of sovereignty agreed under Act of Accession.[97] As a result, with this decision ultra vires acts of the Community may be challenged before the BVerfG.[98]

The main reasoning of the Maastricht judgement of the BVerfG is the belief that people of Europe must shape the European integration process. However, from the institutional point of view, other than the European Parliament which has limited powers compared to other Community institutions there is no equivalent representation of the people at European level which is equivalent to their representation at national level through national parliaments.

Bananas

Another challenge from the BVerfG to the supremacy doctrine of the ECJ concerned an EC regulation on the Common Market Organization (hereinafter: CMO) for bananas. The ECJ rejected an action brought by Germany in order to annul Council Regulation 404/93[99] which set up a CMO for banana market.[100] Under this Regulation, a preferential treatment through quotas was given to the ACP (African-Caribbean-Pacific) countries[101] whereas the Central American producers with whom Germany had traditional trade relations were given lower quotas. As in the case of supplies exceeding the quota, the importers had to pay custom duties.

[96] Craig and De Búrca, *supra* note 16, pp. 294.
[97] Alter, *supra* note 9, pp. 106.
[98] Anne-Marie Slaughter, Alec Stone Sweet and J.H.H. Weiler, *The European Court and National Courts – Doctrine and Jurisprudence,* Oxford: Hart Publishing, 1998, pp. 81.
[99] Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas *OJ L 047 , 25/02/1993 P. 0001 - 0011*
[100] *Bananas* case, BVerfGE 102, 147 (2000) (hereinafter: *Banana* decision).
[101] This preference is given due to the colonial relations of certain Member States with those countries. Lomè Conventions provide the framework for such treatment.

German importers claimed that this Regulation establishing preferential quota system for ACP countries and resultant increased custom duties for third countries in excess of quota breaches their fundamental rights of occupational and property freedom as established by the German Basic law. The ECJ rejected this claim that the Regulation infringes upon non-discrimination, proportionality and fundamental freedoms and that it breached the relevant provisions of GATT, which is an international agreement, signed by Germany creating obligations dating back to EC Treaty under Article 307 (ex. Article 234) of the EC Treaty and therefore takes precedence over EC Law.

The case mainly concerned the question whether the application of Article 17-19 and Article 21(2) of Regulation 404/93 and application of Regulation 478/95[102] in Germany were compatible with Articles 23(1), 14(1), 12(1) and 3(1) of German Basic Law. After a series of cases under lower national courts, the issue was brought before the BVerfG. BVerfG declared the action inadmissible[103]. The BVerfG particularly held that constitutional review of the rules that are part of secondary EC law are only possible if the same level of unconditional protection of fundamental rights cannot be guaranteed by the ECJ.[104]

The *Bananas* decision signals a more conciliatory approach of the BVerfG towards the European integration process.[105] By this decision, *Solange II* and *Maastricht* judgments were reaffirmed and the conditions under which the BVerfG will review Community acts were further substantiated. First, the BVerfG restated that it will not review such acts as long as the ECJ have guarantees for effective protection of fundamental rights similar to the standards of

[102] Commission Regulation (EC) No 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) No 404/93 as regards the tariff quota arrangements for imports of bananas into the Community and amending Regulation (EEC) No 1442/93 OJ L 049 , 04/03/1995 P. 0013 – 0017.
[103] *Bananas decision*, *supra* note 100.
[104] *Ibid.*
[105] Yiannos S. Tolias, "Has the Problem Concerning the Delimitation of the Community's Competence been Resolved since the Maastricht Judgment of the Bundesverfassungsgericht?" *EBLR* 13 (2002), 267 pp. 276.

German Basic Law. It is not required that the EC has the same standard as the German system. Second, a criterion was introduced in order to declare Community acts admissible before the BVerfG. According to this, the plaintiff must demonstrate the general level of protection of fundamental rights in EC is declined from the standard established in *Solange II* in 1986[106]. As a result more stringent conditions are enumerated for the review of Community acts before the BVerfG compared to *Solange II* and *Maastricht*.

3. CONCLUSION

As of today, the BVerfG has never exercised its jurisdiction for review under emergency competence. Thus, practically, it is difficult to conclude that there is a major clash between the jurisdictions of the ECJ and BVerfG. It is highly improbable that there will be a decrease in the level of protection by EC law. With the Bananas case, it was revealed that BVerfG will apply very stringent conditions for the admissibility of the cases for review. However, theoretically, the ECJ and the BVerfG have divergent views on the supremacy of EC law. The future case law will show whether the BVerfG will ever need to deploy its emergency competence that will escalate the tension between two jurisdictions once again. The first signals of further debate will be described in the next chapter.

[106] *Bananas*, *supra* note 100, pp. 164.

CHAPTER III

THE IMPACT OF ENLARGEMENT ON THE APPLICATION OF EC LAW

1. INTRODUCTION

The previous chapter demonstrated, as an example, the gradual ease of the tension between the ECJ and the BVerfG that resulted in a change of the attitude of the BVerfG in the protection of fundamental rights. According to the current state of affairs, the BVerfG agreed the supremacy of Community over the national law if a certain level of protection equivalent to that of Germany for the fundamental rights is ensured by EC Law. The jurisdiction of the BVerfG has been strictly defined under the *Bananas* judgment. However, this should not be seen as a retreat on the side of German Federal Constitutional court. This chapter, in the end, will turn to the German case again to prove that there is still potential for clash between two legal systems even in a Member State that can be regarded to have some learning experience as a result of series of important cases.

Before doing that, another potential source of similar clash will be explained as the primary theme of this chapter: the enlargement of the EU included the Central and Eastern European Countries (hereinafter: CEEC). The recent enlargement poses similar tensions as new Member States have acceded to the EU together with their negative experience of authoritarian regimes. Since May 1, 2004, EC Law has been binding in the ten new Member States. These countries had to adopt the *acquis communautaire* (the existing body of European law) before the accession and thereby recognizing that EC Law not only is binding

but also takes precedence over their national laws. As it is indicated in the first chapter, supremacy of EC law is an indispensable element in the functioning of Community legal order and the relation between the ECJ and national court is one of cooperation rather than a hierarchy. Following the German example, sometimes citing the decisions of BVerfG in the national judgments, by restating the ECJ of its competences, the newly established Constitutional Courts of the new Member States proclaimed that they are the ultimate guardians of national sovereignty and the Constitution.[107]

In this chapter two new Member States, namely Hungary and Poland will be scrutinized. The main reason for this selection is that they are representative of two differing approaches to the principle of supremacy. In Polish case, the accession debates ended up with recognition of a European clause whereas in Hungary the legislature sidestepped the overt expressions for the supremacy of EC Law. However, as the following cases in this part will demonstrate, the result did not change: the Constitutional Courts of both countries questioned the supremacy of EC law and clashes occurred with the ECJ rulings.

Having established the approach of the BVerfG in the previous chapter, it may be helpful to give some account to the national systems in the CEECs. Afterwards, the recent cases before the Hungarian and Polish Constitutional Courts will be analyzed in detail. This chapter will conclude that the potential for clash still exist due to the dynamics of the recent enlargement.

[107] Hungarian Constitutional Court in Europe Agreement Judgment pp. 37 see Janos Volkai, "The Application of the Europe Agreement and European Law in Hungary: The Jugdment Of An Activist Constitutional Court On Activist Notions," *Harvard Jean Monnet Working Paper* 8/99, Harvard Law School (2000).

2. NATIONAL LEGAL SYSTEMS IN CEECs and THE IMPACT OF ENLARGEMENT

Before the accession, in the 1990s, the fundamental reform in the legal systems of the CEECs was to eliminate old-fashioned aspects of communist legal systems which were designed quite differently from Continental legal systems (especially in the areas of criminal and civil law). New laws started to be passed. With the view of eventual accession, CEECs were required to make their laws consistent with the *acquis communautaire* (the existing body of European law).[108] This has created a potential for turbulence in the national legal systems of CEECs with the influx of new legal concepts and values. Therefore, Europeanization has brought yet another challenge that resulted in the mixture of elements of old and new legal systems.

In Hungary, in the last years of communist rule when there was no Constitution in the country a "Constitutional Council" was established for the place of Constitutional Courts under democratic regimes. Later, the Constitutional Court was set up in 1990. From then on, the Hungarian Constitutional Court has become one of the very strong state organs with its wide competences: to supervise the constitutionality of legal regulations passed by the Parliament, national government and local administrations; to monitor of acts enacted by the Parliament that are not signed by the President of the Republic; to interpret the Constitution[109] and decide whether the legislature followed its duties. Therefore, it is possible to conclude that the Constitutional Court is in a sense the most powerful state organ in the Republic of Hungary. Although it cannot make law, it can prevent unconstitutional acts by abrogating them. From

[108] Zdeněk Khün, "The Application of European Law in the New Member States: Several (Early) Prediction," *German Law Journal* Vol 06 No.03, pp. 564.
[109] See Hungarian Constitution [online]; available from http://wiretap.area.com/Gopher/Gov/World/hungary.con; Internet: accessed on 28.05.2006.

1990 to 1995, many important legal regulations were supervised by the Court and it had played a prominent role in shaping new Hungarian democracy.[110] In analyzing the following national cases, it is necessary to bear in mind this central position of the Hungarian Court.

The Polish Constitutional Court has competences similar to the Hungarian Constitutional Court yet it is not that powerful. It was established as a concession to the strong opposition after the imposition of Marshall Law in the 1980s.[111] As the case was with the other CEECs, the transposition of European law into national law posed a challenge in Poland before the accession. However, the Polish judiciary had been staffed by renowned Polish lawyers and academics that were willing to achieve the expectations of further Europeanization. Even before the accession meaning that even before EC law officially acquires its binding force in Polish territory, the Polish Constitutional Court stated that Poland is obliged to ensure that future national legislation to be compatible with EC law to the greatest degree possible. According to the Polish Constitutional Court the legal basis of this statement is the Polish Association Agreement.[112]

Therefore, before the accession, setting up of these constitutional courts marked as an important cornerstone in the reform of legal systems of CEECs. After the accession, some of the CEECs faced a more tangible legal and constitutional challenge in bringing their national legal systems in harmony with the EU law. This is, after all, not an easy task to accomplish due to experiences of previous authoritarian regimes where certain safeguards have been included in the Constitutions. During the accession debates, those concerns regarding

[110] Imre Vörös, Contextuality and Universality: Constitutional Borrowings on the Global Stage – Hungarian View [online]; available from http://www.law.upenn.edu/journals/conlaw/issues/vol1/num3/voros/voros.html; Internet: accessed on 14.04.2006.
[111] Christian Baulanger, "Europeanization through Judicial Activism: Hungarian Constitutional Court's Legitimacy and Hungary's Return to Europe," [online]; available from http://users.ox.ac.uk/~oaces/conference/papers/Christian_Boulanger.pdf; Internet: accessed 14.04.2006, pp. 2.
[112] Khün, *supra* note 108, pp. 566.

independence and sovereignty were discussed in the parliaments of post-communist countries. Therefore, in those countries there is a strong protection of fundamental rights in their Constitutions. The reason is that those countries have communist heritage that led to a long-standing deprivation of independence. These political sensitivities reflected in the debates on the supremacy of EC Law and sometimes shaped the arguments that were line with *Solange*[113] ruling of the BVerfG, and nevertheless resulted in adoption of favourable clauses as in the example of Poland.[114]

The same political sensitivities have resulted in different outcomes in some other new Member States such as Hungary. The debate on supremacy of EC law posed a similar type of tension as between the ECJ and BVerfG. In Poland, too, despite the favourable stand of the Constitutional Court before the Accession as well as adoption of the Europe Clause, the latter judgments of the Polish Constitutional Court gave contradictory results. Similar to the gradual change in standpoint of BVerfG, the same learning effect in these Constitutional Courts might be possible. Yet, latest case-law revealed that compromise has not been reached even in the German case. In this chapter, Poland and Hungary are chosen as case studies due the similar problems that they faced as well as their divergent stand concerning the adoption of European clauses where Poland has more benign approach. Now there is also another aspect in the debate on supremacy of EC law. It is the question of applicability of the principle of supremacy not only to EC Law under the first pillar but also to EU Law such as third pillar

[113] *Solange I* and *Solange II*, supra notes 3-4.
[114] Article 91(3) of the Polish Constitution states that "if an agreement, ratified by the Republic of Poland establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws".

issues. In this connection, the European Arrest Warrant[115] will be discussed with two important cases from Poland and Germany.

2.1 Case Study: Hungary

This part of the dissertation discusses the major developments in Hungary which is one of the new Member States having intrinsic features that paved the way for a new debate on supremacy on EC law. Hungary has a particular institutional design permitting fierce protection of national constitutionalism concepts. As indicated above, the Hungarian Constitutional court is quite powerful and allows for easy access. Furthermore, Hungary has a dualist system used in transposition of international treaties which often led the proclamation of the Court to hold the ultimate arbiter position in the national legal system.[116]

In the Hungarian accession debates the issue of supremacy of EC law was avoided and the supremacy clause was not inserted intentionally, although an official explanation was given as to the acceptance the monist approach of the ECJ.[117] The standpoint of the political opposition was that a European supremacy clause would undermine the Hungarian constitution. Due to qualified majority rule of two-thirds of national parliament, the opposition was able to block the adoption of the Europe clause. Article 2 (A) stipulates that in order to accede to the EU Hungary might exercise certain constitutional competences to implement obligations under the EC Treaty in conjunction with other Member States, and these constitutional competences might be exercised directly by the institutions of the EU. The term 'transfer' of rights was avoided on purpose, thereby giving the government a kind of

[115] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision OJ L 190, 18/07/2002 P. 0001 – 0020.
[116] Hungarian Constitutional Court in Europe Agreement Judgment pp. 37 see Volkai, *supra* note 107, pp. 5.
[117] Sajó, *supra* note 5, pp. 353.

reservation that the Constitutional Court will have competence to review the secondary legislation of the EU. The situation is that under the Hungarian Constitution and the Constitutional Court Act of 1989 which has given the Constitutional Court extensive review competences, it is possible to review the Accession Treaty as well. Since the Hungarian government could not satisfy the majority criteria in the parliament to enact the European clause and prevent the Constitutional court using its review powers of Community law, the uncertainty remains. The case[118] below concerns the tension between the ECJ and the Hungarian Constitutional Court under this situation of uncertainty.

As to the background of the issue, in April 2004 (one month before the accession treaty entered into force) the Hungarian Parliament adopted a law on agricultural surplus stocks (hereinafter, the Surplus Act). This is the law that is implementing the Commission Regulation No 1972/2003 [119] and another Commission Regulation No. 60/2004 [120] setting up transitional measures in the sugar sector. The regulation in question aimed at eliminating the effect of speculative movements creating agricultural surplus and it proposed a system to calculate this surplus. The European legislature wanted the new Member States to device a system to identify those that are responsible for speculative movements. The President of Hungary instead of promulgating the law submitted the issue to the Constitutional Court for a "review of unconstitutionality". While the Constitutional Court was pursuing a preliminary review, on the 1st of May 2004 Hungary became a Member State of the EU. On 25th of May

[118] This decision is not available in English as of May 2006 so I quoted from the Article of András Sajó, *supra* note 5.
[119] Commission Regulation (EC) No 1972/2003 of 10 November 2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia *OJ L 293, 11/11/2003 P. 0003 – 0006.*
[120] Commission Regulation (EC) No 60/2004 of 14 January 2004 laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia *OJ L 009 , 15/01/2004 P. 0008 – 0012.*

2004 the Constitutional Court found the Act unconstitutional. Due to that reason the Surplus Act was not promulgated.

The problem arises from the interpretation of the Hungarian Constitutional Court of the Surplus Act as retroactive and not giving fair lead time. Thus the act was considered as infringing upon a fundamental right namely the legal certainty. Even if the President had signed the Surplus Act without submitting it to the constitutional review, the act would have entered into force on 25th of May 2004. However, the European legislature defined the obligations under the Surplus Act starting much more before by 1st of May 2004. The contentious point is that Member States have to develop and implement measures to be applicable as of 1st of May in order to meet their obligations. As the according to Hungarian Constitution the Surplus Act can only enter into force by 25th of May, making the promulgation of the law retroactive and thus unconstitutional. This is going to be explained below.

The long period for entry into force of the Act was related to the amendments made during the legislative process of the Act. The competent authorities of the Community informed the accession state delegations concerning the need to create stock inventories for increased number of different products (from eight to more than fifty products) compared to inventory in the 1995 accession process. Despite the complaints of accession states concerning this change, the regulations were enacted. Based on those complaints they were amended in a short period of time. The Sugar Regulation was forwarded to the Parliament while there were still amendments for the first regulation[121] (i.e. Regulation No. 1972/2003 of November 2003). Hungarian government was planning to use an expedited parliamentary procedure and

[121] See Regulation No. 1972/2003, *supra* note 120.

to promulgate the Act 45 days before its entry into force and before the accession of Hungary. 45 days were targeted as according to National Expenditure Act, the obligations of tax-payer cannot apply before 45 days from promulgation of a legislative act. The planned date of promulgation was not realized because there was no quorum in Parliament for voting.

The Hungarian Constitutional Court confirmed the unconstitutionality claims of the Surplus Act as it infringes upon legal certainty. Under the Constitution, Hungary is the state of the rule of law which necessitates legal certainty comprising fair lead time and non-retroactivity. The principle of non-retroactivity was breached as the surplus stock was to be determined as the difference between inventory on 1st of May 2004 and daily average of product in 2002-2003. Meanwhile the transactions made after 1st of January were not going to be calculated as the decrease in the stock. Moreover, the inventory establishing the stock by 1st of May was retroactive considering the earliest date for entry into force was three weeks later. There is no fair lead time for the affected person who was required to pay the charge was not given due time to know this arrangements. Also the Constitutional Court found that under the Surplus Act the task of definition of the entities entitled to pay the charge and the method of calculation was given to executive decrees which infringed the Constitution which stipulates that fundamental rights as well as duties are determined through Parliamentary act.

From the practical side the problem was that the Hungarian Constitutional Court overruled the application of the Community regulations, thereby ignoring the principle of supremacy as it has been established by the ECJ over conflicting national rules even having the constitutional character.[122] The Hungarian Constitutional Court in order to avoid direct confrontation on the issue of supremacy of EC Law sidestepped this issue. Its decision was neither related to

[122] *Simmenthal, supra* note 54.

validity nor interpretation of Community law. It perceived the Surplus Act different from original Community regulation by pointing that regulations determine the obligations of Member States not the obligations of their citizens. It was the Hungarian Act in question and the contentions provisions were not the translations of the regulations but they were shaped according to Hungarian legislation. Thus, when it comes to the issue of setting obligations for the Hungarian citizens, it is the Constitutional Court which protects fundamental rights through judicial review.

From the perspective of EC law, according to the Article 249 of the EC Treaty a regulation "shall be binding in its entirety and directly applicable in all Member States" and there is no need for transposition. That means that irrespective of the Surplus Act under the national legislation, the regulation in question has already been a part of Hungarian law. As opposed to what the Hungarian Constitutional Court asserts the contentious provisions of the Act were identical with the Regulation. Therefore, with the practice of the ECJ it may not be considered as retroactive. The real issue in this case is not whether the Act in question was retroactive or not but the way of reception of Community law by the national legal system of Hungary. The Surplus Act whose content was determined by Community Regulation found by the Hungarian Constitutional Court as retroactive.

The standpoint of the ECJ in this case was already spelled out in its *Internationale Handelsgesellshaft* judgment:

> "Recourse to the legal rules and concepts of national law in order to judge the validity of measure adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The

validity of such measures can only be judged on the light of Community law"[123]

Instead the Hungarian Constitutional Court refuses to accept that the Surplus Act and the problems attached to it concerned the Community legislation, therefore EC law. This resembled to the conflict between the BVerfG and the ECJ in *Solange* and *Maastricht* cases. It is also true that the standpoint of the BVerfG has changed over time and it came to the point to accept that the European legal system provides equivalent protection of fundamental rights as the BVerfG. Will this be the case for the Hungarian Constitutional Court?[124]

There was no direct confrontation between the two legal systems as the Hungarian Constitutional Court did not say it open that it has special protection of fundamental rights under the Constitution that is better than the EU system. Instead, the Constitutional Court avoided the question of supremacy of EC law. Thus it is not possible to accuse the Constitutional Court of its denial of reference. However, the problem is deep rooted and there will be times that the confrontation cannot be evaded. In that case, it is of use to look at the evolution of the principle of supremacy and the ease of clash between old Member States such as Germany. It is possible to expect a long learning process though not in the form of sudden revolution. Up until then the clashes can be expected. The following part will deal with another new Member State which already passed the European clause but still having problems with the concept of supremacy of EC law.

[123] *Internationale Handelsgesellschaft, supra* note 49, para. 3.
[124] Sajó, *supra* note 5, pp. 367.

2.2 Case Study: Poland

After the accession of Poland into the EU, the Polish Constitutional Court faced the problem that led to discussions about the principle of supremacy of EC law. According to Article 91(3) of the Polish Constitution "if an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws."

This European clause in the Constitution overtly recognizes the precedence of EC law over any conflicting national law. However the following cases have revealed that the relation between the Polish Constitutional Court and the ECJ will not be as smooth as it was expected.

The first case was specifically related to the third pillar, therefore, to the EU law. In that regard, it is crucial to mention the recent developments in the jurisprudence of the ECJ. Until recently, the supremacy of EC law was used for the cases under the first pillar, EC law. However, the recent *Pupino*[125] judgment of the ECJ revealed the Court is trying to introduce the same principle for the third pillar matters mainly cooperation in criminal matters as such matters began to come under its competence.

The first case[126] concerned Polish law implementing the European Arrest Warrant (hereinafter: EAW) of 27th of April 2005 and the issue of surrendering Polish citizens. Poland implemented the Framework Decision on the EAW and the procedures of surrender between Member States of 13th of June 2002 through an amendment of the Polish Criminal Procedure

[125] Judgement of 16 June 2005, C-105/03 *Criminal Proceedings against Maria Pupino*, Press Release no 59/05, *infra* note 147.
[126] Judgement of 27th April 2005, P 1/05, for English translation [online]; available from www.trybunal.gov.pl; Internet: Accessed on 14.04.2006.

Code of 1997. There were discussions before the adoption this Framework Decision that it infringes the Article 55 of the Polish Constitution. Article 55 states that:

1. The extradition of a Polish citizen shall be forbidden.
2. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden.
3. The courts shall adjudicate on the admissibility of extradition.

Despite views pointing to the necessity of amending the constitution, it was retained intact. Instead, the Criminal Procedure Code was changed. According to these amendments, there was no procedure overtly allowing the extradition of Polish citizens from Polish territory. However, Article 607 p of Criminal Procedure Code stipulated the reasons for refusing to execute an EAW and it does not state Polish citizenship among those reasons for rejection of executing an EAW. There are some other provisions that are bringing restrictions to extradite Polish citizens and persons enjoying political asylum in Poland. These situations are: first, issuing an EAW for executing a previously imposed custodial sentence or detention order (Article 607 s) and issuing an EAW for prosecuting a person for criminal offence (Article 607 t). The latter was the issue that was brought before the Regional Court Gdańsk which referred the case to the Polish Constitutional Court. The Regional Court had received an application on issuing a surrender decision for Polish citizen Maria D. in order for the criminal proceeding against her to be conducted in the Netherlands. The Regional Court had to apply the Article 607 t of the Criminal Code. However, it decided to stay the proceedings and asked for review of constitutionality according to Article 55 of the Polish constitution. The Constitutional Court ruled that Article 607 t was not in conformity with Article 55.1 of the Constitution.

According to Krystyna Kowalik-Bañczyk,[127] on the surface, this ruling of the Polish Constitutional Court can be considered as a refusal of the supremacy of the Framework decisions in relation to Polish Constitution. The ruling of the Constitutional Court has a potential to pose a similar tension as in the Hungarian case. However, the detailed ruling of the Constitutional Court reveals the acceptance by the Constitutional Court of the supremacy of ECJ law. The Polish Constitutional Court made it clear that it was the provisions of Polish Criminal Procedure Code that were declared unconstitutional. In fact, it recognized the supremacy of EC law by suggesting the amendment of the Constitution and reiterating the obligation to interpret domestic law in consistence with EU law. This meant that the Polish Constitutional Court recognized that the Polish Constitution was no longer a definite framework of control and as far as it contradicts EC law it needed to be amended. Indeed, the Polish Constitutional Court used its discretion to maintain the unconstitutional provisions of the Criminal Procedure for the maximum period possible (eighteen months) to give a chance to the Polish legislature to amend the Constitution. In practice this meant that the unconstitutional provisions are still applicable and the national courts have to apply them without asking for review of constitutionality.

However, two weeks after this decision, in another judgment[128], the Constitutional Court denied its ruling in the EAW case above. This was about three motions submitted against the Polish accession to the European Union set by three groups of deputies in the lower chamber of the Polish Parliament (Sejm) due to the conditions in the Accession Treaty. The judgment of the Constitutional Court as a response to these motions was highly controversial for

[127] Krystyna Kowalik-Bañczyk, "Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EC law" *German Law Journal* Vol. 6 No.10 – 1 October 2005 pp. 4.
[128] Judgment of 11th of May 2005, K 18/04, English summary is available [online]; available from www.trybunal.gov.pl; Internet: Accessed on 14.04.2006.

following reasons. According to Article 188[129] of the Polish Constitution, the Polish Constitutional Court has constitutional control over the conformity of ratified international agreements that Poland signs. The judgment of the Constitutional Court concerned various provisions of the Polish Constitution concerning their relation *vis-à-vis* the European law. The matter in question was the conformity of the Accession Treaty provisions with the principles of the sovereignty of the Polish Nation and supremacy of the Constitution over other legal acts existing in legal acts under the Polish legal system. The applicants asserted that under the Polish Constitution, the accession to international organizations is possible not the supranational organizations like the EU.

This judgment[130] of the Constitutional Court posed interesting questions regarding the review of competences of Community institutions (thereby risking the uniform application of the Community law) and retaining sovereignty concerns of the new Member States.[131] In its judgment, for all these provisions, the Constitutional Court denied the inconformity with the Polish Constitution. On the surface, this might be interpreted as acceptance of the supremacy of EC law. However, the reasoning of the Constitutional Court in this judgment reveals the opposite to the extent that it overruled its judgment on EAW case by taking the Polish Constitution as a reference of control. The mere fact that the Constitutional Court issued this judgment thereby recognizing its competence to review the legality of Accession Treaty meant that it did not recognize the supremacy of EC law over the conflicting national law.

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[129] Article 188: The Constitutional court shall adjudicate regarding the following matters:
1) the conformity of statutes and international agreements to Constitution
2) the conformity of statute to ratified international agreements whose ratification required prior consent granted by statute
3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes
4) the conformity to the Constitution of the purposes or activities of political parties
5) complaints concerning constitutional infringements, as specified in Article 79(1).

[130] Judgment of 11th of May 2005, K 18/04, [online]; available from English summary is available at www.trybunal.gov.pl; Internet: Accessed on 14.04.2006.

[131] Kowalik-Bañczyk, *supra* note 127, pp. 7.

According to the reasoning of the Polish Constitutional Court, the accession of the Republic of Poland had not undermined the supremacy of the Polish Constitution over the whole legal order of the Republic of Poland. The inconformity of the national law (provision of Constitution in this case) with EC law would not mean invalidity of such Constitutional norms. Polish integration to Europe is based on the Polish Constitution meaning that legal basis for integration was based on the Polish Constitution. The provision under the Polish Constitution made it possible for Poland to accede to the EU. Thus, any transfer of rights and respective competences has to respect the principles of the Constitution.

The Constitutional Court ruled that the accession to the Union would not amount to loss of sovereignty and independence. According to the Court, Article 8 of the Polish Constitution stipulates that the highest source of law in Poland is the Constitution. Article 9 states the fact that Poland respects its obligations stemming from international agreements. This signifies two levels of law in the Polish legal system. However, the Constitution has supremacy over all other acts including international agreements that enter into force by referendum.

The judgment of the Constitutional Court can be considered as a denial of its earlier judgment in the EAW case. The Court stated that the interpretation of national law in lines with EC law cannot be made if the provision in question breaches the Constitution. The Constitution set the minimum limit for the protection of fundamental rights within the Polish legal system.[132]

The judgment is striking because it is possible to observe the same denial patterns as in 1970s of supremacy of EC law and the jurisdiction of the ECJ for review: the Court ruled as far as

[132] *Ibid*., pp. 7.

supremacy of EC law is concerned that Member States can still review whether the Community institutions act within the limits of their competences in line with the proportionality and subsidiarity principles. This is a clear overruling of its EAW judgment since there is no suggestion for the amendment of the Constitution as in the EAW decision.[133] Franz C. Mayer asserted that parts of this decision of the Polish Constitutional Court seem even more incompatible with European law than the BVerfG's 1974 *Solange I* decision.[134]

3. GERMANY: DOES THE BVerfG STRIKE BACK? – THE DARKAZANLI CASE

Another interesting development in this very controversial subject of the supremacy of EC law is the Darkazanli judgment of the BVerfG of 18th of July 2005[135]. Mr. Darkazanli possesses German and Syrian citizenship. Under Articles 515.2 and 516.2 of the Spanish Criminal Code he was accused by the Spanish authorities of participation in a criminal organization and of participation to terrorist activities. In particular he was accused of providing financial support and serving as contact for the Al-Quaida network in Germany. The German authorities conducted investigations about him, too. However, due to insufficient evidence, they did not initiate criminal proceedings against him. Meanwhile in September 2004, the Spanish District Court in Madrid issued an EAW against Mr. Darkazanli and requested his extradition to Spain from the German authorities. Based on that request, the German authorities arrested him in October 2004 and approved his extradition to Spain.[136] Mr. Darkazanli challenged this extradition before the BVerfG based on the fact that German

[133] *Ibid*., pp. 8.
[134] Mayer, *supra* note 10, pp. 1499.
[135] *Darkazanli* case, *supra* note 8.
[136] Simone Mölders, "European Arrest Warrant Act Is Void – The Decision of the German Federal Court of 18 July 2005" *German Law Journal* Vol.7 No.1 pp. 46-47.

European Arrest Warrant breaches some of his fundamental rights as protected by the German Basic Law particularly Articles 2(1), 3 (1), 16(2), 19(4) and 103(2)[137]:

> Article 16(2): No German may be extradited to a foreign country. A different regulation to cover extradition to a Member State of the European Union or to an international court of law may be laid down, provided that constitutional principles are observed.
>
> Article 103(2): An act may be punished only if it was defined by a law as a criminal offence before the act was committed.

The issue in this case was similar to the Polish case described above: whether the German European Arrest Warrant breaches the fundamental rights as protected by the German Basic Law specifically, the Article 16 (2) second sentence. Article 16 (2) allows extradition of Germans to the extent that the principles of constitutionality are not infringed upon meaning that German legislature will examine the principles of a constitutional state are ensured by the Member State issuing the arrest warrant asking for its execution.[138] This is required in order to be sure that while implementing EAW framework decision, the fundamental right of "freedom form extradition" is not restricted in a non-proportionate way. In this case this is more important because the matter of the case is covered by an intergovernmental pillar. The underlying objective of the Article 16 (2) is to ensure that no German national would be left in a situation where he fears from to be extradited to another Member State whose national criminal law he does not know and whose democratic legislative process he did not participate.

[137] See the English translation from [online]; available from http://www.bundestag.de/htdocs_e/info/030gg.pdf; Internet: Accessed on 14.04.2006.
[138] Mölders, *supra* note 136, pp. 48.

Finally, Article 103 (2) was breached by the EAW Framework Decision. The reason is that Article 81 (4) of the German European Arrest Warrant Act (i.e. the German implementation act of EAW framework decision) stipulated that it is possible to extradite a German national to another Member State if the contested conduct of the German national is regarded a criminal offence under the law of the Member State asking the execution of extradition. That means that even if the alleged conduct of the German national does not amount to a criminal offence under German law, the German national can be extradited to another Member State if the alleged conduct constitutes a crime under Article 2(2) of the EU framework decision. These offences include murder, rape, arson or terrorism. Therefore the basic right stipulated under Article 103 (2) that an act may be punished if it is defined by law as a criminal offence before the act was committed was breached.

As in the Polish case, this case cannot be merely seen as a German constitutional problem. Underneath there is the dispute on the principle of supremacy between the EU law and German Constitutional law. It is true that the German European Arrest Warrant is the act of implementation of the EU framework decision described above. It can be considered as part of national law. Yet, the BVerfG ruled in its later judgments that the *Solange II* criteria are also applicable to the national law having the aim of implementing a Directive. If the BVerfG begin to treat the EU Framework decisions as directives, according to the *Solange II* (where the BVerfG came to the conclusion that the level of protection of fundamental rights in the Community is similar to German legal system) it could not exercise its jurisdiction over German European Arrest Warrant in so far as it is an implementation act of the EU Framework Decision. In the contrary, if it decided to review the act in question, this would amount to a retreat from the *Solange II* to *Solange I* case law, thereby endangering the current status quo of relations between the ECJ and the BVerfG under *Maastricht* decision.

The BVerfG ruled that the German European Arrest Warrant was void. The argument is that this implementing act breaches the right to freedom from extradition as stipulated under Article 16(2) of the German Basic Law in a disproportionate manner. According to the BVerfG, the EU framework decision must be considered as being outside EC Law as it concerned an issue under the third pillar, therefore, outside the EC legal order. This meant that Member States have competence to deny the changes made under this area. Under that competence, German legislature was required to transpose the concerned framework decision in the light of the standards as it was laid down in the Constitution particularly Article 16 (2)[139]. However, as the case showed, it has failed to do so[140].

As a result of the decision, Mr. Darkazanli was entitled to be released from prison and not to be extradited to Spain. Furthermore, it made it clear that unless German legislature does not adopt a new implementing act giving the highest possible consideration to the fundamental rights as laid down under German Basic Law, it is not possible to extradite a German national to another Member State under the European Arrest Warrant.[141]

This case cannot be regarded as overruling of the BVerfG of *Solange II* and *Maastricht* judgments. The BVerfG accused the German legislature rather than the European legislature of acting contrary to the fundamental principles as protected under the German Basic Law. In other words, it was the German legislature failing to comply with the standards while transposing the relevant EC legislation. At the same time, however, it is difficult to see the mild approach of the Polish Constitutional Court in this issue. It was taken for granted by the BVerfG that the German Basic Law is the absolute framework for reference. Therefore it is

[139] *Ibid*., para. 79.
[140] *Ibid*., para. 93.
[141] *Ibid.*, para. 120.

possible to conclude that this judgment of BVerfG might create another tension with the ECJ as the BVerfG did not take into account the recent the *Pupino* judgment of the ECJ. This judgment is particularly important as the ECJ ruled that the principle of loyal cooperation stipulated under Article 10 is also applicable in the area of police and judicial co-operation in criminal matters and not only in the field of first pillar matters[142]. Therefore, the Member States are obliged to apply the principle of supremacy also to third pillar matters. This is definitely not the case in the Darkazanli judgment of the BVerfG.

It may be of use to differentiate between the cases discussed above. In the Hungarian case, the matter concerned a first pillar issue, therefore EC law is at stake whereas the first case of Poland and the German case are related to EAW which is considered under the third pillar, the EU law. In the Accession Treaty judgment of the Polish Constitutional Court, the matter related to whole EU Treaty. Moreover, in the Hungarian case, the EC legislation at issue was in the form of regulation. Thus, there is no way of the same reasoning as in the other EAW judgments where the legislations in question are in the form of EU framework decision. Therefore in the later cases, it was possible for national courts to claim that it is the national legislation that does not take into account the higher values enshrined in the Constitution while transposing the EU framework decision not EC law.

That's why in the Hungarian case and the Polish case on the Accession Treaty, it is straightforward to establish denial of principle of supremacy by the Constitutional Courts whereas in other decisions this is not that apparent. As a result it is possible to conclude that the tension between the Constitutional Courts and the ECJ is still in existence not only in CEECs which have Constitutions protective of fundamental rights and democracy but also in

[142] *Pupino*, *supra* note 125, at para. 42.

Germany whose Constitutional Court has established a co-operation relationship between the ECJ over the years where the supremacy of EC law though with reservation that it has emergency competence. This tension between the BVerfG and the ECJ arose as new areas come under the Community competence.

3. CONCLUSION

It was the legacy of the communist regimes that have shaped the legal systems in many CEECs. In order to understand the current tensions between the Constitutional Courts of these countries and the ECJ, it is necessary to grasp the features of these legal systems together with their peculiarities. In Hungary, for instance, Constitutional Court is one of the strongest -in some instances, the strongest- state organs protecting the democratization process. It is not awkward to expect a similar tension with the ECJ as in the case of the BVerfG. After all, many CEECs including Hungary have imitated the BVerfG while establishing their Constitutional Courts.[143] Indeed, one of the recent judgments of Hungarian Constitutional Court cited above revealed that this may be the case. Even the new Member States that had favourable approach to the supremacy issue have proved that they might as well experience the same difficulties like Hungary. Poland is one of those countries having adopted a clear European clause in its Constitution with its accession to the Union and repeatedly supported the uniform application of Community law. However, the two cases analysed above showed that it cannot escape from the question regarding who is going to decide about constitutionality of national acts adopted to transpose the EC legislation. What is more, is that recently, an old debate has been opened, too. With the EAW judgment, the BVerfG appeared

[143] Sajó, *supra* note 5, pp. 366.

again in the centre of the debate. The next chapter will turn to theoretical side of the debate with the attempt to find a viable solution to this tension.

CHAPTER IV

THE LEGAL DEBATE and POSSIBLE METHODS TO OVERCOME THE CLASH

1. INTRODUCTION

The previous chapter attempted to give some insight to the debate on the supremacy of EC law that it is still relevant in the face of developments with the accession of New Member States. Even in the countries where the transition was smooth, such as Poland, it is possible to observe the first symptoms of the same tension between the ECJ and the Constitutional Courts of old Member States. The question that remains would be a way to approach this problem: will there be any way to avoid this conflict or should we accept things as they are and try to prevent further tensions with methods shorter than a real solution?

The objective of this chapter is to go back to the roots of the debate on supremacy of the EC/EU law and bring some theoretical understanding based on previous chapters. In this context, the monist approach of the ECJ and pluralist view of Member States with dualist systems, the competences of Community institutions and limits of the jurisdiction of the ECJ.

2. THE LEGAL DEBATE REVISITED

As described before, the EC Treaty does not make any explicit reference to the relationship between the national legal orders and the EC legal order. It is silent concerning under which circumstances EC law takes precedence over conflicting national legislation. The only thing

that gives some hints regarding the desired functioning of the Community system can be found in Article 249(2) which stipulates that regulations shall be generally and directly applicable in the Member States. This is indeed one of the justifications for supremacy of EC law that the ECJ asserted in *Costa v. ENEL* decision.[144] As the reasoning of the Constitutional Courts in the Member States demonstrated, this does not explicitly establish the principle of supremacy in the EC Treaty. Thus, the theoretical debate goes on.

The main problem over the debate of principle of supremacy is the delimitation on the competences between the two systems and the determination concerning who is going to be the final arbiter deciding unconstitutionality of a piece of legislation, somewhat related to the EC legislation. It can be either at the stage of adopting EC legislation or at the stage of passing a national legislation transposing EC legislation.

The constitutional clash occurs in fact due to the uncertainty regarding the limits of Community competence.[145] When one analyses the *Bananas* judgment of BVerfG, it appears that it adopted a more conciliatory approach. On the other side, the ECJ is also more cautious in asserting the limits of the Community competence.[146] However, the judgments of BVerfG in the later judgment reveal that this may not be the case. It seems that BVerfG is still asserting itself as the only authority, the final arbiter concerning the applicability of secondary Community law (such as regulations) within the national order and question their constitutionality. Up to now the BVerfG has not exercised its claimed jurisdiction on that matter since it declared that as long as the European Communities have effective protection of

[144] *Costa v. ENEL*, *supra* note 29.
[145] Tolias, *supra* note 105.
[146] In the Case 376/98, *Germany v European Parliament and Council (Tobacco Advertising case)* [2000] ECR I-1267 where the ECJ decided that part of the Directive in question prohibiting certain types of advertising and sponsorhip of tobacco products could have been adopted on the basis of Article 95 EC whereas some other aspects of the prohibition exceed the Community competence and therefore it needs to be partially annuled. See also Tolias, *supra* note 105, pp. 281.

fundamental rights, the BVerfG will not exercise its jurisdiction on the applicability of secondary Community law. As it is not foreseen that the Community will decrease its standards of protection of fundamental rights, the clash on that issue may not be expected. Yet, the competences issue in general remains unresolved. For instance, the conflict may occur between two legal systems if the ECJ applies fundamental principles of Community law in areas - such as defence- where it does not have competence.[147] As a result, the crucial question to be answered is the final arbiter is over the secondary EC legislation.

2.1 The Monist Approach of the ECJ

Concerning the review of the constitutionality of Community law[148] the ECJ alone has the competence to review or abrogate the Community measures. Therefore, it is not possible for the Courts of the Member States to declare Community legislation incompatible, therefore unconstitutional based on their own constitutional provisions.[149] This line of thinking requires from the national constitutional courts not to rule on the substance of the case but to declare their lack of jurisdiction on the case. The logic is that legality of such legislations that determines their application in the Member States is reviewed under EC law and the ECJ is the only authority to do so under European law. In this regard, a national court cannot claim its jurisdiction in such a case at the first place. Thus, national courts cannot claim that such as case as admissible before their court even though they subsequently decide to dismiss the case on the merits of the case (i.e. the substance of the case). That is why according to the monist view of the ECJ, the Polish Accession judgment is problematic.[150]

[147] Tolias, *supra* note 105, pp. 281.
[148] Mattias Kumm, "Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and The European Court of Justice", *Common Market Law Review* 36: 1999. pp. 352.
[149] Kumm, *supra* note 148, pp. 354.
[150] See Polish Constitutional Court Accession Treaty Judgment, *supra* note 131.

This monist approach of the ECJ has also its roots and legal basis in the EC Treaty, mainly Article 220 EC (ex Article 164)[151] and Article 230 (ex Article 173)[152]. According to the jurisprudence of the ECJ, there are three main reasons for the supremacy of EC law. First, there is an international legal obligation that, once signed, Treaties must be observed (*pacta sunt servanda*) In the *Humblet*[153] case this general principle of international law serves as one of the justifications of the ECJ for the supremacy of EC law. The second justification is one of the underpinnings of the European legal system: the establishment of "a new legal order of international law" by Treaties.[154] For the autonomous nature of the Community law, the ECJ has not come up with theoretical explanations.[155] Kumm enumerated the factors that show that the EC legal order indeed has autonomy, thereby, emancipating itself from the legal order of the Member States:

(a) the rich body of law in important areas not strictly limited to the economic sphere,

(b) that have direct effect in Member States' legal orders and,

(c) are supreme over national statutory law,

(d) held to a fundamental rights standard elaborated by the ECJ,

(e) enacted, at least in part, by a legislative process involving majoritarian decision-making and participation of a European Parliament,

(f) adjudicated within a system that prescribes compulsory judicial review and ,

(g) the prevalence of a teleological method of legal reasoning, phenomenologically distinguishable from the focus on text and the

[151] It stipulates that "The Court of Justice and the Court of First Instance, ..., shall ensure that in the interpretation and application of this Treaty the law is observed".
[152] This article concerns the powers of the Court for the review of legality of the Community acts.
[153] Case 6/60, *Humblet v. Belgian State*, 1960 E.C.R. 559, 569. This case was also emphised in Wouters, *supra* note 41.
[154] *Van Gend en Loos, supra* note 2, pp.6.
[155] Wouters, *supra* note 41, pp. 66.

> will of the contracting parties that typically characterizes interpretation in international law.[156]

The last justification is explained in *Costa v. ENEL*: the uniformity and full effectiveness of EC law. The ECJ has a pragmatic goal in mind while inserting this justification which is that without the existence of the principle of supremacy, it is not possible to talk about the direct effect of Community legislation and therefore of EC law at all.[157] The ECJ has developed its reasoning of efficacy and uniform application of Community law in *Simmenthal* case in the following years. As a result of this case law, the principle of supremacy has been established with all its consequences in the national legal systems.

Therefore, the judicial review is institutionalised at the European level and Member States cannot make their version of Treaty interpretations by undermining the principle of supremacy.[158] It is the ECJ who decides the law at the European level. The supremacy of the European legal order is essential to ensure the major aim of the EC Treaty: The uniformity of the legal order. The result is that ECJ has the role of final arbiter.

In this respect, it is essential to mention the duties of the Member States and their institutions particularly national courts under EC law. National courts are crucial as they are the organs in the Member States that decide on what will happen if a Member State fails to fulfil its Community law obligations. Also national courts play important role in the enforcement of EC law within national boundaries as described in the first chapter. According to Article 10 of EC Treaty;

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[156] Kumm, *supra* note 148, pp. 356-357.
[157] Kwiecień, *supra* note 27, pp. 1483.
[158] *Ibid*., p. 1482. See also Kumm, *supra* note 148, pp. 354.

> Member States shall take appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.

As a consequence of the principle of supremacy under the established case-law of the ECJ, the national courts cannot challenge the validity of Community law; they cannot apply national provisions that are in conflict with EC law; they cannot enact such conflicting national legislation and they are under the obligation to abrogate such national legislation.[159]

From the general perspective, indeed this logic is required to ensure the Rule of Law in the EC. The jeopardy of limiting the rule of law to the national jurisdictions can be explained under various headings. The clash of interests between the nation-states may limit the improvement of coherent legal order and effective protection of fundamental rights across the borders[160] and create uncertainty.

However, the monist approach has its flaws. It is still questionable to accept the grounds described above except the one stemming from international law.[161] The main argument against this line of thinking is that there is no such thing as autonomous legal order at the European level, so no precedence of EC law over national laws.[162] The principle of

[159] Kwiecień, *supra* note 27, pp. 1482.
[160] Kumm, *supra* note 148, 358.
[161] Kwiecień, *supra* note 27, pp. 1483.
[162] Kumm, *supra* note 148, pp. 355.

supremacy cannot be considered in isolation without a further analysis of another concept of the Community law, namely the principle of conferral of competences or attribution of powers. It means that the upper level (the EC) has the competence and the power only if the lower level (the Member States) has given this competence. This logic dictates that Member State are still the "master of the Treaties" as they have the *Kompetenz-Kompetenz* (the competence to decide on competences over all the constituent units) where they give corresponding competences to national constituent units as well as to the Union.[163] It is true that EC law contains considerable amount references to the Constitutions of the Member States.[164] It is still the consent of the Member States that gives EC law its existence and it does not have the life of its own without such consent. Simply the requirement for *Kompetenz-Kompetenz* is not fulfilled by the European Union. It does not have a legal personality. Defence, foreign policy and internal affairs are still governed by Member States.[165] As long as the EC/EU is competent to legislate, then the articles of the Treaty as a primary sources and the resultant legislation promulgated based on the legal basis provided under the Treaty have supremacy over national law in case of conflict. Therefore, a clarification of corresponding competences of the EC/EU and the Member States are necessary.

The democratic deficit of Europe has long been a contentious issue and one of the reason the national courts have concerns regarding the fundamental rights protection at the European level. Due to this lack of democratic legitimacy, one can wonder why Member States (having democratically elected parliaments enacting national laws) are not allowed to protect the fundamental rights under their respective Constitutions. It may be either the case that a piece of Community legislation may breach fundamental rights protected under the national

[163] Kwiecień, *supra* note 27, pp. 1485.
[164] Wouters, *supra* note 41, pp. 33.
[165] Kumm, *supra* note 148, pp. 368.

Constitution or Community organs may exceed their competences and deal with issues under the competence of Members States (as defence issues described above) According to this logic, having the supreme law of land, Constitutional Courts must be allowed to exercise their jurisdictions stemming form their Constitutions.

However, for matters that fall under the competence of the EC, where acts of institutions do not exceed the limits of their powers, the ECJ should take precedence over conflicting national measures. The insight provided concerning the competences and the conferral of competences reveals the limits of principle of supremacy. It is possible to conclude that there is a concurrent, a symbiotic type of existence of European legal system and national legal systems.[166] Under this European pluralist legal order (as opposed to the monist approach) there is no hierarchy between the European and national legal systems.[167]

2.2 The National Courts

Are the national courts barred from reviewing the constitutionality of secondary EC law?[168] In other words, the issue is whether EC law may be subject to constitutional review by the supreme Courts of the Member States. The national courts are not inclined to accept the monist approach of the ECJ. Instead, they recognise a dualist view in which international law is implemented in national law. The second and third chapters of this dissertation brought some case studies and emphasized this view of Member States, Germany, Hungary and Poland. It was not the principle of supremacy at the centre of objection of the national courts. The national courts are aware of the fact that it is not possible as in the case of other international treaties to apply the principle of *lex posterior derogat legi priori*. The pragmatic

[166] Kwiecień, *supra* note 27, pp. 1484.
[167] *Ibid*., pp. 1485.
[168] Kumm, *supra* note 148, pp. 352.

approach of the ECJ for the efficacy and uniformity of EC law has been accepted also by the national courts. Instead the grounds for supremacy of Community law are contested. As discussed above, the hierarchy between the two legal systems is not accepted by the national courts. According to the dualist view, the grounds for supremacy for the national courts comes from the principle of observance of the international law in good faith, in other words, *pacta sunt servanda* or the principle of invocability of obligations arising from the international treaties that Member States signed.

As a consequence of this view, the state organs including the national courts are required to apply Community law. The national legal acts cannot be rendered inapplicable automatically in case of conflict with Community law as it is necessary to revoke them according to the national procedures.[169] This kind of protection of supremacy of national constitutional law can be seen in the stage of ratification of Treaties requiring the supremacy of EC law. The discussion over the Accession Treaty of Poland is one of the examples of this protection. The Constitutional Court as a guardian of the Constitution is the final arbiter against the acts of the international organs and legislation of those organs that are in breach of the Constitution. Therefore, the limit for the supremacy of EC law is the Constitution. In *Solange I* this was the stand of the BVerfG: the refusal of the ECJ as the final arbiter. We have seen in the third chapter that to a certain extent Polish Constitutional Court only in its EAW judgment accepted that the absolute point of reference cannot be taken as the national Constitution where the issue is related to the secondary EC legislation. However, this "sympathetic interpretation" has shown its limits in the Polish *Accession Treaty* case.[170]

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[169] Kwiecień, *supra* note 27, pp. 1488.
[170] *Solange* cases, *supra* note 3-4 and Polish Accession Treaty case, *supra* note 88, See also Kwiecień, *supra* note 27, p. 1490.

There are also criticisms against this dualist view. It may be the case that this line of thinking reduces the Rule of law to the national boundaries. EC law signifies an expansion of this Rule of law to the supranational sphere. Also, the argument of democratic legitimacy that is restricted to the nation-state.[171]

As indicated in this part of the chapter, the constitutional clash is the problem between the European legal order and national legal orders. We have seen the arguments of both sides and their respective solutions and the flaws in those solutions. The remainder of the chapter will focus on other alternative solutions that should be considered.

3. METHODS PROPOSED TO OVERCOME THE CLASH

Following the main headings of the debate from both sides above, it is possible to derive some possible solutions to the supremacy of EC law dispute. These are EC Law conform interpretation, Public International Law and European Constitutionalism.

3.1 The principle of consistent interpretation in the light of EC Law

The first way suggested is the principle of consistent interpretation of national law in the light of EC Law in order to ensure the efficacy and uniformity of Community law throughout the Union. This method applies more to the enforcement side of the debate on the principle of supremacy of EC law. It dictates that national laws and rules must be interpreted in the light of EC law in a manner as to conform to the existing provisions of EC law. According to the

[171] Kumm, *supra* note 148, pp. 370.

established case law of the ECJ on the principle of consistent interpretation[172], the national courts are responsible in realisation of their Community obligations.

Under this principle, if there is a conflict between a rule of EC law and national law, they have to decide the case before them by interpreting the national law as far as possible in the lines with existing EC law. The immediate result is that EC takes precedence over the national provisions without undermining the status of the national constitutions and their applicability. However, it does not provide the satisfactory solution as there is still discretion of national court in its interpretation of national law in the light of EC law.

3.2 Public International Law

Another solution offered by scholars is to draw an analogy between EC law and public international law. The existing general principles of international law that is already applicable to the relationship between the EC legal system and national legal systems can be used to the extent that EC law does not provide explicit provisions regulating this relationship (as in the case of absence of supremacy clause in the EC Treaty).

Under the general principles of international law, the European legal system and other national systems are considered as independent legal systems. The EC law is considered more of a system of international law than a supranational one. Therefore EC law should be transposed into national law and the effect of the international treaty is determined at the international level. In case of conflict the solution is also sought at the international level

[172] *Von Colson and Kamann, supra* note 30 and *Marleasing*, *supra* note 31. See also Craig and De Búrca, *supra* note 16, pp. 212-213.

rather than before the national courts. Therefore, the enforcement mechanism of international law is weaker compared to the enforcement mechanism under the EC law where the authorities of the Member States can be effectively brought before the ECJ by the Community institutions.

This approach conflicts with one of the basic principles of EC law, namely, uniform application of EC law throughout the Community. If the EC law is governed by the principles of international law whose principles are not as sophisticated as the EC system, Member States could easily evade and according to differing act of implementations of a same piece of EC legislation would be shaped differently form one Member State to another.

3.3 European Constitutionalism

Kumm presented an alternative conception of Common European Constitutionalism as a midway solution to the principle of supremacy debate between the ECJ and the national courts.[173] It relies on the very basic concept of constitution and secondly to the realization of the Rule of Law at the European scale. The aim is to achieve the uniform application of supranational rules. The Rule of Law will give predictability and regularity in the supranational level.[174] This principle is indeed a reflection of the monist approach of the ECJ. The third principle linked to the ideal of having liberal-democratic governance though the institutionalisation of level of fundamental rights protection and democratic legitimacy.[175] Based on this principle, Kumm establishes a normative framework for the assessment of the doctrines concerning the solution of the debate between the ECJ and national courts.

[173] Kumm, *supra* note 148, pp. 375.
[174] *Ibid*., pp. 375.
[175] *Ibid*., pp. 376.

According to Kumm, "the best set of doctrines within a particular constitutional context at a particular time is the one that realizes these principles to the highest degree possible, all things considered."[176]

Under this new framework, Kumm exemplifies the situation with the German Basic Law (GG) In terms of admissibility, for instance, under the terms of Article 100 GG jurisdiction of the court extents only to parliamentary laws enacted by German Parliament. The question is whether this jurisdiction also extends to acts of secondary EC legislation. From the perspective of the BVerfG, the legislative acts are directly applicable in Germany through legislative act of the Parliament laying down their direct applicability. According to the BVerfG this parliamentary act for which it has jurisdiction under Article 100 GG cannot allow establishment of law autonomous from it and undermines the legal protection of the BVerfG guaranteed by Article 100 GG.

European Constitutionalist approach accepts the existence of the European Legal Order as an autonomous body of law in its own area and therefore it is applicable in Germany. The German Constitution did not restrict the BVerfG's jurisdiction to parliamentary acts as that was the only one exercised on German territory at the time. Rather, it restricts the exercise as it accepts the development of an autonomous body of law in Europe. The acts of this new legal order are not subject to the review of the BVerfG. The legal basis for that principle can be found Article 23 GG and the Preamble which creates a commitment of establishing a "united Europe". This requires that national courts should not interpret Article 100 GG so that it extends to acts of secondary EC legislation. If the guarantees of the ECJ for fundamental rights at the European level are not at sufficient level as the German Basic Law then the

[176] *Ibid*.

BVerfG could assert its jurisdiction over parliamentary acts implementing secondary EC legislation.[177]

As it can be seen, this approach does not go much further from the BVerfG's approach (the approach of national courts). It does not provide an answer to what would happen in the case where the EC Treaty articles are at issue or EC secondary legislation that has automatic direct applicability. Moreover, this approach is also problematic in the sense that the BVerfG can review the constitutionality of the rules of EC law under the circumstances where the adequate protection of fundamental rights is not guaranteed at EC level. The problem with this approach is that conflicts with one of the tenets of his theory, namely uniformity of Community law. On the one hand he tries to achieve uniformity of European law.

4. CONCLUSION

This chapter returned to the theoretical debate over the principle of supremacy. With regard to the principle of supremacy, the ECJ follows a monist approach by asserting the existence of an autonomous European legal order and the necessity to ensure uniform and efficient application of EC law. Indeed, the very existence of EC law depends on the direct applicability of the provisions of EC Treaties and other secondary legislation in the Member States and precedence of EC law over the national laws. Otherwise, without a proper supranational legal mechanism, the meaning of European integration and the commitment of states under the EC Treaties would have been meaningless. However, the Constitutional Courts of the Member States rely on the principle of *pacta sunt servanda* in explaining the supremacy of EC law: their constitutions authorize this supranational organization by giving

[177] *Ibid*., pp. 378.

some of the competences that traditionally belong to the nation-state by surrendering some parts of their sovereignty and they just observe their commitments under the international law. There are, however, some solutions offered to eliminate this constitutional clash. However, none of the solutions provide an effective remedy. The experience with the BVerfG has shown that even if there was a learning experience between two legal systems, the clashes can occur. The effects of enlargement also have been felt in the centre of the debate. A political solution might be needed. The decision-making process and the institutions at the national and the European level might be aligned to each other so that national legislations would not be in conflict with EC Law. However, this is very complicated, time-consuming and inefficient method. The next chapter will turn to the Constitutional Treaty as an alternative solution.

CHAPTER V

THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

1. INTRODUCTION

In 2001 the Laeken European Council the heads of state and government of the Member States of the European Union adopted the "Laeken Declaration on the future of Europe" in order to convene a "European Convention" to draw up a text amending the existing European Treaties.

The preparation of the draft Constitution was a result of contributions of several institutions and of their deliberations under this Convention to which the representatives of the national parliaments, the European Parliament, the national governments and the Commission participated. The Intergovernmental Conference (IGC) adopted the result of the Convention to a major extent. The Treaty establishing a Constitution for Europe (Hereinafter: TCE), commonly referred as the European Constitution was signed in 2004 by the representatives of the Member States. This can be accepted as one of the spectacular developments in the process of European integration. Although, with the subsequent French and Dutch referenda the future of the TCE is bleak, there are still expectations to revive the text.

The main objective of the TCE is to replace a set of existing European Treaties which form the current European constitutional system under a single text; to codify the European Charter of Fundamental Rights and to streamline the decision-making mechanisms in European institutions. With its innovations such as new forms of legislative acts, its amendments in

order decrease the democratic deficit that has been long been a debate in Europe and its introduction of "primacy of EC law" clause for the first time in the Treaty, the TCE can be regarded as one of the bold steps taken in the European integration process. The question remains is that whether Europe will achieve this unity (the uniform application of EC Law through the precedence of EC Law over the national laws) in diversity (in the concurrent existence of various national legal systems besides the EC legal order).[178]

This chapter mainly concentrates on the improvements that the TCE brings to the debate of supremacy in a broader perspective. It is true that for the first time the TCE specifically introduced a clause to decrease if not eliminate the clash between the ECJ and other national courts concerning supremacy of EC Law. Moreover, it brings a clear distinction concerning the competences of the Community vis-à-vis its Member States. It also provides mechanisms to level up the accountability and the legitimacy of the Union by introducing inventions to eliminate the democratic deficit problem.

2. THE MAIN CONTRIBUTIONS OF THE TCE

The main reason for the debate revolving around the principle supremacy of the ECJ law is that there is lack of trust in the national systems that their citizens are represented adequately in the European institutional mechanism and their fundamental rights are better addressed and protected by the national systems. The TCE brings certain mechanisms to ease this tension and to decrease the democratic deficit of the Community which is the main subject of this section. Part I of the TCE describes the values, objectives, decision-making procedures and

[178] "Unity in Diversity" (*In Varietate Concordia* in Latin) has been adopted as the European motto by the Constitutional Treaty under Article 1-8 of the TCE.

institutions of the European Union. It also includes a part concerning provisions on citizenship and democratic life. Part II includes the Charter for Fundamental Rights. Part III describes the policies, internal and external action and functioning of the EU. The main improvements of the TCE will be described under the following sections with a view to understand its contributions to the debate on supremacy of EC law.

2.1 The TCE provides a single foundation for the Union with revised principles and includes the Charter for Fundamental Rights

Under the existing system, the EU is governed by several founding treaties and their amendments. These are three original Treaties founding the European Communities (the ECSC (1951), the EURATOM (1957) and the EEC(1957)) and fourth founding treaty, the Treaty of Maastricht (1992) establishing the European Union. The TCE replaces the existing European Communities and the European Union and other treaties amending and supplementing them such as the Merger Treaty (1965), the Single European Act (1986), the Treaty of Amsterdam (1997) and Treaty of Nice (2001). As a result there will be a single text comprising all these Treaties. Moreover, the European Union will be a single legal personality under the terms of Article I-7 of the TCE.

The Treaty of Maastricht introduced a three-pillar structure with the establishment of the European Union: the Community pillar comprising the three Community Treaties, the Common Foreign and Security Policy (CFSP) pillar and the Justice and Home Affairs (JHA) pillar. Under the Treaty of Amsterdam some activities governed under the JHA were transferred to Community pillar. The Community pillar has a supranational character whereas due to the delicacy of the issues dealt under the second and the third pillar, these retain their

intergovernmental nature. The TCE therefore merges these there pillars although special procedures are still applicable under the second pillar for foreign policy, security and defence.[179] An exit clause is also provided under the TCE that permit Member States to leave the Union.

From the legal perspective, the TCE is a treaty and therefore it needs to be ratified according to the procedures applicable in the Member States. Currently, the TCE failed in the French and Dutch referenda. Had it been ratified it would enter into force in November 1, 2006. As of May 2006, the following states Member States ratified the TCE: Austria, Belgium, Cyprus, Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Slovakia, Slovenia and Spain. The possible future of the TCE will be discussed in the last section.

Another significant input of the TCE is the inclusion of the Charter for Fundamental Rights into the Constitution. Under Title II referred as "Fundamental Rights and Citizenship of the Union" Article I-9 provides that "the Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II." Above all, it provides for the Union to accede to the European Convention on Human Rights (ECHR). This provides a concrete basis in the TCE for the protection of fundamental rights in the EU legal order.

This inclusion should be welcomed in the face of debates between the ECJ and the national courts[180] on the fundamental rights since the Member States had long claimed that the standard of protection for human rights in the Community was not equivalent to that of national systems as it has been stated in previous chapters of this dissertation. It is of use now

[179] The Constitutional Treaty –Key Elements, Euractiv http://www.euractiv.com/en/constitution/constitutional-treaty-key-elements/article-128513
[180] *Internationale Handelsgesellschaft, supra* note 49, para 13.

to turn back briefly to this debate on the protection of fundamental rights and the evolution of the case law of the ECJ to reveal its close link with the debate on principle of supremacy of EC Law.

As a response to the claims, at the beginning the ECJ claimed the contrary asserting that the Community has the same level of protection and used to reiterate the statements in its judgments such as;

> In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[181]

This is closely linked with the debate on supremacy of EC Law as the ECJ asserted that the existing system in the Community for the protection of fundamental rights was adequate and therefore, there was no ground for a Member State to question the validity of a Community measure (such as a secondary EC legislation with a higher rank, a regulation) by proclaiming that it runs contrary to fundamental rights as formulated under its national Constitution. The reason is that the EC law takes precedence over such conflicting national legislation.

Overtime, the ECJ has come to accept the existence of other international treaties. In *Nold v. Commission*:

[181] *Internationale Handelsgesellschaft*, *supra* note 49, para. 4

> In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.
>
> Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

In the *Omega* case for instance, the ECJ outspokenly added to this that[182] "the European Convention on Human Rights and Fundamental Freedoms has special significance in that respect." Finally, this recognition was included in Article I-9 of the TCE.

As a result two major changes are expected to occur: the ECJ will have a codified catalogue of fundamental rights and the jurisdiction of the European Court of Human Rights[183] will expressly cover the Union.[184] Under this new structure, the European Court of Human Rights continues to review the complaints about domestic authorities. This may also include the cases that are brought against the domestic authorities which are simply implementing the national legislation that was adopted in order to implement Community legislation. In these cases the Community legislation may infringe upon the fundamental rights as protected under

[182] Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin der Bundesstadt Bonn ECR 2004* P *I-09609.*
[183] European Court of Human Rights is located at Strasbourg and is one of the institutions of the Council of Europe which is outside the institutional framework of the EC.
[184] Rick Lawson, *The Impact of th European Constitution on the Relationship between Strasbourg and Luxembourg,* Contribution to the Proceedings Asser Institute Colloquium on European Law, The Hague, October 2004, The EU Constitution: The Best Way Forward?

ECHR.[185] With the accession of the European Union to the ECHR, now it is possible for the European Court of Human Rights to address the alleged violations by the institutions of the European Union. At the same time, the ECJ will continue to review the complaints about the European institutions (based on the legislative acts they issued for instance). In the *Internationale Handelsgesellschaft* and the *Nold* cases, the ECJ asserted to do so. Indeed, in its recent decisions such as particularly the *Baustahlgewebe*[186] for the first time the ECJ ruled that there is a Community violation of fundamental rights. With the inclusion of the Charter of Fundamental Rights the Community will have all the means to do so. The Charter indeed comprises a catalogue of wide variety of rights ranging from civil, political, economic, cultural and social rights including very innovative rights such as right to good administration. It is also striking that now it is possible for the ECJ to examine the compliance of the Member States of the fundamental rights protected by the EU as a matter of EU law. In conclusion, as a result of the inclusion of the TCE of the Charter for fundamental rights "human rights protection profile" of the EU will enhance. Therefore, it is possible to expect less cases alleging that a Community measure is in conflict with basic fundamental rights protected under the national constitution as it is now also possible for the ECJ to take action against such act of the Community institutions or even further against a Member State that is in breach of its obligations to protect fundamental rights arising from the TCE.

[185] Such as protection of property. The European Court of Human Rights case EctHR, 13 Sept 2001, *Bosphorus Airways v. Ireland* (Appl. No. 45036/98) where the ECJ refused the claims under the same case Case- 85/95, *Bosphorus* [1996] ECR I-3953.
[186] Case C-185/95 P, *Baustahlgewebe* [1998] ECR I-8417.

2.2 The TCE simplifies and changes the institutional framework

Title IV brings several changes in the institutional structure of the Union. The TCE attempts to simplify the legal instruments that are used in order to fulfil the objectives of the Union. One of the improvements that the TCE brings is the unification of legal instruments across the policy areas. To this end, the number of instruments which is currently 15 will be also reduced to 6. These are specified as European laws and European framework laws (legislative acts), European regulations and European decisions (implementing acts), recommendations and opinions (non-binding acts).

According to this, a European Law (which denotes to the EC Regulation or the PJC[187] Decision previously) will be a legislative act having general application. It is binding in its entirety and directly applicable in all Member States. A European framework law (which denotes to the EC Directive or the PJC Framework Decision previously) is binding as to the results to be achieved, addresses the Member States and leaves the choice of the form and methods. The PJC Conventions are replaced by either European laws or European framework laws. A European Decision replaces Joint actions and Common Positions under CFSP and it is a non-legislative act though having a binding character where it specifies those to whom it is addressed and is binding on them. Recommendations and opinions are set to be non-binding again.[188]

As far as the decision making-procedures concerned, the qualified majority voting (QMV) is defined as 55 percent of the Member States representing at least 65% of the EU's population

[187] The Cooperation on Justice and Home Affairs pillar (JHA) under the Maastricht Treaty was renamed in Amsterdam Treaty as Police and Judicial Cooperation in Criminal Matters (PJC).
[188] Simplified jargon and legal instruments
http://en.wikipedia.org/wiki/European_constitution#Simplified_jargon_and_legal_instruments

under the Article I-25. This mechanism is accompanied by two further arrangements. First, the mechanism tries to prevent a situation where only three large Member States would be able to block a Council decision due to increase in population threshold. Therefore, to form a blocking minority would need to gather at least four Member States. Furthermore, the mechanisms are devised in order to have a broader consensus basis within the Council by allowing at least three-quarters of a blocking minority to ask for vote to be postponed.

Unanimity still remains a rule in the areas such as taxation and partially to other policy areas such as social policy, foreign, security and defence policy.

The TCE also specifies the roles of the European Parliament, the Council and the Commission. The TCE specifically spells out the missions of the Commission under Article I-26 such as its monopoly in legislative initiation process, its executive function and its function of representing the Union externally in CFSP. The Commission is also located at the position under the TCE for the initiation of inter-institutional programming.

Another development in the institutional structure is the creation of the post of the Union Minister of Foreign Affairs who is going to be responsible for the representation of the Union. Article I-28 defines the tasks of this new post. According to this, this task will be the combination of the task of the High Representative for the Common Foreign and Security Policy with those of the Commissioner for acting on behalf of the Community for external relations. This Minister of Foreign Affairs will be in charge of CFSP under the mandate of the Council and at the same time will be a full member of the Commission. This will increase the political accountability aspect of the Union vis-à-vis the European citizen and is a positive development as far as the democratic deficit debates are concerned.

The TEC also establishes the European Council as a distinct institution of the Union than the Council of Ministers. It will be chaired by a President appointed for two and a half years with renewable terms. The presidency of the different Council formations will continue on equal basis. This will assure the continuity in administration.

Composition of institutions also changed. The maximum number of seats in the European Parliament is increased to 750 and for each Member State the minimum number will be minimum 6 and maximum 96 seats. The existing composition of the Commission (one Commissioner per Member State) will be altered by the year 2014.

2.3 The TCE specifies the competences of the Community and updates the third pillar while rewriting the second pillar

As opposed to other Treaties the TCE did not bring major changes concerning the competences of the Community to a large extent. The TCE significantly updates the provisions under the JHA in order to facilitate the establishment of the area of freedom, security and justice. In many of the situations the decision-making mechanism is set as QMV. There is no major change concerning the provisions of external relations.

The competences of the Community are clearly defined under Title III. According to this the areas of exclusive competences of the Union are;

a) Customs union;
b) the establishing of the competition rules necessary for the functioning of the internal market;
c) monetary policy for the Member States whose currency is the euro
d) the conservation of marine biological resources under the common fisheries policy
e) common commercial policy

The areas under the shared competence of the Union and the Member States are;

a) internal market;
b) social policy, for the aspects defined in Part III of the TCE;
c) economic, social and territorial cohesion;
d) agriculture and fisheries, excluding the conservation of marine biological resources;
e) environment;
f) consumer protection;
g) transport;
h) trans-European networks;
i) energy;
j) area of freedom, security and justice;
k) common safety concerns in public health matters, for the aspects defined under the Part II of the TCE.

The delimitation of these competences facilitates the use of the principle of subsidiarity by the Member States to make sure that the Union will not act out of its competences and the tensions concerning the supremacy of the Union law for the areas falls under its exclusive competence, the Union will exercise its supremacy over the law of the Member States.

2.4 The TCE brings more democracy, transparency and efficiency

The democratic legitimacy of the decision-making in the EC has been always one of the contentious issues. The problem of democratic deficit denoted to unresponsiveness of the Community institutions to the "democratic pressure".[189] Under the national systems, the decision makers act under such pressure knowing that they are politically accountable of their decisions and act according to the demand of the society in order to survive in the elections. Despite its supranational character in certain areas which empowers the Community to take action on behalf of the European citizens, some of the important institutions of the EC are not directly elected by the citizens such as the such as the Commission which occupies a significant place in the decision-making structure as the initiator of the legislative acts. Although the European Parliament exists as an elected body, its representation in the decision-making mechanism is limited to certain areas specified under the Treaty despite recent improvement through co-decision procedure. Another aspect is the distance to the citizens. As the areas of competences enlarges the matters become more distant to the citizens. Moreover the complexity of the decision-making in the Union further decreases the transparency of the process and makes it difficult for outsiders to understand what is going on in the decision-making process.

The TCE addresses this democratic deficit issue in a number of areas and certain arrangements are made in order to increase democracy, transparency and accountability of the EU institutions. For instance, the TCE provides that if enough number of signatures are collected (one million) European citizens can invite the Commission to submit an appropriate proposal and initiate legislative act in that matter. Moreover, during the exercise of its

[189] Craig and De Búrca, *supra* note 16, pp. 167.

legislative function, the proceedings of the Council will be open to public. The simplifications in the legislative acts and decision-making procedures under the TCE further aims to decrease this democratic deficit. Furthermore, national parliaments will be informed about all the new initiatives of the Commission and if there are questions that the proposal does not comply with the subsidiarity principle (one third of the Member States Parliaments) then the Commission has to review its proposal. Finally, the inclusion of the Charter for fundamental rights means that a better protection will be provided under the Union.

2.5 The supremacy of the Union Law clause is included

All these above-mentioned new innovations of the TCE have positive reflections to the debate concerning the supremacy of EC law either by increasing the level of protection of fundamental rights, by clearly delimiting the competences of the community, by simplifying the decision-making procedures or by decreasing the democratic deficit of the Community. The TCE brings even more. It includes a clause (Article I-6) clearly stipulating that "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 TCE introduces for the first time such a "supremacy clause" into a Community treaty. After all, since its early decisions such as *Costa v. ENEL*[190] the ECJ has established a case-law and the supremacy of EC law became one of the general principles of EC law. It is more than a mere codification of the existing case-law of the ECJ. From the legal point of view, the Union now can simply rely on a primary source of EU law to found its claims of supremacy of EU law not the its case-law. The rulings of the ECJ, therefore, become more legitimate and well-grounded. The TCE provides that supremacy of EC law has a legal basis in the Constitution.

[190] Case 6/64, *Costa v ENEL, supra* note 29.

3. CONCLUSION

The TCE introduces many innovations in several areas under the Union law. It provides greater transparency, democracy and less complexity in decision-making procedures. In that regard, the TCE is "bringing Europe closer to its citizens". It also replaces the existing Treaties and provides a single legal text. The inclusion of the Charter of Fundamental Rights and the possibility of the accession of the Union to the ECHR are remarkable improvements in the area of protection of fundamental rights. This will increase the level of protection of fundamental rights within the Union and the concerns of the some Constitutional Courts of the Member States (such as the BVerfG or the Hungarian Constitutional Court) will be eased. The clear delimitation of competences also facilitates that who is the final arbiter in which area. Thus, for the matters that fall under the Community competence the Union law will take precedence under the Article I-6 of the TCE. Although the TCE failed during the French and the Dutch referenda, there are certain opinions to save the text. One way suggested is to convince the opponents and save the text in its entirety. An alternative way is to re-draft the text again. Considering the time and efforts spent in the Convention and IGC, the first method is more effective in order to save what has been achieved so far.[191] However, the second way is more plausible in the face of increasing number of opponents of further European integration. Whichever the result will be the EU has to wait for some more time to settle the dispute over the supremacy of EC Law till the adoption of the TCE clarifying many matters that contributed to the debate.

[191] Debate about future possibilities for the Constitution
http://en.wikipedia.org/wiki/European_constitution#Debate_about_future_possibilities_for_the_Constitution

GENERAL CONCLUDING REMARKS

The legal system that has been established with the European Integration process under the supervision of the ECJ is one of the most efficient international legal systems. The supranational nature of the European Communities necessitated this legal system to be founded on principles that distinguish the EC legal system from other international mechanisms. It is something more than the general principles international law but principle of supremacy that ensures assent of the Member States to their obligations enshrined under the Treaty and the secondary EC legislation. Thus, EC law takes precedence over conflicting national legislations in order to provide uniformity and efficacy of the Community law throughout the Union. It is the first chapter of this dissertation that focuses on this monist approach of the ECJ.

The second chapter tackles the debate from another perspective, from the viewpoint of the national Constitutional Courts. The constitutional clash between the two legal systems generally occurs due to dualist legal systems that require the transposition of the international law into municipal law through national legislative acts. The German legal system and the jurisprudence of the BVerfG is one of the outstanding examples of this debate. This relationship between the BVerfG and the ECJ has reached to a certain maturity through the learning process since the ECJ's ruling in *Internationale Handelsgesselshaft.* As a result of this process the BVerfG decided not to use its jurisdiction for constitutional review of the secondary legislation of the Community if certain level of protection for the fundamental rights as in the German system was ensured by EC Law. In *Bananas* judgment, the BVerfG strictly defined its jurisdiction on the secondary EC Law.

The third chapter attempted to demonstrate that this may not be the end of the debate. The jurisdiction of the ECJ and its well established principle of supremacy is under attack. Not only that the BVerfG can decide to use its emergency competence for certain rights protected by the Constitution if a secondary EC legislation conflicts with it (under the third pillar) but also the similar tensions can occur in the courts of new Member States. The Hungarian and Polish Constitutional Courts have given the very first signals in that direction. Those countries had to adopt the *acquis communautaire* before their accession and thereby recognizing that EC Law not only binding but also takes precedence over their national laws. However, as in the German example, sometimes citing from the decisions of BVerfG in the national judgments, by warning the ECJ of the limits of its competences, the newly set up Constitutional Courts of the new Member States asserted that they are the definitive guardians of national sovereignty and the Constitution of their land. Even in the countries where the transition (during the accession debates) was smooth such as Poland, it is possible to trace the same tension with the ECJ.

The fourth chapter turns back to the very question that whether there is a way to ensure *rapprochement* between the ECJ and the Constitutional Courts of Member States. If not, whether there is a way to overcome those conflicting approaches. In this dissertation several ways have been proposed to reach this *rapprochement* including applying only existing EC Law conform interpretation, recourse to public international law principles, finding a mid-way with European constitutionalism. However, these alternative ways do not provide a satisfactory solution.

The last chapter analyses its various innovations under the TCE and suggests that this is the best possible way to address this clash between the two legal systems. Apart from its

introduction of the supremacy clause, TCE provides various means to transcend this problem through increasing the democratic accountability of the Community, increasing the level of standards for the protection of fundamental rights, clarifying the competences and simplifying the decision-making mechanisms. After all, it is apparent that the problem is not the question that which legal system superior over the other but the interaction between these legal systems due to their mandatory co-existence.[192] The TCE provides the means that governs this interaction in a better way if not perfect.

[192] N. MacCormick, "Questioning Sovereigty" (Oxford: Oxford University Press, 1999) pp. 117-21.

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