Mutual Constitutional Tolerance in the EU, with Special Emphasis on the Recent Case Law of the Polish and the Hungarian Constitutional Court

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Abstract

For more than five decades, the constructive and responsible judicial dialogue concerning the primacy of EU law over the national constitutions, have significantly contributed to the creation of a more democratic EU, with a strong and efficient, multi-level fundamental rights protection. For five decades, national constitutional courts and the CJEU have avoided encroaching upon each other's powers and inflicting lasting damage on the European integration and on the rule of law itself. In recent years, however, we have witnessed the worrying signs of a profound defiance towards the supremacy of EU law by some national constitutional courts, particularly in Germany, Romania and in Poland. As it became clear from the consequences of these decisions, defiance of national constitutional courts regarding their obligations based on EU law does not pay off. Namely, national courts and authorities will be under the legal obligation based on EU law to ignore such a decision brought by the national constitutional court, which renders an EU legal act inapplicable; and – as it happened in case of Germany and Poland - it will most likely result in infringement proceedings. The right approach instead, is to continue an open and direct judicial dialogue, as long as it is necessary, to find a solution for domestic constitutional concerns, which is in compliance with the legal obligations under EU law of the Member State in question.

Keywords: constitutional tolerance, constitutional court, judicial dialogue, supremacy, constitutional reservations.

1. Background

More than 50 years have passed, since the CJEU has developed its activist and revolutionary, but for the future of the European integration inevitable case law on the autonomous, directly applicable and directly effective character of the EU law, which requires supremacy in case of conflict with national law, even in respect of national constitutional law.

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Equally, a long time has passed since for the first time, the German Constitutional Court, elaborated its fundamental rights-based reservations, which were later followed by competence-based, sovereignty-based and constitutional identity-based reservations to defeat the requirement of unconditional acceptance of the supremacy of EU law over national constitutional law.

The above case law of the German Constitutional Court was followed by other European constitutional courts, and the German Constitutional Court became the leading and most influential national constitutional court, in – at least at the beginning – a very productive constitutional dialogue, between the CJEU and national constitutional courts.

The legitimate concerns expressed by national constitutional courts have contributed to major changes in EU law. Whether the increased role of the European Parliament until it became co-legislator, or the involvement of the national Parliaments in EU legislation, these changes made the operation of the EU more democratic.[1]

In the area of the protection of fundamental rights, concerns expressed by the German Constitutional Court and later other European constitutional courts, forced the CJEU to clarify what it considers to be a part of the EU fundamental rights framework. The Member States, in turn, have made the decision, that the EU shall join the ECHR, meanwhile, the Lisbon Treaty rendered the EU CFR a part of primary law, with both vertical and horizontal direct effect. In effect, the judicial dialogue between national constitutional courts and the CJEU was constructive and successful.

For almost five decades the above-described constitutional dialogue has proved to be beneficial and greatly contributed to the further development of European integration. For almost five decades, the CJEU and also national constitutional courts avoided encroaching upon each other's powers and inflicting a lasting damage on the common European project. The various reservations, developed by national constitutional courts, following the path trodden by their German counterpart, in the area of fundamental rights, competences, sovereignty and constitutional identity, were not only used carefully, but the dialogue itself helped shape the European integration in a great extent.

There was probably only one instance, when the constitutional court of a recently joined Member State applied the *ultra vires* control over a CJEU decision,[2] however, this was widely condemned in scholarly literature[3] and

1 There are still democratic shortcomings, which gives reason to remain critical. *See e.g.* Joseph H. H. Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law', *in* Carlos Closa & Dimitry Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016, pp. 313-326.

2 As a reaction to the *Landtová* judgment (Judgment of 22 June 2011, *Case C-399/09, Landtová,* ECLI:EU:C:2011:415), the Czech Constitutional Court declared an EU act *ultra vires*, in its decision of 31 January 2012, *Pl. ÚS 5/12 Holubec*.

3 Jan Komarek, 'Playing with matches: the Czech Constitutional Court's Ultra Vires Revolution', *UK Constitutional Law Association*, 2012.

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considered as a misstep from a relatively new Member State's constitutional court. It remained an isolated case. Apart from this singular incident, however, for almost five decades, national constitutional courts continued to acknowledge the ultimate and immense responsibility of declaring an EU act inapplicable, continuing to avoid applying the *Damocles' sword* and inflicting unrepairable damage, *not only on the European integration, but on the rule of law itself*.[4]

The above described cautious approach of national constitutional court radically changed in 2015,[5] when the German Constitutional Court decided for the first time to ignore its obligation to send a preliminary reference to the CJEU in a European arrest warrant case.[6] Instead, it declared the matter *acte claire*, and refused to execute the European arrest warrant in question, citing a violation of Article 1 of the *Grundgesetz*. This approach was further escalated, in the summer of 2020, when the German Constitutional Court declared a CJEU decision and a decision of the European Central Bank to be *ultra vires* and not applicable. As a result, the German Federal Bank was under a legal obligation on the basis of EU law, to ignore the judgment of the Federal Constitutional Court, and at the same time it was under the legal obligation on the basis of German constitutional law, to ignore the relevant decisions of the ECB and the CJEU.[7] The German Constitutional Court not only ignored its obligation to send a preliminary reference to the CJEU, but also created the possibility for infringement proceedings against Germany,[8] and showed a less positive example to other constitutional courts, by breaching the practice of great and well respected predecessors, followed for five decades.

2. Decision No. K 3/21 of the Polish Constitutional Tribunal

The example set by the German Constitutional Court was quickly followed, when on 7 October 2021, the Constitutional Tribunal of Poland (PCT), upon a request for interpretation by the Prime Minister of Poland with respect to the compatibility of Articles 1, 2, and 19 TEU with the Constitution of Poland, declared, that the cited provisions of the TEU are partly unconstitutional.[9]

4 András Jakab & Pál Sonnevend, 'The Bundesbank is under a legal obligation to ignore the PSPP Judgment of the Bundesverfassungsgericht', *Verfassungsblog*, 25 May 2020.

5 On the possible causes and outcomes, *see* Franz C. Mayer, 'Defiance by a Constitutional Court – Germany', *in* András Jakab & Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, 2017.

6 BVerfG 2 BvR 2735/14 15 December 2015 – EAW II.

7 *See* Mayer 2017.

8 Ingolf Pernice, 'Sollte die EU-Kommission Deutschland wegen des Karlsruher Ultra-Vires-Urteils verklagen? PRO', *Verfassungsblog*; *see also* Judgment of 30 September 2003, *Case C-224/01, Köbler,* ECLI:EU:C:2003:513; Judgment of 13 June 2006, *Case C-140/09, Traghetti*, ECLI:EU:C:2010:335; Judgment of 9 September 2015, *Case C-160/14, Ferreira da Silva e Brito*, ECLI:EU:C:2015:565; Judgment of 28 July 2016, *Case C-168/15, Tomásová*, ECLI:EU:C:2016:602.

9 Decision No. K 3/21 (X. 7.) by the Constitutional Court of Poland.

2.1. Context of the Decision

Based on the questions raised by the Prime Minister of Poland before the PCT, it is not difficult to find connections, with the already ongoing infringement proceedings and the rule of law procedure, lunched by the European Commission against Poland, mainly centering around the issue of judicial independence, and the existence of the disciplinary chamber at the Supreme Court.

As it is known, the CJEU passed important rulings with regard to judicial independence in Poland, in its judgments in *C-585/18, C-624/18 and C-625/18*. These CJEU judgments were not well received by the Polish government and the Polish Constitutional Tribunal. The Parliament adopted a new law at the end of 2019, which introduced a new disciplinary offence punishable with dismissal from office, for those cases, where a judge challenges the existence, legitimacy or the effect of a judicial appointment, and the PCT suspended the decision of the Polish Supreme Court, which wanted to give effect to the CJEU rulings by hearing challenges from judges with regard to the existence, legitimacy, or the effect of judicial appointments. With this approach, the PCT was not only defying the enforcement of EU law, but it also blocked the Supreme Court from fulfilling its duties under EU law.

The CJEU ruling on 2 March 2021, in case *C-824/18*[10] on the judicial control over judicial appointment procedures is of a paramount importance from the aspect of strengthening judicial independence within the EU. The CJEU held that Articles 19(1) and 267 TFEU, as well as Article 4(3) TEU preclude the application of national law, which, deprive a national court of its jurisdiction to rule on appeals in judicial appointment cases (in particular, the Polish Supreme Court, against decisions of the Polish National Council of the Judiciary) or which declare such appeals to be discontinued by law while they are still pending, ruling out the possibility of being continued or lodged again, and which thereby also deprive a national court of the possibility of obtaining an answer to the questions that it has referred to the CJEU for a preliminary ruling.

In particular, the CJEU pointed out that Article 267 TFEU and Article 4(3) TEU preclude the application of national law, which have the effect of preventing the CJEU from ruling on questions referred for a preliminary ruling, and Article 19(1) second subparagraph TEU precludes the application of national law, which gives rise to legitimate doubts, as to the independence and neutrality of the judges appointed. Article 19(1) second subparagraph TEU also precludes the application of national law, which would have the effect, that the outcome of appeals in judicial appointment cases are ignored.

No wonder, that the Prime Minister's questions targeted the very same provisions of the TEU, which were referenced in the above case law of the CJEU.

2.2. Legitimacy of the PCT

Well before the judgment in question, serious legitimacy issues were raised with regard to the appointment of five judges of the PCT, due to the fact that in 2015

10 Judgment of 2 March 2021, *C-824/18, A.B. and Others* (nomination of Supreme Court judges, Poland), ECLI:EU:C:2021:153.

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the President of Poland refused to swear in five justices elected by the Polish Parliament to the Constitutional Tribunal, only because parliamentary elections were to be held that year, and he expected that his party (PiS) will win the elections. Following the elections that the PiS had in fact won, the newly elected Parliament elected five new justices, who were sworn in by the President. However, in its May 2021 judgment in *Xero Flor*[11] the ECtHR declared, that the judges sworn in in 2015 were not legitimately elected judges (the decision focused in particular on one of these judges, Mariusz Muszinsky), and Article 6 ECHR (the right to a tribunal established by law/the right to a fair trial) had been violated. It follows from the above, that if the PCT itself is not elected entirely legitimately, then its judgment will not be legitimate either.

2.3. Critique of the Decision

Constitutional courts are the institutions responsible for interpreting the national constitution with *erga omnes* effect, but not the TEU, therefore the Constitutional Tribunal of Poland should have at least submitted a preliminary reference to the CJEU, to clarify the interpretation of the respective provisions of the TEU. Ignoring its obligation to submit a preliminary reference is in itself a breach of EU law under Article 267 TEU.

There are however stronger arguments[12] that the PCT should have instead refused to rule on the matter, as the PCT has already issued a ruling on the compatibility of the respective provisions of the TEU with the Constitution of Poland, in its well-known *Accession Treaty Judgment No. 18/04*[13] (passed in 2005, following accession).

In its *Accession Treaty Judgment* the PCT already gave clear guidance for national courts and authorities on how to reconcile the supremacy of the Polish Constitution declared in Article 8 of the Constitution with the principle of supremacy of EU law. As the PCT back in 2005 pointed out, Article 9 of the Constitution declares the principle of the respect for international law by the State. Poland mainly follows a dualist approach to public international law.[14] Even if the Constitution is the supreme law of Poland, it must respect its international commitments according to the earlier case law of the PCT. Where there is a conflict between the Constitution and the international commitments of the state, then it is the duty of the Constitutional Tribunal to call upon the legislator if necessary, to find a way to resolve the conflict. The above logic was reflected in the earlier case law of the Polish Constitutional Tribunal. According to the *Polish Accession Treaty Judgment*, since the constitution declares itself to be the supreme law of the land, the legislator must resolve all conflicts that may

11 ECtHR, *Xero Flor (dec.),* No. 4907/18, 7 May 2021.

12 Statement of Retired Judges of the Polish Constitutional Tribunal, *Verfassungsblog,* 11 October 2021, at https://verfassungsblog.de/statement-of-retired-judges-of-the-polish-constitutional-tribunal/.

13 Decision No. 18/04. (V. 11.) of the Constitutional Court of Poland.

14 *See also* Anna Wyrozumska, *Transnational Judicial Dialogue on International Law in Central and Eastern Europe*, Łódz, 2017, pp. 20-23.

arise between the Constitution and the international commitments of the state to ensure compliance with international commitments.

In its *Accession Treaty Judgment*, the Constitutional Tribunal suggested *three scenarios* to resolve a possible conflict between EU law and the Polish Constitution, which can also be very helpful in the current situation: *(i)* Scenario one refers to the amendment of EU law, in order to ensure compliance with the Polish Constitution – this scenario seemed less realistic for the Constitutional Tribunal judges in 2005, and it is still less realistic. *(ii)* Scenario two would be to amend the Polish Constitution[15] to ensure its compliance with EU law, which seems to be the most realistic way to solve such a conflict. *(iii)* Last, but not least, scenario three, the least plausible option is to withdraw[16] from the EU.

Even if the PCT has referenced the case law of its German counterpart several times, it should be seen clearly, that there is not much similarity between the German *PSPP* ruling and the *PCT* ruling in case *K 3/21*. Whereas the German Constitutional Court declared a ruling of the CJEU *ultra vires*, primarily because it lacked an appropriate assessment of proportionality, an issue that has later been resolved, in the Polish cases, the EU law provisions found *ultra vires* by the PCT are not about technicalities in a CJEU decision. Instead, these provisions are some of the most fundamental and most important provisions of the TEU, which, as noted above, already passed the constitutional review of the PCT in 2005, following Poland's accession to the EU.

Finally, it must be emphasized, that constitutional reservations, expressed in the form of a cooperative judicial dialogue by constitutional courts towards the unconditional supremacy of EU law over national constitutions is a practice by the majority of constitutional courts in Europe. As underlined earlier, this dialogue was a constructive contribution to the development of European integration. Meanwhile, ignoring legal obligations under EU law, and openly defying the supremacy of EU law can likely result in infringement proceedings and will not further the long term goal of protecting the national constitution either.

2.4. Consequences

Based on the earlier cited case law of the PCT, the Polish government maneuvered itself into a dead-end, with two remaining options (since an amendment of the TEU as a result of the *K 3/21 PCT* judgment is not a realistic scenario): *(i)* either to amend the constitution of Poland, to ensure its compliance with EU law, or *(ii)* to withdraw from the EU. Since EU membership within the population in Poland

15 This happened as a result of the European Arrest Warrant decision of the PCT, in its *P1/05* judgment, where the Constitutional Tribunal declared the EAW FD unconstitutional to the extent that the surrender of a Polish citizen is prohibited by the Constitution. This provision was repealed in order to comply with EU law.

16 Withdrawal from the EU is regulated with the Treaty of Lisbon in Article 50 TEU. Even in the case of withdrawal, the withdrawing state would be responsible for compliance with its legal obligations under EU law for a minimum of two years from the date of notification of withdrawal from the EU.

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is still supported by a large majority,[17] scenario *(ii)* seems less feasible from the perspective of the political future of the ruling party. Given the history of the governing coalition since 2015 in Poland, scenario *(ii)* seems to be equally unlikely. As a result, the PCT decision seems to have led to a dead-end for the government of Poland. Probably with two tangible results: *(i)* first, the EUR 1 million daily penalty payment imposed on Poland, for not complying with the CJEU order in *C-204/21 R*, in particular for not suspending the operation of the disciplinary chamber at the Supreme Court (failure to fulfil obligations), where it would be a naivety to think, that even if the two cases were not directly related, the PCT decision did not have an impact on the amount of the penalty; *(ii)* infringement proceedings launched on 22 December 2021.

3. Decision No. 32/2021. (XII. 7.) AB of the Hungarian Constitutional Court

Following the above decision of the PCT, there were great expectations how the Hungarian Constitutional Court will respond to a question of interpretation of the Europe clause in the Fundamental Law posed by the Minister of Justice in February 2021.[18] The Minister's question concerned the enforcement of CJEU judgment *C-808/18*,[19] which required Hungary to allow a foreign national staying illegally in the territory of Hungary to stay for the period until the migration control procedure is conducted, or if they submitted an application for asylum, until the asylum procedure is concluded. The concern raised by the Minister was, that given the lack of efficiency of the EU migration control mechanism, only one third of those whose return is ordered actually leave the territory of the Member States. As a result, the persons concerned could well remain in the territory of Hungary and become part of the Hungarian population, which however would violate national sovereignty and Hungarian constitutional identity.

The Hungarian Constitutional Court however, opted not to follow the example set by the German Constitutional Court in the PSPP judgment and the Polish Constitutional Tribunal. Instead it ruled, that as the Minister requested an interpretation of the Fundamental Law, it can only give an interpretation of the respective provisions of the Fundamental Law, and the Hungarian Constitutional Court can neither rule on the constitutionality of a CJEU judgment, nor on the primacy of EU law. In connection with the interpretation of the Europe clause in the Fundamental Law, the Hungarian Constitutional Court pointed out, that in line with the doctrine of pre-emption under EU law,[20] where the joint exercise of competences is incomplete, Hungary may exercise the relevant non-exclusive EU competence, until the EU institutions take the necessary measures to ensure the effectiveness of the joint exercise of competences.

17 *See* at www.bankier.pl/wiadomosc/Ponad-80-proc-Polakow-za-pozostaniem-w-Unii-Sondaz-Kantar-8186349.html.

18 The question of interpretation was related to Articles E(2) and XIV(2) of the Fundamental Law.

19 Judgment of 17 December 2020, *Case C-808/18, Commission v Hungary,* ECLI:EU:C:2020:1029.

20 *See also* Decision No. 32/2021 (XII.7.) AB, Concurring opinion by Marcel Szabó.

The decision was largely positively received in literature,[21] mainly because the Hungarian Constitutional Court did not follow the defiant tendencies of its German and Polish counterparts, avoiding a direct conflict with the CJEU. There were however also arguments, that with this decision the Hungarian Constitutional Court practically empowered the government to ignore EU law, by partially handing over constitutional control to the government.[22] This latter interpretation doesn't seem to be supported by the text of the decision, nor its reasoning, on the contrary, on para. 28 for instance it is noted, that:

> "the institutions and bodies of the Hungarian State have a duty under Article E(2) of the Fundamental Law to ensure that, when drawing up national legislation on asylum applications and asylum seekers, these provisions are formed in accordance with the principles of solidarity and sincerity laid down in Article 4(3) TFEU."

The above decision by the Hungarian Constitutional Court seems to be consistent with its earlier approach, particularly its *Decision No. 2/2019. (III. 5.) AB*, where the Constitutional Court pointed out, that the Constitutional Court interprets the Fundamental Law in conformity with EU law, in the vein of *Europafreundlichkeit*, and with due respect to the European constitutional dialogue. As far as the identity review is concerned, the Hungarian Constitutional Court also pointed out that constitutional identity is not a list of static values, it includes the fundamental freedoms, division of competences, republic as form of government, respect for autonomies under public law, freedom of religion, parliamentarism, equality, acknowledging judicial power, protection of nationalities, altogether the achievements of the Hungarian Historical Constitution upon which the entire Hungarian legal system is based. All these must be safeguarded in the framework of a constitutional dialogue[23] with the CJEU and other European constitutional courts, based on the principles of collegiality, equality and mutual respect.

21 Kim Lane Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament', *Verfassungsblog,* 21 December 2021, at https://verfassungsblog.de/escaping-orbans-constitutional-prison/; Nóra Chronowski & Attila Vincze, 'Full Steam Back: The Hungarian Constitutional Court Avoids Further Conflict with the ECJ', *Verfassungsblog,* 15 December 2021, at https://verfassungsblog.de/full-steam-back/.

22 László Blutman, 'Az uniós jog elsőbbsége: alkotmánybíróságok lázadása', *Közjogi Szemle,* 2022/1, p. 6.

23 For more on the notion and forms of a judicial dialogue in this context, *see* Tímea Drinóczi, 'Alkotmányos párbeszéd-elméletek', *Jura*, 2012/2, pp. 60-72; on the distinction between monologues and real dialogues *see also* Attila Vincze & Nóra Chronowski, *Magyar alkotmányosság az európai integrációban*, HVG-ORAC, 2018, pp. 496-497; *see also* Fruzsina Gárdos-Orosz, 'Preliminary reference and the Hungarian Constitutional Court: a context of non-reference', *German Law Journal*, Vol. 16, Issue 6, 2015, pp. 1569-1590.

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4. Conclusions

The above recent changes stand in stark contrast with the earlier careful and responsible approach of the German Constitutional Court and its European counterparts, which were based on the concept of constitutional tolerance[24] and cooperative constitutionalism,[25] as formulated by Weiler and Häberle more than two decades ago.

As Weiler pointed out, constitutional tolerance is *one of Europe's most important constitutional innovation*.[26] Weiler noted, that the concept of constitutional tolerance is not a one-way concept, it applies equally to constitutional actors on EU and national level, to EU institutions, particularly to the CJEU, as well as to national governments and constitutional courts. National constitutional actors are required to be tolerant towards EU constitutional actors, but at the same time, EU institutions must also take into consideration that in an EU with 27 different constitutional traditions, one cannot require Member States' constitutional courts to unconditionally obey EU law. Thus, there is a need for a dialogue, based on mutual respect and shared values.

Häberle underlined, that in the EU, sovereign states decided to cooperate on international level, to confer sovereign competences on international organizations, to provide a higher level of security and welfare. Throughout this cooperation, states did not lose their sovereignty, since they still have an influence over their jointly exercised competences, and they can also withdraw if they wish from this international cooperation. This cooperation however also requires, that (as Weiler pointed out) Member State constitutional actors show more tolerance towards the EU, particularly in the framework of the judicial discourse between national constitutional courts and the CJEU. This approach of self-restraint and tolerance is characterized by di Fabio, as the necessary conditions for the peaceful coexistence.[27]

The concepts of *mutual constitutional tolerance* and *cooperative constitutionalism* are especially relevant, if not an inevitable condition for *peaceful coexistence* in today's EU including 27 different constitutional traditions and identities.

As EU law requires Member States to observe EU law, national constitutional courts duly focus on the protection of the core of their national constitutions, on national constitutional identity, over which Member States cannot accept the supremacy of EU law. This is because such values and core principles of national constitutional law are *taboo* for the constitution-making authority. In this context

24 Joseph H. H. Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg', *Harvard Jean Monnet Paper*, 10/2000.

25 Peter Häberle, 'Der kooperative Verfassungsstaat', *in* Peter Häberle, *Verfassungslehre als Kulturwissenschaft*, 2. Auflage, Duncker & Humblot, 1998.

26 Joseph H. H. Weiler, 'On the power of the Word: Europe's constitutional iconography', *I-CON,* Vol. 3, Issue 2- 3, Special Issue, 2005, pp. 173-190.

27 Udo di Fabio, 'Friedliche Koexistenz', *Frankfurter Allgemeine Zeitung*, 20 October 2010, at www.faz.net/aktuell/politik/staat-und-recht/gastbeitrag-friedliche-koexistenz-11057029.html.

of *multilevel constitutionalism,*[28] where a certain constitutionalization of public international law[29] may be observed, core constitutional values are not perceived as competing with the identity and values of the EU, on the contrary, they are *two sides of the same coin*, and shall be equally protected by national courts, as well as the CJEU. Consequently, national constitutional identity and EU identity should *reinforce* each other and sensitivity, *mutual tolerance* and mutual respect[30] should characterize all sides of the judicial dialogue, imposing great *responsibility* on these courts, both on the EU and on national level.

On a practical note, as AG Cruz stated in *Gauweiler,*[31] the CJEU and constitutional courts should be open to cooperation and continue the judicial dialogue as long as it is required, just as it was demonstrated in *Taricco*.[32] Whereas national constitutional courts approach the increased competences of EU institutions and the concept of unconditional supremacy of EU law over the national constitutions with reservations, national constitutional courts also acknowledge their *double identity* under EU law. On the one hand, *national constitutional courts have the duty under EU law to ensure the effective enforcement of EU law* (since their Member State accepted to be bound by the founding treaties and the whole *acquis communautaire* in its entirety). For example, the German Constitutional Court considers it to be unconstitutional, *i.e.* a violation of the fundamental right of *access to justice*, *access to a lawful judge* under the *Grundgesetz*, if a court fails to submit a preliminary reference to the CJEU where there is a question of interpretation or question of validity of EU law in the case before it. On the other hand, national constitutional courts have the duty to *protect the constitution and therewith also the national constitutional identity*. Such a dual identity can only be resolved, if national constitutional courts actively take part in the *judicial dialogue* with the CJEU and their national counterparts.

European and national constitutional law increasingly go hand in hand, while European and national constitutional identity mutually reinforce each other, contributing towards the strengthening of a European constitutional architecture. Protecting national constitutional identity and EU identity at the same time is a joint task of national constitutional courts and the CJEU, where continuous dialogue and *mutual tolerance* ("constitutional tolerance", as Weiler puts it) shall be the cornerstone of *peaceful coexistence*.

28 For more in-depth analysis *see* Ingolf Pernice, 'Multilevel constitutionalism and the crisis of democracy in Europe', *European Constitutional Law Review*, 2015/11, pp. 541-562.

29 Erika de Wet, 'The constitutionalization of public international law', *in* Michel Rosenfeld & András Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, pp. 1209-1230; Antje Wiener *et al.*, 'Editorial. Global constitutionalism: human rights, democracy and the rule of law', *Global Constitutionalism*, 2012/1, pp. 1-15; Häberle 1998.

30 András Varga Zs., 'Respect of national identities as european value – European aspects of constitutional identity of Hungary', *Alkotmánybírósági Szemle*, 2020/Különszám.

31 Judgment of 14 January 2015, *Case C-62/14, Gauweiler,* ECLI:EU:C:2015:400, paras. 53-65. In *ultra vires* cases the reviewing criteria would be very similar for the national constitutional court as well as for the CJEU.

32 Judgment of 8 September 2015, *Case C-105/14, Taricco*, ECLI:EU:C:2015:555.

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