



**European Court of Human Rights (ECHR), European Court of  
Justice (ECJ) and their Interaction with Selected National  
Constitutional Courts from the Separation of Powers Perspective**

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## **Abstract**

The thesis focuses on the relationships between national constitutional courts represented by the German Federal Constitutional, Czech Constitutional Court and between supranational courts represented by the Court of Justice of the European Union (ECJ), European Court of Human Right (ECHR). The reason why to examine interactions taking place between these courts is the fact that they have a considerable impact on the formation of globalized legal framework. Main purpose is to conceptualize hierarchical structure existing between national and supranational courts on the basis of the empirical analysis of selected case-law of these courts. Besides that, the thesis should assess how the discourse between courts impinges on the power of other institutional actors.

The main contribution is the better understanding of factors influencing mutual dialogue between these courts which should enhance cooperation and effectiveness of interconnected jurisdictions.

## Introduction

*“Law in action consists of people legislating, adjudicating, administering, negotiating, and carrying on other legal activities. It is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation.”<sup>1</sup>*

The existence of overlapping jurisdictions consisting of national and supranational layers accentuates the importance of mutual communication between institutional actors which serves as a necessary precondition for the maintenance of an existing intricate framework.<sup>2</sup> The best suited for the dialogue between national and supranational orders are the institutions supervising all legal processes taking place in their own legal order. The supreme position of the national constitutional courts (“NCCs”) allows them to communicate with all institutional actors and thus to uphold uniform and coherent development of the national law which makes NCCs suitable for the dialogue with supranational jurisdiction. The most prominent position in the realm of supranational legal order belongs to the Court of Justice of the European Union (“ECJ”) and to the European Court of Human Rights (“ECHR”), which vividly shape the curves of this complex system with their judgment having far-reaching implications on national jurisdictions.<sup>3</sup>

This thesis is based on assuming that relationships between the NCCs and the supranational courts (“SC”) are not based on a strict hierarchy. On contrary, they are dynamic rather than static.<sup>4</sup> This fluidity wielding the mutual interactions between SC and NCC is finally reflected in their case-law. Therefore I would analyze decisions of SC and NCCs, paying

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<sup>1</sup> Harald Berman, *Law and revolution : the formation of the Western legal tradition*, (Cambridge, Mass. : Harvard University Press, 1983), 5

<sup>2</sup> Alec Stone Sweet., *CONSTITUTIONALISM, LEGAL PLURALISM, AND INTERNATIONAL REGIMES*, 16 Ind. J. Global Legal Stud. 621, p.622

<sup>3</sup> See with regard to ECHR Pollicino, O., *Italy: Constitutional Court at the crossroads between constitutional parochialism and co-operative constitutionalism*, E.C.L. Review 2008, 4(2) 363-382

See with regard to ECJ Martin Shapiro and Alec Stone Sweet, *On Law, Politics & Judicialization* (Oxford: Oxford University Press, 2002) p. 265,

<sup>4</sup> Alec Stone Sweet, *The Judicial Construction of Europe*, (Oxford: Oxford University Press, 2004), p. 10

attention to the overall context in order to conceptualize the formation of doctrines which are instrumental for their mutual dialogue. My hypothesis is that although clear-cut hierarchy between NCC and SCC is seemingly lacking, there are nevertheless theoretical and practical factors creating *de facto* hierarchical structure consisting of national and supranational layers.

Discourse taking place between SC and NCC contributes to the development of the current supranational framework. A role of the NCCs is vital in its building since judges of constitutional courts could have impact on the reception and the application of supranational law given their influence on the entire domestic legal order. More precisely, they are even vested with the exclusive power to limit and attribute effects to supranational jurisdiction.<sup>5</sup> It could be concluded that NCC has not lost its prominent position with the advent of SC. On contrary, the current configuration only reasserts their powers which could now have extra-territorial effect.

Another factor stressing the importance of NCCs is their power to invalidate national legal norms incompatible with the ECHR.”<sup>6</sup> In addition references to the case law of the ECHR and ECJ made by national constitutional judges in their decisions could facilitate the blending of the supranational law with the domestic law by providing it with greater normative strength. For all these reasons, NCCs play a pivotal role in the reception of supranational law and are therefore indispensable partners for their supranational counterparts.

“However, judicial internationalization can create a loss of democratic accountability and the rule of law through bypassing democratically elected legislatures in favor of global governance networks and similar entities.”<sup>7</sup> Paradoxically, involvement of nation states in supranational structures is a result of democratic decisions made by elected governmental bodies

<sup>5</sup> Dimitrios Doukas, *The verdict of the German Federal Constitutional Court on the Lisbon Treaty: not guilty, but don't do it again!* E.L. Rev. 2009, 34(6), 873

<sup>6</sup> Helen Keller and Alec Stone Sweet, *A Europe of Rights – The Impact of the ECHR on National Legal Systems*, (Oxford: Oxford University Press, 2008), p. 13

<sup>7</sup> Richards, S. W., *The legitimacy of Supreme Courts in the context of globalization*, Utrecht Law Review, Volume 4, Issue 3, 12/2008), p. 124

having a direct mandate. Therefore the interference of NCCs in this process under the guise of protection of democracy on the domestic level could potentially impair democracy also on global level by setting the decision of directly elected bodies aside. Hence the analysis would examine the ongoing process from the separation of powers perspectives.

The first part of the work focuses on the institutional settings of both NCCs and SC. Analysis of their legal framework is critical, since it presents “DNA” of these courts and thus has a significant effect on the formation of relationships between them. The structure of the constitution of Germany and the Czech Republic would be also examined in this section with the emphasis on constitutional doctrines which actually affect relationships with supranational jurisdictions. The doctrine of inalienable constitutional core which is present in the jurisprudence of the FCC as well as in the CCC could be mentioned in this regard since it has influence reaching beyond the realm of the national law. Analytical and descriptive methods will be used in this part to sketch basic theoretical outline.

Second part centers on landmark cases in which ECJ got involved in the discourse with NCC. In order to capture evolving nature of mutual relationship between the ECJ and NCCs, the analysis of groundbreaking decisions is taking into account the broader context of integration and is chronologically ordered. This holistic approach enables to perceive judgments as organic processes reacting to and simultaneously influencing the dynamics of the European integration rather than isolated events uprooted from their overall context. Attention would be dedicated to the accession of the Czech Republic to the EU whereas the main purpose is to demonstrate how the concrete constitutional doctrines of the CCC developed as reaction to transition from totalitarian regimes impinged on the integration of the Czech Republic to the EU. The main method employed in this chapter is descriptive and comparative one.



Third part would expound relationship between the ECHR and contracting states. This chapter is subdivided to the theoretical and to the practical part. Theoretical part describes the process of reception of the ECHR since it influenced further development of the doctrines of the NCC. Central part examines the position of the ECHR within a domestic legal order and analyses effects of the ECtHR judgments. Theoretical background synthesizing relevant knowledge should facilitate the consequent interpretation of important cases.

As to the practical part, it is also subdivided. Firstly it concentrates on so-called symbolic judgments in order to demonstrate the shift of a paradigm in the approach of the ECtHR which is scrutinizing thoroughly procedural practices of contracting states. Apart from description of particular judgments, also their aftermath and impact would be explained. Next part describes the endeavor of the ECtHR to deal with its docket crisis by employing innovative jurisprudential strategies. Basically, the ECtHR strives to solve the immense overload in two ways. Firstly, it emphasizes in its judgments the obligation of contracting states to guarantee the adequate protection of the ECHR at domestic level. Secondly, Strasbourg court prescribes concrete remedies which a contracting state has to adopt in order to rectify the violation. All these changes should be tracked down in the judgments of the ECtHR. As to the methods, theoretical part would be based on analysis and synthesis whereas the practical part relies mainly on comparative method.

Better understanding of the causal relationships between factors influencing default position of NCCs a SC could contribute to the development of solid transnational jurisdictions warranting high level of human rights protection. First, result of smooth adoption of judgments of SC, especially those introducing wide-ranging changes can enhanced efficiency and legitimacy of supranational jurisdictions (since decisions are properly implemented) as well as national jurisdiction (defects are removed, improvements introduced). Although the influence of

supranational and now even national courts spans beyond borders of single state, it should not be forgotten that it is the individual and its protection which should always stand in the center.

## Chapter I: Theoretical Background

Main purpose of this chapter is to outline basic institutional framework which is vital for the understanding of judicial dialogues taking place between national and supranational courts. Essential features of national constitutional courts (“NCCs”) should be analyzed together with the national constitutions. Emphasis would be put on the position of the NCCs in domestic legal system and on the effects of their decisions within domestic legal order. Consequently, supranational courts will be introduced whereas the existing differences between them should be highlighted.

### 1.1. Sorcerer & Apprentice - Federal Constitutional Court (“FCC”) and The Czech Constitutional Court („CCC“)

#### 1.1.1. Features of respective courts

According to their legal definition, the FCC and the CCC could be characterized as specialized bodies empowered to carry out the centralized review of the constitutionality which means that they can annul statutes for they non-compliance with a constitution. Both could execute an abstract or concrete review of constitutionality. Abstract review of constitutionality means that the constitutional court does not resolve dispute between two parties, but review the constitutionality of the act “in vitro”, on the basis of a motion made by specific dignitaries, which often allows relocating the political battle to the courtroom.<sup>8 9</sup> “In abstract review process, courts make law outside of the judicial process and according to law-making techniques more

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<sup>8</sup> see Donald P. Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany* (Durham and London: Duke University Press, 1997), 28

<sup>9</sup> see Wojciech Sadurski, *Post communist Constitutional Courts in Search of Political Legitimacy*, available at [http://128.252.251.212/harris/conferences/constitutionalconf/Constitutional\\_Courts\\_Legitimacy.pdf](http://128.252.251.212/harris/conferences/constitutionalconf/Constitutional_Courts_Legitimacy.pdf) (last visited 16.03.2012)

legislative-prospective-than judicial-retrospective.”<sup>10</sup> Delicacy of this issue was recognized by the CCC, which ruled that the degree of interference in constitutional rights must reach a certain degree of severity to enable the cancellation of the law in abstract review procedure especially when social rights are at stake since they belong to the “political questions”.<sup>11</sup> Another important feature common to both courts is the self-empowerment to strike down even constitutional amendment as unconstitutional.<sup>12</sup>

It is striking that according to the systemic point of view, both constitutional courts are *de iure* part of the judiciary. Nonetheless, the FCC expressly proclaimed itself as occupying the same rank as the Bundestag or the Bundesrat, whereas its judges are considered to be supreme sentinels of the basic law, not mere federal judges or civil servants.<sup>13</sup> The CCC did the same proclamation when it denoted itself a specialized organ *sui generis*, which does not belong to the judiciary branch.<sup>14</sup> Even the fact that judges of the FCC as well as the CCC are approved by the legislative body<sup>15</sup> stresses their political function. This contributes to the fact that the NCCs regard themselves to be the supreme sentinels of democratic order.

### 1.1.2. Structure of the Czech Constitution (“CCN”) and the German Basic Law (“GG”)

The GG presents the paramount legal instrument occupying the top of the legal hierarchy. According to the doctrine, the constitutional provisions are not self-standing, but on a contrary they create an organic unity and have to be interpreted in context.<sup>16</sup> Yet the GG itself is internally differentiated consisting of general principles and provisions. Human dignity as a leading

<sup>10</sup> Martin Shapiro and Alec Stone Sweet, *On Law, Politics & Judicialization* (Oxford: Oxford University Press, 2002) p. 202

<sup>11</sup> see judgment of 20.05.2008, Pl. ÚS 1/08, no. 251/2008 Col., 23

<sup>12</sup> The FCC found this power in its seminal judgment Southwest State Case (1951) I BVerfGE14, the CCC in hotly debated (and criticized) judgment of 10.09.2009, PL.ÚS 27/09, no. 318/2009 Sb.

<sup>13</sup> Donald P. Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany*, 16

<sup>14</sup> Rostislav Pukl, *Interpretace práva a právní argumentace v soudní praxi (Interpretation of the Law and Legal Argumentation in Judicial Practise)*, (Doctoral thesis, University of Brno, 2010), 55

<sup>15</sup> see GG, Chapter. IX., Art. 94 *et see* CCN, Chapter IV, Art. 84

<sup>16</sup> Donald P. Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany*, 45

principle stands at the top, which could be inferred from the fact that it is inviolable and that is the first provision of the constitution. Human dignity is closely followed by the principle of the democratic, social and federal state based on the rules of law and justice. All these principles are imbued in the particular human rights entrenched in the GG.<sup>17</sup> This vexing structure of the German constitution creates a so called objective order of values,<sup>18</sup> whereas this appeal to “objective character” should accentuate the neutrality of a judge in the application process. In a nutshell, the constitutional body comprised of different parts functions as a one living organism controlled by the leading “meta-legal” principles.

The CCN also adheres to the ethereal norms going beyond and even standing above the written text.<sup>19</sup> In one of its decisions, the CCC ruled that even the legislative and executive branch of the government are bound by the existing value order and should respects its priority in all its acts.<sup>20</sup> It has proved its dedication to the above mentioned principles when it strove to “eliminate the formalist positivist approaches of the ordinary courts extended to the realm of civil procedure if the excessive formalism results in a sophisticated justification of apparent injustice.”<sup>21</sup> Unlike the FCC, the CCC regards all constitutional rights to be equal.<sup>22</sup> The

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<sup>17</sup> *Id.* at 31

<sup>18</sup> *Id.* at 63

“There are constitutional principles that are so fundamental and so much an expression of the law that has precedence even over Constitution and other constitutional provisions that do not rank so high and may be null and void because they contravene this principles” Southwest State Case (1951) I BVerfGE14

<sup>19</sup> *see e.g.* judgment of 21.12.1993, Pl. ÚS 19/93, No. 14/1994 Col., 5

“Legitimacy of the political regime cannot be grounded solely on the formal-legal aspects, because the values and principles upon which this regime rests are not only of legal but also of political nature. These principles of our constitution such as sovereignty of people, representative democracy, and state of law are the principles of the political organization of the society which could not be precisely framed by normative terms. Even though the positive-legal regulation is inferred from them, the content of these principles is not exhausted by their normative regulation – it remains something more.”

<sup>20</sup> Judgment of 08.11.2011, Pl. ÚS IV.ÚS 1642/11

<sup>21</sup> Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Budapest and New York: Central European University Press, 2002),

234

<sup>22</sup> David Kosař, *Conflicts between Fundamental Rights in the Jurisprudence of the Constitutional Court of the Czech Republic* (October 7, 2007), E. Brems, ed., pp. 349, 2008. Available at SSRN: <http://ssrn.com/abstract=1689259> (last time visited on 17.03.2012)

difference between them should be assessed in a contextual framework by empirical, systemic, contextual and value arguments.<sup>23</sup> The CCC, similarly to its German counterpart, is steered by the abstract principles going beyond the written text. Neither the CCN nor the GG are therefore value-neutral documents. On a contrary, they blatantly refuse pure positivism. The GG regards fundamental rights to be existent even prior to the existence of the state which corresponds more to the Anglo-American than to the continental legal tradition.<sup>24</sup> Both constitutional courts warns against falling down the slippery slope as it happened in the past, where the constitution was hollowed in compliance with valid law.<sup>25</sup> We can conclude that both constitutional orders embraced at last the idea that the law is not a pure science but more the “art of goodness and justice.”

The most remarkable difference between GG and CC is that the catalogue of fundamental rights as provided by the Czech constitutional order is listed separately in the Charter of the Fundamental Rights and Freedoms.<sup>26</sup> Procházka claims that this greater amount of constitutional text results in the greater flexibility of the CCC as it has more material to interpret and is therefore not forced to rely on general provisions.<sup>27</sup> The rights listed in the Charter of the Fundamental Rights and Freedoms are internally structured, whereas the negative rights such as right to life are directly claimable, whilst social rights could be claimed only on the basis of the law which implements them. The FCC regards the fundamental rights to be more than subjective rights; they are, according to its understanding objective principles. This more abstract concept makes the limitation of respective rights more porous, which provides the FCC with greater

<sup>23</sup> Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe*, 245

<sup>24</sup> Donald P. Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany*, 41

<sup>25</sup> Judgment of 15.09.1999, No. Pl.ÚS 13/99 Col. 233/1999, 4

“The very notion that injustice remains injustice even when shrouded in the cloak of law had been reflected even in the constitution of the postwar Germany and nowadays even in the constitution of the Czech Republic.”

<sup>26</sup> CCN, Chapter I, Art. 3

<sup>27</sup> Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe*, 234

latitude in their interpretation.<sup>28</sup> To comprehend this approach we should come out from the fact that fundamental rights are basically formulated in a negative way – they shield an individual from interference by government. Nonetheless, the FCC notion of fundamental rights as principles enables it to prescribe the state to take positive action in order to secure a purely negative right (such as freedom of speech).

Both constitutional instruments resemble each other with regard to the internal organization of the constitution. The GG contains a static, unalterable constitutional core which comprises the federal character of the political system and basic principles provided by Art. I – 20, safeguarded by the so-called eternity clause.<sup>29</sup> Article I. proclaims the inviolability of dignity whereas Art. 20 establish a democratic, social and federal state resting on the principles of law and justice. The CCC deduced the existence of the material core of the constitution from the Chapter I., Art. 9, par. 2 of CCN which provides: “Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.” The immutability of constitutional core now creates one of the constitutional doctrines.<sup>30</sup>

We have mentioned the existence of the static core. Another visceral concept is the horizontal effect of the constitutional norms, which means that they are radiating through the whole legal system. To put it differently, the constitutional provisions are not static; they permeate through the whole legal order and are therefore present not in the sphere of the public,

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<sup>28</sup> Norman Dorsen et col., *Comparative Constitutionalism – Cases and Materials (Second edition)*, (Thomas Reuters: 2010), 185

<sup>29</sup> GG, chapter VII., Art. 79(3)

<sup>30</sup> Judgment of 10.09.2009, Pl.ÚS 27/09 No. 318/2009 Col.

In highly contested decision, the CCC held that not only the substance, but also the procedural aspects of the constitutional amendment could violate the constitutional court. It appeared that the only way how to solve the existing political crisis would be an early election. However, the criteria which enable to do so are quite stringent and therefore the constitutional amendment stating that the mandate of current deputies will end at the day of the elections was adopted. The CCC decided that the one-shot amendment of the constitution is contrary to the principle of the generality of the legal norms (violation of substantive aspect) moreover the constitution does not allow adopting an amendment having ad-hoc nature (violation of procedural aspect).

but even in the sphere of private law.<sup>31</sup> We can conclude that the constitutional provisions are not only perpetual, but also omnipresent in the whole legal order (if not even divine).

### 1.1.3. Binding effect of the decisions

#### *Germany*

Obligation to follow the judgments of the FCC is derived from Article 31 sec. 1 of the Constitutional Court Act (“CCA”) which proclaims that decisions of the FCC bind all constitutional institutions. In addition, they have the effect of final judgment, therefore they are binding *inter partes*. Besides that they also have *erga omnes* effect since all constitutional institutions are obliged to comply with judgments of the FCC. “This far-reaching binding effect covers the tenor of the judgment and the leading arguments of the decision.”<sup>32</sup>

Another crucial provision is Article 31 sec. 2 of the CCA according to which decisions reviewing constitutionality of the impugned legislation have the force of law. “This means that – as it is the normative effect of a law – not only state institutions but also every private person is bound.”<sup>33</sup>

The Article 35 CCA empowers FCC to decide on who shall enforce its decisions and where this execution shall take place.

In a nutshell, decisions of the FCC are influencing legal system in two ways. Firstly, decisions annulling a piece of legislation have immediate effect and are not difficult to follow, since the statute which was declared unconstitutional cannot be applied. Secondly, there is a

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<sup>31</sup> *see e.g.* Judgment of 21.04.2011 II.ÚS 3113/10, part. II

“Fundamental rights are not applicable directly all the time. In certain cases their influence is indirectly permeating through the norms of ordinary law. This is valid for the horizontal relationships, i.e. relationships which are not based on the *superiority and inferiority but on equality of the participants*.”

*et see* BVerfGE 7, 198 I. Senate (1 BvR 400/51) Lüth-decision

<sup>32</sup> Arnold Rainer, *The decisions of the German Federal Constitutional Court and their binding force for ordinary courts (Report)*, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), 6.11.2006, 2

<sup>33</sup> *Id.* at 3



question of interpretation of fundamental rights provision. The problem is how to separate constitutional law from the realm of ordinary law.

### ***Czech Republic***

Binding effect of the decisions of the CCC stems directly from the Art. 89 sec. 2 of the CCN according to which the executable decisions of the CCC are binding for all bodies and persons. As a result the decisions of the CCC are binding externally and also internally because the CCC is the state body as well.<sup>34</sup>

If we are talking about external binding force it is necessary to differentiate between *inter partes* and *erga omnes* effect. The *inter partes* decisions of the CCC have cassation effect against decisions of Supreme Courts as well.<sup>35</sup> However, precedential value or *erga omnes* effect of such decisions is more debatable.

As was already stated, the obligation of the ordinary courts to follow the decisions of the CCC stems from the Art. 89 sec. 2 of the CCN. Nevertheless, the CCC held that is not executing the function of the constitutional review in all matters because ordinary courts also serve as guardians of constitutionality; however, they have to follow the decisions or let's say precedents of the CCC which unifies the case-law in the field of constitutional law.<sup>36</sup> This argumentation confirming normative binding force is logical since the CCC is the supreme interpreter of the constitution and its decision should be therefore respected.<sup>37</sup> It is important to note that the CCC does not insist on verbatim application of its decisions, but demands reflection sensitive to the context.<sup>38</sup>

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<sup>34</sup> Ladislav Vyhnánek, *Formální aspekty judikatury Ústavního soudu (Formal Aspects of the Case-law of the Czech Constitutional Court)* (Doctoral Thesis), (Brno: Právnická fakulta), 48

<sup>35</sup> Judgment of 04.03.2004 IV., ÚS 290/03, No. N 34/32 Col.

<sup>36</sup> Judgment of 25.01.2005, III. ÚS 252/04, No. N 16/36 SbNU 173 Col.

<sup>37</sup> Ladislav Vyhnánek, *Formal Aspects of the Case-law of the Czech Constitutional Court*, 66

<sup>38</sup> *Id.* at 70

## 1.2. The ECJ and the ECtHR – rivals, allies, admirers

### 1.2.1. Features of respective courts

The ECJ and the ECtHR could be characterized as supranational courts. Both of them were established by the international treaties, yet their institutional development has taken different directions. Both are offspring of the post-war Europe established to foster intensive international cooperation thus maintaining peace and prosperity. These courts review the compliance of national legal acts with international agreements.<sup>39</sup> Yet each of these courts was entrusted with a different mission, has a different institutional setting and distinct jurisdiction. ECJ has been originally a “federal court” has gradually evolved and now possess far-reaching jurisdiction over Member States.

“The ECHR was established to do rights business and only rights business.”<sup>40</sup> Despite seemingly narrow limits the ECtHR has been accused of finding human rights everywhere.<sup>41</sup> Compared to the ECJ, the number of countries falling within the remit of the ECtHR is greater which presents an uneasy task to harmonize different legal systems. Another limit relies on the fact that the ECtHR deals solely with the vertical relationship, e.g. the violation of the fundamental rights by a state.

A weakness symptomatic to both abovementioned courts is that most of the constitutional courts of the member states have not recognized *de iure* their unconditional supremacy, although their decisions are *de facto* strictly followed by national authorities.<sup>42</sup> Jurisprudence of

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<sup>40</sup> Martin Shapiro and Alec Stone Sweet, *On Law, Politics & Judicialization*, 155

<sup>41</sup> Paul Gallagher, *The European Convention on Human Rights and the Margin of Appreciation* (January 10, 2012). UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 52/2011.

Available at SSRN: <http://ssrn.com/abstract=1982661> or <http://dx.doi.org/10.2139/ssrn.1982661>. (last visited 03.12.2011), 13

<sup>42</sup> see (regarding the ECJ) J.H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, Available at <http://ftp.infoeuropa.euroid.pt/database/000036001-000037000/000036583.pdf> (last visited 24.01.2012), 2

constitutional conflict, as intended has become a permanent feature of this system.”<sup>43</sup> This unstable position is reflected in decision-making of ECJ and the ECtHR since they have to accommodate existing opposing forces in order to prevent disobedience likely to undermine their legitimacy.<sup>44</sup> Another split exists between national and supranational courts whereas the supranational courts basically interpret the national law but it is up to the national courts to apply it.

### 1.2.2. Access to the Courts

Every individual whose rights as provided by the ECHR were violated could file a complaint and bring his/her case to Strasbourg. Necessary precondition which must be met in order to have a case heard by the ECtHR is the exhaustion of domestic remedies. “The purpose of Article 35 § 1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (“ECtHR”).<sup>45</sup> This aspect is crucial because it allows the national supreme judicial body to retain its authority over lower courts. “In a well-ordered judicial system, the higher levels operate under rules of subsidiarity. They will not examine claims which the applicant has failed to raise properly before the lower courts.”<sup>46</sup> “Further, national authorities have a better understanding of the circumstance of their respective

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see (regarding the ECtHR) Nicolas A.J. Croquet, *THE EUROPEAN COURT OF HUMAN RIGHTS' NORM-CREATION AND NORM-LIMITING PROCESSES: RESOLVING A NORMATIVE TENSION*, 17 *Colum. J. Eur. L.* 307, 28

<sup>43</sup> Gráine de Búrca and J.H.H. Weiler, ed., *The European Court of Justice* (Oxford: Oxford University Press, 2001), 133

<sup>44</sup> Janneke Gerards, *Judicial Deliberations in the European Court of Human Rights* (2008). *THE LEGITIMACY OF HIGHEST COURTS' RULINGS*, N. Huls, M. Adams, J. Bomhoff, eds., The Hague: T.M.C. Asser Institute, 2008. Available at SSRN: <http://ssrn.com/abstract=1114906>, 412

<sup>45</sup> *Kudla v. Poland*, Application No. 30210/96, (ECtHR, 26.10.2000), para. 152

<sup>46</sup> Gertrude Lübke-Wolff, *How can the European Court of Human Rights reinforce the role of national courts in the Convention system?* Seminar: 2012, Available at: <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Seminar+documents/Dialogue+between+Judges/11-17>, (last visited 05.08.2012), 12

societies and are best placed to adjudicate human rights disputes in good faith and in accordance with international standards. This is why we have the principle of subsidiarity.”<sup>47</sup>

Put it more precisely, constitutional or other supreme courts of the respective country cannot be omitted in the application process. As to the practical effect, the cases coming before ECtHR are already well-discussed and analyzed by national authorities.<sup>48</sup> The comparison with the application procedure regarding the ECJ will make the distinction and stemming implication more apparent.

In contrast to the ECtHR, it is nearly impossible for the individual to bring the case before the ECJ since he/she is regarded to be a non-privileged applicant.<sup>49</sup> This could be perceived as a serious drawback since the EU law has become ubiquitous. Hence more important case-law suppliers are the privileged (Commission, Member States) and semi-privileged actors (European Central Bank) which are allowed to bring the case without any standing restriction.

The ECJ decided on the motion of the Commission whether the member state fails to implement the EU law.<sup>50</sup> Furthermore its jurisdiction comprises the empowerment to decide whether on the legality of legal acts, intended to have effect vis-à-vis third parties.<sup>51</sup> But at the heart of the power of the ECJ lies the competence to interpret Treaties, the EU legislation and to give so-called preliminary rulings.<sup>52</sup> According to this procedure, every national court now has a power of judicial review and can ask the ECJ question regarding the application of EU law

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<sup>47</sup> Jonas Christoffersen et Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics*, (Oxford: Oxford University Press 2011), 190 - 191

<sup>48</sup> Janneke Gerards, *Judicial Deliberations in the European Court of Human Rights*, 412

<sup>49</sup> *case 25/62 Plaumann v Commission* [1963] ECR 199

defines criteria which an applicant must met in order to bring his case to Luxembourg which is extremely difficult in practice.

<sup>50</sup> Art. 258 TFE

<sup>51</sup> Art. 263 TFE

<sup>52</sup> Art. 267 TFE

which makes the whole process more dispersed and decentralized.<sup>53</sup> The ECJ then decides on the point of law whereas its conclusion is binding for the national court.

This specificity has far-reaching consequences. As a result, the appeal courts not mentioning the supreme courts are entirely omitted process which distorts the hierarchy existing between national courts. As a result, supreme courts are losing one of their vital functions - control over the subordinated courts.<sup>54</sup> In contrast, the courts of lower instance have gained by this empowerment effective leverage over the supreme courts. This asymmetry has a tendency to exacerbate tensions already existing, especially between supreme courts and the constitutional court (examples will be provided later on).<sup>55</sup> To sum up, the ordinary national courts are mostly those who are loading the ECJ's barrel with ammunition, whereas their referrals have stood behind the most daring and bold interpretation of the treaties. Another important implication is that the answers of the ECJ are directly "transposed" to the national legal order through the decisions of referring national courts. The process is a nice division of labor, where the ECJ interprets or answers the question and this decision is consequently applied by the national court in pending case. In contrast, the enforcement mechanism of the ECHR is lengthy and awkward because the ECtHR decides on cases which were already decided by the final authority of the national state.<sup>56</sup>

### 1.2.3. Approach of the Courts

<sup>53</sup> Gareth T. Davies, *The Division of Powers Between the European Court of Justice and National Courts: A Critical Look at Interpretation and Application in the Preliminary Reference Procedure*. REGULATING THE INTERNAL MARKET, Niamh Nic Shuibne, ed., Edward Elgar, 2006. Available at SSRN: <http://ssrn.com/abstract=861824>, 4

<sup>54</sup> Martin Shapiro and Alec Stone Sweet, *On Law, Politics & Judicialization*, 216

<sup>55</sup> see Arthur Dyevre, *The Czech Ultra Vires Revolution: Isolated Accident or Omen of Judicial Armageddon?*, Available at: <http://verfassungsblog.de/czech-ultra-vires-revolution-isolated-accident-omen-judicial-armageddon/> (last visited 26.03.2012)

Author discusses the recent decision of the CCC which ruled that the decision of the ECJ was ultra-vires. It has been the first case when the national constitutional court manifestly rebelled against the ECJ.

<sup>56</sup> Janneke Gerards, *Judicial Deliberations in the European Court of Human Rights*, 412

The ECtHR does not review the validity of the legal rule *per se*, but ascertain whether the application of the legal acts interferes with individual human rights. “Thus the test applied by the Court is concrete rather than abstract and focuses on the individual rights violation in question rather than on the general compatibility of a legal situation with the Convention.”<sup>57</sup> When solving disputes, the ECtHR thus pays close attention to the specific merits of each case resulting in case-by-case doctrine.<sup>58</sup> Such an approach allows taking into account the national specificities thus making the decision easier to swallow for the respective state. But this highly individualized approach of the ECtHR results in lesser consistency and coherency in its case-law. ECtHR is aware of this flaw and although it favors individual approach, it also perceives itself as an agenda setter for the whole Europe and therefore goes beyond “individual justice.”<sup>59</sup> Another driving force behind this motion is the extreme overload of the ECtHR, therefore it seeks alternative ways to “deliver” justice more efficiently. The result of its endeavor is the so called pilot-judgments which directly prescribe legal reforms of the system and thus going far beyond case-law approach.<sup>60</sup>

Although the ECJ tries to formulate abstract principles which should be generally valid, it often makes decisions solely on the merits of an individual case.<sup>61</sup> The reason of this approach is that “value pluralism and the relevance of the particular case are embraced as crucial features of coherent account of legal reasoning.”<sup>62</sup> Hence the ECJ often blends together interpretation and

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<sup>57</sup> *Id.* at 420

<sup>58</sup> Janneke Gerards, *Judicial Deliberations in the European Court of Human Rights*, 419

<sup>59</sup> *see e.g. Karner v. Austria*, application no. 40016/98 (ECtHR, 24.07.2003 ), para. 26

“Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.”

<sup>60</sup> *see Broniowski v. Poland*, application No. 31443/96 (ECtHR, 28.09.2005) in this case the ECtHR went beyond the individual justice when solving the systemic violation of human rights.

<sup>61</sup> Gareth T. Davies, *The Division of Powers Between the European Court of Justice and National Courts: A Critical Look at Interpretation and Application in the Preliminary Reference Procedure*, 12

<sup>62</sup> Gráine de Búrca and J.H.H. Weiler, ed., *The European Court of Justice*, 64

the application of the law. On the other, hand Bengoetxea claims that the ECJ distills the facts from the actual case and defines them in a universal formula, so its rationale that can be applied in a Member State jurisdiction.<sup>63</sup>

After all there is a constant tension when we compare a case-by-case approach and the one formulating abstract principles. The former usually pays too much attention to fact to the detriment of generality and predictability, while the latter one pushes forward generality to the detriment of separation of powers principle since the broadly formulated judgments are akin to the laws.

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<sup>63</sup> *Id.* at 60

## **Chapter II: European Court of Justice and the National Constitutional Courts**

Both ECJ and NCCs could channel intra and extra-systemic legal discussion since they occupy supreme position within their jurisdiction as was demonstrated in the first chapter. Under intra-systemic legal discourse should be understood the communication between various layers of their own legal system. Extra-systemic communication comprises the interaction taking place between various legal orders such as between EU law and law of particular member state. “The formal authority of EU law is therefore predominantly governed by the relationship between the ECJ and NCCs.”<sup>64</sup>

I would focus in this chapter on the process of interaction between NCCs and the ECJ on the backdrop of the European integration. In order to do so, this chapter would firstly excavate the basics upon which the legal relationship between the EU/EC and national organs rest upon. Secondly, the landmark cases decided by the FCC before the accession of the Czech Republic to the EU would be analyzed. Then the background of the accession of the Czech Republic would be explained and supported by the case analysis. Finally, the conclusions should describe the nature of current system and propose principal solutions how to amend its functioning.

### **2.1. 1963 – 1970 Framing the map of the European integration**

During this era, the ECJ (re) invented wheels which finally set the vehicle of the integration in the motion. Namely it was the doctrine of direct effect and supremacy. Another

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<sup>64</sup> Damian Chalmers et al., *European Union law : cases and materials 2<sup>nd</sup> edition*, (Cambridge : Cambridge University Press, 2010), 189



crucial element was the existence of preliminary reference procedure anchored in Treaty bringing all doctrines together which re-conceptualized relationship between the Communities and Member States in such a way that it started to resemble federation model.<sup>65</sup> In this pioneer period, the ECJ was addressing its monologue to the entire Community, without being questioned by the NCCs.

### 2.1.1. Doctrine of Direct Effect

The *Van Gend en Loos*<sup>66</sup> judgment was truly a revolution in the development of the EU law by which the ECJ committed a *coup de etat*.<sup>67</sup> First of all, this judgment proclaimed that the Community constituted new legal order for the sake of which member states had limited their sovereignty. Secondly, the feature of this new legal order is that its provisions have direct effect in the realm of the national law. This means that rights which are sufficiently clear, precise and unconditional could be directly and immediately derived from the Treaty although they did not previously exist within the sphere of the national law.<sup>68</sup> Thus the direct effect plays also gap-filling function by substituting the lacking national implementation.<sup>69</sup> Conclusively, postulated doctrine was a major deviation from the international law based on the respect of national sovereignty according to which each state assigns effect to international treaties on its own.<sup>70</sup>

<sup>65</sup> J. H. H. Weiler, *The Transformation of Europe*, The Yale Law Journal, Vol. 100, No. 8, Symposium: International Law. (Jun., 1991), pp. 2403-2483, 2413

<sup>66</sup> Case 26/62, *Van Gend & Loos* [1963] E.C.R. I. Case 70/87

<sup>67</sup> Wojciech Sadurski, *Juridical Coups d'état – all over the place. Comment on “The Juridical Coup d'état and the Problem of Authority” by Alec Stone Sweet*, 8 German Law Journal 935-940 (2007), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=862>, (last visited 30.04.2012), 6

<sup>68</sup> Paul Craig and Gráine de Búrca, *EU Law: Text, Cases and Materials*, (Oxford: Oxford University Press, 2011), 259

<sup>69</sup> Koen Lenaerts, Tim Corthaut, *Of birds and hedges: the role of primacy in invoking norms of EU law*, E.L. Rev. 2006, 31(3), 287-315, 3

<sup>70</sup> Armin von Bogdandy, *Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law*, 6(3) *Int'l J. Con. L.* 397 (2008), p. 403

Doctrine of direct effect was groundbreaking since it allows individuals to claim rights against the member states, but also against other individuals.<sup>71</sup> Another feature was that the protection of the EC law could be claimed by the individual on the entire territory of the EC even against its own state.<sup>72</sup>

One should take into consideration that it was the preliminary reference procedure which was designed by the Member States and directly embedded in the Treaty which provided a bridge between individual litigant and the ECJ and thus between the EC law and national law.<sup>73</sup> Hence the national courts became those who are obliged to enforce EC laws as if they were enacted by the national legislatures.<sup>74</sup> “In practice direct effect meant that Member States violating their Community obligations could not shift the locus of dispute to the interstate or Community plane.”<sup>75</sup> Hence the nature of disputes changed from interstate to transnational.<sup>76</sup> Individuals thus became not only beneficiaries, but also guardians of the integration process. “This private actor cases (*as opposed to the inter-state cases*) also tend to have domestic enforcement components, bringing international law into domestic realm, thereby harnessing domestic actors to help enforce international rules.”<sup>77</sup> To sum up, the Member States by signing up of Treaties established political fundamentals of integration. Consequently, The ECJ developed legal doctrine from which the individuals could directly benefit. Therefore it was the

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<sup>71</sup> J. H. H. Weiler, *The Transformation of Europe*, 2413

<sup>72</sup> Joerges, Christian, *Rethinking European Law's Supremacy with Comments by Damian Chalmers, Rainer Nickel, Florian Rodl, Robert Wai* (July 2005). EUI Working Paper Law No. 2005/12. available at SSRN: <http://ssrn.com/abstract=838110> or <http://dx.doi.org/10.2139/ssrn.838110>, (last visited 22.07.2012), 32

<sup>73</sup> Julio Baquero Cruz, *The Changing Constitutional Role of the European Court of Justice*, 34 *INTERNATIONAL JOURNAL OF LEGAL INFORMATION* 223-245 (2006), 227

<sup>74</sup> Joerges, Christian, *Rethinking European Law's Supremacy with Comments by Damian Chalmers, Rainer Nickel, Florian Rodl, Robert Wai*, 16

<sup>75</sup> J. H. H. Weiler, *The Transformation of Europe*, 2414

<sup>76</sup> Karen J. Alter, *Private Litigants and the New International Courts*. *Comparative Political Studies*, Vol. 39, No. 1, pp. 22-49, 2006 ; Northwestern Public Law Research Paper No. 05-18. Available at SSRN: <http://ssrn.com/abstract=820024>, (last visited 12.07.2012), 24

<sup>77</sup> Karen J. Alter, *Private Litigants and the New International Courts*, 24

combination of political process (preliminary references embedded in the Treaty), legal development (doctrine of direct effect) and of sociological aspect (individual litigants such as transport company in the Van Gend en Loos) which aggregately laid the foundations of the new legal order.

### 2.1.2. Doctrine of Supremacy

One of the principle characteristics of the EC law is its supremacy which was postulated in the landmark judgment *Costa v. ENEL*<sup>78</sup> according to which the EC law prevails in its sphere of competence even over national law. Later on, the ECJ made even bolder statement when proclaiming the superiority of the EC law over national constitutional law.<sup>79</sup> Strikingly, the ECJ held in the *Simmenthal*<sup>80</sup> that not only the constitutional court, but even ordinary court which is called upon to decide the conflict between the EC law and the national law, should give the precedence to the EC law. This dispersed method of the enforcement of the EU law facilitated the observance of the EU law since the individual seeking redress does not have to make its way to the constitutional court.<sup>81</sup> “Additionally, although this has never been stated explicitly, the Court (ECJ) possesses the “Kompetenz-Kompetenz” in the Community legal order, i.e. it is the body that determines which norms come within the sphere of application of Community law.”<sup>82</sup>

One could not overlook that the doctrine of direct effect and supremacy are intertwined and mutually supporting each other. In states with monist legal tradition, international treaty has immediate effect within domestic legal order. However, position of these international treaties could be on par with ordinary legislation. Yet the direct effect makes EU provision immediately effective in the realm of national law while doctrine of supremacy places it on the top of the legal

<sup>78</sup> *Case 6/64, Costa v ENEL [1964] E.C.R. 1203.*

<sup>79</sup> *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125*

<sup>80</sup> *Case 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629, para. 263*

<sup>81</sup> Paul Craig and Gráine de Búrca, *EU Law: Text, Cases and Materials*, 264

<sup>82</sup> Damian Chalmers et al., *European Union law : cases and materials 2<sup>nd</sup> edition*, 185

hierarchy. “Parallels to this kind of constitutional architecture may, with few exceptions, be found in the internal constitutional order of federal states.”<sup>83</sup>

It is surprising that member states swallowed top-down imposition of these doctrines encroaching into their sovereignty without major exceptions. Cruz opines that although supremacy and direct effect were not expressly mentioned in the Treaty, they were not prohibited by it and they were, on contrary a logical follow-up of its framework.<sup>84</sup> Plausible explanation is that authority of the EC law avoided free-riding, promoted efficiency (as was proclaimed by the ECJ) and finally led to problem-solving.<sup>85</sup> Another explanation is that the supremacy and direct effect were accepted partially because they were limited to the sphere of the competence of the EC law which was narrow at that time which minimized the risk of potential clashes between EC law and national law.

## 2.2. 1970s - Paving the road

If we look at the doctrines of supremacy and direct effect, they have different meaning at the time of their adoption and distinct after several decades of integration. More precisely, their substantive content has not changed, the EC law stands still higher than national law, but given the widening breadth of the EC law, its overall impact increased. In following era, the ECJ had been incrementally carving out a greater portion from the competence pie.<sup>86</sup> As a result, the ECJ broadened the scope within which the supremacy and direct effect can efficiently operate.

Thus “in vitro”, the effect of the supremacy and direct effect remained intact. However, growing body of the EU law contributed to the soaring level of interaction between EC law and

<sup>83</sup> J. H. H. Weiler, *The Transformation of Europe*, 2415

<sup>84</sup> Julio Baquero Cruz, *The Changing Constitutional Role of the European Court of Justice*, 226

<sup>85</sup> Joerges, Christian, *Rethinking European Law's Supremacy with Comments by Damian Chalmers, Rainer Nickel, Florian Rodl, Robert Wai*, 30

<sup>86</sup> J. H. H. Weiler, *The Transformation of Europe*, 2437

the national law whereas these “in vivo” processes led to qualitative transformation of supremacy and direct effect.<sup>87</sup> This remark could be backed up by the fact that the *Costa v. ENEL* was contested decades after it had been released and even in minority of the Member States.<sup>88</sup>

From this point, two different stories are being told about allegedly the same fairy-tale occurred. First is the narrative of the ECJ according to which the EU law is autonomous, always triumphing over the national law including constitutional law. Problem is that the NCCs have not really internalized constitutional characteristics which were imposed on them by the ECJ.<sup>89</sup> Existing system of supranational jurisdictions is than characterized by the lack of clear hierarchy since interacting legal systems tend to be self-referential, each of them claiming to be an ultimate source of authority.<sup>90</sup> Even though the supranational legal system could claim their superiority, they simply lack the means to enforce their assertions.<sup>91</sup> There is therefore a split between normative powers belonging to the ECJ and between real powers firmly resting in the hands of the Member States.<sup>92</sup> This dichotomy has been considerably steering the course of European integration and created a basis for the dialogue between the courts. It has been firstly spelled out in the controversy touching upon the fundamental rights protection which became a jewel-crown in the competences of the NCCs after the WW2.

### 2.2.1. Fundamental rights protection

<sup>87</sup> J. H. H. Weiler, *The Transformation of Europe*, 2418

<sup>88</sup> Julio Baquero Cruz, *The Changing Constitutional Role of the European Court of Justice*, 229

<sup>89</sup> Matej Avbelj, *Questioning EU Constitutionalisms*, 9 German Law Journal 1-26 (2008), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=883>, (last visited 27.06.2012), 22

<sup>90</sup> Komárek, Jan, Institutional Dimension of Constitutional Pluralism (March 20, 2010). CONSTITUTIONAL PLURALISM IN EUROPE AND BEYOND, Avbelj and Komárek, eds., Hart, 2010. Available at SSRN: <http://ssrn.com/abstract=1575522> (last visited: 27.06.2012), 1

<sup>91</sup> Gareth T. Davies, *Constitutional Disagreement in Europe and the Search for Pluralism* (February 25, 2010). Available at SSRN: <http://ssrn.com/abstract=1559323> or <http://dx.doi.org/10.2139/ssrn.1559323>. (last visited 27.06.2012), 3

<sup>92</sup> Damian Chalmers et al., *European Union law : cases and materials 2<sup>nd</sup> edition*, 187

It was indeed a cunning move made by the ECJ that it started to delve into the sphere of human rights protection. Reason was obvious. If the ECJ claims to be supreme, it has to convince the Member States that it also takes the protection of the human rights seriously even though it means to impose limits on the action of the Community.<sup>93</sup> On the other hand, this partial limitation added legitimacy to the integration project and allowed it to expand to other fields. Thus the ECJ stated that it would protect the human rights within the EC whereas the substance of these rights would be inferred from the constitutional tradition of member states.<sup>94</sup> Later on, the ECJ provide persuasive reasoning why the human rights shall be protected by the ECJ:

“Reference to the legal rules or concepts of national law in order to judge the validity of measures 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 in the light of Community law.”<sup>95</sup>

Despite these lofty promises of the ECJ regarding the human rights protection, the FCC refused the unconditional surrender to the supremacy of the EC law which resulted in numerous clashes with the FCC.

### 2.2.2. *Solange* saga – Encounter of the ECJ and the FCC

In a nutshell, the FCC proclaimed in the so-called *Solange I*<sup>96</sup> decision that it could not accept the supremacy of the EC law, since it does not provide adequate protection for the human rights<sup>97</sup> due to the lacking charter of rights and a genuine democratic legislative process. The

<sup>93</sup> J. H. H. Weiler, *The Transformation of Europe*, 2417

<sup>94</sup> *Case 29/69, Stauder* [1969] ECR 419

<sup>95</sup> *Case 11/70, Internationale Handelsgesellschaft* [1970] ECR 1125, para. 3

<sup>96</sup> BVerfGE 37, 271.

<sup>97</sup> *Case 29/69, Stauder* [1969] ECR 419

was a landmark case which introduced the dignity into the EU law. However, the breakthrough was achieved in the *International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125 Case 11/70 which held that human rights are integral part of the EU law. The ECJ held in the *Nold* 4/73 [1974] ECR 491 that in order to

underpinning of this decision was that the doctrine of supremacy could not dilute the elementary constitutional structure which is inalienable.<sup>98</sup> Thus notably famous *Solange* saga started to write its history and now it serves as an example that absence of clear-cut hierarchy does not inevitably lead to chaos, but could stimulate development of the entire legal system through the mutual dialogue.<sup>99</sup> It also serves as an example that what the FCC does is copy-pasted by other NCCs.<sup>100</sup> The ECJ picked up the gauntlet, and as a consequence, it progressively carved out the concept of human rights creating visceral principles (not only rules) upon which the EC law relies on. Thus the ECJ instigated by the FCC discovered by its judicial creativity a new legal continent of the fundamental rights within the sphere EU law.

The effort of the ECJ was crowned by the success when the FCC proclaimed in *Solange II*<sup>101</sup> decision that:

“In view of this development, the Federal Constitutional Court announced that it would no longer review secondary Community law on the basis of the fundamental rights of the German Constitution, as long as the European Communities, and in particular its Court, generally ensure an efficient protection of fundamental rights against the authorities of the Communities that is to be deemed equal in substance to the protection of fundamental rights inalienably required by the German Constitution.”<sup>102</sup>

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protect the human rights, it would draw the inspiration from the constitutional orders of the member states. This decision also gave a written form to the human rights. Interestingly, these cases came into play before the advent of the *Solange* judgment. Nevertheless, the decision of the FCC only fostered the efforts of the ECJ to include more rights.

<sup>98</sup> Charles F. Sabel and Oliver H. Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*. European Law Journal, Vol. 16, Issue 5, pp. 511-550, September 2010. Available at SSRN: <http://ssrn.com/abstract=1665887>, (last visited 23.04.2012), 517

<sup>99</sup> Alec Stone Sweet, *CONSTITUTIONALISM, LEGAL PLURALISM, AND INTERNATIONAL REGIMES*, 16 *Ind. J. Global Legal Stud.* 621, 636

<sup>100</sup> Zdeněk Kühn, *THE EUROPEAN ARREST WARRANT, THIRD PILLAR LAW AND NATIONAL CONSTITUTIONAL RESISTANCE/ACCEPTANCE: The EAW Saga as Narrated by the Constitutional Judiciary in Poland, Germany, and the Czech Republic*, Croatian Yearbook of Law and Policy, Volume 3, 2007, 131

<sup>101</sup> BVerfGE 73, 339 2 BvR 197/83

<sup>102</sup> Ninon Colneric, “Protection of Fundamental Rights through the Court of Justice of the European Communities” Working Paper 2, Available at: <http://denning.law.ox.ac.uk/iecl/pdfs/working2colneric.pdf> (last visited 22.01.2012), 9

Essentially, the FCC retreated from its position and swore to abstain from case-by-case basis review of the constitutionality EU laws, which was a noble gesture of deference shown toward an “alien” legal order. Now on, only general decline in the protection of human rights could trigger the action of the FCC.<sup>103</sup>

This could be perceived as a victory for the ECJ since it hushed the caveats of the FCC and managed to broaden its jurisdiction by inclusion of fundamental rights in its arsenal. But the true victor was the FCC which managed to push the ECJ into desired direction. And all what the FCC had to do was to raise its voice.

In addition, *Solange* commits national and supranational order to monitor the jurisprudential output of the others and to make acceptance of their deviations from national preferences contingent on a continuing finding of equivalence of fundamental results.”<sup>104</sup>

### 2.2.3. Doctrine of implied powers

However, the ECJ has been assertively if not aggressively enlarging sphere of competence of the EC law and simultaneously its own jurisdiction under the guise of the implied powers rationale. Parallel could be drawn with the *McCulloch v. Maryland*<sup>105</sup> decision since the ECJ proclaimed that “powers would be implied in favor of the Community where they were necessary to serve legitimate ends pursued by it.”<sup>106</sup> So called ERTA case<sup>107</sup> was the

<sup>103</sup> Charles F. Sabel and Oliver H. Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, 519

<sup>104</sup> *Id.* at 512

<sup>105</sup> *McCulloch v. Maryland*, 17 U.S. 316 (1819)

“There is nothing in the Constitution of the United States similar to the Articles of Confederation, which exclude incidental or implied powers.

If the end be legitimate, and within the scope of the Constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.”

<sup>106</sup> J. H. H. Weiler, *The Transformation of Europe*, 2416

<sup>107</sup> Case 22/70, *Commission of the European Communities v. Council of the European Communities*, [1971] E.C.R.



groundbreaking decision of the ECJ for following reasons: Firstly, it allowed the ECJ to review all community measures having legal effect.<sup>108</sup> Secondly, if the matter falls within the scope of the EC law, member states are excluded from further action.<sup>109</sup> This means that in the area which was exclusively vested into the community, member states are barred to take any action.<sup>110</sup> Once the EC has taken any action in the specific field, the preemptive doctrine disallowed member state to be active in this area.<sup>111</sup>

Thirdly, and most importantly, the ECJ held that “grant of internal competence must be read as implying an external treaty-making power.”<sup>112</sup> „The principle of parallelism of internal and external powers was closely linked to the supremacy principle. It was based on the same concern for effectiveness, since unilateral international action of the Member States could impair what had already been done internally by the Community.”<sup>113</sup>

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<sup>108</sup> *Id.* at para. 39

<sup>109</sup> *Id.* at para 52

<sup>110</sup> J. H. H. Weiler, *The Transformation of Europe*, 2417

<sup>111</sup> *Id.* at , 2417

<sup>112</sup> J. H. H. Weiler, *The Transformation of Europe*, 2416

<sup>113</sup> Julio Baquero Cruz, *The Changing Constitutional Role of the European Court of Justice*, 232

### 2.3. 1980s - Integration on the Traffic-Lights

“Since the 1990’s European law (and policy) has been entangled in a discussion about its foundations, its institutions and procedures, and its normative fundaments, leaving the EU in a state of a permanent legitimacy crisis.”<sup>114</sup>

The onslaught of the ECJ squeezing the realm of the national law did not remain without response. This was especially true after the adoption of the SEA in 1986 which introduced the majority voting system in certain policy fields. During the so-called Luxembourg accords in 1970, each decision had to be taken unanimously. Although this rendered the legislative process inefficient, each Member State vested by the veto power fully controlled the outcome of the voting. Yet for the Member States it was difficult to overrule the decisions of the ECJ due to the unanimity requirement “since the unanimity as a highly restrictive rule favors the dominance of the constitutional court over the evolution of the constitutional law.”<sup>115</sup> This was also possible explanation why the Member States decided to switch to majority voting.

One also has to take into consideration that number of Member States has raised since the foundation of Communities so the original voting platform proved to be insufficient.<sup>116</sup> However, introduction of majority voting brought other drawbacks because it allowed taking of decisions against the will of certain Member States while doctrines the direct effect, supremacy and broadening of the scope of community powers rendered these decisions immediately operative<sup>117</sup>

<sup>114</sup> Joerges, *Christian, Rethinking European Law's Supremacy with Comments by Damian Chalmers, Rainer Nickel, Florian Rodl, Robert Wai*, 45

<sup>115</sup> Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 640

<sup>116</sup> J. H. H. Weiler, *The Transformation of Europe* , 2456

<sup>117</sup> J. H. H. Weiler, *The Transformation of Europe* , 2462

Another hotly debated issue which arose was so-called democratic deficit of the EC. In a nutshell, the members of the Council are representatives of the national government while the Commissioners could be conceived as high-ranking civil servant. As a result, decision-making process of the EC undertaken by executive branch bypasses the control of national parliaments and thus distorts separation of powers principle.<sup>118</sup> European Parliament demanded greater power in order to mitigate the impact of this deficit and to restore the legitimacy of the EC since it was the only directly elected body.<sup>119</sup>

But this is only one way how to look at the democratic deficit. As was aptly pointed out, introduction of the majority voting weakens the control of national parliaments over Council.<sup>120</sup> In addition, the transfer of the powers to the European Parliament necessarily impoverishes the legislative powers of the national parliaments. Furthermore, the fully-fledged parliamentarism could not evolve without strong European civil society which is at present – missing.<sup>121</sup> Thus there is no political capital since the trust, mutual concern and common point of reference are lacking.<sup>122</sup>

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<sup>118</sup> In addition, the legislative approved by the Community could set aside the national legislation due to the doctrine of the primacy of the EU law.

<sup>119</sup> J. H. H. Weiler, *The Transformation of Europe*, 2467

<sup>120</sup> *Id.* at 2473

<sup>121</sup> Joerges, Christian, *Rethinking European Law's Supremacy with Comments by Damian Chalmers, Rainer Nickel, Florian Rodl, Robert Wai*, 49

<sup>122</sup> Neil Walker, *After the Constitutional Moment* (November 2003). The Federal Trust Constitutional Online Paper Series No. 32/03. Available at SSRN: <http://ssrn.com/abstract=516783> or <http://dx.doi.org/10.2139/ssrn.516783>, (last visited at 23.07.2012) 8

## 2.4. 1992 - Maastricht Treaty – Full speed ahead!

Maastricht treaty introduced changes of magnificent scale. First of all, it established EU as the new legal entity with the notoriously famous three pillar structure. The first pillar which comprised European Communities was in its nature supranational. Other two pillars Common Foreign and Security Policy and Justice and Home Affairs were conceived as intergovernmental with limited reach of the institutions of the Community.<sup>123</sup> Reason was obvious. Second pillars deals with the matters which do not fall within the remit of courts, whereas the issues included in third pillar were considered to be too sensitive to fall prey to the ongoing process of integration.

Furthermore the agenda of monetary union was kicked off and the idea of EU citizenship came up. Maastricht certainly reacted at the stimuli provided by the legal integration protruded by the ECJ. Notably it introduced the principle of subsidiarity with the intention to halt the expansion of EC. Simultaneously it enhanced the competences of the EC in sensitive fields such as cooperation in justice and home affairs. The aim was to create Community which would be capable of taking supranational action yet the wall between the EC law and national law would be stronger.

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<sup>123</sup> Carl Lebeck, *Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino - Part II/II*, 8 German Law Journal 501-532 (2007), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=825>, 502

### 2.4.1. Maastricht ruling – integration of Europe outflanked

If the Maastricht treaty was tectonic shift in the development of the EU law, than *Maastricht*<sup>124</sup> judgment of the FCC was tectonic crack which had followed. The core of the decision was the compatibility of the Maastricht Treaty with the Basic Law. Interestingly, the FCC upheld the constitutionality of the Maastricht, yet it confined the development of the EU law more significantly than the constitutional courts of France and Spain which found the Treaty unconstitutional.<sup>125</sup>

In the *Maastricht* ruling, the FCC employed a new tactic. In the *Solange* saga, the FCC explicitly asked the ECJ to be more active in the area of human rights protection. One can say that it was a direct permission given to the ECJ to broaden its jurisdiction. In contrast, the *Maastricht* was the cold shower since the FCC imposed explicit limits on the European integration and prohibited expansive interpretation by the ECJ.<sup>126</sup> “Hence, the principle of dynamic interpretation has now been neutralized to some extent by the more static notion of subsidiarity.”<sup>127</sup> In addition, the spirit or more precisely the ghost of the *Maastricht* have been replicated in consequent judgments of the FCC and is still haunting the integration project today.

First of all, the FCC quashed the part of the complaint claiming the inadequate human rights thus upholding *Solange II*. Nevertheless the FCC enriched its substance when it stated that not only the implementing acts of the German authorities, but also the acts of the EU itself fall within its purview. So far so good.

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<sup>124</sup> 89 BVerfGE 155

<sup>125</sup> Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, European Law Journal, Vol. 14, Issue 4, pp. 389-422, July 2008. Available at SSRN: <http://ssrn.com/abstract=1139482> (last visited 13.03.2012), 390

<sup>126</sup> M. K. Meessen, *Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany*, Fordham International Law Journal, Volume 17, Issue 3, 1993, 517

<sup>127</sup> *Id.* at 529

However, the FCC partially admitted the constitutional complaint whereas it based its decision on the fact that the Article 38 of the German Constitution granting the right to participate in the elections of the Bundestag could be impaired. Thus the highlight of the decision was question of democratic legitimacy. The FCC stated that the further transfer of competences to the EU could hollow the powers of the Bundestag which would consequently dilute the legitimation of state power through electoral process. The result would be the violation of inviolable constitutional principle of democracy as enshrined in the Art. 79(3) in conjunction with Art. 20 (1) and (2).

In the next step, the FCC provided thorough analysis of the Art. 38 and used it as a yardstick to evaluate whether the EU complies with these standards. Since the FCC was comparing apples with pomegranates it necessarily came to the conclusion that the EU did not passed through this muster. However, the FCC admitted that the European Parliament provided EU with a certain degree of legitimacy which nonetheless is not sufficient to remove its innate democratic deficit. Furthermore the FCC pointed out that there is no European demos which would grant the European Parliament greater part of legitimacy, although it admitted that it can evolve in the future.<sup>128</sup> As a result, substantive amount of powers must remain within the hands of national parliaments so the national state would not be reduced to an empty shell (*the FCC used term Entstaatlichung*).

It was said that the FCC was comparing the apples with the pomegranates when assessing the democratic legitimacy of the EU. This metaphor ought to shed the light on the situation. The ambition of the EU at best was to become one pomegranate housing under its peel the “seeds” represented by the Member States. It never aspired to corrosion of the nation states to create one

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<sup>128</sup> S. G. Kielmansegg, *German Constitutional Law and European Integration in the Wake of Lisbon*, German Constitutional Law, Vol. 5, 4/2011, 553

super-size apple. In addition it was the very purpose of the establishment of the EC and later on of the EU to limit the sovereignty of the national states in order to evade the “freeriding” and get rewards in other form (“pooled sovereignty”). Therefore the federation should have served as a backdrop for the evaluation of its democratic standards, not the unitary state.

Argument of lacking European demos<sup>129</sup> is fallacious for the same reason, since “in the federal context the constituent power cannot be autonomous, for its member units already exists as constituted political entities and cannot be ignored.”<sup>130</sup> In order to mitigate the democratic deficit, the FCC suggests strengthening the role of the European Parliament whenever the partial loss of influence of Bundestag occurs.<sup>131</sup> Of course, it was a cunning trick to dress the EU in the straitjacket from which it could not escape due its substance.

Second caveat was directed to the problem of *Kompetenz-Kompetenz*. Basically the FCC asserts that the powers, rights and obligations must be precisely embedded in the Treaties. Their creation *ex machine* especially through creative interpretation was prohibited under the threat that they would not be legally binding within the realm of German sovereignty. Naturally, the FCC reserved this kind of review for itself thus obtaining the new power. From this point, the FCC became the supranational court because it could assess the validity of EU legislation.<sup>132</sup> It is however suggested that this onslaught on the sovereignty of the ECJ violated the EU law and was basically unnecessary since the ECJ proved that it could correct its own decisions and that remains impartial in the questions of competence.<sup>133</sup>

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<sup>129</sup> The FCC used the book written by Herman Heller in 1928 in order to characterize the elementary precepts of citizenship thus blatantly disregarding development in this area. Basically, the FCC looked for arguments best fitting to its doctrine. see Meessen, K., M., 526

<sup>130</sup> Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 409

<sup>131</sup> M. K. Meessen, *Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany*, 520

<sup>132</sup> *Id.* at 520

<sup>133</sup> *Id.* at 523

The argumentation was further revolving around the core of the state sovereignty. The FCC introduced the neologism “*Staatenverbund*” in which the Member States are the true masters of the Treaties which could withdraw anytime and as uncontested sovereigns, they decide which powers could be transferred to the EU.<sup>134</sup>

To sum up, the powers of EU are limited, enumerated and derived. Consequently, the EU cannot define its own competences, since it lacks genuine and original sovereignty. This argument goes counter the position taken by the ECJ in the *Van Gend en Loose* decision stating that not the states, but the peoples established the “new legal order”.<sup>135</sup> One has to raise the question, whether such a strong stance was necessary, since the Maastricht treaty introduced the principle of subsidiarity as a self-restraint mechanism.<sup>136</sup>

One can compare the FCC to the general and The *Maastricht* ruling serves as a vivid example of its strategic mastery because the FCC managed to outmaneuver the ECJ without firing a single shot, only by employing its deceptive methods. First of all it stretches the interpretation of the Art. 38 to the greatest extent, thus encircling and limiting the meaning of the Art. 23.<sup>137</sup> Hence the FCC was able to prescribe the flexible interpretation of the Treaties, yet it did not shy away to nearly rewrite Art. 23. But more importantly, the FCC managed to encircle all member states of the European Union since *Maastricht* ruling has “extra-territorial” effects on its neighbors. Claiming the necessity to protect the democracy in Germany, the FCC undemocratically locked

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<sup>134</sup> Dimitrios Doukas, *The verdict of the German Federal Constitutional Court on the Lisbon Treaty: not guilty, but don't do it again!* E.L. Rev. 2009, 34(6), 868

<sup>135</sup> Compare to stance taken by the CCC: “In contrast to international law, Community law itself determines and specifies the effects it has in the national law of the Member States.” Czech Constitutional Court, Judgment of 08.03.2006, Case Pl. ÚS 50/04, No. 154/2006 Coll., 26

<sup>136</sup> Paul P. Craig, *Subsidiarity, a Political and Legal Analysis* (February 24, 2012). *Journal of Common Market Studies*, Vol. 50, p. 72, 2012; Oxford Legal Studies Research Paper No. 15/2012. Available at SSRN: <http://ssrn.com/abstract=2028332>, 11

<sup>137</sup> Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 393



all the Member States of the EU in its own normative vision.<sup>138</sup> As a result, the FCC did not only take initiative from the ECJ, but even from the legislatures of the Member States of the whole EU.

In addition, the stance of the FCC laid dynamite to the foundations of the EU law and gave the trigger to the NCCs. It stems from the treaties that uniform application and interpretation of the EU law was vested to the ECJ and dispersion of this power among NCC presents the risk of constitutional Babel. It is striking that the FCC did not make a preliminary reference to the ECJ which would be step maintaining unity on one hand and avoiding constitutional parochialism on another. As a result, the reluctance of the FCC to send preliminary references to the ECJ became the intrinsic feature of its doctrine. At the end of the day, the FCC became the supranational court exploiting the ongoing judicialization in order to reassert its position.

On the other hand, the seemingly stringent *pax germanica* was more lenient in practice. With regard to the FCC, one could agree with Cruz that more important for the FCC is to say something than to do something.<sup>139</sup>

In fact, the FCC has not declared any legal act to be violating the principle of conferral.<sup>140</sup> Although this barking has some influence on the ECJ, it has not led to the general halt to its judicial activism. “The *effet utile* and teleological interpretation seems to appear less frequently in judgments about competences, yet the restrictive turn did not take place in which individual rights are directly at stake, such as European citizenship or state liability for breaches of

<sup>138</sup> Joerges, Christian, *Rethinking European Law's Supremacy with Comments by Damian Chalmers, Rainer Nickel, Florian Rodl, Robert Wai*, 15

<sup>139</sup> Julio Baquero Cruz, *The Changing Constitutional Role of the European Court of Justice*, 228

<sup>140</sup> Andreas Vosskuhle, *Multilevel cooperation of the European constitutional courts: “der Europäische Verfassungsgerichtsverbund”*, E.C.L. Review 2010, 6(2), 183

Community law.”<sup>141</sup> Other areas in which the ECJ has been expressing greater deference include direct and indirect taxation and other areas of vital importance for the national state policy.<sup>142</sup>

The fair load of critic was poured out at the FCC. It was quite dubious, whether the mere act of ratification of the Maastricht Treaty could impair the right guaranteed by the Art. 38. In fact, the fractional political minority which would have not be heard otherwise amplified its voice through the FCC by utilizing the abstract review of constitutionality. True that one of the most important role of the Constitutional Court is to protect under-represented groups. Yet in this case the threat to the rights was potential rather than actual. It is more precise to say that FCC simply used the chance to impose its views while surpassing the ordinary public political debate which also was not in compliance with the principle of democracy.

Not only the way how the FCC interpreted its position, but also the content of this interpretation raise many questions. The FCC perceived the democracy and the participation through the narrow prism of the national law, which does not fully correspond with the current state of affairs. Put differently, the globalized nature of the world called for the globalized response which is often unachievable by the single Member State. The cross-border problems could be solved with greater democratic output on the EU-level.<sup>143</sup>

<sup>141</sup> Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, available at: <http://cadmus.eui.eu/handle/1814/6760>, (last visited 30.06.2012), 404

<sup>142</sup> Andreas Voskuhle, *Multilevel cooperation of the European constitutional courts: “der Europäische Verfassungsgerichtsverbund”*, 182

<sup>143</sup> Damian Chalmers et al., *European Union law : cases and materials 2<sup>nd</sup> edition*, 201

## 2.5. 1999 – 2003 From Maastricht through Amsterdam (1999) to Nice (2003) – An (Un)expected Journey?

Basically, Amsterdam and Nice were a part of the institutional overture which should prepare the EU for the largest enlargement in its history.

Amsterdam introduced co-decision of the European Parliament in new fields which should make the EU more democratic. The voting procedure in the Council was switched from unanimity to majority in many areas. Amsterdam treaty broadened the catch of the 3 pillar introduced by the Maastricht treaty.<sup>144</sup> The stronger emphasis was put on co-operation in immigration, police and law-enforcement affairs.

Nice was dealing mainly with the institutional reforms. Hence the Nice Treaty capped the number of the members of the European Parliament, the size of the Commission and re-allocated the number of votes in the Council of Ministers.<sup>145</sup> Also, it disposed the veto power of national governments represented in the Council of Ministers in many areas.

Beside the changes tied with enlargement, both Treaties vested the EU with new additional powers. By the broadening of the scope of the EU law, the Member States basically confirmed their willingness to continue in the integration, but also expressed consent with the creative interpretation of the Treaties made by the ECJ.

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<sup>144</sup> Ester Herlin-Karnell, *In the Wake of Pupino: Advocaten voor der Wereld and Dell'Orto*, 8 German Law Journal 1147-1160 (2007), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=881>, 1150

<sup>145</sup> Nice Treaty, available at: [http://news.bbc.co.uk/2/hi/in\\_depth/europe/euro-glossary/1230330.stm](http://news.bbc.co.uk/2/hi/in_depth/europe/euro-glossary/1230330.stm), last visited 06.07.2012

### 2.5.1. The CCC and the EU law - A Bridge too far?

There is clear distinction which should be made with regard to the EU law and its influence on the national law. Old member states of the EU/EC have been continuously exposed to the ongoing process of the *constitutionalization*.<sup>146</sup> In other words, they were travelling by the airplane while this machine has been undergoing major changes during the flight. It is quite understandable when certain passengers were complaining that the airplane is changing the course which resulted in *Solange saga* and *Maastricht* ruling. To sum up, the process of the adaptation to the EC/EU law was long-lasting, gradual process which allowed the Member States to formulate their doctrines.

On the other hand new member states such as Czech Republic entered to the board in 2004 when the legal foundation had been already laid down. Doctrines of supremacy, direct effect, implied powers etc. have been in the use for the long time, being constantly reshaped and reaffirmed through Treaty amendment process. From this point of view it is interesting that newcomer did not embrace these doctrines without reservations which could be ascribe to the tremendous influence of the FCC on the process of the formation of EU doctrines in the post-communist countries.

As a results, eastern Europeans “regard supremacy as a concept rooted in the national constitutions, rather than deriving from the autonomous nature of the Community legal order.”<sup>147</sup> “Additionally, it is for the national constitutional/supreme court to oversee whether the acts of the Communities which enter the national domain remain within the attributed powers or

<sup>146</sup> Damian Chalmers et al., *European Union law : cases and materials 2<sup>nd</sup> edition*, 189

<sup>147</sup> Anneli Albi, *Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of Cooperative Constitutionalism*, 3 *European Constitutional Law Review*, 25 – 67 (2007), 2

whether they go beyond.”<sup>148</sup> Hence even the so-called EU-amendments of national constitutions which made it possible to introduce the doctrine of supremacy and direct effect were not regarded as affecting the supreme position of the constitution itself.<sup>149</sup> They are minimalist in scope and extent which reflect the prevalent euro-skepticism of majority of citizens.<sup>150</sup>

There are several factors responsible for this position of eastern European countries. According to the Sajó, the NCCs in post-communist countries played pivotal role in the reconciliation process with the totalitarian past and to enter to the EU legal regime without any caveats meant to hand-over the sovereignty which has been regained only few years ago.<sup>151</sup>

Moreover the ECJ was being accused of not taking human rights seriously and using them only as a fig leaf.<sup>152</sup> Therefore the source of concern of newcomers was that the subordination to the EU law would downgrade protection of fundamental rights and freedoms below the level provided by NCCs.<sup>153</sup> It is quite ironic that originally it was the EU who had been having doubts about the level of human rights protection guaranteed by the “barbarians from the east” and now, they were those who are being suspicious.<sup>154</sup>

Other rationale could be described simultaneously as power-retaining and power-aggrandizing. As was already hinted, the self-esteem of the NCCs stemming from their crucial

<sup>148</sup> Michal Bobek, *Thou Shalt Have Two Masters: The Application of European Law by Administrative Authorities in the New Member States* (2008). Review of European and Administrative Law, Vol. 1, No. 1, pp. 51-63, 2008. Available at SSRN: <http://ssrn.com/abstract=1555674>, 60

<sup>149</sup> Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, (Cambridge: Cambridge University Press: 2005), 8

<sup>150</sup> Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, 72

<sup>151</sup> András Sajó, *Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy*, 2(3) Zeitschrift für Staats- und Europawissenschaften, 351 – 371 (2004), 353

<sup>152</sup> Anneli Albi, *Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of Co-operative Constitutionalism*, 35

<sup>153</sup> *Id.* at 33

<sup>154</sup> Wojciech Sadurski, 'Solange, Chapter 3': *Constitutional Courts in Central Europe - Democracy - European Union* (December 2006). EUI LAW Working Paper No. 2006/40. Available at SSRN: <http://ssrn.com/abstract=963757> or Available at: <http://dx.doi.org/10.2139/ssrn.963757> (last visited 23.01.2012), 6 -

role in the democracy-building process does not allow them to yield their supreme power.<sup>155</sup> At the same time, the accession to the EU vested them with the new power – to decide on the limits of integration which buttressed their position vis-à-vis political branches since now on, they could rule whether the constitution allows more integration.<sup>156</sup> All above mentioned fetishes, idols, and obsessions are reflected in Article 10a which was adopted by the Czech Republic in order to allow the accession to the EU. According to Article 10a sec. 1

*Some powers executed by the organs of the Czech Republic could be transferred by international treaty to the international organization or institution.* The analysis of this article reveals that the EU is not directly mentioned and is subsumed under the term international organization or institution, which corresponds with the old-fashioned conception of sovereignty.<sup>157</sup> Secondly, the amendment deals only with transfer of powers; it does discuss the principle of direct effect or supremacy of the EU law. Besides that, the Czech legislator extensively amended article 10 which had as an effect the shift from the dualism to monism.<sup>158</sup>

However, the legislator was criticized that by adoption of such brief amendments it simply washed off its hand and left all the interpretation troubles on the CCC since “in case of manifest constitutional conflicts with EC law, the room for interpretation by the Constitutional Courts is more limited and may give rise to unnecessary confrontations between the NCC and the ECJ.”<sup>159</sup> After the legislator had done its constitutional minimum to open a door for integration ajar, it was time for the CCC to grasp the reins.

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<sup>155</sup> András Sajó, *Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy*, 371

<sup>156</sup> Wojciech Sadurski, *'Solange, Chapter 3': Constitutional Courts in Central Europe - Democracy - European Union*, 4

<sup>157</sup> Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, 113

<sup>158</sup> *Id.* at 71

<sup>159</sup> *Id.* at 115

### 2.5.2. Sugar Quota case – Supremacy LLC

The big decision in which the CCC introduced itself on the EU stage was the *Sugar Quota*<sup>160</sup> case where it defined its stance towards the EU law which could be characterized, as “supremacy limited.” In this ruling, the CCC decided that the EU regulation is compatible with the Czech Constitution while upholding to the level protection of the human rights as guaranteed by the ECJ. Notably the CCC interpreted the “constitution in the light of the ECJ case-law on general principles of law, which form a part of Community law. In other words, “the Constitutional Court let these principles radiate into the interpretation of constitutional law.”<sup>161</sup>

In contrast, it struck down the implementation of the regulation, adopted by the Czech government because “according to the CCC, Community law was directly applicable and there was no legal basis for a national law transposing the Commission’s regulation into the Czech national legal order.”<sup>162</sup> In addition, the CCC replicated the doctrine of the FCC when it expressed that conferral of power to the EU is conditional and revocable.<sup>163</sup> It also set the limits for the transfer of powers:

“The delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law based state.”<sup>164</sup>

<sup>160</sup> Judgment of 8 March 2006, Pl. ÚS 50/04 („Sugar Quota III“), no. 154/2006 Coll.,

<sup>161</sup> Eliška Wagnerová, *The Czech Constitutional Court Doctrines on Community and Union Law*, Available at: <http://www.venice.coe.int/docs/2006/CDL-JU%282006%29024-e.pdf> (last visited 05.02.2012), p. 4

<sup>162</sup> Wojciech Sadurski, *Solange, Chapter 3: Constitutional Courts in Central Europe - Democracy - European Union*, 6

<sup>163</sup> Eliška Wagnerová, *The Czech Constitutional Court Doctrines on Community and Union Law*, 6

<sup>164</sup> Michal Bobek, and David Kosař, *The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview* (April 17, 2010). NATIONAL JUDGES AND SUPRANATIONAL LAWS. A COMPARATIVE OVERVIEW ON THE NATIONAL TREATMENT OF EU LAW AND THE ECHR, G. Martinico & O. Pollicino, eds., pp. 157-190, Europa Law Publishing, 2010. Available at SSRN: <http://ssrn.com/abstract=1591370>, 3

Consequently CCC recognized that the “Community law norms enjoy application precedence over the legal order of Member States of the EC, although the CCC added an reservation when it proclaimed that Community legal norms cannot be in conflict with the principle of democratic law-based state.”<sup>165</sup> Interestingly, the CCC recognized the autonomous nature of EU law when it opined that the primacy of the EU law originates from the Community law itself.<sup>166</sup> Furthermore, the CCC gave positive answer to the question whether it could review the constitutionality of the national measures implementing the EU law.<sup>167</sup>

## 2.6. 2005 Failed Constitutional Treaty - Do wishes come true when EU stars are falling?

The Constitutional Treaty was about power of symbols and symbols of power. The name itself – Constitutional Treaty (“CT”) sent strong message about the shifting of integration to qualitatively new level. Introduction of the flag and anthem of the EU even strengthen the impression of decisiveness of this moment. However, from the substantive point of view, the extent of reforms proposed by CT was no greater than that introduced the Amsterdam Treaty or by the Nice Treaty and definitively not greater than by the Maastricht Treaty.<sup>168</sup>

The CT should be the at least a coma if not a full stop symbolizing the ripeness and vitality of the EU project.<sup>169</sup> Thus main attempt was the merging of existing pillars and Treaties into one cohesive document including full-fledged Charter of Fundamental Rights, thus

<sup>165</sup> Wojciech Sadurski, *'Solange, Chapter 3': Constitutional Courts in Central Europe - Democracy - European Union*, 7

<sup>166</sup> Eliška Wagnerová, *The Czech Constitutional Court Doctrines on Community and Union Law*, 7

<sup>167</sup> Zdeněk Kühn and Michal Bobek, *What About that 'Incoming Tide?' The Application of EU Law in the Czech Republic* (August 1, 2009). THE APPLICATION OF EU LAW IN THE NEW MEMBER STATES - BRAVE NEW WORLD, A. Lazowski, ed., pp. 325-356, TMC Asser Press, 2010. Available at SSRN: <http://ssrn.com/abstract=1442496>, 9

<sup>168</sup> Neil Walker, *After the Constitutional Moment*, 3

<sup>169</sup> *Id.* at 4



“bringing together even tighter judicial space.”<sup>170</sup> More importantly it contained declaration of primacy of the EU law. Although it was long-established doctrine being constantly re-affirmed by judicial practice it has been also normatively constantly contested by the NCCs. Yet its blatant inclusion seemed to be supporting federal ambitions of the EU.<sup>171</sup>

However, the CT was also about limitations since its ambition was to divide the competences more precisely between the EU and between Member States.<sup>172</sup> Another idea animating the CT project was that it should establish the Pan European political community which could later serve as an ultimate legitimation for the actions taken by the EU.<sup>173</sup> As a result, the CT should stand at the beginning of the summoning of the European demos.<sup>174</sup>

At the end of the day, the French and Dutch referenda refused the CT which accentuated weaknesses of elite-driven legal and political integration disregarding the will of those for welfare of which it should have been established – citizens.

### 2.6.1. Developments of the EU Criminal law

Closer look at the field of criminal law reveals feverous activity which has been taking place in this field especially after 9/11.<sup>175</sup> It was mentioned that the CT should have eliminated 3-Pillar structure which would bring the police and judicial cooperation in criminal matters into purview of the ECJ.<sup>176</sup> Yet the ECJ decided not wait for the political action. Therefore it went other way around in famous *Pupino*<sup>177</sup> judgment in order to start the process of “depillarization.”

<sup>170</sup> Ester Herlin-Karnell, *In the Wake of Pupino: Advocaten voor der Wereld and Dell'Orto*, 1148

<sup>171</sup> Vaidotas A. Vaicaitis, *European Constitutionalism v. Reformed Constitution for Europe*, *Jurisprudencija/Jurisprudence*, 2010, 1(119), p. 69–83, 76

<sup>172</sup> *Id.* at 76

<sup>173</sup> Neil Walker, *After the Constitutional Moment*, 8

<sup>174</sup> *Id.* at 9

<sup>175</sup> Ester Herlin-Karnell, *In the Wake of Pupino: Advocaten voor der Wereld and Dell'Orto*, 1148

<sup>176</sup> *Id.* at, 1150

<sup>177</sup> *Case C-105/03, Pupino [2005] E.C.R. I-5285.*

In a nutshell, this case is about framework decision which is a legal instrument adopted under third pillar requiring domestic implementation before having any effect.

Moreover, Article 34 EU expressly rejects the direct effect of the third-pillar law. Thus the ECJ argued that efficient attainment of EU objectives and principle of loyalty enshrined in Art. 10 EC should apply also in the third pillar. Thus the ECJ “supranationalized” framework decision since it imbued it with indirect effect and supremacy. Therefore the national courts were obliged to set aside piece of domestic legislation even when the framework decision has not been fully transposed to the national legal order. Hence the ECJ did not take into consideration the primary intent of the Masters of the Treaties to treat first and third pillar as separate entities due to the specificity of their nature.<sup>178</sup> It was not only the insensitivity to the constitutional structure introduced by the Maastricht treaty but also disregard of the principle of legality, traditionally perceived as an essential element of the criminal law which prompted the legal response from the FCC which refused to recognize indirect effect of framework decisions which influenced its decision in the European Arrest Warrant case.<sup>179</sup>

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<sup>178</sup> Carl Lebeck, *Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino - Part II/II*, 521

<sup>179</sup> Jan Komárek, *European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony*. Jean Monnet Working Paper No. 10/05. Available at SSRN: <http://ssrn.com/abstract=934067> or <http://dx.doi.org/10.2139/ssrn.934067>, 10-11

### 2.6.2. European Arrest Warrant (EAW) – The FCC Hit the Weak spot

The European Arrest Warrant<sup>180</sup> was swiftly adopted after the 9/11 events and could be perceived as a milestone in the integration of the criminal law at the EU level. The main purpose of the EAW is to facilitate the extradition of nationals of one Member State to another Member State. Traditionally, extradition is a lengthy and awkward process which is political in nature. Usually the minister of justice/interior has to agree with the extradition of a citizen. However, the EAW transformed the political nature of the procedure to the judicial one. Now on, it is the judge who decides whether a person will be extradited (the framework uses term surrender) to another Member State. The underlying rationale is the “free circulation of criminal decisions, grounded on a system of mutual trust among Member State’s legal systems”.<sup>181</sup> It could be said that this principle presents the new perception of the EU territory.<sup>182</sup>

The mutual trust reflected in presumably comparable level of criminal procedures eliminates the borders of Member States of the EU and merges them to the one unified territory. Thus the current surrender procedure is akin to the extradition of the US citizen from Alabama to Arkansas. As a result, the requested state is basically obliged to surrender his citizen; the refusal is confined to enumerated grounds. While greatly facilitating the movement of suspects, this legal instruments has collided with the provisions of national constitutions prohibiting extradition of own country nationals. Moreover, this also touches upon the question of state

<sup>180</sup> COUNCIL FRAMEWORK DECISION of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

<sup>181</sup> Oreste Pollicino, *European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in an Attempt to Strike the Right Balance Between Legal Systems - Part I/II*, 9 German Law Journal 1313-1354 (2008), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1021>, 1317

<sup>182</sup> This „federal“ concept of the territory of the EU has also emerged in the *Case C 34/09, Gerardo Ruiz Zambrano v Office national de l’emploi (ONEM)*, although under different circumstances.

sovereignty. The FCC as well as the CCC thus had to resolve the encounter between the constitutional law, EU law and the sub-constitutional law implementing EU law.

The German Basic law enables the extradition of German nationals provided that the fundamental principles of the rule of law are respected. Surprisingly, the FCC interpreted BL rather extensively which resulted in nullifying of the implementation of the EAW.<sup>183</sup> Interestingly, the FCC did not directly challenge the validity of the EAW, thus avoiding the clash with the EU law, but rather questioned its implementation by the German legislator.<sup>184</sup> In the pending case where the surrender of the German citizen was requested under EAW, the FCC found out that the principle of the rule of law has not been guaranteed by the provision implementing the EAW.

The fact that the German legislature omitted to transpose optional grounds for refusal of the EAW listed in Art 4 para. 7 was chunk which the FCC was not able to swallow. The above mentioned provision granted the national authorities discretion to refuse the surrender, if the crime was committed on the state's own territory by its national. The FCC opined that in such a case, citizen should be prosecuted under its own legal system, because he basically "should not be removed without his will from a legal order in which he has confidence."<sup>185</sup>

The FCC stated that the citizenship is an intimate bond between the state and the citizen, which could not be withered away. Nationals of the state are also members of the democratic community and therefore could not be simply uprooted from their legal own system. To support its stance, the FCC mentioned the painful historical experience of prosecution of the Jews.

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<sup>183</sup> 2 BvR 2236/04

<sup>184</sup> Jan Komárek, *European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony*, 4

<sup>185</sup> Simone Mölders, *European Arrest Warrant Act is Void – The Decision of the German Federal Constitutional Court of 18 July 2005*, German Law Journal, Vol 07., No. 01, 45-58, 47

Another reason why the implementation was held unconstitutional by the FCC was the fact that it did enable the judicial review of the surrender. But more importantly, the FCC managed to undermine the whole logic of the EAW and EU Criminal law because it put the mutual trust in doubt. According to the decision, it could not be presumed that the other Member States could guarantee the same level of fundamental rights protection as the Germany. Therefore the mutual trust should be refused which means that each request to surrender own national must be reviewed on the case-by-case basis.

It could be concluded that the FCC employed the same tactic as it did in the *Maastricht* ruling. Rather than making a direct onslaught on concrete legal instrument it questioned the entire principle. In case of the *Maastricht* ruling it was democracy, here mutual trust. The reasoning of the FCC is again circular, because it states that the absence of general harmonization of penal law among the Member States enables only limited mutual trust. A *contrario*, necessary precondition for reaching of the “full mutual trust” is the general harmonization. However, such harmonization will in turn lead to the loss of the national identity which is prohibited under *Maastricht* judgment.<sup>186</sup>

Again, decision of the FCC has far-reaching consequences transgressing the legal boundaries of the Germany and causing the blockade of EU law.<sup>187</sup> It is needless to say that the effect of the annulment was immediate. Spanish court which requested suspects accused of bomb attacks in Madrid on the basis of the EAW proclaimed that Germany excludes itself from the cooperation in criminal matters.<sup>188</sup>

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<sup>186</sup> Jan Komárek, *European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony*, 17

<sup>187</sup> *Id.* at 14

<sup>188</sup> *Id.* at 20

This skeptical point of view is a departure from the *Solange II* status quo, where the FCC reconciled itself with the fact that the level of protection of fundamental rights provided by the ECJ is not the same as the protection guaranteed by the Germany. Here, the FCC was much more reluctant to entrust national legal systems. This stance is plausible although the violation of human rights by the EU has been scarce and has not affected the “hard-core” right such as liberty or even right to fair trial.<sup>189</sup> Yet the EAW deals with the criminal law capable of imposing the harshest sentences and severely impairing the rights of one citizen.<sup>190</sup>

### 2.6.3. EAW – Textual Interpretation Surrendered by the CCC!

The ethos of *Solange* was invoked in the EAW case when the CCC asserts that the precedence of the Community law is not absolute. It also stated that the delegation of powers is limited by the necessity to preserve the state sovereignty of the Czech Republic and the substantive-law based state. “Understandably, unless this extraordinary circumstance and highly unlikely situation were to come about, the Constitutional Court, pursuant to the ECJ doctrine of supremacy, will not review individual norms of Community law for their constituency with the Czech Constitutional order.”<sup>191</sup> However, the CCC departed from its view expressed in the *Sugar Quota* case when it held that certain acts of the EU, even the national implementing measures, fall out of the scope of the constitutional review, save as the situations, where the eternal core is at stake.<sup>192</sup>

<sup>189</sup> One can doubt whether Spanish incommunicado detention complies with this requirement see *Spain must end incommunicado detention*, available at: <http://www.amnesty.org/en/news-and-updates/report/spain-must-end-incommunicado-detention-20090915> (last visited 30.08.2012)

<sup>190</sup> Eliška Wagnerová, *The Czech Constitutional Court Doctrines on Community and Union Law*, 9

<sup>191</sup> *Id.* at 7

<sup>192</sup> Zdeněk Kühn and Michal Bobek, *What About that 'Incoming Tide?' The Application of EU Law in the Czech Republic*, 9

Despite these proclamations, the CCC got engaged in the full review of the implementation of the EAW invoking the doctrine of eternal core.<sup>193</sup> But unlike in the *Sugar Quota* case, where the CCC reviewed the validity of the EU law with the constitutional core, in the EAW case it used an entire constitutional order as a yardstick due to the peculiarities of the 3. Pillar law.<sup>194</sup>

The CCC also refined its position with regard to the review of the national measures implementing the EU law. If the certain instrument of the EU defines only objective to be met, thus leaving a margin of discretion in the hand of the member states, then the CCC could scrutinize its validity through the optic of the constitutional law. If the EU law leaves no room for discretion, the doctrine of primacy of EU law will then exclude the jurisdiction of the CCC. Finally, the CCC ruled that the implementation of the Framework decision, under which the EAW was adopted, could be reviewed despite the fact that it leaves no room for the discretion.<sup>195</sup>

In contrast to the Basic Law, the Czech Constitution prohibits the removal of citizen from the territory of the state.<sup>196</sup> Despite this hindrance the CCC put all its efforts to save the implementing measure.<sup>197</sup> With the help of the judicial creativity, the CCC inserted the optional grounds for the refusal to the national implementation measure. It simply utilized the provision of Procedural code which enables to refuse the extradition if it violates the constitution. Exploiting this lacuna, the CCC held that the respective article of the criminal code must be interpreted in the light of the Art. 4 para. 7 of the Framework decision. Put differently, the CCC imbued the respective provision of Procedural code with the content of the Art. 4 para. 7 of the

<sup>193</sup> Judgment of 3 May 2006, Pl. ÚS 66/04

<sup>194</sup> Peter Bříza, *The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008*, *European Constitutional Law Review*, 5, pp 143-164, 145

<sup>195</sup> Eliška Wagnerová, *The Czech Constitutional Court Doctrines on Community and Union Law*, 8

<sup>196</sup> Part I, Art. 14 par. 4, Charter of the Fundamental Rights and Freedoms,

<sup>197</sup> Michal Bobek and David Kosař, *The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview*, 4

Framework decision. Arguable both CCC and FCC could have reached similar result if they would have recognized the limited direct effect of the Framework decision as developed in the *Pupino*<sup>198</sup> judgment. Therefore the contested provisions of the Framework decision could have been implemented by the constitutional courts especially when the incorporation of provisions of optional grounds for the refusal of the surrender would have led to improvement of the position of the individual.

Despite more Euro-friendly interpretation, the CCC did not exclude the possibility that individual arrest warrant request may be held unconstitutional. Put differently, the CCC reserves for it the right to decide on constitutionality of individual arrest warrants, thus limiting the supremacy of the EU law. This aptly depicts that the EAW did not entirely remove the political aspect of the surrender. “Instead, due to the requirements of the constitutional courts, it would be rather another step forward in both the judicialization of European politics and the politicization of the judiciary.”<sup>199</sup>

In order to uphold the constitutionality of the EAW, the CCC expounded the historical context of the prohibition of forced removal of nationals in different manner than the FCC. During the communist era, it was a common practice, to forcefully remove the political opponents from the territory of the Czech Republic whereas they were consequently deprived of their citizenship. The provision of the constitution prohibiting a removal of citizens was a direct reaction to these historical events. However, the CCC argued, that the purpose of the provision is simply not the prohibition of extradition.

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<sup>199</sup> Zdeněk Kühn, *THE EUROPEAN ARREST WARRANT, THIRD PILLAR LAW AND NATIONAL CONSTITUTIONAL RESISTANCE/ACCEPTANCE: The EAW Saga as Narrated by the Constitutional Judiciary in Poland, Germany, and the Czech Republic*, 119



In employing the purposive argumentation, the CCC went a bit further when it concluded “the EAW reflects the new rights of Czech citizens who have also become European citizens, which brings them also new responsibilities of the 21<sup>st</sup> century, nonexistent in the old Europe of closed borders.”<sup>200</sup>

Interestingly, the CCC took into considerations also the rights of the victims. The extradition enables to conduct the criminal proceedings in the state in which the criminal act was committed thus contributing to the fair trial for both suspect and victim. Furthermore the CCC held that the “all domestic law sources, including the Constitution, must be interpreted as far as possible in conformity with the legislation implementing the European integration process.”<sup>201</sup> Moreover, the CCC declared that the principle of the interpretation in conformity with the EU law belongs to the constitutional principle.<sup>202</sup>

In order to defend the idea of mutual trust, the CCC opined that the very fact that the Member States of the EU are signatories of the ECHR upholds the idea of the mutual trust. It could be concluded that the historical and the purposive interpretation as applied by the CCC substituted the literal meaning of the constitution.<sup>203</sup> The obvious purpose was to deter the collision with the EU law.<sup>204</sup> “One might wonder whether it would be ultimately helpful for

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<sup>200</sup> *Id.* at 116

<sup>201</sup> Oreste Pollicino, *European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in an Attempt to Strike the Right Balance Between Legal Systems - Part I/II*, 1337

<sup>202</sup> Zdeněk Kühn and Michal Bobek, *What About that 'Incoming Tide?' The Application of EU Law in the Czech Republic*, 8

<sup>203</sup> Zdeněk Kühn, *THE EUROPEAN ARREST WARRANT, THIRD PILLAR LAW AND NATIONAL CONSTITUTIONAL RESISTANCE/ACCEPTANCE: The EAW Saga as Narrated by the Constitutional Judiciary in Poland, Germany, and the Czech Republic*, 114

<sup>204</sup> Michal Bobek and David Kosař, *The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview*, 10

democracy if problematic EU rules were justified by activist constitutional courts and by the technical language of the law.”<sup>205</sup>

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<sup>205</sup> Zdeněk Kühn, *THE EUROPEAN ARREST WARRANT, THIRD PILLAR LAW AND NATIONAL CONSTITUTIONAL RESISTANCE/ACCEPTANCE: The EAW Saga as Narrated by the Constitutional Judiciary in Poland, Germany, and the Czech Republic*, 133

#### 2.6.4. Medicine Product case – Sleeping Pills Prescribed for the EU Law by the CCC

Interestingly, the CCC suggested in the *Medicine Product case*<sup>206</sup> that certain international treaties on fundamental rights and fundamental freedoms are part of the constitutional law. Surprisingly, the CCC opined that the EU law does not form part of the Czech Constitutional order. This case is also emblematic for another reason. Following the footsteps of the FCC in the *EAW case*, the CCC rephrased the conflict between the EU law and the national law as a conflict between the national and constitutional law. This twist grants the CCC greater degree of independence since it could now compare the national implementing measures with its own constitutional standards, rather than with the case-law and doctrines of the EU.<sup>207</sup> “Although the conflict between EU law and the national law, no matter how clear, cannot establish unconstitutionality of the national law, it can provide an important supportive argument to conclude that the law is in conflict with the national constitution.”<sup>208</sup>

As a result, EU law is always applied through the optic of the national constitutional law. This seemingly weak position attributed to EU law could be explained by the fact that the CCC simply tries to regain its power which was vested to ordinary courts via decentralized review.

<sup>206</sup> Judgment of 16 January 2007, case no. Pl. ÚS 36/05 („*Medicinal Products for Human Use Case*“) no. 57/2007 Coll.

<sup>207</sup> Michal Bobek and David Kosař, *The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview*, 12

<sup>208</sup> Zdeněk Kühn and Michal Bobek, *What About that 'Incoming Tide?' The Application of EU Law in the Czech Republic*, 7

## 2.7. 2009 Lisbon Treaty - If you wish that your dreams come true do not say them aloud!

Lisbon treaty was for the EU a way out of the mud. Yet it did not remain without taints. Substantively, it was verbatim to the CT.<sup>209</sup> Yet symbolically; it was much weaker since it eliminated all signs of constitutional (federal) rhetoric. Thus the flag and anthem were removed; Charter of the Fundamental rights of the EU (“Charter”) was approved as a self-standing document. Its contribution remains limited since it applies only to fields which are in the competence of the EU or to the breaches which Member States commit while implementing EU law.<sup>210</sup> Charter is basically nothing more than a codification of rights and principles which emerged in the case-law of the ECJ so its main added value is that it makes them more visible.<sup>211</sup> However, this codification does not preclude the ECJ from discovering of new rights or principles. From the institutional point of view, the role of the European Parliament was strengthened in order to reduce the democratic deficit of the EU.

Confusing internal structure inherited from previous Maastricht Treaty remained and “de-pillarization” was only partial. As to the form of approval, it was ratified without ado by national parliaments, Irish referendum being the sole exception.

It seemed that the contest about the primacy of the EU law came to an end by the Declaration 17 attached to the Lisbon Treaty which proclaims the primacy of the Treaties over

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<sup>209</sup> Vaidotas A. Vaicaitis, *European Constitutionalism v. Reformed Constitution for Europe*, 70

<sup>210</sup> If the Charter applied also to the actions of Member States, it would incredibly soar the power of the EU and introduce overtly federal elements into the current framework. This creeping federalization occurred in as the aftermath of the case *Gitlow v. New York*, 268 U.S. 652 (1925).

For further info *see* Opinion of AG Sharpston delivered on 30 September 2010 (1) in case C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEM)*, para. 172

<sup>211</sup> Vaidotas A. Vaicaitis, *European Constitutionalism v. Reformed Constitution for Europe*, 78

the law of the Member states. Allegedly, the supremacy of the EU was endorsed by all Member States and not merely by the ECJ.<sup>212</sup> Nevertheless it is more than dubious whether NCCs adopts the view of legislature.<sup>213</sup>

Thus the Lisbon Treaty suffers to the same vices as the CT since the broader public was again excluded from drafting and from the ratification.<sup>214</sup> As a result, the political and legal form of integration still dominates over social involvement.<sup>215</sup>

### 2.7.1. Lisbon ruling of the CCC – Integration of Europe under Siege

The *Lisbon* treaty could be perceived as a compilation of already established legal principles and doctrines of the EU and the *Lisbon ruling*<sup>216</sup> goes in similar vein, mainly reiterating objections of the FCC raised in previous decisions. In the nutshell, FCC followed the *Maastricht* rationale when it proclaimed that the EU is derivative legal order whereas the integration is not a one-way ticket. However, potential lacunas left after the *Maastricht* were sealed and grip of the German sovereignty doctrine was tightened. In conclusion, the main source of concern for the FCC remains the reservation of statehood, the democracy and the federalism.

It is noteworthy that the principle of the supremacy of the EU law, although tacitly tolerated and respected, was only annexed to the Lisbon Treaty due to the defiance of Member States. The underlying rationale for its exclusion from the main body of the Lisbon treaty was

<sup>212</sup> Damian Chalmers et al., *European Union law : cases and materials 2<sup>nd</sup> edition*, 188

<sup>213</sup> Paul Craig and Gráine de Búrca, *EU Law: Text, Cases and Materials*, 266

<sup>214</sup> Vaidotas A. Vaicaitis, *European Constitutionalism v. Reformed Constitution for Europe*, 80

<sup>215</sup> *Id.* at, 81

<sup>216</sup> BVerfG, 2 BvE 2/08

that it could possibly strengthen the remit of the judicial review power of the ECJ.<sup>217</sup> However, this fear seems to be irrational, because the *Lisbon* added nothing new to its substance. Furthermore the FCC asserts (as it did in *Maastricht*) that the supremacy of EU law is derived and conferred from the Member States and does not emanate from the autonomous nature of the EU legal order.

“FCC intentionally downplays the evolution of this supranational Community into an integrated legal order conferring rights on private parties, which has been shaped by the doctrine of the ECJ, and involves the autonomous exercise of public power subject to controls analogous in nature to those in a state.”<sup>218</sup>

The FCC also used democracy argument in the as he did in the *Maastricht* ruling. It has explicitly ruled out the possibility that any constitutional body could legitimize the transfer of the *Kompetenz-Kompetenz* to the EU. Such an empowerment is reserved for the people who are the only one *pouvoir constituant*.

The FCC has also drawn red lines which should not be overstepped by the organs of the EU. Firstly, the amendment of the primary law of the EU should be always ratified by the Bundestag;<sup>219</sup> any simplified procedure including only EU bodies and national parliaments is out of question.<sup>220</sup> “Therefore it is the Bundestag, which has *Integrationsverantwortung* – a persistent responsibility to determine the essential features of German integration policy.”<sup>221</sup>

<sup>217</sup> Gunnar Beck, *The problem of Kompetenz-Kompetenz: a conflict between right and right in which there is no praetor*, E.L. Rev. 2005, 30(1), 42

<sup>218</sup> Dimitrios Doukas, *The verdict of the German Federal Constitutional Court on the Lisbon Treaty: not guilty, but don't do it again!* (2009) 34 *European Law Review* (Thomson: Sweet & Maxwell) 866-888, 870

<sup>219</sup> Mattias Wendel, *Lisbon Before the Courts: Comparative Perspectives*, *European Constitutional Law Review*, 7, pp 96-137 doi:10.1017/S1574019611100061, 115

<sup>220</sup> Dimitrios Doukas, *The verdict of the German Federal Constitutional Court on the Lisbon Treaty: not guilty, but don't do it again!*, 872

<sup>221</sup> S. G. Kielmansegg, *German Constitutional Law and European Integration in the Wake of Lisbon*, *German Constitutional Law*, 561

However, the novelization of the Treaty having broad scope and dynamic nature would be hold unconstitutional, even if it would comply with prescribed procedure.

Apart from the *ultra vires* review established in Maastricht, the FCC introduced so-called constitutional identity review. According to the ruling, the EU should not distort the essential principles creating the inviolable core of the German Constitution. This prohibition stems from the principle of loyal cooperation, according to which the EU has to defer to the national identities. Naturally, it is the FCC which undertakes a role of a sentinel vigorously protecting the the constitutional core from even potential encroachment of the EU law. Problem of this approach is that the term identity review is overbroad and therefore granting generous leeway to the FCC. To sum up, the FCC will not abstain from the ultra-vires and national-identity review as he did in the fundamental rights in the *Solange II*.

The FCC also expressed its view regarding the relationship between the national legal order and European Union law. Basically, the EU law should in principle prevail over the national law provided that it will respect essentials of the national Constitution consisting of fundamental rights and national identity.<sup>222</sup>

Other caveat was raised with regard to the competences of the EU. According to the ruling, national parliaments must retain competences of “high political significance” whereas the FCC enumerates non-exhaustive list of these competences. One can observe that the FCC is proceeding further in the maneuver which has started in the Maastricht ruling in order to effectively diminish the elbow-room of the EU. Again, the term “competences of high political significance”, due to its abstractness, does not allow the EU to avoid potential clashes. “Thus, whether or not the integration process has left sufficient substance for national policy decisions

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<sup>222</sup> Damian Chalmers et al., *European Union law : cases and materials 2<sup>nd</sup> edition*, 197

can only be evaluated on the basis of an overall review.”<sup>223</sup> In contrast, the FCC can invoke this doctrine anytime especially when coupled with other vague principles such as democracy, or identity.

The question of democratic legitimacy and democratic deficit was also put on the table. The FCC reiterates that current level is sufficient as long as the EU remains a union of sovereign states. However, if the substantial legislative function is transferred to the EU resulting its federalization, than the present level of legitimacy will be insufficient and would require the consent of German people acting as *pouvoir constituant*. More importantly, the FCC held that the Basic Law precludes the entry into a European Federal State.<sup>224</sup>

Taking previous paragraph together, it could be concluded that the FCC succeeded in check-mating the process of integration by quite circular argumentation. On one hand, it claimed that further transfer of powers, especially those denoted as being substantial, is inadmissible. Yet it is clear that as long as the EU would not have power to tax, or have impact on social security schemes, the German citizens would not be interested in its affairs. As a result, the FCC deterred the possibility of creating of the European demos actively participating in the democracy on the European level. Even the strengthening of the European parliament would lead to the weakening of the national parliaments which is also out of a question. Moreover, looking through the lenses of the FCC, the European parliament is not representative enough since it does not respect the principle of equal weight for each vote as a Bundestag. Thus it is more than clear that without sufficient ties existing between German citizens and the EU, there will be no interest at all to federalize the EU. It is therefore appropriate to cite the president of the FCC, Andreas

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<sup>223</sup> S. G. Kielmansegg, *German Constitutional Law and European Integration in the Wake of Lisbon*, German Constitutional Law, 557

<sup>224</sup> S. G. Kielmansegg, *German Constitutional Law and European Integration in the Wake of Lisbon*, German Constitutional Law, G., 551



Vosskuhle: “The Basic law allows barely more Europe.”<sup>225</sup> To sum up, the transformation of EU into full-fledged federation would require the adoption of brand new German Constitution.<sup>226</sup> Again, the FCC became the final arbiter of this process, thus triumphing over other constitutional bodies, over the ECJ and even over the other Member States.

### 2.7.2. Lisbon judgments of the CCC – Two Times YES to Integration

*Lisbon judgment I*<sup>227</sup> continued in the CCC’s tradition of the Euro-friendly interpretation, although the CCC used the constitutional order as a whole, not only the constitutional core as a backdrop for its review.<sup>228</sup> The reason for this stricter standard was the fact that for the approval of the treaty requires the same majority of deputies as for the amendment of the Constitution. To limit the scrutiny only to the constitutional core would therefore strip the *ex ante* review of constitutionality of its very substance. “However, the CCC limited its scrutiny to those provisions of the Lisbon Treaty expressly contested by the petitioner.”<sup>229</sup> Due to the fact that the CCC did not review the constitutionality of the Lisbon Treaty in its entirety, the door for the further constitutional complaints was left open.

Consequently the constitutional debate spins around the idea of sovereign state. The CCC analyzed more old-fashioned conception of sovereignty with the idea of “pooled” sovereignty according to which:

<sup>225</sup> M. Ammam and I. Klopfer, *Mehr Europa lässt das Grundgesetz kaum zu*, Frankfurter Allgemeine, 25.09.2011, Available at: <http://www.faz.net/aktuell/wirtschaft/europas-schuldenkrise/im-gespraech-andreas-vosskuhle-mehr-europa-laesst-das-grundgesetz-kaum-zu-11369184.html> (last visited 30.04.2012)

<sup>226</sup> Dimitrios Doukas, *The verdict of the German Federal Constitutional Court on the Lisbon Treaty: not guilty, but don't do it again!*, 554

<sup>227</sup> Judgment of 26.11.2008, Pl. ÚS 19/08, no. 446/2008 Col.

<sup>228</sup> Peter Bříza, *The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008*, 147

<sup>229</sup> Mattias Wendel, *Lisbon Before the Courts: Comparative Perspectives*, 105

“The transfer of certain state competences that arises from the free will of the sovereign and will continue to be exercised with the sovereign’s participation in a manner that is agreed upon in advance and is reviewable, is not *ex defintionem* a conceptual weakening of the sovereignty of a state, but, on the contrary it can lead to its strengthening within the joint actions of an integrated whole.”<sup>230</sup>

Finally, the CCC on this point upheld the constitutionality of the Lisbon treaty, since the EU still remains an international organization lacking the *Kompetenz-Kompetenz* and because the Member States are free to withdraw from the Union.

Following the footsteps laid down in the *Sugar Quota* case, the CCC reasserts its position when it held that “the transfer of powers may not cover comprehensive areas of law making, nor does it mean that the international organization, in whose favor the transfer is made, could not exercise these powers exclusively.”<sup>231</sup> With regard to the issues touching the constitutional core the CCC proclaimed that not only the mere text of the Lisbon treaty, but also its application matters.<sup>232</sup>

Furthermore the CCC demonstrates deference towards the ECJ when it proclaims to abstain from the review of the competence issues. As a result, the CCC broadens the scope of the *Solange doctrine* to the *ultra vires review*, something, which the FCC refused to do in its *Lisbon* ruling. To substantiate this notion, the CCC pointed out at the capability of the ECJ to handle these issues. Despite this high level of confidence in the ECJ, the CCC nevertheless reserves for itself the mean of the last resort to exercise the review of competences.

<sup>230</sup> Peter Bříza, *The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008*, 149

<sup>231</sup> *Id.* at 151

<sup>232</sup> Ján Komárek and ed., *The Czech Constitutional Court's Second Decision on the Lisbon Treaty of 3 November 2009*. *European Constitutional Law Review*, 5 , pp 345-352 doi:10.1017/S1574019609003459., 351

Other hotly debated issues were so-called flexibility clauses allowing the adoption of measures beyond the Union competences. However, the CCC quashed the allegations according to which these clauses circumvent the Article 10a of the Constitution regulating the transfer of powers. Pursuant to the CCC, the application of above mentioned clauses is specified and limited.<sup>233</sup> The CCC continued in similar vein when dealing with the simplified voting procedures embedded in the Treaty on the European Union (“TEU”) which allows switching from the unanimity to the majority voting procedure when amending the Treaty of the Functioning of the European Union (“TFEU”). Since the Art. 48 (6) explicitly prohibits any broadening of the competences transferred on the Union in the Treaties, and thus the Art. 10a of the Constitution is not affected, because contested provisions amends only voting, not the powers of the EU.<sup>234</sup>

Claimants were also unsure about the inclusion of the Charter of the Fundamental Rights of the Union. Their source of concern was how this adoption would influence the jurisdiction of the ECtHR, as well as the level of fundamental rights protection guaranteed by the Czech Constitution. The CCC calmed all the worries down when proclaimed that the access of the EU to the ECHR would promote the greater compatibility of the human rights regimes.<sup>235</sup> Most importantly it hinted on the Art. 52(3) and more precisely on the Art. 53 of the Charter which states that the level of protection as provided by the Charter cannot be lower than the one existing before its adoption. “Moreover, in its judgment Pl. ÚS 36/01, the Constitutional Court held that it is not permissible do decrease the standard for the protection of human rights that has

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<sup>233</sup> Peter Bříza, *The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008* 155

<sup>234</sup> *Id.* at 156

<sup>235</sup> *Id.* at 156

been attained.”<sup>236</sup> In addition the CCC mentioned the *Bosphorus*<sup>237</sup> case in which the ECtHR (in *Solange* fashion) proclaimed that as long as the fundamental rights protection in the EU provided by the ECJ is on adequate level, it will not review its decision.

More importantly, the CCC ostensibly demonstrates its position in the ongoing process of EU integration when stating:

“that even after the Treaty of Lisbon enters into force, the relationship between the European Court of Justice and the constitutional courts of Member States would not be in principle placed in a hierarchy in any way; it should continue to be a dialogue of equal partners, who will respect and supplement each other, not compete with each other.”<sup>238</sup>

### 2.7.3. Lisbon II. of the CCC

*Lisbon II.*<sup>239</sup> exploited the gap which remained after the *Lisbon I.* decision. In order to exclude any other attacks on the constitutionality of the Lisbon treaty, the CCC decided that the Lisbon treaty as a whole comply with the Czech Constitution.<sup>240</sup> The decision could be denoted as minimalist, since it did not add much substance to the previous one.<sup>241</sup> Most notably, the CCC in the *Lisbon II* decision “refused to follow the example of the FCC and to define the substantive limits of transferred competence and to set out expressly the essential requirements of a democratic state governed by the rule of law, which cannot be transferred onto the European

<sup>236</sup> Eliška Wagnerová, *The Czech Constitutional Court Doctrines on Community and Union Law*, 10

<sup>237</sup> *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* [GC], No. 45036/98, judgement of 30 June 2005, ECHR 2005-VI.

<sup>238</sup> Peter Bříza, *The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008*, 162

<sup>239</sup> Judgment of 03.11.2009, Pl. ÚS 29/09, No. 387/2009 Coll.

<sup>240</sup> Mattias Wendel, *Lisbon Before the Courts: Comparative Perspectives*, 105

<sup>241</sup> Michal Bobek and David Kosař, *The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview*, 5

level.”<sup>242</sup> “The CCC stated that these limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion.”<sup>243</sup>

The CCC also dismissed the arguments asserting that the democratic deficit of the decision-making procedures in the European Union is in violating the principle of democratic state and separation of powers. The bound mandate of the government, which was the remedy proposed by the appellants is perfectly possible under the Lisbon Treaty, which does not prevent regulation of these issues on internal level. Furthermore the petitioners are wrong when they deny the existence of participatory democracy on Union level. Both the democracy on internal level and on Union level are mutually interwoven and reinforcing each other.

It could be concluded that CCC timidly accepted the doctrines of the supremacy and the direct effect of the EU law. Although it embraced the German doctrines, it “does not hesitate to enrich the national constitution through a more concrete content of EU law including the ECJ case law.”<sup>244</sup> “Unfortunately, the jurisprudence of the CCC is far from being settled and established. The CCC is lacking a consistent approach in answering the same questions.”<sup>245</sup> The outcome of these existing discrepancies was fully exposed in the *Landtova*<sup>246</sup> case.

#### 2.7.4. Landtova case – Cry Havoc and Let Slip the Dogs of War!

If the Sugar quota case was described as first performance at the EU stage, the *Landtová* case resembles the behavior of specific rock bands which tend to destroy all their equipment at

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<sup>242</sup> *Id.* at, 5

<sup>243</sup> Ján Komárek and ed., *The Czech Constitutional Court's Second Decision on the Lisbon Treaty of 3 November 2009*, 346

<sup>244</sup> Zdeněk Kühn and Michal Bobek, *What About that 'Incoming Tide?' The Application of EU Law in the Czech Republic*, 10

<sup>245</sup> Zdeněk Kühn and Michal Bobek, *What About that 'Incoming Tide?' The Application of EU Law in the Czech Republic*, 10

<sup>246</sup> Case C-399/09, *Landtova*

the end of the concert. For the first time in the history of the EU integration, the NCC declared the decision of the ECJ to be *ultra vires*. The case aptly demonstrates the structural deficiencies of the supranational judicial review existing within the EU.

First of all, the power struggles for the final authority are not common only at the European level. Even the national legal orders are bifurcated and plagued with lengthy quarrels between the constitutional courts and various supreme constitutional courts.<sup>247</sup>

It was mentioned that the preliminary references made the ordinary courts seemingly on par with the constitutional courts. Exactly this feature of the EU legal order stood at the beginning of this ancient-like tragedy (or comedy). The Czech Supreme Administrative Court (“SAC”) has been waging a war with the CCC for a long time. In order to reach decisive victory, the SAC decided to back-up its position with the ECJ and therefore it filed a preliminary reference whereas the ECJ ruled in its favor. It is noteworthy to say that the referred ruling *Landtová* was 17<sup>th</sup> in the long string of cases, in which the CCC and SAC fought over the interpretation of social security scheme.<sup>248</sup>

The CCC perceived the decision of the ECJ as a slap from the SAC and pushed the big red button – it declared that the ECJ ruled *ultra vires*.<sup>249</sup> When doing so, maybe not so surprisingly, the CCC invoked the doctrine of eternal constitutional core which was allegedly touched by the contested decision thus proving how ominous/flexible this doctrine is.

However, one can even accuse the CCC of ruling *ultra vires*, since it interpreted the EU regulation on its own, which clearly falls out of the scope of its jurisdiction and which runs counter doctrine laid down in *EAW* case. In addition it also breached its duty to refer the questions

<sup>247</sup> Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 634

<sup>248</sup> Jan Komárek, *Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution*, available at: <http://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/> (last visited 30.04.2012)

<sup>249</sup> Judgment of 20. 3. 2007, Pl. ÚS 4/06, N 54/44 SbNU 665

to the ECJ since the interpretation of the EU law was involved. Peculiarly, this decision was regarded by the commentators a mere act of revenge, which did not bring the CCC any strategic advantage.<sup>250</sup> This stands in sheer contrast to the strategy of the FCC, which has managed to pull the strings of the EU integration without directly questioning the decisions of the ECJ.

“While the CCC ornamentally refers to the FCC rulings concerning the possibilities of intervention, everybody who has ever had a look at these decisions would know that they are quite different – if only because the FCC suggested that it would firstly send preliminary references to the ECJ before finding its ruling *ultra vires*.<sup>251</sup>

One can thus say that the CCC bit before barking. Another remarkable feature of this decision is that the CCC appeared to be far more Euro-friendly in its previous decisions than the FCC, despite that it stabbed dagger in the ECJ’s back.

It was said that the CCC reminds a rock back destroying its instrument at the end of the concert. Problem is that the CCC has to appear on the stage again. Yet its instruments such as consistency, reasoning, rationality and cooperation are seriously damaged. More importantly, it obviously did not make any sense to use the means of last resort, in this case *ultra vires* ruling, in the first place.

Moreover, *Landtova* creates a constitutional dilemma for ordinary courts. If they refuse to follow decision of the ECJ, they will breach the EU law. If they decide to adhere to the interpretation of the ECJ, they will breach the constitutional order of the Czech Republic (Art. 89 sec. 2).<sup>252</sup> Although it is suggested that this situation resembles the Hawk-Dove game whereas its iteration leads to “consistently higher level of human cooperation”, one must be careful with

<sup>250</sup> Arthur Dyeve, *The Czech Ultra Vires Revolution: Isolated Accident or Omen of Judicial Armageddon?*, Available at: <http://verfassungsblog.de/czech-ultra-vires-revolution-isolated-accident-omen-judicial-armageddon/>, (last visited 30.04.2011)

<sup>251</sup> Jan Komárek, *Playing With Matches: The Czech Constitutional Court’s Ultra Vires Revolution*,

<sup>252</sup> Ladislav Vyhnánek, *Formální aspekty judikatury Ústavního soudu (Formal Aspects of the Case-law of the Czech Constitutional Court)* (Doctoral Thesis) (Brno: Právnická fakulta Masarykovy Univerzity, 2012), 82

optimism.<sup>253</sup> The boldness, or to be more precise berserk of the CCC could lead to disintegration of the entire legal system.

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<sup>253</sup> Arthur Dyevre, *The Czech Ultra Vires Revolution: Isolated Accident or Omen of Judicial Armageddon?*



## 2.8. Conclusion of the Chapter II.

“ECJ allegedly manages States law and rendered it indistinguishable from analogous legal relationships in constitutional federal states.”<sup>254</sup> Problem is that although the ECJ conceive itself as being an ultimate source of authority, the NCCs still insist that their constitutions are the legal documents of paramount importance.<sup>255</sup> Thus the FCC and the ECJ speak with different normative language and as a result, this legal Babel about the ultimate source of power reflects deep normative split between various legal systems. Hence conflicts are inevitable owing to the intricate nature of the entire system. Therefore the question is how to reduce them to acceptable level. I suggest to treat national constitutions as the supreme source of power since this goes in the line with the legal reality. Another step is to amend the preliminary reference procedure in order to reduce the internal pluralism which often has negative implications on the external pluralism. In order to achieve this goal, only the NCCs should be allowed to send preliminary references to the ECJ.

The existing regime of supranational jurisdictions is than characterized by the lack of clear-cut hierarchy since interacting legal systems tend to be self-referential, each of them claiming to be an ultimate source of authority.<sup>256</sup> The problem is that the NCCs have not really internalized constitutional characteristics which were imposed on them by the ECJ.<sup>257</sup> The most prominent example is however the proclamation of the superiority of the EU law attached to the

<sup>254</sup> Matej Avbelj, *Questioning EU Constitutionalisms*, 5

<sup>255</sup> Gareth T. Davies, *Constitutional Disagreement in Europe and the Search for Pluralism*, 3

<sup>256</sup> Jan Komárek, *Institutional Dimension of Constitutional Pluralism* (March 20, 2010). CONSTITUTIONAL PLURALISM IN EUROPE AND BEYOND, Avbelj and Komárek, eds., Hart, 2010. Available at SSRN: <http://ssrn.com/abstract=1575522> (last visited: 27.06.2012), 1

<sup>257</sup> Matej Avbelj, *Questioning EU Constitutionalisms*, 22

Lisbon Treaty which seems to be disregarded by the NCC although it expresses the will of the legislator. “But even though national courts may express skepticism about EU law at the limits of its competence or legitimacy, they do not express doubt that most aspects of national participation in the EU are constitutionally legitimate.”<sup>258</sup> Hence the discipline to the EU law is to large extent discipline to the national law which makes the supranational jurisdiction more efficient.<sup>259</sup>

Thus the dilemma of the judge of the NCCs is, how to reconcile the allegiance to the constitutional values as such (e.g. dignity), with the requirements originating from supranational legal order adherence to which, nevertheless originates, at least indirectly from the constitution.<sup>260</sup> However, in case of legal collisions, only one principal solution should prevail.<sup>261</sup> Either there is a legal hierarchy or there is a legal chaos. Given the existing reality, the supranational legal system could claim their superiority, but they simply lack the means to enforce their assertions.<sup>262</sup> Therefore the national constitution having a real power should have the last word in the supranational discussion.

According to Maduro’s principle of universality, each court should espouse such a method of reasoning which could be utilized by other court within the EU thus contributing to the harmonious development.<sup>263</sup> “This Kantian approach seems to be impractical. First of all, there are 27 divergent legal orders and to formulate decision in such manner which will comply

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<sup>258</sup> Gareth T. Davies, *Constitutional Disagreement in Europe and the Search for Pluralism*, 12

<sup>259</sup> *Id.* at 3

<sup>260</sup> Nico Krisch, *The Open Architecture of European Human Rights Law*, *The Modern Law Review*, Volume 71: Issue 2 - March 2008, 197

<sup>261</sup> Adam Bodnar, *The Right to an Effective Remedy in a Polycentric Legal System* (*German Law Journal* Vol. 06, No. 11) p. 1618

<sup>262</sup> Gareth T. Davies, *Constitutional Disagreement in Europe and the Search for Pluralism*, 3

<sup>263</sup> Miguel Poirares Maduro, *Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism*. Available at SSRN: <http://ssrn.com/abstract=1134503> or <http://dx.doi.org/10.2139/ssrn.1134503>, 18

with their national constitution seems to be impossible.<sup>264</sup> Given the pervasive dichotomy between the ultimate sources of authority, no one should expect the NCCs to be more faithful to the EU law since “NCCs still consider that their ultimate allegiance, in the event of conflict, is to national constitutions and national supreme courts.”<sup>265</sup> In Slovakia we used to say that shirt closer to one’s body than coat. Hence the national law is a shirt whereas the EU law mere coat to the NCCs which is even logical, since the EU has not become the full-fledged federation yet.

If we look at the EAW saga, both CCC and FCC managed to reconcile the domestic law with the EU legal order thus avoiding the direct conflict. However, each particular national solution has the potential to affect the uniformity of the entire system making it asymmetrical.<sup>266</sup> Put differently, German solution did not set EAW aside, yet it undermined the entire system when proclaiming that the mutual confidence in legal orders could not be presupposed. Such an insensitive approach has a tendency to diminish the authority of the EU law. One isolated actions of NCC could produce extra-territorial results considerably undermining the authority of EU law, potentially triggering snowball effect.<sup>267</sup>

In contrast, the extremely friendly position such as the adapted by the CCC in the EAW case could undermine the legitimacy of the domestic legal order (which nevertheless legitimizes the supranational legal order) since all variable solutions striving to forcefully reconcile the national law with the EU law could potentially run counter to the idea of the legitimacy of the law and result in legal nihilism.<sup>268</sup>

To sum up, sometimes even truthful attempts to harmonize the interpretation of the domestic with the EU law are either to the detriment of uniformity of the EU law or negatively

<sup>264</sup> Jan Komárek, *Institutional Dimension of Constitutional Pluralism*, 4

<sup>265</sup> Gareth T. Davies, *Constitutional Disagreement in Europe and the Search for Pluralism*, 3

<sup>266</sup> Damian Chalmers et al., *European Union law : cases and materials 2<sup>nd</sup> edition*, 202

<sup>267</sup> Davies, Gareth T., *Constitutional Disagreement in Europe and the Search for Pluralism*, 11

<sup>268</sup> András Sajó, *Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy*, 371

influence the legitimacy of the domestic law. Hence the insistence on the compliance with the EU-law brings with itself a risk that the judicial decision-making would degrade into judicial politics thus putting legitimacy into doubt.<sup>269</sup>

According to Kumm's theory, there should be a presumption of the effective and uniform enforcement of the EU law.<sup>270</sup> Thus the main responsibility to reconcile the competing interests rests on the ECJ which is best suited to govern the entire system since it has jurisdiction over all 27 member states. Moreover, the primary allegiance of the ECJ in contrast to NCCs is the EU law.

"The obligation of national courts of last resort to refer questions of Community law to the Court of Justice is the indispensable hierarchical element within that framework — but one which is seldom respected."<sup>271</sup> One of the principle solutions would be to limit the preliminary ruling procedure to courts of last instance. Although the ECJ claims that current form is necessary in order to maintain uniform application and thus efficiency of the EU law, the true reason is that its main concern is not to uphold the uniformity, but the supremacy of the EU law.<sup>272</sup> Moreover, to maintain the uniformity on such level as the ECJ demands is not tenable nor desirable.<sup>273</sup> The fact that the ECJ is trying to hide its true intentions could be evidenced by the fact that "the most preliminary ruling cases are actually challenges to the EU rules and

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<sup>269</sup> Cormac S. Mac Amhlaigh, *Questioning Constitutional Pluralism* (August 4, 2011). U. of Edinburgh School of Law Working Paper No. 2011/17. Available at SSRN: <http://ssrn.com/abstract=1905053> or <http://dx.doi.org/10.2139/ssrn.1905053>, 10

<sup>270</sup> Cormac S. Mac Amhlaigh, *Questioning Constitutional Pluralism*, 7

<sup>271</sup> Julio Baquero Cruz, *The Changing Constitutional Role of the European Court of Justice*, 237

<sup>272</sup> Jan Komárek, *In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure*. European Law Review, Forthcoming . Available at SSRN: <http://ssrn.com/abstract=982529> (last visited: 23.07.2012), 6

<sup>273</sup> Gareth T. Davies, *The Division of Powers Between the European Court of Justice and National Courts: A Critical Look at Interpretation and Application in the Preliminary Reference Procedure*, 27

Commission decisions, not questions about the compatibility of national rules and European law.”<sup>274</sup>

Contemporary regime allowing ordinary courts to bypass the NCCs distorts the judicial hierarchy of domestic legal system and lead to internal conflicts.<sup>275</sup> As a result, supreme courts are losing one of their vital functions - control over the subordinated courts.<sup>276</sup> It is striking that the ECJ insists on the contemporary form of preliminary references claiming that it is necessary for the uniform application of the EU law, yet it overlooks the fact that it is simultaneously precluding the NCCs to retain control over the uniform application of the national law. This exacerbates the problem of internal pluralism within the national legal order which consequently has the spill-over effect on external pluralism. *Landtová* case serves as a prominent example. Thus the limitation imposed on preliminary references would have manifold advantages: Firstly, it would change the quantity and quality of the cases reaching the ECJ so it would be able to focus on “fewer cases of greater importance.”<sup>277</sup> As a result, the ECJ would function as the ECtHR sometimes laying down an important new principle, but often simply supervising the margin of appreciation.<sup>278</sup> Secondly, it would re-assert the authority of the NCCs since they would be able to fully control domestic legal system which could make them more willing to send preliminary references.<sup>279</sup> With this regard it sounds plausible that the reservations of NCCs

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<sup>274</sup> Alter, Karen J., *Private Litigants and the New International Courts*, 43

<sup>275</sup> Jan Komárek, *In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure*, 2

<sup>276</sup> Martin Shapiro and Alec Stone Sweet, *On Law, Politics & Judicialization*, 216

<sup>277</sup> Jan Komárek, *In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure*, 9

<sup>278</sup> Gareth T. Davies, *The Division of Powers Between the European Court of Justice and National Courts: A Critical Look at Interpretation and Application in the Preliminary Reference Procedure*, 27

<sup>279</sup> In fact, the NCCs are still able to maintain control over subordinated courts. The *Landtova* was primarily assertion of supremacy addressed to the the Supreme Administrative Court. But the point is that defiance of supreme courts transfer internal conflicts to international level.

regarding the supremacy of the EU law were not intended to undermine the EU law as such, but to raise voice in internal discourse.<sup>280</sup>

In addition, suggested reform of preliminary reference system would renew more natural channels of communications between the national and supranational legal orders. Obviously, the NCCs are as actors best informed about the application of the national law on all levels and therefore they would be a natural partner for the dialogue with the ECJ.

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<sup>280</sup> Jan Komárek, *In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure*, 8

### Chapter III: ECtHR and the National Constitutional Courts

“The Convention (ECHR) can function in effective manner only if it is directly applied by the domestic courts, in particular, the domestic constitutional and/or supreme courts. Thus there must be a constant process of cooperation and dialogue between the ECtHR and national jurisdictions.”<sup>281</sup>

This remark implicates the paramount role which NCCs could play in the formation of doctrines regulating the relationships between national legal orders and the ECHR regime.<sup>282</sup> There are several reasons which explain this. Firstly, the NCCs could due to their supreme position influence the reception of the ECHR, namely they are able define its position within the national legal order. Secondly, they could be instrumental in providing guidance to other national actors regarding the implementation of the ECHR and decisions of the ECtHR.<sup>283</sup> To sum up, the function of the NCCs as the masters of the floodgates is of vital importance.

Hence this chapter would expound their importance vis-à-vis the ECHR system. First, I will explain which the major forces were influencing the formation of doctrine of respective NCCs. Namely we can speak about the time and context of the adoption of the ECHR, the existing legal culture and the formal position of the ECHR within the domestic legal hierarchy. Then I shall analyze the landmark cases in which the views of the ECtHR collided with those of the NCCs.

<sup>281</sup> Mitchel de S.-O.-l'E Lasser, *Judicial deliberations: a comparative analysis of transparency and legitimacy*, (Oxford: Oxford University Press, 2004), 396

<sup>282</sup> Oreste Pollicino, *The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?*, Yearbook of European Law 2010 29: 65-111, 67

<sup>283</sup> Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*. European Journal of International Law, Vol. 19, p. 125, 2008; Vanderbilt Public Law Research Paper No. 07-20; Vanderbilt Law and Economics Research Paper No. 07-27. Available at SSRN: <http://ssrn.com/abstract=1021798>, 133

Finally, the conclusion should summarize the impact of supranational dialogue on the domestic legal order.

### **3.1. Context of Reception of the ECHR**

#### **3.1.1. Germany**

Accession to the ECHR should renew the credibility of the Germany and confirm the departure from its totalitarian past. Thus “the German ratification of the ECHR can also be understood as an important political signal to the international community of its commitment to democratization and rights protection.”<sup>284</sup> Therefore the ECHR was adopted in 1949 only with one reservation pursuant to which it would only apply the provisions of Article 7(2) ECHR within the limits of Article 103, para. 2, of the GG (prohibiting retroactive punishment).<sup>285</sup> This reservation was finally withdrawn in 2001. Furthermore, in Germany “the ECHR benefited much from the geopolitical environment, as it allowed Western European states to demonstrate their commitment to human rights in the face of the Soviet challenge.”<sup>286</sup>

After the fall of the iron curtain, the ECHR regime was extended also to Eastern Germany in 1990 which brought the necessity to tackle with the heritage communist past. As a result, the judicial system of the newly unified Germany was heavily overburdened which was even taken into consideration by the ECtHR.<sup>287</sup>

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<sup>284</sup> Helen Keller and Alec Stone Sweet, *A Europe of Rights – The Impact of the ECHR on National Legal Systems*, (Oxford: Oxford University Press, 2008), 112

<sup>285</sup> *Id.* at 112

<sup>286</sup> Nico Krisch, *The Open Architecture of European Human Rights Law*, 209

<sup>287</sup> Helen Keller and Alec Stone Sweet, *A Europe of Rights – The Impact of the ECHR on National Legal Systems*, 112

*see* *Süssmann v. Germany*, Application No.: 20024/92 (ECtHR, 16.09.1996), para. 52 the ECtHR recognized the importance of the overall political and social context of the case being decided. Thus it did not find violation of article 6(1) in this case since the FCC was overburdened as a result of the German re-unification with a cases having greater priority.



One should not overlook that the unlike other parties, Germany had had an extensive catalogue of the human rights before the ECHR was adopted. In addition, Germany introduced in 1951 individual constitutional complaint which provided effective guarantee to these rights. Thus the German legal order was protecting to large extent rights embedded in the ECHR which contributes to prevention of human rights violations and was poignantly described as a substantive method of prevention of collisions.<sup>288</sup> Hence the existence of effective redress mechanism in the national legal order results in the low number of adverse judgments against Germany.<sup>289</sup> Allegedly, influence on the domestic legal system and political debate is therefore limited.<sup>290</sup> This is mirrored in the fact that the ECHR could be even overruled by the *lex posterior*, albeit the legislator must expressly declare its intention to do so.<sup>291</sup>

Yet the dramatic soar of the volume and influence of the ECtHR judgments changes the perception of FCCs since its judges are well-aware of the risk of being reviewed by the Strasbourg if they do not comply with its standards.<sup>292</sup>

However, overlapping between the rights protection as provided by the FCC and the ECtHR is prone to cause tensions, if the FCC and the ECtHR, starting from the same line reach different outcomes. Taking it all together, the existence of human rights catalogue in the German legal order which is substantively similar to that provided by the ECHR, and effectively

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<sup>288</sup> Andreas Vosskuhle, *Multilevel cooperation of the European constitutional courts: "der Europäische Verfassungsgerichtsverbund"*, 180

<sup>289</sup> Christoph Gusy and Sebastian Müller, *How can the role of the European Court of Human Rights be enhanced? Recommendations for Germany* (Policy Paper), available at: <http://www.juristras.eliamep.gr/?tag=germany>, (last visited 26.07.2012), 3

<sup>290</sup> Eirik Bjorge, *National supreme courts and the development of ECHR rights*, Int J Constitutional Law (2011) 9 (1): 5-31, 26

<sup>291</sup> *Id.* at 26

<sup>292</sup> Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, (Oxford: Oxford University Press, 2009), 25

guaranteed by the FCC through constitutional complaint, has served as filtering mechanism keeping the number of complaints reaching the Strasbourg at the low level.<sup>293</sup>

### 3.1.2. Czech Republic

Czech Republic succeeded to the ECHR in 1993 after the Czechoslovakia had been divided. In case of the Czech Republic, adoption of the ECHR could be perceived as an “injection” to its legal system contributing to the renewal of the democracy after the fall of communism.<sup>294</sup> In the post-communist environment, the ECHR has often served as the external source of inspiration and as an anchor helping to solidify democratic developments which contributes to its prominent position within this legal order.<sup>295</sup> Moreover, the creative reception of the ECHR case-law imbued the CCC with the legitimacy, which was lacking right after its establishment due to the novelty of this institution.<sup>296</sup> To sum up, the ECHR provided aid in the sealing of legitimacy and cognitive gap thus helping to develop the robust human rights protection which proved to be crucial for the settlement with the communist past.<sup>297</sup>

Contribution of the ECHR could be evidenced by the fact that the judges of the Constitutional Court have been citing the jurisprudence of the ECtHR in their judgments, especially to buttress their position vis-à-vis other political actors.<sup>298</sup> In addition, the ECtHR has also gained a

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<sup>293</sup> The number of judgments delivered in 2010 was 47. Greece, which is considerably smaller country scored with 668 judgments. For further information see: [http://www.echr.coe.int/NR/rdonlyres/0A35997B-B907-4A38-85F4-A93113A78F10/0/Analysis\\_of\\_statistics\\_2010.pdf](http://www.echr.coe.int/NR/rdonlyres/0A35997B-B907-4A38-85F4-A93113A78F10/0/Analysis_of_statistics_2010.pdf) (last visited 26.07.2012)

<sup>294</sup> Oreste Pollicino, *The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?*, 89

<sup>295</sup> Helen Keller and Alec Stone Sweet, *A Europe of Rights – The Impact of the ECHR on National Legal Systems*, 543

<sup>296</sup> Zdeněk Kühn, *Comparative law in the Jurisprudence of the Central European Constitutional Courts*, Magazine for the Legal Theory and Practice, 2/2003, p. 110

<sup>297</sup> Norman Dorsen et col., *Comparative Constitutionalism – Cases and Materials* (Second edition), (Thomas Reuters: 2010), 120

<sup>298</sup> Michal Bobek, and David Kosař, *The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview*, 18

prominence between the ordinary people distrustful to the judicial machinery of post-communist realm.

### **3.2. Position of the ECHR and the judgments of the ECtHR within the national legal order – general overview**

#### **3.2.1. Position of the ECHR**

Before delving deeper into national layer of analysis, it is important to distinguish between the position of the ECHR and the position of the judgments of the ECtHR. The ECHR *per se* is an international agreement and therefore it should be observed by the Parties according to the principle *pacta sunt servanda*. Yet it is up to the national legal order which attributes position and effect of an international norm within its territory.<sup>299</sup> Thus every legal order places ECHR on different level, hinging also on the fact, whether the respective state is monist or dualist.

Yet the remote parallel could be drawn with the position of the ECJ *vis-à-vis* member states. Here, again, the NCCs quarrel about the ultimate superiority with the ECtHR. One could contest that “the ECHR had become a constitutional instrument, whereas the ECtHR is perceived as a final arbiter in the field of human rights protection.”<sup>300</sup> However, this characterization of the ECHR in constitutional terms tends to be based on pragmatic grounds to reduce the ECHR’s immense workload rather than ontological or normative considerations.<sup>301</sup>

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<sup>299</sup> Armin von Bogdandy, *Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law*, 403

<sup>300</sup> Nico Krisch, *The Open Architecture of European Human Rights Law*, 184

<sup>301</sup> Cormac S. Mac Amhlaigh, *Questioning Constitutional Pluralism*, 13

### 3.2.2. Position and effects of the ECtHR judgments (general overview)

There are two prevalent theories regarding the position and effect of the judgments of the ECtHR in domestic legal order. According to the first theory based on legal positivism, judgments of the ECtHR are declaratory in their nature, deriving their force from the binding character of the ECHR.<sup>302</sup> They are perceived as a secondary obligation arising from the breach of primary obligation of the contracting parties to comply with the ECHR. Therefore the judgments are perceived as decision of international tribunals addressed to particular state.<sup>303</sup> This implies that state is bound only by the judgment which is addressed directly to it, so the effect of judgment is limited *inter partes*. Yet this obligation to apply the decision *inter partes* does not mean that it should be applied schematically.<sup>304</sup> This approach is laudable since it tries to take into consideration the overall social context which is often more crucial for preserving the content of the decision than the mere text.<sup>305</sup>

Latter theory, in contrast, postulates that new judgments adopted according to the principle of evolutive interpretation could create new obligations and thus having constitutive effect.<sup>306</sup> As a result, they have self-executing, *erga omnes* character and should be therefore observed by all contracting parties.<sup>307</sup> Not surprisingly, the latter theory is becoming favored by

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<sup>302</sup> Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, 25

<sup>303</sup> Michal Bobek, *Case-law of the European Court on Human Rights, Sectional report for particular countries and national systems*, (2008), [available at: http://www.eui.eu/Personal/Researchers/mbobek/docs/ESLP.pdf](http://www.eui.eu/Personal/Researchers/mbobek/docs/ESLP.pdf), (last visited 27.07.2012), 82

<sup>304</sup> *Id.* at 86

<sup>305</sup> Zdeněk Kühn, *Comparative law in the Jurisprudence of the Central European Constitutional Courts*, Magazine for the Legal Theory and Practice, 2/2003, p. 120

<sup>306</sup> Eirik Bjorge, *National supreme courts and the development of ECHR rights*, 12

<sup>307</sup> *Id.* at 13

the ECtHR which reflects its self-esteem as being a constitutional court imposing “European public order”.<sup>308</sup>

According to this notion, the state authorities should keep up the pace with the Strasbourg jurisprudence if they do not want to be “named and shamed” on international level for non-compliance with the evolving standard of the ECHR.<sup>309</sup> This potential threat creates autonomous pressure on judges to take seriously ECtHR judgments even against other states, especially in the event of settled case-law which is potentially applicable to case being decided.<sup>310</sup> “Result is slow, but constant change of the sphere of sovereignty of the modern state.”<sup>311</sup>

However, both theories shares one common feature – they do not admit direct effect to the ECtHR decisions.<sup>312</sup> “The best argument in favor of vertical direct effect of the ECHR is that the ECHR as a living instrument evolving over time whose protections were intended to increase with economic and social progress.”<sup>313</sup>

In practice, even the judgment rendered directly against specific state could not have immediate cassation effect vis-à-vis to defective acts nor can create rights for the individual.<sup>314</sup> This implies that the enforcement mechanism is highly decentralized and therefore the application of the ECHR rest upon national authorities.<sup>315</sup> From this point of view, the ECHR remains truly an international regime, as opposed to the EU. However, if the ECJ incorporates

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<sup>308</sup> Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 40 TEXAS INTERNATIONAL LAW JOURNAL 359, 374 (2005), 363

<sup>309</sup> Eirik Bjorge, *National supreme courts and the development of ECHR rights*, 5

<sup>310</sup> Christoph Gusy and Sebastian Müller, *How can the role of the European Court of Human Rights be enhanced?*, 4

<sup>311</sup> Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 364

<sup>312</sup> Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, 26

<sup>313</sup> Eric Engle, *Third Party Effect of Fundamental Rights (Drittwirkung)*, European Law / Europarecht (2009) Vol. 5 No. 2, 165-173, 169

<sup>314</sup> Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 374

<sup>315</sup> Jonas Christoffersen and Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics*, (Oxford: Oxford University Press 2011), 195

the decision of the ECtHR in its own ruling, it will obtain quality of EU law thus gaining indirectly a direct effect.<sup>316</sup>

There is another possibility which could influence binding force and effect of the judgments of the ECtHR. If the NCC refers in its decision to the judgment of the ECtHR, the referred judgment of the ECtHR would arguably become organic part of decision of the NCC and therefore would be transposed into domestic law. As a result, normative force of the ECtHR judgment would be derived from the normative force of the judgment of the NCC. Thus the decision of the ECtHR serving “only” as interpretative tool for the NCC could become binding and directly effective for all state bodies (including the NCC itself) once incorporated into the decision of the NCC.

“Like other rules of international law, the Convention requires parties to guarantee a certain result – the conformity of their domestic law and practice with the conventional duties – but it leaves the manner in which this result is achieved to the discretion of the Parties.”<sup>317</sup> In accordance with this approach, the ECtHR is normally not giving precise instruction how to remedy sustained harm, although this has changed recently.<sup>318</sup> This freedom of choice arguably allows individual state to limit the effect of the international norm when it severely collides with constitutional principle.<sup>319</sup> Another reason justifying deviation of the state authorities from the Strasbourg judgment could be implausible factual assessment by the ECtHR since the state

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<sup>316</sup> see Michal Bobek, *Case-law of the European Court on Human Rights, Sectional report for particular countries and national systems*,

<sup>317</sup> Robert Blackburn and Jörg Polakiewicz, *Fundamental Rights in Europe – The European Convention on Human Rights and its Member States, 1950-2000*, (Oxford: Oxford University Press, 2000), 33

<sup>318</sup> Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, 26

<sup>319</sup> Armin von Bogdandy, *Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law*, 308

authorities are better placed to evaluate the facts of the case.<sup>320</sup> This is even reflected by the margin of appreciation doctrine recognizing different standards of human rights protection.<sup>321</sup>

There is another criterion which should be considered, namely how precise the judgment is. “The more the development goes in the direction of general judgments, the harder domestic implementation will become – and the greater will be the pressure on the Court (ECtHR).”<sup>322</sup>

Above mentioned theoretical outline produces clashes of ideologies in practice. The evolutive interpretation and the trend toward more general judgments arguably turns the ECtHR into a legislator while curtailing the state sovereignty. In addition, the ECtHR is not best suited to produce sweeping decisions since it cannot properly assess factual background and to propose solutions “best fitting” national order.

### **3.3. Position of the ECHR and the judgments of the ECtHR within the national legal order – Germany**

Germany is a country with a so-called dualist model which implies that international treaties have to be approved by the parliamentary statute in order to confer rights and obligations to individuals (Art. 59(2) GG). Put it differently, they do not have direct effect and thus “their domestic effects in Germany are conditioned on formal incorporation and compliance with substantive constitutional law.”<sup>323</sup> As a result, the ECHR enjoys formally the status of an ordinary law. However, even as an ordinary statute, the ECHR occupies a distinct position.<sup>324</sup> It is partially because the ECHR, as an instrument of international law, could not be affected by the

<sup>320</sup> Jonas Christoffersen and Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics*, 184

<sup>321</sup> *Id.* at 196

<sup>322</sup> *Id.* at 195

<sup>323</sup> Frank Hoffmeister, *Germany: Status of European Convention on Human Rights in domestic law*, *Int J Constitutional Law* (October 2006) 4 (4): 722-731., 724

<sup>324</sup> Non-derogable rules of customary international law, such as the prohibition of torture present exception.

ordinary statutes.<sup>325</sup> This stems from the constitutional prescription of openness of the GG towards the international law (Art. 24 GG). As the FCC observed, the principle of openness toward the international law is the reflection of German sovereignty which not only allows but also expect and facilitates the development of international law.<sup>326</sup> This implies that the German constitution do not only have a last word in the dialogue between European and International Courts, but serves as its normative basis.<sup>327</sup>

“The Germany legal theory distinguishes two ways in which the case-law of the ECtHR influence the German legal system – it affects the legal system by its binding force (*Rechtskraftwirkung*) and as a guide facilitating the interpretation of the ECHR (*Auslegungshilfe*)”<sup>328</sup>

Generally speaking, the binding force of the judgments is recognized in respective case against Germany. In contrast, decisions against other contracting parties should serve as an interpretative tool of the Convention. However, division applied by this base theoretical sketch is not that clear cut in practice.

One should therefore not overlook the role which the FCC played in strengthening of the position of the ECHR and its jurisprudence. Pursuant to the FCC’s landmark judgment *Görgülü*<sup>329</sup>, ordinary statutes have to be interpreted not only in the light of the GG, but also in the light of the ECHR:

“The guarantees of the Convention influence the interpretation of the fundamental rights and constitutional principles of GG. The text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the GG,

<sup>325</sup> Robert Blackburn and Jörg Polakiewicz, *Fundamental Rights in Europe – The European Convention on Human Rights and its Member States, 1950-2000*, 43

<sup>326</sup> 71 BvG, 2 BvR 2365/09, para. 89

<sup>327</sup> *Id.* at 89

<sup>328</sup> Michal Bobek, *Case-law of the European Court on Human Rights, Sectional report for particular countries and national systems*, 87

<sup>329</sup> BVerfGE 111, 307 (para. 34)



provided that this does not lead a restriction or reduction of protection of the individual's fundamental rights under the GG.<sup>330</sup>

In addition, the “FCC held that judgments of the ECtHR reflect the actual status of Convention law.”<sup>331</sup> As a result, judgments of the ECtHR should be duly taken into account by German administrative and judicial bodies, because they are bound by the rule of law (art. 20 (3) GG). “Hence if a judgment of the Strasbourg court has touched on subject matter that comes before the German courts, the latter must incorporate its reasoning in their own constitutional interpretation.”<sup>332</sup> “The FCC thus has, following the principle according to which the ECHR is a yardstick for the interpretation of national rights, by giving very strong interpretations to national rights arguably contributed to pushing the content of Convention forward.”<sup>333</sup>

Obligation to interpret domestic law in the light of the ECtHR is softened by the requirement according to which the Strasbourg decision must be applied in such a way which would fit into domestic law.<sup>334</sup> This excludes their direct effect,<sup>335</sup> but on the other also their schematic application and requires an active process of reception sensitive to constitutional context.<sup>336</sup>

Another significant point made by the FCC regarding the ECtHR judgments was that they do not only address past violations, but are also onward looking.<sup>337</sup>

However, “no constitutional complaint could be based solely on the alleged violation of the ECHR.”<sup>338</sup> As a result, the ECHR is perceived as an instrument which should complement to the

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<sup>330</sup> Helen Keller and Alec Stone Sweet, *A Europe of Rights – The Impact of the ECHR on National Legal Systems*, 119

<sup>331</sup> Frank Hoffmeister, *Germany: Status of European Convention on Human Rights in domestic law*, 725

<sup>332</sup> *Id.* at 725

<sup>333</sup> Eirik Bjorge, *National supreme courts and the development of ECHR rights*, 30

<sup>334</sup> 71 BvG, 2 BvR 2365/09, para. 90

<sup>335</sup> Christoph Gusy and Sebastian Müller, *How can the role of the European Court of Human Rights be enhanced?*, 6

<sup>336</sup> 71 BvG, 2 BvR 2365/09, para. 92

<sup>337</sup> Frank Hoffmeister, *Germany: Status of European Convention on Human Rights in domestic law*, 729

fundamental rights protection as provided by the GG.<sup>339</sup> Conclusively the FCC “developed techniques which led to de facto monism with respect to the ECHR”,<sup>340</sup> thus insulated it from the encroachments of ordinary statutes and managed to attain high degree of harmonization between its own jurisprudence and the jurisprudence of the ECtHR. Ultimately, according to the decisions of the FCC, the German legal system should be constantly updated in the light of the ECtHR jurisprudence.<sup>341</sup>

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<sup>338</sup> Christian Tomuschat, *The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court*, 11 German Law Journal 513-526 (2010), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1253>, 515

<sup>339</sup> Robert Blackburn and Jörg Polakiewicz, *Fundamental Rights in Europe – The European Convention on Human Rights and its Member States*, 121

<sup>341</sup> *see Van Kuck v Germany*, Application no. 35968/97 (ECtHR, 12.06.2003) In the present case the ECtHR decided that the Germany violated Article 8 of the ECHR since it refused to reimburse expenditures for the sex-reassignment surgery. During the time of the German decision, there was no relevant jurisprudence indicating such a duty. But when van Kuck reached the ECtHR, the decision *Christine Goodwin v. UK*, Application no. 28957/95 (ECtHR, 11.07.2002) had been already issued. Thus the ECtHR found violation at the side of the Germany and assigned *ex tunc* effect to its own jurisprudence. However, the ECtHR did not admit any damages to the applicant in the *Van Kuck v. Germany*, but even finding of violation was highly symbolic. Since the *Christine Goodwin v. UK* was decided prior to German decision, it implies that states themselves do not have to wait for the lead of the ECtHR but they are obliged to be more assertive and creative in the field of human rights. The *ex tunc* effect of the Strasbourg jurisprudence contains *de minimis* requirement of the national legal order to keep pace with its development and to recognize *ex nunc* effects of Strasbourg judgments. In other words, after the *Christine Goodwin v. UK* had been issued, all contracting states are obliged to implement its rationale. But now on, no contracting state could expect that the ECtHR would satisfy itself only with finding of violation as it happened in *Van Kuck v. Germany*, since the time for “transposition” of the *Christine Goodwin v. UK* into domestic law has “elapsed”.

*see* Markus Ogorek, *The Doctrine of Parliamentary Sovereignty in Comparative Perspective*, 6 German Law Journal 967-980 (2005), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=606>, 975

German Federal Court of Justice (“GFCJ”) decided that it is not admissible to use a diary seized from an accused as evidence. In order to justify its decision, the GFCJ made reference not only to the Article 1 sec. 1 in connection with Art. 2 sec. 1 of the GG, but also cited the respect for private and family life guaranteed in Article 8 ECHR which also proscribes such treatment.

### 3.4. Position of the ECHR and the judgments of the ECtHR within the National Legal Order Czech Republic

Czech Republic is a country with a monist legal system which could be inferred from the Art. 10 CC serving as a general rule giving priority to all international treaties, provided that they are duly promulgated and ratified by the Parliament. Hence the obligation to observe the ECHR stems from the national/constitutional law and from the international law according to the principle *pacta sunt servanda*.

From the formal point of view, treaties have the same rank as ordinary laws, they only enjoy application precedence.<sup>342</sup> Nevertheless, the CCC managed to promote the ECHR to the constitutional status in its groundbreaking decision of 25 June 2002 (Pl. ÚS 36/01).<sup>343</sup> As a result, the ECHR occupies higher position than provided by the CCN which enables the CCC to strike down the ordinary law for its non-compliance with the ECHR.<sup>344</sup> Rationale for this promotion of the ECHR is that according to Article 9 section 2 of the CCN it is inadmissible to abate the acquired level of protection of fundamental rights and freedoms as guaranteed by the CCN which now includes even international treaties on human rights.<sup>345</sup> Moreover, the ordinary courts are according to decision Pl. ÚS 36/01 obliged to refer any conflicts<sup>346</sup> arising between the international human rights treaties and the ordinary laws under concrete review of constitutionality to the CCC since this conflict should be assessed as a conflict between the constitutional law and the ordinary law.

<sup>342</sup> Michal Bobek and David Kosař, *The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview*, 15

<sup>343</sup> Judgment of 25.06.2002 Pl. ÚS 36/01, 403/2002 Coll.

<sup>344</sup> Michal Bobek, *Case-law of the European Court on Human Rights, Sectional report for particular countries and national systems*, (2008), 90

<sup>345</sup> Judgment of 25.06.2002 Pl. ÚS 36/01, No. 403/2002 Coll. para. VII.

<sup>346</sup> This obligation stems from the § 109, sec. 1, letter c.) Civil Procedural Code and § 224 sec. 5 Penal Code.

Strikingly, before this decision had been taken, the respective constitutional provision<sup>347</sup> empowered the ordinary courts with the capacity to review the compliance of the ordinary laws with the ECHR. This remarkable aberration from the constitutional text done by the CCC offers two explanations: “First, the CCC simply wants to retain power over ordinary courts. This seems logical given the pervasive problem with the internal pluralism of the Czech legal order characterized with the battles between the CCC and the Supreme Administrative Court and Supreme Court.”<sup>348</sup> Second, it was the deep mistrust of the CCC in the ability of ordinary courts to apply properly the international human rights treaties”<sup>349</sup> This could be ascribed to the insufficient knowledge of the Strasbourg jurisprudence among judges and also to the “uncreative” way of interpretation which is an unwelcomed heritage of the communism.

Regarding the application of the ECtHR case-law, the Czech Republic adopted a doctrine similar to the German one. According to the decision of the CCC, the judgments of the ECtHR against Czech Republic in particular present not only a duty stemming from the international law, they are having also a legal basis in the domestic law (Art. 1 sec. 2 of the CCN).<sup>350</sup> Although this binding effect of the Strasbourg case-law is of lesser degree than the one of the ECJ, it should be nevertheless respected.<sup>351</sup> In addition, the constitutional principle of equality (Art. 1 sec. 3 para. 1 of Czech Charter of Fundamental Rights and Freedoms) prescribing to treat similar cases similarly also creates an obligation to respect the ECHR case-law since it reduces the discretion of judges and thus guarantees the equal application of the law.<sup>352</sup>

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<sup>347</sup> Art. 87(1)(a) of the CCN

<sup>348</sup> see Michal Bobek, *The Administration of Courts in the Czech Republic – in Search of Constitutional Balance*, Forthcoming in 16 (2) European Public Law (2010)

<sup>349</sup> Michal Bobek and David Kosař, *The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview*, 16

<sup>350</sup> Judgment of 06.11.2003 Pl. ÚS. 604/02, Coll., volume 32, decision No. 7, p. 48

<sup>351</sup> Michal Bobek, *Case-law of the European Court on Human Rights, Sectional report for particular countries and national systems*, 91

<sup>352</sup> *Id.* at 91

The question how to tackle with judgments against other states has not been resolved yet, but generally speaking, these decisions are not formally binding, but are recognized as interpretative tools having supportive function in the interpretation of domestic legal norms.<sup>353</sup> However, judgments of the ECtHR as such are not valid source of law.<sup>354</sup>

Nevertheless from the way how the CCC applies the case-law of the ECtHR could be inferred that the CCC recognizes its normative force. This normative binding force could stem from the fact that decision of the ECtHR does not present an opinion favored by particular judge, but a universally valid argument symbolically shared by other democracies.<sup>355</sup> “It is notable in this regard that the decision sp. Zn. Pl. ÚS 16/99 abolished the entire section of the Civil Process Code for its non-conformity with the Article 6 of the ECHR as interpreted by the ECtHR.”<sup>356</sup> Thus the CCC respects that the ECHR is a living instrument, binding in the form as interpreted by the ECtHR.<sup>357</sup>

However, pervasive problem of the work with of the ECtHR case-law is that the CCC applies it only to confirm its line of argumentation.<sup>358</sup> Such selective approach, lacking a critical reflection necessarily undermines the persuasive value of the Strasbourg judgments.<sup>359</sup>

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<sup>353</sup> Michal Bobek, *Case-law of the European Court on Human Rights, Sectional report for particular countries and national systems*, 91

<sup>354</sup> Michal Bobek and David Kosař, *The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview*, 17

<sup>355</sup> Zdeněk Kühn, *Comparative law in the Jurisprudence of the Central European Constitutional Courts*, 114

<sup>356</sup> Ladislav Vyhnánek, *Formální aspekty judikatury Ústavního soudu (Formal Aspects of the Case-law of the Czech Constitutional Court)* (Doctoral Thesis) (Brno: Právnická fakulta Masarykovy Univerzity, 2012), 42

<sup>357</sup> *Id.* at 41

<sup>358</sup> Michal Bobek, *Case-law of the European Court on Human Rights, Sectional report for particular countries and national systems*, 94

<sup>359</sup> Zdeněk Kühn, *Comparative law in the Jurisprudence of the Central European Constitutional Courts*, 115

### 3.5. Symbolic cases – Van Hannover saga & D. H. and others v. Czech Republic

One could only speculate why the ECtHR in *von Hannover v. Germany*<sup>360</sup> decided to confront the dogmatic of the FCC dealing with the freedom of speech.<sup>361</sup> In contrast the *D.H. and others v. Czech Republic*<sup>362</sup> goes in line with the new approach of the ECtHR trying redress the grievances of systematically discriminated Roma population.<sup>363</sup> However, there are common traits unifying these two judgments mentioned above. Firstly, in both cases, contracting state is obliged to take positive procedural measures in order to achieve the efficient protection of substantive right.<sup>364 365</sup> This is quite unusual, since most of the ECtHR judgments deals with the violation of the substance of the right.<sup>366</sup> Secondly, it is the high political importance which makes from them “full” judgments having a large-scale impact.<sup>367</sup>

Apart from challenging the jurisprudence of the FCC, the *von Hannover v. Germany* touches upon the freedom of press which is regarded to be one of tenets of democracy.<sup>368</sup> Moreover, there are large numbers of stakeholders which are affected by this decision – not only publishers, but also the public. Symbolic value of *D.H. and others v. Czech Republic* relies in the fact that Roma population creating “disadvantaged and vulnerable” minority without real political power presents and emblematic failure of the democratic Europe to tackle with their

<sup>360</sup> *von Hannover v Germany*, application no. 59320/00, (ECtHR, 24.06.2004)

<sup>361</sup> Felix Müller and Tobias Richter, *Report on the Bundesverfassungsgericht's (Federal Constitutional Court) Jurisprudence in 2005/2006 - Part II/II*, 169

<sup>362</sup> *D.H. and Others v. Czech Republic*, application No. 57325/00, (ECtHR, 13.11.2007)

<sup>363</sup> James A. Goldston, *The Struggle for Roma Rights: Arguments that Have Worked*, Human Rights Quarterly, Volume 32, Number 2, May 2010, pp. 311-325, 318

<sup>364</sup> *Id.* at 319-320

<sup>365</sup> *von Hannover v Germany*, application no. 59320/00, (ECtHR, 24.06.2004) para. 5

<sup>366</sup> Gerdrude Lübke-Wolff, *How can the European Court of Human Rights reinforce the role of national courts in the Convention system?* Seminar: 2012, Available at: <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Seminar+documents/Dialogue+between+Judges/11-17>, (last visited 05.08.2012), 14

<sup>367</sup> Mitchel de S.-O.-l'E Lasser, *Judicial deliberations: a comparative analysis of transparency and legitimacy*, 395

<sup>368</sup> *see Pedersen and Baadsgaard v. Denmark*, application no. 49017/99 (ECtHR, 17.12.2004 )

discrimination and segregation. In addition, the discrimination of Roma has stood behind violation of wide arrays of other fundamental rights, including right to life.<sup>369</sup> Thus the right to education which was at stake in *D.H. and others v. Czech Republic* is highly symbolic, since it should be perceived as an outward looking right likely to allow new generation of Roma not only to integrate, but to acquire a capacities to deal with the problems on their own.<sup>370</sup> Finally, both Germany and Czech Republic were directly targeted by the ECtHR. Germany was probably picked up by the ECtHR because it simply wanted to harmonize European standard of privacy protection and therefore it was necessary to dispose Germany from its comparative advantage. In contrast, the Czech Republic was chosen since there was a strong evidential basis that children are being segregated in a public schools on account of their race.<sup>371</sup> It seems logical that the ECtHR wanted a big case to highlight the systemic problem and thus to set the trend for other countries.<sup>372</sup>

### 3.5.1. Von Hannover v Germany I.<sup>373</sup>

The relationship between the ECtHR and the FCC was profoundly influenced by the case *Von Hannover against Germany* and resulted in the cold-war between both courts. The issue at stake was the proper balance between the right to privacy and the freedom of speech. Finally, the ECtHR concluded that the Germany did not attach adequate protection to the privacy.

<sup>369</sup> James A. Goldston, *The Struggle for Roma Rights: Arguments that Have Worked*, 318

<sup>370</sup> Lydia Gall and Robert Kus, *What Happened to the Promise of D.H.?*, Roma Rights , Number 1, 2010, 39 – 45, 39

<sup>371</sup> James A. Goldston, *The Struggle for Roma Rights: Arguments that Have Worked*, 320

<sup>372</sup> see *D.H. and Others v. Czech Republic*, application No. 57325/00, (ECtHR, 13.11.2007) para. 205

The ECtHR mentioned in conclusion that the Czech Republic is not the only country witnessing the wide-spread discrimination of Roma. This remark implicitly says that other countries having problems similar problems with discrimination should follow the conclusions stemming from the judgment for Czech Republic.

<sup>373</sup> *von Hannover v Germany*, application no. 59320/00, (ECtHR, 24.06.2004)

As to the facts of the case, the Caroline von Hannover is a daughter of the prince of Monaco. As a prominent figure, she has been constantly chased by the press which has been looking for the details of her private life. Since she was unable to prohibit the publication of the clandestinely taken photos depicting her and her family in private sphere, she filed a complaint to the Strasbourg claiming that the German law does not afford adequate protection to her privacy. In respective case the ECtHR ruled unanimously that the FCC grants insufficient level of protection to the privacy of the prominent figures of contemporary society and therefore violated Art. 8.

The importance of this case could be ascribed to following factors: Firstly, this decision is an untypical example of the Strasbourg case-law since it carries a strong *Drittwirkung* element. Secondly, the case deals with the so-called multi-polar situation since it involves Caroline von Hannover's right to privacy, freedom of the press and the right of the public to be informed. Finally, the ECtHR "corrects" the long established case-law of the FCC regarding freedom of speech which caused consternation among German constitutional judges since they were found to be violating fundamental rights.<sup>374</sup> More precisely, the ECtHR refuted the complex jurisprudence of the FCC on the freedom of press which was more painful for the FCC than finding an act of the legislature to be in the breach of the ECHR.<sup>375</sup>

### *Drittwirkung*

In a nutshell, the defendant in the dispute in front of the ECtHR is always the contracting state. Therefore it is not possible for an individual to sue the private individual directly. This

<sup>374</sup> Nicolas Nohlen, *Von Hannover v Germany*, application no. 59320/00 (ECtHR, 24.06.2004)-VI Eur. Ct. H.R., The American Journal of International Law, Vol. 100, No. 1 (Jan., 2006), pp. 196-201, 198

<sup>375</sup> Felix Müller and Tobias Richter, *Report on the Bundesverfassungsgericht's (Federal Constitutional Court) Jurisprudence in 2005/2006*, 169



usually does not pose any problems since the most of the obligation under the ECHR are having negative character, which means that the state has to abstain from certain action.<sup>376</sup> However, the maintenance of these negative obligations sometimes requires a positive action of the state. Thus the individual could fill a complaint against a state which failed to protect him from another individual. “In the words of the Court (ECtHR), the Article 8 obligation to respect an individual’s privacy imposed positive obligation that may involve adoption of measures designed to secure respect for private life even in the sphere of the relations of individual’s themselves.”<sup>377</sup> In the present case, it is the press which as private party violates the fundamental rights of other private party, namely Caroline von Hannover. Since the decision established new balance between the privacy and freedom of press, it has far-reaching implications on publishers as third parties established even in other contracting states to the Convention.<sup>378</sup> More precisely, it has already triggered in the United Kingdom the discussion about the necessity to reform the Practice of the Press Complaints Commission.<sup>379</sup> Another problem with this type of decisions stems from the fact that broadening of the privacy protection of von Hannover is inevitable detrimental to the freedom of press (and vice versa).

“With respect to all situations of this kind, the Court would manifestly run into trouble with the Article 53 ban on restricting rights which are granted on the domestic level if, instead of applying the minimum standards for both rights involved and leaving a margin of balancing options to national courts and legislators, it were to undertake to do all the balancing itself.”<sup>380</sup>

<sup>376</sup> Harris, O’Boyle & Warbrick, *Law of the European Convention on Human Rights*, 18

<sup>377</sup> Harris, O’Boyle & Warbrick, *Law of the European Convention on Human Rights*, 20

<sup>378</sup> Nicolas Nohlen, *Von Hannover v. Germany App. No. 59320/00.2004-VI Eur. Ct. H.R.*, 201

<sup>379</sup> M. A. Sanderson, *Is Von Hannover v Germany a step backward for the substantive analysis of speech and privacy interest?*, E.H.R.L.R. 2004, 6, 631-644, 635

<sup>380</sup> Gertrude Lübke-Wolff, *How can the European Court of Human Rights reinforce the role of national courts in the Convention system?*, 15

### *Balancing done by the ECtHR*

The FCC decided the case at hand by using the so-called concept of “a figure of contemporary society *par excellence*” which was developed by the jurisprudence of the FCC.<sup>381</sup> According to this concept, well-known persons such as Caroline von Hannover have a lowered level of protection stemming from their impact on the formation of the public opinion. Given their importance, the press is allowed to inform the public about their behavior in the private sphere.<sup>382</sup>

The FCC balanced freedom of press with the right to privacy and concluded that even the privacy of prominent figures is protected, however “they have to retire to a secluded place with the objectively recognizable aim of being alone and where, confident of being alone they behave in a manner in which they would not behave in public.”<sup>383</sup>

Basically, the ECtHR balanced the freedom of speech of the press with the right to privacy of the Caroline von Hannover, and came to the conclusion that the FCC failed to provide adequate protection to the privacy. It based its decision on following arguments:

Firstly, in contrast, the ECtHR ruled that it is difficult to assume which place could be deemed as secluded given the vague definition of this concept.<sup>384</sup> Secondly, the ECtHR emphasized the importance of the press in democratic society.<sup>385</sup> However, the ECtHR stressed that whether the press exercises the role of the “public watchdog” depends on the content of the information it delivers. More precisely, it came to the conclusion that as to the content, information published about Caroline von Hannover is due to its highly personal content unable

<sup>381</sup> *von Hannover v Germany*, application no. 59320/00 (ECtHR, 24.06.2004), para. 32

<sup>382</sup> *Id.* at para. 32

<sup>383</sup> *Id.* at para. 32

<sup>384</sup> *von Hannover v Germany*, application no. 59320/00 (ECtHR, 24.06.2004), para. 73

<sup>385</sup> *Id.* at para. 57

to contribute to the public interest given the fact that Caroline von Hannover does not execute any official function.<sup>386</sup>

On contrary, if she was a politician, the press would be allowed, according to the established case-law of the ECtHR to inform about her privacy.<sup>387</sup> Conception adapted by the ECtHR is based on categorical rather than on factual consideration since not only persons having political, but also those with cultural and economic power could have impact in democratic society and therefore the public should be informed about their privacy as well.<sup>388</sup>

Yet the ECtHR has not resolved what constitutes the elements of private life as well as what is likely to contribute to the debate of general interest – it could be only inferred from the decision that trivial aspects of private life of non-politicians simply does not.<sup>389</sup> Moreover, vagueness of the ruling does not allow press to know in advance what could be published without potential repercussions.<sup>390</sup>

There is also a Trojan horse concealed in the line of argumentation. The ECtHR put emphasis not only on the fact that published information was private, but also stressed that given their triviality, they are not likely to contribute to the formation of public opinion. This implies that if Caroline *von Hannover* was depicted cheating her husband, the information would not be

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<sup>386</sup> *von Hannover v Germany*, application no. 59320/00 (ECtHR, 24.06.2004), dissenting opinion of Judge Cabral Barreto

The applicant is a public figure, even if she does not perform any function within or on behalf of the State of Monaco or any of its institutions.

„Public figures are persons holding public Office and/or using public resources, and more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain – para. 7 of Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy.

<sup>387</sup> *von Hannover v Germany*, application no. 59320/00 (ECtHR, 24.06.2004), para. 63

<sup>388</sup> *von Hannover v Germany*, application no. 59320/00 (ECtHR, 24.06.2004), dissenting opinion of Judge Cabral Barreto in which he opines that the general interest does not have to be limited to political debate.

<sup>389</sup> M. A. Sanderson, *Is Von Hannover v Germany a step backward for the substantive analysis of speech and privacy interest?*, 637

<sup>390</sup> Nicolas Nohlen, *Von Hannover v Germany*, application no. 59320/00 (ECtHR, 24.06.2004)-VI Eur. Ct. H.R., 200

considered to be trivial and would be upheld as being sufficiently important despite of more intrusive character.<sup>391</sup>

Aftermath of this decision is quite appealing. While the federal minister of justice expressed the view that the *von Hannover* decision is not binding for the Germany, the president of the FCC (requested by the government) opined that the government should not appeal to the Grand Chamber until the practical effects on the German legal order will be observed.<sup>392</sup> Both statements express certain degree of hostility and they were incorporated into the *Görgülü*<sup>393</sup> decision.

### 3.5.2. Aftermath of *von Hannover I.* - *Von Hannover II.*<sup>394</sup>

Current decision of the Grand Chamber presents an example “*par excellence*” how fruitful the dialogue between the courts could be. The German courts adjusted their practices according to the *von Hannover I.* decision despite the fact that the decision was not highly esteemed. Nevertheless Caroline von Hannover was still unsatisfied with the level of protection granted by the national authorities and therefore she filed another round of complaints. She conceded that the decision *von Hannover I.* has not been fully implemented into the German legal order since:

The FCC reiterated that it is the duty of the civil courts to interpret the provisions of civil law in the light of the fundamental rights paying attention to the Convention.<sup>395</sup> Moreover, the balancing of multi-polar situation could lead to different outcomes depending on the fact of the

<sup>391</sup> M. A. Sanderson, *Is Von Hannover v Germany a step backward for the substantive analysis of speech and privacy interest?*, 644

<sup>392</sup> Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 360

<sup>393</sup> *Görgülü v. Germany*, application No. 74969/01 (ECtHR, 26.02.2004)

<sup>394</sup> *von Hannover v. Germany No. 2*, application no. 40660/08 and 60641/08 (ECtHR, 07.02.2012 )

<sup>395</sup> *von Hannover v. Germany No. 2*, application no. 40660/08 and 60641/08 (ECtHR, 07.02.2012 ) , para. 45

respective case, yet this divergence does not constitute a reason for the FCC to step in and to correct the decision.<sup>396</sup>

At the end of the day, the ECtHR refused her complaint pointing out at the fact that the German courts have brought their jurisprudence in compliance with the judgment *Caroline von Hannover I*. In addition, the Federal Constitutional Court, for its part, had not only confirmed the new approach, but also undertaken a detailed analysis of the Strasbourg's case-law in response to the applicant's complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law."<sup>397</sup>

Seemingly, the von Hannover saga was a success for the ECtHR, since it managed to change well-established doctrine of the German law. Simultaneously, it was also a success for the FCC since by taking the *von Hannover I*. duly into account, it averted the risk of being "named and shamed" by the ECtHR again. Yet the reality was more puzzled.

### 3.5.3. Axel Springer Ag v. Germany<sup>398</sup>

The Grand Chamber of the ECtHR ruled unanimously in present case that the Germany breached the freedom of expression (Art. 10) of the publisher.<sup>399</sup>

In respective case the applicant published articles which informed that the TV-actor X was accused of drug possession. Consequently, the regional courts issued injunctions prohibiting further publication of articles on the privacy protection grounds.<sup>400</sup> However, the applicant wanted to abolish the injunction and therefore made its way to the Federal Court of Justice which

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<sup>396</sup> *Id. at* para. 45

<sup>397</sup> *Id. at* para. 125

<sup>398</sup> *Axel Springer Ag v. Germany*, application no. 39954/08 (ECtHR, 07.02.2012)

<sup>399</sup> *Id. at* para. 109

<sup>400</sup> *Axel Springer Ag v. Germany*, application no. 39954/08 (ECtHR, 07.02.2012), para. 17, 38

refused appeal.<sup>401</sup> The Federal Court of Justice pointed at the *Van Hannover v. Germany* claiming that articles were published merely to satisfy the curiosity of particular readership.<sup>402</sup>

Yet the ECtHR ruled in favor of applicant. It proclaimed that criterion of contribution to a debate of general interest does necessarily have to comprise only political issues, but could involve crimes, sporting issues, etc.<sup>403</sup> Then it opined that famous figure do not have the same degree of privacy protection as ordinary persons, although privacy of public figures other than political figures is generally protected against intrusion, especially when the aim of its breach is mere satisfaction of the public curiosity (*ECtHR argued with Van Hannover v. Germany*).<sup>404</sup> Yet the information about allegation of drug possession is a judicial fact whereas the public is entitled to be informed about criminal proceedings.<sup>405</sup> In addition, the article informed about legal assessment and circumstances leading to X's arrest and not about his privacy.<sup>406</sup> The ECtHR also paid attention to the fact that the identity of X was confirmed by state authorities which granted the information about drug possession a sufficient factual basis.<sup>407</sup>

It is beyond reasonable doubt that Although German courts and the ECtHR were relying on *Von Hannover v. Germany* they arrived to utterly different conclusions which implies that *Von Hannover v. Germany* does not provide a clear guidance how to balance between the right to privacy and the freedom of speech. Although the concept of prominent figure par excellence developed by the FCC tilted more in favor of freedom of press, still, it was less vague than its Strasbourg substitute.

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<sup>401</sup> *Id.* at para. 44

<sup>402</sup> *Id.* at para. 48

<sup>403</sup> *Id.* at para. 90

<sup>404</sup> *Id.* at para. 91

<sup>405</sup> *Id.* at para. 96

<sup>406</sup> *Id.* at para. 108

<sup>407</sup> *Id.* at paras. 104, 105

Another strange feature is that the *Axel Springer* in which the ECtHR ruled in the right opposite way as in the *Van Hannover II.*, although they were issued at the same day is revealing. It simply confirms that it was not the FCC, but the ECtHR which failed to construe a proper doctrinal test result of which could be anticipated with sufficient precision in advance. Another problem was that the ECtHR reached adverse conclusion only because it assessed facts differently than national courts.<sup>408</sup> This is odd since “national authorities have a better understanding of the circumstance of their respective societies and are best placed to adjudicate human rights disputes in good faith and in accordance with international standards. This is why we have the principle of subsidiarity.”<sup>409</sup>

It is tenuous at best, whether the privacy acquired better protection, yet the uniformity of jurisprudence and thus the legitimacy of the ECtHR definitively suffered a blow.<sup>410</sup> It could be therefore concluded that fundamental rights protection as provided by the ECtHR does not have to be necessarily better than the one guaranteed by the national legal order.

### 3.5.4. D.H. and Others v. Czech Republic<sup>411</sup>

The issue of the *D.H. and Others v. Czech Republic* was disproportionate placement of Roma pupils in the schools for teaching mentally challenged students (so called “specialized schools”) in the Czech Republic which allegedly led to the infringement of the right under article

<sup>408</sup> see *Axel Springer Ag v. Germany*, application no. 39954/08 (ECtHR, 07.02.2012), dissenting opinion of Judge López Guerra joined by Judges Jungwiert, Jaeger, Villiger and Poalelungi.

As was pointed out, the German court applied properly doctrinal test and criteria established by the case law of the ECtHR. The ECtHR reached a different conclusion although it used the same test since it assessed the facts on its own, arguably violating the margin of appreciation granted to German courts. However, such an factual approach turns the ECtHR into a court of fourth instance.

<sup>409</sup> Jonas Christoffersen and Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics*, 190 - 191

<sup>410</sup> Mitchel de S.-O.-l'E Lasser, *Judicial deliberations: a comparative analysis of transparency and legitimacy*, 395

<sup>411</sup> *D.H. and Others v. the Czech Republic*, application No. 57325/00 (ECtHR, 13.11.2007)

2, Protocol 1 in connection with Art. 14 ECHR to be free from racial discrimination in the realm of education. More precisely, the crux of the *D.H. and Others v. Czech Republic* was the lack of the procedural safeguards capable of securing the substantive content of the Convention.<sup>412</sup>

As was aptly pointed out:

“The struggle for equal access to education was seen by generations of early civil rights activists as the key to achieving greater economic and political power, and thus equality in society.”<sup>413</sup> Other reasons for importance of this decision are following: Firstly, it was pointed out at the systemic failure resulting in the discrimination of the Roma Minority regarding the education.<sup>414</sup> Secondly, the principle of indirect discrimination was recognized by the ECtHR. Finally, the statistical evidence was held to be sufficient to shift the burden of proof from the applicant to the government. Another remarkable feature is that the ECtHR delivered judgment dealing predominantly with the constitutional rather than with the individual justice.

As to the fact of the case, the Roma children are disproportionately assigned to so-called special schools established for mentally challenged children. Special schools offer very limited curriculum in comparison to ordinary school which prevents applicants to obtain secondary education other than the vocational training. This limitation considerably diminished their chances to success at the labor market. It should be noted that the final decision whether to assign children to special school is finally up on his parent.

Applicants sought reversal of decision leading to their placement in special schools and demanded re-schooling. Since ordinary courts did not rule in their favor, they filed a

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<sup>412</sup> *Id.* at paras. 28, 206

<sup>413</sup> M.E.A. Goodwin, *Taking on racial segregation: the European Court of Human Rights at a Brown v. Board of Education moment?* Rechtsgeleerd Magazijn THEMIS 2009-3, available at <http://arno.uvt.nl/show.cgi?fid=96970>, (last visited 27.06.2012 ), 115

<sup>414</sup> Jennifer Devroye, *The Case of D.H. and Others v. the Czech Republic*, 7 Nw. U. J. Int'l Hum. Rts. 81, available at <http://www.law.northwestern.edu/journals/JIHR/v7/n1/3> (2009), 81



constitutional complaint. The CCC dismissed their claim adducing two main reasons:<sup>415</sup> Firstly, domestic remedies have not been exhausted since 13 out of 18 applicants had not used the school system appeal process. Secondly, the CCC stated that it did not have a competence to hear the case, since no legal provision had been applied in an unconstitutional way.

One cannot get rid of the impression that arguments given by the CCC were quite formalistic. Especially the argument of non-violation of any right could be refuted, since the racial discrimination impairs numerous constitutional guarantees such as dignity or could be even regarded as degrading or inhuman treatment.<sup>416</sup> “In summation, the ECtHR ruled out that the CCC had afforded the applicants – both those who had brought their claims and those who had not – an effective remedy with a reasonable prospect of success.”<sup>417</sup>

Hence the ECtHR delved into the analysis of the application. It took into consideration statistics according to which “50,3 % of all Roma children attended a special school in Ostrava, while only constituting 5 % of the town overall population.”<sup>418</sup> Moreover, the consent of parents had not been in many cases an informed one. The argument is that parent of Roma children are unable due to their poor education and social merits to fully comprehend the meaning of such decision for the future of their children.<sup>419</sup>

Getting into details, the ECtHR dealt more with the overall social context of discrimination than with the specific flaws of education. This could be inferred from prescribed remedies which demonstrates “the failure of the ECtHR to see the individual child is accentuated

<sup>415</sup> *D.H. and Others v. the Czech Republic*, application No. 57325/00 (ECtHR, 13.11.2007), para. 28

<sup>416</sup> *Id.* at para. 25

<sup>417</sup> Jennifer Devroye, *The Case of D.H. and Others v. the Czech Republic*, 89

<sup>418</sup> M.E.A. Goodwin, *Taking on racial segregation: the European Court of Human Rights at a Brown v. Board of Education moment?*, 117

<sup>419</sup> *D.H. and Others v. the Czech Republic*, application No. 57325/00 (ECtHR, 13.11.2007), para. 203

by the complete absence in the Court's reasoning of the harm done to misplaced children who pass through the special schooling system."<sup>420</sup>

The decision is problematic for manifold reasons. If we are talking about the consent of the parents, one has to take into account that the judgment basically declares Roma parents to be incapable of making the informed decisions. One cannot avoid the feeling that the ECtHR implies that it should be up to state to take the welfare of the Roma children under its protective wings.<sup>421</sup>

It is quite persuasive that Roma parents have been often aware of the impact of their decisions. As was suggested, they wanted simply to protect their children from bullying from the side of "white" kids and from the side of the teachers as well to which they were objected in ordinary schools due to their inability to cope with others. Thus the special schools has been perceived as a "safe haven", or put differently, they have been regarded by their parents to be in the best interest of their child.<sup>422</sup> This demonstrates that it is often not that easy to come up with optimal solution in case dealing with such complex rights violation. Rather superficial assessment of the facts by the ECtHR in the present decision could run counter the idea standing behind its establishment– to provide better protection for the human rights. Moreover, such a strong emphasis on constitutional justice may prove to be detrimental in the future since the role of the ECtHR is to step-in only subsidiary.<sup>423</sup>

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<sup>420</sup> M.E.A. Goodwin, *Taking on racial segregation: the European Court of Human Rights at a Brown v. Board of Education moment?*, 122

<sup>421</sup> D.H. and Others v. the Czech Republic, application No. 57325/00 (ECtHR, 13.11.2007), dissenting opinion of Judge Borrego Borrego, para. 13

<sup>422</sup> D.H. and Others v. the Czech Republic, application No. 57325/00 (ECtHR, 13.11.2007), para. 63

<sup>423</sup> Robert Blackburn and Jörg Polakiewicz, *Fundamental Rights in Europe – The European Convention on Human Rights and its Member States, 1950-2000*, 35

### 3.5.5. Aftermath of the *D.H. and others v. Czech Republic*

Up till now, conclusions stemming from the *D.H. and others v. Czech Republic* have not been properly implemented.<sup>424</sup> Even the Committee of Ministers expressed concern about the sluggish pace of implementation. Basically, the most visible change was that special schools were only re-named (in much Orwellian fashion) to practical schools while discrimination remains.<sup>425</sup> Strikingly, the Prague City Courts demanded from the applicant to prove that he was discriminated which is at odd with the principle postulated in the *D.H. and others v. Czech Republic* according to which the burden of proof is shifted once a *prima facie* claim of discrimination is made.<sup>426</sup>

Conclusively, the Czech Government failed to take appropriate positive measures which would utterly change discriminatory practises.<sup>427</sup> It could be concluded that it is not only difficult for the national government to comply with such sweeping judgment imposing positive measures, but it is also difficult to monitor and enforce them.<sup>428</sup>

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<sup>424</sup> *Czech Republic: Four Years After Landmark Judgment, Urgent Action Needed to Stop Illegal Segregation of Romani Children into Special Education*, available at: <http://www.errc.org/article/czech-republic-four-years-after-landmark-judgment-urgent-action-needed-to-stop-illegal-segregation-of-romani-children-into-special-education/3946>, (last visited 08.04.2012)

<sup>425</sup> Lydia Gall and Robert Kus, *What Happened to the Promise of D.H.?*, Roma Rights , Number 1, 2010, 39 – 45, 43

<sup>426</sup> *Id.* at 43

<sup>427</sup> *Id.* at 44

<sup>428</sup> James Goldston, *Czech Roma Children Need Action Now to End School Segregation*, Foreign Policy Blog 12.06.2012

### 3.6. Görgülü and Preventive Detention Cases – War and Peace

*Görgülü* could be regarded to be an immediate response of the FCC expressing dissatisfaction with *von Hannover* case.<sup>429</sup> Thus the FCC decided to take counter-measures in order to mitigate the effects of Strasbourg jurisprudence which was perceived to increasingly encroach into the sovereignty of the German legal order. However, the guidelines which the FCC set in the *Görgülü* were not indicative enough for lower courts which led to legal uncertainty and arbitrariness in the implementation of the ECtHR judgments culminating in the *Preventive Detention Cases*. Therefore *Görgülü* in connection with *Preventive Detention Cases* demonstrates indispensable role played by the NCCs in providing guidance to lower ranking courts which is instrumental for the implementation of the ECtHR decisions.

#### 3.6.1. Görgülü – For whom the bell tolls

In *Görgülü*, the ECtHR found Germany to be in the breach of the right to family life. As to the fact, Turkish national fathered a child. Nevertheless the mother of the child broke the connection with the father and gave the child to the adoption right after his birth. After the father got know what happened, he sought to obtain the custody of the child in order to be with him. First, the court ruled in his favor, but the appeal court refused his arguments and proclaimed that it is in the best interest of the child to stay with the foster family. Even the FCC refused his complaint; therefore he turned to Strasbourg which confirmed his claims when concluding that German authorities violated his right to family life. However, when the applicant tried to enforce the Strasbourg decision on domestic level, but he failed. More precisely, appeal court in

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<sup>429</sup> Felix Müller and Tobias Richter, *Report on the Bundesverfassungsgericht's (Federal Constitutional Court) Jurisprudence in 2005/2006*, 169

Naumburg (Oberlandsgericht) opined that the ECtHR's judgments are not binding for state authorities, but only for Germany as a subject of international law.<sup>430</sup> Consequently the applicant filed a new constitutional complaint by which he sought to implement ECtHR's judgment.

Surprisingly, the FCC held that Strasbourg decisions are not automatically binding for state authorities. However, the ECtHR timidly admitted that "the authorities and courts of the Federal Republic of Germany are obliged, *under certain conditions, to take into account*<sup>431</sup> of the European Convention on Human Rights as interpreted by the ECtHR in making their decisions."<sup>432</sup> *A contrario*, there are legitimate grounds for which the judgments of the ECtHR could be declared as non-applicable by national authorities. Although the FCC tried to blunt the edges when added that the reasons must be given for such a departure.

"It is true that when on the basis of an individual application the European judges have come to a specific result, it may well turn out that a generalization of their views needs careful reflection and cannot be extended in an automatic fashion to entire classes of identical or similar cases. But after Strasbourg has spoken the final word in an individual case, the national authorities have no license to dispose of such a pronouncement according to their own discretion, except if new circumstances have emerged that could not have been foreseen by the European judges."<sup>433</sup>

However, *Görgülü* has also positive implications (from the perspective of the ECtHR) because "the FCC indirectly promoted ECHR to the constitutional standard of review in spite of its formal rank as ordinary federal law, by not only committing the German state as a subject of international law, but also all German state authorities and courts to the Convention."<sup>434</sup> To sum

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<sup>430</sup> Felix Müller and Tobias Richter, *Report on the Bundesverfassungsgericht's (Federal Constitutional Court) Jurisprudence in 2005/2006*, 164

<sup>431</sup> One should perceive that phrases: "*under certain conditions and take into account significantly*" does not express deference toward the nature and binding effect of Strasbourg judgments.

<sup>432</sup> Christian Tomuschat, *The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court*, 523

<sup>433</sup> *Id.* at 524

<sup>434</sup> Andreas Vosskuhle, *Multilevel cooperation of the European constitutional courts: "der Europäische Verfassungsgerichtsverbund"*, 181

up, the requirement to take into account the ECHR could be regarded as procedural way how to avoid clashes with the ECtHR.<sup>435</sup>

Another positive aspect of this decision is that the FCC ordered lower-ranking courts that they are obliged to follow the instructions given by the ECtHR in respective case (*inter partes*).<sup>436</sup>

Again, the FCC replicated that it is its task to provide the balance between the openness toward the international law and between the sovereignty. Thus the decision could be perceived as remote analogy to the *Solange/Maastricht* doctrine because “the Constitutional Court showed willingness to remain the arbiter of the impact of the ECHR on German law in concrete cases, and more generally to control the effects of the ECtHR’s judgments within the German legal order.”<sup>437</sup> “Hence it is even appropriate to speculate about the possible emersion of a Unitarian theory of the jurisprudential supranational law in its relationship with the national, specifically judicial powers.”<sup>438</sup>

### 3.6.2. Preventive Detention Cases – Bury the Hatchet!

The institute of preventive detention having a long tradition in German penal system allows imposing of preventive detention after serving of s prison sentence. As a result, a person stays under similar conditions in the prison for specific time period whereas the rationale is to protect society against dangerous criminals. According to the German law, the preventive detention is not considered to be penalty, but rather a corrective measure which seemingly avoids

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<sup>435</sup> *Id.* at 181

<sup>436</sup> Frank Hoffmeister, *Germany: Status of European Convention on Human Rights in domestic law*, *Int J Constitutional Law*, 729

<sup>437</sup> Helen Keller and Alec Stone Sweet, *A Europe of Rights – The Impact of the ECHR on National Legal Systems*, 137

<sup>438</sup> Oreste Pollicino, *The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?*, 110

the violation of *ne bis idem* principle.<sup>439</sup> Therefore the preventive detention does not require culpability on the part of the detainee and thus could be employed solely for protection of the society from future harm.<sup>440</sup> However, this brief description reveals that preventive detention is problematic since it inflicts *actual* harm to the freedom of particular individual in order to prevent society from *potential* harm.

Preventive Detention Cases are particularly interesting since they accentuated problematic aspects of the principles laid down in *Görgülü* decision. One could see remote parallel with von *Hannover v. Germany*, because also in these cases the national law and practice dealing with preventive detention were long-established and uncontested. Taking it all together, it turned to be problematic for the national courts to implement appropriately the decisions of the ECtHR.

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<sup>439</sup> Grischa Merkel, *Incompatible Contrasts? – Preventive Detention in Germany and the European Convention on Human Rights*, 11 German Law Journal 1046-1066 (2010), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1283>, 1051

<sup>440</sup> Christopher Michaelsen, *'From Strasbourg, with Love'—Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights*, Human Rights Law Review (2012)12 (1): 148-167.doi: 10.1093/hrlr/ngr046, 149

***M. v. Germany***<sup>441</sup>

In *M. v. Germany*, the applicant M. served prison sentence, and was obliged to stay 10 years in the preventive detention (which was at that time maximum limit). Meanwhile the federal law was adopted, which allowed to extend the preventive detention for unlimited period. Consequently, this new law was retroactively imposed to applicant who was then obliged to stay in preventive detention for unlimited duration.

Not surprisingly, the ECtHR ruled in this highly contested decision that retroactive extension of preventive detention (but not preventive detention as such) violates the ECHR, namely the Art. 5 s 1 (a) and Art.7 s 1 since the conditions, under which the preventive detention is served, is akin to the serving of a prison sentence.<sup>442</sup> Thus the retroactively imposed preventive detention is de facto a new sentence which requires new trial and new conviction before the person is condemned. In addition, the retroactive imposition of preventive detention was made by the so-called executive courts which are not competent to decide on the question of the guilt. Actually, *M. v. Germany* was not warmly welcomed by the German government which has not fully transposed its effects into the German legal order. As a result, German legislature has not amended the law in a way which would comply with the ECtHR decision, but has on contrary introduced new series of laws with the intention to obviate the effects of the judgment. As a

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<sup>441</sup> *M. v. Germany*, application no. 19359/04 (ECtHR, 17.12.2009)

<sup>442</sup> Grischa Merkel, *Incompatible Contrasts? – Preventive Detention in Germany and the European Convention on Human Rights*, 1053



result, “the problem how to deal with the situation was left to the German Courts which has led to a highly arbitrary legal situation.”<sup>443</sup>

The reasons for this arbitrariness were following: Firstly, before the case reached the ECtHR, it had gone naturally through the FCC which found the institute of preventive detention to be in compliance with the GG. Secondly, as was already mentioned, the legislature has not amended the respective laws and therefore the courts were pushed to rule against the valid legal norms. Taking it all together, the decision of the FCC in this matter and the respective law provision in the eyes of the German judges prevails over the ECHR which has arguably only the status of the federal law.

### ***Haidn v. Germany***<sup>444</sup>

*Haidn v. Germany* case could be perceived as a follow-up or next round in the preventive detention contest which was fought on international rink. Here the ECtHR ruled that the retrospective imposition of preventive detention is contradictory to the ECHR.

Quite peculiar is the procedural history of the case. While the recidivist sex-offender was serving his sentence, the new act allowing continued placement in prison after serving a sentence, was adopted. Consecutively the applicant was found dangerous for the society and it was ordered, pursuant to the new legal act, for him to stay in prison after serving his sentence. Surprisingly, this continued placement was preventive in nature, which means that it could be ordered without any further convictions.

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<sup>443</sup> Grischa Merkel, *Case Note - Retrospective Preventive Detention in Germany: A Comment on the ECHR Decision Haidn v. Germany of 13 January 2011*, 12 German Law Journal 968-977 (2011), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1349>, 969

<sup>444</sup> *Haidn v. Germany*, application no. 6587/04 (ECtHR, 13.01.2011)

The ECtHR held in its argumentation that the judgment convicting Mr. Haidn contained no order for his detention for preventive purposes. Therefore the retroactive imposition of preventive detention was de facto a punishment without a trial, since “there was no sufficient causal connection between Mr. Haidn’s conviction and his detention for preventive purposes.”<sup>445</sup>

### ***Response of the FCC***

After the decision in *M. v. Germany* and *Haidn v. Germany*, not only applicant M. himself but also other inmates serving retroactively imposed preventive detention have demanded their release by referring to the judgment *M. v. Germany* of the ECtHR. However, problem arose with the implementation of the decisions of the ECtHR which were in sheer discrepancy with national law. It was said that the national authorities have to take the decisions of the ECtHR into consideration. Despite this duty, the Cologne Court of Appeal, among others, refused to terminate the preventive detention arguing that the „ECtHR’s judgment is not in compliance with the German Law, and thus the Federal Legislature needs to react.”<sup>446 447</sup> Interestingly, other courts respected claims of the appellants and set them free which led to the state of legal uncertainty. Hence it was left up to the FCC to make authoritative decision which was finally delivered in the so called *Preventive Detention Case I and II*.<sup>448</sup>

In these decisions, the FCC has duly taken the reasoning of the ECtHR into account which is striking, since it *de facto* overruled its previous case law. Although decisions of the

<sup>445</sup> Christopher Michaelsen, ‘From Strasbourg, with Love’—Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights, 161

<sup>446</sup> Grischa Merkel, *Case Note - Retrospective Preventive Detention in Germany: A Comment on the ECHR Decision Haidn v. Germany of 13 January 2011*, 976

<sup>447</sup> Bundesgerichtshof, decision of 12 May 2010 – 4 StR 577/09: <http://www.hrr-strafrecht.de/hrr/4/09/4-577-09.php>

<sup>448</sup> BvG, 2 BvR 2365/09, 4 May 2011

FCC do not have the nature of the precedent, it is the general prescription of justice to treat similar cases similarly. In its reasoning, the FCC proclaimed that GG have to be interpreted in according to the ECHR, despite its seemingly inferior position within the German legal order since this requirement stems from the duty to interpret the GG in compliance with the international law. „The FCC then found that all provisions of the German Criminal Code on the imposition and duration of preventive detention were incompatible with the fundamental right to liberty as protected by Article 2(2) in conjunction with Article Article 104(1) of the GG.“<sup>449</sup> Furthermore the FCC ruled that the legislator failed to establish a distance between the prison sentence and preventive detention. According to the FCC’s ruling, the retrospective imposition of preventive detention violated the principle of legitimate expectations, since the prolonging of preventive detention beyond the 10-year limit as well as its retrospective imposition has seriously impaired the confidence of appellants.<sup>450</sup>

To sum up, the FCC harmonized its stance with the ECtHR which was widely acclaimed as a sign of harmonious cooperation between national and supranational courts. Nevertheless, the FCC partially diverged from the opinion of the ECtHR when implementing its decision. First of all, the current regime of preventive detention will be maintained for two years during which the legislature has to come up with tenable solution how to reconcile legal framework with demands of the ECtHR. It is quite surprising to leave the unconstitutional act operational for such a long time, especially when such highly esteemed value as liberty is at stake.<sup>451</sup> In addition, in case of

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<sup>449</sup> Christopher Michaelsen, *‘From Strasbourg, with Love’—Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights*, 163

<sup>450</sup> *Id.* at 164

<sup>451</sup> *Assanidze v. Georgia*, Application no. 71503/01 (ECtHR, 08.04.2004) The ECtHR directly ordered immediate release of the applicant who has been detained for a considerable amount of time, since there is no other way how to secure his right than release. Arguably, similar remedy would be appropriate also in the present case.

the continuous violation “it is the most important duty of the state to bring the violation to an immediate end.”<sup>452</sup>

Present set of cases demonstrates that guidelines made in *Görgülü* decision by the FCC were not sufficiently the way how the ordinary courts have taken “into consideration” decisions made by the ECtHR regarding the preventive detention cases varies considerably. Some of them applied them, other refused to do so. Implications of these existing discrepancies were following: Firstly, diminished level of legal certainty and reduced efficiency/legitimacy of the ECtHR judgments. Secondly, as to the present cases, the outcome was the extension of length of proceedings, since decisions of the ECtHR have not been implemented by the national courts, and therefore the applicant had to make again his appeal to the FCC.

*Preventive Detention Case I and II* demonstrated much greater deference towards the ECtHR since the FCC proclaimed that the judgments of the ECtHR serve de facto as precedent.<sup>453</sup> The reason behind this attitude is to reduce the risk that the Germany would be condemned for the human rights violation.<sup>454</sup> This modified stance of the FCC could solve the uncertainty caused by *Görgülü*.

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<sup>452</sup> Georg Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, 380

<sup>453</sup> 71 BvG, 2 BvR 2365/09, 4 May 2011, para. 89

<sup>454</sup> *Id.* at para. 90

### 3.7. Right to an effective remedy and related cases of the ECtHR

The grand chamber of the ECtHR had aptly defined the purpose of the right to effective remedy: “The object of Article 13, as emerges from the *travaux préparatoires*, is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court.”<sup>455</sup>

Implications stemming from this definition are following. Firstly, it is primarily up to the contracting state to provide effective protection for the ECHR rights. Role of the Strasbourg machinery is therefore subsidiary. Secondly, “the protection of rights in the national legal order must be dependent upon the remedies available there.”<sup>456</sup>

Importance of this provision has grown in the context of the chronic overload to which the ECHR regime suffers.<sup>457</sup> From the long-term perspective the ECtHR cannot be the primordial guarantor of the ECHR rights; therefore it is necessary to decentralize the Convention system by providing effective remedies on domestic level which will also restore the true meaning of principle of subsidiarity.<sup>458</sup>

The ECtHR also pointed out in the *Kudla v. Poland* at the problem of proceedings exceeding the reasonable time as demanded by the Article 6 sec. 1 which could led to the breach of the rule of

<sup>455</sup> *Kudla v. Poland*, Application No. 30210/96, (ECtHR, 26.10.2000), para. 152

<sup>456</sup> Robin C. A. White et al., *European Convention on Human Rights*, (Oxford: Oxford University Press, 2010), 131

<sup>457</sup> Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, p. 146

<sup>458</sup> Michal Balcerzak, *Applying and supervising the ECHR*, The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings, Workshop held at the initiative of the Polish Chairmanship of the Council of Europe’s Committee of Ministers, Directorate General of Human Rights Council of Europe 2006, available at: [http://www.echr.coe.int/NR/rdonlyres/82597AB6-124F-48D5-8BBB-792899EB0C6A/0/AmeliorationsRecours\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/82597AB6-124F-48D5-8BBB-792899EB0C6A/0/AmeliorationsRecours_EN.pdf), 22

law if there is no effective remedy within domestic legal order against such delays.<sup>459</sup> For a remedy to be considered effective it must be capable of directly remedying the situation complained of.”<sup>460</sup> The key test is whether the remedy in any given case is capable of having a significant effect on the length of the proceedings as a whole – is it capable of speeding them up or preventing them from being unreasonably long?”<sup>461</sup> To sum up, the remedy must be effective both in practice and in law.<sup>462</sup>

The effective system of remedies available on domestic level is of crucial concern for the ECtHR. It is not surprising that the ECtHR pays great attention to solve the problem of malfunctioning domestic legal system and to tackle with excessive length of proceedings since its main interest is to reduce the number of complaints.

### 3.7.1. *Sürmeli v. Germany*<sup>463</sup>

In a present case the applicant complained about the excessive length of the proceedings pending before domestic courts against which he does not have effective remedy under national law. This led to the breach of his right on effective remedy as provided by the Article 13.

The ECtHR concedes that according to the Art. 13 sec. 1, there must be an effective remedy in the domestic legal order. In order to be deemed as effective the remedy could consist of single measure or of aggregate of remedies.<sup>464</sup> As to the impact, the effective remedy must preferably

<sup>459</sup> *Kudla v. Poland*, Application No. 30210/96, (ECtHR, 26.10.2000), para. 148

<sup>460</sup> Pieter van Dijk, Fried van Hoof, Afjen van Rijn and Leo Zwaak (eds.) *Theory and Practice of the European Convention on Human Rights*, (Antwerp: Intersentia, 2006), 134

<sup>461</sup> Michael O’Boyle, *Effectiveness of remedies for complaints of length of proceedings – recent case-law and problems*, Applying and supervising the ECHR, The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings, *Workshop held at the initiative of the Polish Chairmanship of the Council of Europe’s Committee of Ministers*, Directorate General of Human Rights Council of Europe 2006, available at: [http://www.echr.coe.int/NR/rdonlyres/82597AB6-124F-48D5-8BBB-792899EB0C6A/0/AmeliorationsRecours\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/82597AB6-124F-48D5-8BBB-792899EB0C6A/0/AmeliorationsRecours_EN.pdf), 27

<sup>462</sup> Robin C. A. White et al., *European Convention on Human Rights*, 136

<sup>463</sup> *Sürmeli v. Germany*, Application no. 75529/01 (ECtHR, 08.06.2006 )

<sup>464</sup> *Sürmeli v. Germany*, Application no. 75529/01 (ECtHR, 08.06.2006 ), para. 99

prevent the continuation of the violation or to provide adequate redress for any violation that has already occurred. Ideally, the preventive and compensatory remedy should be combined together. Conclusively, the overarching principle of the remedy is to put an immediate halt to the continuous violation of the rights.<sup>465</sup> Thus the ECtHR expressed in its opinion that to achieve that purpose there should be a remedy which enables to hasten the proceedings so the infringement of the right could be avoided. In addition:

“Where a domestic legal system has made provision for bringing an action against the State, the Court has pointed out that such an action must remain an effective, sufficient and accessible remedy in respect of the excessive length of the proceedings and that its sufficiency may be affected by excessive delays and depend on the level of compensation.”<sup>466</sup>

Applying this principle to the present case it held that the 4 available remedies proposed by the government has not fulfilled above mentioned criteria. With regard to the constitutional complaint, as one of the available remedies, the main reason for this conclusion was that although the FCC could rule that the excessive length of proceeding in respective case is unconstitutional, yet it could not prescribe any deadlines or substantive measures how to deter the continuation of the violation.<sup>467</sup>

At the same time, the ECtHR proposed to adopt a new remedy which would comply with the criteria laid down in the judgments. “Thus this case is a further example of the Court’s (ECtHR) increasing preparedness to discuss the type of measure that might put an end to a systemic situation giving rise to violation of Convention rights with a view to assisting respondent state to fulfill its obligations under Art. 46.”<sup>468</sup>

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<sup>465</sup> *Id. at para. 101*

<sup>466</sup> *Id. at para. 100*

<sup>467</sup> *Id. at para. 105*

<sup>468</sup> *Civil procedure: unduly long civil proceedings – absence of adequate domestic remedy – Arts. 6 (1) & 13, E.H.R.L.R. 2006, 5, 571-575, 575*

Significance of this case could be ascribed to the two things. First of all, the Grand Chamber of the ECtHR did not satisfy itself with the founding of the violation of the ECHR, but it prescribed a concrete remedy for a systemic defect. Secondly, before the ECtHR issued its judgment, the solution for the systemic violation had been already proposed by the German legislator. Interestingly, it was the decision of the *Kudla v. Poland* which compelled the German government to take an action, so seemingly case standing out of the German legal realm. Thus it could be observed that the German national authorities strive to embed the decisions of the ECtHR into its legal system, which diminishes the risks of legal collisions and promotes the cohesion among the European legal orders.

### 3.7.2. *Klein v. Germany*<sup>469</sup>

This case deals with the excessive length of proceedings pending mainly before the FCC which led to the breach of the Art. 6 sec. 1 of the ECHR.

Regarding the factual situation, the decision of the District court obliged applicant to pay a sum of 141 Deutch Mark (DM) since he refuted the calculation and special payment of the coal-mining contribution.<sup>470</sup> Therefore he lodged the constitutional complaint on 22 June 1986 claiming that imposed contribution and method of calculation was unconstitutional.<sup>471</sup> Finally, the FCC delivered its judgment on 11 October 1994.<sup>472</sup>

The ECtHR held that: “The reasonableness of the length of proceedings must be assessed in the light of the circumstance of the case and having regard to complexity of the case, the conduct of

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<sup>469</sup> *Klein v. Germany*, Application no. 33379/96 (ECtHR, 27.07.2000)

<sup>470</sup> *Id.* at para. 11

<sup>471</sup> *Id.* at para. 12

<sup>472</sup> *Id.* at para. 39



the parties and of the authorities, and the importance of what is at stake for applicant in the litigation.”<sup>473</sup>

Hence the FCC defended its position by contending that the case was extremely complex since a numerous remarks made by official authorities had to be taken into account.<sup>474</sup> In addition, as a result of German re-unification, the FCC was overburdened by cases dealing with more pressing violations and finally that the proceedings were not of major importance since the case was only about 142 DM.<sup>475</sup>

Although the ECtHR admitted that particular case it quite complex, it nevertheless refuted the heavy-case law of the FCC resulting from re-unification, since the proceedings before the FCC started before the fall of the curtain.<sup>476</sup> Although the sum was only about 142 DM, present case raises important question of principle.<sup>477</sup> In addition, the ECtHR proclaimed that the Convention imposes positive obligation on Contracting states to organize their judicial system in such a way that the courts would be able to comply with requirements of the ECHR including the obligation to hear cases within a reasonable time.<sup>478</sup> Furthermore, the ECHR distinguishes between temporary backlog which is justifiable if the state offers appropriate remedial action and between chronic overload as the one of the FCC which is not excusable.

### 3.7.3. Hartmann v. Czech Republic<sup>479</sup>

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<sup>473</sup> *Klein v. Germany*, Application no. 33379/96 (ECtHR, 27.07.2000), para. 36

<sup>474</sup> Françoise Calvez, *Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights*, European Commission for the Efficiency of Justice (CEPEJ) Strasbourg, 6-8 December 2006, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1073329&Site=COE>, 26

<sup>475</sup> *Klein v. Germany*, Application no. 33379/96 (ECtHR, 27.07.2000), para. 37

<sup>476</sup> *Id.* at paras. 40, 45

<sup>477</sup> *Id.* at para. 46

<sup>478</sup> *Id.* at para. 42

<sup>479</sup> *Hartman v. Czech Republic*, application no. 53341/99 (ECtHR, 10.07.2003)

In *Hartman v. Czech Republic*, the ECtHR ruled that there was a breach of a right to effective remedy as provided by the Article 13, since there is no relief against proceeding which has not been decided in reasonable time foreseen by the Article 6 sec. 1. Like in the *Klein v. Germany*, also here the ECtHR evaluated whether the constitutional complaint could be regarded as a mean to speed up the proceeding and came to the conclusion that it could not consider a constitutional complaint to be effective because it was not shown to make it possible to compel courts to expedite proceedings or to provide compensation for any damage resulting from their excessive length.”<sup>480</sup>

Respective case should be assessed in the connection with the case *Sürmeli v Germany*. The substantive violation of the ECHR was basically the same in both cases. Yet despite the similar factual situation, the difference in remedies prescribed by the ECtHR in *Hartman v. Czech Republic* and *Sürmeli v. Germany* varies significantly. Former case could be termed as an old-school approach of the ECtHR characterized by the delivery of the individual justice, yet the impact of the latter one reaches far beyond the single case since it directly prescribes systemic remedy.

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<sup>480</sup> Applying and supervising the ECHR, The improvement of domestic remedies with particular emphasis on cases of unreasonable length of proceedings, *Workshop held at the initiative of the Polish Chairmanship of the Council of Europe's Committee of Ministers*, Directorate General of Human Rights Council of Europe 2006, 28

### 3.7.4. Zvolský and Zvolská v. The Czech Republic<sup>481</sup>

*Zvolský and Zvolská v. The Czech Republic* which is mostly known as a decision dealing with the restitution. However, I want to focus on the violation of Article 6 sec. 1 which occurred as a result of the procedural flaws in the constitutional complaint procedure of the CCC. Thus the issue raised in *Zvolsky and Zvolska v. The Czech Republic* case is about legal certainty. The problem is not simply one of interpretation of substantive rules, but that a *procedural rule* has been construed in such a way as to prevent the applicants' action being examined on the merits, with the attendant risk that their right to the effective protection of the courts would be infringed.”<sup>482</sup>

The core of the case is the relation between constitutional complaint and appeal against the decision of the Czech Supreme Court (“SCt”) whereas the question is how interpret the requirement of the exhaustion of all domestic remedies which is precondition for the submission of constitutional complaint.<sup>483</sup> Pursuant to the Czech legal order, constitutional complaint could be submitted within the prescribed 60-days’ time-limit after the exhaustion of the all domestic remedies which includes also the appeal on the points of law against the decision of the SCt.<sup>484</sup> Otherwise, the potential outcome could be existence of diverging opinions of SCt and the CCC. Hence before the SCt emits its decisions, constitutional complaint is inadmissible.<sup>485</sup> Yet the problem is, when the time-limit for the lodging of the constitutional complaint starts to run.

<sup>481</sup> *Zvolsky and Zvolska v. The Czech Republic*, application no. 46129/99 (ECtHR, 12.11.2002)

<sup>482</sup> *Id.* 51

<sup>483</sup> Vít A. Schorm, *Evropský soud pro lidská práva a Česká Republika (European Court on Human Rights and Czech Republic)*, 1 Český helsinský výbor (2003), available at: <http://www.helcom.cz/view.php?cisloclanku=2003060906>, (last visited 27.07.2012)

<sup>484</sup> *Zvolsky and Zvolska v. The Czech Republic*, application no. 46129/99 (ECtHR, 12.11.2002) para. 28

<sup>485</sup> *Id.* at para. 34

In previous cases decided by the CCC, applicants lodged simultaneously appeal to the SC and constitutional complaint to the CCC. Not surprisingly, the CCC declared in such a case the constitutional complaint inadmissible, since otherwise there would be two parallel proceedings with possibly divergent outcomes. “They subsequently lodged fresh appeals with the Constitutional Court, once the SCt had refused them leave to appeal. However, their constitutional appeals were again declared inadmissible, this time on the ground that they were out of time.”<sup>486</sup> Obviously, the practice of the CCC was so divergent that it led to the unpredictability of the CCC’s decisions.

In the *Zvolský and Zvolská v. Czech Republic*, applicants proceeded consequentially and first lodged appeal to the SCt. After the SCt rejected their appeal, they sought to bring the complaint to the CCC, which refused it since the time-limit for the application has allegedly elapsed.<sup>487</sup> Obviously, the CCC has drawn an inspiration from the Kafka’s novels since there were basically two possibilities:

Firstly, to lodge simultaneously constitutional complaint and appeal on points of law and being refused for the failure to exhaust all statutory remedies. Secondly, to file a constitutional complaint after the SCt handed down its decision which would result for its inadmissibility for being out of time.

Finally, the ECtHR held such practice inadmissible and proclaimed that “the setting time-limits for bringing appeals must not be applied in a way which prevents litigants from using an available remedy. I would daresay that one the animating forces standing behind this odd procedure is the tension persisting tension between CCC and the SCt.

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<sup>486</sup> *Zvolsky and Zvolska v. The Czech Republic*, application no. 46129/99 (ECtHR, 12.11.2002), para. 36

<sup>487</sup> *Id.* at para. 40

The ECtHR also proposed that the application procedure shall be changed in such a way that time for lodging of constitutional complaint should start to run after the delivery of the decision of the CSCt or at least this time should stop to run once the appeal to the SCt is lodged.<sup>488</sup> Conclusively, the applicants were according to the ruling of the ECtHR deprived of their right of access to a court since the appeal procedure as demanded by the CCC constituted undue burden.<sup>489</sup>

After the release of the *Zvolsky and Zvolska v. The Czech Republic* the CCC was reluctant to change its deficient procedure. Consequently bunch of similar cases had been handed down by the ECtHR<sup>490</sup> and as a result, the Czech Constitutional Court (“CCC”) finally changed the appellation procedure by its decision No. 32/2003 according to which the constitutional complaint is admissible only after the SCt decides on the appeal on points of law. Finally, the Czech Parliament amended appellation procedure by the act No. 83/2004.<sup>491</sup> This amendment confirmed in § 72 sec. 3, 4 what the CCC proclaimed in its decision, which demonstrates that the CCC could exert pressure on the legislature.

Respective case aptly demonstrates the unwillingness of the CCC to change its own practice. More importantly it also confirms its reluctance to recognize the *erga omnes* effect of the ECtHR judgments. Thus in *Zvolsky and Zvolska* case it was the aggravated effect of repetitive individual complaints which led to the change of defective national practices. “This

<sup>488</sup> *Zvolsky and Zvolska v. The Czech Republic*, application no. 46129/99 (ECtHR, 12.11.2002), para. 52

<sup>489</sup> *Id.* at para. 54

<sup>490</sup> e.g. *Jesina v. The Czech Republic*, Application No. 18806/02 (ECtHR, 26.07.2007)

<sup>491</sup> Petr Cerny and Peter Stavelik, *Vliv Evropského soudu pro lidská práva na řízení před Ústavním soudem ČR (Influence of the ECtHR on the proceedings of the Czech Constitutional Court)*, available at: [http://www.ipravnik.cz/cz/clanky/pravo-ustavni-a-spravni/art\\_4978/vliv-evropskeho-soudu-pro-lidska-prava-na-rizeni-pred-ustavnim-soudem-cr.aspx](http://www.ipravnik.cz/cz/clanky/pravo-ustavni-a-spravni/art_4978/vliv-evropskeho-soudu-pro-lidska-prava-na-rizeni-pred-ustavnim-soudem-cr.aspx) (last visited on 07.01.2011)

incrementalism limits demands for changes; it reduces the degree of challenge and allows for approves of slow socialization into the Strasbourg's conception of rights."<sup>492</sup>

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<sup>492</sup> Nico Krisch, *The Open Architecture of European Human Rights Law*, 214

### 3.8. Conclusion of the Chapter III.

It is necessary to comprehend that the pivotal role in the protection of the ECHR regime is played and should be played by national courts.<sup>493</sup> The role of the ECtHR on contrary is and should remain subsidiary. Reasons are both descriptive and normative. As to the descriptive point of view, there is a tendency to think that “the ECHR had become a constitutional instrument, whereas the ECtHR is perceived as a final arbiter in the field of human rights protection.”<sup>494</sup> However, The FCC expressly proclaimed that the GG has an ultimate word in the dialogue with Strasbourg.<sup>495</sup> And despite promoting ECHR to the constitutional rank, the CCC perceives particular judgment of the ECtHR against Czech Republic to be of lesser force than the decision of the ECJ. Moreover, the enforcement of ECtHR judgments is still the matter of contracting states. Furthermore, the ambition of the ECtHR to deliver constitutional justice remains problematic since “institutional setting places national authorities in a better position and thus enlightens them with better knowledge of the factual circumstances.”<sup>496</sup> This aptly demonstrates that the ultimate say remains within the hands of NCCs. “Thus, the characterization of the ECHR in constitutional terms tends to be based on pragmatic grounds to reduce the ECHR’s immense workload rather than ontological or normative considerations.”<sup>497</sup>

It could be asserted that both constitutional courts like to cite the judgments of the ECtHR. In other words, they like to teach other national actors about the jurisprudence of the

<sup>493</sup> Jonas Christoffersen et Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics*, 190

<sup>494</sup> Nico Krisch, *The Open Architecture of European Human Rights Law*, 184

<sup>495</sup> 71 BvG, 2 BvR 2365/09, 4 May 2011, para. 89

<sup>496</sup> Jonas Christoffersen et Mikael Rask Madsen, *The European Court of Human Rights between Law and Politics*, 184

<sup>497</sup> Cormac S. Mac Amhlaigh, *Questioning Constitutional Pluralism*, 13

ECtHR, but they do not like to be overruled by the ECtHR and be taught about fundamental rights protection. Nevertheless, from the national constitutions of the Czech Republic and Germany stem the obligation to adhere to the international law. From this point of view, it is interesting that both CCC and FCC managed to give the ECHR a more prominent position than envisaged by the legislature which insulated the ECHR from the interferences of ordinary legislation.

Yet I would distinguish between the outcome reached by the FCC and the CCC. In a nutshell, the FCC postulated in the *Görgülü v. Germany* that ordinary laws should be interpreted by courts through prism of the ECHR regime and its case law. This led to the dispersed application of the ECHR regime. Although this approach seems to be flexible, it revealed its weaknesses, since the FCC had to interfere in order to unite heterogeneous application of *M. v. Germany* by ordinary courts. Probably the situation will improve after the guidance which the FCC postulated in its *Preventive Detention I, II*.

In contrast, ordinary courts are obliged to refer any discrepancies between ECHR and national law to the CCC which led to the concentrated review. Czech approach reflects the domestic legal reality where the CCC acts as a consolidator of the case-law of the Supreme Court (“SCt”) and the Supreme Administrative Court (“SACt”). Arguably, the CCC prohibited the SCt and SACt to apply ECtHR case-law in order to prevent the situation where these two institutions would use the ECtHR judgments as a lever against decisions of the CCC (as it happened with the ECJ jurisprudence). This could serve as evidence that existing internal pluralism impinges on the relationship with the supranational jurisdiction. In other words, the existing supranational regime could exacerbate the internal pluralism; therefore it is logical that the CCC tries to dispose domestic actors from a chance to exploit the possibility offered by the external source of power (ECtHR judgments are perceived as an obligation stemming from international law). Efforts of



the CCC are laudable since its main intention is to build coherent body of law fully complying with the principle of legal certainty which is difficult to achieve once the ultimate authority is missing.

Being aware of the leading position of the FCC, the ECtHR rarely goes to the open conflict with it.<sup>498</sup> But situations where the FCC and the ECtHR cross their arms are not “accidental occurrences, but matters of principle.”<sup>499</sup> Nevertheless, the FCC is usually responsive to the critique of the ECtHR.<sup>500</sup> This could be inferred from the way how the judicial dialogues were led in *von Hannover saga* or in *Preventive Detention cases*. Although *von Hannover v. Germany I.* quashed freedom of speech doctrines developed by the FCC, it was nevertheless respected and applied in *von Hannover v. Germany II.* The same could be said about the institute of preventive detention which was part of German penal tradition, but was abolished after the pressure coming from Strasbourg. “Therefore the case law of the organs of the ECHR has in general influenced the German legal order, in particular after a conclusion of violation.”<sup>501</sup>

The fact that the ECHR occupies the same level as the Czech constitution partially attributes influence to the ECtHR case law. So far, the CCC has cited Strasbourg jurisprudence more than 2000 times whereas certain judgments of the CCC have been predominantly decided on the basis of ECtHR case-law.<sup>502</sup> Yet occasionally the CCC tends to be stubborn and limits the effects to Strasbourg judgments only to particular case which sometimes leads to the string of cases, in which the ECtHR points out at the same problem as was witnessed in the *Zvolsky and*

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<sup>498</sup> Helen Keller and Alec Stone Sweet, *A Europe of Rights – The Impact of the ECHR on National Legal Systems*, 133

<sup>499</sup> Christian Tomuschat, *The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court*, 515

<sup>500</sup> Robert Blackburn and Jörg Polakiewicz, *Fundamental Rights in Europe – The European Convention on Human Rights and its Member States, 1950-2000*, 353

<sup>501</sup> Helen Keller and Alec Stone Sweet, *A Europe of Rights – The Impact of the ECHR on National Legal System*, 678

<sup>502</sup> Ladislav Vyhnánek, *Formální aspekty judikatury Ústavního soudu (Formal Aspects of the Case-law of the Czech Constitutional Court)* (Doctoral Thesis), (Brno: Právnická fakulta Masarykovy Univerzity, 2012), 42

*Zvolska v. Czech Republic*.<sup>503</sup> This reluctance to implement Strasbourg decision was expressed by Czech government in the *D.H. and others v. Czech Republic*. But the question is, whether the CCC would be willing and able to enforce the *D.H. and others v. Czech Republic* given its vagueness. Probably it will be possible to complain about certain aspects of the decisions which are more precise, e.g. to impugn the practice of Czech Courts not recognizing reverse burden of proof in case of racial discrimination. Such approach will go in line with the practice of the CCC treating the ECtHR judgments as interpretative guidelines when applying them to other persons than applicants. However, this would demand further strategic litigation on domestic level whereas the applicants should refer non-implementation of the ECtHR judgment to the CCC. Conclusively, the sweeping judgments *D.H. and others v. Czech Republic* does not allow domestic courts to fully participate in its enforcement and thus implementation because of its over-breadth.

The source of tension existing between NCCs and the ECtHR is the interpretation of a concrete human rights norm, more precisely about the application of the common values.<sup>504</sup> Allegedly, this discourse could “encourage various actors to continuously reflect on the legitimacy of their authoritative decision-making and on the proper allocation of authority which would enhance dialogue, mutual learning and cross-fertilization.”<sup>505</sup> However, *von Hannover saga*, *Preventive detention cases* and *Görgülü* demonstrate weaknesses of solving dispute by permanent conflict. The final outcome is than a product of a lengthy judicial Ping-Pong between various national and supranational actors in which individual is reduced to the ball moving from

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<sup>503</sup> Michal Bobek and David Kosař, *The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia: An Overview*, 18

<sup>504</sup> Cormac S. Mac Amhlaigh, *Questioning Constitutional Pluralism*, 25

<sup>505</sup> Matej Avbelj, *Questioning EU Constitutionalisms*, 14

one instance to another. This definitively does not contribute to the legitimacy and therefore it undermines the authority of the institutions.

It is suggested that in order to prevent conflicts, the ECtHR should only impose “minimum standards” and limit the role of the evolutive interpretation.<sup>506</sup> But the problems with the application of the Strasbourg case-law do not arise because the cases being decided are trivial, but because they often deal with visceral aspects of domestic legal order. This is a case of *Preventive Detention cases* where the ECtHR really tried to enforce minimum standard and yet got dragged into a lengthy conflict.

The new test striking balance between privacy and the freedom of speech which was introduced in *Von Hannover v. Germany* by the ECtHR could be hardly regarded as imposing minimum standard. From the perspective of the evolutive interpretation it is dubious at best, whether the ECtHR allocated protection to freedom of speech and privacy in a more balanced way than the FCC, especially when taking into account legal certainty. Similarly, *D.H. and others v. Czech Republic* did not provide clear instructions about its implementation. Thus it is even difficult for the CCC to possibly enforce the compliance with the *D.H. and others v. Czech Republic* due to its vagueness.

Conclusively, the striking differences existing between *Axel Springer v. Germany* and *von Hannover II* confirm that a factual assessment should be done by the NCCs. Regarding the *D.H. and others v. Czech Republic*, certain aspects of the judgments are based on superficial analysis made by the ECtHR. By proclaiming that it is not necessary to review each application since all Romani are discriminated, the ECtHR is distancing itself from its fundamental role – to

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<sup>506</sup> Gertrude Lübke-Wolff, *How can the European Court of Human Rights reinforce the role of national courts in the Convention system?* (last visited 05.08.2012), 16

decide on case-by-case basis. Finally, the current approach of the ECtHR prescribing concrete remedies tends to reduce the freedom of choice left upon to the state which is at odd with the principle of subsidiarity.<sup>507</sup>

The efforts of the ECtHR exerting pressure on contracting states to introduce effective domestic remedies (partially *Zvolsky and Zvolska v. Czech Republic*, *Sürmeli v. Germany*) should be praised since it is in line with the principle of subsidiarity and reflect appropriately power-balance existing between national and supranational jurisdiction. Finally, it is in the best interest of the ECtHR to cut down the number of complaints and thus to increase its efficiency and consequently its legitimacy.

Conclusively, the centers of power are contracting states. Therefore the ECtHR should step-in only subsidiary and it should keep up with its normative ideal to enforce “minimum standard.” This would not avoid clashes, but would potentially make national authorities more willing to cooperate, if they would not be scrutinized only because their factual assessment differs from the one of the ECtHR. However, the NCCs and other actors should comprehend that they are bound by international law and therefore should disregard it only when it manifestly collides with their own constitution Especially *inter partes* effects of the ECtHR should be duly observed.. Regarding the *erga omnes* effect of ECtHR decisions, I assert that they should serve as interpretation guidelines which on hand does not exclude creativity of national authorities and on the other hand facilitates the harmonization of human rights protection across the Europe.

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<sup>507</sup> Oreste Pollicino, *The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?*, 89

## Conclusion

**Hierarchy is one of the precepts of the democracy, since it serves as an instrument of self-restraint.<sup>508</sup>**

There is a prevalent trend which tends to characterize the ECJ and the ECtHR as constitutional courts due to their impact on the formation national legal orders. Yet the NCCs still regard their constitutions to be the ultimate source of power.<sup>509</sup> Given the absence of clear hierarchy, there is a tendency to describe current system as heterarchical or pluralist.<sup>510</sup> According to this notion, it is possible that there will be two contracting norms having the same legal force because of the absence of hierarchy. However, the idea of several self-standing legal orders producing such contradicting results should be refuted since it does not correspond with the legal reality. Simply, one legal norm must always prevail. If one looks at the *Preventive detention cases*, there was a situation in which two contradicting rulings existed simultaneously. Finally, this dichotomy was removed by the FCC which upheld the ruling of the ECtHR.

Furthermore, The ECHR law, the EU law and the national law do not consist of different legal substance; they are only distinguished by their legal force. Thus the basic distinction between them is their relative position within the domestic legal order, within the hierarchy. This is crucial, since the domestic legal order cannot work with legal norms of different kind. Finally, all sources of law have to be put on a common denominator which is usually provided directly by a specific constitutional provision. Hence it is a domestic constitution which serves as

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<sup>508</sup> Gráinne de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism*, (Cambridge: Cambridge University Press, 2012), 17

<sup>509</sup> Gareth T. Davies, *Constitutional Disagreement in Europe and the Search for Pluralism*, 3

<sup>510</sup> Nico Krisch, *The Open Architecture of European Human Rights Law*, 185

common frame of reference resolving conflicts.<sup>511</sup> Therefore a constitution is a device which deciphers various legal sources and attributes them respective position in the hierarchy within the national legal system. As a result, only one law should prevail in case of the collision.

It is therefore not the adherence of NCCs to the supranational legal order which makes that current system of mutually intertwined jurisdictions functions despite occasional disturbances. It is the basically the adherence to the national constitution which prescribes the allegiance or deference to the legislator and thus to the supranational jurisdiction. What Krisch calls judicial politics is the dilemma which the constitutional judge has to solve – how to reconcile the allegiance to the constitutional values as such (e.g. dignity), with the requirements originating from supranational legal orders adherence to which nevertheless stems, at least indirectly from the constitution.<sup>512</sup> Constitutional tolerance characterized by the voluntary acceptance of the discipline of the EU law as described by Weiler<sup>513</sup> could stem from the fact that national law and EU law are now inextricably connected. As a result, various national and international legal systems are more integrated than they appear to be.<sup>514</sup>

I would suggest that the EU law and the ECHR generally prevail over the national law, but it is not because ECJ and ECtHR are more powerful than NCC, but simply because national constitution allows it. Thus in relative terms, the ECtHR and the ECJ are superior even to NCCs. Yet in absolute terms, NCCs prevail and should prevail since there must be ultimate arbiter for the sake of legal certainty.

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<sup>512</sup> Nico Krisch, *The Open Architecture of European Human Rights Law*, 197

<sup>513</sup> Gráinne de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism*, 12

<sup>514</sup> Nico Krisch, *The Open Architecture of European Human Rights Law*, 184

The constitutional pluralism presupposes that there is a guiding set of principles which allows mitigating of potential conflicts.<sup>515</sup> Logically, these principles are external in their nature, standing above competing legal orders and serving as an ultimate source of authority. Thus they allow transformation of divergent jurisdictions to a common denominator and by recalling to the final authoritative rules enables to decide which one prevails. Hence the implications of their existence are following: Even if one perceives the legal orders to be of different kind, or self-standing, in case of conflict, they have to be converted on common denominator. Secondly, these guiding principles are finally becoming the ultimate source of authority. Conclusively, even here we can talk about the hierarchy, which is guaranteed by the supra-legal principle. Yet it is dubious whether overarching principles such as democracy or rule of law could help to solve potential quarrels. It is true that there is an existing consensus that democracy and rule of law should be upheld. What differs and ultimately matters is the practical application of these legal maxims.

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<sup>515</sup> Matej Avbelj, *Questioning EU Constitutionalisms*, 15

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<sup>516</sup> In this regards, doctoral thesis present a work which is a precondition for obtaining JUDr. degree, not PhD. Degree. As to its scientific importance, it occupies position above LLM and below PhD. thesis.

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