Research at Harvard Law School

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My Fulbright Experience in Boston gave me the chance to take courses in the field of international business law at Boston University and to conduct research related to my PhD dissertation at Harvard Law School in comparative constitutional law. Through the wonderful community of people in my LL.M program and the Massachusetts Fulbright Alumni Chapter I had the chance, for example, to go hiking in New Hampshire, to discover the beautiful nature of the east cost, and to visit Miami in February. I believe that this experience, along with the contacts and friendships gained during my stay in the United States, will be long lasting and very important in my life. I can see already how valuable it is to have an American LL.M diploma in the legal market and how much it will increase the quality of my teaching and my academic writing.

1. Personal impressions

Class Experience

I took part in an LL.M class of 60 students with various nationalities. I was the only student from the Central East European region.
In general my first impression was that everything has been nicely prepared to warmly welcome us to the Boston University Campus and to the city of Boston.

The basic differences between Boston University and most European universities were the size of the classes and the interaction between the students and the professors. As opposed to university lectures in Hungary or in Germany (where I also had the chance to participate in an LL.M program and law classes), where 200-300 students attend the lectures, in Boston there was a maximum of 30-50 students assigned to each class.

As far as class participation is concerned, we were not only allowed but even requested to participate in the classes in various ways.

First of all, it was very common for us to receive homework assignments in each class, mostly arbitration and ordinary court cases, which we had to read by the next class. We discussed these cases in the classroom in such a way that any student could have been called upon by the professor; therefore, every student had to prepare all the cases for every class, which I personally – as I am also a law lecturer – consider to be a very good way to make students think about the origin of existing law principles. The rules and principles of high courts and arbitration panels or of positive law itself were discussed in the classroom. But we always first read the case and then afterwards drew conclusions about the existing principles and legal rules on the basis of the rulings. This method also showed us how common law principles come into practice in the real world.

On the other hand, every student was asked to participate in the class even without being called on. The so called *Socratic Method* was the core element of the teaching methodology at Boston University. This method uses continuous discussion to force us, the students, to draw our own conclusions about the key points of existing legal principles. Our decisions regularly conflicted with the decisions made by various courts, which helped us to understand the advantages and disadvantages of the reasoning used by the different types of courts.

It was particularly advantageous to experience the unique national and cultural diversity of our LL.M class. To hear the opinions of students from China, India, France, Germany, Italy and various other countries, not only on important business law questions, but also on human rights questions, like abortion and the death penalty, was particularly impressive.

My personal impression was that the case studies brought us much closer to

the real life needs of people and that they helped us to prepare for the demands of a professional carrier.

1.1. Wonderful Boston!

I was in a very lucky situation in Boston, because I had the opportunity to participate in very colorful programs organized by the Massachusetts Fulbright Alumni Chapter and also by my LL.M program.

One of the most interesting programs was when the Massachusetts Fulbright Alumni Chapter organized a visit to Lowell National Historic Park. Lowell is one of the oldest industrial cities in the United States. It gets its name from a person who visited England to learn how the steam engine and other inventions from the industrial revolution work and who then brought those inventions back to the United States and implemented them into American industry.

The Massachusetts Fulbright Alumni Chapter also made it possible for us to meet with Hungarian Fulbrighters living in Boston and build up useful connections with them. This was a great opportunity.

Also, the LL.M program organized various programs, such as discovery competition in the city of Boston, a trip to Mount Monadnock, an international potluck dinner, and various international dinner events, where we always went to different restaurants to try out a new nation's cuisine. We participated in various programs with U.S law students, exchanging ideas with them.
Boston is really the most beautiful and most European city in the United States, in my opinion. It is truly the best city for foreign students who would like to conduct thorough research in their own field of interest and at the same time experience America and get real first hand experience of it.

1.2. Massachusetts Fulbright Alumni Chapter

As I already mentioned, the Fulbright Alumni Chapter provided us with various opportunities to meet with other Fulbrighters in the city of Boston, from various universities and professional research fields, and to build a real and long-lasting network with foreign Fulbrighters. We attended programs such as the above mentioned visit to Lowell National Historic Park, but we also went to see an American "cabaret" at the Coolidge Corner Theater, which is located in a very typical part of Brookline, Massachusetts. The Thanksgiving dinner we had with a Fulbright Alumna, who was also Dean of the Northeastern University, and her lovely family was also unforgettable.

Through the Massachusetts Fulbright Alumni Chapter we also had the chance to meet Hungarians living in Boston and to hear about the Hungarian network of students in Boston, who were studying at the world famous MIT (Massachusetts Institute of Technology) or at Harvard or Northeastern University.

The Boston Hungarian network regularly met at a famous pub in Boston called "Big City" and was a very good opportunity to keep in touch with other Hungarians.

1.3. Research at Harvard Law School

The opportunity to do research at the world famous Harvard Law Library while I was preparing my PhD thesis as well as to attend and present at a conference at Harvard were great experiences, and I personally profited a great deal from them.

2. Summary of research topic

Impact of EU law on national constitutions – Shall constitutional courts go to Luxemburg? Turning constitutional tolerance into cooperative constitutionalism

2.1. introduciton

The requirement that EU law has primacy over national laws, even over national constitutional laws, is not expressly stated in the founding treaties of the European Community, but it is established by the practice of the European Court of Justice.[1]

According to the case-law of national constitutional courts in Europe[2] in the last half century, it seems that certain countries are not willing to accept unconditionally the precedence of EU law over national laws, especially over national constitutional laws. In the practice of the constitutional judiciary of these countries, there is a core[3] of national constitutional law, according to which the national constitutional courts are not ready to acknowledge the unconditional precedence of EU law. They claim that the development of the twentieth century shows[4] that there is too much to lose by giving up those achievements in national constitutional law[5] to a supranational entity, whose democratic credentials are questionable and whose acts cannot always be monitored by the member states.[6]

The national constitutional courts - which are meant to protect the coherence of member states' legal systems, to guarantee the conformity of laws with the national

1 Case 6/64 Costa v. ENEL (1964) ECR 585.

2 See: Cases from the practice of the German and Italian Constitutional Court and ECJ: Case No 2 BvR 52/71, Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel (Solange I.), German Constitutional Court, 29 May 1974.; Case No 2 BvR 197/83, Wünsche Handelsgesellschaft (Solange II.), German Constitutional Court, 22 October 1986.; Case No 2 BvR 2134/92, Maastricht Treaty 1992 Constitutionality Case, German Constitutional Court, 12 October 1993.;.Case No 183/73, Frontini v. Ministero delle Finanze, Italian Constitutional Court, 27 December 1973.; Case No 232/89, Fragd v. Amministrazione delle Finanze dello Stato, Italian Constitutional Court, 21 April 1989.

3 In the light of the previously cited Solange and Maastricht decisions of the German Constitutional Court and the Frontini judgment of the Italian constitutional court this core clearly extends to human rights (or with the German constitutional terminology: basic rights – *Grundrechte*) related questions.

4 Further readings on this issue: Gustav Radbruch, Der mensch im Recht; with a self critical perspective: Carl Schmidt as the former ideologist of the Nazi regime turns into the "living consciousness" of the German nation

5 German Grundgesetz

6 Further readings on the so called democratic deficit of the European Community, derived earlier from the merely consultative role of the European Parliament, and nowadays also arousing the question, whether national governmental representatives are responsible for their national Parliaments regarding their vote in the European Council – see: recent German law passed, become effective after the ratification of the EU Constitution

constitutions, and in this way to protect constitutional values and basic rights – preserve their rights in most of the member states to keep an eye always on the legislation of the EU. They want to make sure, on the one hand, that the EU does not exceed the limits of its competences, set up by the Founding Treaties and the accession agreements, and on the other hand they want to preserve an appropriate human rights protection level in the EU.[7] In other words: national constitutional courts would not accept any derogation of the constitutional achievements of the past few decades in Europe. The list of the cases decided by the German or the Italian constitutional courts preserving their national constitutional rights and even risking direct conflict with EU law and EU institutions goes back to 1973.

There seem to be four ways (*or escape paths*) of possible development in this area in the next few years:

1) First, there are signs of a very promising trend, whereby national constitutional courts have a chance to refer questions about how to interpret the law to the ECJ whenever EU law is ambiguous or not clear. As the ECJ has already pointed out, the interpretation of "court" by the ECJ can be different from the interpretation provided under national law, therefore, even in unexpected situations the court might accept the referrals of national bodies, which apply EU law, but which are not considered to be "courts" according to national law. In this respect it is relevant that the ECJ has already accepted referrals from national constitutional courts several times, and that should encourage national constitutional courts to refer ambiguous cases to the ECJ. In other words, when interpreting the notion of "court" of Art. 234 of the Treaty of Rome, the findings of the ECJ are relevant to the constitutional courts' views on the legal nature of national courts.

2) The cases of ambiguity or interpretive uncertainty regarding EU law should be distinguished from those situations where a given piece of EU law is clear, but also clearly in conflict with national constitutions. In these cases, how could the relevant provision of

7 According to the national *sovereignty (accession) clause* incorporated in the national constitutions of the member states, for example in Germany Art. 23. of the *Grundgesetz,* in Greece Art. 28. of the Greek Constitution, in France Art. 15 of the French Constitution, in Italy art. 11. of the Italian Constitution, national constitutional courts became entitled to keep an eye on the extent of the EU competence exercise and to interpret the national integration clause in the constitution, which confers right to the necessary extent according to the Treaty. This duty to interpret opens up the possibility of two different methodologies or approaches: the one is, or could be, that the national constitutional court would hold the violation of EC law to be the violation of the national constitution, as well (Italian Constitutional Court). That would be a "fair approach": if constitutional courts are entitled to judge the appropriate method for EC competence exercises according to the integration clause, then it should also be entitled under the same clause to ensure that the member state fulfils its obligation to comply with EU law and the rules of EU membership. The less cooperative and more restrictive approach in the sense of the self determination of the national constitutional courts and their judicial role is such that they declare the enforcement of EU law to be exclusively the responsibility of ordinary courts, and the review of the national laws' constitutionality as an exclusive responsibility of the constitutional court (Spanish and Portuguese constitutional courts). What can a national court do when national law conflicts with EU law and the constitutional court denies the responsibility to resolve this conflict? The only way would be to disregard the conflicting national provision, which would be an unusual – and a very American way of exercising judicial power.

EU legislation be granted direct effect and direct applicability in national courts? A constitutional court would probably feel compelled not to apply the unconstitutional EU law provisions.[8]

The questions raised by these cases might be decided by constitutional courts along the lines of a model developed by the Hungarian Constitutional Court for international treaties: when an article in an international treaty is found to be unconstitutional[9], the Court does not set it aside. Unconstitutional provisions remain applicable, so as not to violate the state's international contractual obligations. The Court, however, orders the Parliament at the same time either to modify the constitution and bring it in line with international law, or to initiate negotiations to modify the international obligations of the state. If translated onto the field of EU law, this option would certainly provide a plausible solution. It seems to be a different – and less confrontational - model than the one followed by the German Constitutional Court in its recent judgment on the European Arrest Warrant.[10]

3) The liability of the member states for violating EU law is now, by a national court's decision, a new field of application of the law of state liability[11]. The ECJ has recently applied the Francovich criteria in a case in which EU law was breached by a supreme judicial body. From this point on, state liability for constitutional court decisions does not seem implausible, even though it would certainly imply harsh confrontations between Luxembourg and the member states.[12]

4) The Treaty of Lisbon[13] would make previously ambiguous fields of shared competence more clearly defined. The enactment of the Human Rights Charter of the EU and the accession of the EU to the ECHR would also leave less doubt in human rights fields and probably alleviate the worries of national constitutional courts. It is possible that in the future in Europe the cases of Solange I, Solange II, Maastricht and Bananenmarkt, Frontini, and Fragd will lose the importance they currently have.

Even if previously debated fields became clearer, the need for judicial cooperation in the European Union would remain highly relevant at a constitutional level. The

8 It should be noted that regulations do not need national implementation and have a direct effect. Even if a national constitutional court would find a regulation to be unconstitutional, there is a lack of authority and it is not possible to strike down the EU regulation. The only thing to do is disregard the regulation, which would cause the breach of EU law by the member state. In the case of directives the situation is such that the implementing law might be struck down; however, that would also cause a violation of EU law by the member state. There is still the possibility of a constitutional bargaining between the national legislator and the constitutional court to find a way to implement the law nationally, which also satisfies the requirements of constitutionality.

9 Case No. 30/98, Europa Agreement 1994 Constitutionality Case, Hungarian Constitutional Court, 1998.

10 Case No 2 BvR 2236/04, Decision on the European Arrest Warrant Act, German Constitutional Court, 18 July 2005.

11 Case C-224/01 Koebler v Austria [2004]

12 In the American model of constitutional judiciary procedure, the supreme judicial body is responsible for the constitutional judiciary as well …[explain].

13 http://europa.eu/lisbon_treaty/index_en.htm

10 new member states of the European Union -- most of them in East-and Central Europe-- must now implement and apply a tremendous amount of EU legal materials. During this process, the attitude of national constitutional courts will be of fundamental importance.

2.2. the CONCEPTS of constitutional tolerance and cooperative constitutionalism

Both concepts are frequently used in the course of discussions on the future of European constitutionalism. Constitutionalism means more than the written constitution, it involves also the values[14] and the history of a nation. The notion of constitutional tolerance in a European context is based on the essays and articles of Professor Joseph Weiler[15]. The notion of cooperative constitutionalism *(der kooperative Verfassungsstaat[16])* has a German origin, and can be found primarily in the essays of Professor Peter Häberle.

The two concepts have a very similar meaning, but they approach the same problem from different angles. We shall first look at the meaning of the words in both notions. What is constitutionalism, and what is a constitutional state? *Constitutionalism* refers to the values and the history of a nation's constitutional law. *Constitutional state* is sometimes used as the opposite of the nation state. The notion of *constitutional state* (V*erfassungsstaat*) opens up the way for international cooperation[17] through articles in the constitution, which say for example that "the Republic of Hungary acknowledges the generally recognized principles of international law and secures the coherence of national law with international obligations."[18] It follows that both the national protection of constitutionalism and international constitutionalism together serve the goals of protecting human dignity on the international level.[19] The same is true about cooperation at the European level. The only difference is that European law is even more cogent than international law in the member states, and therefore cooperation is even more desirable. Because individuals are, along with states and international organizations, proper subjects of public international law, the state in its relations with its citizens is fully bound by international treaty obligations. The concept of nation state must yield to the notion of a constitutional state, which implies a necessarily cooperative attitude in international relations.

Generally, a Constitution sets up the basic structure of the state, lists the major

14 **European Constitutionalism Beyond the State, ed.** WEILER, J.H.H. AND WIND, MARLENE Cambridge, 2003 at p. 3

15 **European Constitutionalism Beyond the State, ed.** WEILER, J.H.H. AND WIND, MARLENE Cambridge, 2003 at pp. 15-23.

16 *Peter Häberle, Der kooperative Verfassungsstaat*, in: ders., VERFASSUNGSLEHRE ALS KULTURWISSENSCHAFT, 2. Auflage 1998, pp. 175-

17 **Peter Häberle, Rechtsvergleichung im Kraftfeld des** Verfassungsstaates, Berlin, 1992. at p. 8 to compare with Peter Häberle, Der kooperative Verfassungsstaat, in: ders., Verfassung als öffentlicher Prozess, 1978, p. 407

18 **Art. 7.1 of the act nr. XX of 1949 on the Constitution of the** Republic Hungary; translation is my own.

19 **Peter Häberle, Rechtsvergleichung im Kraftfeld des** Verfassungsstaates, Berlin, 1992. at p. 296.

state organs and institutions, defines their responsibilities and mutual relationships, and includes a catalogue of basic rights which can be directly enforced and relied upon by people in the State's territory. Historically, constitutive elements have also been rules determining the relationship of the state with its citizens. These elements belong to national constitutions – or to constitutional traditions, as in the case of England.

In the history of the European Community, the fear of losing control over important achievements in the field of basic rights has always been a major source of member states' concerns. Having the last word in matters of such constitutional importance is a symbol of moral commitment and national identity.[20] Moreover, the ever increasing spheres of Community and -- later on -- Union competences, formulated in vary vague terms in the TEC and in the TEU, were additional causes for member states' concerns.

The traditional, political expression of such concerns goes as follows: national governments and European Parliament representatives have a strong obligation to represent the wishes of their constituencies. Last summer the German Parliament passed a law on the responsibility of the German government towards the German Parliament to make clear how they are going to vote in the Council of the European Union and what interests they are going to represent there. However, the European Court of Justice and the European Court of First Instance still have the "last word" when the interpretation of Community law is in question.

What consequences does this fact generate in national legal systems?

National constitutions are very stable laws in the sense that different guarantees were promulgated in different states to make them hard to change. The national judicial organs, which are responsible for reviewing the constitutionality of national law, play the main role in interpreting national constitutions. In case of a conflict between EU law and national constitutional law, national constitutional courts and judicial organs in charge of constitutional review must keep a cooperative attitude towards EU law. Most importantly – I argue - this cooperative attitude of constitutionalism in Europe between member states and the EU must be obtained in the relationship between national constitutional courts and the European Court of Justice in Luxemburg *from both sides*. The major option for this cooperation is the preliminary reference, which will be discussed in a separate section of this article.

Both Professor Weiler and Professor Häberle argue that the cooperative attitude is the only way for national constitutional law to operate on international and European levels. The theory of constitutional tolerance advocates respect for the difference

20 **European Constitutionalism Beyond the State, ed.** WEILER, J.H.H. AND WIND, MARLENE Cambridge, 2003 at p. 15.

of that "*distinct other*", and promotes the understanding of the reasons why member states are so keen on protecting national constitutional values. The theory of cooperative constitutionalism argues, as well, in favor of constitutional tolerance, but from the side of the nation states; these should understand that the common constitutional values are protected more effectively through an international level of cooperation.

The possible solution shall be somewhere in the middle: both the ECJ and the national constitutional courts shall be tolerant towards the opposite concerns. As the history of the European Integration has shown, integration can be pursued without the fear of losing national identity, and with no loss of national diversity. It shall be a main goal of national representatives in the European Parliament and Council to adopt legislation which serves as a guarantee of balance within the European legal system: when integration proceeds, and the ECJ requires member state courts and constitutional courts to comply with EU law, member states will not have to lose long established moral and constitutional values based upon the constitutions and upon the practice of the constitutional courts. The accession of the European Union to the European Convention on Human Rights, and further clarity in the allocation of Union's and member states' competences can be promising steps towards constitutional cooperation. At the same time member states' cooperation towards common constitutional and moral values will achieve not only a higher level of tolerance and mutual understanding between the member states and the central level in the EU, but a higher tolerance in Europe between the member states as well. That was the original aim of the "Founding Fathers" of the European Union, the originally intended benefit of the European Integration[21]. Before accusing the promoters of integration of being centralistic and intolerant towards member states' concerns, we shall not forget, that after the collapse of the Nazi regime in Europe, a Unified Europe seemed to be the best way to avoid a new conflict between European countries and to promote mutual understanding among them. We can argue that the "Founding Fathers" did not see any threat that such integration meant losing important national constitutional values, but it seems less likely just a few years after the collapse of the centralist and intolerant Nazi regime. It seems more likely that when Jean Monnet and Robert Schuman dreamed of a common Europe, they considered the threat of losing national constitutional and moral values as an avoidable one as they attempted to serve the high aim of an "ever closer Union". That is what the integration history of the EU has shown us. Tolerance is never a lonely, one-sided approach; it always needs the effort of both sides to achieve some result, and in our research it shall be a cooperative constitutionalism as discussed in this article. Supposing

21 Robert Schuman, Jean Monet had a dream on a united Europe with a higher tolerance.

that member states' representatives in the European Parliament and Council will properly represent member states' interests in European legislation, there is a good chance of continuing further integration without losing important national constitutional and moral values.

According to the theory of cooperative constitutionalism, the age of nation states has, in a sense, expired. States are now cooperating with each other both politically and economically, because it is much easier to achieve human rights protection, peace and security, environmental protection, and prosperity through cross-border cooperation than within the borders of the nation state.

This switch from national isolationism to international cooperation requires a change in the concept of sovereignty, as well. With ever increasing international cooperation, member states confer a significant amount of their sovereignty rights to supranational institutions. It is important to emphasize that this conferral is revocable.[22]

As for the legislative technique, it requires an amendment to the constitution or a similar amendment like the one passed by the UK Parliament in 1976. The formulation of the *Europe Clause* or *Integration Clause* or *Sovereignty Clause* in national constitutions can vary. Some member states prefer a broad formulation, others a stricter one. Some constitutions do not make explicit reference to the European Union, but rather to generic international organizations; this allows for a broader application of the clause. Most of the *Europe clauses* do not mention the supremacy of EU law. This is to be expected, because – as mentioned above – even the primary law of the EU fails to proclaim the supremacy of EU law over national constitutions. Almost all the state constitutions establish boundaries and set specific goals which shall be served by the sovereignty conferral: such values can be the protection of human rights, rule of law, democratic government and social state, or the principle of subsidiarity. A few member states' constitutions do not mention any such requirements for sovereignty conferral.

Almost every constitution contains some provision regarding the appropriate level of sovereignty conferral. The ECJ shall judge such appropriateness on the basis of the TEC. At the same time the incorporation of the *Europe Clause* in the national constitution establishes for the national constitutional court the right to determine whether the applied EU law is within the conferred competences according to the Founding Treaties. This clause not only opens the door for EU law to enter national borders, and to become directly applicable in the member state territory, but it also prevents the national legislator from legislating in areas of exclusive Community competence. The

22 The draft EU constitution includes a paragraph on the withdrawal from the European Union. Withdrawal from EU membership used to be a subject of extended scholarly debate

conferral of certain parts of national sovereignty to the EU, at the same time, confers the right of jurisdiction on national constitutional courts to determine whether the applied Community law is within the Community Competences.

These points of potential conflict: human rights, basic protection of rights, and the appropriateness of competence exercise, have been at the core of the docket of the constitutional courts in the last decades.

How can we argue for a higher level of cooperation between national constitutional courts and the ECJ? The most important tool for cooperation on the national level and European level in the judiciary is the preliminary ruling procedure, which allows for questions to be submitted to the ECJ regarding the interpretation of the Treaty. The sphere of participants in the preliminary ruling or, in other words, the notion of "court" according to Art. 234 TEC is interpreted by the ECJ. The ECJ has an autonomous power of interpretation in this field, and must pay no regard to the notion of court in national law. However, the determination of court of last instance is a matter of national law. The constitutional court in most of the European countries can clearly be considered to belong among courts of last instance. It could be argued that constitutional courts are not necessarily in every aspect courts of last instance; they often have the right to set aside a court's decision or order a new trial. In such cases the ECJ does not consider the decision making court to be a court of last instance. However, our view is that even in these cases the constitutional court's decision as a matter of constitutional review and constitutional interpretation can not be overruled by any other judicial instance and in this respect the constitutional court needs to be considered to be a court of last instance.

To be sure, the strict judicial enforcement of the application of art. 234 by the member states, according to art. 226 TEC, might be counterproductive. It would be hard to use this tool against a member state to get the national constitutional court to be more cooperative, because the interpretation of the "Community law question" still remains in the autonomy of the member state's court. Member states' courts can only decide in which cases the interpretation of EC law is necessary to make a proper decision. A rigorous and relatively frequent application of art. 226 procedures against member states, like a "Sword of Damocles," might also not be consistent with the principle of judicial autonomy, which is recognized Community-wide.

However, the application of art. 226 in the above cases is not a pure matter of theoretical discussion. With regard to constitutional courts the Commission once seriously considered initiating an art. 226 procedure against a member state because of the failure of its constitutional court to refer a preliminary question to the ECJ[23]. Furthermore, in another case

23 After the Solange I decision of the German Constitutional Court - reported by Rudolf Streinz.

the ECJ initiated an art. 226 process against a member state because of the failure of the national court to refer a preliminary reference.[24] Recently, the ECJ also found in one case that the state could incur liability for breach of EC law due to the fact that a supreme judicial authority failed to refer a case to the ECJ.[25] One possible answer to the question of why the violation of EC law procedure would rarely be used against those member states whose highest courts fail to refer a preliminary reference to the ECJ is that the Commission values highly a well-functioning cooperation between member state courts and ECJ[26].

Based on the above reasons, the willingness of national courts, including constitutional courts, to cooperate with the ECJ is likely to be stronger if it comes from the confidence that it is the best way to build a common European constitutional law, and that nothing important can be lost in terms of human rights protection and national sovereignty, as well as national and moral constitutional values, by showing a more cooperative attitude towards the ECJ. Even if states could be found liable[27] for the failure of their courts of last instance to refer a question to the ECJ, it would still be hard to prove that the interpretation of a given community question was on the one hand ambiguous in itself and on the other hand necessary for the decision of the given case. One decision of the Hungarian Constitutional Court has shown that if a case is unconstitutional in itself, the reference to the ECJ will not help, because the unconstitutionality is not linked to the interpretation of Community law. Even if the ECJ interpreted EC law in the case, the national implementing legislation would still remain unconstitutional for other reasons not linked to EC law.[28] It is the responsibility of the national legislator to find the best possible and constitutional way of implementation or to harmonize the constitution with the international and European obligations of the country.

It can be also argued that the concerns of national constitutional courts towards EC law seem to become less immanent or threatening. As for the human rights concerns of the national constitutional courts, the accession of the EU to the ECHR is an important step to secure an EU wide human rights standard. It should also be noted that EU law has current references recognizing and respecting the ECHR and the practice of the European Court on Human Rights[29]. The explicit accession would imply also the jurisdiction of ECHR over the EU,

24 In the case of „Pingo – Hänchen", BGH 11.5. 1989, I ZR 163/88, reported by Meier, EuZW 1991, 11.

25 Case C-224/01 Koebler v Austria [2004]

26 see: e.g.: Commission's response in this direction to a question in the European Parliament; cited by: Mayer (Hrsg), Kommentar zum EU- und EG Vertrag (seit 2003), 248.

27 Even in the Köbler case the state was held not liable.

28 Judgement Nr. 17/2004. (V.25) ABh of the Hungarian Constitutional Court – the decision was criticized in the literature, for not being cooperative and not referring the involved Community question for interpretation before the ECJ; see: András Sajó, Miért nehéz tantárgy az együttműködő alkotmányosság? (in: FUNDAMENTUM, 2004/3. sz.)

29 see: TEU Art. 6.2.

which would make concerns, formulated by for example the German or the Italian Constitutional Court, less imminent[30]. The competence areas become clearer in the Treaty of Lisbon than in the TEC; however, there still remains room for extensive interpretation by the ECJ, through the doctrine of implied powers and pre-emption.

The above described developments (on the one hand, that the ECJ has made it very clear, that if a court of last instance fails to fulfill its obligation to refer an EU law interpretation question to the ECJ according to Art. 234, their member states might face in the future an Art. 226 procedure; and, on the other hand, the adoption of the Treaty of Lisbon) will also definitely alleviate certain member states' concerns regarding insufficient human rights protection in the EU or undue expansion of EU competences by the ECJ. Considering all these tendencies in the European Union, it becomes understandable why scholars are criticizing the less than cooperative attitude shown by certain constitutional court decisions[31] and why they are claiming that only strong cooperation on the constitutional level can make the common building of EU law stronger. Constitutional tolerance in the sense of a mutual collaboration, not only from the ECJ, but also from the member states, would definitely promote further integration without losing important national moral and constitutional values. The fact that there is no choice other than cooperation between modern constitution states becomes clear in light of the above described development of international and European law. The abstract requirement of constitutional tolerance, if incorporated in the practice of both the ECJ and the national constitutional courts, will result in a joint cooperative effort of member states' courts, member states' constitutional courts and the ECJ.

2.3. the notion of court and tribunal in the preliminary ruling procedure before the ecj

Art. 220 TEC declares the European Court of Justice and the Court of First Instance to be the authentic interpreters of Community law. Art. 234 TEC allows courts and tribunals to submit preliminary references to the ECJ, and courts and tribunals of last instance are obliged to submit preliminary references to the ECJ if there is a Community law question, which is not *acte clair*.[32] The ECJ has the

30 It should be noted that according to Art. 6.2 TEU, currently the human rights protection in the EU is still linked to the European Convention on Human Rights, because the TEU declares that the European Union „..respects fundamental rights as guaranteed by…" ECHR. This referred provision also says that the Community also respects fundamental rights as they result from the common constitutional traditions of the member states, and the general principles of Community law.

31 See: JOSEPH H H WEILER, On the power of the word: Europe's Constitutional Iconography, lecture held in the Boston University School of Law

32 see: eg.: CILFIT v Ministro della Santa (1982) ECR 3415.: ECJ

power of autonomous interpretation in determining which national authority is considered to be court or tribunal in the application of art. 234 TEC. National law on this issue will not be relevant.[33] It is of particular importance to determine whether constitutional courts are allowed to refer preliminary questions to the ECJ. The ECJ interprets the notion of „*court*", and the notion of „*court of last instance*" autonomously and slightly differently from national laws.[34] The *Italian Constitutional Law* explicitly states that due to the fact that the *Italian Constitutional Court is not a national court* as referred to in Art. 234 (3) of the EC Treaty, it cannot refer matters for preliminary rulings.[35] If consideration of the constitutionality of an act involves a question concerning the interpretation of the EC law, the Italian Court shall refer the matter to the European Court of Justice for a preliminary ruling, before referring it to the Constitutional Court for a preliminary ruling.[36]

The ECJ considered the eligibility of arbitration courts to participate in the preliminary ruling procedure. It was held that it would conflict with the whole concept of arbitration (implying speed and privacy) to allow a preliminary reference. However, permanent arbitration courts, which apply EU law and have a permanent and binding jurisdiction on the parties, can refer questions to the ECJ[37]. According to the well established practice of the ECJ, tribunals, administrative bodies[38] of last instance (eg. *Unabhängige Verwaltungssenat* in Austria), and even professional chambers (which in respect to the national law would be non-judicial organs) are entitled to submit preliminary reference to the ECJ. Advisory bodies, *de facto* endowed with the function to serve as the highest administrative courts, were considered to be a "court" in EC

stated that "the correct application of Community law may be obvious", when the preliminary reference shall not be applied.

33 246/80 Broekmeulen v. Huisarts Registratie Commissie (1992) ECR 2311.

34 That is why the place of national constitutional courts in the judicial hierarchy, according to national constitutional law, is less important. It can be determined if national constitutional courts are entitled to submit a preliminary reference before the ECJ.

35 See: the report of the Italian report in: Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, 18th Kolloquium regarding the Preliminary Ruling process before the Court Of Justice of the European Community, Helsinki, 20 - 21 Mai, 2002., http://193.191.217.21/colloquia/2002/gen_report_en.pdf; The question is debated in Italian constitutional law. The Italian constitutional court determined in its decision of 168/1991, that it reserves the right to make a preliminary reference. Ordinary courts shall make first a preliminary reference and then it shall go to the constitutional court. The question is still debated in Italian constitutional jurisprudence.

36 Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, 18th Kolloquium regarding the Preliminary Ruling process in the Court of Justice of the European Community, Helsinki, 20 - 21 Mai, 2002., http://193.191.217.21/colloquia/2002/gen_report_en.pdf, pp. 19-20.

37 102/81 Nordsee v. Reederei Mond (1982) ECR 1095.; see also: 109/88 Handels-og Kontorfunktionaernes Forbund I Danmark v. Dansk Arbejdsgiverforening (1989) ECR 3199.

38 138/80 Borker (1980) ECR 1975.; see further: e.g.: C-24/92 Corbiau v. Administration des Contributions (1993) ECR I-1277.

law[39]. Generally, the referring body can be considered to be a court if it fulfils the following criteria: the body is established by law, it is permanent, and not an *ad hoc* court, its jurisdiction and decisions are binding on the parties, and it applies the law. Further established requirements are independence and a territorial link within the European Union. The court also stated that policy reasons can inform the evaluation of these criteria, and that the presence of all elements is not necessary.

The interpretation of the notion of last instance by the ECJ is also slightly different from national laws; however, the state of national law must be given more weight by the ECJ in this matter. The ECJ considers the existence of remedies under national law in a very practical way, and against the decision of an administrative body not only administrative but also judicial remedies would be required.

The lack of adversarial elements in a process in the constitutional court and the high level of abstraction of the constitutional cases are relevant, when I decide whether national constitutional courts can or must submit a preliminary reference in case of doubt on the meaning of EC law. The necessity of the interpretation of EC law in a case – as said above - remains a decision of the court of last instance and this fact reduces the practical importance of this rule.

The requirement of a common constitutional cooperation towards the building of a common constitutional order can be served in the best way through the cooperation of national constitutional courts and the European Court of Justice in the preliminary ruling process. Even though the ECJ stated that the notion of "court" in Art. 234 of the EC Treaty is to be interpreted autonomously at the EC level, it is still worthwhile to take a look at the regulation of such issues in selected member states.

The *German Constitutional Court* considers the possibility of referring an interpretation matter regarding the EC law in front of the ECJ as important[40]. As it was said above, the „place" of constitutional courts in the judicial hierarchy, according to national law, is less important, due to the autonomous interpretation of the ECJ. However, it should be noted that under *Austrian Constitutional Law*[41] there are three equal high courts: the High Court of Justice, the Constitutional Court, and the High Administrative Court, which are the three highest courts in their own fields of responsibility. In the Austrian judicial

39 **36/73 Nederlandse Spoorwegen v. Minister van Verkeer en** Waterstaat (1973) ECR 1299.

40 **Association of the Councils of State and Supreme Administrative** Jurisdictions of the European Union, 18th Kolloqium regarding the Preliminary Ruling process before the Court of Justice of the European Community, Helsinki, 20 - 21 Mai, 2002., http://193.191.217.21/colloquia/2002/gen_report_en.pdf, pp. 19-20.

41 **Art. 82-94, 130 Austrian Constitution, especially Art. 92, 130,** 137-148.

system, the Constitutional Court is one of the three highest courts.

The Austrian Constitutional Court and the Belgian Cour d'Arbitrage successfully referred interpretation questions before the ECJ regarding the notion of court under Art. 234 of the EC Treaty. The possibility of the Hungarian Constitutional Court to submit preliminary references to the ECJ seems to be also clear.

The Austrian Constitutional Court has so far referred three matters to the ECJ. One was the question of energy transfer,[42] the second was the entitlement of foreign workers to participate in labour union elections[43] and the third one was the issue of processing personal data and the disclosure of data on the income of employees subject to control by the *Rechnungshof* (Central Auditing Authority.

42 Nr. B 2251/97, Austrian Constitutional Court (C-143/99, ECJ)

43 Nr. W I-14/99, Austrian Constitutional Court (C-171/01, ECJ)