Federalism as the Future of the Diverse EU?

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Edited by
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Foreword

Varga Zs. András

For about two years we have been thinking about, and talking in this research group about the future of the EU and its federalisation as one of the possible ways forward. This analysis and prediction may be based on different points of view. We will attempt to project the conditions, problems to be solved and challenges of federalisation onto a large historical background which is not very detailed, but focuses on the major character of centuries behind us.

For about 2000 years the architecture of public or social power was influenced by the imperial heritage of Rome (even if its Western component fell at about the middle of this bi-millennial epoch) from the republican transformation of Rome until peace was made in Westphalia. As is typical for any empire, Western imperial Rome was:

- great;
- heterogeneous: different tribes, ethnicity, languages, religions, cultures were kept together;
- liberal, in the sense that the imperial norms of power and life did not cover everything, only the most important behavioural rules were general, the rest – and this 'rest' practically covered everyday life - was left to the local communities;
- non-nationalistic: the different local communities were not forced to accept a first class or more precious nationality above them, neither were they melted into a single and uniform society;
- instead of national (or better: ethnical) unity and interest more general principles were compulsory: laws, the empire and its leader, religion and its values;
- however, the role of regions and their peoples was different, later it was described by the central/peripheric dichotomy; the central regions and their

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populations were predominant, in that they could decide on general politic, including peace or wars, taxes, and generally applicable laws;
– an important feature was separation of the public and the spiritual authority: the magistrates, and later on the emperor and the pontifex maximus were interdependent but autonomous.

This double, autonomous but interdependent power was kept even after the Christian transformation. Not accidentally, Roman imperial heritage gave the factual, social and physical root of the Christian Church, but its other root, the spiritual one, the Jewish legacy also accepted the double power of the King and of the High Priest. Thus, the Church took forward the whole previous architecture, and the only change was the common religion.

Even after the fall of the Western Roman Empire, the ideal of organising public affairs remained the same. There were permanent attempts to re-establish the empire. Under Charlemagne and later by the Holy Roman Empire these attempts were successful for longer or shorter periods. It is not exaggeration to say that willingness to create an empire is one of the genetical determinations of Europe. In Eastern parts of Europe, where the imperial establishment was present for this whole period it is even stronger.

This Roman heritage was broken finally by Westphalia. However, Westphalia itself was a consequence of a longer process started by the double and later triple papacy. From 1378 two popes reigned from Rome and Avignon with two papal courts, separate boards of cardinals, and finally separate successors. Different European regions and monarchs accepted either one or the other. This was an ecclesiastical and social reality for some generations, which lead to a loss of confidence in the spiritual authority of the Pope and Church. How could the papacy have been the final authority if there were two popes? The uncertainty became even greater when the Emperor Sigismund of Luxembourg, and the King of Hungary tried to convince the two popes to renounce their thrones and elect a generally accepted new pope. The outcome was ugly. As well as the popes in Rome and Avignon, there appeared a third pope in Pisa. By all means, this scandalous situation was solved by the Emperor, who forced all the three popes to resign and electing a new and commonly accepted pope. The process was approved by the Sinod of Konstanz.

The scandal was solved, but the broken architecture could not be restored. The unity of the papacy was reconstructed, but its spiritual authority was not the same. How could it be, when peace within the Church was established only by the Emperor? The Church had been a spiritual authority equal to the emperor's, but this twin authority was now lost. The Church became subordinated to the Monarch. What came next is common knowledge, reformation and as fulfilment Westphalia.

Since then the former double authority was forgotten and the single authority of the sovereign became the essence of the new architecture. Many centuries came and went and the genetical willingness of Europe to create an empire was combined

with the long experience of personal, and later institutional and then finally national sovereignty.

The predominance of Westphalia came to a quite quick but bloody end with the two World Wars, with the foundation of the United Nations Organisation, the Council of Europe and the European Communities, actually the European Union a special recombination of the past is on stake.

Even today sovereignty belongs to the States of Europe. This is in continuity with Westphalia. The inter- and supranational institutions or systems of institution are the subjects of international law, however this institutional legal position does not entail sovereignty.

Nevertheless, on the other hand the inter- and supranational institutions have extended without limits their range of influence. This is explicit in the case of the European Communities and their actual status as the European Union. The guiding principle of 'ever closer union', the principle of particular, and later the general primacy of European law, the judicial practice that hollows out the regulation of the treaties stating that every competence that does not belong to the Union remains with the member states, recalls the imperial heritage of Rome. If it is concluded to a federation, we will realise all the imperial features: greatness, heterogeneity, the liberal organisation of every-day life, the non-nationalistic raison d'etat, have some common values.

What is missing is the double authority of public (state) and spiritual power. Furthermore, a spiritual authority is missing because there is no reminiscence of common spirituality in Europe. However we are Western people, and we keep the memory that we need something more than the mere physical power of the state. We need something to fill the space that remained after common spirituality. And what do we have? What could we invent? Nothing more than the legal and the normative notion of values and list of extremely abstract values, beginning with Rule of Law.

At a first glance it is a perfect substitution of spirituality. The values within Art. 2 of the TEU are common, elevated, abstract, and human. We can continue the long list of laudatory adjectives. Almost everything is done.

We will have a federation which reflects the old imperial past (I just repeat: non-nationalistic, liberal etc.). We may keep the member states with their relics (language, colours, anthem, coat of arms) which reflect Westphalia. Naturally this reflection does not contain sovereignty, but the sun still rises every day whether a state is sovereign or not. We will have an abstract cloud of values to make the memory of the past more realistic.

However, the question remains: how can the spiritual authority be replaced? Or in a more concrete manner: who decides on the values? And at this point we face a strong danger: the authority of values is the same authority of public power. The two authorities are united. We will have an empire with a single final authority.

This is no longer Rome – there is no double authority with interdependence but autonomy. And this is no longer the system of Westphalia where the equal sovereigns had the power to control each other.

The new imperial order would combine what is more efficient in Rome and Westphalia. The only doubt is that an uncontrolled empire does not belong to the Roman heritage. This would be something else completely. Strong, efficient, uncontrolled, frightening.

Chapter 1

The European Union and Federalism: Thinking Outside the Box

Giacinto Della Cananea

Abstract

This chapter focuses on the European Union, viewed from the angle of the traditional distinction between states, both unitary and federal, and the unions of states. The chapter analyses critically what may be called the 'ascending order' approach to the study of modern polities; that is, an approach based on an increasing order or trend, without reversing direction, as well as on the assumption that the categories employed are intrinsically and necessarily different in some respects. An alternative approach, which is not based on rigid distinctions between the various types of modern polities, is then proposed. In the process of developing such alternative approach, the focus is on general principles.

Keywords: European Union, ascending order, general principles, rule of law, supranational courts.

1. Introduction

This chapter concerns both administrative and constitutional law, which are currently regarded as the twin main pillars of public law. It focuses on the European

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Union from a federal perspective.[1] This topic has been subject to much comment in the legal literature.

The purpose of this chapter is not to provide a general overview of the topic, for my own views on this matter have been set out on an earlier occasion[2] and limits of space would not permit it. It has the more limited purpose to encourage, so to say, thinking outside the box; that is, to explore ideas about regional integration that look unusual because they are not limited by our intellectual tradition. A (perhaps diminishingly important) strand of legal thought has categorically denied that any commonality could exist between public law within and outside of the state. A more sophisticated variant of this strand is constituted by what may be called the "ascending order" approach to the study of modern polities; that is, an approach based on an increasing order or trend, without reversing direction, as well as on the assumption that the theoretical categories that are employed – unitary states, federations, and unions of states - are intrinsically and necessarily different in some respects. It is, by all means, perfectly legitimate to adhere to this point of view. By the same token, it is legitimate to subject it to critical scrutiny, as well as to propose an alternative approach which is not based on rigid distinctions between these types of polities. The chapter thus uses a variety of factual and normative elements. It also uses insights from both legal and political science literature.

The chapter is structured as follows. The starting point is what has just been referred to as the "ascending order" approach. Its main features will be delineated. The next step will be to critically analyse the "ascending order" approach, firstly with regard to the categories that are employed, and secondly because there are several significant divergences between theory and fact. The main elements of an alternative approach will then be delineated. In the process of developing such an alternative approach, I will point out the importance of general principles, which I consider to be one of the most important issues from a public law perspective. It will be argued that the jurisprudence of supra-national courts can help us to understand both why the general principles shared by most, if not all, legal orders are relevant for the public authorities that act beyond the states and why such principles must be taken into account within national systems.[3]

1 Two collective works, in particular, deserve mention: Cappelletti, Seccombe and Weiler, 1986, and Nicolaidis and Howse, 2001; For a retrospective of the evolution of the European construction in its first four decades, see also, Weiler, 1991, p. 2403, and, for its political philosophy, Dickson and Eleftheriadis, 2021.

2 della Cananea, 2003 (arguing that the EU is a mixed polity, and that there have been other types of mixed polities in the past, such as multinational empires). In a similar vein, see Cassese, 2017, p. 78.

3 Supranationalism has been intended in more than one way. For Ernst B. Haas, it meant that political and social forces were building a new type of regional integration: 1967, 2nd edn. For lawyers, it meant that the new institutions exercised powers binding national authorities: see Reuter, 1965; Dehousse, 1969, p. 183; For even more views about supranationalism, Stone Sweet and Brunell, 1998, p. 63 (showing the emergence of the supranational constitution through the rulings of the Court of

2. The "ascending order" approach

To begin with, we need to look more closely at what was initially called the "ascending order" approach. According to a strand of legal and political thought dating back to the Treaty of Westphalia, there is a clear-cut distinction between states and other entities. Samuel Pufendorf argued that the State was a *respublica regularis* (that is, a regular political entity), because sovereignty was concentrated, while empires were irregular forms of government (*respublica irregularis*).[4] It differed, moreover, from systems of states, where the various components renounced the unilateral exercise of some of their sovereign powers in favour of their joint exercise.[5]

Following this line of reasoning, it is held that unitary states, federations and unions of states can be arranged in an increasing order.[6] The various polities are arranged in a sequence such that the next element is always characterised by more diversity and more decentralisation than the previous one. The first type of polity in an ascending sequence has the lowest diversity, while the last one has the greatest diversity. While normative powers are centralised within unitary states, they are increasingly decentralised within federations and confederations and, *a fortiori*, within unions of states such as the EU. Similarly, there is an ascending order concerning heterogeneity, in the sense that unitary States are characterised by homogeneity, while federations and confederations allow for more diversity, and unions of states, *a fortiori*, do so.

There is evidence that, except for ethnically diverse states without aspirations for mono-ethnicity, such as Spain and the United Kingdom, many of the newer European nation-states in the nineteenth century had one crucial defining feature, they strove to be ethnically homogeneous. Germany and Italy provide illuminating examples.[7]

Within nation-states, moreover, the power to legislate on many important issues is centralised. Nineteenth century France exemplified this, and Italy followed its model soon after its political re-unification in 1861. By contrast, federations are characterised by a more or less pronounced heterogeneity. For example, according to Daniel J. Elazar, since the beginning the U.S. was highly differentiated from both an ethnic and religious point of view, and this is the key to understanding its institutional arrangements.[8] Thus, the Constitution conferred legislative powers to both

Justice) and Lindseth, 1999, p. 628. (emphasising the administrative dimension of supranationalism). Intergovernmental theories, can be considered in § 2.

4 Cassese, 1986, p. 120. As regards the vast literature which preceded the last century, it suffices to observe it was only some years after the Treaty of Westphalia that Samuel Pufendorf criticised the irregularity – the 'monstruosity' – of the Empire: see his De iure naturae et gentium, 1672, Book VII in Pufendorf, 1991, p. 144.

5 Pufendorf, 1991, p. 146.

6 See, among others, Wallace, 1985, p. 406.

7 See Hurrelmann et al., 2007, p. 11.

8 Elazar, 1998, p. 122.

levels of government, the Federation and the states. Tocqueville noticed it more than two centuries ago with remarks that fully retain their importance:

> The principle of the division of legislative power thus received its final consecration; henceforth then, the necessity to divide legislative activity among several bodies can be considered a demonstrated truth. This theory, more or less unknown in the ancient republics, introduced into the world almost by chance, like most great truths, misunderstood among several modern peoples, has finally passed as an axiom into the political science of today.[9]

This is by no means an isolated case. For example, in Switzerland, where there were distinct social groups with different languages (French, German, Italian, and Ladin), a federal constitution was adopted in 1848, which was subsequently revised several times, most recently in 2000.[10]

A fortiori, so the argument goes, diversity inevitably characterises the EU. Three aspects can be detected in this respect. Firstly, it is precisely because the EC/EU is a union of states that it is even more heterogeneous than federations. Secondly, its heterogeneity is not simply an element of fact, it is also a necessary element. This is confirmed by a cursory consideration of some fundamental norms. Under Article 4 (2) TEU, the EU 'shall respect ... national identities'. Moreover, by virtue of Article 22 of the Charter of fundamental rights, which now has the same legal value of the treaties, the EU must respect linguistic diversity. Thirdly, the Union's legislative powers are limited by a strict doctrine of conferral. [11] The Union is thus based on attributed powers. It is clear that the issue of competence has a central importance with regard to the relationship between the EU and its Member States.

The view just outlined is however based on some implicit assumptions that are questionable. On the one hand, it would be wrong to infer from the provisions of the treaties that EU institutions are responsible for 'some unwarranted arrogation of power' to the detriment of states' rights.[12] On the contrary, national governments have often widened the scope of application of the competences of the EU. On the other hand, when the Court of Justice has broadly interpreted those competences, the states, being the masters of the treaties, could have redefined them in a restrictive manner, but did not do so. Emphasising the "creeping competences" of the EU is, therefore, an over simplistic approach to an important and interesting issue. Nevertheless, more than its institutional foundation, what matters here is its conceptual foundation. This will be subject to critical scrutiny.

9 Tocqueville, 1821, p. 137.
10 Fleiner, 2002, p. 97 (pointing out that diversity is at the heart of Swiss federalism).
11 See Craig, 2004, p. 323. See also, on previous reform proposals, von Bogdandy and Bast, 2002, p. 227.
12 Craig, 2004, p. 324.

3. The deficiencies of the "ascending order" approach: the categories employed

Whatever its simplicity and apparent appeal, the "ascending scale" approach is flawed for both conceptual and factual reasons. First, it utilises some categories or concepts, such as those of state, federation and unions of states, as if they were fixed and immutable. On the contrary, the phenomena to which those concepts refer to can, and do change, throughout time. Secondly, and as a consequence of the evolution of those entities, whose distinctive traits have been previously considered - namely, the social substratum and the division of lawmaking powers - have changed throughout the years and are still changing. This second aspect will be discussed in the following paragraph.

Meanwhile, it can be observed that the concept of state is legally relevant, but ambiguous. It is legally relevant, because there are some legal consequences that follow from the finding that a certain entity can be qualified as a state. Included within these consequences, there are both powers and duties. There is, for example, a state's power to exercise force within its territory, albeit within the limits established by international custom and treaties. However, the concept of state is ambiguous. This is shown by the fact that it is necessary to distinguish the modern state, that which has been characterised by a professional bureaucracy for collecting taxes in order to pay the army, from previous political bodies.[13] Its ambiguity is confirmed by the advent of the welfare state, which has further developed the vocation of the state to deal with all interests that are socially relevant.

In contrast with nation-states, federations are said to be a mechanism for accommodating diversity and allowing different choices, with respect to the autonomy of their components. There is, again, some truth to this. However, there are, important differences between federations. What matters, for our purposes here, is not so much, to borrow Montesquieu's distinction between republics and empires, that some federations have a vast territory (for instance, Canada), while others have a small territory (Switzerland). Nor is it whether a federal regime is either symmetric or asymmetric. That is, whether it accords a special status to some of its components. Examples include the Basque country in Spain and Kashmir in India, before its special status was withdrawn. What really matters is whether there is any legal foundation or grounds to distinguish federations and confederations. Actually, there is no legal consequence that follows from including a certain polity within federations or confederations.[14] Thus, it cannot be said that as, for instance, Belgium or

13 See Cassese, 1986, p. 120. As regards the vast literature which preceded the last century, it suffices to observe it was only some years after the Treaty of Westphalia that Samuel Pufendorf criticised the irregularity – the "monstruosity" – of the Empire: see his *De iure naturae et gentium,* 1672, Book VII, Pufendorf, 1991, p. 144.

14 Giannini, 1986, p. 112.

Canada are federations, a certain quality or trait necessarily follows from it. It is, likewise, of limited helpfulness to raise the doubt whether Germany is a federation because it assigns legislative powers mainly to the Bund, whereas the Lander are generally responsible for implementation. What matters is the gradual construction of the federal settlement since 1949.[15]

Finally, although unions of states share some features, in that they differ with regard to other features, which are not less important from an institutional and legal perspective. For example, both the United Nations (UN) and the Council of Europe (CoE) are intergovernmental organisations, based on multilateral treaties. However, accession to the UN is open to every state and is subject only to the requirement to keep peaceful relations with other states. It is not fortuitous then, that the UN includes, to use the order of concepts employed by John Rawls[16], not only constitutional liberal democratic or non-liberal but decent governments, but also authoritarian governments and outlaw states, which refuse to comply with reasonable legal precepts aiming at protecting individuals and minorities. By contrast, not only is the accession to the CoE limited to European countries, but it is also subject to more stringent requisites; that is, under Article 8 of the Treaty of London (1949) the respect of democracy, the rule of law, and fundamental rights. Consistently with these demanding requisites, the membership of a state that infringes them may be terminated, as happened recently with Russia, following the invasion of Ukraine. Similarly to the CoE, the European Community has been a regional organisation open to the accession of other nations that belong to the same area.[17] For this purpose, the EU sets out not only procedural rules, but also substantive conditions. That is, the respect of the values upon which the Union is founded, including democracy, liberty, and the respect for the rule of law and fundamental rights (Article 2 TEU).

4. The deficiencies of the "ascending order" view: the divergence between facts and theory

After explaining why the "ascending order" model is conceptually flawed, it must be added that, factually, there is much that is imperfectly understood about modern polities.

Even within traditionally homogeneous and unitary states, such as France, the second half of the twentieth century has seen the creation of territorial bodies entrusted with legislative powers, namely the regions. Together with this institutional change, there has been the recognition of both ethnic and linguistic minorities,

15 For this discussion, see Where, 1963; See also Benz, 1999, p. 55.
16 Rawls, 2001, pp. 3–5.
17 Boulouis, 1990, p. 45.

notably in Corsica and Brittany. There is, therefore, a moderate heterogeneity of social groups, with their own cultures and languages. Such heterogeneity is more evident, and sometimes striking, in other states, such as Italy and Spain. It is precisely for this reason that the legislative powers of sub-national governments have dramatically increased.

The internal transformation of the states is not isolated. Legal scholarship was accustomed to looking to the state as the most important source of political authority. The state was the institution to which demands were addressed and which was charged with considerable responsibilities, including protecting the national interest and the rights of its citizens abroad. After 1945, states have operated in an increasingly complex web of national, trans-national, and supra-national legal processes. This is no mere incremental change.

Between historians, there is debate about the role of the EC/EU. Two interpretations of the events that occurred during the second half of the last century have been proffered. The first suggests that the EC/EU has weakened the legitimacy of the nation state. The other interpretation argues that the EC has been the instrument for the rescue of the nation state.[18]

This is by all means an interesting debate, from which public lawyers and political scientists may learn much. However, from a legal perspective the states that have become members of "regional" organisations such as the EU have agreed either to renounce some of the traditional attributes of sovereignty or, according to another strand of thought, to exercise their powers jointly, not autonomously. Thus, for example, they have renounced to the old privileges concerning the exercise of justice. Historically, within the Holy Roman Empire, the emperor could grant the *privilegium de non appellando* to an imperial estate.[19] As a consequence, there was a limit to the extent to which an appeal could be brought to the imperial supreme courts. There is no such limitation in the supranational legal orders of our epoch, where both the Court of Justice of the EU and the European Court of Human Rights have compulsory jurisdiction and individuals and corporations can lodge complaints against state action or inaction. This confirms that any attempt to use the word "state" as a qualifying concept is susceptible to have only a limited range of applications or usefulness.

Another caveat is applicable as far as federations are concerned. As observed earlier, the "ascending order" vision of political systems asserts that federations are characterised by a more pronounced heterogeneity than unitary states. This is, again, true to some extent. However, federations are not necessarily the product of ethnic and cultural diversity. This is the case with Canada, but not with Australia. Whether Australia has recently taken adequate steps to protect its cultural heterogeneity, with special regard to ethnic minorities, is another question, which requires autonomous treatment.

18 See Milward, 2000.
19 For further analysis, see Bryce, 1907.

A final remark concerns other distinctions between federations and unions of states. As noticed earlier, the EU is characterised by a marked ethnic and linguistic diversity, which must be respected. However, in the Indian federation there is an even greater ethnic and linguistic diversity. In India the languages spoken belong to very different linguistic families, the major ones being the Indo-Aryan language (78% of Indians) and the Dravidian languages (spoken by 19.64%) in Southern India. This is not merely a fact but also has legal consequence. Interestingly, in 1947 the Indian Constitution entered Article 343 into force, affirming that the official language would be Hindi, with the official use of English to continue for a further 15 years. Later, a constitutional amendment allowed for the continuation of English alongside Hindi in the Indian government indefinitely. Arguably, the striking diversity of local languages has induced the rulers to maintain the use of a "foreign" language that could be understood by all.[20]

This line of reasoning may be usefully completed with a further look at the division of legislative powers, or competence, between the EU and its Member States. There are two sides of the same coin, that is, existing Union competence and how it may be widened, if the public interest so requires.

The regulation of the Single European Market may be considered from a particular point of view that, I believe, all public lawyers would regard as practically important; that is, the regulation of government procurements. In the Union whenever a public contract reaches the thresholds established by EU directives (that is, more than 5 million Euros for public works and 143,000 Euros for central government contracts concerning services), all public authorities, including private entities that are under public control in one way or another, can only use the procedures established by directives, including bids. Moreover, no-bid contracts, namely contracts that are awarded to a single vendor without any previous competitive bidding procedure, are allowed only under certain circumstances, including urgency or the existence of a single provider for a certain service. Outside of these situations, such contracts are forbidden. As a result, no-bid contracts are annullable before national courts, as established by the settled case law of the European Court of Justice. In the U.S. no-bid contracts are often criticised on the grounds that they lack transparency and can lead to a waste of taxpayers' money. However, there are no federal rules prohibiting them. It is for national lawmakers to prevent the executive branch from using no-bid contracts. Thus, for example, in California competitive bidding is required unless there is a particular legal basis for bid exemption, while in Iowa lawmakers rejected the Governor's request to fund no-bid contracts.[21]

Finally, although the legislative powers of the EU are based on the principle of conferral, it does not follow from this that there is what judge Koen Lenaerts called 'a constitutionally protected nucleus of sovereignty for the Member States'.[22] This

20 See Tillin, 2007, p. 45.
21 Beeman, 2020. For further analysis, see Bartle and La Course, 2003, p. 192.
22 See Lenaerts, 1990, p. 220.

is a matter of political discretion entrusted by Article 235 to the Council, acting in accordance with the stated procedure, to decide on the necessity of such action. On the other hand, in more than one case, the ECJ has decided to "stretch" Community competence. For the Court, national interests appear to be properly protected by the procedural safeguards inherent in the structure of the institutional framework, namely, decision-making procedures and judicial safeguards.

5. An *excursus* on moral disagreement in the EU and the US

The argument that is being made in this chapter about the divergence between theory and reality can be developed more thoroughly with regard to a perspective that is both interesting and important, namely that of moral disagreement. The structure of the argument within this paragraph should be made apparent at the outset. Firstly, I will illustrate how moral disagreement is examined in the context of federalist regimes in a recent and thought-provoking essay written by Guido Calabresi and Eric Fish. Secondly, it will be argued that their analysis is supported by both historical and contemporary analysis. Thirdly, and more importantly for our purposes here, a brief comparison between the EU and the US will be attempted.

The starting point is the well-known conclusion reached by Isaiah Berlin about the differing visions of the good that follows from diverse moral ideas, thus preventing the achievement of harmony in contemporary societies.[23] The implications, which contrasting visions of the world will have for the shape and content of public law, are considered from a federal vision. Calabresi and Fish discuss two themes. The major theme concerns federalist government. The "minor" theme concerns specifically the U.S.

From the former viewpoint, the authors argue that a federalist government provides an important, though partial, solution to the lack of harmony in contemporary societies. Different social groups may live within the same federation because its structure leaves certain moral questions, for example abortion or capital punishment, to local control. This allows them to keep their 'distinctive moral views, while at the same time coexisting in the larger national polity alongside those with whom they disagree'.[24] Calabresi and Fish also point out that Americans disagree profoundly on a range of important questions of moral principle, such as capital punishment and same-sex marriage. For each of these questions, a policy that is deemed necessary by some appears totally unacceptable to others. As a consequence, it is difficult for the supporters of these contrasting views to coexist in the same nation. If one of these

23 Berlin, 1992.
24 Calabresi and Fish, 2016, p. 1.

factions gains control of government, it may use public powers to adopt decisions that are "abhorrent" to the other one.[25]

This analysis is impeccable and may easily be supported by both historical and contemporary examples. Historically, racial segregation was an element of division, though Tocqueville was not the only writer who expressed some scepticism about it. For him, '[T]he prejudice of race appears to be stronger in the States which have abolished slavery, than in those where it still exists; and nowhere is it so intolerant as in those States where servitude has never been known'.[26] After 1850, such division emerged in two diametrically opposed positions regarding the U.S. Constitution. For some, the Constitution did not prohibit slavery. For others, it gave government the authority to abolish slavery, in particular by using the Commerce Clause and by granting due process rights to protect fugitive slaves. Both strategies found their way in two new constitutional amendments approved by Congress before the Civil War had ended. While the 13th Amendment outlawed slavery, the 14th Amendment ensured the due process of law for all, within the states.[27] However, it did not outlaw methods that could prevent many from voting, hence the significance of the Civil Rights Act (1964).

Another examples is both constitutionally relevant and significant from a comparative perspective. It concerns capital punishment. Although the Constitution's Eight Amendment establishes a ban on cruel and unusual punishment, it does not set out precise rules about when a jury may impose the death penalty and how it must be carried out. As a result, diversity reigns. Twenty-seven of the fifty states currently provide the death penalty for certain crimes, even though some of them have either adopted a moratorium or have "*de facto*" suspended executions since various points in time. However, it remains a prerogative of each state, although the Supreme Court has held that some types of punishment are 'cruel and unusual' and thus violate the Eight Amendment, while others are unconstitutional for the lack of adequate guidelines for judges and juries when deciding whether to impose capital punishment.[28]

The significance of these findings is not limited to U.S. public law in itself. It also concerns a comparison with EU public law. Consider once again, capital punishment. As early as the age of the Enlightenment, thinkers such as Cesare Beccaria argued that civilised nations had to ban capital punishment.[29] More than two centuries later, that wish has become reality. Within the EU, capital punishment is prohibited by the Charter of Fundamental Rights, which under Article 6 (1) TEU has the same legal value as the treaties. Article 2 (1) recognises to everyone the right to life and Article 2 (2) reinforces such protection by establishing that 'no one shall be condemned to

25 Calabresi and Fish, 2016, p. 15; See also Sunstein, 1996.
26 Tocqueville, 1821, p. 533.
27 For further analysis, see Ackerman, 1991 (for the thesis that the abolition of slavery occurred as a disruption of contract).
28 The legislative provisions providing guided discretion have been approved by the US Supreme Court in a line of cases, including *Jurek v. Texas,* 1976.
29 Beccaria, 1764.

the death penalty'. The essence of this fundamental provision corresponds to those of the European Convention of Human Rights. While Article 2 (2) ECHR indicates some cases in which 'deprivation of life shall not be regarded as inflicted in contravention of this article', Article 2 of Protocol No 6 to the ECHR, has a more restrictive content. It provides that

> A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions.

As a result of this, capital punishment is prohibited, too, in the greater area of Europe, i.e.: the CoE that stretches from the Atlantic Ocean to the Carpathian Mountains.[30] Only outside this area is capital punishment allowed, namely in Belarus and Russia (where there is, however, a moratorium). Comparatively, there is a striking difference with regard to the US. The choice of a "harsh justice" in America divides it from Europe, and the key to understanding this divide is, for some commentators, the greater weight that is given in Europe to human dignity.[31]

An important corollary of the vision of moral disagreement in federalist government elaborated by Calabresi and Fish concerns the comparison between unified Europe and the US. In the US, there is an unending conflict over moral issues that divide Americans such as capital punishment, racial segregation and abortion, for which the Supreme Court has recently held that there is no room for federal legislation, thus overturning *Roe v. Wade* after almost fifty years.[32] To talk of an objective good or a shared societal value is therefore vacuous, despite the existence of a strong federal power. On the contrary, notwithstanding the weakness of the "central government" within the EU, a unified Europe has survived for so many decades amidst crises and enlargements. The precise key to understand the underlying reason is moral disagreement, in the sense that 'the value differences are remarkably limited'.[33] Despite different histories and cultures, as well as religious variations, on important moral issues the Member States 'think pretty much alike' or, at least, the differences that exist have not risen to an intensity that would require a strong central authority to intervene, as Supreme Court did in *Brown and Board of Education*.[34]

Two caveats are appropriate to qualify the conclusion just reached. The first is that no irenic vision of public law in Europe is justified. Old differences persist, for example in the treatment of persons imprisoned. New differences emerge, for instance as far as same-sex marriage is concerned. The other caveat regards EU

30 Costa, 2013, p. 81.
31 Whitman, 2005.
32 US Supreme Court, 2022, *Dobbs v. Jackson Women's Health Organization*.
33 Calabresi and Fish, 2016, p. 14.
34 US Supreme Court, 1954, 347 U.S. 483, the landmark decision of the U.S. Supreme Court ruling that the doctrine "separate but equal" could no longer be applied in the field of education. For further analysis, see Balkin, 2001.

institutions. Some recent decisions, for instance about whether and how the Union should support Ukraine, reveal a diversity of views that is unprecedented. Nothing suggests therefore, that the rulers benefit from an atmosphere of Jovian calm in which they would be able to decide what is best for the peoples of Europe. The general point that has been made here operates on a different level. Making a theory asserting the existence of a categorical difference between the US and the EU, in the sense that the former is more homogeneous that the latter on moral grounds, would be empirically weak.

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6. Beyond the "ascending order": a wide spectrum of polities

Thus far we have considered both the normative and descriptive adequacy of the "ascending scale" approach. We have found that, whatever its apparent appeal, this approach does not withstand critical scrutiny. Firstly, methodologically, the idea that nation states, federations and unions of states are fixed and immutable a *priori* categories is flawed and must therefore, be revised. Secondly, a legal theory that takes for granted the existence of neat differences between three categories should be revised. There are obvious differences between the various types of polities. The degree of difference in this respect should not, however, be exaggerated. The real world is much more complex and this should be taken into due account by both public lawyers and political scientists. Thus, for example, we have seen that from the viewpoint of moral disagreement the EU is surely not more divided that the US.

This is all very well, but naturally, once we have explained why the "ascending order" approach has several deficiencies, we have to put something else at its place. In the remaining space, I can only mention, without examining them in detail, some elements of a more adequate theory of modern polities. The first is the concept of polity, which does not designate every organised society, but only the entities that possess some specific attributes of authority. The second element is how these entities should be considered. The third is a practical demonstration of the existence of common attributes. This demonstration, which will be accomplished in the following paragraph, concerns the general principles of law.

The starting point is the concept of polity. A long-standing tradition of legal and political thought focuses on this concept. This old tradition goes back in time to Aristotle's Politics, where two distinct approaches were used. There was a theory of the ideal, or best, state, from a philosophical perspective. There was, additionally, an analysis of actual states, more precisely a comparative analysis, because Aristotle compared the constitutions of Sparta, Crete, Carthage.[35] In both approaches, "polity" was the chief structural concept of societies, and the only environments within which

35 Aristotle, no date, book II, section 1272 b.

men could live.[36] Not all societies, however, could be regarded as polities, but only those which achieved an ordered organisation of power. Interestingly, in the modern era the term "polity" was translated as "state". This was a manifestation of the belief that the term "state" could be viewed as timeless. In the same order of ideas, the general theory of the state elaborated by Austrian and German public lawyers at the end of the 19th century applied the concept of state to a variety of entities. That theory held that the concepts of state and sovereignty, or *imperium*, were closely related, in the sense that sovereignty was a necessary attribute of each state and that its scope of application included both peoples and territory. Interestingly, while most theorists asserted that sovereignty was indivisible, Georg Jellinek observed that, empirically, this was not always the case. For example, although Bosnia was still part of the Othman Empire, state authority on that territory was exercised by Austrian institutions. He thus coined the term "*co-imperium*".[37] His remark was not only a healthy antidote against the belief that the state phenomena may be considered without an adequate awareness of their spatio-temporal mutability, it was also a fertile indication that sovereignty had to be conceived not in an abstract manner, but concretely. Following this line of reasoning, it is easy to observe that in last seven decades the Member States of the EC/EU have shifted from an isolated to a joint exercise of sovereignty concerning both lawmaking and dispute resolution in several areas. With the Treaty of Maastricht, it exercises monetary sovereignty, with a single currency and a central bank. It impinges on other sensitive areas like foreign policy and defence, although the decisions are still in the hands of national governments. The EU can thus be regarded as a polity having its own power and legitimacy.

Secondly, this broad notion of polity can be used to construct an alternative approach, based on a spectrum, namely a broad range of political entities – including federations, confederations, unions – that exist and can be identified between two extreme points, from a completely unitary order, where central government is the main actor that defines and enforces rules while other public authorities have no legislative power at all, to a legal regime where other sites of authority have gained importance in regulating many areas of economic and social life.[38] The metaphor of the spectrum of light seems appropriate, because as this term designates a band of colours, with different degrees of refraction of light, so does a spectrum of public institutions, with each different form at its margins shading into other forms.[39]

36 Aristotle, no date, book II, section 1252 b., 27. In secondary literature, see Bluhm, 1962, p. 743.
37 Jellinek, 1900.
38 For a similar approach, see Elazar, 1987.
39 For this remark, see Watts, 2000, p. 161.

7. General principles: beyond the divide between internal and external public law

As a final step, some implications of the theory just delineated will now be analysed. They concern the general principles of law. Firstly, it will be argued that, in contrast with the school of thought according to which there is a divide between public law that is internal to the state and that which is external, there are some general principles governing the conduct of all public authorities. Second, it will be observed that the rule of law and its corollaries, notably the separation of powers, are in contrast with the traditional way to consider certain institutional issues as mere "internal affairs".

At the beginning of this study, a mention was made of two variants of the same theory that would have been subjected to critical scrutiny. The stronger variant categorically denies that any commonality might exist between public law within and outside the state. The softer variant is constituted by the "ascending order" approach to the study of modern polities. The difference of emphasis between these variants should not conceal the similarities in their approach, that is, to establish rigid boundaries between the various types of polities. Earlier in this study, I explained why the latter variant does not withstand critical scrutiny. It is to the other one that we now turn. As a first step, its intellectual and institutional foundations will be considered. Next, the emergence of general principles common to the legal orders of the Member States will be illustrated. The focus will then shift towards the rule of law and one of its corollaries, namely judicial independence.

The intellectual foundations of the theory under consideration owe much to a well-known German thinker, Hegel. The fact that there are completely different laws within and outside the State was obvious, almost axiomatic, for Hegel. In his Philosophy of Right, he argued that the reality of internal public law changes when the relationship between the States are concerned, that is to say in their external law.[40] While every individual State has its own constitution, its internal law,[41] reflecting the *volksgeist*, another set of legal principles regulates the State in establishing relationships with other States. Such relationships are subject to the State's external law. This line of reasoning permitted Hegel to recognise the existence of two different legal orders, which, due to their different foundations, were not only independent, but reciprocally isolated. This concept of the sovereign power of the State has a variety of consequences for each separate State. Firstly, there is no ground for *ius gentium*. Secondly, transactions between sovereigns can only be based on treaties. As States enjoy full autonomy, this may be exercised above individual treaties,[42] although this does not mean that Hegel did not acknowledge the need to respect the

40 Hegel, 1821.
41 Hegel, 1821, § 259.
42 Hegel, 1821, § 330 and the addendum n. 191.

obligations stemming from treaties. His concept has deeply influenced an important school of thought in international law, in which Hans Triepel and Lassa Oppenheim have been the leading figures.[43] Namely, that international law, from this point of view, is not simply separated from internal public law, but is built on completely different foundations. Still today, many public lawyers reiterate that the state is a central category because it is characterised by a system of authority that is totally distinct from others.

The conceptual and institutional foundations of the divide between the two fields of public law, within and outside the state, are however highly questionable. Conceptually, at the heart of the Hegelian theory there is a sort of "sacralisation" of the State ('man must … venerate the state as a secular Deity'), [44] which might have been appealing in the mid 19th century, but is not so two centuries later. Moreover, the legal environment has profoundly changed in the meantime. At the international level a change occurred with the Statute of the International Court of Justice. Article 38 included within the sources of law, that the ICJ is bound to apply, in order to avoid a *non liquet*, the general principles of law recognised by civilised nations, meaning the general principles that are valid *in foro domestico*.

Since the early years of its jurisprudence, the Court of Justice of the EC referred to general principles in two ways. On the one hand, it applied general principles extrapolated from the Treaties establishing the Communities. On the other hand, especially when the Court had to resolve disputes in relation to issues and matters not expressly covered by the Treaties, it choose to draw on the principles shared in the legal systems of Member States. Initially it referred to those principles without a written norm authorising it to do so. Subsequently, it could avail of both general and sector specific norms established by the Treaties. The general norm was found in the reference that was made by Article 164 of the Treaty of Rome to the Court's mission to ensure the respect of the "law" in the interpretation and application of the Treaty. This particular norm was established by Article 288 (now Article 340 TFEU), according to which

> in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Even a cursory glance at this provision shows that it does not simply presuppose a vertical relationship between EU law and national laws. Rather, it connects national legal order with that of the EU. It thus requires EU lawyers to study national regimes of the liability of public administrations.

43 Triepel, 1899, p. 82; Oppenheim, 2005, p. 20; only considers the principles of customary and conventional international law.

44 Hegel, 1821, § 328. The critical remark is borrowed from Romano, 1954, p. 419.

When reviewing the legality of the acts adopted by both EC and national institutions, the European Court of Justice (ECJ) has also referred to other general principles of law, such as the principles of proportionality and legal certainty, including those between the general principles of EC law.[45] This process of judicial creation of general principles is of the utmost importance. If a certain principle is considered by the Court as common to all or most national jurisdictions, then it is included between those general principles of which the Court has to ensure an observance. This method, which has permitted the Court to qualify as general principles, amongst others, the right to be heard and proportionality, has been codified by the Treaty establishing the European Union (TEU). Article 6(3) of the TEU, reads as follows

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.[46]

The underlying assumption is that there are not only distinctive national traditions, but also common constitutional traditions. Included among these common traditions is, for example, the right to effective judicial protection.

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8. General principles: the rule of law and judicial independence

After delineating the development of general principles, it can be helpful to look more closely at some of them, which have been at the heart of recent academic and institutional debate, that is the rule of law and one of its corollaries, judicial independence.

There exists voluminous literature on the historical origins of the concepts of Rule of Law, *Rechtsstaat* and *Etat de droit*, which will not be described here.[47] The focus is rather on their twofold role in EU law. On the one hand, respect for the rule of law is a requisite for joining the Union. This requisite, which was implicit in the original *foedus* between the founders of the EC, was made explicit by European Council meeting in Copenhagen in 1993, together with stable political institutions, and respect for fundamental rights and other criteria. It is now enshrined into the Treaties and must be respected by the Union's Members. Article 7 TEU establishes the political mechanism for ensuring the respect of EU values. On the other hand,

45 Reuter, 1964, p. 263.
46 Emphasis added. On common traditions, see Pizzorusso, 2002; Cassese, 2021, p. 592.
47 See Craig, 1997, p. 467. See also the Venice Commission, 2007.

the rule of law must be respected by the Union's institutions and agencies, in the discharge of their functions and powers. The strong connection between the two sides of the rule of law was emphasised by Walter Hallstein in the early 1970s, when he argued that, as the Member States of the EC complied with the principle of *Rechtsstaat*, so the EC itself had to be conceived as a *Rechtsgemeinschaft*.[48]

The ECJ has included the rule of law between the principles of which it ensures that respect is given. In particular, in its landmark ruling in *Les Verts* the Court has held that

> the European Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.[49]

More recently, in its opinion n. 2/13 on accession to the EU, the Court held that the set of common values, upon which the Union is founded is the 'premise [that] implies and justifies the existence of mutual trust between the Member States that those values will be recognized' and respected.[50]

In consistensy with this settled interpretation, EU institutions have developed a rule of law "toolbox" with a view to ensuring its respect.[51] Thus, for example, in its first ruling on the "Cooperation and Verification Mechanism" (CVM), the Court of Justice confirmed that this mechanism falls within the scope of Romania's Treaty of Accession and that it must therefore, be regarded as binding.[52] Another example concerns judicial independence. This is simultaneously viewed as the necessary precondition to the vindication of individual rights, including the freedom of thought, and as an existential requisite for its cooperation with national courts. It is for these reasons that, for example, Hungarian legislation authorising the removal of judges by means other than impeachment or imposing their early retirement is regarded as inconsistent with the rule of law.[53]

Two concluding remarks are appropriate. The first is that, although the rule of law may mean different things in different contexts and epochs, including the "thin" conception which may be acceptable even under an authoritarian government, in the

48 Hallstein, 1972.

49 Judgment of the Court of 23 April 1986, Case 294/83, *Parti écologiste "Les Verts" v European Parliament*, § 23.

50 Opinion of 18 December 2014 on the accession of the EU to the European Convention on Human Rights (Opinion 2/13), § 168.

51 European Commission, 2014, COM(2014) 158 final/2.

52 CJEU, Joined Cases C-83/19, C-127/19 and C-195/19, Cases C-291/19, C-355/19 and C-397/19, *Asociaţia 'Forumul Judecătorilor din România*.

53 CJUE, judgment of 6 November 2012, *Commission v. Hungary* (holding that the national scheme of compulsory early retirement was inconsistent with the principle of proportionality). See also ECtHR, judgment of 23 June 2016, *Baka v Hungary*, application n. 20261/12, § 155, recalling the judgment of the Hungarian Constitutional Court no. 166/2011, of 19 December 2011.

European legal area its *noyeau dur* includes both the principle of legality and judicial independence. Secondly, and consequently, for the Member States it is no longer possible to assert that their measures concerning the judiciary fall within their "internal affairs" and are, therefore, governed only by the laws of each state. The internal affairs doctrine is an instrument through which national institutions have jealously guarded the ability to apply their own laws. However, it no longer applies to national institutions in the areas covered by EU law.

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9. Conclusion

A quick attempt to synthetise the basic argument of this study proceeds as follows. Leaving aside the methodological implications to be drawn from this work, the thrust of the conceptual and empirical findings has been to criticise the traditional distinction between unitary States, federations and unions of States. The key issue then becomes one of ascertaining not *ex ante*, but *ex post*, whether there are general principles that are common to all these polities and the consequences that follow from them with regard to the discharge of public functions and powers. In particular, although debate will doubtless continue as to which concepts best capture the meaning and significance of the rule of law, there is no doubt that its corollaries, including judicial independence, apply to both the EU and its Member States.

References

Ackerman, B. (1991) *We The People: volume 1. Foundations*. Harvard: Harvard University Press.

Aristotle (ca. 335 BC) *Politics*, book II [Online]. Available at: https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0058%3Abook%3D2%3Asection%3D1272b (Accessed: 20 September 2024).

Balkin, J.M. (ed.) (2001) *What Brown v. Board of Education Should Have Said*. New York: NYU Press.

Bartle, J.R., La Course, R. (2003) 'A Review of State Procurement and Contracting', *Journal of Public Procurement*, 3(2), pp. 192–214; https://doi.org/10.1108/JOPP-03-02-2003-B003.

Beccaria, C. (1872) *Dei delitti e delle pene.* Engl. Translation (1764) [*An Essay on Crimes and Punishments]*. Albany: Little & Co. [Online]. Available at: http://files.libertyfund.org/files/2193/Beccaria_1476_EBk_v6.0.pdf (Accessed: 20 September 2024).

Beeman, P. (2020) 'Lawmakers refused to fund no-bid contracts before Reynolds used federal virus aid', *Iowa Capital Dispatch*, 21 October 2020. [Online]. Available at: https://iowacapitaldispatch.com/2020/10/21/lawmakers-refused-to-fund-no-bid-contracts-before-reynolds-used-federal-virus-aid/ (Accessed: 20 September 2024).

Benz, A. (1999) 'From Unitary to Asymmetric Federalism in Germany: Taking Stock of 50 Years', *Publius*, 29(4), pp. 55–78; https://doi.org/10.1093/oxfordjournals.pubjof.a030052.

Berlin, I. (1992) 'Two Concepts of Liberty', inaugural lecture delivered before the University of Oxford on 31 October 1958, in *Four Essays on Liberty*. Oxford: Oxford University Press.

Bluhm, W.T. (1962) 'The Place of the "Polity" in Aristotle's Theory of the Ideal State', *The Journal of Politics*, 24(4), pp. 743–753; https://doi.org/10.2307/2128046.

Boulouis, J. (1990) *Droit institutionnel des communautés européennes*. 2nd edn. Paris: Montchrestien; https://doi.org/10.3406/afdi.1990.2972.

Bryce, J. (1907) *The Holy Roman Empire*. 3rd edn. London: MacMillan.

Calabresi, G., Fish, E.S. (2016) *Federalism and Moral Disagreement*. Minnesota: University of Minnesota Law School.

Cappelletti, M., Seccombe, M., Weiler, J. (1986) 'Integration Through Law: Europe and the American Federal Experience. A General Introduction' in Cappelletti, M., Seccombe, M. and Weiler, J. (eds.) *Book 1 A Political, Legal and Economic Overview*. Berlin, Boston: De Gruyter, pp. 3–68.

Cassese, S. (1986) 'The Rise and Decline of the Notion of State', *International Review of Administrative Sciences*, 7(2), pp. 120–130; https://doi.org/10.1177/019251218600700203.

Cassese, S. (2017) 'From the Nation-State to the Global Polity' in King, D., Le Galès, P. (eds.) *Reconfiguring European States in Crisis*. Oxford: Oxford University Press, pp. 78–96; https://doi.org/10.1093/acprof:oso/9780198793373.003.0004.

Cassese, S. (2021) 'Ruling from Below: Common Constitutional Traditions and their Role', *New York University Environmental Law Journal*, 29(3), pp. 591–618.

Costa, J.P. (2013) *La Cour européenne des droits de l'homme. Des juges pour la liberté*. Paris: Dalloz.

Craig, P. (1997) 'Formal and substantive conceptions of the rule of law: an analytical framework', *Public Law*, 1997/Autumn, pp. 467–487.

Craig, P. (2004) 'Competence: clarity, conferral, containment', *European Law Review*, 29(3), pp. 323–344.

Dehousse, J.M. (1969) 'Essai sur le concept de supranationalité', *Chronique de politique étrangére*, 22(2), pp. 183–203.

della Cananea, G. (2003) *L'Unione europea. Un ordinamento composito*. Bari: Laterza.

Dickson, J., Eleftheriadis, P. (eds.) (2012) *The Philosophical Foundations of European Union Law*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780199588770.001.0001.

Elazar, D.J. (1987) *Exploring Federalism*. Tuscaloosa: University of Alabama Press.

Elazar, D.J. (1988) 'The New Europe: a Federal State or a Confederation of States?', *Swiss Political Science Review*. 4(4), 119–139; https://doi.org/10.1002/j.1662-6370.1998.tb00254.x.

Fleiner, T. (2002) 'Recent Developments of Swiss Federalism', *Publius*, 32(2), pp. 97–124; https://doi.org/10.1093/oxfordjournals.pubjof.a004949.

Giannini, M.S. (1986) *Il pubblico potere. Stati e amministrazioni pubbliche*. Bologna: Il Mulino.

Haas, E.B. (1967) *Uniting Of Europe: Political, Social, and Economic Forces, 1950-1957*. 2nd edn. Notre Dame: University of Notre Dame Press.

Hallstein, W. (1972) *Europe in the Making*. London: Allen & Unwin.

Hegel, G.F. (1942) *Grundlinien der Philosophie des Rechts*. Berlin: Nicolai.

Hurrelmann, A., Leibfried, S., Martens, K., Mayer, P. (2007) 'The Golden-Age Nation State and its Transformation: A Framework for Analysis' in Hurrelmann, A. Leibfried, S., Martens, K. (eds.) *Transforming the Golden-Age Nation State*. Berlin: Springer, pp. 1–23; https://doi.org/10.1057/9780230590861.

Jellinek, G. (1900) *Allgemeine Staatslehre*. Berlin: O. Häring.

Lenaerts, K. (1990) 'Constitutionalism and the Many Faces of Federalism', *American Journal of Comparative Law*, 38(2), pp. 205–263; https://doi.org/10.2307/840100.

Lindseth, P.L. (1999) 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community', *Columbia Law Review*, 99(3), pp. 628–738; https://doi.org/10.2307/1123519.

Milward, A. (2000) *The European Rescue of the Nation-State*. 2nd edn. London: Routledge; https://doi.org/10.4324/9780203982150.

Nicolaidis, K., Howse, R. (eds.) (2001) *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union*. Oxford: Oxford University Press; https://doi.org/10.1093/0199245002.001.0001.

Oppenheim, L.F.L. (2005) *International Law. A Treatise*. 3rd edn. London: Longman.

Pizzorusso, A. (2002) *Il patrimonio costituzionale europeo*. Bologna: Il Mulino.

Pufendorf, S. (1672) *De iure naturae et gentium*, Engl. Transl. (1991) *On the Duty of Man and Citizen*. Cambridge: Cambridge University Press.

Rawls, J. (2001) *The Law of Peoples*. Harvard: Harward University Press; https://doi.org/10.2307/j.ctv1pncngc.

Reuter, P. (1964) 'Le recours de la Cour de Justice des Communautés à des principes généraux de droit', *Mélanges Rolin. Problèmes de droit des gens*. Paris: Pedone, pp. 263–283.

Reuter, P. (1965) *Institutions européennes*, Paris: Presses Universitaires de France.

Romano, S. (1954) 'Oltre lo Stato', *Scritti minori*. Vol. I. Milano: Giuffrè, pp. 345–356.

Stone Sweet, A., Brunell, T.L. (1988) 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community', *American Political Science Review*, 92(1), pp. 63–81; https://doi.org/10.2307/2585929.

Sunstein, C.R. (1996) *Legal Reasoning and Political Conflict*. Oxford and New York: Oxford University Press; https://doi.org/10.1093/oso/9780195100822.001.0001.

Tillin, L. (2007) 'United in Diversity? Asymmetry in Indian Federalism', *Publius*, 37(1), pp. 45–67; https://doi.org/10.1093/publius/pjl017.

Tocqueville, A. (1821) *De la démocratie en Amérique*, Engl. transl. Schleifer, J.T. (2012) *Democracy in America*. Indianapolis: Liberty Fund.

Triepel, H. (1923) 'Les rapports entre le droit interne et le droit international', *Recueil des cours de l'Académie de droit international*, 1, pp. 77–121.

von Bogdandy, A., Bast, J. (2002) 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform', *Common Market Law Review*, 39(2), pp. 227–268; https://doi.org/10.54648/406262.

Wallace, W. (1985) 'Less Than a Federation, More Than a Regime: The Community as a Political System' in Wallace, H., Wallace, W. and Webb, C. (eds.) *Policy Making in the European Community*. New York: Wiley.

Watts, R.L. (2000) 'Daniel J. Elazar: Comparative Federalism and Post-Statism', *Publius*, 30(4), pp. 155–168.

Weiler, J.H.H. (1991) 'The Transformation of Europe', *Yale Law Journal*, 100(8), pp. 2403–2483; https://doi.org/10.2307/796898.

Where, K.C. (1963) *Federal Government*. 4th edn. Oxford: Oxford University Press.

Whitman, J.Q. (2005) *Harsh Justice. Criminal Punishment and the Widening Divide between America and Europe*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780195182606.001.0001.

Legal Sources

CJEU, Joined Cases C-83/19, C-127/19 and C-195/19, Cases C-291/19, C-355/19 and C-397/19, *Asociaţia 'Forumul Judecătorilor din România*.

CJUE (2012) Judgment of 6 November 2012, *Commission v. Hungary*.

ECtHR (2016) Judgment of 23 June 2016, *Baka v Hungary*, application n. 20261/12.

European Commission (2014) *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2.

Judgment of the Court of EU (1986) Case 294/83, *Parti écologiste "Les Verts" v European Parliament*.

Opinion of 18 December 2014 on the accession of the EU to the European Convention on Human Rights (Opinion 2/13).

US Supreme Court (1954) *Brown v. Board of Education,* 347 U.S. 483.

US Supreme Court (1976) *Jurek v. Texas*.

US Supreme Court (2022) *Dobbs v. Jackson Women's Health Organization*.

Venice Commission (2007) *Venice Commission's Report on the rule of law*. Venice.

Chapter 2

European Integration as a Process of Emergence of the Postmodern Supranational State

Aleksander Stępkowski

Abstract

The chapter propose to consider contemporary process of European integration as a stage of a longer socio-political process that was initiated with the cultural change that took place during the Enlightenment. This process is determined in its substance by the intellectual categories underpinning modern intellectual culture. Today they inspire transgressive postmodern development of the culture. The chapter describes the way in which, implementation of this modern intellectual agenda predetermines trajectory of political development resulting in contemporary European integration. At first it demonstrates the way in which the agenda was aimed at the reconstruction of premodern society and resulted in the emergence of the modern nation-state. However, the modern state by no means appeared to be the accomplishment of this process. Instead, it has been continuing and contemporary achieved its new transgressive stage resulting in creation of postmodern supranational political structures gradually dominating over the modern nation-states. The chapter identifies striking similarities between the process of the formation of modern nation states and the contemporary formation of the postmodern supra-national state. It analyses process of European integration demonstrating the quest towards providing EU with the autonomous democratic legitimacy. Subsequently, this would allow to marginalise member states and the principle of conferral granting EU in the future with the unconstrained power to legislate. Advancement of this tendency is demonstrated in the European Parliament's proposal for the amendment of the EU Treaties as adopted in November 2023.

Keywords: modernisation, European integration, intellectual determinants of political process, modern nation-state, postmodern supranational state, administrative courts, constitutional courts.

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1. Introduction

This chapter proposes that contemporary European integration should be considered as one stage within the broader process of contingent socio-political changes in Europe, which started at the beginning of the modern era. The political aspect of this broader process is the most spectacular, however, it is only a result of the implementation of specific intellectual agenda which predetermines trajectory of political development. At first, this agenda was aimed at the reconstruction of premodern social reality and resulted in the emergence of the modern nation-state. However, the modern state is by no means the end of this process. Indeed, it has been continuing and contemporary achieved its new transgressive stage. The current stage of the process can be hence labelled as post-modernisation.

In more precise terms, the argument of this chapter is that the European integration we experience is but the next stage of the same political process that was initiated with the intellectual revolution brought by the Enlightenment. Therefore, we can point out striking similarities between the process of the formation of modern national states and the contemporary formation of postmodern supra-national state. In this way, it can be argued that the future shape of European integration will not be subject to divergent paths depending on specific political decisions. The final effect was predetermined with the intellectual choices Europeans made at the start of the modern era.

The process consists of the gradual displacement of basic sovereign attributes (the power to legislate i.e. setting universally binding legal rules), to an ever-higher level of social life. The contemporary process of European integration consists (in its essence) of the transfer of these competencies from the level of the modern nation-state, where it had been located in the representative body (the parliament), to the level of supranational organisation. However, this process takes effect not only by means of specific political decisions that mark the successive stages of the political integration in Europe. Its specificity consists of a considerable autonomy from politics, or – speaking more precisely – the process rather inspires political decisions from a meta-perspective of the intellectual culture. This culture determines political thinking, which only then inspires official course of action.

Another characteristic moment comes from specific circumstances, under which the formation of the modern nation-state took place. For a long time, this was focused on the deconstruction (or just the destruction) of pre-modern social structures and institutions. Only after the accomplishment of this deconstructive stage, it was possible to re-construct society based on the new intellectual foundations. Therefore, contemporary postmodern stage of the same process is much more consequent in implementing ideas that had been underpinning modernisation since Enlightenment. The reason for this is simple. Today the same ideas that inspired modernisation are implemented into already modernised society, using already elaborated technical instruments. Therefore, those intellectual premises are implemented in a postmodern social reality in a way that is much more consequent or radical.

2. Intellectual background

2.1. The social contract and the EU Treaty

Modern social and political projects are based on a specific anthropological premise, which has inspired the modern vision of political and social order. This premise is based on a new conceptualisation of sovereign power. Individualistic anthropology, considering man to be a free from and equal to others, imposes the necessity of contract as a means to explain the phenomenon of social life. The individual is considered as being able to live in common with others and build legal relationships with others by means of an autonomous act of a free will, when encountering the autonomous will of another free and equal individual.[1] This explains the reason for the theory of social contract as an explanation for the phenomenon of social life and the imposition of a contractual method for its conceptualisation, making modern civil law (based on the principles of the formal equality of subjects and the autonomy of their wills) the foundation for modern social life.

Therefore, the method of creation of postmodern political and social order through international treaties, is – in its theoretical dimension – no different from the method underpinning the creation of the modern state. Thomas Hobbes and John Locke emphasised that political communities created as a result of this social contract were mutually in the same situation where individuals had remained in the state of nature.[2] However, the only implication of this statement by Locke was the necessity of the state's federative power. Nevertheless, its logical conclusion must be the possibility of sovereign states to enter into a new social contract on a supra-national level. Hobbes and Locke did not mention this possibility, but implementation of their theoretical concepts – that resulted in the establishment of the modern sovereign nation-state – revealed that any further developments towards the creation of a supra-national political entity, would appear to be the inevitable consequence of the previous development to date.

1 This was precisely described by J.G. Fichte: The deducted relation between rational beings – namely, that each individual must restrict his freedom through the concept ion of the possibility of the freedom of the another – is called the Relation of Legality Legal Relation (*Rechtsvehältniß*); and the formula given to it is called the Fundamental Principle of the Science of Right *(Rechtssatz*). Fichte, 1869, pp. 78–79. See also: *Das deductirte Verhältniß zwischen vernünftigen Wesen, daß jedes seine Freiheit durch den Begriff der Möglichkeit der Freiheit des anderen beschränke unter der Bedingung, daß das erstere die seinige gleichfalls durch die des anderen beschränke, heißt das Rechtsverhältniß; und die jetzt aufgestellte Formel ist der Rechtssatz.* Fichte, 1796, p. 49.

2 Hobbes, 1996, p. 235: '… every sovereign hath the same right in procuring the safety of his people, that any particular man can have in procuring the safety of his own body. And the same law that dictateth to men that have no civil government what they ought to do, and what to avoid in regard of one another, dictateth the same to Commonwealths' (XXX, 30); Locke, 1824, p. 217: 'There is another power in every common-wealth, which one may call natural, because it is that which answers to the power every man naturally had before he entered into society … . So that under this consideration, the whole community is one body in the state of nature, in respect of all other states or persons out of its community'. (II, 12, § 145).

These regularities can be clearly seen when analysing the main mechanisms of social control over political power. Regarding public law, it is possible to clearly state not only the very fact of the occurrence of these processes, but also to indicate its specific institutional forms. This text will briefly outline this complex, general process, and its contemporary stage known as the European integration.

2.2. Theoretical determinants of the modern control of political power

Modern political and social change is rooted in the – novel in 17 century – understanding of social life and political power as originating from the will of people and not from the God. This change in the understanding of the origin of political power implies that it has been created by free and equal individuals who are also authorised to control the power so created. Necessary consequences of this conceptual shift resulted in changing the way the social control over political power should operate.

The pre-modern intellectual culture emphasised moral constraints for politics, which resulted in granting it to those who are *virtuous* i.e. able to understand what the common good consists of and to promote it in a proper way. Modern culture challenged this position by taking as an axiom conviction of the irresistible power of human selfishness, which invariably nullifies moral efforts, if an external legal sanction for misbehaviour does not exist.[3] Modernity, while rejecting the pre-modern assumption of a possible virtuous life, argued that human reason is rather unlikely to understand the idea of the 'good' transcending individual self-interest.[4] Hence, if someone claims to be rational to the extent of allowing him to judge impartially about the good as a virtuous man, he should rather be considered a selfish hypocrite (as portrayed by Molière in his *Tartuffe*), hiding his egoistic aspirations behind lofty rhetoric.[5] Adopting this perspective, it was no longer possible to recognise ethics as a viable and autonomous regulator of social life, ensuring the effective control over

3 Hobbes, 1996, p. 111: 'For the laws of nature, (as justice, equity, modesty, mercy, and, in sum, doing to others as we would be done to,) of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like. And covenants, without the sword, are but words and of no strength to secure a man at all. Therefore, notwithstanding the laws of nature (which everyone hath then kept, when he has the will to keep them, when he can do it safely), if there be no power erected, or not great enough for our security, every man will and may lawfully rely on his own strength and art for caution against all other men.' (XVII, 2); Locke, 1824, pp. 133–134: '… the law of Nature would, as all other laws that concern men in this world, be in vain if there were nobody that in the state of Nature had a power to execute that law, and thereby preserve the innocent and restrain offenders'. (II, 1 § 7).

4 Locke, 1824, p. 204: '…though the law of Nature be plain and intelligible to all rational creatures, yet men, being biased by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.' (II, 9, § 124).

5 Hobbes, 1996, p. 28: '…when men that think themselves wiser than all others clamour and demand right reason for judge, yet seek no more but that things should be determined by no other men's reason but their own, it is as intolerable in the society of men, as it is in play after trump is turned to use for trump on every occasion that suit whereof they have most in their hand. For they do nothing else, that

the political power. The latter, in order to be real, should be based on a criterion external to man, thus creating opportunities for objectivity of social control.[6] For this reason, looking from a modern perspective, real control of power had to have the human factor stripped away as much as possible, so that it could be based on depersonalised legal mechanisms. Modernity proposed an idea of social life as created and organised by means of written, technical and thus de-personalised (objectified) legal rules, operating regardless of human passions and desires.

Therefore, the pre-modern concept of the *rule of law*, where the law was understood in terms of a widely understood moral order ascertainable in a reasonable way by the *virtuous men*, was replaced with the *rule of law* understood as a technical, statutory enactment provided by the popular legislator through the operation of depersonalised legislative procedures.[7] The legislation so created, was believed to be an objective measure of what is good and evil and thus what is allowed or forbidden in the operation of public authority. In order to assure the conformity of actions taken by the public authority, with the so objectified measures of proper conduct, special institutions were created, which would review the legality of the operation of public authority. This was the political effect of the fundamental change within the intellectual culture providing a critical shift in the understanding of the nature of sovereignty and its source.

The pre-modern conceptualisation of a sovereign power, understood as a necessary consequence of the social character of God-created human nature – and as such originating from the same (divine) source as the human nature – was replaced with the concept of a social contract explaining the emergence of a sovereign without any supernatural context. The sovereign that had been created with contractual means, was believed to provide – through legislation – ethical conditions necessary for common social life. This new intellectual paradigm set a strong general tendency towards granting the highest political authority (legislative power) to a representative body.[8] This philosophy was preceded by two fundamental ideas de-

will have every of their passions, as it comes to bear sway in them, to be taken for right reason, and that in their own controversies: bewraying their want of right reason by the claim they lay to it' (V, 3).

6 It clearly results from the account about the natural law given by Locke, 1824, p. 211: 'the law of Nature being unwritten, and so nowhere to be found but in the minds of men, they who, through passion or interest, shall miscite or misapply it, can- not so easily be convinced of their mistake where there is no established judge; and so it serves not as it aught, to determine the rights and fence the properties of those that live under it … . To this end it is that men give up all their natural power to the society they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of Nature' (II, 11, §136).

7 Locke, 1824, p. 204: 'in the state of Nature there are many things wanting. Firstly, there wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them' (II, 9, § 124).

8 Locke, 1824, pp. 208–209: 'This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it. Nor can any edict of anybody else, in what form soever conceived, or by what power soever backed, have the force and obligation of a law which has not its sanction from that legislative which the public has

termining the modern way of thinking about the operation of properly understood public authority.

The first being about popular control over the public authority as provided directly (within the framework of popular elections) or indirectly (by the representatives of the popular sovereign). The second required judicial control over the action of the public authority. It is the second which was considered the most advanced. Therefore, it was placed at the very heart of warrants that a public authority will conduct, granting security, freedom and the well-being of individuals.

Legal control became a key factor in the operation of public authority – its technical development took a considerable amount of time. It was supposed to replace the moral evaluation of those in power, with the objective legal standards, depriving traditionally considered ethics of any significance on political grounds and making statutory law the only moral standard allowed in modern public life. This change was considered necessary to make social control of power possible, real and objective. For this reason, the control exercised by the newly conceptualised courts, as an independent branch of power, was considered, on the grounds of modern political theory, to be the most appropriate.

3. Dualism of the modern control of political power

This overview of the intellectual background determining conceptualisation of the modern system of control over the actions of political power, allows us now to look more closely at the two closely correlated dimensions of the social control: political and legal.

chosen and appointed; for without this the law could not have that which is absolutely necessary to its being a law, the consent of the society, over whom nobody can have a power to make laws but by their own consent and by authority received from them; and therefore all the obedience, which by the most solemn ties any one can be obliged to pay, ultimately terminates in this supreme power, and is directed by those laws which it enacts. Nor can any oaths to any foreign power whatsoever, or any domestic subordinate power, discharge any member of the society from his obedience to the legislative, acting pursuant to their trust, nor oblige him to any obedience contrary to the laws so enacted or farther than they do allow' (II, 11, § 134). It must be however admitted that Jean Jacques Rousseau denied the principle of representation, insisting that legislative power must not be exercised otherwise than by the popular assembly consisting of all the citizens. *'la volonté est générale, ou elle ne l'est pas; elle est celle du Corps du Peuple, ou seulement d'une partie. Dans le premier cas, cette volonté déclarée est un acte de souveraineté, & fait loi. Dans le second, ce n'est qu'une volonté particulière, ou un acte de magistrature; c'est un décret tout au plus.'* (II, 2) Rousseau, 1792, p. 59. Despite sound theoretical arguments, no one else was insisting on this for practical reasons. Even the Jacobins during the French revolution, aiming at practical implementation of the Rousseau's theory, were only able to propose a system of partial local assemblies and finally even this compromising solution was suspended and never brought into effect.

3.1. Political dimension of the process

Looking from political perspective, the most striking feature of the process was regularity according to which bodies initially intended to provide political control over the authorities making policy-choices, with the laps of time overtook this policy making power. This involved transfer of decision-making centres to higher levels of social life.

Looking from the most general perspective, at the threshold of the modern era, royal administration started to make substantial oversight of the feudal self-governmental institutions acting on King's behalf. With time, royal officers assumed the substance of the power from the feudal structures. Once this had happened, a contingent tendency appeared to submit all central administration's political power to the control of the representative bodies. This process was accomplished in the early 20th century, with political subordination of administration to the parliaments, making government predominantly an executor of the statutory law. Let's look how it has happened.

The first stage of the process consisted of the centralisation of power during the period of absolute monarchy. Despite the popular perception of an absolutist monarchy as the incarnation of the feudal social order, substantially speaking, it deprived the old social system of any real significance, transmitting its real power to the monarch (formally) and his council (substantially).[9] Centralisation of power within the absolutist monarchy was the first step towards the emergence of the modern administration,[10] which elaborated the method of managing the whole

9 Alexis de Tocqueville was describing this phenomenon of decomposition of the old feudal self-governmental administration and its gradual replacement by centralised royal administration which was already modern in its very essence: 'A first glance at the old government of the kingdom leaves an impression of a host of diversified rules, and authorities, and concurrent powers. France seems to be covered with administrative bodies and independent functionaries, who, having purchased their offices, can not be displaced. Their functions are often so intertwined and similar that it seems they must clash and interfere with each other. […] These are all old, ruined authorities. Among them, however, is found an institution either new or lately transformed … . In the heart of the kingdom, and close to the monarch, an administrative body of singular power has lately grown up and absorbed all minor powers. That is the Royal Council.' Tocqueville, 1856, p. 51.

10 Again, Tocqueville perfectly described the way the absolutist direct predecessor of the *Conseil d'Etas*, was operating during the monarchical reign: 'Though its origin is ancient, most of its functions are modern. It is everything at once: supreme court of justice, for it can reverse the decision of all ordinary tribunals and highest administrative authority, from which all subordinate authorities derive their power. As adviser of the king, it possesses, under him, legislative powers, discusses all and proposes most of the laws, levies and distributes the taxes. It makes rules for the direction of all government agents. It decides all important affairs in person and superintends the working of all subordinate departments. All business originates with it, or reaches it at last; yet it has no fixed, well-defined jurisdiction. Its decisions are the king's, though they seem to be the Council's. Even while it is administering justice, it is nothing more than an assembly of "givers of advice," […]. This Council is not composed of nobles, but of persons of ordinary or low extraction, who have filled various offices and acquired an extensive knowledge of business. […] It works noiselessly, discreetly, far less pretentious than powerful. It has no brilliancy of its own. Its proximity to the king makes it a partner in every important measure, but his greater effulgence eclipses it'. Tocqueville, 1856, p. 52.

country from its capital[11]. Local agents of the central government had been acting for some time concurrently to the old feudal local institutions controlling it on behalf of the king but gradually took over the real functions of regulating social life hitherto performed by the dispersed self-governing corporate structures. Feudal self-governmental bodies were first effectively marginalised during the absolutist monarchy[12] and later abolished with the whole feudal system by the newly established, revolutionary republican regime.

However, the centralised administration as created during the absolute reign survived the abolishment of the feudal order. The centralised royal administration destroyed the feudal system in its substance before the political revolution took place. Moreover, it allowed the revolution to succeed, as it was enough for revolutionaries to control the capital in order to seize power in the whole state. Therefore, the end of the feudal state (not necessary the end of the monarchy, depending on the country) by no means amounted to the abolishment of the centralised administration. On the contrary, the latter became even more powerful, operating however on a new constitutional principle of the state under the rule of law (in German the *Rechtsstaat*) and perceived as the antithesis of absolute monarchy.[13]

3.2. Intellectual Foundations.

This revolutionary process was inspired by the natural law ideology. This noble concept associated with the notion of durable order, in substance was but a revolutionary political agenda directed towards critic of the social *status quo* and subsequent enforcement of the new social order by means of newly conceptualised law – believed to envisage natural law. The new concept of law found its expression

11 '… one agent in each province sufficed. The substantial government was in the hands of the intendant. That functionary was not of noble extraction. He was invariably a stranger to the province, a young man with his fortune to make. He obtained his office neither by purchase, election, nor inheritance; he was selected by the government from among the inferior members of the Council of State and held his office during good behaviour. While in his province, he represented that body, and was hence styled in office dialect the absent commissioner (commissaire départi). His powers were scarcely less than those of the council itself, though his decisions were subject to appeal […] he was, in his province, the sole instrument of the will of government'. Tocqueville, 1856, pp. 52–54.

12 Tocqueville described this on the example of the provision of public roads. '… except in the *pays d'états*, all public works, including those which were exclusively local, were decided upon and undertaken by the agents of the central power. Other authorities, such as the seignior, the department of finance, the road trustees (grands voyers), were nominally entitled to co-operate in the direction of these works. However, practically these old authorities did little or nothing, as the most cursory glance at the records shows. All highways and roads from city to city were built and kept in repair out of the general public fund. They were planned and the contracts given out by the Council. The intendant superintended the engineering work, the sub-delegate mustered the men who were bound to labor. To the old authorities was left the task of seeing to parish roads, which accordingly became impassable.' Tocqueville, 1856, p. 57.

13 Zmierczak, 1995, pp. 11–12, 18.

in the modern concept of legislation, considered to be an expression of popular will. The old feudal *ius commune* was portrayed as an irrational and convoluted source of man's oppression.[14] The "new law" as postulated by philosophers promoting the idea of the law of nature, was to be simple, clear for all and easy to understand.[15]

The true fulfilment of these social ideas was codification of the law, considered as a statutory enactment of the law of nature, which would liberate the people from all tyranny whatsoever, particularly the tyranny of lawyers. The way out of this intolerable situation – as it was presented in the political writings of that times – was a revolutionary agenda based on the law of nature, once again associated with codification – this time codification of the political order in the form of a constitution.[16] Hence, as expressed by Voltaire, the Enlightenment called for the creation of an entirely new legal order set up on the gutted debris of the past,[17] regardless of social acceptance of the new radical agenda introducing social change.[18]

The aim of every modern codification project was to put the order of natural law into writing. This idea had been well known since the time of Thomas Hobbes,[19] John

14 The concept of natural law had very strong critical aspect denying rationality and legitimacy of the feudal law which was presented as necessary to be abolished "in the name of reason". Francois Quesnay expressed this in this way: '*Souvent le droit légitime restreint le droit naturel, parce que les lois des hommes ne sont pas aussi parfaites que les lois de l'Auteur de la nature, et parce que les lois humaines sont quelquefois surprises par des motifs dont la raison éclairée ne reconnais pas toujours la justice; … . La multitude des lois contradictoires et absurdes établies successivement chez les nations, prouve manifestement que les lois positives sont sujettes à s'écarter souvent des règles immuables de la justice, et de l'ordre naturel le plus avantageux à la société.*' Quesnay, 1888, p. 366.

15 Alexis de Tocqueville described the primary goal of the Enlighted intellectuals in prerevolutionary France with those words: '…They all started with the principle that it was necessary to substitute simple and elementary rules, based on reason and natural law, for the complicated and traditional customs which regulated society in their time. It will be ascertained, on close inquiry, that the whole of the political philosophy of the eighteenth century is really comprised in that single notion'. Tocqueville, 1856, p. 171.

16 A theoretical elaboration of the question of framing the entire system of law in the form of several codes, of which a constitutional code would be the basis (alongside the criminal and civil codes), was given by Jeremy Bentham, among others, in 1817 in his journalistic "letters" addressed to the Americans. See: Bentham, 1998, pp. 139–140.

17 'If you are desirous of having good laws, burn those which you have at present, and make fresh ones.' Voltaire, 1901, p. 79; See also: Sójka-Zielińska, 2007, pp. 31–32.

18 Helvetius had no illusions about the lack of public acceptance of the Enlightenment reform program: 'In countries that are polished, and already subject to certain laws, manners, and prejudices, a good plan of legislation being always incompatible with an infinity of personal interests, established abuses, a n d plans already adopted, will always appear ridiculous. It will be a long time before its importance is demonstrated, and during that time it will be always contested.' Helvetius, 1810, p. 278.

19 Hobbes, 1996, p. 185: 'The law of nature and the civil law contain each other and are of equal extent. For the laws of nature, which consist in equity, justice, gratitude, and other moral virtues on these depending, in the condition of mere nature […], are not properly laws, but qualities that dispose men to peace and to obedience. When a Commonwealth is once settled, then are they actually laws, and not before; as being then the commands of the Commonwealth; and therefore also civil laws: for it is the sovereign power that obliges men to obey them. […] The law of nature therefore is a part of the civil law in all Commonwealths of the world. Reciprocally also, the civil law is a part of the dictates of nature. […] Civil and natural law are not different kinds, but different parts of law; whereof one part, being written, is called civil the other unwritten, natural.' (26).

Locke,[20] and their intellectual followers. This is why the transition from the Enlightenment school of natural law to legal positivism proceeded smoothly. Natural law as understood in a modern way, was not so much the antithesis, but rather a logical consequence of implementing ideas propagated by the chief exponents of the school of the "law of nature".

It is sufficient to mention Jean Jacques Rousseau[21] and the way his ideas influenced Emmanuel Kant, a philosopher who exerted a tremendous impact on the shape of the liberal understanding of the state under the rule of law (the *Rechtsstaat*).[22] Kant said that the law as laid down by the legislator constituted rules so sacred that even the mere thought of the suspension of their operation was practically tantamount to committing an offence.[23] Hence for Kant the legislator's will in the determination of the rules of justice was a will beyond criticism and exempt from censure.[24]

Kant's categorical position was additionally reinforced by Hegel. Hegel's freedom was incarnated in the *Rechtstaat* as being subject to rational legislation, the real, objective freedom that liberated the individual from feudal bondage.[25] This was the ideological substrate for the growth of the notion that was characteristic for German liberalism, being the "sovereignty of the state". The concept was considered a compromise between the sovereignty of monarch and sovereignty of the people. Therefore, while in the French theory, the law was considered an expression of the

20 Locke, 1824, p. 204: '… in the state of nature … There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them: for though the law of nature be plain and intelligible to all rational creatures; yet men being biased by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases' (II § 124).

21 Rousseau did not conceive of the legislative process as the writing down of the law of nature, as it was understood by Locke or Quesnay. In Rousseau's view, the same function (of an ideal social order) played the concept of the "*volonté général*". Therefore, laws properly enacted necessarily had to contain just norms: Rousseau, 1792, p. 42–43: '*… la volonté générale est toujours droite & tend toujours à l'utilité publique … Si, quand le peuple suffisamment informé délibère, les citoyens n'avoient aucune communication entr'eux, du grand nombre de petites différences résulteroit toujours la volonté générale, & la délibération seroit toujours bonne*' (II, ch. 3). If we take it into account we will understand why, in the French legal cultural, control over the application of the law was understood as a defence of the statutory enactment ('the will of the people') against the rebellion of the judges. See: Perelman, 1984, pp. 70–71. See also: Żyro, 2008, p. 352.

22 Buchner, 1996, p. 111; Łustacz, 1968, pp. 112–113.

23 Kant, 1797, p. 174: '*Ein Gesetz, das so heilig (unverletzlich) ist, daß es praktisch auch nur in Zweifel zu ziehen, mithin seinen Effect einen Augenblick zu suspendiren schon ein Verbrechen ist, wird so vorgestellt, als ob es nicht von Menschen, aber doch von irgend einem höchsten, tadelfreien Gesetzgeber herkommen müsse…*'. (II Teil, I. Absch. A)

24 Kant, 1797, pp. 169–170. '*der Wille des Gesetzgebers(legislatoris) in Ansehung dessen, was das äußere Mein und Dein betrifft, ist untadelig (irreprehensible)'.* (II Teil, I. Absch. § 48).

25 Hegel, 1861, pp. 40–41: '… state … must be understood [as] the realization of Freedom, i.e. of the absolute final aim, and that it exists for its own sake … Truth is the Unity of the universal and subjective Will; and the Universal is to be found in the State, in its laws, its universal and rational arrangements. The State is the Divine Idea as it exists on Earth'.

"will of the people", German legal scholars proposed that the law be considered an expression of the "will of the state", contributed by the representative body cooperating with the government and the monarch.[26] In this way German liberalism made an inextricable Hegelian connection between the concepts of strong state power and the idea of freedom.[27]

The practical implementation of this modern political concept was to be affected by the introduction of an appropriate institutional and legal order called – depending on the country – *Êtas légal* (France) or *Rechtsstaat* (Germany), which can be translated into English as the "state based upon the rule of law". Originally this new legal order entailed a constitution, the guarantee of civil rights, and a formal equality with respect to civil law (although not, for a long time yet, equal political rights),[28] a system of administrative courts, and local government.

The bolstering of the status of the representative body was to submit administration acting by virtue of the royal authority to social control and ultimately to the law. Thereby in the mid-19th century, two German-speaking countries (Prussia in 1850, and Austria in 1867) each transformed from the status of a constitutionally "limited monarchy", with respect to its legislation and judiciary to that of a "constitutional monarchy," providing for legal liability of its ministers. At the time this was considered the peak of political freedom[29] and the correct incarnation of the *Rechtsstaat* ideal.

Looking from a theoretical perspective (which was gradually implemented during a considerably long time) the lynchpin regulating the exercise of power was no longer the royal authority, but the rational "will of the people" materialised in statutory enactments considered as ensuring stability, freedom and security to citizens. This measure was supposed to guarantee that henceforth the state would truly serve the general well-being of citizens, which was perceived as synonymous with the provision of the broadest possible scope of freedom for the individual, as well as a guarantee of individual security.[30] Thus the concept of the modern state under the rule of law represented the liberal ideal of a just socio-political order.[31]

26 For more see: Łustacz, 1968, pp. 124–125. In a similar way, EU legislation is contemporarily understood as an effect of joint cooperation of the Commission, the Parliament and the Council.

27 Łustacz, 1968, pp. 128–129.

28 Earlier than political rights, civil rights were attributed with universal character: A. Esmain. '*Les droits politiques n'appartiennent qu'aux citoyens, à qui la constitution et la loi en accordent la jouissance et l'exercice; ils ne sont point accordés à tous les membres de la nation, sans distinction aucune d'âge, de sexe ou de capacité; nous avons vu qu'il en était ainsi même pour le droit politique fondamental, le droit de suffrage. Au contraire, les droits individuels appartiennent, en principe, à tous les individus qui composent la nation, quels que soient leur âge, leur sexe et leur incapacité de fait ou même leur indignité.*' Esmein, 1896, p. 375; Hobbes, 1996, p. 235.

29 In the context of the liberal doctrine of the II Empire period in France see: Zmierczak, 1978, p. 117.

30 '*… der constitutionelle Staat eigentlich kein anderer ist, als der Rechtsstaat, nämlich derjenige, in welchem nach dem vernünftigen Gesamtwillen regiert, und nur das allgemeine Beste erzweckt wird. Als das allgemeine Beste haben wir angegeben die möglichste Freicheit und Sichercheit aller Mitglieder der bürgerlichen Gesellschaft*'. Aretin, 1838, p. 156. See also: Petersem, 1798, pp. 93, 105.

31 Zmierczak, 1978, p. 23.

The practical implementation of this liberal ide of the just state (being an essentially ethical one) was subsequently reduced to the technical dimension of the application of the statutory law.[32] Hence, despite (in fact, due to) its roots in natural law theory, liberalism and the concept of the "state under the rule of law" came to be permanently associated with legal positivism,[33] sometimes referred to as "formalised liberalism".[34] In practice the ethical concept of "justice" was replaced by the technical concepts of "legality". Both in the French and German cultural milieu the statutory act acquired the features of a secular sacrosanctity – a thing of perfection.[35] This constituted the practical accomplishment of the ideas propagated by the most progressive philosophers, according to whom a properly drafted and enacted statute perforce reflected the law of nature.[36] Later on, when natural law theory no longer dominated political discourse, the will of a parliament as selected in representative elections, was considered as no different from that of society.[37]

Thus, irrespectively of the particular national specificity, liberal democratic political transformation was always connected with a positivist approach to the law. The construct of the modern state under the rule of the law assumed a distinctly positivist approach to the law already at its philosophical source. This is why more often than not, society at large failed to grasp the alleged difference between the state under the rule of law, which lawyers were so enthusiastic about, and the *police state*.[38] Usually the blame for such situations would be ascribed to an insufficient degree of implementation of the idea of democracy. Therefore, revolutionary

32 Wołpiuk, 2004, pp. 19, 27.

33 Wieacker, 1967, pp. 439–440, 447; Izdebski, 2001, p. 75.

34 Baszkiewicz and Ryszka, 1979, pp. 378–379.

35 As for French context see: Kubiak, 1993, pp. 9–11.

36 '*La législation positive consiste donc dans la déclaration des lois naturelles, constitutives de l'ordre évidemment le plus avantageux possible aux hommes réunis en société* …' Quesnay, 1888, p. 376; Kant also emphasised that '§ 9. … *Das Naturrecht im Zustande einer bürgerlichen Verfassung (d. i. dasjenige, was für die letztere aus Principien a priori abgeleitet werden kann) kann durch die statutarischen Gesetze der letzteren nicht Abbruch leiden*'. The words 'kenen nicht Abbruch leiden' is to be understood in this context as an expression of objective impossibility. Similarly, Locke had stated (II, § 131) '… the power of the society, or legislative constituted by them, can never be supposed to extend further, than the common good'. For a collection of similar statements see: Opałek, 1957, pp. 128–131; as well as Ermacora, 1977, p. 5.

37 'Where a Parliament truly represents the people, the divergence between the external and the internal limit to the exercise of sovereign power can hardly arise, or if it arises, must soon disappear. Speaking roughly, the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people, or at any rate of the electors; that which the majority of the House of Commons command, the majority of the English people usually desire. To prevent the divergence between the wishes of the sovereign and the wishes of subjects is in short the effect, and the only certain effect, of bona fide representative government'. Dicey, 1908, p. 81.

38 Izdebski, 2001, p. 76; It was also emphasised by J. Baszkiewicz: '… The liberal state was to encompass little, but the sphere designated to it by the consent of the individuals was to be firmly squeezed. The liberals of old were not at all in favour of a forbearing or sluggish state. The repressive systems of the liberal states attest to this … . These systems were very brutal'. Baszkiewicz, 1998, p. 210.

egalitarian movements radically defying the 19th-century political *status quo* often called themselves democrats or social democrats and would become known as communists in 20th century.[39]

For this reason too, the enfranchisement and political empowerment of a larger portion of society was seen as a way to resolve social problems.[40] Therefore political controversies, particularly in the second half of the 19th century, focused on the status of parliament and the extent of suffrage rather than on the quality of the statutory law.[41] In England, where by the 19th century parliamentary supremacy was no longer a controversial issue, the problem was confined to the scope of political enfranchisement.[42] However, on the Continent the constitutional status of the representative body by no means had been *a priori* established. Therefore, a non-revolutionary political program to guarantee parliament (then considered only as a political arena for thoughts-exchange and political control over the administration) superior status among the central state authorities might have been considered as a measure of political radicalism. There was a general sense of confidence that the rising political stature of parliament would be a sufficient guarantee for the socially satisfactory content of statutory law.[43]

As may be readily observed, the processes of democratisation expressed through political endeavour to enhance the constitutional status of parliament did not attenuate, but on the contrary enhanced the natural inclination – inherent in the way of precepting the modern state under the rule of law – to espouse legal positivism.[44]

However, despite political rhetoric, in practice, the entire bureaucratic administrative structure created by the police state was still in operation, subordinated to the monarch or republican head of state. The central administration was still in charge of taking strategic political decisions. Parliaments were rather considered a means of political control over the administration. Parliamentary authority in the field of legislation was limited to issues of personal freedom and private property (called in Germany as *Freiheit und Eigentums Klausel*).

However, the new legislation was gradually penetrating deeper and deeper into this area of administration. Acts of parliament were regulating more and more

39 It is clearly stated by the Marx in the Communist Manifesto, 1848, (Chapter II), p. 26: 'the first step in the revolution by the working class is to raise the proletariat to the position of ruling class to win the battle of democracy." (Chapter IV), p. 34: '…they (communists – A.S.) labour everywhere for the union and agreement of the democratic parties of all countries.'

40 The similar idea in the end of 20th c. was expressed under the label of "democratic deficit" used as the reason for strengthening systemic position of the European Parliament.

41 Pietrzak, 1987, p. 107.

42 After the spread of suffrage in the second half of the 19th century, English doctrine was convinced that the will of a representative parliament could not differ from that of the people. Albert Venn Dicey gave expression to this conviction when he wrote: 'All that it is here necessary to insist upon is that the essential property of representative government is to produce coincidence between the wishes of the sovereign and the wishes of the subjects …'. Dicey, 1908, p. 81.

43 See: Zwierzchowski, 1989, pp. 11–12.

44 Stawecki, 2000, p. 44.

matters that restricted, the hitherto unconstrained activities, of administrative authorities.[45] In order to secure the proper implementation of this new legislation, administrative courts and the administrative law were created, as understood in the present-day sense. On the basis of the principle of the state under the rule of law, a very substantial role was attributed to controlling or supervisory institutions with special attention given to the administrative courts.[46] The courts were ascribed the status of an institution inseparable from this liberal concept of the state, as an efficient replacement for the erstwhile administrative disciplinary authority, which was previously the only way to supervise the public administration.[47] In the political dimension, this process led to the political domination of parliaments over the administration.

At the beginning of the 20th century, once this had been achieved via the creation of a parliamentary state, the representative bodies which had originally provided general social control over the administration, would now have subordinated it by means of the newly understood principle of legality. After World War II contemporary parliaments of liberal democracies acquired a status far stronger than the position of the royal heads of state had ever commanded in the old constitutional monarchies.[48]

In the latter half of the 20th century legislative bodies took over the sovereign policy-making functions formerly exercised by the administrative authorities. This change took place with no loss incurred by the parliaments with regard to their supervisory and legislative powers. Hence, we may compare their constitutional status, as acquired in the second half of 20th century, with that of the 19th century administrative authorities, although it should be remembered that the scope of powers held by modern parliaments has expanded enormously.

The political aims of the modern *Rechtsstaat* are no longer determined by the administrative authorities. In the 20th century this is the task of legislation, which also decides how these goals are to be implemented.[49] The government can exert an influence on this insofar as it can influence the activity of the legislative authority by means of a parliamentary majority, from which (in a different way) it is derived.

The function of providing a guarantee formerly performed by a state's legislation has been taken over by its constitution, especially the part of it which contains guarantees of fundamental rights. However, political domination of democratically elected Parliaments quickly proved its insufficiency to meet the expectations of modern individuals, in terms of providing adequate conditions for the development and flourishing of the social order. Once again, unified national markets appeared to be too limited to satisfy economic growth, whereas the political power concentrated

45 Zimmermann, 1959, pp. 14–15.
46 Pietrzak, 1987, p. 105.
47 Langrod, 1925, pp. 20–21.
48 Łustacz, 1968, pp. 318–319.
49 Tkaczyński, 2005, pp. 301–303.

in national parliaments appeared not to be insufficiently citizen-friendly and far too intrusive for individuals. This was even more apparent in the context of legislative inflation that has become a characteristic phenomenon of liberal democracies since the latter part of the 20th century.[50]

4. Judicial dimension of the modern political process

The modern quest towards making political power accountable, concurrently to its political path of development, had a legal dimension. The later had been manifesting in the creation of new judicial structures and new branches of law corresponding to the process of the creation of modern political structures (emergence of the central administration, functional transformation of the representative bodies). The new courts were to exercise control over the centres of power that, at a given stage, were granted primary power (i.e. sovereign in the meaning of empowerment to determine state's policy). At the very beginning of the process, it was manifested in *de facto* reduction of the powers of the ancient common courts administering premodern *ius commune*.

4.1. Modern Administrative Courts

In Belgium and Italy, where liberals had established a judicial review model administered by the common courts – as inspired by the superficial interpretation of the British tradition of the *rule of law* – referred to on the Continent as the *Justitzstaat*, *régime judiciaire* or *unité de juridiction*,[51] it soon turned out that within the context of the Continental political and legal culture the common courts most often declined to rule on the legality of administrative operations[52] and could not be considered a proper model of European judicial review over administrative action.

It is commonly agreed that the emergence of the European administrative jurisdiction is associated with the Napoleon's foundation (or precisely reestablishment) of his *Conseil d'Etats* (Council of State) and the *conseils de préfecture*. However, this jurisdiction had its roots in the previously mentioned pre-revolutionary institutions, by means of which the king (i.e. with the Royal Council acting on his behalf) reserved to royal authority the power to judge cases involving property and personal freedom, when related to activities of public servants. The king had been withdrawing cases of this category from the jurisdiction of common courts and transferring them to

50 See: Staughton, 1998, pp. 200–204.

51 Some of the writers of the early 20th c. labelled this model as "English system of administrative courts". See: Langrod, 1925, p. 35; Marsili, 1910.

52 Izdebski, 1990, p. 81; Izdebski, 2001, pp. 104–105.

provincial royal officers.[53] The idea was to exclude royal officials from the jurisdiction of the delegated (common) courts in these cases, by having them evoked by the king, and then transferred to be decided by royal authorities from which the so called "reserved jurisdiction" emerged. Hence, the French administrative jurisdiction was but a transformation of the ancient royal *justice retenue*. Originally it was not based on administrative matters but rather on the special position of the public officials who were supposed not to be liable under civil law (neither ancient nor modern). Therefore, the new jurisdiction could hardly be considered an expression of the concept of the état *légal* but rather a reference to the principles of the absolutism voluntarily self-subordinating to the law.

The *Conseil d'Etat*, i.e. the highest administrative authority, judged internal appeals against administrative agencies, but also heard complaints for abuse of power (*recours pour excès de pouvoir*) brought against them. Having had them heard, the Council made recommendations to the head of state, who was the supreme administrative magistrate, for the annulment of decisions made in violation of the law. Under the July Monarchy, this resulted in the emergence of a separate jurisdiction of the Council, separated from its administrative activity and called the *contentieux d'annulation*. It was the system by which the legality of administrative decisions – corresponding functionally to the administrative jurisdiction – could be reviewed.[54] Originally it functioned as a common practice, but during the Second Empire in 1872 it became recognised as a statutory, when the *Conseil d'Etat* was acknowledged as the body appointed for independently judging administrative disputes.[55]

These provided in France with a system of jurisdiction regulating relations between citizens and public administration which was the product of case-law as elaborated by the *Conseil d'Etat*. Due to its position as the highest administrative authority, the *Conseil* was able to efficiently impose a set of procedural standards to be followed on the lower administrative authorities.[56]

In German-speaking countries, external reviewing institutions of judicial character were not set up until the transformation of limited monarchies into constitutional monarchies had taken place, starting with Baden in 1863.[57] Two models had been developed there. The Northen three-tier administrative jurisdiction emerged in Prussia and gradually developed in 1872-1883. It was headed by the Prussian Supreme Administrative Court (*Preußische Oberverwaltungsgericht* – PrOVG). The main

53 Tocqueville, 1856, pp. 73–78; See also: Izdebski, 1990, pp. 38–39.

54 For more about this early period of formation of the administrative jurisdiction in France see: Dareste, 1862, pp. 1–198.

55 Jurisdiction of the Council of State was set in Article 9 of the Act 1872: '*Le Conseil d'Etat statue souverainement sur les recours en matière contentieuse administrative et sur les demandes en annulation pour excès de pouvoir formés contre les actes des diverses autorités administratives*'. For more see: Izdebski, 1990, p. 35; Izdebski, 2001, p. 106; Izdebski, 2005, pp. 137–138; See also: Nowotarski, 1947.

56 In academic writings jurisdiction of the Council of State was compared to that of the Roman praetor. Langrod, 1925, p. 119; Nowotarski, 1947, p. 21; Hobbes, 1996, p. 235.

57 See also Wyrzykowski, 1990, pp. 122–123.

characteristic of this model was the strong institutional ties of tribunals with the local self-government.[58]

The Southern model was established in Austria in 1875 and was represented by the centralised Administrative Tribunal consisting of a single-instance court.[59] These diverse developments throughout Europe led to crystallisation of a judicial review system presiding over administrative decisions in modern sense that conformed to the *Rechtsstaat* standards. With the establishment of the judicial control of the activity of administrative authorities around the 1870s, many authors claimed that the ideal of the state under the rule of law had thereby been instituted.[60]

4.2. Criterion of Legality

However, the true political meaning of the administrative courts was dependent on the meaning that was given to the concept of the *legality*. In common understanding, *legality* means a conformity with statutory law. Technically speaking however, the true, operative meaning of the *legality* meant the scope of the judicial review as provided by the administrative courts. In other words, it means the extent to which administration is accountable to the administrative courts. In this respect a lot depended on the way, the competence of the administrative courts was described.[61] In general, transformation in the meaning of *legality* moved from its original understanding protecting individual subjective rights, towards subjection of every administrative action to law requiring specific statutory authorisation for any action taken by the administrative authorities.

Originally, administrative authorities were empowered to freely determine public policy. This power was restricted only by those legal provisions which directly protected individual rights. Administrative authorities were not required to give statutory authorisation for each action they made. This was why a broad area of administrative activity was not subject to judicial review and only partially regulated by statutory law. Administrative activity unregulated by statutory law was considered as a sphere of "free" or "discretionary" decisions.[62]

However, this situation did not fully conform to the philosophical premises underpinning modern political theory, considering executive power as driven only by the will of the legislative as expressed in law.[63] Therefore, it was necessary to elim-

58 On the formation of the administrative justice in Prussia see: Langrod, 1925, pp. 129–133.

59 Izdebski, 2001, pp. 104–105, 223.

60 See also: Radwański, 1985, pp. 54–56, demonstrating common belief among German lawyers about the II Reich as embodiment of the idea of the Rechtsstaat.

61 Stępkowski, 2010, pp. 84–90.

62 Stępkowski, 2010, pp. 115–131.

63 Rousseau, 1792, p. 86: '*Toute action libre a deux causes qui concourent à la produire; l'une morale, savoir la volonté qui détermine l'acte, l'autre physique, savoir la puissance qui l'exécute. […] Le Corps politique a les mêmes mobiles; on y distingue de même la force & la volonté; celle-ci sous le nom de puissance législative, l'autre sous le nom de puissance exécutive*.' (III, 1); Montesquieu, 1859, p. 132: '*Les deux autres pouvoirs (législative et exécutrice – A.S.) … ils ne s'exercent sur aucun particulière, n'étant,*

inate this inconsistency by submitting all administrative activity to the law, while compliance with this principle would be provided by means of a judicial review. Efforts towards the implementation of these premises went in two directions. On the one hand the scope within which administrative authorities were allowed to act freely was narrowed down by the development of statutory law regulating the operation of administrative authorities. On the other hand, for the administrative courts to function properly they had to work out ways in which they could extend the scope of their judicial review – at least to some degree – to the areas where administrative authorities were left to act freely. This twofold action resulted in the creation of administrative procedure i.e. the legal rules determining proper conduct of every activity taken by the administrative authorities.

4.3. Modern Parliamentary State

Looking from a political perspective, the struggle for the submission of all administrative activity to statutory law can be considered a political competition between the executive (administration) and legislative powers. At stake from this confrontation was the issue, who (either legislative or executive) has the authorisation to determine public policy or otherwise: who is empowered to take sovereign decisions. This confrontation resulted in the, already mentioned emergence of the parliamentary state in which parliaments acquired sovereign powers. However, these were administrative courts that had been playing a crucial role in this confrontation. The courts enforced real subjection of the administration to the will of parliament as expressed in statutory enactments. Administrative courts became the ultimate arbiter between legislative and executive powers.

Subordination of administrative activity to (statutory) law implied a new way of thinking about administrative discretion and a fundamental change in the review of the legality with which it was being exercised. As a result, each European country elaborated a contemporary formula for the judicial review of administrative discretion.[64]

However, after the World War II the administrative courts could no longer perform the same constitutional function that they had previously been providing. The reason was that key decisions relating to public affairs were now being made by the legislature and not by the administrative authorities. These were the reasons why disappointment started to creep in as to the efficiency of the administrative courts, which in the second half of the 20th century considerably blighted their authority and reputation.[65] This disappointment also inspired the proliferation and growth of the institution of the ombudsman and standards of transparency in the

l'un, que la volonté générale de l'État, et l'autre, que l'exécution de cette volonté générale.' (De l'Esprit des lois, XI, 6).

64 Izdebski, 2010, pp. 12–13; Garlicki, 1990, p. 27.

65 Izdebski, 2001, pp. 83, 167; in relation to France Longchamps, 1968, pp. 87–90.

activities of administrative bodies which were perceived (quite rightly) as a response to the unsatisfactory degree of the evaluation of administrative action provided by the administrative courts.[66] Nevertheless these measures are merely supplementary to the work carried out by administrative jurisdiction to scrutinise executive authority. Today this is just one (and not the most important) aspect of social control over the functioning of public authorities. This development was envisaged because the guarantees given to individuals by the administrative jurisdiction were no longer sufficient. It became necessary to create an analogous institutional system to protect individual citizens against their parliament and its legislation, the constitutional courts. They were intended to protect individuals, not against illegal administrative action, but against legislative acts authorising through statutory means, the abusive interference with the individual subjective rights.[67]

The analogy between constitutional and administrative jurisdiction takes a variety of forms, depending on the specific legal culture.[68] The French constitutional court employs the techniques elaborated by the administrative courts, such as *détournement de pouvoir* and *erreur manifeste d'appréciation*.[69] In Austrian law the scope of powers held by the administrative and constitutional courts interlock and overlap, so that the constitutional court operating in Vienna (*Verfassungsgerichtshof*) is sometimes referred to as "the extraordinary administrative court".[70] Therefore, constitutional and administrative courts in Austria are treated as essential components of a single, complex system for the protection of the individual rights against the state.[71]

Contemporary constitutional courts have been inevitably, though not necessarily intentionally, supporting the ongoing process of transferring sovereignty to the supranational level. This action is concurrent to primary goal of the constitutional courts, and similar to the role the administrative courts had in subordinating administration to parliaments. This results from ensuring that parliaments duly carry out the integrative decisions taken by the international administration.[72] However, this process manifests a transgression of the modern politics manifesting disintegration of the sovereignty as understood in modern terms, as a characteristic feature of the modern nation-state. On the other hand, the process points to the emergence of postmodern sovereignty, attributed to supranational political structures.

66 Izdebski, 2001, pp. 222, 224–225.
67 Alexy, 2002, p. 367.
68 La justice administrative en Europe, 2007, pp. 32–34.
69 Garlicki, 1990, p. 27.
70 Sobieralski, 2006, pp. 166–167. For more about relationships between administrative and constitutional courts See: Garlicki, 1990, pp. 29–31. The author is not considering however those relationships as functional continuity.
71 Łętowski, 1990, pp. 177–178.
72 For more see: Stępkowski 2010, pp. 412–417.

5. European integration as postmodern political transformation

Soon after World War II, in parallel with the parliamentary driven processes of constitutional integration of modern states, European structures of international administration started to be created. Over time, their functioning has triggered strong integrative processes, the effects of which we experience today with the functioning of the European Union and the Council of Europe. A special role in this context is played by international tribunals operating within these structures, which started to create international administrative law.[73] In time, with the gradual strengthening of those meta-structures, the process resulted in the erosion of sovereignty at the level of the nation-state and its subsequent dislocation to international level. Hence, one can clearly observe the decomposition of the modern understanding of sovereignty and its *de facto* dislocation beyond the borders of the nation-state towards international structures which over the time became supranational.

5.1. Postmodern Character of European Integration

The growth of decision-making powers of international organisations creates the need for supranational institutions to control the way in which these sovereign powers are exercised. In effect, it resulted in describing the international order with some constitutional forms – attributing to them characteristic features of the state.[74] As a result of this process, referred to as "governance beyond the nation-state",[75] modern states are undergoing a fundamental transformation and becoming incorporated into a system of supranational structures that make legally binding decisions for these states.

Ulrich Beck and Edgar Grande linked these transformations in the functioning of nation-states to the broader issue of so-called "reflexive modernisation" (as contrasted with the "first" or "simple" modernisation that took place in the 19th century) which, in the current context, could be properly referred to as "postmodernisation."[76] The authors argue that

> ... the nation-state, as one of the basic institutions of the first modernity undergoes a fundamental transformation in the process of reflexive modernization. ... The reflexive modernization of statehood leads, firstly, to the production of a multiplicity

73 Izdebski, 2001, p. 179.
74 Klabbers, Peters and Ulfstein, 2009, p. 80.
75 For more see: Hurrell, 2007, pp. 95 et seq.
76 It should be noted that the Beck and Grande reserve the adjective "postmodern" for neoliberal tendencies, however the meaning of the "postmodern" as used in this text is exactly corresponding to the concept of reflexive modernisation understood as transgressive continuation of the modernisation (qualified by them with adjectives "early" or "first").

> and variety of new forms of transnational «governance beyond the nation-state». In doing so, the nation-state is not completely replaced or even supplanted but is incorporated in various ways into new international governments and organizations, new transnational institutions, new forms of regionalism, and so on. The result of this development, to the extent that it is already becoming known, are new comprehensive systems of «(world) governance»....[77]

In Europe, these processes are embodied both in the structures that make up the European Union and the Council of Europe. This also allow us to expect the future integration of those organisations[78] which already is in process, with regards to expected accession of the European Union to the European Convention of Human Rights as provided for in the Article 6(2) TUE. At the same time, it should be added that these processes, taking place at a supranational level, also have their reverse expression in the affirmation, as provided by the supranational structures, of localism understood in terms of pluralism. However, in reality, this affirmation of regional specificity, only in a slightly different way, leads also to the decomposition of the modern nation-state's structures, making it easier to establish a supranational system of governance. The nation-state suffers from the disintegrative effect of the diverse forms of regionalism on the one hand and from the transfer of sovereign decision-making competences beyond national politics. The slogans of localism are designed to serve the affirmation of pluralism, understood in the postmodern sense, as a process bringing about a politics of radical, pluralist democracy rooted in locality.[79] However, this development might be reasonably considered as the implementation of the vision of postmodern politics as outlined in the 1970s by Jean-Francois Lyotard.[80]

Those postmodern, supranational (in contrast to modern – national) structures, although in theory are fully dependent on the decisions of the states that created and empowered them, in practice increasingly extend their powers, *de facto* dominating over national parliamentary states. Since the contemporary EU Member States led by national parliaments, are increasingly bound to implement political decisions taken

77 Beck and Grande, 2009, p. 72.

78 See for more: Stępkowski, 2010, pp. 406–408.

79 Lash, 1994, p. 113. '… reflexive modernity proffers a politics of radical, plural democracy, rooted in localism and the post-material interests of the new social movements'.

80 Jean-Francois Lyotard in his Instructions païennes, talking about postmodern politics, acknowledged that 'the idea that I think we need today in order to make decisions in political matters cannot be the idea of the totality, or of a diversity. Then the question arises: How it be pragmatically efficacious (…)? Is a politics regulated by such an idea of multiplicity possible? ... Ad here I must say that I don't know.' This early expression of the postmodern approach in politics is not addressing the issue of creating new "totality" in order to deconstruct the relics of the modern structures, but it seems that the notion of "reflexive modernization" seems to respond to this incompleteness of the Lyotard's thinking about politics. See: Lyotard and Thébaud, 1985, p. 94. About founding the postmodern politics on the idea of pluralism localism and multiculturalism see also: Morawski, 2001, pp. 40–41.

at the EU level, despite possible incidental solutions presented as strengthening of the national parliaments, it is by no means unfounded to speak of the emerging *de facto* tendency to consider Member States, and their authorities, as having a more executive function, whereas the EU determines strategic goals and policies.[81] Thus, European integration might rightly be considered as a process of the transformation of sovereign nation-states into "self-disciplined members of a cosmopolitan European Empire," also referred to as "cosmopolitan states".[82] It is difficult to deny the accuracy of this description notwithstanding the fact that it does not please everyone.

In particular, European integration considerably weakened position of national legislative bodies. This is clearly reflected in the changing relationships between the legislative and the other two branches of power on a national level. The national executive took *de facto* considerably stronger position than the Parliament in determining much of the legislative process. The authorised representative of the national government takes part in drafting European law which is then implemented by the national parliament.[83] However, it is mostly deprived of substantial impact regarding the content of the law.[84] The gradual grow of EU law resulted in placing national parliaments in the position of formal executor of decisions taken within the European political process, party to which are the national governments and not the national parliaments. Subsequently it is the government that submits draft laws transposing EU directives to national legislative, which has a very limited ability to intervene into the merits of that draft.[85] In this way the parliament acquires more executive function whereas substantial power to influence policy-making processes belongs to executive. The real importance of national legislature is becoming gradually reduced to the dimension of designating national government. After that happens, the real power of national legislature becomes reduced to implementing political decisions taken outside the national parliament.

Moreover, the position of the national judiciary against parliament is considerably strengthened within the European integration process. Courts are less and less bound by statutory laws as provided by Parliament. The system of judicial referrals under Article 267 TFEU has been developing in a way that considerably limits the binding force of national legislation. Moreover, the EU axiology as declared in TEU Article 2 appears to be a very useful means of broadening the scope of the power conferred formally on EU institutions, especially on the CJEU determining the ultimate meaning of the Treaties' provisions.

From an external perspective, the decomposition of the nation-state's sovereign position has two convergent and complementary dimensions, the creation of a new,

81 For more: Tkaczyński, 2005, pp. 310–313.
82 Beck and Grande, 2009, p. 139.
83 Patyra, 2012, p. 156.
84 Kruk, 2006, p. 157.
85 Bałaban, 2007, p. 132 ; Patyra, 2012, p. 156.

postmodern socio-political order and the decomposition of the modern socio-political order with the central importance of the sovereign nation-state.

Despite the fact, that the postmodern process destroys political and social structures characteristic for modernity, it by no means denies its intellectual foundations. To the opposite: this deconstructive aspect of the postmodern affirms these intellectual premises upon which the modernity was founded. The postmodern process draws transgressive consequences from the same intellectual foundations, which however requires destruction of the institutions being by this time the lynchpin of the modern social life. For the same reason, supra national political structures are subject to the same process determining their development and (still changing) identity. Therefore, we can discover important parallels in the development of postmodern supranational political structures, to the stages that had been leading to the crystallisation of modern political structures of the nation-state. Actually, all the process of forming supranational organisations is quite commonly and increasingly driven by the idea of the *rule of law* in a way which is analogous to that in which we refer to the modern nation-state.[86]

The very first analogy is the sole establishment of fundamental socio-political structures: the modern state was conceptualised as an effect of the hypothetical[87] social contract, whereas postmodern, supranational political structures have been factually created by means of international treaties contracted between sovereign national states representing individuals in the state of nature.

However, the parallels between the formation of a national and a supranational political and legal order goes far beyond the question of genesis and also apply to the development of an institutional structure. This analogy consists of the move from the political domination of the executive as a decision maker towards the attribution of these competences to a representative body. The case of the European Union situation was specific. The aforementioned process of transition concerned sovereign powers that have not been vested in the EU. The process rather consists of

86 Klabbers, Peters and Ulfstein, 2009, pp. 59–60.

87 Hobbes, 1996, p. 89; clearly admitted that he was not considering the state of nature as if it had been existing in the beginnings, but he was considering it as a state of no-justice i.e. the state without an operating sate power (as granting very conditions for considering human relationships in terms of justice) also where it used to be and was abolished. In fact, the state of nature was just a kind of narrative descripting asocial character of human nature: 'It may peradventure be thought there was never such a time nor condition of war as this; and I believe it was never generally so, over all the world'. J.J. Rousseau clearly introduces the social contract as a hypothesis, beginning the chapter devoted to it: '*Je suppose les hommes parvenus à ce point où les obstacles qui nuisent à leur conservation dans l'état de nature, l'emportent par leur résistance sur les forces que chaque individu peut employer pour se maintenir dans cet état*'. Rousseau, 1792, p. 22. Also Immanuel Kant was arguing against considering the state of nature as a historical fact Kant, 1797, p. 210: '*Der Geschichtsurkunde dieses Mechanismus nachzuspüren, ist vergeblich, d.i. man kann zum Zeitpunkt des Anfangs der bürgerlichen Gesellschaft nicht herauslangen (denn die Wilden errichten kein Instrument ihrer Unterwerfung unter das Gesetz, und es ist auch schon aus der Natur roher Menschen abzunehmen, daß sie es mit der Gewalt angefangen haben werden)*' (§ 52).

the emergence of the sovereign power on the supranational level concurrently with the process of divesting of the nation-states from their sovereign powers.

If we consider however the emergence of the national sovereignty in its proper form, as a manifestation of the popular sovereignty, then the early (not fully) modern period of the limited and constitutional monarchies might be considered as the quest towards the emergence of a fully modern sovereignty understood as the popular rule. In this context, the period when the Council and the Commission were dominating seemed to be slowly approaching an end, thus making space for the European Parliament. The legitimacy of the Union as stemming from the will of the Member States seems apparently to be in decline and is gradually being replaced with direct legitimacy as provided by democratic elections to the European Parliament.

This course of action is apparently manifesting in the proposals of the European Parliament for the amendment of the Treaties as adopted in November 2023. The proposals 'aim to reshape the Union in a way that will enhance the Union's capacity to act and strengthen its democratic legitimacy and accountability'.[88] If we add to this statement some specific solutions resulting in the institutionalisation of the mechanism permitting the circumvention the ordinary legislative procedure as specified in Article 289(1) TFUE, and concurrently do the same with the principle of conferral as expressed in Article 5(1) TUE, it becomes clear that European Union is heading directly to attain the status of a supranational state.

5.2. European Integration in Outline

The original Communities (Steel and Coal – ESCC 1950, Economic – EEC 1957, Euratom 1957) were endowed with an institutional structure reflecting to some extent modern principles of the three-fold division of power. The General Assembly as instituted for ESCC, or European Parliamentary Assembly established for EEC represented representative bodies. The High Authority for ESCE or Commission for EEC should be considered as the executive power and the tribunals of justice as instituted for those communities corresponded to judicial power. Additionally, to that threefold structure, the communities were provided with an important intergovernmental body responsible for decision making and coordination of the communities' activity with the Member States' activity (Special Council of Ministers for ESCC and Intergovernmental Council for EEC). These institutions were then unified by the Merger Treaty in 1965, providing a common four-fold structure for the communities (Council, Commission, European Parliament and the European Court of Justice).[89]

Regarding decision making powers, there has been dominating those institutions, which were not directly legitimized by democratic elections, i.e. the. Council

88 Explanatory statement of the Report on proposals of the European Parliament for the amendment of the Treaties (A9-0337/2023) as adopted on 11 November 2023.

89 Galster and Witkowski, 1996, pp. 23–32.

and the Commission. Originally it was the Council who had been the main decision-making body legitimised by the Member States (national governments).

This institutional structure reflects, to a considerable degree, the political structure of the early modern nation-states where royal authority was legitimised in a traditional dynastic way and the popular legitimacy was only gradually emerging by means of strengthening power of the Parliament. The Council and the Commission could be hence compared to the early modern royal authority together with the royal administration. The European Parliament, as was the case in the early stages of modern political transformation, was mainly authorised for political control serving as the forum for public discourse. Similarly, as the royal dynastic authority had been in a slow decline in its own importance throughout 19th century, a similar process might be noticed, with respect to the Council.

Following the decision taken at the Member-States summit in December 1974, since 1979 members of the European Parliament ceased to be merely delegates of existing national parliaments and started to be democratically elected. From today's perspective, this should be considered as a milestone in the process of European integration, even if it was not considered so at that point in time, and that it took a considerable amount of time to become obvious. The European Parliament cased to be an institution of international cooperation between national parliaments and became a supranational body based on its own democratic legitimacy. This change did not have immediate political consequences in terms of the radical strengthening of the European Parliament, however it opened the gate for subsequent changes in that direction. It is also remarkable to note that this happened concurrently with the creation of the European Currency System with the ECU and was soon followed by the declaration of the Council in 1981 announcing steps being taken towards creation of the European Union resulting in the resolution of the European Parliament of 14 February 1984. The resolution contained a project of the Treaty on European Union.

This general direction of the development of European integration was not affected in substance by subsequent political obstacles which resulted in delaying the establishment of the Union. Ambitious plans were restricted to the adoption of the Single European Act of 1987, which was however still a considerable step forward, towards the creation of the Union. It widened competences granted to the communities (new integration policies e.g. environmental protection) as well as restricting unanimity requirements in the Council's decision-making process. The Single European Act also strengthened the political position of the European Parliament allowing it, in certain matters, to participate with the Council in joint legislative procedures. It is clearly visible, in this context that the Council was legitimised in a "traditional" way from sovereign states, whereas independent democratic legitimacy of the European Parliament has been gradually crystalising since 1979 on a supranational level.

Despite the temporary decline in the dynamics of the integration progress, in 1992 the Maastricht Treaty was finally adopted and since 1993 the European Union came into existence. The Maastricht Treaty accomplished merger of the three communities into one European Community, making it a supranational organisation

endowed with the legal personality, to which two additional policies were added operating within the scheme of international cooperation.

The Maastricht Treaty accomplished the early stage of European integration. Formally, the EU has only represented the enhancement of the already existing cooperation between the Member States, which was deepened and widened for the "common foreign and security policy" (CFSP) as well as the cooperation in the field of "justice and home affairs" (JHI). However, whereas the initial communities as created in 1950s could by no means be considered as having attributes of the modern states, the European Union already has possessed some of the attributes (e.g. common currency, common market, European citizenship, autonomous legal system) of the modern state.

The creation of the European Union was however only the beginning of the new chapter in the integration process. Subsequent changes were introduced in the Treaty of Amsterdam which considerably strengthened competences of the European Parliament in the legislative process. Then, the Treaty of Nice which entered into force in 2003 was the first step towards the merger of the supranational (the first) pillar of the Union with the international components of the Union as included in the second and the third pillars.

The next ambitious advancement of integration was proposed in the Constitution for Europe as adopted in 2004. Amongst other things, it provided e.g. for the express declaration of EU law primacy over national constitutional systems. However, this attempt to advance European integration came too quickly for France and the Netherlands and failed to pass a national referendum in both countries. The situation was quite similar to that of the first project of the Treaty of European Union of 1984, which was replaced with the far less ambitious Single European Act. Similarly, political obstacles, slightly lowering the dynamics of institutional integration, appeared only to be temporary.

After rejection of the Constitutional Treaty in 2005, a similar institutional effect was achieved two years later in the Treaty of Lisbon as adopted in 2007 and brought into effect from 2009. The Lisbon Treaty, having abolished the European Community and extended its own supranational character concerning the second and the third pillars, granted The European Union with the legal personality providing it with a new supranational identity as the subject of international law.

Not surprisingly, the Lisbon treaty has considerably strengthened the position of the democratically legitimised European Parliament. It became a key factor in the legislative process, though still acting alongside the Council. These legislative powers as described in Article 289 TFUE closely resemble the conceptualisation of the legislative power in the 19th century of *Staatslehre* as the joint cooperation between the administration, parliament and the monarch promulgating legislation. An important restraint to this legislative power of the acting jointly Parliament and Council is still provided in article 17(2) TUE stipulating that EU legislative acts may only be adopted on the basis of a Commission proposal, unless Treaties indicate otherwise. In most general term, the Council adopts certain policies determining political goals, which

are turned into a draft law by the Commission and presented to the Council acting jointly with the Parliament for adoption.

The systemic goal of the Commission is to represent the interests of the EU. In order to secure its independence in promoting the Union's interest, it was granted with a systemic position between the Council and the European Parliament. On the one hand the President of the Commission is proposed by the Council. The rest of the commissioners are proposed by the President of the Commission upon consultations with the member states are *de facto* nominated by the Member States. This creates a strong link between Commission and Member-States directly or indirectly (via the Council). However, the President of the Commission and the commissioners must be accepted by the Parliament which might oppose their nomination. The Parliament also provides political control of the Commission in order to ensure that commissioners will look after interest of the Union and not those of the Member-State of which they originate. In this way the influence of Member-States is balanced with the influence of the European Parliament and provides considerable autonomy and independence to the Commission.

This autonomous (and powerful) position of the Commission as provided by means of balancing the Council's and the Parliament's competences, might soon be considerably reduced to one resembling the position of a cabinet within the parliamentary-cabinet system, which would make the Commission fully dependent on the Parliament. This course of action is however by no means surprising, as the enhancement of the powers of the European Parliament has been already long considered a way of legitimising the extension of the Union's regulatory powers.[90] This general direction, as manifested in the Lisbon Treaty, was by no means affected by the solutions declared as strengthening national parliaments, making them guardians of the proportionality and subsidiarity principles (paragraph 3 of the Article 5 TUE). The said procedure of an *ex-ante* 'early warning' mechanism as provided for in the TUE Article 12(b) allows national parliaments to monitor compliance with the principle of subsidiarity. However, it lacks real significance as it requires considerable cooperation between national parliaments being neither easy nor efficient. Therefore, it has no serious impact, also because of the limited scope of application of the subsidiarity principle.[91] This recent development confirms only that general course of action empowering the European Parliament and not the national representative bodies, has been really taken.

90 See: Kumm, 2005, p. 294; Sadurski, 2006, p. 32.

91 The *ex ante* "early warning" mechanism in the TEU second subparagraph of Article 5(3) and Article 12(b) allow national parliaments to monitor compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol No 2. By virtue of those provisions national parliament (or its chamber) has eight weeks since a formal information about a draft legislative act, to send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. This might result in withdrawing the legislative proposal by the Commission. So far only 3 times the procedure was applied and only once the proposal was withdrawn.

5.3. Towards EU as Parliamentary Super-State

Analogically to the process that took place at the beginning of 20th century as to the relations between administration and national parliaments, proposals by the European Parliament for the amendment of Treaties as adopted in November 2023 provides for the clear subjection of the Commission to the will of the European Parliament. This will already be manifested in the changing of the name of the institution into the "Executive".[92] However, the changes proposed in the project, as adopted by the Parliament, systematically tend to minimise the influence of the Council and the Member-States on the composition and operation of the Commission renamed as the Executive.

First of all, the proposal determines a fixed number of 15 commissioners. This means, that each Member State will no longer be represented in each Executive.[93] An even more fundamental change is however proposed to section 7 of the Article 17, regulating the nomination of the President of the European Union (the late President of the Commission), who will preside over the Executive, as well as the nomination of its members. According to the proposal, the relationship between the Council and the European Parliament will be completely reversed. The Parliament will now propose the President of the Executive, instead of the Council, whereas the Council, instead of proposing, will only accept the proposed candidate, being able (once) to oppose the parliamentary proposal in this respect. The President of the EU will no longer consult with Members-States regarding the candidates for the members of the Executive which, looking from a legal perspective only, means it will completely lose its impact on the composition of the Executive.[94]

This demonstrates that the proposed course of changes directly follows the pattern according to which modern nation-states were developing to the form of parliamentary democracies with a parliamentary-cabinet system. The European Union will replace legitimacy drawn so far from the (governments) of the Member-States with the direct democratic legitimacy of the European Parliament liberated from the Members-States and thus subjecting them to the Union in a quasi-federative way.

However, probably the most radical way in which this course of action has been taken are the proposed amendments 17 and 18. Those proposals respectively aim at amending Article 11 paragraph 4 subparagraph 1 TUE regulating European citizens' initiatives and introducing a new subsection 1a to this provision. According to the amendment, the citizens' initiative will no longer be required to demonstrate the way in which it is "serving the purpose of implementing the Treaties" as it has been to date. Therefore, following such an initiative the Parliament will be able to

92 Proposed Amendment 43 to the Treaty of the European Union.

93 Proposed Amendment 47 to the Treaty of the European Union. This effect will be to some extent soften by the possible appointment of the undersecretaries for a specific portfolio or task considering the geographical (still not national!) range of the commissioners sitting in the Executive.

94 Proposed Amendment 49 to the Treaty of the European Union.

legislate outside the scope of matters in which competences has been conferred upon the Union by the Member States. To make it even more apparent, the newly proposed subparagraph 1a stipulates, that 'The Commission or the European Parliament may propose a legal act based on any valid citizens' initiative' (emphasis added).

The removal of Treaty constraints for the citizens' initiative, demonstrates clear tendency of seeking direct democratic legitimacy for EU actions. This new provision allows the European Parliament itself to propose any legislation disregarding any substantial limitations stemming from the principle of conferral with no need for engaging the Commission. This also explains the reason why, the proposal for amending Article 17(2) aims at the removal of the adverb "only" from the sentence "Union legislative acts may *only* be adopted on the basis of a Commission proposal …".[95] In such a way, after the additional, preliminary stage of organising a citizens' initiative, the European Parliament will be empowered to legislate upon its own initiative in any matter including those which were not conferred on the Union by the Member States. This proposal tends directly towards disregarding the principle of conferral, as declared in Article 5 TUE. The proposed amendments demonstrate a clear shift towards the ultimate liberation of the European Union from the constraints of Treaties and national governments. Formally speaking, authorisation still will be provided by the Treaty of the European Union and additionally strengthened by the democratic character of the citizens' initiative. However, this authorisation is expressed in very broad terms, not defining any specific matter nor the limits for this newly proposed power. In fact, it is granting the EU with substantially unconstrained discretionary powers weakening the validating importance of the will of national governments as expressed in the material provisions of the Treaties referring to the matters in which the EU is empowered to act.

An important legitimising factor for this revolutionary solution is founded upon the popular character of the European civic initiative. This seems to be understood as a sufficient justification for disregarding the principle of conferral. Therefore, depending on the prospective interpretation of the amended provisions, in future a similar effect might allow the proposed new Article 11(4b) to authorise the European Parliament to submit to the European Council a proposal for a European referendum conforming to the European values as laid down in Article 2.[96] There is no express statement saying that a legislative proposal, if accepted by referendum, will not have to fall within the competences conferred on the Union by the Member States in the Treaties. However, the overall context of the proposed amendments as well as the extremely wide and vague character of the "values" listed in Article 2 strongly inclines thinking towards this direction. This intuition is even stronger if taking into account that according to the proposed Amendment 14, the second sentence of the Article 10(3) is to be excluded in a new paragraph 3b as a separate principle stipulating that the EU's decisions shall be taken as openly and as closely to the citizen as possible.

95 Proposed Amendment 44 to the Treaty of the European Union.
96 Proposed Amendment 20 to the Treaty of the European Union.

If we additionally consider a further safeguard proposed in Amendment 19 granting to the European Parliament and to the Council the competence to adopt provisions to guarantee their decision-making and the adherence to the principles set out in Articles 10 and 11 within the ordinary legislative procedure,[97] there seems to be sufficient grounds for interpretation, that proposals accepted in the referendum need not observe the boundaries resulting from the principle of conferral as enshrined in Article 5(1) TUE. Moreover, this new competence confers on the European Parliament and the Council extremely wide discretionary powers, potentially authorising very invasive measures to discipline the Member-States, considerably weakening the function the Treaties consisting of setting the limits to the competences of the EU institutions.

It is also worth adding, that for a long time, the European Parliament has been disregarding any Treaty constraints when adopting its own political resolutions. It was considered acceptable since the resolutions are not legislative acts, thus having no binding legal effect. However, this wide-spread practice has already prepared the ground, making it a part of ordinary practice, to adopt the Parliament's positions far outside the scope of the competences conferred upon the Union in the Treaties. If the proposed amendments will be adopted, this transgressive practice by no means will be weakened nor restricted and is likely to radiate on the legislative process.

As was already mentioned, the above-described development of the European Union constitutional system towards supranational sovereign political structure, demonstrates striking parallels with the development of the modern nation-state. The same analogies concerning the judicial contribution to this process.

5.4. Judicial Contribution to European Integration

The above outlined political process, which is transforming the identity of EU structures from that of an international organisation into that of a supranational state, could not be fully understood without acknowledging the judicial contribution. Indeed, the process is strongly supported from within the nation-state institutions. *Per analogiam* to the earlier stages of the process of displacement of modern sovereignty here described, also at this stage, the dislocation of political competencies at the supranational level takes place with the support of judicial bodies, starting with the constitutional courts. More interestingly, this is often done to the accompaniment of firm statements affirming the sovereign status of nation-states. However, while in the literal layer of jurisprudence the constitutional courts are often very vocal on the protection of the constitutional sovereignty of their countries. At the same time, they do much to ensure that in fact, the verbally affirmed category of national sovereignty does not create real obstacles for the informal widening of the Union's competences

97 The provision is intended as the new paragraph 4 a within the Article 11 TUE.

at the expenses of the Member States.[98] Moreover, the warning-rhetoric of "*Solange*" as used by the constitutional courts has been efficient in calming public sentiments, which might oppose this process. However, it is not even the issue of the widening competences granted, but rather of the erosion in understanding of the principle of conferral, which is of key importance here. As has already been mentioned above, the transformation process is not so much directed towards adding some new powers or widening those already granted. It is rather focused on depriving the principle of conferral of its substance and reducing it to a rhetoric figure.

In order to illustrate the relationship between the activity of the national judiciary and constitutional courts in particular, it is useful to take the example of the Polish Constitutional Tribunal, which had been firmly insisting on its position as the guardian of Poland's constitutional sovereignty, especially when judging on the conformity of the Accession Treaty,[99] as well as the Lisbon Treaty[100] to the Polish Constitution. Marek Safjan, the former president of the Polish Constitutional Court, in one of his speeches from that period emphasised that

> the adoption of a European law-friendly interpretation of the national law provisions, confirmed in the jurisprudence of the Constitutional Court in a series of judgments ..., is justified from the point of view of protecting our own Polish interests ... [F]or it is ... our vital interest, as a state participating in the processes of European integration, to respect European law.[101]

The statement is by no means controversial, however allows also better understand the qualification of EU Member-States as 'self-disciplined members of the cosmopolitan European Empire'.[102]

A spectacular example of this was the judgement P 1/05 discussed by Safjan and presented by him as proof of the Polish Constitutional Court's intransigence in upholding Polish constitutional sovereignty. It was decided in the case that the statutory provision implementing European Arrest Warrant into Polish law was contrary to Article 55 of the Polish Constitution. Certainly, this sovereigntist conclusion would have been more obvious had it not been for the Court's statement that the elimination of an unconstitutional statutory provision would be tantamount to the existence of a new unconstitutionality. This new unconstitutionality would result from violation of Article 9 of the Constitution binding Poland to fulfil its international commitments. In this regard, the Court clearly suggested not only the need to

98 Referring to German constitutional judgements, Alex Graser describes this process with the saying that 'Barking dogs seldom bite'. See: Graser, 2023, pp. 18–38; In relation to Polish law see: Stępkowski, 2023, pp. 247–251; In relations to the decisions by the French Conseil Constitutionnel See: Sulikowski, 2002, pp. 76–88.

99 Judgement of 11 May 2005, K 18/04, OTK ZU 5/A/2005, item 49.

100 Judgement of 24 November 2010, K 32/09, OTK ZU 9/A/2010, item 108.

101 Safjan, 2006, p. 13.

102 Beck and Grande, 2009, p. 139.

amend the Constitution, but also very direction of such an amendment,[103] maximally postponing the occurrence of the legal effects of the ruling.[104] Thus, although the Court stood *prima facie* for respecting the Polish Constitution, it actually recommended in its ruling to adapt its content to EU law. Thus, the Court clearly stated that it is the Polish *raison d'etat* to shape the content of the Constitution in such a way as to ensure that it does not interfere with the EU law.

Likewise, analysis of the Polish Constitutional Court's solemn declarations that "member states retain the right to assess whether Community (EU) legislative bodies, in issuing a particular law, acted within the framework of the competences delegated to them and how they exercised them in accordance with the principles of subsidiarity and proportionality"[105] leads to conclusions which are not so obvious. The impression that could arise from such statements about the existence of legal guarantees for national sovereignty vanish if it is noted that the resulting controversy would have to be resolved by the CJEU in preliminary ruling for which Constitutional Court would be bound to apply under the Article 267(4) TFEU.[106] Thus, it turns out that closer examination of the spectacular declarations about constitutional sovereignty of EU member states, leads to serious confusion.

In this context, the constitutional judiciary acquires another extremely important function, although not expressed anywhere in the national constitution. It is to watch over the conformity of national constitutional order with laws emerging beyond national structures. Constitutional courts are, to a much greater extent than the CJEU, interested in ensuring that there are no conflicts between constitutional provisions and Community law.[107] As a result, national courts not only evaluate the

103 'The decision of the Constitutional Court declaring Article 607t § 1 of the Code of Criminal Procedure unconstitutional. Results in the loss of binding force of this provision. However, in the present case, this direct effect resulting from the judgment is neither equivalent to nor sufficient to ensure the compliance of the legal state with the Constitution. This objective can only be achieved through the intervention of the legislator. Indeed, taking into account Article 9 of the Constitution, which stipulates that 'the Republic of Poland shall observe international law binding upon it', and the obligations arising from Poland's membership of the European Union, it is indispensable to amend the law in force in such a way as to enable not only full, but also constitutional implementation of Council Framework Decision 2002/584/JHA ... . Thus, in order for this task to be accomplished, an appropriate amendment of Article 55(1) of the Constitution cannot be ruled out, so that this provision provides for an exception to the prohibition on extradition of Polish citizens allowing their surrender on the basis of the EAW to other Member States of the European Union. If the Constitution is amended, bringing national law into conformity with EU requirements will also require the legislator to reinstate the provisions on the EAW which, as a result of the TK ruling, will be eliminated from the legal order'. Trybunał Konstytucyjny, 2005. See also statement by W. Sadurski in: Debata, 2009, p. 21.

104 For more detailed account See: Stępkowski, 2023, pp. 252–253.

105 Safjan, 2006, p. 16.

106 See: Wojtyczek, 2009, p. 188.

107 Ewa Łętowska directly acknowledge: ' … so far, there has been no 'open conflict between the Court of Justice and the Constitutional Courts, but this is because such a conflict has been carefully and skillfully avoided, rather through the efforts of the national courts (in particular the courts of public law and the Constitutional Court)'. Łętowska, 2005a, p. 1141.

constitutionality of laws through their interpretation conformant to EU law[108] but simply interpret the constitution in accordance with European law. However, if it appears to be impossible to interpret a national constitution in accordance with EU law due to the explicit wording of the constitutional provisions, then the constitutional courts do not hesitate to communicate the need for changes in the text of the national constitution itself.[109]

Thus, regardless of being very vocal about constitutional sovereignty, constitutional courts still demonstrate in practice a clear tendency in contemporary European legal culture to make national legal systems dependent on the content of political decisions made at the level of the European cosmopolitan empire. No substantial difference in this respect stems from the fact that the process is carried out in a very flexible way that presupposes a transitional period allowing for accommodation of national legal systems.

6. Conclusion

The contemporary process of European integration is determined in its content by the intellectual categories underpinning modern intellectual culture, which also inspires its transgressive postmodern development. Therefore, political integration within the EU seems to be only a stage of a longer socio-political process that was initiated with the cultural change brought about during the Enlightenment.

The whole process is determined by individualistic anthropology which inspires the creation of ever higher political structures intended to protect individual equality and freedom. However, these are never successful in this respect and thus never-ending. All socio-political changes we experience today are determined by cultural choices that were made centuries ago. Therefore, the process is barely manageable using ordinary political means. On the contrary, political decisions are rather predetermined with intellectual categories inspiring imagination of the policymakers.

108 In case of Polish Constitutional Court, it was declared already before Polish accession to EU in judgment of the 28 January 2003, OTK ZU 1/2003, item 4, § 4.5: 'The constitutionality review exercised by the Court requires reference to legal provisions of the Constitution as the benchmark against which the legal provisions under review are assessed. The postulate of using European law in the pre-accession period as an interpretative inspiration for the Constitutional Tribunal means above all the use of that law for the reconstruction of the constitutional model in the exercise of control. (...) Therefore, when construing standard (norm) according to which the constitutionality assessment is carried out, one should make use not only of the text of the Constitution itself, but – to the extent to which this text refers to terms, concepts and principles known to European law – to these very meanings'. Łętowska, 2005a, p. 1143. It is important to note, that the judge rapporteur in this case was Ewa Łętowska herself.

109 Stępkowski, 2010, pp. 416–417.

The chapter aimed at demonstrating the regularity of modern and postmodern socio-political processes. This explains the reason why it seems that the future constitutional character of the European Union is by no means yet to be determined. It had already been determined long before the contemporary idea of European integration appeared at the deep level of intellectual identity of the modern culture. Therefore, despite possible turbulences or declines in the dynamics of the process, as long as our intellectual horizons are predetermined with individualistic anthropology, our decisions will lead European governments towards the creation of a unified, supranational European state. It seems impossible to prevent this process of deconstruction of the modern nation-states at the political or intellectual level, unless a radical cultural change appears that would refer to the content of premodern intellectual categories, rediscovering the proper meaning of the social, and not individualistic, nature of man.

References

Alexy, R. (2002) *A Theory of Constitutional Rights*. Oxford: Oxford University Press.

Aretin, J., Freiherr von, Ch. (1838) *Staatsrecht der constitutionellen Monarchie*. 2nd edn. Leipzig: Literatur-Comptoir.

Bałaban, A. (2007) 'Sześć funkcji Sejmu Rzeczypospolitej Polskiej', *Przegląd Sejmowy,* 81(4), pp. 127–150.

Baszkiewicz, J. (1998) *Powszechna historia ustrojów państwowych*. Gdańsk: Arche.

Baszkiewicz, J., Ryszka, F. (1979) *Historia doktryn politycznych i prawnych*. Warszawa: Państwowe Wydawnictwo Naukowe.

Beck, U., Grande, E. (2009) *Europa kosmopolityczna. Społeczeństwo i polityka w drugiej nowoczesności*. Warszawa: WN Scholar.

Buchner, W. (1996) *Kant – państwo i prawo*. Kraków: Aureus.

Dareste, R. (1862) *La justice administrative en France. Traité de contentieux de l'administration*. Paris: Durand.

Dicey, A.V. (1908) *Introduction to the Study of the Law of the Constitution*. 7th edn. London: Macmillan.

Ermacora, F. (1977) 'Teoretyczne koncepcje praworządności państwowej', *Studia Prawnicze*, 1(51), pp. 3–8; https://doi.org/10.37232/sp.1977.1.1.

Esmein, A. (1896) *Eléménts de droit constitutionnel Français*. Paris: Larose.

Fichte, J.G. (1796) *Grundlage des Naturrechts nach Prinzipien der Wissenschaftslehre*. Iena – Leipzig: Ch.E. Gabler.

Fichte, J.G. (1869) *The Science of Rights*. Philadelphia: J. B. Lippincott & co.

Galster, J., Witkowski, Z. (1996) *Kompendium wiedzy o Unii Europejskiej*. Toruń: Dom Organizatora.

Graser, A. (2023) 'The Dilemma of the Presumptuous Watchdog: Constitutional Identity in the Jurisprudence of the German Federal Constitutional Court' in Varga, Zs. A., Berkes, L. (eds.) *Common Values and Constitutional Identities. Can Separate Gears Be Synchronised?*. Budapest – Miskolc: CEA Publishing, pp. 13–49; https://doi.org/10.54237/profnet.2023.avlbcvci_1.

Grzybowski, K. (1968) *Historia doktryn politycznych i prawnych. Od państwa niewolniczego do rewolucji burżuazyjnych*. 2nd edn. Warszawa: Państwowe Wydawnictwo Naukowe.

Harris, J., Schofield, P. (1998) *The Collected Works of Jeremy Bentham: 'Legislator of the World': Writings on Codification, Law and Education*. Oxford: Oxford University Press; https://doi.org/10.1093/actrade/9780198207474.book.1.

Hegel, G.W.F. (1861) *Lectures on the Philosophy of History*. Vol. 3. London: George Bell & Sons.

Helvétius, C.A. de (1810) *A Treatise of Man His Intellectual Faculties and His Education. A new Improved edition. Vol. 2*. London: Albion Press for J. Cundee, and Vernor, Hood and Sharpe.

Hobbes, T. (1996) *Hobbes: Leviathan: Revised student edition*. Edited by R. Tuck. Cambridge: Cambridge University Press.

Hurrell, A. (2007) *On Global Order: Power Values and the Constitution of International Society*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780199233106.001.0001.

Izdebski H. (2001) *Historia administracji*, 5th edn. Warszawa: Beck.

Izdebski, H. (1990) 'Francja' in Garlicki, L. (eds.) *Sądownictwo administracyjne w Europie Zachodniej*. Warszawa: Państwowe Wydawnictwo Naukowe, pp. 35–82.

Izdebski, H. (2005) 'Francuska Rada Stanu', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 1(1), pp. 137–142.

Izdebski, H. (2007) 'Sądownictwo administracyjne w Europie', *Zeszyty Naukowe Sądownictwa Administracyjnego*, No. 4, pp. 133–138.

Izdebski, H. (2010) 'Zasada proporcjonalności a władza dyskrecjonalna administracji publicznej w *świetle* polskiego orzecznictwa sądowego', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 28(1), pp. 9–23.

Kant, I. (1797) *Metaphysische Anfangsgründe der Rechtslehre*. Königsberg: Friedrich Nicolovius.

Klabbers, J., Peters, A., Ulfstein, G. (2009) *The Constitutionalization of International Law*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780199543427.001.0001.

Kowalik-Bańczyk, K. (2005) 'Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law', *German Law Review*, 6(10), pp. 1355–1366; https://doi.org/10.1017/S207183220001436X.

Kruk, M. (2006) 'Tryb przystąpienia Polski do Unii Europejskiej i konsekwencje członkostwa dla funkcjonowania organów państwa' in Wójtowicz, K. (eds.) *Otwarcie Konstytucji Rzeczypospolitej Polskiej na prawo międzynarodowe i procesy integracyjne*. Warszawa: Wydawnictwo Sejmowe, pp. 139–157.

Kubiak, A. (1993) *Francuska koncepcja kontroli konstytucyjności ustaw*. Gdańsk: Wydawnictwo UG.

Kumm, M. (2005) 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', *European Law Journal,* 11(3), pp. 262–307; https://doi.org/10.1111/j.1468-0386.2005.00260.x.

Langrod, J.S. (1925) *Zarys sądownictwa administracyjnego ze szczególnym uwzględnieniem sądownictwa administracyjnego w Polsce*. Warszawa: Instytut Wydawniczy "Bibljoteka Polska".

Lash, S. (1994) 'Reflexivity and its Doubles' in Beck, U., Giddens, A., Lash, S. (eds.) *Reflexive Modernization. Politics, Tradition and Aesthetics in the Modern Social Order*. Stanford: Standord University Press.

Łętowska, E. (2005a) '"Multicentryczność" systemu prawa i wykładnia jej przyjazna' in Popiołek, W., Ogiegła, L., Szpunar, M. (eds.) *Rozprawy prawnicze księga pamiątkowa profesora Maksymiliana Pazdana*. Kraków: Zakamycze, pp. 1127–1146.

Łętowska, E. (2005b) 'Multicentryczność współczesnego systemu prawa i jej konsekwencje' *Państwo i Prawo*, 4/2005, pp. 3–10.

Łętowski, J. (1990) 'Austria' in Garlicki, L. (eds.) *Sądownictwo administracyjne w Europie zachodniej*. Warszawa: Państwowe Wydawnictwo Naukowe.

Locke, J. (1824) *Two Treatises of Government*. A New Edition. London: Thomas Tegg.

Longchamps, F. (1968) *Współczesne kierunki w nauce prawa administracyjnego na zachodzie Europy*. Wrocław-Warszawa-Kraków: Zakład Narodowy im. Ossolińskich.

Łustacz, L. (1968) *Ustawa i rozporządzenie w klasycznej doktrynie francuskiej i niemieckiej*. Warszawa: Państwowe Wydawnictwo Naukowe.

Lyotard, J.F., Thébaud, J.L. (1985) 'Just Gaming', *Theory and History of Literature*. Vol. 20. Minneapolis: University of Minnesota Press.

Marsili, G.M. (1910) *Il concetto di eccesso di potere. Saggio di Diritto Amministrativo*. Perugia: Tipografia di G. Boncompagni.

Marx, K., Engels F. (1848) *Manifesto of the Communist Party*. London: William Reeves.

Montesquieu, Ch. (1859) *Œvre completes de Montesquieu*. Vol. 1. Paris: L. Hachette.

Morawski, L. (2001) *Co może dać nauce prawa postmodernizm?* Toruń: TNOiK.

Nowotarski, Z. (1947) *Instytucja „recours pour excès de pouvoir" w francuskim prawie administracyjnym*. Kraków: Nakładem Polskiej Akademii Umiejętności.

Opałek, K. (1957) *Prawo podmiotowe. Studium z teorii prawa*. Warszawa: Państwowe Wydawnictwo Naukowe.

Patyra, S. (2012) *Mechanizmy racjonalizacji procesu ustawodawczego w Polsce w zakresie rządowych projektów ustaw.* Toruń: Wydawnictwo Adam Marszałek.

Perelman, Ch. (1984) *Logika prawnicza. Nowa retoryka*. Warszawa: Państwowe Wydawnictwo Naukowe.

Petersem, J.W. (1798) *Litteratur der Staatslehre: Ein Versuch. Erste Abtheilung.* Stuttgart: Metzler.

Pietrzak, M. (1987) 'Państwo prawne w Konstytucji z 17 marca 1921 r.', *Czasopismo Prawno-Historyczne*, 39(2), pp. 103–134.

Quesnay, F. (1888) *Œuvres économiques et philosophiques de F. Quesnay fondateur du système physiocratique … publiées avec une introduction et des notes par Auguste Oncken*. Paris: Guillaumin.

Radwański, R. (1985) *Socjalne państwo prawne w doktrynie Republiki Federalnej Niemiec 1949–1969.* Opole: Instytut Śląski.

Rousseau, J.J. (1792) *Du contrat social (ou) Principes du droit politique*. Lyon: De l'imprimerie d'Amable Le Roy.

Sadurski, W. (2006) ''Solange, Chapter 3': Constitutional Courts in Central Europe – Democracy – European Union', *EUI LAW Working Paper,* No. 2006/40; https://doi.org/10.2139/ssrn.963757.

Safjan, M. (2006) 'Niezależność Trybunału Konstytucyjnego i suwerenność konstytucyjna RP', *Państwo i Prawo*, 6/2006, pp. 3–17.

Sobieralski, K. (2006) 'Z problematyki sądownictwa administracyjnego w Austrii', *Zeszyty Naukowe Sądownictwa Administracyjnego*, (1), pp. 165–177.

Sójka-Zielińska, K. (2007) *Kodeks Napoleona: historia i współczesność.* Warszawa: Wydawnictwo Naukowe PWN.

Staughton, Ch. (1998) 'The Peter Taylor Memorial Lecture 1998 Too Much Law', *64 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 64(3), pp. 200–204.

Stawecki, T. (2000) 'Instrumentalne traktowanie prawa – różne perspektywy' in *Prawo i ład społeczny. Księga jubileuszowa dedykowana Profesor Annie Turskiej*. Warszawa: Wydawnictwo Sejmowe, pp. 38–57.

Stępkowski, A. (2010) *Zasada Proporcjonalności w europejskiej kulturze prawnej. Sądowa kontrola władzy dyskrecjonalnej w Nowoczesnej Europie*. Warszawa: Liber.

Stępkowski, A. (2023) 'Polish Constitutional Identity and the EU Challenges: European Law as a Tool for the Redrafting of the Polish Constitution' in Varga, Zs. A., Berkes, L. (eds.) Common Values and Constitutional Identities. Can Separate Gears Be Synchronised?. Budapest – Miskolc: CEA Publishing, pp. 225–270; https://doi.org/10.54237/profnet.2023.avlbcvci_7. Ex.avlbcvci_7.

Sulikowski, A. (2002) 'Francuska koncepcja suwerenności i jej ewolucja w procesie integracji europejskiej', *Państwo i Prawo*, 2002/8, pp. 76–88.

Tkaczyński, J.W. (2005) 'Egzekutywa demokratycznego państwa prawa wobec współczesnych wyzwań cywilizacyjnych', *Politeja*, 2(4), pp. 300–316.

Tocqueville, A. de (1856) *The Old Regime and the Revolution*. New York: Harper & Brothers.

Voltaire (Arouet, F.M.) (1901) 'Laws' (section I) in Morley, J. (ed.) *A philosophical dictionary. Vol. VI – Part I. The works of Voltaire: A contemporary version*. New York: E.R. DuMont.

Wieacker, F. (1967) *Privatsrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung.* 2nd edn. Göttingen: Vandenhoeck & Ruprecht.

Wojtyczek, K. (2009) 'Trybunał Konstytucyjny w europejskim systemie konstytucyjnym', *Przegląd Sejmowy,* 4(93), pp. 177–191.

Wołpiuk, W.J. (2004) 'U *źródeł* koncepcji demokratycznego państwa prawnego', *Studia Prawnicze*, 3(161), pp. 17–33; https://doi.org/10.37232/sp.2004.3.2.

Wyrzykowski, M. (1990) 'Republika Federalna Niemiec' in Garlicki, L. (eds.) *Sądownictwo administracyjne w Europie zachodniej*. Warszawa: Państwowe Wydawnictwo Naukowe, pp. 121–162.

Zakrzewski, W. (1959) *Działalność prawotwórcza w* świetle *teorii niemieckiej*. Kraków: Wydawnictwo UJ.

Zimmermann M. (1959) *Pojęcie administracji publicznej a „swobodne uznanie"*. Poznań: Wydawnictwo Poznańskie.

Zmierczak, M. (1978) *Ideologia liberalna w II Cesarstwie Francuskim*, Poznań: Wydawnictwo Poznańskie.

Zmierczak, M. (1995) 'Kształtowanie się koncepcji państwa prawnego (na przykładzie niemieckiej myśli polityczno-prawnej)' in Wronkowska, S. (eds.) *Polskie dyskusje o państwie prawa*. Warszawa: Wydawnictwo Sejmowe, pp. 11–27.

Zwierzchowski, E. (1989) *Europejskie trybunały konstytucyjne. Zarys rozwiązań konstytucyjnych*. Katowice: Wydawnictwo Uniwersytetu Śląskiego.

Żyro, T. (2008) *Wola polityczna. Siedem prób z filozofii praktycznej*. Warszawa: Wyd. Akademickie i Profesjonalne.

Prints without authorship

European Parliament (2023) *Explanatory statement of the Report on proposals of the European Parliament for the amendment of the Treaties (A9-0337/2023) as adopted on 11 November 2023* [Online]. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2023-0337_EN.html#_section3 (Accessed: 25 October 2024).

La justice administrative en Europe (2007) *Observatoire des Mutations Institutionnelles et Juridiques de L'université de Limoges*, Paris: Presses Univ. de France.

Trzecia debata Tocqueville'owsk. (2009) *Sąd czy ustawodawca: Legitymizacja sądownictwa konstytucyjnego we współczesnej Europie*. Łódź: Centrum Myśli Polityczno-prawnej im. Alexisa de Tocqueville'a 2009.

Legal Sources

Polish Constitutional Tribunal (2003) *Judgment of 28 January, K 2/02*, OTK ZU 1/A/2003.

Polish Constitutional Tribunal (2005) *Judgment of 27 April, P 1/05*, OTK ZU 4/A/2005.

Polish Constitutional Tribunal (2005) *Judgment of 11 May, K 18/04*, OTK ZU 5/A/2005.

Polish Constitutional Tribunal (2010) *Judgment of 24 November, K 32/09*, OTK ZU 9/A/2010.

Chapter 3

Federalism as a Principle – Constitutional Consequences

Alena Krunková

Abstract

The aim of this section is to examine federalism from the position of constitutional law and state science. Modern groupings of states are currently pushing the boundaries of traditional statehood in a new direction. This trend reveals new connections with open questions of state law. At the same time, it brings new challenges, the mastery of which presupposes a knowledge of the theoretical contexts and factual pitfalls of the application of federalism. The introduction is therefore essential to define the basic theoretical correlations of federalism as a principle of constitutionalism in relation to the territorial organisation of the state and the form of government. The form of government in the state is largely determined by the structure of its supreme bodies and the mutual relations between them. In addition, by their decisions, federal authorities determine the legal and factual level of relations between federation and member state. In the above context, it is necessary to examine the structure and relations of the main EU decision-making bodies, especially in view of possible federalist tendencies in the European Union.

Keywords: Federalism, Constitutional Law, European Union, Composite states, Unitary states.

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1. Introduction

As a form of state law, federalism is a traditional concept of several interdisciplinary branches. Especially in the field of state science, political science or comparative constitutional law, it is a subject of examination both in theoretical and practical terms. This is also due to the fact that it determines the limits of state compartmentalisation in connection with the redistribution of sovereignty. From the position of states, the way of effective coexistence has been a matter addressed almost since time immemorial.[1] This issue takes on a modern dimension in the current conditions of globalisation and Europeanisation, especially in relation to the growing centralisation tendencies.[2] Historical developments have also brought about various forms of unification of individual states.[3] Despite specific applications in the modern states of the twenty-first century, it has always been about resolving the original essence, namely determining the way of mutual coexistence of several state law formations. This dimension of federalism makes it an important matter of state law, anchored in the standards the nature of which is constitutional. This, on the other hand, also determines the definition of federalism in the structure of constitutional principles.[4]

Federalism has always been associated with the organisation and functioning of certain political institutions. It is an expression of their interconnection and correlation. Therefore, its definition depends on which institutions we base our definition on. According to J. Filip, in terms of the degree of autonomy and participation of the entities of the federation in the performance of their functions, federalism ranges between unitarism (practically zero degree) and confederalism.[5] At least in its basic framework, this aspect presupposes a definition of basic differences on the unitarianism-federalism-confederalism scale. All the more so because the legal framework of the European Union absorbs the features of each of them.

The term "federalism" is derived from the Latin word "foedus", one of the meanings of which is "treaty, agreement".[6] We can also perceive federalism as a

1 Bröstl, 2023, p. 112.
2 Škutova, 2013, p. 85.
3 It can be observed that from the state-law arrangement point of view, several atypical forms of association of states appear in the current period, in which elements characteristic of both the federation and those of the confederation are intertwined.
4 'Given that the constitution does not contain explicit provisions on immutable articles, it is only possible to speak of an implicit material core of the Constitution, the scope of which is determined by the case law of the Constitutional Court. A fundamental decision in this respect was the Finding in Case No. PL. ÚS 7/2017 (the so-called Mečiar amnesties), in which the Constitutional Court stated that the material core of the Constitution consists of the principles of a democratic state governed by the rule of law. As regards these principles, their enumeration is not definitive and is constantly evolving; therefore, it is necessary to assess interference with the material core of the Constitution on a case-by-case basis, taking into account also the intensity of any interference…' – see the Finding of the Constitutional Court of the SR in Case No. PL. ÚS 21/2014 of 30 January 2019.
5 Filip, Svatoň and Zimek, 2006, p. 76.
6 Holländer, 2009, p. 130.

name for the theory of using federal principles to divide competences between the member states and the whole.[7]

Federalism is most closely associated with the existence of a federation, that is, a federal state. In fact, federation is a state of the states that in terms of international law constitute a single entity. At the constitutional level, the basis of federalism as a union is the division of sovereignty between the composite state and the individual member states. However, sovereignty as such cannot be completely divided. In this sense, we understand the division of sovereignty in the spirit of the division of individual areas of social relations between the composite state and the member states, but in these divided areas, sovereignty is already fully exercised either by the member states or the federation. In the outlined context, we can specify the already known vertical definition of competences,[8] determining the position of the member states and of the whole within centralist or decentralist tendencies. Thus, from a seemingly simple construction, several questions arise, the meaning of which may also change during the dynamic development of the federation.

2. Multifacetedness of federalism – a few remarks on the theoretical concept

2.1. Federalism as a way of territorial organisation of the state

Federalism provides the conceptual basis for the federation as a form of a composite state. Therefore, we will also use the term federation as a definition of state designation in terms of the state form. It is natural for each state to divide its territory for the purpose of its effective administration. It is also okay that the state itself determines its territorial units and defines their legal status in a more or less centralised way. If we were to examine a unitary state, the above specification would be definitive in this sense. However, territorial division and the definition of relations between individual levels of territorial and administrative units is also true of federal states, yet this is not always unambiguous.

However, it follows from the nature of the federal state that the essential territorial units of which it is composed are not only administration and government in nature, but that they also have a state law dimension. In the federation, the territory is made up of territorial and political (not administrative) units that have the nature of a state. Thus, at least two state units exist voluntarily next to each other in

7 Simply put, federalism is a method of political organisation that brings together individual states or other political entities within a larger political system, while allowing each entity to maintain its own autonomy.

8 Žofčinová, 2020, pp. 381–392.

one state unit, or the territory of some federations is further divided into the areas of capital cities (districts) or federal (territories), which are directly administered by federal authorities. This is the alpha and omega for any differentiation of composite states. To begin with, we consider it important to emphasise that according to the nature of territorial units in the state, we distinguish:

- Unitary states – their territory is divided into territorial units of an administrative and legal nature, or territorial units of a territorially self-governing nature (e.g., Slovak Republic, Czech Republic, Hungary, Poland), or autonomous territorial units (Italy).
- Composite states – already having territorial units of state law nature in their territory, usually federations (U.S.A., Austria, Germany), but also other forms of composite states (personal union, or real union).

In addition, from the point of view of international law, confederations can be distinguished as unions of states (Switzerland[9]) and other transnational associations, such as the European Union. The nature of the territorial units of the state is thus the dividing line between a unitary and a composite state. However, no less important is voluntary participation. This is because the latter determines the position of relations between the state as a whole and its units (units or internal divisions). At a legal level, these relationships manifest themselves:

- in division of power and competences between the state as a whole and its units, the member states,
- in the legal status and mutual relations of state authorities with the competence of the whole (common bodies of the state as a whole) and the authorities of individual member states.

In federal state units, relations between a member state and its territorial units also arise, which are equally manifested at a legal level by the division of jurisdiction and the competence between the member state as a whole and its territorial units, as well as in the legal status and mutual relations of state authorities with competence in the territory of a member state and the authorities of individual territorial units. Therefore, through the rule of law, the territorial organisation of the federal state operates in a multi-stage manner:

- firstly at the level of federation and territorial units, i.e., the member states;
- subsequently, at the level of the member states and their territorial units, i.e. the self-governing units of the member states;
- but also at the level of federation and territorial self-governing units of the member states within the framework of the application and direct effect of

9 In state theory, Switzerland is referred to as an example of a confederation, the official name of Switzerland is still the "Swiss Confederation" according to the 1999 constitution, but Switzerland is a state unit exhibiting features that meet the definition of a federal state. The United States were also a confederation until the adoption of the 1787 constitution.

federal legislation with respect to these units, which are issued from the position of the centre for the purpose of performing other state functions. Within the framework of EU legal acts, this aspect – direct effect of EU regulations (e.g., GDPR) on self-government bodies – direct intervention in the activities of self-government bodies.

When specifying the organisation of the state as a whole in terms of its territorial organisation, it is also necessary to take into account several fundamental power issues beyond the sphere of territorial self-government. For example, the question of the holder of state power, forms of exercising public power, as well as direct participation of the population in the exercise of public power, which thus take on a three-tier character in the federation.

2.2. Federalism and its place within the principles of constitutionalism

In countries applying a federal state constitution, federalism is, by nature, a constitutional principle. The essential moment in this context is the fact that the federation arises from being enshrined in the constitution, not through an international treaty. It thus becomes a fundamental constitutional principle on which the law of the federation is based and forms the basis for the so-called federal legal standards (federal law).

This aspect is also the basic dividing line for determining the constitutional nature of a body which is a state. That is, whether the body constituting a state (grouping or union of states) operates on a contractual basis within the rules of international law or whether the body constituting a state is based on the value of classical constitutional law, at the same time explicitly expressed in the standard of the supreme legal force. This differentiating criterion also represents the main difference between federation and confederation. Originally, the forms of federation and confederation as concepts were confused. Their content started to become clearer only in the mid-19th century, when confederations referred to looser connections of sovereign states, or unions of states, based on a foundation which took the form of a treaty.

The fact that the legal basis for the establishment of a confederation is an international treaty results in a strict ratification of the founding international treaty of the confederation from the position of all members of the federation. The setting of the creation of primary law of the European Union takes over this model of functioning, which probably sometimes leads to considerations that the legal form of the European Union could have the character of a confederation. A further misleading assumption comes from another aspect of confederation, namely that it is made up of independent states that retain their status of full international entities in terms of international law. They do not adapt their constitutions to the founding treaty of the confederation, on the contrary, the core of their functioning is the constitution, in which they independently (and not infrequently differently from other confederation entities) regulate their internal organisation of the state. At the same time, only the member states are bearers of sovereignty in the confederation. The founding treaty of a confederation is only a

connecting attribute of independent states and must comply with their constitutions. At this point, however, the functioning of the European Union differs significantly from that of a confederation. On the one hand, this is due to the nature of primary law in terms of the principle of its primacy, and, on the other hand, to the decision-making activity of the Court of Justice of the European Union and its established case-law. Similarly, another sign of confederation cannot be applied to functioning of the European Union. This is because confederation lacks a complete system of its supreme bodies, unlike federation. The confederation creates only those bodies that it needs to exercise its competences. As a rule, these are issues of customs, finance, and alternatively foreign policy or defence. However, unanimity also applies to the functioning and decision-making processes of these bodies, which is reminiscent of the functioning of the European Communities before the introduction of decision-making by majority. Moreover, decisions of confederation bodies are not directly binding on the entities of national law in the territory of the confederation member states, only on the member states themselves. Which is also an element that is different from the functioning of the European Union. Similarly, confederation does not usually establish its own citizenship, which is another difference between the federation and the European Union. From a historical point of view, one more differential aspect is visible, that the confederation has mostly represented the so-called transitional form either to create a stronger union, a federation (e.g., U.S.A., Switzerland), or to its demise and the emergence of unitary states (e.g., the former Yugoslavia, the Czechoslovak Federal Republic).[10]

As a constitutional principle, the principle of federation was incorporated by the US constitution of 1787 in such a way that the central power of the federation was derived from the authority and sovereignty of the people, not from a position of the authority of the member states. The member states had the opportunity to express their positions in the framework of the ratification of the constitution, but this did not change the fact that federal power gained the right of its immediate exercise in relation to all citizens. At the same time however, the member states remained equally sovereign in those areas of competence that the constitution defined for them. Based on the aforementioned premise, based on federalism as a constitutional principle and with some modifications, other composite states have been created.[11]

The principle of federalism as a constitutional foundation is expressed by several signs, regardless of whether the constitution explicitly defines it or not. These features

10 The Constitution of the Slovak Republic was created during the time of the common state with the Czech Republic, during the time of the Czechoslovak Federative Republic. The process of its creation was the result of rather turbulent democratic changes that began with the fall of the totalitarian regime in November 1989. The coexistence of the Czech and Slovak peoples in the common state gradually became more and more problematic. In January 1990, shortly after the November events, the Slovak National Council (the chamber of the federal parliament for the Slovak Republic) adopted a declaration, which became a political decision, on the drafting of three separate constitutions – the federal constitution and the constitutions of two member states – the Czech and Slovak Republics. Unfortunately, it was not possible to synchronise the work on the three constitutions in the course of further development.

11 Orosz, 2021, pp. 55 et seq.

are derived from the already mentioned divided sovereignty, which allows member states to build statehood without restrictions. Thus, a clear sign is the coexistence of the constitutions of member states alongside the federal constitution. The same applies to the dual system of state authorities, citizenship, dual legislative, executive and judicial powers. Nevertheless, the basic feature remains the constitutional division of competences between the federation and the individual member states.

Thus, the definition of federalism in the constitution presupposes the definition of the scope which can be stated exhaustively – that is, by a positive enumeration for one of the entities and a negative enumeration for the other federal. If the federation's competences are explicitly enumerated in the constitution and are enumerative in the case of a member state, it will usually be federalism of a decentralised nature (e.g., the U.S.A.). Otherwise, that is, if the competences of the member states are exhaustively defined and the federation has its competence determined negatively (i.e., the federation acts in all other undefined areas), this may lead to signs of centralised federalism. Similarly, Belgium has its powers defined in the constitution, although it is not possible to talk about the excessive centralisation of federalism there now. A special structure of competences in this regard is contained in the Fundamental Law of the Federal Republic of Germany, which, in addition to explicitly defined competences of the federation and the member states, also enshrines the so-called competing legislation. In accordance with Art. 72 para. 1 of the Fundamental Law of the Federal Republic of Germany, rights of priority of federal bodies is provided for, so the member states may issue legislation only if the federation has not exercised this right. The above division of powers leads to centralisation of federation in favour of federacy.

When splitting powers, it is also appropriate to mention the so-called cooperative federalism. It is based on mutual support, solidarity and rational cooperation. It leaves the power conflict between the whole and the member states behind, it is based on the principle of subsidiarity, according to which it is necessary to entrust the federacy only those powers that the member states cannot exercise purposefully, or often not even realistically.

2.3. Federalism and the Form of Government

The basic features of a federal state are:

- composite state – the federation consists of territorial units that are of a state-legal nature;
- the federation is thus a "state of states" that form a single entity in terms of international law;
- the legal basis of the federation is the constitution, the creation or approval of which is participated in by the member states in various forms (qualified majority voting, requirement of ratification by the member states, approval in a national referendum in conjunction with support by a majority in the member states or in a qualified number of them);

- the common (central) constitution of the federation (usually referred to as the federal constitution) defines the division of competences between the state as a whole and its individual parts;
- member states have their own constitutions, which must be in accordance with the federal constitution;
- there is a dual system of supreme state authorities (the federal system of supreme state authorities and the system of supreme state authorities in each individual member state);
- a bicameral structure of the parliament exists in a composite state, within which the second chamber is of a federal chamber nature, i.e., the chamber representing and protecting the interests of the member states (in the federal chamber, the member states are usually represented equally);[12]
- in some federations, special constitutional bodies formed by representatives of the member states in the constitutionally established ratio are created to protect the member states' interests (e.g., the Federal Council in the FRG, representing a kind of a second chamber of the Federal Parliament);
- dual system of legislation (federal and of the member states) exists;
- dual citizenship (federal and of the member states) exists.[13]

Federalism and the form of government cannot be separated, because they are an essential part of the principles of constitutionalism. In addition, in countries using the federal state system, the form of government is fundamentally influenced by elements of federalism. The direction of the relationship of the supreme state bodies depends on its centralisation or decentralisation, which determines the form of government in a fundamental way. If we approach the definition of the term "form of government" in a broader sense, it will be necessary to specify and define the following questions:

12 From this point of view, such specificity was the Czechoslovak Federation as a two-member federation, within which the parity representation of representatives of both republics was guaranteed in the House of Nations of the Federal Assembly. Moreover, when deciding on matters exhaustively defined by the constitutional law on the Czechoslovak Federation, the Czech part of the House of Nations and its Slovak part voted separately, while the approval of both parts of the House of Nations was required to approve the decision in question (prohibition of majorisation).

13 A frequently discussed issue is the possibility of new member states entering a composite state, which is generally accepted, and in some states also sets the conditions for the entry of new states into the federation. The question of secession of a certain member state from the federation is more complicated. Although the right of secession is theoretically generally admitted (despite the classical federations – the USA and Switzerland - not recognising it), it is not explicitly enshrined in the constitutions of the composite states. The exceptions were socialist federations, e.g., it was enshrined in the Constitution of the USSR, although the implementing federal law to this constitutional provision was adopted only in 1990. Ultimately, referendums on secession from the USSR (or referendums on state independence) were held in several Soviet republics and became the constitutional basis for the constitution of independent states. In a similar disintegration process, the SFRY unravelled. In both cases, however, the holding of referendums was associated with armed riots to a greater or lesser degree, and also open military conflicts. In contrast, the constitutional basis for peaceful division of CSFR originated in the constitutional law of the federal parliament without holding a referendum (despite the fact that this institute formed part of the federal legislation).

– who is the bearer of power, i.e., who the power is vested in,
– in what forms the power is exercised,
– what is the legal status, manner of creation of powers and competences of the supreme constitutional bodies and their mutual relations,

It is the last level that determines the form of government in the narrow sense of the word by defining the structure of the supreme, in this case, federal bodies.

3. Federal bodies – creators of federal power

In standard state formations that enshrine federalism in their constitutions, a system of independent federal bodies is envisaged. The peculiarities of these federal bodies can be specified on several levels:

– federal bodies stand along the line of the supreme authorities of the member states, thus implementing a dual system of power in the state,
– they create a separate structure of supreme bodies, mostly copying the structure of the member states, which, however, does not have to be the rule (e.g., Australia and Malaysia are federal states, and their form of government is a constitutional monarchy),
– the type of form of government is determined by federal state bodies according to the mutual relations among them,
– representation of all members of the federation is required in collective federal bodies, and the manner of representation is either parity (e.g., the US Senate) or proportional (Federal Council in Austria),
– the method of formation of collective federal bodies is predetermined. It usually presupposes the direct participation of the member states' citizens in their creation (by direct elections), but the principle of delegation (Federal Council in Germany) is not excluded,
– changing the form of government is thus a bit more difficult, as it requires consent not only from the position of the federation, but also from the position of the member states.
– federal bodies play an essential role within the federation as a whole – they represent and exercise legislative, executive and judicial powers, thus copying the tripartite separation of powers in the state,
– federal bodies also play an essential role externally, in international relations, as they represent the federation and are often the point of contact between the international level and their member states.

In other words, it is impossible to study federalism without examining its supreme bodies.

3.1. The institutions of the European Union as a federal bodies?

Thus, a specific situation arises in the context of the European Union. There is a long-standing dispute over sovereignty between the Member States and the institutions of the Union in the form of a latent conflict over the relationship of European Union law with the constitutions of the Member States. Here, too, it is obvious that the sovereignty of the Union tends to be implemented through the European Union institutions.

The institutions or bodies of the European Union are the factor that played an important role in its integration. Their position has changed, not only in terms of their composition, but also in terms of their powers. The examination of the bodies of the European Union is also important in relation to the future development of the Union. Pursuant to Article 13 of the Treaty on European Union (hereinafter referred to as the EU Treaty) and Article 223 et seq. of the Treaty on the Functioning of the European Union (TFEU) the bodies of the European Union are considered to be the following: the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors. In addition to their exclusive enumerative listing in the Treaties, a common feature of these bodies is that they apply, in the manner provided for in the Treaty, whether they form the standards of European Union law, regardless of where they are domiciled. In another sense, we can also characterise them as authorities that in some way resemble the authorities of the State in terms of powers or, alternately, creation. In this respect we denote them as fundamental or main bodies of the European Union, which have the opportunity to use subsidiary or auxiliary bodies for their activities.

At the level of federalism (and in composite states), it is the federal authorities that perform essential tasks not only in relation to the law of the federation. Particular attention is paid to those federation bodies that are created directly, as their legitimacy is unquestionable. In the European Union, only the European Parliament is such a body.

3.2. Stages of development of the main EU decision-making bodies

At the same time, the historical development of the European Union went hand in hand with development of its main bodies, not only from a quantitative point of view. Although the founding treaties (of the three communities at that time) did not devote a large space to characterise their main bodies (or institutions) within their texts, as is otherwise customary in federal constitutions,[14] those characteristics have been in fact gradually strengthening. When examining the main bodies of the

14 Many theoretical concepts of federalism point to the significant connection of federal bodies with the development of federalism.

European Union, it is important to point out some historical milestones that have marked a leap in their development.

A significant milestone in the development of the main decision-making bodies was the Merger Treaty of 1965. The concept of the original founding treaties of the three European Communities concerning legislative activity was based on a more prominent position of the Council, which was also often presented as the Council of Ministers. Its status in relation to the European Parliament has been reformed by developments only to a minimal extent in the context of the changes showing the trend of strengthening the powers of the European Parliament. However, this has not made the fact that even after more than half a century it still plays a key role in the legislative activity of the European Union any less significant. Thus, we can conclude that the originally created body (one of four), defined in the ECSC founding treaty, remained closest to the concept and the purpose for which it was created. Its name has also remained unchanged, which was modified only in connection with the creation of the European Union. Simultaneously with the signing of the so-called Treaties of Rome, the Agreement on Joint Bodies was also signed, which became effective upon the Treaties of Rome entering into force (January 1, 1958). On the basis of this Agreement, one Parliamentary Assembly and one Court of Justice were thus presented as bodies carrying out activities for all three Communities. In this sense, the position of the Assembly was adjusted in relation to the new communities, when it began to be perceived as the "European Parliamentary Assembly", and its number was expanded to 142 members. In terms of powers, the line of the consultative and supervisory body was maintained in relation to the executive bodies of all three Communities, which had the power to dismiss the EEC and EURATOM Commission without limitation, in the case of the ECSC High Authority, the dismissal had to be based on an unfavourable assessment of the annual report.

In March 1962, the Assembly was renamed the "European Parliament", but this name was not incorporated into primary law until the Single European Act in 1986. The structure of the institutions of the European Communities was thus as follows:

- ECSC – High Authority, Council, Joint Parliamentary Assembly, Joint Court of Justice.
- EEC – Commission, Council, Joint Parliamentary Assembly, Joint Court of Justice.
- EURATOM – Commission, Council, Joint Parliamentary Assembly, Joint Court of Justice.

The aforementioned structure was streamlined on the basis of the Merger Agreement (signed on April 8, 1965, and effective from January 1, 1967), according to which three Councils were merged into one for the joint exercise of powers. The High Authority of the ECSC and the EEC and EURATOM Commission have been replaced by a single Commission. The European Parliament has acquired the power of scrutiny with the possibility of appeal to the Commission. This created a quartet of authorities exercising powers for all three communities, but consistently guarding

their position with respect to each of the communities. When dealing with its affairs, each of the bodies observed the founding agreement to which the matter related.

3.2.1. Trend of Expansion

Following the expansion of the three communities and subsequently the European Union, the expansion of their bodies (with respect to their competences) is beginning to be perceived in terms of both a quantitative and a qualitative point of view. As the integration and cooperation of the European Communities with neighbouring (non-member, or third nation) countries deepened, the issue of institutional reform became more prominent. According to the so-called Luxembourg compromise, major decision-making in the Council was pushed into the background, causing considerable complications in the adoption of legal acts and indicating a change in the direction of integration by an inconspicuous return to classic international cooperation. In addition, this fact was in favour of modifying the decision-making rules and the structure or mutual relations of the individual main bodies. Due to the nature of the legal basis of the bodies under examination (in primary law), the changes took place wholly within the revision treaties. In this context, we narrow the area of examination mainly to selected aspects following the Single European Act (1986), the Treaty of Amsterdam (signed on October 2, 1997, effective May 1, 1999) and the Treaty of Nice (signed on February 26, 2001, effective February 2, 2003).

From among the changes in the proceedings of the Council of the European Union, we consider it important to draw particular attention to the following facts. In connection with the vote, the Single European Act definitively broke the Luxembourg compromise when the application of majority voting in the Council was introduced. At first, harmonisation rules necessary for the establishment of the internal market were adopted in this way, and gradually majority decision-making became the normal way of voting for the Council of the European Union. An important fact from among the changes to the Treaty of Amsterdam was the appointment of a new Secretary-General of the Council as High Representative for the European Union's foreign policy. The Treaty of Nice reassessed the ratios of the so-called "weighted vote" in the Council and introduced a system of the so-called "double majority" (voting based on votes and population). Although the perception of the position and powers of the European Parliament has shifted significantly towards emphasising its role in the functioning of communities, and despite representing the legislative power of individual member countries, it nevertheless remained an institution unchanged from the point of view of how it was created - as a delegation of members of national parliaments.

The way the Commission was created has changed, in that the President of the Commission was to be appointed by the governments of the Member States on the basis of a unanimous decision and the subsequent consent of the European Parliament. The appointment of individual members of the Commission was also entrusted to the subsequent scrutiny of the Parliament. In this context, a kind of fictitious relationship

"European Parliament – Commission" emerged with a conspicuous manifestation of the parliament-government relationship in a parliamentary governmental form. Another revision treaty – the Treaty of Nice – continued to strengthen the European Parliament's powers in the legislative field. It modified the status of MEPs and updated their number. It granted Parliament the full right to become a privileged claimant in invalidity proceedings before the Court of Justice. The position of the President of the Commission was strengthened inwardly, and the President was given a sovereign position towards individual members of the Commission (redistribution of the agenda, appointment of the Vice-President with the subsequent consent of the Commission, obligation of the Member of the Commission to resign if invited to do so by the President and the Commission agrees with it, etc.). The way the Commission was created changed - the President was appointed by the Council with the consent of the European Parliament, then the President proposed the other members of the Commission, who were approved by the European Parliament and appointed by the Council, in consultation with the President-designate and after the Member States had submitted their positions. Each Member State was entitled to be a member of the Commission.

3.2.2. Trend of Reform

The European Union, like other non-EU countries, is in the process of reform. Global conditions across societies cause consequences of a diverse and, above all, unpredictable nature. The ongoing changes clearly affect the internal market, but in a subsidiary way, they cause an increase in new aspects in the position of Member States. An attempt at responding to those circumstances was in fact the Lisbon Treaty (signed on December 13, 2007, and effective from December 1, 2009), which itself entered into history with a subtitle of the "Reform Treaty". The reform function in relation to the examined bodies was fulfilled in some way, although the original ambitions indicated a broader scope of changes, which were to be reflected in the impact on the entire area of public administration also in the position of individual Member States. Last but not least, the very activities of the European Union bodies in the so-called border issues implemented[15] a certain latent process of changes from the inside. Changes in the positions of the examined bodies are undoubtedly of a broader nature than those listed here, but in the context of this chapter and in accordance with the examined attributes, we consider it important to draw particular attention to the following. The Council of the European Union remained the main legislative body of the European Union, which, even though having undergone some changes in its development, remained fundamentally unmarked by them in terms of its powers or composition. The changes were implemented only for the purpose of improving operations and streamlining decision-making processes. The six-month rotating presidency of the Council was preserved with the modification of the coordination of

15 Žofčinová, 2016, pp. 45–53.

three consecutive states (the so-called "troika formation"). The High Representative for Foreign Affairs and Security Policy was appointed to the Foreign Affairs Council as its Permanent President.

Substantial changes were introduced by the Treaty in relation to the European Parliament, which extended its powers in the field of legislation, the Union budget and international treaties. In terms of the European Parliament creation, it is rightly denoted as the "legitimately elected body". The power of the legitimate process of direct elections is unquestionable; the handing over of a mandate from the source of power (the citizens) should obviously result in a real possibility to exercise that power. Its role also changed by the fact that it gained the right to take a position on (and subsequently to approve or not to approve) the issue of admission of new Member States to the Community. The legislative process of cooperation was enshrined in secondary legislation, and it also affected the position of the European Parliament. From the original advisory – consultative power, the Parliament was granted a substantive share in the area of legislation, the Union budget and international treaties in the ordinary legislative procedure.

The powers of the Commission to issue implementing rules for legal acts adopted by the Council were partially expanded. According to the original version of the Lisbon Treaty, the number of members of the Commission was to be reduced. Based on the so-called "Irish Protocol" the principle that each Member State would have one representative in the Commission was retained. The European Parliament's relationship with the Commission was strengthened, in that the President of the Commission was elected by Parliament on the basis of a proposal from the European Council in accordance with the results of the parliamentary elections.

At present, it is difficult to predict in which direction developments in the area under examination will take us. In connection with global events (war conflicts), no revision of the founding treaties is planned, but it is also not possible to exclude the factual strengthening of the main bodies of the European Union.

3.3. The European Parliament

Elections to the European Parliament will take place in all Member States in 2024. At the same time, the European Parliament is the body whose transformational development is the most pronounced among the bodies of the European Union. I will mention some of its historical milestones:

The predecessor of the European Parliament was the Parliamentary Assembly (hereinafter referred to as the "Assembly"), which was established under the Treaty of the European Coal and Steel Community (1951) and consisted of 78 representatives, delegates from the national parliaments of the six founding countries (France, Germany, Italy, the Netherlands, Belgium, and Luxembourg). Thus, it was in the position of an indirectly created body, from members of the parliaments of the Member States, i.e., from representatives of the legislative power within individual Member States. The powers initially conferred did not indicate that the Assembly was planned

as a fundamental legislative body, and most likely not as the only law-making body. In accordance with the founding agreement, it was vested with mainly consultative (in budgetary matters) and supervisory powers. Its task was also to supervise the activities of the High Office, evaluate its annual report, or divest it of full powers in justified cases permissible by the treaty. The first Assembly conceived in this way convened on September 10, 1952 in Strasbourg.

In March 1962, the Assembly was renamed the "European Parliament", but this name was not incorporated into primary law until the Single European Act in 1986.

The first direct elections to the Parliament were held in June 1979, in July of the same year the European Parliament began to operate with 410 Members from nine Member States at its headquarters in Strasbourg. The transnationality of the European Parliament was supported by the fact that its members, namely deputies, lost their dependence on national parliaments and, from the point of view of creation, presented direct legitimacy in the sense of the legitimation chain through direct elections. The Single European Act once again extended the role of the European Parliament, which gained the right to express its opinion on the issue of admitting new Member States to the Community and subsequently to either authorise or not authorise their entry. The legislative process of cooperation was enshrined in secondary legislation and it also affected the position of the European Parliament. From the original advisory, consultative power, the Parliament was granted a substantive share in the creation of some legal acts. In practice, this meant that the Council could only adopt the common position after hearing the opinion of the European Parliament, but still without the need for its consent. The Maastricht Treaty significantly strengthened the role of the European Parliament in both legislative and supervisory work. For example, the introduction of the co-decision procedure strengthened its participation in the creation of secondary legal acts. It was granted the so-called budgetary power (in the process of creating the European Union budget). In relation to the Commission, Parliament has acquired the right to request legislative action (the so-called indirect legislative initiative) and its power to appoint the Commission has been strengthened. At the request of at least a quarter of its Members, it was allowed to set up "inquiry committees" to investigate offences or misconduct in the implementation of Community law before the Court of Justice. The extension of the powers of the European Parliament was renewed in the legislative area under the Treaty of Amsterdam, when the number of sectoral policies in which the co-decision principle was applied to the adoption of legal acts was increased. The number of Members of the European Parliament also increased, with the Treaty introducing the principle that it must not exceed 700 Members. The amendment to the Lisbon Treaty, amended by the "Irish Protocol", provided for a maximum of 751 Members, with each State needing to have at least six and no more than ninety-six Members. The current European Council Decision (EU) 2023/2061 of 22 September 2023 establishing the composition of the European Parliament, changed the number of Members of Parliament to 720.

On the basis of a brief historical excursion, we can see that the European Union made efforts to strengthen sovereignty and increase legitimacy precisely by

strengthening the position and powers of the Parliament. As already mentioned, 2024 is an election year for the European Parliament. The elections in individual countries will take place between June 6 and 9, 2024, with more than 400 million eligible voters in the 27 Member States. The Charter of Fundamental Rights of the European Union (hereinafter referred to as the "Charter"), which became legally binding upon the Treaty of Lisbon entering into force on 1 December 2009, regulates the right to vote in its fifth title entitled "Civil Rights". The right to vote is specified by the Charter in Title V in Articles 39 and 40. The above-mentioned articles deal only with electoral law at the supranational and municipal level, which is a logical procedure for not interfering with the national level in the area under examination. In relation to the transnational level, Article 39 touches on the active and passive electoral rights of the European Parliament, namely the specification of entities entitled to vote in elections. It also lays down the principle or principles of the exercise of suffrage, which are already the traditional universality, directness, secrecy, and freedom of elections. The above-mentioned level of the regulation completes the general provisions of the electoral law in connection with the fact that citizens of the European Union have the right to elect their representatives, i.e., directly create a representative body on the basis of the legitimation chain.

The regulation on how elections are carried out is the exclusive competence of the Member States. Although there are some common rules on elections, some aspects may vary from country to country, such as whether it is possible to vote by mail or from abroad. The days on which elections are held also vary. Universally, they start on a Thursday (the day when elections are usually held in the Netherlands) and end on Sunday (when elections are held in most countries). Equally, the conditions for candidacy for the European Parliament are set by the states themselves. In the elections, national political parties compete for votes, some of which are affiliated with a pan-European political party. The European dimension comes only after the elections, when elected deputies can become part of transnational political groups.

In this case, the civic dimension is of a specific nature, as it grants rights to entities and citizens of the Union, explicitly specified in the "Civil Rights" section. These rights, and that also means the right to vote, may be held by entities that are entitled to the status of "citizen of the European Union". An EU citizen is any natural person who holds the citizenship of any of the Member States. Due to the nature of citizenship of the Union, the citizenship principle is reduced to citizenship of a group of Member States. Here we identify one of the basic limits of European integration – the clash of state sovereignty with the personification of citizenship. On the one hand, the fact that EU citizenship is linked to the citizenship of a Member State makes it de facto uncontrollable for EU citizenship holders. At the same time, it is impossible for the European Union to interfere in the relationship of "Euro-citizenship", the conditions for its acquisition or loss are in the hands of the Member State. With the withdrawal of a member state, the European Union also loses voters to the European Parliament, for example. These facts negate the basic principle on which sovereign states stand – the existence of their own population, the bearer of

legitimacy and the creator of state power. Thus, Euro-citizenship does not play an important role in relation to the creation of the European Parliament, the citizenship of a Member State is crucial in this respect. The non-existence of the European peoples can be considered a "democratic deficit of the EU", but on the other hand, it cannot be overlooked that EU membership, by its very nature, extends democratic institutes in the Member States in a not insignificant way, given that

- in the vast majority of Member States the key issues of EU membership are decided in a referendum,
- citizens of the Member States directly elect their representatives in the European Parliament
- citizens of the Member States can participate in European petitions addressed to EU bodies and turn to the European Ombudsman with their initiatives,
- citizens of the Member States become the bearers of the fundamental rights enshrined in the Charter of Fundamental Rights of the EU, respect for which is guaranteed both by national courts and by the EU judiciary.[16] If we look at statistical indicators, the area of countries whose borders form the external borders of the EU (sometimes not very correctly referred to as the EU area) is more than 4 million km^2. The population accounted for by the Member States is approximately 448.4 million km^2. So far, elections for the European Parliament have been held a total of 9 times. The electoral turnout of citizens of all Member States oscillates around 50%. The highest turnout was in 1979, when parliament was elected for the first time and elections were held in nine Member States. Conversely, the lowest turnout was in 2004, when 10 new Member States took part in the elections for the first time. So far, the Slovak Republic has the first place in the lowest participation of all Member States. According to statistical indicators, we can perceive that only half of the possible voters exercise the sovereignty of their power in relation to the EU, which distorts the idea of four million European citizenship. However, statistical indicators also indicate a significant polarisation of society, which is also visible on a European scale. These are the challenges that the European Union will have to face in the future, and even when organising relations with Member States, it will have to reflect on the personnel substrate behind it.

4. Federalism and political issues

Federalism and the political scene cannot be separated. Federalism and politics are intertwined and the former also constitute a research topic in political sciences. In a broader sense, it also refers to the process of association (or integration) of

16 Orosz, 2021, pp. 56–67.

several units into a certain whole or a union. Such a whole can take various forms – it can be an association of the territory, an association of a political entity, a society, states, and the like. The political interconnection is then apparent both in the institutional and the functional aspect, i.e., in the special functioning of political and state institutions. Similarly, the institutions of the European Union arise from the political basis. Primary political interconnection is inherent in the European Council and the Council of the EU. The only EU body having a direct political mandate from the citizens of the EU Member States is the European Parliament. However, secondary political interconnectedness can be found in all major EU bodies.

The aim of this paper is to examine the interconnectedness of the political sphere and federalism (as a result of integration) in selected, and in some way borderline aspects of the constitutional level, with an emphasis on the supranational framework of the European Union. The examined level is definitely wide-ranging, that is why attention shall be focussed only on those aspects that piqued our interest especially in connection with the Slovak Republic's experience with federalism. If generalised to a certain extent, a parallel with the current political situation in the European Union can be discerned.

The basic question in this context is then the determination of the degree of influence of the political elite on federalism, the answer to which necessitates exploration of the topic at several levels. Namely:

1) Influence of the political scene at the birth of federalism
2) Influence of the political scene during the life of federalism
3) Influence of the political scene upon the demise of federalism

Drawing from examples of individual stages experienced in the Slovak Republic, we want to point out the danger of underestimating the impact of political context in the European Union. The unsuccessful ratification of the Treaty establishing a Constitution for Europe in 2004, or the so-called "Brexit", which began with a referendum in 2016, showed that the political elite in a state can have a very significant impact on decision-making processes related to state law issues.

Under the political elite, we mean representatives of the political spectrum, especially from the ruling, but also from the opposition political parties, as long as they are in a position to actually influence public opinion. The position of political parties is far from stable. It has undergone development in the same way as the states have evolved themselves. What is certain, however, is that the promoted values of the ruling political parties have a significant influence both at the birth and during the course of the functioning of federalism.

4.1. Nationalism versus Functionality – Premises of Federalism

As a part of the federal state, the Slovak Republic's history is not long. From Czechoslovakia's founding in 1918, it was part of a unitary state. The constitutional existence of two independent nations (although in a way close to each other) in

the form of a unitary statehood brought subsequent problems. On the other hand, it must be said that this historical journey together enriched, developed, and helped to overcome the obstacles of historical development in Europe.

The disintegration of Austria-Hungary proved to be a good starting point for the emergence of independent states. Just as a few decades later, the disintegration of the socialist bloc posed a good opportunity for the preparation of a relatively large number of states from behind the former iron curtain for the enlargement of the European Union. Both events were the result of the regrouping of forces of the political spectrum and the changes made to the continental political grouping.
The first Constitution of Czechoslovakia of 1920 was internationally recognised and considered one of the best constitutions of its time. However, the political spectrum that constituted it dealt with the question of the legal arrangement of the state in a special way. Despite several indications in favour of a composite state, the Constitution of the Czechoslovak Republic of 1920 introduced a unitary one. Although it built on the dualism of the legal arrangement of Austria-Hungary, it gradually planned to replace it with a uniform legal arrangement. Originally, territorial units (the Czech Republic, Slovakia, and the Carpathian Ruthenia) were to be equal, which was reflected in the symbols of the state (especially in the state coat of arms, in the national anthem). The bearer of the sovereignty of the new state became the united "Czechoslovak nation". State citizenship in the Czechoslovak Republic was conceived as the only one and uniform (§4 of the 1920 Constitution).

Very clear political positions that were of practical importance in the concept of a common Czecho-Slovak state began to be realistically manifested earlier, already in the years of the First World War. The concept of independent Czechoslovak statehood, as determined by the Czechoslovak Foreign Resistance represented by T.G. Masaryk, E. Beneš and M.R. Štefánik, began to apply.[17] Based on the Martin Declaration of October 30, 1918, representatives of Slovak political parties declared that the Slovak nation was part of a linguistically and culturally historically united Czech-Slovak nation.[18]

17 However, many socio-political events indicate that the idea of a Czechoslovak state (the constitution and integrity of the nation state) was gradually being conceived even earlier. Largely involved in the process was T.G. Masaryk, who began to combine the Czech and Slovak issues into a common Czechoslovak idea. He formulated it in his work 'New Europe: Slavic Opinion', which was also published in the so-called Washington Declaration.

18 Originally, an important manifestation of the idea of the joint statehood of the Czechs and the Slovaks was the signing of the Cleveland Agreement by representatives of the Slovak League and the Czech National Association in the USA on October 22-23, 1915. (On behalf of the Slovak League it was signed by its chairman Albert Mamatej and the secretary Ivan Daxner). The agreement set out an agenda for the union of the Czech lands and Slovakia in the form of a federative union with the full autonomy of Slovakia, which envisaged the establishment of its own parliament for Slovakia, its own state administration with the state language being Slovak. The state was to be democratic with universal and direct suffrage via secret ballot. Subsequently, the Pittsburgh Agreement (May 30, 1918), which was signed by representatives of the Czech National Association, the Union of Czech Catholics and the Slovak League, already marked a retreat from previous positions. Notably, the strengthening of the Czecho-Slovakism idea, and the fiction of a united Czecho-Slovak nation as a state-forming factor

The constitutional enshrining of the fiction of a united Czechoslovak nation and the centralist exercise of "power from Prague" in practical life undermined relations on the Slovak part. Tension was increasing together with a deepening sense of non-recognition of Slovaks as a distinct nation. This resulted in escalation of requests for Slovakia's autonomy. The unequal status of both parts of the Republic was also exacerbated by the economic policy of the state, which meant an increase in unemployment in Slovakia and emigration.

Throughout the entire existence of the pre-Munich Republic (1918–1938), relations between these two nations were not resolved at the state law level, and the demands of the Slovaks were regularly dismissed as unjustified. The small share of Slovak representation in central government and the lack of institutional guarantees (no national state bodies were established) led to tension and the destabilisation of the state. Attempts at change soon followed. Already in the summer of 1921, the Slovak People's Party submitted three specific bills on autonomy, justified as efforts to implement the Pittsburgh Agreement (1918), according to which Slovakia was to have its own assembly, administration, and courts in the common state. However, neither of the bills were addressed in the Parliament. The most famous of the bills drafted by Dr. Vojtech Tuka was the Draft Union Charter of the Czech - Slovak Federal Republic (the so-called Tuka's Constitution). Although it was not an official document, it established the confederal symbols of the Czechoslovak state.

Based on the assessment of historical facts, it can be documented that the issues of Slovakia's position were a secondary problem in the Czech policy promoting the creation of a new state formation.[19] Ultimately, when the Czechoslovak state was es-

were introduced. It no longer spoke of a federative union of the future state. According to the text of the agreement, 'Slovakia shall have its own administration, its own assembly and its own courts. Slovak will be the official language at the school, at the office and in public life'. It can, therefore, be concluded that this was to be an arrangement analogous to autonomy. This agreement had no political or legal significance. Only the constitutional bodies of the new state could decide on the future shape and form of the Czechoslovak state. See: Palúš and Somorová, 2010, pp. 26 et seq.

19 Two days after the National Committee in Prague declared an independent Czechoslovak state (October 28, 1918), representatives of the Slovak public and cultural life met in Turčiansky Svätý Martin with the aim of discussing the post-war development of Slovakia, officially establishing the Slovak National Council as a representative body and on its behalf endorsing to the idea of the right to self-determination and the creation of a common state with the Czechs. History then played one of its paradoxical stories. Slovak politicians negotiating in Martin did not know that the Czechoslovak state had already been declared in Prague. So they elected the National Council and adopted the Declaration of the Slovak Nation. When the text of the Declaration was brought to Prague on November 1, 1918, it received a warm welcome by the National Committee. The Committee considered it a sufficiently clear declaration of the Slovaks on the common state. From the point of view of state law, it was undoubtedly a fundamental document that can be included among those that laid the formal foundations of the Czechoslovak state. According to the Declaration, representatives of all Slovak political parties assembled on November 30, 1918, in Turčiansky Svätý Martin, organised at the National Council of the Slovak branch of the united Czechoslovak nation, insisted on the principle of self-determination adopted by the whole world. At the same time, the National Council embraced the fact that 'the Slovak nation is a part of the Czechoslovak nation unified through speech, culture and history'. See: Palúš and Somorová, 2010, pp. 30 et seq.

tablished, the Slovak representation accepted the ideas and program of the Czech political representation.[20] The subsequent development of Czechoslovakia in relation to the state system was characterised by a recurring question of the legal arrangement of relations between Czechs and Slovaks on the principle of equality. The constitutions of 1948 and 1960 were shaped by the socialist regime, and the political spectrum was represented by a single communist party. Any changes were only possible in the spirit of the leading party's policy line, and changing the unitary state was not one of its priorities.

As part of the adoption of the constitution in 1948 in the post-war period, a process of centralisation began, marked by the suppression of any federalist tendencies. In terms of the state legal arrangement, the Constitution defined the Czechoslovak Republic as a united (unitary) state of two equal nations of Czechs and Slovaks. Although it declared the autonomy of the Slovak nation (autonomy sui generis), institutionally the model of a unitary state with an asymmetrical arrangement was confirmed. This meant that, in addition to the Czechoslovak authorities, it anchored the existence of Slovak national authorities with limited autonomy, but it did not anchor any Czech national authorities. The Slovak national authorities (the Slovak National Council – as a legislative body and the Trustees Corps – as an executive body) had only very limited competence and were essentially fully dependent on the Czechoslovak authorities, in particular the Czechoslovak government. This model formally persisted until the adoption of the Constitutional law no. 143/1968 Statutes on the Czechoslovak Federation.

With respect to the political spectrum, the relationship between the legal constitution and the de facto constitution was significantly bound to the political regime at a specific historical stage. The political regime either more or less respected the constitution, or ignored it either to a certain extent, or completely. In the period from 1920 to 1938, the constitution was principally respected and was the basis of a pluralistic democracy; on the contrary, in the period from 1948 to 1989, the reality was political dominance over the authority of the constitution. Nevertheless, in neither period was the state law arrangement issue able to be resolved to the satisfaction of both nations.

The 1960 Constitution was centralist in the matter of the state law arrangement with only formal remnants of the asymmetric model. As part of the attempt to find a new solution for the executive bodies of the Slovak National Council, the Trustees Corps was dissolved. The Slovak National Council was described as a "national body of state power and administration in Slovakia", but its competence was only symbolic. Neither did the "efforts" to partially improve the activities of the Slovak authorities in 1963-1964 turn out to be positive. This confirmed a newly learned fact that the asymmetric model proved to be inappropriate and incapable of implementing the equal-with-equal principle in the conditions of Czech and Slovak coexistence. Subsequently, on October 27, the National Assembly adopted a constitutional law no. 143/1968 Statutes on the Czechoslovak Federation, which established the so-called dual-entity federation on a

20 See: Posluch and Cibulka, 2009, p. 53.

national basis. The foundation of the federation stemmed from the recognition of the national sovereignty of the Slovak and Czech nations, which was a significant contribution to the already curtailed reform process. This resulted in the transformation of the Czechoslovak unitary state into a composite federal state. As the federation's entities, two national republics were created, the Czech Socialist Republic (CSR) and the Slovak Socialist Republic (SSR), which reflected the proclaimed principle of two equals now at the institutional level. The reason for the creation of the federation was a renewed dissatisfaction of Slovakia in a unitary state, but the political spectrum of Slovakia was already strong enough to try implementing the changes in question in the spirit of socialist internationalism. The system of federal bodies (bicameral Federal Assembly, President, Federal Government, Federal Departments, Office of Attorney-General, Supreme Court and Constitutional Court of the Federation) and the system of the two republics' bodies were constituted (Czech National Council and Slovak National Council, Republics' Governments, Departments, Supreme Courts in the respective Republics and the Constitutional Courts of the National Republics were also to be established). The competence between the federation and the republics was divided into three groups: the exclusive competence of the federation, the joint competence of the federation and the republics, and the exclusive competence of the republics. The exclusive competence of the federation and the competence of the federation in common matters was explicitly enumerated in the constitutional law. The republics were given competence over other matters.

4.2. Political Context in the Functioning of the Federation

The process of federation formation was greatly influenced by the political events of August 21, 1968. The territory of Czechoslovakia was occupied by Soviet troops and other allied armies, which ended the ongoing process of reform. Although the representatives of the former USSR also expressed reservations about the federal arrangement of the Czechoslovak Socialist Republic, the process of adopting a federation constitutional law came to fruition in October when it passed in the parliament. However, the political situation in the country was not conducive to a genuine practice of federalism, so the process of the so-called "normalisation" began, the main feature of which was significant centralisation of political and state power. As soon as December 1970, the Federal Assembly passed a set of laws that substantially changed and distorted the content of the federation. These changes, which substantially limited the powers of the republics in favour of the centre, were part of the overall normalisation tendencies launched in April 1969.[21] Federalism was only

21 For example, constitutional law no. 125/1970 Statutes, amending the constitutional law no. 143/1968 Statutes on the Czechoslovak Federation, which, in accordance with the political objectives of the Communist Party of Czechoslovakia and the escalating "normalisation", enforced centralist elements, especially in matters of competence, so that the republics were deprived of the opportunity to influence the fundamental economic issues of the state by their authorities.

a matter of a formal statement, the constitutions of the republics, required by the constitutional law on the Czechoslovak Federation, were not adopted. Federalisation elements were increasingly weakened by both legal and factual means, which translated into a strongly unitarised federation. While each of the two republics had its own legislative body (the national council), and its own government,[22] the specific principle of prohibition of forming a majority nonetheless applied. It consisted of the fact that when voting on certain laws, the consent of the majority or the constitutional majority (of three-fifths) of representatives elected in the CSR, and the majority of representatives elected in the SSR was required.

The political influence of that time was very strong. The Czecho-Slovak Federation was established at a time when it could not rely on satisfactory internal and external political and democratic conditions and found itself more or less alone in the midst of other suspended reform actions. This was coupled with Moscow's negative international political pressure. In fact, acting on the principle of democratic centralism, the power monopoly of the Communist Party decided that its priority was the political-state unity of the state in the spirit of the idea of a united Czechoslovak statehood.

4.3. Political Influences in the Demise of the Federation

Fundamental changes in the context of dysfunctional federalism occurred after the events of the so-called "Velvet Revolution" in November 1989. It was a transition from a totalitarian socialist statehood model to the formation of a modern democratic state governed by the rule of law. Yet the issues of the state law arrangement continued to resonate, especially on the part of Slovak representatives. It was mainly a new division of competences between the federation and the republics, which would otherwise determine the degree of political and state law independence of the republics. In connection with addressing this problem, several official meetings of the heads of both the federal and the republics' governments were held with the participation of other representatives of political life, including the President of the Republic, V. Havel, in the second half of 1990. The result was the so-called "competence law", which redefined the competences between the federation and the republics in a new way.[23] It strengthened the position of the national republics in the area of foreign policy, defence and other important economic areas and extended the power of the republics' authorities in adopting federal laws. Crucial decisions remained in the hands of the federal authorities.

Still, the expected release of tension in the relations between the federation and the Republics failed to materialise. On the contrary, its adoption raised considerations about the inflexibility and dysfunction of such a federation on the part of federal authorities, meaning the competence law can be described as a missed opportunity.

22 The Czech National Council had 200 deputies, the Slovak National Council 150 deputies.

23 Constitutional law no. 556/1990 Statutes, amending constitutional law no. 143/1968 Statutes on the Czechoslovak Federation.

Initiated by the President of the Republic in the first half of 1991, several meetings of official representatives of the federation and the Republics and representatives of the coalition, later also the most important opposition political parties, were held in order to resolve the fundamental question of the constitutional system of the Czechoslovak Republic, i.e., the question of the state law arrangement. Many concepts have been put forward, ranging from completely unitarian on the one hand, through the concepts of federalism, federation, and confederation to the concepts of complete sovereignty and independence of the Republics on the other. This only confirmed the complexity of the issue raised and the diversity of competing views on its resolution.

In these negotiations, it was principally agreed that the new constitutional system should be built from the grassroots upon the initiative of the Republics. Formally, this fact was to be reflected in the application of the so-called contractual and ratification principle, according to which the basis of the new constitutional system was to be a treaty (agreement) between the Republics or between the CNC and the SNC, subsequently approved by the Federal Assembly, with the new constitution of the CSFR being subject to the approval (ratification) of national (Republics') parliaments.[24] This cleared some space for the preparation and conclusion of a state (state-law) treaty on mutual coexistence between the Republics.

In the second half of 1991 and at the beginning of 1992, a number of complex negotiations took place between the leaderships of the CNC and the SNC and their expert groups, which eventually resulted in a draft Treaty on the Principles of the State Law Arrangement of the Common State in Milovy in February 1992.[25] Nonetheless, some issues in the content of the draft treaty remained contentious.[26]

Due to the fact that the most contentious issues in the draft treaty could not be removed because of upcoming parliamentary elections, negotiations between the CNC and the SNC leaderships were suspended. The rivalry became apparent in the relations between political partners in connection with the upcoming elections. This essentially ended the talks on the possible adoption of the basic postulates of the new regulation of the common state, exhausting the political possibilities of finding a consensus on the mode of coexistence in the common state.

The political parties – the Movement for Democratic Slovakia (HZDS) in Slovakia and the Civic Democratic Party (ODS) in the Czech Republic won in the parliamentary

24 More details: Palúš and Somorová, 2010, pp. 47 et seq.

25 The SNC leadership did not pass this bill (February 12, 1992) (the vote ended at 10:10). On March 5, 1992, the leadership of the Czech National Council declared that there was nothing left to negotiate about. More details: Orosz, 2009, p. 27.

26 The disputed issues in the draft treaty were, in particular, the legal nature of the treaty (agreement), its entities and it being legally binding; the succession (procedure) of steps in the creation of a new constitutional system of Czechoslovak Federative Republic, the Czech Republic and the Slovak Republic; the method of ratification of federal constitutional standards, the division of competences between the Federation and the Republic, especially in the field of foreign relations, finance, transport and communications, etc.

elections held on June 5 and 6, 1992. Neither of these political parties had the split of the federation on their election agenda. Their election agendas only contained proposals for changes within the existing form of the state law arrangement. ODS proposed that the competences of the federation should be clearly defined, advocated a federation with strong competences of the centre, inclined toward the so-called functional federation. HZDS favoured the loosening of the federal union in favour of the confederative elements or confederation assuming the international sovereignty of each of the two Republics.[27]

Divergent views on the state law arrangement proved irreconcilable. Negotiations to maintain a common state have not been resumed by these political parties and they have not been able to find a recourse for agreement. Space for the concept of constituting separate sovereign Republics emerged. In the above case, the influence of political elites on the split of federation is apparent. This happened despite the fact that through their respective election agendas, they did not receive a mandate from voters to decide on the issue.

It can be said that the initiated process of dissolution of CSFR was the result of an objective situation created by the elections, which escalated also as a result of uncompromising ambitions of the winning election entities in both republics. Despite the predominance of political negotiations and agreements on the method of splitting the CSFR, there was a clear effort to make the division cultivated and peaceful, as well as to make this procedure constitutional. The purpose of these efforts was to create a constitutional space (framework) for a constitutional decision on division of the federation.

Thus, an original way of dividing a federation consisting of two entities was implemented in Czechoslovakia in a constitutional way. It consisted of gradual decentralisation of the federation and the transformation of the then constitutional system in a manner which enabled its division.

Significant in this process were the negotiations of the HZDS and the ODS on August 26 and 27, 1992 in Brno, where both parties agreed on a detailed schedule for the subsequent division procedure. For the first time, the date of January 1, 1993 was set as the date on which the division would actually occur.[28] Thus, federal state power disintegrated.

The constitutional basis for the division of Czechoslovakia was not a referendum, although it was a constitutional option. At that time, the referendum was regulated by constitutional law no. 327/1991 Statutes on Referendum. This law envisaged the use of a referendum on fundamental issues of the state law arrangement of the Czechoslovak Federation (an optional referendum) and on the issue of the withdrawal of the Czech Republic or the Slovak Republic from Czechoslovakia (an obligatory referendum). The referendum was not declared because the representatives of the political parties could not agree on the issue thereof. They gave priority to the

27 See, e.g., Stein, 2000, pp. 48–54, 159 et seq.
28 Orosz, 2009, pp. 25 et seq.

agreement of political leaderships in the federal parliament expressed in the adoption of the constitutional law.

Thus, the dissolution of Czechoslovakia and the creation of two successor states took place in a constitutional (legal) manner under the following constitutional regulations:

- constitutional law no. 541/1992 Statutes on Division of Property of the Czechoslovak Federative Republic between the Czech Republic and the Slovak Republic and the transfer of title thereto to the Czech Republic and the Slovak Republic (of November 13, 1992)
- constitutional law no. 542/1992 Statutes on Dissolution of the Czechoslovak Federative Republic (of November 25, 1992)
- constitutional law no. 624/1992 Statutes on the Termination of the Tenure of Judges and on the Termination of Public Service Employment in Connection with Dissolution of the Czechoslovak Federative Republic (of December 17, 1992)
- Constitution of the Slovak Republic no. 460/1992 Statutes (of September 1, 1992, specifically Articles 152 to 156 of the Constitution).

With respect to the Czech Republic also:

- Constitution of the Czech Republic, constitutional law no. 1/1993 Statutes (of December 16, 1992)
- constitutional law of the Czech National council no. 4/1993 Statutes on measures related to the dissolution of the Czechoslovak Federative Republic (of December 17, 1992).

From a historical perspective, it is noteworthy that the Federal Assembly elected as the parliament of the Czechoslovak Federation decided on the dissolution of this federation and of itself. From a political point of view, it undoubtedly exceeded the legitimacy of the election agendas of political parties, on the basis of which elections were held in 1992 and in which, barring one exception (the agenda of the Slovak National Party), the dissolution of Czechoslovakia was not mentioned at all.[29]

4.4. European Consequences (in place of a conclusion)

The European Union is not a typical textbook example of federalism.[30] First of all, it lacks a state law basis, as international treaties continue to be its primary law.

29 See: Klíma, 2003, p. 162.

30 The fundamental legal limit is the very delimitation of the form of the European Union as a supranational international organisation - an integration grouping. Legislative limits are defined by the Lisbon Treaty in its Art. 3a, para. 2: 'The Union shall respect the equality of Member States before treaties, as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. In particular, national security remains the sole responsibility of

Also absent is the voluntary component of the Member States that established the international organisation and entrusted it sovereignty only to this limited extent. In fact, it shows signs that give rise to controversy in the area of state law. Examining the political context, it can be stated that the tendencies towards federalism will be directly proportional to the political representatives of individual states. In the simplest of terms, the political spectrum of the EU can be explained as being from barely identifiable to unidentifiable. When work began on the Treaty establishing a Constitution for Europe in 2001, which was to create the so-called Constitution of the European Union, the political elite of the EU envisaged this Treaty a success. On the other hand, the political spectrum also has its own political life in the European Union. This, however, is the case only in the context of the composition of the European Parliament, and even then to a limited extent. The upcoming European Parliament elections in 2024, even with increased mandates, may change this political spectrum, which, however, can never be created solely from the position of the European Union itself. It will always be a reflection of the political forces of individual states, although the subsequent formulation in political fractions is already modifiable in a way. However, the fundamental power of the political spectrum lies in the representatives of the executive power in the Member States, mainly through the European Council and the Council of the EU. The current political arena in individual Member States may consist of several levels – the so-called three-component system in the case of federal Member States (e.g., Germany, Austria)[31] or the two-component system in the case of unitary Member States. Of the policy instruments, a referendum may play an important role, which in the case of federal Member States can be implemented at three levels, federal, state and local. A certain proportion between the exercise of political power in the state and increasing centralisation has the possibility to hinder any undesirable efforts that would threaten the current position of the Member State. Clear signals of satisfaction or dissatisfaction unambiguously manifest themselves in, for example, unexpected non-acceptance of documents of a fundamental nature (Treaty establishing a Constitution for Europe).

Despite the above, I consider it important to draw attention to the danger of the factual level of federation, which has no support in the legal system, both in the negative sense of the word on the above-mentioned example of the Czechoslovak Federation from 1968, when the federation did legally exist, except that on a real level it did not. Still the same, if not greater, danger is identifiable in the opposite case, namely if there is no federation from a legal point of view, but real elements of federalism are exhibited. In conclusion, I would like to point out that all the characteristic features of a federation (divided sovereignty, dual constitution, dual citizenship, dual system

each Member State.' Similarly, in Art. 263 of the Treaty on the Functioning of the European Union, it is added that 'The European Union is a Union based on the rule of law that has established a complete system of legal remedies and procedures designed to enable the Court of Justice of the European Union (CJEU) to review the legality of the EU institutions' acts.'

31 At federal, Member State and local level.

of state bodies, etc.) are always perceived in correlation with the current political system of the federation. Thus, for example the long-term dominant position of one or more parties without appropriate dialogue leads, over time, to the de facto emptying of the institutes of the federation. (e.g., Czechoslovak Federative Republic, Russia, Mexico). If the leading political parties promote the centralisation of a federation, it results in the weakening of the member states' autonomy, regardless of the number of powers entrusted to them by the federal constitution. Strengthening the federation does not have to be implemented directly by changing the federal constitution, it can take place through judicial interpretation, but also in a latent way – by promoting cooperation between the two levels in all areas. This leads to an increase in bureaucratisation, a loss of clarity of competences and, ultimately, the strengthening of centralisation tendencies. This actually deepens grassroots integration, in a factual way.

The broader context of the historical interpretation of constitutional sciences shows that some models of constitutional relations are repeated. Therefore, it is necessary to examine the experiences of the past because they can be instructive and useful in the present as well. The possibility of a Member State leaving the European Union can also be perceived in this context. Legal relations from the past, which were considered done deals, have been reopened due to the impact of Brexit, for example, and require updating.

Therefore, continuing with the outlined considerations, it can be stated that the European Union is neither a confederation nor a federation, but an association of states sui generis. The legal consequence of each state's accession to the EU (on a voluntary basis and by exercising its competence) is undoubtedly also the fact that the Member State loses its monopoly of sovereignty on matters transferred to the EU. The modern existence of the European Union as a supranational organisation provides room for a specific perception of traditional contexts and relationships in almost every area of social life that is more or less affected by the legal system of the European Union. The specificity and, in some way, the uniqueness of this legal system is indisputable, as well as the fact that it is a uniqueness acquired by the spontaneous development in the spirit of the objectives set out in the founding treaties. As already mentioned, one of the essential features of this type of international organisation is the existence of decision-making bodies. Decision-making, because in the founding treaties, they were also entrusted with the legal basis to bind all Member States with their decisions. As the European Union or its legal system has evolved, its bodies have also evolved, mapping the changes in social life in the Union. From another point of view, we can also characterise it in a way that it was the activities of the institutions of the European Union that caused fundamental changes in the Union itself. The European Union has been linked to the previous European Communities for seven decades now. Its main decision-making bodies have also been functioning all along, so it is clear that they must have undergone development.

However, perceiving the above-mentioned context, we consider it essential to be reminded of one more fact, namely that the sequence of steps to transform the legal system of the European Union at each step was approved primarily by the Member

States, through their representatives, who sat on its individual bodies. Any further shift (e.g., also towards a state formation) can be determined again only by the Member States and that must be done unanimously. It is also true that the position of power of individual Member States of the European Union is not the same. It is influenced by a number of changing factors, such as the social situation in individual countries, the strength of nationalism in the country, coping with migration processes or unemployment, but also the size or geopolitical location of the state, which also determine (or at least affect) the limits of integration.

References

Bröstl, A. (2023) *Všeobecná* štátoveda. Košice: Univerzita Pavla Jozefa Šafárika, ŠafárikPress.
Filip, J., Svatoň, J., Zimek, J. (2006) *Základy státovědy.* Brno: Masarykova univerzita.
Holländer, P. (2009) *Základy všeobecné státovědy.* Plzeň: Aleš Čenek.
Klíma, K. (2003) *Teorie veřejné moci (vládnutí).* Praha: Aspi Publishing.
Orosz, L. (2009) *Ústavný systém Slovenskej republiky (doterajší vývoj, aktuálny stav, perspektívy)*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach.
Orosz, L. (2021) *Základy teórie ústavy*. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach.
Palúš, I., Somorová, Ľ. (2010) *Štátne právo Slovenskej republiky.* 3rd edn. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach.
Posluch, M., Cibulka, Ľ. (2009) Štátne *právo Slovenskej republiky 3. vydanie.* Šamorín: Heuréka.
Škutova, D., Prando, P. (2013) *Slovenský federalizmus versus taliansky federalizmus.* Banská Bystrica: Belianum.
Stein, E. (2000) Česko-Slovensko *(konflikt, roztržka, rozpad)*. Praha: Academia.
Žofčinová, V. (2016) 'Redefining of dependent work and its socio-legal dimension in Slovak Republic', *European Scientific Journal*, Special Edition, 1/2015, pp. 45–53.
Žofčinová, V. (2020) 'Public law aspects of work-life balance in Slovak republic from the perspective of european legislation', *The Lawyer Quarterly: International Journal For Legal Research*, 10(4), pp. 381–392.

Legal Sources

Constitution of the Slovak Republic of 1992 (460/1992 Coll.).
Constitutional law no. 541/1992 Statutes on Division of Property of the Czechoslovak Federative Republic between the Czech Republic and the Slovak Republic and the transfer of title thereto to the Czech Republic and the Slovak Republic.
Constitutional law no. 542/1992 Statutes on Dissolution of the Czechoslovak Federative Republic constitutional law no. 624/1992 Statutes on the Termination of the Tenure of Judges and on the Termination of Public Service Employment in Connection with Dissolution of the Czechoslovak Federative Republic Constitution of the Czech Republic, constitutional law no. 1/1993 Statutes.
Constitutional law of the Czech National Council no. 4/1993 Statutes on measures related to dissolution of the Czechoslovak Federative Republic.

Chapter 4

On "Auxiliary Precautions" (Publius) and Role of Federalism and Separation of Powers in the Evolution of European Integrations and Institutions

Petar Bačić

Abstract

In the process of the development of the EU as an innovative, *sui generis* political and economic union of states, the forms of preventive constitutionalism – namely, federalism and the separation of powers – are shaped, modified and applied. This means that European constitutionalism, in order to nurture a "prudent attitude towards citizens", must be understood as a policy that will follow Madison's path and "compensate for a lack of better motives" with opposing and conflicting interests. As a consequence, both the theoretical and practical sides of the EU constitutional framework – if it indeed aspires to become an ever closer union among the peoples of Europe – must not only enable "the government to control the governed", but also equally support and realise all existing and new "auxiliary precaution" measures, and checks and balances within government itself. In this article the author will focus precisely on the separation of powers and federalism as "auxiliary precautions" which every "good government" should take into account, including that of the EU.

Keywords: State, European Union, Member States, Separation of powers, Federalism.

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'Power corrupts and absolute power corrupts absolutely.'
Lord Acton[1]

'The Union's and Member States' constitutions
confront the same central question:
the phenomenon of public power as the heart of every constitutional order.'
N. MacCormick[2]

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1. Introduction

At the very beginning of the creation of the United States as the first modern constitutional democracy, *Publius* (here: James Madison) in the Federalist No. 51. reminds us of difficulties in framing the government 'which is to be administered by men over men': 'You must first enable the government to control the governed; and in the next place oblige it to control itself'.[3] Madison emphasises that constitution resolves that particular problem by using measures of "auxiliary precautions" (*the necessity of auxiliary precautions*). The horizontal separation of powers represents the main constitutional precautionary measure. National government is divided in three different departments: legislative, executive and judicial. Each branch of government is given the power to check on the other two branches. A system of checks and balances is applied so that no branch of power can become more powerful than the others. A further constitutional precautionary measure is the vertical separation of powers, or federalism. Here, the separation of powers refers to the arrangement between the national (federal) government and the state governments. The Constitution removes numerous obstacles as it regards that the governance of the nation and "auxiliary precautions" serve to protect the rights of citizens.[4]

Following the historical example of the United States, which in 1787 adopted a constitution with separation of powers and federalism as "auxiliary precautions" against abuse of power, it took 170 years for the representatives of six European countries to commit to creation of 'an ever closer union among the peoples of Europe' in a manner

1 Acton, 1887.
2 MacCormick, 1999, p. 113.
3 'If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.' The Federalist Papers: No. 51. See also Hamilton and Madison and Jay, 1981, p. 348. The main goal of The Federalist, a series of 85 essays written by the founding fathers Alexander Hamilton, James Madison and John Jay, was to 'urge and recommend' a new Constitution 'to the People of the State of New York', ratification of which was important, but questionable. The essays were published unanimously, signed under the collective pseudonym *Publius*.
4 Ibid.

similar to the American founding fathers. With the adoption of the Treaty of Rome that opens up the perspective of a common development of European states, the construction and realisation of the project of European constitutionalism began, which in the decades that followed expressed all the unique complexities inherent in its nature.[5]

It should be assumed that the "wise architects" of the EU were aware of possible abuses of power in such a new and supranational model of integration and regulation. The migration of constitutional ideas was not an unknown phenomena, but it was also known that it was a "complex and contentious" process, 'both in empirical and in normative terms'.[6] We have already pointed out that in the U.S. Madison used "auxiliary precautions", i.e. the federal separation of powers and different mechanisms of checks and balances, against the concentration of powers in the hands of the legislative body. In the supranational European context, certain ideas began their life and application specifically.

In any case, the possibility of comparing these two historical endeavours of the USA and the EU proves to be useful in many ways.[7] The migration of constitutional ideas has also found fertile ground in this area. The example of the constitution-making process of the founding fathers shows that from the beginning all the important reasons for the necessary rationalisation and application of the form of preventive constitutionalism, by which A. Vermeule refers to as the 'structurally parallel debate on preventive principles of constitutionalism', are an 'attempt to guard against or even minimise particular political risks, such as the "abuse of power" or 'tyranny' particularly feared in the founding'.[8] In that sense the Constitutional Convention in Philadelphia and 1787 U.S. Constitution presented results of long discussions on how to create such a government that will be under self-control. The American founding fathers were designing, exhaustively and for a long time, a way to separate the power between the three branches of federal government. They carefully studied numerous checks and balances that could govern the mutual relations among the different branches of government. And because of those efforts, the Constitution they ultimately presented to the American people included a wide variety of mechanisms to protect people's liberties – including the set of famous "auxiliary precaution" measures.[9]

The time in which similarities in the constitutional development between American and European institutions were emphasised, was replaced by different remarks. G. Nolte indicates that after World War II, and especially after the collapse of socialist systems in Eastern Europe, certain 'issues have emerged which seem to indicate that European constitutional theory and practice is becoming aware that it has developed certain rules and possesses certain properties which are characteristically different from U.S. constitutionalism and vice versa'.[10] The development of European integration, the creation of

5 On different views of EU constitutionalism see Lindseth, 2010, pp. 1–57; Isiksel, 2015, p. 13.
6 Walker, 2006, p. 316.
7 See, for example, Lenaerts and Gutman, 2006, pp. 1–121.
8 Vermeule, 2012, p. 218.
9 Eisinger, 2015, p. 2.
10 Nolte, 2003, p. 10.

numerous and diverse institutions both on European as well as on national levels, and their inevitable influence on each other, expressed through dialogue and harmonisation, opened up the possibility of discovering a particular "European constitutionalism".

Although strong currents of critical analysis against the EU emphasised that a simple "transplanting of constitutional rule narrative in the supranational context" is not exactly natural, and that the EU cannot be simply contextualised using constitutional concepts. From its beginning, the EU constitutionalisation process was related to the process of transformation of "traditional, state-reliance, international organisations" into a community that will gradually develop from a group of legal relations and solutions that bind sovereign states into a vertically integrated legal arrangement that, within the sphere of application of EU law, guarantees legally enforceable rights and obligations to all public and private legal entities.[11]

During the process of development of the EU as an innovative, *sui generis* political and economic union of states, the forms of what Vermeule called instruments of preventive constitutionalism – namely, federalism and separation of powers – will be shaped, modified and applied in a special way. This means that European constitutionalism, if it desires to have and nurture a "prudent attitude towards citizens", must be understood as a policy that will follow Madison's path and "compensate for the lack of better motives" with opposing and competing interests. And the consequence of this is that the tested and rationally built EU constitutional framework "must" not only enable "the government to control the governed", but also equally support and realise all known as well as new "auxiliary" precautionary measures, and checks and balances within the government itself.[12] In this sense, in the following chapters more attention shall be paid to the separation of powers and federalism as "precautionary measures" that every "good government" should take into account, including that of the EU.

2. On the separation of powers and federalism as "auxiliary precautions" in the development of the American constitutionalism in brevis

Starting with the adoption of the federal Constitution in 1787, the state and legal system in the USA rests on two pillars of American constitutionalism: separation of powers and federalism. Despite being exposed to great challenges during the long process of acceptance, opposition and adaptation to new times and changing circumstances, these two principles never lost their qualities as the guardians of the democratic republic.[13]

11 Rittberger and Schimmelfennig, 2006, p. 1149.
12 Russell, 2001.
13 Baraggia, Fasone and Vanoni, 2020, pp. 2–3.

2.1. The separation of powers in the United States

The first three articles of the U.S. Constitution (1787) establish the separation of powers. Art. 1. of the Constitution establishes the legislative branch embodied in Congress which consists of two houses: the House of Representatives and the Senate. Congress is primarily responsible for making laws. As a general rule in the legislative domain, firstly the non-delegation doctrine is accepted, prohibiting the legislative branch to delegate its powers to other entities. However, Congress later accepted the possibility that administrative agencies issue regulations if they are provided with an "intelligible principle" on which they can base their rules. Art. 2. of the Constitution establishes the executive branch of the federal government which consists of the President of the USA. The president approves and implements laws passed by the legislature. Art. 3. of the Constitution establishes and empowers the judicial branch of national government which is represented by the Supreme Court. The judicial branch interprets the laws passed by the legislative branch. The separation of powers in the United States was connected from the beginning with a system of checks and balances. Namely, the system provides each branch of government with special individual powers to check other branches and to prevent the supremacy or superiority of one branch over the others – the Congress has the power to create laws, the President has the power to veto them, and the Supreme Court may declare laws as being unconstitutional. The House of Representatives and the Senate may override a Presidential veto (under the condition of 2/3 vote in both houses). Further, the system of checks and balances provides powers to appoint or remove members of other branches of government. For example, Congress can impeach the President, or convict him for crimes such as treason or bribery (the House of Representatives has the power to bring impeachment charges, the Senate has the power to remove President from the office). Also, the candidates for the Supreme Court are appointed by the President and then need to be confirmed by the Senate. Judges also may be removed from office by impeachment (in the House of Representatives) and conviction (in the Senate). In this way, the system gives the right and authority that, except in the case of nullification of law, each branch of government checks the other branches.[14]

Constitutional acceptance of the separation of powers meant that the founding fathers consciously rejected the parliamentary system which was widely accepted in Europe, and in which the legislative and executive branches were mixed. Naturally, from the perspective of the present day, much has changed since the emergence of the USA as the first constitutional democratic republic in the 18th century. The reality of modern constitutional democracies shows that in reality the separation of powers has always been marked by the dominance of one branch, whatever it was. Later considerations of the theory and practice of separation of powers take different positions. Instead of three equal, independent branches of government, modern government, for practical reasons, actually consists of two branches, or according to

14 Vile, 1998, pp. 131–193.

others, in reality there is only one branch, but it all depends on "how good are we in math". In the United States, for example, every branch of government has been imperial at one particular time – an imperial Presidency, an imperial Congress, and an imperial Court have all been under discussion at some point in time. This is especially true for the modern executive that has become a "giant centrifuge" in today's presidential system sucking in power from all sides, and making *de facto* laws through regulations and executive orders.[15]

2.1.1. Is there a new separation of powers?

During the Heroic Age of American constitutionalism, the interaction of political ideas and practical issues regarding the organisation of government already revealed a series of imperfections in the separation of powers doctrine. The expansion of state activities into all areas of society and stages of life only deepened those imperfections further, which together with a corresponding growth of the administrative state apparatus, irreversibly influenced changes in constitutional systems throughout the world. It has become evident that the old and new controversies of this doctrine were and are not resolved by historical references.[16]

The first powerful critique of the founding fathers' tripartite separation of powers theory came from Woodrow Wilson, the 28th President of the United States (1913-1921). In his conception of government, the Constitution was inadequate as the foundation of modern governance.[17] Therefore the state needed to be managed by administrative "experts", that is modern administrative agencies that combine legislative, executive and judicial competences without clear distinction of functions. According to that concept, agencies made binding rules because they had the authority, issued guidelines regarding the implementation of rules, and ultimately adjudicated alleged rule violations. Wilson argued that "modern government" must implement administrative methods and be guided by "experts", well-educated administrators in administrative agencies which have a special knowledge that goes beyond competences and the interests of ordinary American citizens. Furthermore, they should not be "excessively" constrained by ordinary concepts of democratic governance or constitutional checks and balances. Constitutional democracy must be improved by the implementation of administrative methods of government.

The founders accepted the separation of powers in order to calm emotions and encourage the rule of reason. However in reality, according to Wilson and Progressives, the Founders prevented effective and responsible government. Therefore, the government should be free of limitations imposed through institutional checks and balances in order to function more efficiently and to truly respond to the will of the people. Nevertheless, the more Wilson sought to make politics more democratic, the

15 Schlesinger, 1973, p. 252.
16 Marshall, 1971, p. 124; Levi, 1976, pp. 371–391.
17 Wolfe, 1979, p. 122.

less democratic the administration of government became. Wilson argued that separating politics from an administration led by unelected experts would best achieve the government's goals. In other words, Progressives have shaped the bureaucratic, regulatory or administrative state according to the idea that unelected and highly qualified experts can govern the nation more rationally, efficiently and responsibly than ordinary politicians who are beholden to voters and often prone to corruption. The modern presidency was a key tool for the progressive transformation of government. The Progressives have challenged and fundamentally changed the constitutional arrangements of the Founders. Having separated politics from a government led by unelected bureaucrats, the system of government advocated by progressives not only ignored the consent of the governed, but also greatly expanded the power of the federal government.[18]

Progressive ideas on "good government" differed greatly from the understanding that the founding fathers laid in the foundations of the Constitution in 1787. Namely, Founders assumed that the government can exercise power in two ways. The first way is arbitrary rule in which the government decides on its actions *ad hoc* and where decisions are left to the whim of any official or group currently holding office. The second way is the implementation of a system based on the rule of law, characterised by widely known and promulgated laws that lead the government as well as citizens and which, since it is known exactly what must or must not be done, enables the circumvention of state coercion. In order for the rule of law system to represent the effective protection of citizens' rights, the constitutional mechanism is based on the separation of powers. For the Founding Fathers, the fundamental goal of the separation of powers was to preserve individual rights from arbitrary government.

The essential place of the separation of powers in the U.S. Constitution is actually revealed to us through three important principles of American constitutionalism: (1) The first is the non-delegation principle; which primarily refers to the fact that one branch of government cannot allow its powers to be essentially exercised by another branch. (2) The second principle is related to the first one, in that one branch must not combine functions or powers. (3) The third goal of the separation of powers is that the administration is responsible to the President as head of the executive branch.

Woodrow Wilson believed that a government that wants to live up to the tasks set before the state and society during modern times must seek to reject the restrictions of limited government. In that sense the separation of powers was the most serious obstacle to the new, modern liberalism, simply because it directed the federal government in the direction towards goals enumerated in the Constitution and the Declaration of Independence. Apart from the fundamental difference in the very purpose of government, what was a particular problem to the early 20th century Progressives' vision of national administration were the specific goals of

18 Pestritto, 2012, p. 2.

the separation of powers enumerated above. The range of activities that progressives wanted to regulate was too broad for the original constitutional conception of legislative power. That is why the creators of progressive liberalism designed the delegation of regulation-making, that is, the regulatory authority, from the law-makers in Congress to the increasingly large administrative apparatus of the federal state.

This apparatus would be more suitable for administering a number of issues of the modern complex economy for the simple reason that it was composed of experts capable of any type of adaptation. That is why the realisation of the administrative vision of progressive liberalism required the removal of the non-delegation doctrine and the adoption of combining functions as an operational principle of administrative agencies. Moreover, Progressives believed that administrative agencies would never accomplish their mission if they remained subordinate to national political institutions. Since modern regulations should be based on an objective and politically neutral expertise, administrators should have been freed from political influence. Thus, the constitutional positioning of the administration within the executive branch and under the control of the President represented a problem by which the Progressives sought to separate administrators, not only from the head of the executive branch, but also from politics itself. The idea of separating politics from administration was a fundamental goal of American progressivism and this precisely explains the fierce attack of Progressives on the constitutionalism of the Founding Fathers, based on the separation of powers.[19]

We have seen that the separation of powers constitutes an important principle of liberal constitutionalism. However, the example of the development of the constitutional democratic state in the U.S. has already shown that the traditional explanation of the separation of institutions was no longer an adequate instrument for the distribution of power in the modern state. After World War II, the development of a new model covering the separation of powers theory for the administrative state was advocated for with increasing vigour. Traditional theories should be replaced with newer models that have the potential to both improve democratic checks and balances and legitimise the role of administrative and regulatory bodies in the modern state.

Through explaining how the development of modern governance undermined the principles that had originally supported the separation of powers, this theory tried to identify the ways in which lawyers and administrators sought to preserve some democratic principles in certain areas. These efforts were most clearly expressed in positions towards the division of power in international organisations, especially in the European Union as an innovative framework of the political-legal thinking and in its development from the middle of the 20th century to the present day.

19 Bačić and Bačić, 2016, pp. 123–124.

2.2. On the vertical separation of powers (federalism) in the United States from Philadelphia to Washington

The ideological defence of American federalism as well as of the separation of powers principle has its strongest argument in the advocacy of political freedom, individualism and human rights. For Alexander Hamilton, James Madison, John Jay and other Founders, the creation of an efficient constitutional structure of political institutions, and especially the regulation of relations between the respectable central government and its peripheral parts was one of the central points of the constitutional debates that preceded the adoption of the Constitution in 1787. In the most durable Constitution in the world, the foundations of the division of power between federal Congress and the member states, as well as the most important provisions regarding the promotion of cooperative relations between the two principal actors of the federal organisation of government (for example, the state implementation of elections of federal officials, the consideration of constitutional changes that would be proposed by the Congress, and militia training in accordance with nationally prescribed procedure) were laid out and guaranteed.[20] In this sense, relations between the federal centre and the peripheral holders of political power remained a permanent topic of political relations in the later period as well, as was clearly indicated by the theory and practice of American federalism from 1787 until the present day.[21] That same federalism underwent an evolution marked by several stages. Before the adoption of the Constitution in 1787 and until the inauguration of the new federal government, the United States were a confederation. The Federation was strengthened from 1789 until the end of the Reconstruction era in 1877 and the adoption of the Fourteenth (1868) and Fifteenth Amendments (1870). Inspired precisely by the American experience William H. Riker defines federalism as a 'political organisation in which the activities of government are divided between regional governments and a central government in such a way that each kind of governments has some activities on which it makes final decisions'.[22]

(i) Phase of dual federalism. The key elements of dual federalism were indicated already indicated by A. Hamilton in Federalist No. 32:

> …as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted

20 Zimmerman, 2001, p. 15.
21 Elazar, 1981, pp. 5–19; Peterson, 2006, pp. 92–116; Ewing, 2016, pp. v. et seq.
22 Riker, 1975, p. 101.

> an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.[23]

The existence of the dual system was also confirmed by the U.S. Supreme Court decisions in cases *Chisholm v. Georgia*, 2 U.S. 419 (1793), and *Abelman v. Booth* 62 U.S. 506 (1858) in which Justice B. Taney ruled that 'the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres'.[24]

This dual federalist phase is characterised by the expansion of federal power, to which the The U.S. Supreme Court contributed greatly. The Supreme Court decided, for example, in the McCulloch v. Maryland (1819) ruling that the constitutional "necessary and proper" clause implied that Congress could establish "all appropriate means" in order to fulfil "the legitimate ends" of the Constitution. In the specific case, the Constitution did not expressly authorise Congress to create a national bank, but Chief Justice J. Marshall argued that Congress could establish the bank as an appropriate instrument that would enable it to facilitate its enumerated powers, such as the collection of taxes, the regulation of interstate commerce and the borrowing of money. Accordingly, under the supremacy clause of Art. 6. of the Constitution states were prohibited to interfere in the lawful activities of the national government.[25]

(ii) Phase of cooperative federalism. In the discussions following the adoption of the Constitution James Madison was convinced that 'the national government cannot be maintained without the cooperation of the states', from which the conclusion was later drawn that the founding fathers did not really insist on establishing a system of dual federalism in the literal sense. That this was indeed the case could also be concluded by emphasising the importance of certain provisions for cooperation between federal government institutions and government institutions at the state level, according to which: (i) the legislature of each state shall appoint two members of the U.S. Senate, (ii) the method of appointing the president and presidential electors in each state shall be decided by its legislature, (iii) the members of the House of Representatives shall be elected by "qualified electors" in each state, (iv) amendments to the Constitution proposed by the Congress shall be decided by state legislatures or conventions, (v) the training of the national guard shall be decided by the states in accordance with the nationally prescribed procedure, etc.[26]

A special impetus to the development of cooperative federalism was given by the President W. Wilson. Namely, Wilson advocated that relations between the centre and the periphery as a type of partnership between national and state governments at state and local level. In such a cooperation the traditional lines of authority, which

23 The Federalist Papers: No. 32.
24 *Ableman v. Booth*, 1858, 62 U.S. 506.
25 *McCulloch v. Maryland*, 1819, 17 U.S. 316.
26 Zimmerman, 2001, p. 19.

were clearly outlined under the regime of dual federalism, began to blur. A key concept of cooperative federalism is partnership. Cooperative federalism implied the willingness of the federal government to negotiate and bargain with state and local officials on the formulation of federal policy and its implementation by states and local communities. However, this federalism greatly strengthened the role of the federal government, which became so dominant that the action of the member states obviously became of "secondary importance".[27]

Based on his political experience from Wilson to the 1960s, D. Elazar described cooperative federalism as opposed to

> …that federalism which implies the division of functions between levels of government as well as the division of government structures. Although the theory of cooperative federalism presupposes a sharing of structures, it accepts that sharing that ranges from programs in formal federal-state agreements to regular informal contacts for information and experience.[28]

(iii) Phase of creative federalism. During the 1960s, the period of creative federalism emerged as an important dimension of the Great Society program, launched by President Lyndon B. Johnson (1963-1969). This form of federalism reflected a new theory of intergovernmental relations that was formulated as a response to the earlier conventional theory. The factual situation was such that the balance of federal power was shifting toward federal government.[29] This type of federalism was also known as "coercive" or "regulatory" federalism for the simple reason that federal government unilaterally imposed its political measures on local and member state governments. According to R. Musgrave:

> Coercive federalism emerged as the dominant contemporary element mainly as a national political response to social movements demanding deep federal interventions into state and local polities in order to protect individual rights, the environment, and other social goods and also to mitigate negative externalities (e.g., air pollution), while fiscally enticing states into redistributive programs despite redistribution being a more common federal function.[30]

(iv) Phase of new federalism. The main idea on which this new federalism rests, is that decentralisation as a policy enhances administrative efficiency, reduces public spending and improves policy outcomes. This type of federalism developed during the administrations of Presidents Richard Nixon (1969-1974) and Ronald Reagan (1981-1989). It was a reaction against the strengthening of the federal government

27 Elazar, 1981, p. 7.
28 Elazar, 1981, p. 17.
29 Yatsco, 2006, pp. 1–2.
30 Musgrave, 1959, cited in Kincaid, 2019, p. 3.

and the increased centralisation that characterised the "creative federalism" of President L.B. Johnson. Nixon's administration tried to decentralise programs and distribute power and funds towards state and local governments. The main recipients of this aid were elected local officials. General revenue sharing programs were created and restrictions on how local governments spent the money were minimised. As for U.S. federalism, the election of President Reagan heralded the advent of a "devolution revolution" in which the President pledged to return authority to the states according to the Constitution.[31]

The U.S. Supreme Court supported ideas and programs of new federalism in its decisions, especially in those cases that aimed at limiting the scope of the federal government's powers. Such was the decision in *United States v. Lopez* of 1995 in which the Gun-Free School Zones Act of 1990 that prohibited possession of guns in school areas was struck down. It also marked the end of a broad interpretation of the commerce clause, which since the 1960s enabled the regulation of numerous local commercial activities.[32]

The return to the re-strengthening of central federal authority was marked by the creation and operation of the Department of Homeland Security as well as by other federalisation measures adopted as a response to the threat of terrorism. This trend continued during the administration of George W. Bush (2001-2009) and during the mandate of Barack Obama (2009-2017).

The federal state was also strengthened during the administration of Donald Trump (2017-2021), when the coronavirus pandemic exposed the model of presidential federalism. Under such circumstances, and opposing the position of his own Republican Party on "limited government", Trump actually used the powers of federal government to 'make America great again', and this was exactly what was paid for by the expansion of federal powers.[33]

2.3. Concluding remarks on separation of powers and federalism as "auxiliary precaution" measures in the United States

The fundamental concept of the founding fathers was the idea of limited government i.e. constitutionalism. Constitutionalism meant the construction of a government that would be limited by the Constitution, that is, a government that would rule only in accordance with the Constitution and conditions related to the assigned competences and approved purposes.[34] It concerns the application of J. Madison's "double security of the constitution" principle, whereby Madison meant two major structural principles of the Constitution: federalism and the separation of powers. Federalism and the separation of powers have both the division of power in a vertical and

31 Marbach, 2006, p. 1.
32 *United States v. Lopez*, 1995, 514 U.S. 549.
33 Jacobs, 2021.
34 Henkin, 1992, p. 885.

horizontal sense in order to prevent the accumulation of excessive power at any level of its activity, and the encouragement necessary for representatives of the people to control the exercise of power by state institutions at different levels in common. Federalism restrains government by creating two sovereign competences – national government and state governments – which limits the influence of both. The separation of powers imposes internal limits dividing the government against itself, giving different branches separated functions and forcing them to divide power.[35]

In the period from 1787 to the present day, the idea of the separation of powers in the U.S. has developed into a complex of norms, which are made up of four principles: (i) the principle of tripartism, which indicates and requires that at the level of federal government, three of its components – the legislative, executive and judicial branches, are formally distinguished; (ii) the principle of division of personnel performing their duties in each of the three branches of state power; (iii) the principle of the division of functions between the three bodies of state power; and (iv) the principle of checks and balances, according to which each government body should have special powers as a means of controlling the function of other bodies in order to maintain a balance between them. Among different checks and balances instruments, the most important is judicial review or the control of the constitutionality of laws as a special American contribution to the theory and practice of the separation of powers. It is exactly judicial review that will prove to be an essential element in achieving division and balance between the legislative, executive and judicial branches of government in the U.S. The adoption of the principle of judicial review as one of the "auxiliary precautions" was actually a means of obliging government to exert self-control and thus to preserve the principle of limited government as a fundamental principle of the newly established constitutional democracy.

Just like the principle of separation of powers, the principle of federalism saw its application in the most complete way within the framework of constitutional democracy in the United States. In this sense, the American federation is the first and most serious application of federalism in the democratic constitutionalism.

3. EU constitutionalism and dimensions of federalism and separation of powers as "necessary precautionary measures"

Following the American and French constitutional revolutions, which generally determined the development of the state and society in the direction of constitutionalisation and democratisation, the modern era can rightly be labelled as the

35 Pryor, 2002, p. 116.

time of the "triumph of constitutionalism".[36] The foundations of constitutionalism and its "fundamental components" were still separation of powers and federalism. Though not perfect, even being described as a "source of folly and frustration", they became permanent and important characteristics of old and new states.[37] Under the influence of constitutionalism, written constitutions established a set of state institutions that ensure the necessary conditions for the realisation of a democratic Rechtsstaat. A large number of such constitutions limit politics by legal means, comprehensively structuring relations of power, normatively helping in integrating societies and offering a practical representation of legitimate democratic rule within the state. Although these achievements cannot be denied, the fact is that the period of maturation of constitutionalism in our time coincides with the erosion of some of the fundamental conditions on which these achievements rested. P. Dobner and M. Loughlin point out that among these conditions the most prominent are those related to the theory and practice of the state and democracy that are generated

> from the claim that 'we the people' are the authorising agents of the constitutional scheme. Constitutionalism is increasingly being challenged by political realities that effect multiple transgressions of the notion of democratic statehood. It is in this sense that constitutionalism can be understood to be entering a twilight zone.[38]

However, the most eloquent denial of this claim regarding the twilight of constitutionalism represents the fact that constitutionalism has spread around the world. According to M. Rosenfeld, after World War II, this process spread in "at least two ways". Firstly, the spread of constitutionalism is at work within a large number of nation-states in which constitutions affirm the spirit of the ideals of modern constitutionalism. Constitutions serve to limit state power, elevate the rule of law, protect fundamental rights and are guarantees for maintaining an appropriate level of democracy. However, the second path marks the diffusion of constitutionalism from its traditional national state environment into transnational or global frameworks, where the "new transnational dimension of constitutionalism" is triggered by the simultaneous internationalisation and constitutionalisation of international law. According to Rosenfeld:

> The internationalization at stake has had in turn two distinct dimensions: a convergence of constitutional norms and values across a multitude of nation-states; and a migration of such norms and values into transnational orderings encompassing several nation-states and/or non-state actors operating across national borders. On the other hand, the constitutionalization of international law has similarly proceeded along two axes: constitutional-type norms and values have increasingly permeated

36 Loughlin, 2010, p. 55.
37 Beckett, 1988, p. 635.
38 Dobner and Loughlin, 2010, pp. XI–XVI.

> international law through the deployment of jus cogens and through other means; and, international legal norms as set in treaties essentially amounting to contracts among signatory nation-states have more recently in some cases acquired a constitutional dimension by virtue of their allocation of legal rights and obligations among nation-states parties to an international treaty and their own citizens.[39]

Constitutionalism is in fact going through "another reneissance" and this time in the context of supranational institutions. International institutions and organisations ranging from the UN to the WTO, different human rights protection instruments and documents including the UN Universal Declaration and the ECHR, *ius cogens*, transnational contract law, the Vienna convention on the Law of Treaties (1969), New York Arbitration Convention (1958), etc. All of these, at one time or another, were considered forms of constitutional order.[40] Bearing transnational consensus on the abovementioned forms in mind, the term "global constitutionalism" is being expanded to denote the school of thought or perspective of a political agenda that advocates the application of constitutional principles in an international context, such as rule of law, democracy, checks and balances, and human rights protection, all in order to improve the efficiency and fairness of the international legal order.[41] Bearing in mind a transnational consensus on the above-mentioned forms, the term "global constitutionalism" is being expanded to denote a current of thought or the perspective of a political agenda that advocates the application of constitutional principles in the international legal order, such as rule of law, democracy, checks and balances, human rights protection, all in order to improve the efficiency and fairness of the international legal order. Constitutionalism is also of crucial importance to the European Union, which emerged as a transnational project after the adoption of the Treaty of Rome (1957) for which it was claimed, in the light of constitutionalism thesis and its evolution, that

> …in critical aspects the Community has evolved and behaves as if its founding instrument were not a treaty governed by international law but, to use the language of the European Court, a constitutional charter governed by a form of constitutional law.[42]

If the elements of constitutionalism are incorporated into the description of everything in the EU – and J. Weiler reminds us that constitutionalism is the "DOS or Windows of the European Community"[43] – a reasonable conclusion would be that the new transnational constitutionalism as a *mixtus compositum* contains traditional

39 Rosenfeld, 2014, p. 178.
40 Isiksel, 2012, p. 102.
41 Peters, 2006, p. 579.
42 Weiler, 1999, p. 221.
43 Ibid.

elements of constitutionalism in addition to new characteristics. Such "most frequently cited signs of constitutionalism" that are connected with constitutional order include 'the hierarchical organisation of norms, the authority to produce binding rules, direct applicability, binding mechanism of dispute resolutions, system of precedent, schedules of fundamental rights, and rudimentary channels of democratic accountability'. In a nutshell, it is being claimed that institutions which replicate the features we associate with constitutional orders must be considered in constitutional terms. To borrow Alec Sweet Stone's colourful metaphor, 'if it looks, walks and quacks like a duck, than it is probably a duck'.[44]

It is actually a form of the functional constitutionalism that will characterise the constitutional practice that appears on the "level of specialised institutions above the state". Referring to Richard Falk, who writes on global constitutionalism as an "extension of constitutional thought on world order", Anne Peters develops the idea on compensatory constitutionalism. Namely, globalisation positions national states and their constitutions in situations of great tension. Global problems force states to cooperate within international organisations and through bilateral and multilateral agreements. Formerly typical governmental functions, such as guarantees of security, freedom, and equality, have been transferred to higher decision-making levels. More and more authority as it concerns exercising of traditional state functions, including military and police, is being given to non-state actors. Now the process of governance in the sense of "overall process of regulating and ordering issues of public interest", as a result of numerous such phenomena, takes place outside and above the constitutional boundaries of states. This in fact means that:

> …state constitutions can no longer regulate the totality of governance in a comprehensive way, and the state constitutions' original claim to form a complete basic order is thereby defeated. The hollowing out of national constitutions affects not only the constitutional principle of democracy, but also the rule of law and the principle of social security. Overall, state constitutions are no longer 'total constitutions'. In consequence, we should ask for compensatory constitutionalization on the international plane. Only the various levels of governance, taken together, can provide full constitutional protection.[45]

The complex phenomenon of "multi-level governance", imposed on the theory by the issue of the legitimacy of European integration, and especially the question of democratic deficit that accompanies the practice of complex multi-level governance structures, has led to more attention being paid to the topic of the understanding of democracy at European level, as well as to the need for its protection. In this context there is an almost natural revival of well-known James Madison's arguments (neo-Madisonian'vision) highlighting that both supranational and intergovernmental EU

44 Isiksel, 2012, p. 103.
45 Peters, 2006, p. 580.

institutions are "legitimised via their instantiation of two core democracy principles" advocated by Madison, namely the separation of powers and the system of checks and balances. The important question posed by A. Moravcsik regarding the possibility of "despotism in Brussels" and his understanding of L. Siedentop's "Democracy in Europe" is beyond mere rhetoric and certainly has its place in questioning the role of "auxiliary precautionary measures" in the EU context. We need to check how the restrictions that prevent the abuse of power are formed in the EU, in what way these measures i.e. the separation of powers and federalism exist in the EU as a 'very sophisticated, contemporary version of Madisonian democracy' and how to draw out an argument on EU's legitimacy from its multi-level composition.[46]

4. Adaptation of the old separation of powers principle in the evolution of European integration and institutions

Despite the resistance and disbelief that the old separation of powers principle would still have a role in a supranational constitutionalism (constitutionalism beyond the state), recent events have shown that 'the structure of governance and the factually implemented separation of powers have experienced far-reaching changes'. In empirically based research, E. Salzberger and S. Voigt point out the emergence of completely new levels of governance, among which the European Union occupies a special place. In addition, a "voluntary submission" to international institutions such as the WTO and their "rules of the game" plays an important role everywhere.[47] The supranational narrative joined the international law narrative and the narrative of nation states (statist narrative). Furthermore, one of the structural premises is the "constitutional narrative" according to which legal relationships between the member states and the European Union have undergone a "substantial transformation". Relations that were regulated by international law have grown into fully developed constitutional relations, and the original international treaties by which the initial communities were founded have been constitutionalised. In that sense, M. Avbelj concludes that it is nowadays beyond doubt that 'the overall relationships between the member states and the EU are indistinguishable from analogous legal relationships in the constitutional federal states'.[48]

The emergence of the European Union opened debates about its legitimacy. It should be pointed out that traditionally, for a long time, debates about the legitimacy of political orders have been conducted around the issue of limitations of political power, methods and instruments of this permanent civilisational endeavour. We will use the

46 Moravcsik, 2001, pp. 114–122; Siedentop, 2001, p. 272; Bickerton, 2011, pp. 659 et seq.
47 Salzberger and Voigt, 2009, p. 198.
48 Avbelj, 2008, p. 6.

debate on the legitimacy of the European Union because it also featured a "neo-Madisonian" vision that recognised the multi-level nature of the EU as a modern version of Madison's argument on the separation of powers and the system of checks and balances. We believe that the separation of powers and the system of checks and balances are still *mutatis mutandi* instruments of democratic responsibility and control in the EU today. This point of view is confirmed by Jacques Ziller who, despite declarations that the concept of the separation of powers is not applicable to the EU system, still considers

> …that there is and will be a genuine separation of powers in the EU system, and that its elements will become clearer in the basic treaties of the EU, due to the contribution of the European Convention, albeit the EU institutional setting will remain a very complex system.[49]

The European Union today is a supranational organisation, an economic and political partnership between 27 European countries, member states that have transferred competences i.e. powers to the EU to facilitate the formation and implementation of European policy in the areas of agriculture and fisheries, the environment, trade policy, and economic and monetary markets. The political centre of the EU consists of seven institutions: the European Council (composed of the heads of state or government), the Council of the European Union (composed of ministers from relevant policy areas), the European Commission, the European Parliament, the Court of Justice of the European Union, the European Court of Auditors and the European Central Bank. In accordance with the transfer of powers and division of competences, the governments of the member states cannot make fully independent legislative decisions in certain policy areas (exclusive competences of the EU).[50]

EU decisions are based on rules already established in the Treaty on the functioning of the European Union. Accordingly, EU institutions and member states must cooperate in almost all policy areas. The European Commission (EC) prepares and proposes laws that (in most cases) are adopted by the Council of the EU and the European Parliament. The governments of the member states are represented in the European Council and, depending on the policy area under discussion, in different compositions of the Council of the European Union. The European parliament is directly elected by EU citizens and acts as a co-legislator (with the exception of any areas specified in Treaties). The European Parliament must give its consent to the proposal of the EC and has the right to amend it. In that way, European citizens participate in the decision-making process in the EU. Today, decisions of the Council are made by a qualified majority vote. This means that decisions are made by a majority vote, subject to the fulfilment of certain additional conditions. Furthermore, mechanisms for the accountability and control of the EU policies are envisaged in Treaties. In addition to being a co-legislator, the European Parliament acts as an important factor in

49 Ziller, 2008, p. 136.
50 Möllers, 2013, pp. 110 et seq; Klabbers, 2019, pp. 25–41.

terms of accountability and control regarding the implementation of EU policies. In that process it is assisted by the European Court of Auditors that audits regularity, efficiency and effectiveness, while its special reports are also discussed in Parliament's Budgetary Control Committee. After the financial and economic crisis, which was reflected in formal or common policies of the EU, intergovernmental policies gained importance, especially between the countries of the Eurozone. Those countries concluded agreements that exclusively concern the Eurozone and may operate outside the treaty framework, thus remaining out of application of the rules on accountability and control that apply to the EU as a whole. The existence of differentiated policy areas such as the Eurozone also results in different arrangements of control.[51]

In what way did new supporters of J. Madison (Europe's Neo-Madisonians) actualise the role of the separation of powers, that "old" and in the same time "new" instruments of government control, and accountability in the EU context?[52] In the traditional sense, the separation of powers has always been a means of preventing tyranny and enabling a system of checks and balances. According to the classical conception, the parameters and procedures for the enactment, enforcement and application of laws are designed to prevent tyranny by separating power between the branches of government and by giving each branch the ability to check any possible abuse of power made by the other branches. Nevertheless, prevention of tyranny and protection of freedom are not the only justifications of such arrangement. Another important justification for the application of the separation of powers is that the elaborated institutional and procedural design of each of the three branches allows for greater efficiency in each. The Constitution divides the state powers not only to establish checks and balances among the branches of government, but also to increase the probability that the role assigned to each particular branch will be performed consistently and effectively.

The EU is faced with the challenge of how to resolve the relationship between institutional construction and the popular will *de manière républicaine*. By all means, the existing problems of today's EU are not the same as those that worried Madison in the 1780s. During his time, there was concern about the excessive politicisation of member state legislatures and the dangers this phenomenon posed to the relations between the states of the federation. Another phenomenon which has been worrying the EU for a long time is the democratic deficit. In other words, the EU is experiencing a problem of insufficient politicisation. Namely, the parliaments of the member states, as well as the European Parliament, are facing serious challenges to restore or regain popular legitimacy.

In the debate about the democratic deficit, one of the most direct and clearest interventions was A. Moravcsik's claim *a la Madison* that 'the classic justification for democracy is to check and channel the arbitrary and potentially corrupt power

51 European Commission, 2009, pp. 1–108; Schimmelfennig, 2020, pp. 992–993.
52 Salzberger and Voigt, 2009, pp. 197–201; Gormley, 1991, pp. 1–18; Möllers, 2003, pp. 1–52.

of the state'.[53] He argues that the EU is not less democratic than the member states, and concludes that as a multi-level system of decision making and plural executive it is in fact more constrained than any national polity, precisely because of institutional "checks and balances, notably separation of powers". Convinced that every description of a "European spectre" as a superstate is absurd, this author concludes that precisely for the reason that the power of the EU is so significantly constrained, many analysts hesitate to call it a state, preferring instead to use the more diffuse, more neutral term of "governance system".[54]

A. Moravcsik argues that the EU as the most ambitious and successful example of peaceful international cooperation in world history is 'not a system of parliamentary sovereignty but of separation of powers'. The existence of checks and balances in all areas in which the EU operates makes arbitrary action and any other actions difficult. For Moravscik, such institutional procedures are the conventional tool for protecting the interests of vital minorities – a design feature generally thought to be most appropriate to polities, like the EU, that must accommodate heterogeneous cultural and substantive interests.[55]

The argument offered by A. Héritier rests upon on the claim that the nature of the EU's political system is fragmented and as such it basically replicates Madison's argument about the agonistic relations that exist between different branches of government. There is competition between institutions which creates distrust, and also prevents mutual control between them. Limititations at EU level are, at the same time, the solution to the problem with tyrannical majorities in Europe, which nation states have so far been unable to solve. Argumentation structured in this way i.e. as a defence of multi-level EU in the name of minority rights, is also advocated by other scholars, such as J. J. Weiler, N. McCormick, etc.[56] This dialogue is supplemented by Jan Zielonka who argues that the fragmented political order represents the answer to the problem of ensuring proper control of political power that must be balanced. Such dissemination of power contributes to consolidating awareness and accountability as different actors that control each other and reacting to any observed abuses of power. Zielonka reminds us of Madison's phrase, "ambition must be made to counteract ambition" and emphasises that "plurilateral governance" of the EU that is compared to "neo-medieval empire" offers an updated version of Madison's arguments on the principles of separation of powers and the system of checks and balances.[57]

53 Moravcsik, 2002, p. 604.
54 Moravcsik, 2002, p. 611.
55 Lijphart, 1990; Moravcsik, 2002, p. 609.
56 Bickerton, 2011, p. 4.
57 Zielonka, 2006, p. 184.

4.1. Integration and Montesquieu redivivus

From the very beginning of the development of the EU, the reality of the connection of this community with the theory and practice of the separation of powers principle was rejected by many. This was collaborated by numerous opinions that such a 'concept is not applicable to the EU system'.[58] Negative views were especially dominant in the initial years of European integration and the development of its institutions, when the division of powers was interpreted in a strictly American way. Namely, consistently to the rigid understanding according to which legislative power is entrusted exclusively to Congress; executive power to the President of the Republic, and judicial power to the US Supreme Court. In that sense, the 'American-style presidential separation of powers regimes are exportable and desirable under certain carefully controlled circumstances'.[59]

However, since the logic of the separation of powers as a principle that guaranteed values of constitutional democracy was wide open, especially at the moment when former socialist countries started with the process of democratisation and accession to European integration, ideas began to be articulated, according to which the European Community from that time

> ...cannot remain indifferent to the imperatives flowing from this principle in relation to the structuring of its own constitutional system of exercise of public authority... As a credible project of supranational government... the European Community is bound to achieve the highest standards of constitutionalism even if this requires it to further question some leftovers of intergovernmentalism which may, on balance, not really be needed any longer to keep alive the appropriate equilibrium of powers between the Community and the Member States.[60]

In Europe, naturally, another constitutional interpretation was drawn about Montesquieu's ideas about the separation of powers. Robert Schütze reminds us that Montesquieu also spoke about the possibility of combining powers, and about authorities that ultimately act in concert (*..elles seront forcées d'aller de concert*):

> To form a moderate government, it is necessary to combine the several powers; to regulate, temper, and set them in motion; to give, as it were, ballast to one, in order to enable it to counterpoise the other. This is a masterpiece of legislation; rarely produced by hazard, and seldom attained by prudence. ... These three powers should naturally form a state of repose or inaction. However, as there is a necessity

58 Ziller, 2008, p. 136.
59 Calabresi and Bady Kyle, 2010, p. 5.
60 Lenaerts, 1991, pp. 11–36.

> for movement in the course of human affairs, they are forced to move, but still in concert.[61]

For Schütze, the basic idea behind this "second" conception of the separation of powers is a system of checks and balances. That was the concept that inspired fundamental European treaties. Namely, Treaties do not place a particular institution within the framework of a related government function. Instead, its authors adopted another, completely opposite nomotechnique. Thus, for example, in the Treaty on the European Union, each institution has its own "article", the first section of which indicates the combination of state functions in which it participates. The fundamental treaties have therefore prepared a system of distribution of powers between the various institutions of the EU, assigning to each institution its own role in the institutional structure of the Union and the tasks it has to perform in it. That was the conception of the separation of powers envisaged by Art. 13(2) TEU: 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'.[62]

This Treaty provision points out to three possible situations. Firstly, each institution has to act within the limits of the powers conferred on it in the Treaties, meaning that the unilateral expansion of its constitutional role is not possible. Meaning, without an explicit mandate, as envisaged in the Treaty, the transfer of competences from one institution to another is not allowed. Secondly, a harmonised institutional balance means that each institution has to exercise its competences with due regard to the competences of other institutions. Institutions are embedded and interconnected within the EU governance processes. Thus, three EU institutions cooperate in the ordinary legislative procedure: The European Commission that proposes a legislative act, and The European Parliament and Council of Europe that jointly decide on its adoption. It is all part of the intentional institutional balance of the Treaty.[63]

With regard to the old question about which state "powers" or "functions" are recognised in the EU, the state of affairs is such that the Treaties do not classify state functions following formal criteria or according to a special procedure. Namely, in accordance with the classic constitutional position, Treaties use the material conception of state authorities. In this sense, legislative power refers to the creation of legal acts, and the executive has the authority to propose and apply them, while the judiciary interprets these acts. In addition to these three "traditional" authorities, in recent times, additional "state" authorities have been shaped by the constitution, known as the "fourth" branch which refers to the relations of the political community (body politics) with the exterior, and is located between the legislative and

61 Montesquieu, 1748, pp. 74, 181.
62 Consolidated version of the Treaty on European Union, TEU, Title III Art. 13 (2).
63 Schütze, 2012, pp. 84 et seq.

executive branches, and a "fifth" branch which refers to the state control of financial markets and is identified with state banks that regulate and maintain the flow of money.[64] In a nutshell:

> The EU – that has a sophisticated system of fundamental rights protection – also has a complex separation of powers regime, so there can be no doubt about its constitutional nature. The EU has bicameral legislative, whereby the EP and the Council in principle share the function of approving laws based on Commission proposals – although in some cases legislative power is exercised exclusively by the Council, without an equal role for the EP. The EU also has dual executive power, led by the European Commission and the European Council, which have mastered the governing function – even if policy direction is increasingly determined by the European Council while the Commission "rules" in matters of less political sensitivity. Finally, the EU has a complex judiciary, centred on the European Court of Justice, but it also includes all national judges.[65]

It is the analytical reconstruction of the powers of EU institutions, in which trends in the functioning of the legislative, executive and judiciary in the EU are dynamically observed, that enables the conclusion that the EU has a complex system of separation of powers, with bicameral legislative, dual executive and complex judiciary. At the same time, in observing contrasting practices in the functioning of the EU's form of government, especially the coexistence of parliamentary and presidential pressures, F. Fabbrini leaves the question open as to further prospects for subsequent reforms of the EU's constitutional architecture in the context of the debate on the future of Europe.[66]

Finally, in the context of post-Lisbon institutional structure, the term "institutional balance" emerged as the new, corrective method of concretising, differentiating and supplementing the functions and competences in division of the power complex. This correlation can be explained in following way:

> Moreover, if the general idea of division of powers may be understood to have a constitutive and in that sense also foundational role in the framework of modern constitutionalism, the idea of institutional balance tends to be used as a corrective tool instead of having a constitutive meaning. Institutional balance provides a convenient conceptual framework for counteracting something that is considered as legally or politically harmful or undesirable in the development of the European Union. Balancing between the extremes of technocratic guidance – democracy is a practical example of this observation….[67]

64 Ibid.
65 Fabbrini, 2023, p. 23.
66 Fabbrini, 2023, pp. 1–26.
67 Moskalenko, 2016, p. 4.

5. EU federalism and its modifications – Irregulare aliquod corpus et monstro simile – So what?

The project of integration of (Western) European countries into a new political-economic alliance, which appeared immediately after the end of World War II., was from the very beginning strongly and permanently influenced by the federal idea, whose "theory and practice are at the very heart of European integration" (W. Burgess). It is worth pointing out that these ideas were of primary interest, regardless of whether their advocates explained the European construction as a perfectly feasible and empirically valid component,[68] or just as another variant of S. Pufendorf's "miraculous platypus" (*irregulare aliquod corpus et monstro simile*).[69] The ideas that matured before and after the adoption of the Treaty of Rome were mostly grouped around the banner whose slogan was 'determination to lay the foundations of an ever-closer union among the peoples of Europe'.[70]

The inspirational source of federalism in the American context is most definitely a perfect union, a kind of "Open Sesame" of American constitutionalism, meaning they are magic words that inspired generations of Americans to build a constitutional democracy in which the value of federalism from the beginning was highlighted in a special way. Namely, constitutional democracy in America is ordained and established for the following main purposes: (i) to form a more perfect union; (ii) to establish justice; (iii) to insure domestic tranquility; (iv) to provide for the common defence; (v) to promote the general welfare; (6) to secure "the blessing of liberty" to then and future generations.[71]

According to Madison, Hamilton and Jay, as stated in The Federalist Papers, the U.S. Constitution contained significant innovations compared to the organisation of federations of the past. The federalism of the founding fathers was the federalism of a double community, in which each citizen belongs to both his state and the federal union. The federalist compromise at the Philadelphia Convention in 1787 concerned a system built on a new conception of federalism that combined a powerful federal executive power, two houses of representatives (one representing the nation, the other representing the states), the Federal Constitution, and after 1791 a broad guarantees of civil rights and citizen's freedoms (Amendments I-X). The federal constitution was not limited only to defence and security, but it also regulated the national economy. This concept of federalism was based on the notion of a dual community, local and global, in which both the harmony of the whole and the efficient functioning of local government were taken care of. The very principle of federalism was understood as the division of political power and responsibility between the centralised federal

68 Burgess, 2000, p. IX.
69 Osiander, 2010, pp. 1. et seq.
70 Treaty of Rome, 1950.
71 Allen, 2021, p. 21.

government on one hand and the dispersed parts (member states of the federation) on the other, with an emphasis on mutual benefits in protecting the freedom of the people and the civil rights of individuals. Thus, federalism in the American case was much more than a mere dispersion of power; it was highly valued as a principle of promoting and preserving self-government and a shield of protection of the rights and freedoms of the American citizens.

In contrast to the American example (a more perfect union), the phrase "ever closer union" in the European context has been the source of numerous polarisations and disagreements regarding the path that European countries should take. The 1957 Treaty Establishing the European Community already contained the objective of "ever closer union" in its Preamble. The real trouble-maker in this context was Great Britain, which, despite the fact that it agreed several times to the EU Treaties and their amendments, of which the stipulation "ever closer Union" was an integral part, constantly sought and found in this phrase "a call forward towards a federal Europe", i.e. Europe as a super-state, a 'lingering symbol of a "United States of Europe" ambition'. Though the phrase "ever closer union" (in its entirety: "an ever closer union among the peoples of Europe") in European law and politics may be found to have already started from 1957, it really did not mean any specific call towards political union, that is creating a new European super state. Treaties emphasise the 'process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen', meaning they don't mention the political union and even the word "union" is written with a lowercase letter u. The phrase has little direct legal effect. The European Court of Justice did not cite it often in the sense of supporting decisions with federalist expansionist pretensions of the centre. However, critics believe that the CJEU pursued an integrationist agenda by relying on the objective of "ever closer union", which therefore 'cannot be described as solely symbolic'.[72]

The question of "genuine" meaning and character of the community that follows the EU from the beginning revives reminiscences of Samuel Puffendorf (1632-1694) whose 1667 treatise *De Statu Imperii Germanici* offered a strong critique of the disastrous state of public law in the Roman-German empire and counted the guild of constitutional lawyers as its apologists. Puffendorf there described the Roman-German empire as a "monster" because it divided sovereignty between the emperor and state. Puffendorf considered the Empire as an "irregular state" (irregulare corpus), because it represented neither a monarchy nor a confederation of states. The book raised an uproar throughout Germany and was quickly banned from universities, while the writer was condemned by the Imperial censor and the spiritual head of the Empire, the Pope.[73]

72 Miller, 2015, pp. 4 et seq.

73 Sæther, 2016, p. 21; Osiander, 2010, p. 6; 'There is now nothing left for us to say, but that Germany is an Irregular Body, and like some misshapen Monster, it can, at least, be measured by the common

Puffendorf's case lays bare all the sensitivities about the issue of federalism, the nature and form of which the political power constantly tried to accommodate to itself with the least possible damage to its untouchable "sovereign" character. Elaborating on the issue of the evolution and contribution of European federalism, attention is drawn in the relevant literature to the old European distinction between the Bundesstraat – federal state, and Staatenbund – confederation, union of states, while still taking into account the useful remark of Henry Sidgwick (1838-1900) that this "strict" historical-scientific distinction may have been given a lot of "undeserved importance" because these two terms, confederation, and federal state. represent just two phases in the development of federality:

> Sidgwick suggested that the term "federality" embraced a wide divergence of views about federal principles, akin almost to a spectrum of federality. And his phrase "federal polity" can be conveniently reduced to two main types, namely, a federal state (or federation) and a confederation (or league of independent states). However, as he observed, 'in neither case is the distinction simple and sharp since the balanced combination of "unity of the whole aggregate" with "separateness of parts", which constitutes federality, may be realised in very various modes and degrees.[74]

From its birth, and until this day, the European Community has displayed prudence in the search for a strict definition of the political-legal character of the European association of states, and caution in defining the relations of central institutions with the member states of the alliance. It is therefore not surprising that from time to time the intellectual search for figuring out the "nature of the beast" is summarised with the following statement: 'Curious and cumbersome perhaps, but the EU is still a formidable creature'.[75]

At present, sovereignty still mainly rests with the states. In addition, the existence of the unanimity rule in several areas such as fiscal and social policy, the exclusive competence of the Council in foreign affairs and defense, the *de facto* intergovernmental Commission and other elements call into question the existence of a true federation. The European Union is an international innovation that combines intergovernmental and confederal, and supranational and federal elements. It is definitely not a federation, maybe just a "federation in the making". The key elements missing are: (a) all EU legislation should be created by co-decision and qualified majority voting, including foreign affairs and defence; (b) pan-European constituencies should be created; (c) the supranational European Commission should be elected by the European Parliament and the Council of the European Union, not the member states; (d) the European Parliament should have the power to pass laws and

Rules of Politics and Civil Prudence, and that nothing similar to it, in my opinion, exists anywhere else on the whole globe'. Pufendorf, 1696, p. 176.

74 Burgess, 2000, p. 255.

75 Thornhill, 2008, p. 17.

to introduce taxes at EU level (together with the Council of the EU); e) The European Council should be limited to the role of the collective head of state; f) interpersonal solidarity mechanisms should be created, such as EU unemployment insurance and health insurance for the elderly; g) The EU should have a single voice in international affairs and security. By all means, in reality a federation treaty could hardly be agreed upon by all the current states. Perhaps only a small number of pro-European countries could initiate cooperation towards the European federation, with a federal core that would emerge within the current eurozone. Reform proposals that have recently been presented in the European Parliament, concentrating, amongst other things, on strengthening the Parliament and the Commission while weakening the influence of the European Council, replacing the unanimity by qualified majority voting in different areas, introducing new exclusive Union's competences and further widening of shared competences, the establishment of a defence union including military units under the operational command of the Union, and strengthening the EU's supervision of national policies, would undoubtedly significantly change the Union and push it towards a federal framework.[76] However, the decision regarding the question if this the right step forward for European integration still remains in the hands of its Member States.

5.1. Federalism as a "precautionary measure" in constitutional engineering of the EU?

Bearing in mind all the misfortunes and misery brought to Europe by rampant nationalism in the period of 1914-1945, enthusiasts behind the idea of a united Europe worked to build an international order with rules that would transcend national borders. The meaning of these rules was sought in suppressing the destructive and protectionist potential of the nation state. The idea of a peaceful coexistence of several states in an alliance was the *l'idee force* of European federalists A. Spinelli, R. Schuman, J. Monet and others. Inspired by libertarian ideas of Lord Acton they believed that 'the co-existence of several nations under the same State is a test, as well as the best security of its freedom'.[77] In Acton's mind, federalism as a division of power between the central government and the governments of the member states was implied as a 'precautionary measure'.

During the time of fierce clashes between Federalists and Anti-federalists at the Constitutional convention in Philadelphia, among the Anti-federalists there was a widespread mindset about the cautious handling of power, and authority. They were aware of the possibility of its abuse, so they found very convincing arguments against its administration. Several of them were firmly convinced that tomorrow 'the cradle of

76 See European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties; See Lionello, 2023, pp. 1–5.

77 Mingardi, 2022.

the Constitution would be the grave of republican liberty'.[78] The content of these discussions had a great influence on the European federalists in the preparation of the first European organisation (The Council of Europe), and the first European communities.

It should be repeated that the essence of preventive constitutionalism (Vermeule) is the advocacy and defence of rules and structures as precautionary measures and procedures against the risk of the abuse of power by acting officials or other constitutional actors, the risk of a tyrannical majority or other political pathologies. In the set of several different forms, the federalist principles of caution have a special significance. We have no doubt that it was precisely this point of view that inspired the understanding of member states as "masters of the Treaties". We believe that this is so because the federalist precautionary principle advocates the strict control of the competencies of central federal institutions. At the beginning of the 19th century St. George Tucker (1752–1827) urged that the Constitution 'is to be construed strictly, in all cases where the antecedent rights of a state may be drawn in question'. That is so-called "Tucker's rule", based on consent theory and precautionary measures:

> As every nation is bound to preserve itself, or, in other words, [its] independence; so no interpretation whereby [its] destruction, or that of the state, which is the same thing, may be hazarded, can be admitted in any case, where it has not, in the most express terms, given [its] consent to such an interpretation.[79]

In the European continental political tradition of federalism, there is a permanent awareness of the political "hazard" that centralised power will "destroy" the independence of what in the American context Tucker considered the sovereignty and independence of the member states of the confederation. Such states must be firmly presumed to take adequate precautions for their own survival. Therefore it must also be presumed that they will not risk their own destruction unless they are convinced that taking such a risk is infallible. For many Europeans as well as for early federalist commentators, the main federalist principle of the strict construction of national powers was similar to the X. Amendment of the US Constitution which provides that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'.[80]

It is therefore evident that the process of European integration was from the beginning connected with the idea of federalism. Francesco Palermo, just like many others who have followed the evolution and forms of EU integration, emphasises that it is an ongoing process, that is – a *sui generis* experiment.[81] According to Miguel Maduro, what exists and evolves is nothing but European constitutional pluralism

78 Marshall, 1926, pp. 240–41, cited in Vermeule, 2012, p. 185.
79 Tucker, 1803, p. 423; cited in Vermeule, 2012, pp. 188–189.
80 Vermeule, 2012, p. 189; Grappi, 2007, pp. 95. et seq; Burgess, 2000, pp. 163 et seq; Vayssière, 2022, pp. 1–14; Pinder, 1993, pp. 240 et seq.
81 Palermo, 2019, p. 1.

in action and its "contrapunctual law". With regards to Maduro's theory, its aim is twofold. On one hand constitutional conflict is avoided, while on the other when it does arise it can be managed effectively. Through an analogy with the musical theory of counterpoint, Maduro tries to show that the coexistence of different voices does not result in a cacophony, but instead a harmony that expresses the simultaneous independence and interdependence of the elements. The principles of contrapuctual law are 'the principles to which all the actors of the European legal community must commit themselves and according to which the EU legal order as a system of law'. The aim of the contrapunctual principles is to rise above European and national monism and to realise 'incompletely theorized agreements' (C. Sunstein), whereby 'different actors may proceed from different bases and by different routes, but nevertheless come up with the same (or at least different but compatible) results'.[82]

Reality therefore points us towards a compromise reconceptualised understanding of federalism that would be broader than the classic American model, yet narrower and more principled than the multi-level management approach. Such an attitude and approach identifies a minimum of institutional and procedural elements that are essential for the qualification of a system as "federal", but without excluding different combinations, such as the distribution of powers according to general and specific goals, existential guarantees that protect the rights of all constituent members, and the mechanism of negotiating a compromise based on the equality of members. In this direction, the normative questions of an institutional structure (constitutional engineering) can be seen, which form the basis for the idea and practice of desirable federalism, namely equality among the constituent members of the federation (horizontal dimension), and the balance of power between two, three or more levels of government (vertical dimension). In any case, possible combinatorial variations can be grouped into two different models, the American model of "constitutional federalism" and the European model of "contractual federalism".[83] Which way to go? Which concept of federalism should be used?

The compromise process between the EU in the centre and the member states as a "political periphery" became a political choice with the adoption of the Single European Act (1986), which elevated

> the philosophy of cooperative federalism from a legislative to a constitutional phenomenon by means of two new constitutional ideas: the principle of subsidiarity and complementary jurisdiction. The Treaty on the European Union expanded these two constitutional means into general guardians of European federalism.[84]

Thus, in the 1980s European political philosophy gave impetus to the principle of subsidiarity, which in the context of a general and intense socio-political search by

82 Flynn, 2013, p. 45.
83 Benz and Broschek, 2013, pp. 1–23.
84 Schütze, 2009, pp. 242 et seq.

several actors for a compromise between capitalism (individualism) and communism (collectivism) represented the idea that

> ... the central authority should have a subsidiary function, in the sense that it performs only those tasks that cannot be realised on a more immediate or local level... and with the aim of achieving unity through the harmonious arrangement of several objects.[85]

When the Treaty on the EU (1992) constitutionalised the principle of subsidiarity making it general constitutional principle, the European federalism finally gained a constitutional principle whose exclusive task was nothing more than to 'protect the Member States from the danger of excessive centralisation'. Article 5(2) of TEU, which elaborates the principle of subsidiarity, actually constitutionalised the principle of cooperative federalism as a Union principle. This principle also became the federal guardian of overlapping areas of competence and in that sense had nothing to do with dual federalism.[86]

6. Republic of Croatia as Member State of the European Union and actor of cooperative federalism

A quick look at the political map of the world shows us that we live in an age of federalism. In every review of comparative political systems it is pointed out that of the G-20 states, namely the countries with the most developed economies in the world, at least eleven have federal constitutional structures (USA, India, Germany, Brazil, Argentina, Canada, Indonesia, Australia, Russia, Mexico, South Africa, while several others are experimenting with federalism and the devolution of power). Of the ten countries with the highest GDP sin the world, only two – China and France – lack any semblance of federal structure. Of the ten most populous countries in the world, eight have federative or devolutionary structures. Only two of ten largest countries by land area in the world lack federal structure. One should also keep in mind that there are so many countries around the world which have transferred competences to growing international entities of different kinds (WTO, EU, NAFTA, NATO, etc.). Therefore, it might not be an over-exaggeration to say that "our time is witness to the decline and fall of "nation-states".[87]

85 Schütze, 2009, pp. 245 et seq.
86 Ibid.
87 Calabresi and Bickford, 2014, pp. 123–124.

6.1. Republic of Croatia as an actor in EU institutions

The Republic of Croatia became a Member State of the European Union on 1st July 2013. Joining the EU was one of the Croatia's main goals from the day it first gained independence. Croatia applied for full EU membership on 21st February 2003, and was confirmed as a candidate country on 18th June 2004. Accession negotiations were officially launched on 3rd October 2005. During its first ten years of membership, the Republic of Croatia achieved two strategic goals, moving it deeper into EU integration, namely Croatia joined the Schengen area and the Eurozone.

Following its accession, Croatia became a member of the European Union with all rights and obligations that stem from that membership, and certain competences were transferred to the institutions of the European Union in accordance with the provisions of the Treaty on the European Union and the Treaty on the Functioning of the European Union as well as the provisions of the Constitution of the Republic of Croatia (Chapter VIII – European Union).[88] For the purposes of more efficient functioning, numerous laws and decisions were adopted, defining the competences and obligations of various institutions and state administration bodies. For example, the Law on the Cooperation between the Croatian Parliament and the Government of the Republic of Croatia in European Affairs, which defines that the Parliament monitors and supervises the work of the Government in the EU institutions, reviews EU documents the positions of the Republic of Croatia and is able to reach conclusions on them, participates in the process of proposing candidates of the Republic of Croatia for the EU institutions and bodies, participates in inter-parliamentary cooperation between Member States and in cooperation with the European Parliament, etc. An Interdepartmental Working Group for European Affairs was also established, which reviews and prepares position proposals that will be advocated by representatives of the Republic of Croatia, and submits them to the Coordination for Foreign and European policy of the Government of the Republic of Croatia.

(i) Conducting European affairs. National institutions (Croatian Parliament, Government, judiciary, Constitutional Court) are engaged in European affairs based on the provisions of European law and national constitutional law.[89] Croatia's accession to the EU membership on 1 July 2013 reflected changes to the status and the role of the Croatian Parliament. Namely, legislative and non-legislative acts adopted at the EU level are either directly applicable in Croatia, or Croatia is obliged to transpose them into its national legislation. When adopting such acts, Croatia is represented in the Council of the European Union as a legislative body, by the Croatian Government. In the other legislative body of the European Union, the European Parliament, Croatian citizens are directly represented by Members of the European Parliament elected in Croatia.

88 Constitution of the Republic of Croatia, Official Gazette Narodne novine No. 85/2010 (consolidated text).

89 Official data available at the official web page of the Parliament; Hrvatski sabor, no date.

Conducting European affairs in the Croatian Parliament implies the Parliament's participation in the decision-making process at the level of the European Union through the activities of the Croatian Parliament arising from the membership of the Republic of Croatia in the European Union. The Croatian Parliament's participation in European affairs is regulated by Article 144 of the Constitution of the Republic of Croatia, the Law on the Cooperation of the Croatian Parliament and the Government of the Republic of Croatia in European Affairs and the Standing Orders of the Croatian Parliament.[90] The Parliament conducts European affairs indirectly by monitoring the activities of the Government in the institutions of the European Union, and directly by exercising the powers conferred on national parliaments by the Treaty of Lisbon. The powers of the Croatian Parliament in European affairs are, as a rule, carried out by the European Affairs Committee, while the Foreign Affairs Committee is in charge of issues pertaining to the Common Foreign and Security Policy. The European Affairs Committee closely cooperates with other working bodies of the Croatian Parliament that follow the policies of the European Union each within its own remit.[91]

The Standing Orders of the Croatian Parliament provide for the involvement of all working bodies and members of Parliament in European affairs.[92] Members of the European Parliament elected in Croatia may participate in the sessions of all working bodies of the Croatian Parliament.

(ii) Direct participation. Pursuant to the Protocol No. 1 of the Lisbon Treaty on the Role of National Parliaments in the European Union, EU institutions forward directly to the national parliaments all draft legislative and non-legislative acts as well as other documents on Croatian language.

The Parliament directly participates in the decision-making process in the European Union by monitoring its compliance with the subsidiarity principle in the proposals of legislative acts and legislative acts of the EU and by participating in the procedures of revising the Treaties and implementing the passerelle clause. The exchange of views within the framework of political dialogue between national parliaments and the Commission is also a form of direct participation in the decision-making process.

(iii) Indirect participation. The Croatian Parliament indirectly participates in the decision-making process of the European Union by supervising Government activities in the institutions of the European Union. Pursuant to the provisions of the Law on the Cooperation of the Croatian Parliament and the Government of the Republic of Croatia in European Affairs and the Standing Orders of the Croatian Parliament, the Parliament monitors the work of the Government in the institutions

90 Law on the Cooperation of the Croatian Parliament and the Government of the Republic of Croatia in European Affairs and the Standing Orders of the Croatian Parliament.

91 Hrvatski sabor, no date.

92 Standing orders of the Croatian Parliament, Official Gazette Narodne novine no. 81/13, 113/16, 69/17, 29/18, 53/20, 119/20, 123/20, 86/23.

of the European Union by adopting conclusions on the positions of the Republic of Croatia and the documents of the European Union, forming the basis of which the Government acts within institutions, namely holding debates during meetings of the European Council and the Council of the European Union, and by participating in the procedure for proposing candidates for the institutions and bodies of the European Union. During the procedure of consideration of EU documents and the relevant positions of the Republic of Croatia, the discussions on the meetings of the Council of the European Union and the procedure of nominating candidates for EU institutions and bodies, the powers of the Croatian Parliament are, as a rule, executed by the European Affairs Committee.[93]

(iv) Obligation of harmonisation of legislation. As a member state of the European Union, Croatia is obliged to align its national legislation with the *acquis communautaire*. The European acquis is constantly evolving and national regulations must be harmonised accordingly. Since 1 July 2013, the Croatian Parliament has adopted legislation harmonised with the acquis following the procedure established in the pre-accession period, according to which all legislative proposals that align Croatian legislation with the acquis bear the designation "P.Z.E." and are adopted under urgent procedure if so sought by the sponsor. The Parliament adopts the annual legislative alignment plan, which is an integral part of the Government's programme for incorporating and implementing the acquis, and is the basic document in the process of incorporating and implementing EU law in Croatian legislation. Croatia is obliged to implement the notification procedure i.e. to timely notify the European Commission of the measures for the transposition of new directives into Croatian legislation, as well as to properly implement the adopted legislation. The EU acquis is available in the Croatian language, which is one of the official languages of the Union, in order to provide Croatian citizens with equal access to European legislation.[94]

(v) Interparliamentary cooperation. Interparliamentary cooperation in the European Union is an important instrument for the coordination and attainment of the influence of national parliaments on the decision-making process at European level. The Lisbon Treaty has given national parliaments new powers in the field of European affairs, thus increasing the importance of interparliamentary cooperation, which provides for the exchange of information and best practices between national parliaments and the European Parliament. Mutual cooperation between national parliaments of the European Union Member States and their cooperation with the European Parliament is also important for bringing the European Union closer to the citizens. Various forms of interparliamentary cooperation are available to national parliaments, including the Croatian Parliament, and involve conferences and meetings as well as information exchange platforms.

93 Hrvatski sabor, no date.
94 Ibid.

7. Which form of federalism is the dominant modus operandi of European integration?

It is rightly pointed out that the EU, due to its innovations and complexity, is a unique phenomenon in the modern world of political leadership and legal regulation. The evolution process of EU integration and institutions has demonstrated the acceptability of the federal method of governing this complex supra-organisation of modern society. Nevertheless, one could rightly ask what type of federalism corresponds to the EU? Or, what type of federalism already exists in the EU? In the search for systematic answers, two points stand out. In one case, the criteria is qualification, and in the other it is the outcome of European integration. The first approach actually puts the EU into "federalist theory frames", while the latter directly addresses the "nature of the beast".[95]

(a) When it comes to the qualification of EU federalism, the literature distinguishes three alternative categories of federalism: new confederalism, cooperative federalism and regulatory federalism. (i) Scholars who advocate new confederalism take *sui generis* nature of European integration as a starting point. The EU is a polity that functions in practice, but fails to work in theory. P. Vila Maior adds an alternative qualification and poses the question, namely, is the EU a 'new federalist' polity? (ii) Advocates of cooperative federalism point to the fact that the development of European integration encouraged a closer relationship between the EU level and the member state level. Both supranational and national levels are involved in cooperation because they realised that it is the best solution to solve the problem. For supporters of cooperative federalism, the emphasis is on shared responsibilities between supranational and national units of governance. (iii) A related approach is regulatory federalism. The difference between cooperative federalism and regulatory federalism relates to aspects of decision-making. While cooperative federalism focuses on top officials, regulatory federalism pays attention to the bottom-up perspective, where regulatory agencies and networks are the main actors, as they provide the impetus for the final verdict of top officials in the decision-making process.[96]

(b) Answers to the question about the "nature of the beast" are grouped into three categories. The EU is an asymmetrical confederation, a federation without a federal state, and an emerging federal state. Bearing in mind that integration is a process and a laboratory of modern governance, the typology is almost endless. Nevertheless, it is evident that the EU has more federal characteristics, so it can be concluded that: 'In all respects, the EU is consistent with a federation without a federal state, whose internal organisation is characterised by decentralisation in a key sense. Overall, there is strong evidence that the EU is a decentralised federation'.[97]

95 Maior, 2009, pp. 12 et seq.
96 Maior, 2009, p. 13.
97 Ibid.

The long theory and practice of the division of competences between the centre and periphery, central government and states represents one of the "oldest questions of constitutional law". Generally speaking, traditional responses to that challenge, both in practice and in literature, mostly fall into two categories of federalism. One approach, dual federalism, assigns powers exclusively to federal or central (state) agencies. Another approach creates situations where central and peripheral (federal and state agencies) have overlapping competences, often called cooperative federalism.

Among the numerous researchers of the questions, what federal philosophy has the European Union followed and what is the structure of European law, a special contribution to the discussion is offered by Robert Schütze. In his book on dual and cooperative federalism, he specifically researched arguments that, he ascertains, reveal and justify the evolution of the European legal order through different modalities of federalism. The first argument relates to the decline of constitutional exclusivity on the part of the Member States and the European Union. For almost all objects of government, the Union and Member States operate in an area of divided, shared powers. The second argument analyses the decline of legislative exclusivity. European and national legislation increasingly complement each other in solving the social problem. The third argument describes the 'constitutionalisation' of cooperative federalism in the form of the subsidiarity principle and the idea of complementary competences. Schütze concludes that cooperative federalism benefits both levels of government, the Union and the Member States, since the constitutional mechanism of uniform European standards supplemented by different national standards best expresses the idea of a federation as "unity in diversity".[98] This idea was succinctly and wisely summed up by the classic protagonist of modern federalism Carl J. Friedrich (1901 – 1984) in the message that federalism merges in itself, and shapes and reconciles what he called a "federal spirit", which is in fact composed of two opposed aspirations, "one is striving towards diversity, and the other is striving towards unity. It will be shown that coexistence is possible, and that the federal order has a future only when these two aspirations penetrate each other".[99]

8. Conclusion

During its long political history, the Republic of Croatia has experienced various forms of federalism. Leaving aside historical forms for the purpose of this discussion (personal unions, real unions, etc.), as that discourse would not stay within the parameters of this study, we shall focus only on the period of its constitutional and

98 Schütze, 2009, pp. 345–352.
99 Blindenbacher and Koller, 2003, p. 560.

political history from 1945-1990. Despite some assessments that Yugoslav socialist federalism was not "federalism" at all, during the socialist period (1945-1990) the evolution of federalism nevertheless took place within the spectrum of authenticity (centralist, dual, unbalanced) to confederal (asymmetric, cooperative). That period left behind a valuable experience, which brought Croatia closer to the problems of the federal principle, regardless of the form in which it appeared.[100] This is even more apparent when one takes into account the differences that exist between the Yugoslav federalism in its initial, developmental phase (1945-1971) and its relevant features from its "mature", second, experimental phase (1971-1990) which are more than evident. Therefore, the next conclusion is quite legitimate, as it is true that

> ...the Yugoslav political system could be considered a relevant example of a federal system, even a system that can be theoretically considered a very specific federal system... (this is evidenced by) a series of articles on Yugoslav federalism in Publius, a respected journal dealing with theory and practice of federalism in the world.[101]

After all, the events of the early 1970s, when the Yugoslav federation began to "federate", also produced the federalist idea of the Croatian Spring, which was

> …not only an introduction to the movement for the creation of a democratic independent Croatian state in 1989-1991; its results, despite the political defeat of its creators and holders, expressed through the Constitutional Amendments of 1971 and the Constitution of 1974 with the right to self-determination of the republics and their original sovereignty, enabled the international recognition of the Republic of Croatia in 1992.[102]

After the first ten years of "coexistence" between the EU and the Republic of Croatia, we can say that this relationship is no longer a "tale of two discourses".[103] After joining the European Union, Croatia has already had the opportunity to constructively and critically evaluate its first experiences of coexistence within the framework of the new community. In accordance with its possibilities and potentials, Croatia is already participating in the only possible discourse, namely 'the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and closely as possible to the citizen'. It is a process in which the European federal quality is a solid basis for the coexistence of the EU and its member states.

100 Podolnjak, 2007, pp. 89 et seq.
101 Podolnjak, 2007, pp. 95 et seq; see, for example, Denitch, 1977, pp. 107–117.
102 Sokol, 2007, p. 141.
103 Rodin, 2007, p. 258.

References

Acton, L. (1887) *Acton-Creighton Correspondence* [Online]. Available at: https://oll.libertyfund.org/title/acton-acton-creighton-correspondence/ (Accessed: 15 October 2023).

Allen, W.W. (2021) 'Constitutional Reflections: A Recurrence to Fundamental Principles and Forming a More Perfect Union', *Nevada Lawyer* [Online]. Available at: https://howardandhoward.com/media/pdf/NevadaLawyer_Sept _Allen _ConstitutionPart1-CLEarticle_9-30-21.pdf (Accessed: 15 October 2023).

Avbelj, M. (2008) 'The Pitfalls of (Comparative) Constitutionalism for European Integration', *Eric Stein Working Paper,* No. 2008/1, pp. 1–28; https://doi.org/10.2139/ssrn.1334216.

Bačić, A., Bačić, P. (2016) 'Konstitucionalizam i administrativna država', *Zbornik radova Pravnog fakulteta u Splitu,* 53(1), pp. 119–137; https://doi.org/10.31141/zrpfs.2016.53.119.119.

Baraggia, A., Fasone, C., Vanoni, L.P. (eds.) (2020) *New Challenges to the Separation of Powers – Dividing Power*. Cheltenham: Edward Elgar Publishing; https://doi.org/10.4337/9781788975278.

Beckett, C.H. (1988) 'Separation of Powers and Federalism: Their Impact on Individual Liberty and the Functioning of Our Government', *William & Mary Law Review,* 29(4), pp. 635–651.

Benz, A., Broschek, J. (eds.) (2013) *Federal Dynamics: Continuity, Change, and the Varieties of Federalism*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780199652990.001.0001.

Bickerton, C.J. (2011) 'Europe's Neo-Madisonians: Rethinking the Legitimacy of Limited Power in a Multi-level Polity', *Political Studies*, 59(3), pp. 659–673; https://doi.org/10.1111/j.1467-9248.2010.00872.x.

Blindenbacher, R.J., Koller A. (2003) *Federalism in a Changing World:* Learning from Each Other: Scientific Background, Proceedings and Plenary Speeches of the International Conference on Federalism. Montreal: McGill-Queen's University Press; https://doi.org/10.1515/9780773571402.

Burgess, M. (2000) *Federalism and European Union: the Building of Europe*. Abingdon: Routledge.

Calabresi, S.G., Bady Kyle, B. (2010) 'Is the separation of powers exportable?', *Harvard Journal of Law and Public Policy*, 33(1), pp. 5–16.

Calabresi, S.G., Bickford, L.D. (2014) 'Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law', *Nomos,* 2014/55, pp. 123–189.

Craig, P. (2021) 'Institutions, Power, and Institutional Balance' in Craig, P., de Búrca, G. (eds.) *Evolution of EU Law*. Oxford: Oxford University Press; pp. 46–98; https://doi.org/10.1093/oso/9780192846556.001.0001.

Denitch, B. (1977) 'The Evolution of Yugoslav Federalism'*, Publius,* 7(4), pp. 107–117; https://doi.org/10.2307/3329500.

Dobner, P., Loughlin, M. (2010) 'Introduction' in Dobner, P., Loughlin, M. (eds.) *The Twilight of Constitutionalism?*. Oxford: Oxford University Press, pp. 11–16; https://doi.org/10.1093/acprof:oso/9780199585007.002.0008.

Eisinger, V. (2015) 'Auxiliary Protections: Why the Founders' Bicameral Congress Depended on Senators Elected by State Legislatures'*, Touro Law Review*, 31(2), pp. 234–295. [Online]. Available at: https://digitalcommons.tourolaw.edu/lawreview/vol31/iss2/7 (Accessed: 17 October 2023).

Elazar, D.J. (1981) 'The Power to Govern: Assessing Reform in the United States', *Proceedings of the Academy of Political Science*, 34(2), pp. 5–19; https://doi.org/10.2307/1173787.

Elazar, D.J. (1985) *Forces Shaping the Federal Svstem Today in Emerging Issues jn American Federalism- Papers Prepared forACIR's 25'th Anniversary* [Online]. Available at: https:// library. unt.edu/gpo/acir/Reports/information/M-143.pdf (Accessed: 19 October 2023).

Ewing, C.M. (2016) 'The Politics of Sovereignty: Federalism in American Political Development'*, Dissertation*, pp. 5–264.

Fabbrini, F. (2023) 'The Separation of Powers in the European Union'*, Rivista Trimestrale di Diritto Pubblico*, No. 2023/1, pp. 13–44.

Federalist Papers (1788) *No. 32 The Same Subject Continued Concerning the General Power of Taxation* [Online]. Available at: https://avalon. law.yale.edu/18th_century/fed32.asp (Accessed: 15 September 2023).

Flynn, T. (2013) *The Universality of Interface Norms Under Constitutional Pluralism: An Analysis of Ireland, the EU and the ECHR*. Edinburgh: The University of Edinburgh.

Gormley, W.T. (1991) 'The Bureaucracy and its Masters: The New Madisonian System in the US', *Governance*, 4(1), pp. 1–18; https://doi.org/10.1111/j.1468-0491.1991.tb00001.x.

Grappi, G. (2007) *La questione antifederalista e il dibattito sulla ratifica della Costituzione degli Stati Uniti, 1787-1788*. Bologna: University of Bologna.

Hamilton, A., Madison, J. (1788) *The Federalist Papers: No. 51*: *The Structure of the Government Must Furnish Proper Checks and Balances Between the Different Departments.* [Online]. Available at: https://avalon.law. yale.edu/18th_century/fed51.asp (Accessed: 15 September 2023).

Hamilton, A., Madison, J., Jay, J. (1981) *Federalistički spisi*. Beograd: Radnička štampa.

Henkin, L. (1992) 'Constitutionalism*,* Democracy and Foreign Affairs'*, Indiana Law Journal,* 67(4), pp. 879–886.

Isiksel, T. (2012) 'On Europe's functional constitutionalism Towards a constitutional theory of specialized international regimes', *Constellations*, 19(1); https://doi.org/10.1111/j.1467-8675.2011.00665.x.

Isiksel, T. (2015) 'Functional constitutionalism in the European Union', *Draft paper to be presented at the EUSA Biannual Meeting in Boston*; https://doi.org/10.1093/acprof:oso/9780198759072.003.0003.

Isiksel, T. (2016) *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State*. 1st edn. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780198759072.003.0001.

Jacobs, N. (2021) *Trump, Donald* [Online]. Available at: https://encyclopedia.federalism. org/index.php/Trump,_Donald (Accessed: 21 October 2023).

Kincaid, J. (2019) 'Three Shades of American Federalism', *50 Shades of Federalism* [Online]. Available at: https://ldr.lafayette.edu/concern/publications/nz8060259 (Accessed: 29 October 2023).

Klabbers, J. (2019) 'The European Union in the Law of International Organizations: Misfit or Model' in Wessel R., Odermatt J. (eds.) *Research Handbook on the European Union and International Organizations.* Cheltenham: Edward Elgar Publishing, pp. 25–41; https://doi.org/10.4337/9781786438935.00007.

Lenaerts, K. (1991) 'Some reflections on the separation of powers in the european community', *Common Market Law Review,* 28(1), pp. 11–36; https://doi.org/10.54648/COLA1991004.

Lenaerts, K., Gutman, K. (2006) 'Source „Federal Common Law" in the European Union: A Comparative Perspective from the United States', *The American Journal of Comparative Law,* 54(1), pp. 1–121; https://doi.org/10.1093/ajcl/54.1.1.

Levi, E.H. (1976) 'Some Aspects of Separation of Powers', *Columbia Law Review*, 76(3), pp. 371–391; https://doi.org/10.2307/1121549.

Lindseth, P.L. (2010) *Power and Legitimacy- Reconciling Europe and the Nation State*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780195390148.003.0001.

Lionello, L. (2023) 'A Leap Towards Federalisation', *Verfassungsblog*, September 2023, pp. 1–5; https://doi.org/10.17176/20230922-223502-0.

Loughlin, M. (2010) *What is Constitutionalisation?*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780199585007.003.0003.

MacCormick, N. (1999) *Questioning Sovereignty, Law, State, and Nation in the European Commonwealth*. Oxford: Oxford University Press.

Maior, P.V. (2009) 'The European Union as a Federal Polity? An Input to an Unfinished Symphony'*, Paper for the 21st. World Congress of the International Political Science Association (IPSA),* 'Global Discontent? Dilemmas of Change', July 12–16, 2009, Santiago, Chile.

Marbach, R.J. (2006) *New Federalism (Nixon)* [Online]. Available at: https://encyclopedia.federalism.org/index.php?title=New_Federalism_(Nixon) (Accessed: 15 October 2023).

Marshall, G. (1971) *Constitutional Theory*. Oxford: Clarendon Press.

Miller, V. (2015) 'Ever Closer Union' in *the EU Treaties and Court of Justice case law, Briefing Paper,* 2015/07230.

Mingardi, A. (2022) *The EU's future: Like Switzerland or more like Italy?* [Online]. Available at: https://www.gisreportsonline.com/r/eu-future/ (Accessed: 12 October 2023).

Montesquieu, Ch. (1748) *The Spirits of Law*. Batoche Books.

Moravcsik, A. (2001) 'Despotism in Brussels – Misreading the European Union', *ForeignAffairs,* 80(3), pp. 114–122; https://doi.org/10.2307/20050155.

Moravcsik, A. (2002) 'In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union', *Journal of Common Market Studies,* 40(4), pp. 603–24.

Moskalenko, O. (2016) 'The Institutional Balance: a Janus-faced concept of EU constitutional law', *Politeja – Pismo Wydziału Studiów Międzynarodowych i Politycznych Uniwersytetu Jagiellońskiego,* 13(45), pp. 125–143; https://doi.org/10.12797/Politeja.13.2016.45.07.

Möllers, C. (2003) 'Steps to a Tripartite Theory of Multi-level-Government', *Jean Monnet Working Paper,* No. 2003/5.

Möllers, C. (2013) *The Threes Branches – A Comparative Model of Separation of Powers*. Oxford: Oxford University Press.

Nolte, G. (2003) 'European and U.S. Constitutionalism: comparing essential elements', *UniDem Seminar organised in Göttingen on 23-24 May 2003 in co-operation with the Institute of International Law, University of Göttingen, and Yale Law School,* Göttingen, pp. 9–22.

Osiander, A. (2010) 'Irregulare aliquod corpus et monstro simile: Can historical comparisons help understand the European Union?', *Draft paper for the Annual Meeting of the American Political Science Association,* Revised version, August 2010; https://doi.org/10.2139/ssrn.1648807.

Palermo, F. (2019) *What does the EU tell us about Federalism?* [Online]. Available at: http://50shadesoffederalism.com/theory/what-does-the-eu-tell-us-about-federalism/ (Accessed: 14 October 2023).

Pestritto, R.J. (2012) 'Woodrow Wilson and the Rejection of the Founder's Constitution'*, Constitution 201: The Progressive Rejection of the Founding and the Rise of Bureaucratic Despotism*; https://doi.org/10.5422/fordham/9780823251940.003.0009.

Peters, A. (2006) 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', *Leiden Journal of International Law*, 19(3), pp. 579–610; https://doi.org/10.1017/S0922156506003487.

Peterson, P.E. (2006) 'The Changing Politics of Federalism in the United States' in Greer, S.L. (eds) *Territory, Democracy and Justice – Regionalism and Federalism in Western Democracies*. London: Palgrave MacMillan, pp. 92–116; https://doi.org/10.1057/9780230510388_5.

Pinder, J. (1993) 'Federalism Versus Nationalism: The European Community and the New Europe', *New Europian Law Review,* 62(1), pp. 41–54.

Podolnjak, R. (2007) 'Federalizam u bivšoj Jugoslaviji i Europskoj uniji' in Smerdel, B. (ed.) *Primjena federalnog načela i pouke ustavne reforme 1971.* Zagreb: Centar za demokraciju i pravo Miko Tripalo.

Pryor Jr., H.W. (2002) 'Madison's Double Security: In Defense of Federalism, the Separation of Powers and the Rehnquist Court', *Alabama Law Review,* 53(4), pp. 1167–1182.

Pufendorf, S. (1696) *The Present State of Germany.* Carmel: Liberty Fund.

Riker, W.H. (1975) 'Federalism' in Greenstein, F. I., Polsby, N. W. (eds.) *Governmental Institutions and Processes*. Boston: Adison Wesley Publishing Company, pp. 93–172.

Rittberger, B., Schimmelfennig, F. (2006) 'Explaining the constitutionalization of the European Union', *Journal of European Public Policy*, 13(8), pp. 1148–116; https://doi.org/10.1080/13501760600999474.

Rodin, S. (2007) 'Hrvatska i Europska unija-priča o dva diskursa' in Smerdel, B. (eds.) *Primjena federalnog načela i pouke ustavne reforme 1971*. Zagreb: Centar za demokraciju i pravo Miko Tripalo, Zagreb, pp. 205–214.

Rosenfeld, M. (2014) 'Is Global Constitutionalism Meaningful or Desirable?', *The European Journal of International Law,* 25(1), pp. 177–199; https://doi.org/10.1093/ejil/cht083.

Russell, G. (2001) *Constitutionalism: America & Beyond*. Office of International Information Programs, U.S. Department of State.

Sæther, A. (2016) *Samuel Pufendorf-The Grandfather of Modern Political Economy?* [Online]. Available at: https://core.ac.uk/download/pdf/288306841.pdf (Accessed: 15 October 23).

Salzberger, E., Voigt, S. (2009) 'Separation of powers: new perspectives and empirical Findings – Introduction', *Constitutional Political Economy,* 2019/20, pp. 197–201; https://doi.org/10.1007/s10602-009-9076-6.

Schimmelfennig, F. (2020) 'The Conference for the Future of Europe and EU Reform: Limits of Differentiated Integration', *European Papers,* 5(2), pp. 989–998. [Online]. Available at: https://www.europeanpapers.eu/it/system/files/pdf_version/EP_eJ_2020_2_16_Dialogues_Frank_Schimmelfennig_00409.pdf (Accessed: 24 October 2023).

Schlesinger Jr., A.M. (1973) *The Imperial Presidency*. Boston: Houghton Mifflin Co.

Schütze, R. (2009) *From Dual to Cooperative Federalism-The Changing Structure of European Law*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780199238583.001.0001.

Schütze, R. (2012) *European Constitutional Law*. Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9781139031769.

Siedentop, L. (2001) *Democracy in Europe*. New York: Columbia University Press.

Sokol, S. (2007) 'Federalistička ideja od Hrvatskog proljeća 1971. do restrukturiranja Europske unije' in Smerdel, B. (ed.) *Primjena federalnog načela i pouke ustavne reforme 1971*. Zagreb: Centar za demokraciju i pravo Miko Tripalo, pp. 139–144.

Thornhill, J. (2008) *The Nature of the Beast – Curious and cumbersome perhaps, but the EU is still a formidable creature* [Online]. Available at: https://www.ft.com/content/e978e48e-43e9-11dd-842e-0000779fd2ac (Accessed: 24 October 2023).

Vayssière, B. (2022) 'Federalists and the Beginnings of the Council of Europe: Converting Institutions and Opinion to Supranationality (1949–1951)', *Histories*, 2(1), pp. 1–14. [Online]. Available at: https://doi.org/10.3390/histories2010001 (Accessed: 25 October 2023).

Vermeule, A. (2012) 'Precautionary Principles in Constitutional Law', *Journal of Legal Analysis*, 4(1), pp. 181–222; https://doi.org/10.1093/jla/las003.

Vile, M.J.C. (1998) *Constitutionalism and Separation of Powers*. Indianapolis: Liberty Fund.

Walker, N. (2006) 'The Migration of constitutional ideas and the migration of the constitutional idea: the case of the EU' in Choudry, S. (ed.) *The Migration of Constitutional ideas*. Cambridge: Cambridge University Press, pp. 316–334; https://doi.org/10.1017/CBO9780511493683.012.

Weiler, J.H.H. (1999) 'Introduction: The Reformation of the European Constitutionalism' in Weiler, J.H.H. (ed.) *The Constitution of Europe – Do the New Clothes have an Emperor and Other Essays on European Integration*. Cambridge: Cambridge University Press.

Wolfe, C. (1979) 'Woodrow Wilson: Interpreting the Constitution', *The Review of Politics,* 41(1), pp. 121–142; https://doi.org/10.1017/S0034670500029363.

Yatsco, T. (2006) *Creative Federalism* [Online]. Available at: https://encyclopedia.federalism.org/ index. php?title =Creative_Federalism596877 (Accessed: 15 October 2023).

Zielonka, J. (2006) *Europe as Empire: The Nature of the Enlarged European Union*. Oxford: Oxford University Press; https://doi.org/10.1093/0199292213.001.0001.

Ziller, J. (2008) 'Separation of powers in the European union's interwined system of government a Treaty Based analysis for the use of political scientists and constitutional lawyers', *Il Politico,* 73(3), pp. 133–179.

Zimmerman, J.F. (2001) National-State Relations: Cooperative Federalism in the Twentieth Century', *Publius: The Journal of Federalism,* 31(1); https://doi.org/10.1093/oxfordjournals.pubjof.a004894.

Legal Sources

Constitution of the Republic of Croatia, Official Gazette Narodne novine No. 85/2010 (consolidated text), 5/14.

Law on the Cooperation of the Croatian Parliament and the Government of the Republic of Croatia in European Affairs, Official Gazette Narodne novine No. 81/13.

McCulloch v. Maryland (1819) 17 U.S. 316. [Online]. Available at: https://supreme.justia.com/ cases/federal/us/17/316/ (Accessed: 15 October 2023).

Standing orders of the Croatian Parliament, Official Gazette Narodne novine no. 81/13, 113/16, 69/17, 29/18, 53/20, 119/20, 123/20, 86/23.

Treaty of Rome (1950) [Online]. Available at: https://eur-lex.europa.eu/EN/legal-content/summary/treaty-of-rome-eec.html (Accessed: 25 October 2023).

United States v. Lopez (1995) 514 U.S. 549. [Online]. Available at: https://supreme.justia.com/cases/federal/us/514/549/ (Accessed: 15 September 2023).

Chapter 5

Member States in the EU: The Issue of (Pooled) Sovereignty

Michal Petr

Abstract

It has been argued by some scholars that within the European Union, Member States are no longer sovereign. Others claim that the sovereignty of Member States is not lost, but "pooled" with the sovereignty of other members. Still others argue that the notion of sovereignty has itself has changed and it needs to be understood in a modern (or even post-modern) way. This paper analyses the notion of sovereignty, both generally and specifically in the EU context. I argue that, in practical terms, Member States remain sovereign within the EU, meaning that no decision can be taken without their consent as they wield the veto power. The relationship between the EU and its Member States thus remains horizontal in principle, without a simple hierarchy. However, this approach is challenged by the existence of qualified majority voting, which allows one Member State to be "overvoted" by others. Admittedly, this may be the price of efficient decision-making, but it dramatically changes the position of a Member State within the EU. In this context, I put forward that two conditions must be met for a Member State to retain sovereignty in such circumstances. First, the competences of the EU and the Member States need to be clearly delimitated. In particular, the Member States need to be absolutely free to decide which decisions should be subject to unanimity and qualified majority voting. And second, the power to decide whether certain competences remain with the Member State or have been transformed to the EU must remain with the Member State concerned. The number of recent *ultra vires* judgments of national constitutional courts shows that the Member State understand this in the same way.

Keywords: competences; constitutionalism; qualified majority voting; sovereignty; *ultra vires*.

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1. Introduction

In 1999, William Wallace opined in his influential essay on the concept of shared sovereignty that '[n]o government in Europe remains sovereign in the sense understood by diplomats or constitutional lawyers of half a century ago'.[1] Similar arguments had been raised before; as Neil MacCormick observed already in 1993, 'it seems obvious that no state in Western Europe any longer is a sovereign state'.[2] This has led to claims that sovereignty, if relevant at all, needs to be understood in a "modern" way, taking into account the current extent of international cooperation. The term "late sovereignty" is sometimes employed in this regard.[3]

This debate is particularly relevant within the European Union, that challenges the sovereignty of its Member States in two ways. Firstly, it puts forward to have created its *sui generis* legal order, superior to that of the Member States, which may eventually lead to conflicts between top judicial institutions, the Court of Justice of the European Union (hereinafter referred to as the CJEU), on the one hand, and national constitutional courts, at the other. And secondly, unlike in other international organisations, the decision-making within the EU is in principle not based on unanimity and consensus, but on majority voting (the so called ordinary legislative procedure),[4] which ultimately means that in a Member State, there may be a law in place that the State itself does not agree with, but which the State is obliged to enforce.

This is the context in which this paper discusses the issue of sovereignty within the EU. It strives to take into account the perspective of Central Europe, and in particular the Czech Republic as the author comes therefrom. Its main focus is the future: what shall be the relationship between the European Union and its Member States, to what extent they shall remain sovereign, would their sovereignty be passed to the EU or would it be "pooled" beyond the Member States' control?

In this regard, four questions need to be answered: (i) under what conditions may a state be considered sovereign; (ii) how does EU membership modify the sovereignty of the Member States; (iii) may state sovereignty be divided and what does "pooled" sovereignty mean; (iv) where should the boundaries between the powers of the EU and its Member States be drawn?

In order to answer these questions, the paper is structured as follows: first, it discusses the concept of sovereignty, both in its traditional and contemporary understanding (Chapter 2). Second, it focuses specifically on the European Union and its impact on the Member States' sovereignty (Chapter 3); as a case study, Czech jurisprudence and academic discussions will be introduced (Chapter 4). Finally, we shall focus on the position of a Member States within the EU and on the guarantees that need to be in place in order for a state to remain sovereign (Chapter 5).

1 Wallace, 1999, p. 503.
2 MacCormic, 1993, p. 16.
3 Walker, 2002, p. 346.
4 Arts. 289–294. Treaty on the Functioning of the European Union (hereinafter referred to as TFEU).

2. The Concept of Sovereignty

The concept of sovereignty is arguably a relatively new one, appearing at the end of the Middle Ages and gaining prominence with the establishment of modern national states. Its meaning, and indeed its purpose, has nonetheless been changing over the years. A proper understanding of this concept is crucial for answering the questions posed in this paper.

We will therefore start with the traditional approach to sovereignty, as framed in the sixteenth century, and its subsequent development. Thereafter, we will analyse the situation today, focusing on interpretation that is sometimes referred to as late sovereignty. Finally, we will focus on the question, what is the purpose of sovereignty, and what does it mean today, in practical terms, for a state to be sovereign.

2.1. The Traditional Approach

The concept of sovereignty in the traditional sense is associated with the sixteenth century writer Jean Bodin, according to whom it meant absolute power capable of expressing itself against all society.[5] This concept was employed by territorial rulers in order to justify their power within their territory, 'in justifying their aspirations to free themselves from the influence of the emperor and the pope' and to 'consolidate their territorial jurisdiction in contrast to overlapping medieval personal jurisdiction'.[6]

Sovereignty was associated with exclusiveness, in current discourse with the exclusiveness of the state's powers over all the persons and all the facts in its territory.[7] This understanding also led to describing sovereignty as indivisible; as proposed by Hugo Grotius in the seventeenth century: 'sovereignty is a unity, in itself indivisible'.[8]

Later theory started to distinguish between "internal" sovereignty, signifying the highest, original power within a territorial jurisdiction (meaning that the state's power is not subject to any foreign power), and "external" sovereignty, corresponding with the doctrine of independence and equality of states.[9] As summarised in modern legal theory by Neil MacCormic: 'a state is sovereign if the exercise of power internally to the state is not subject to external superior power or to other constraints or restrictions legal in nature'.[10]

The concept of sovereignty is inherently state-based and territorial.[11] Sovereignty is associated with a state that has absolute and exclusive power over its territory.

5 Bifulco and Nato, 2020, p. 8.
6 Lapidoth, 1992, p. 326.
7 Lapidoth, 1992, p. 330.
8 Lake, 2007, p. 225.
9 Lapidoth, 1992, p. 327.
10 MacCormic, 1993, p. 14.
11 Agnew, 2005, p. 439.

Such an understanding has multiple implications. The first is the notion of the sovereign equality of states, enshrined in the United Nations Declaration on Principles of International Law,[12] accompanied by the principle of non-intervention, meaning that 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State'.[13] The second is the principle of exclusive territorial jurisdiction and the presumption in favour of the state's competences, meaning that the sovereign state possesses the totality of powers, without a need to enumerate them.[14] The third is the crucial implication that no adjudication is binding upon a sovereign state without its consent;[15] thus, for example, the International Court of Justice has in principal jurisdiction only when the parties to the dispute have agreed to submit it to that court. For the purposes of this paper, three characteristics need to be stressed: sovereignty is in the traditional understanding connected with a specific territory, the state's power over this territory is exclusive and total, i.e. indivisible.

At this point, a final remark needs to be made. The concept of sovereignty had been traditionally associated with a single person – the ruler. With the rise of democracy, this was however no longer acceptable and '[o]ver the course of the French Revolution, […] Bodin's princely sovereignty was replaced by popular sovereignty. The people became the pouvoir constituent'.[16] Thus today, sovereignty is not associated with the ruler or with any institution of the state, but with the people that have the power to constitute the state itself.

Thus, the sovereign is currently represented only as an abstract, as the power of the people constituting the legal order, from which all the powers of the state are derived;[17] in this understanding, the sovereign stays "outside" of the state which it has constituted (as it has exercised its "constituting" powers), while the state, thus constituted, exercises from then on its "constituted" powers, derived from the sovereign.

This distinction is frequently overlooked and the state is still being identified with the personified sovereign. According to current constitutional theory, this is not precise: the sovereign exercises its powers before the state is constituted (in practical terms, before the state's constitution) and thus, the state only enjoys the powers derived from the sovereign.[18] Understood in this way, the sovereign as a constituting

12 United Nations, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. Resolution 2625 (XXV), 24 October 1970.

13 Ibid.

14 Lapidoth, 1992, p. 329.

15 Ibid.

16 Volk, 2022, p. 717.

17 Belling, 2016, p. 649.

18 The Czech Constitutional Court observed this distinction already in 1993 in its seminal case concerning the lawlessness of the communist regime. In its judgment Pl. ÚS 19/93, 21 December 1993, the Constitutional Court observed that the principle of the sovereignty of the people, who are the bearers of constitutive power, means that 'Within the concept of a constitutional state, there are no longer sovereign powers, there are only competencies'.

power has unlimited and indivisible powers that cannot be delegated to any other entity. This sovereignty is by no means limited by EU membership, or by any other international organisation.

For practical purposes, however, sovereignty is associated with the state as an exclusive holder of actual powers. The notion of sovereignty thus encompasses the overall powers of the state: 'Sovereignty, strictly speaking, is a legal institution that authenticates a political order based on independent states whose governments are the principal authorities both domestically and internationally'.[19] This is the understanding of sovereignty, as it was originally crafted. We may refer to it as "practical" sovereignty, and we will discuss this issue in the rest of this Chapter, leaving aside the sovereign as a constituting power (*pouvoir constituent*).

2.2. Sovereignty Today

The traditional understanding of sovereignty based on territory, exclusivity and indivisibility, outlined above, is frequently associated with the Peace of Westphalia, symbolising the transformation of empires and statelets of the Middle Ages into modern sovereign states: 'The new sovereign state escaped from the medieval system of dispersed authority and successfully established and enforced its own centralised authority'.[20] It is by its nature "binary": 'the binary separation of internal and external, the postulation of a uniform and self-contained sovereign entity, and the search for the supreme'.[21]

Arguably, such an understanding may no longer fit the realities of today's globalised world. No state can nowadays claim an absolute power concerning all the affairs within its territory. As put forward by Ruth Lapidoth, '[s]overeignty in its classic connotation of total and indivisible state power has been eroded by modern technical and economic developments and by certain rules of modern constitutional and international law'.[22] Therefore, it might be observed that 'there is a shared sense that the conventional understanding of sovereignty as unlimited and indivisible rule by a state over a territory and the people in it is in need of serious critical scrutiny'.[23]

19 Jackson, 1999, p. 432.

20 Jackson, 1999, p. 439; In a similar vein of argument, Lake, 2007, p. 224, puts forward that 'the victors gathered at Westphalia are widely understood to have elevated secular rulers to positions of ultimate authority over other possible authorities, especially that of the universal church'. It is sometimes claimed that the traditional model of sovereignty was, indeed, only a model, that never materialised in practice. David Lake, when discussing the traditional understanding of sovereignty, talks about the "myth of Westphalia" and claims that 'the principle of sovereignty that these early thinkers developed – and which we today have largely inherited – was never meant as a description of practice nor as a foundation of a positive theory of international politics but as a normative ideal in the services of state-building'; Lake, 2007, p. 227.

21 Volk, 2022, p. 737.

22 Lapidoth, 1992, p. 345.

23 Agnew, 2005, p. 437.

The problem is specifically severe for the EU Member States, whose membership is defined precisely by surrendering part of their sovereignty. This crucial issue will be discussed in detail in Chapter 3 below, we may however start with a quote from the *Costa* ruling of the CJEU, according to which the specific characteristics of the EU law stem from the fact that 'the Member States have limited their sovereign rights'.[24] However, what does this "limitation" actually mean in practice? As famously questioned by Ole Waever: 'How does a state with two-thirds of its sovereignty look? How sovereign has the EU become? A fifth? One-quarter? Sovereignty is an indivisible quality, which a unit either enjoys or does not'.[25]

There are other examples demonstrating that the powers of a modern state are in fact limited, from the jurisdiction of the European Court of Human Rights, that is empowered to issue rulings on the claims of individuals binding on the states, to the possibility to legally use force against a state on the basis of Chapter VII of the United Nations Charter.[26]

In this connection, two questions need to be answered. Firstly, do the states exhibit the characteristics of sovereignty, as described above? I have already quoted several notable authors claiming that current European states may no longer be called sovereign in the traditional understanding of the word. I also take the view that it is hard to dispute that nowadays, no state can claim an absolute power concerning all the affairs within its territory.

Hence, the second question: are states no longer sovereign? Do we need an "updated" understanding of sovereignty, or may we abandon the concept altogether? And if we still need it, how shall we understand it?

2.3. The Relevance of Sovereignty

The importance of the concept of sovereignty is undisputed: 'The importance of the doctrine of sovereignty can hardly be overrated. It was a formidable tool in the hands of lawyers and politicians, and a decisive factor in the making of modern Europe'.[27] Still, under current discourse, the understanding of sovereignty 'oscillates – both empirically and normatively – between irrelevance and redefinition'.[28]

Some scholars propose a model not based on sovereignty at all, with a single supreme authority replaced by multiple, non-hierarchical centres:

> Can we think of a world in which our normative existence […] [is] anchored in […] a variety of institutional systems, each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of

24 CJEU, 1964, 6/64.
25 Waever, 1995, p. 417.
26 Charter of the United Nations, 1945, 1 UNTS XVI.
27 d'Entreves, 1970, p. 67.
28 Volk, 2022, p. 718.

> which, for most purposes, can operate without serious mutual conflict in areas of overlap?[29]

Even though appealing in theory, it is difficult to imagine the actual application of such a model; as assessed by Ondrej Hamulak, it seems 'rather like a laboratory solution with minor significance in real life'.[30]

Indeed, although sovereignty 'has lost much of its relevance, it will probably survive since it has a strong symbolic appeal'.[31] Nevertheless, apart from the "symbolic appeal", what do we actually need the concept of sovereignty for? Fundamentally, sovereignty defines the state as we understand it. It is 'that mysterious quality which a state must have in order to be a state, which is based on the institution of mutual recognition among states'.[32] It is the legal basis for the existence of states and its participation in international relations, 'the basic norm, grundnorm, upon which a society of states ultimately rests. […] [I]n a world of independent states certain norms are necessarily basic: norms of equal sovereignty, non-intervention, reciprocity, etc. That is the normative logic of the institution'.[33]

The sovereignty of states thus stands at the basis of international legal order, and I consider it to be as relevant as ever.[34] For practical purposes, the notion of sovereignty encompasses the overall powers of the state. It is however important to realise that there is no enclosed list of attributes that a state needs to possess in order to be considered sovereign:

> there is no *à priori*, timeless list of what sovereignty contains. States do not insist on certain prerogatives whose sum total equals sovereignty. Rather, they insist on sovereignty first, and on that basis collectively decide on its content. For that reason, sovereignty may be circularly defined, since states themselves define their world.[35]

In this understanding, sometimes referred to as "late sovereignty",[36] the concept of sovereignty is still relevant. It however significantly differs from its traditional understanding, because the state as a sovereign loses its exclusivity – competences within a specific territory are no longer associated only with the states, but also with

29 MacCormic, 1993, p. 76. He goes on to specify that 'it would involve a diffusion of political power centres as well as of legal authorities. It would depend on a high degree of relatively willing co-operation and relatively low degree of coercion […]'.

30 Hamuľák, 2015, p. 77.

31 Lapidoth, 1992, p. 345.

32 Waever, 1995, p. 419.

33 Jackson, 1999, p. 432. He develops this idea on p. 456, stressing that 'to date the societas of sovereign states has proved to be the only generally acceptable and practical normative basis of world politics'.

34 Waever, 1995, p. 417; current practice 'allow us to speak of post-sovereign realities. However, this does not prevent the sovereignty-based system from continuing to operate'.

35 Waever, 1995, p. 421.

36 Walker, 2002, p. 346.

other entities, serving a specific function.[37] From the external point of view, a state needs to be perceived as sovereign by other sovereign states; this remains a binary choice. Concerning the internal powers, the state no longer needs to exercise all of them; it however remains sovereign as long as it had freely decided to delegate some of its powers, and the conditions thereof. In this meaning, as a sum of powers of the state, the state sovereignty clearly is divisible,[38] and a state remains sovereign even with a significant part of its powers delegated to another entity. We can therefore conclude that a state may be understood to be sovereign even if it loses the exclusivity of powers within its territory.

Current debate concerning the question of sovereignty of a modern state, and in particular a Member State within the EU, revolves around the balance of powers of, on the one hand, the Member States, and, on the other, the EU. This is the issue of "practical" sovereignty of a Member State. In the following chapter, we will therefore discuss the details, limits and consequences of division of powers within the European Union.

3. Sovereignty and the European Union

The uniqueness of the European Union lies in its supranational character. We will therefore discuss this issue first. As the supranationality is based on the transfer of certain sovereign rights from a Member State to the EU, we will next focus on this process, including its limits and its consequences. Finally, we shall discuss what consequences the transfer of certain powers has on a state in practical terms.

3.1. The supranational character of the EU

Unlike most other international organisations, the European Union is characterised by its "supranational" character. Surprisingly, this unique characteristic was not (and still is not) enshrined in written law; instead, it was developed by the CJEU, in particular in its two seminal judgements *Van Gend en Loos* and *Costa v ENEL*, creating 'the cornerstone of an altogether new body of law'.[39]

37 Walker, 2002, p. 346. He explains that 'This is because of the emergence of polities whose posited boundaries are not (or not merely) territorial, but also sectoral or functional. That is to say, claims to ultimate legal authority are no longer limited to (state) claims to comprehensive jurisdiction over a particular territory, but now also embrace sectorally and functionally limited claims, whether such claims are also territorially limited, as in the EU, or global, as in the WTO'.

38 Lake, 2007.

39 Vauchez, 2010, p. 15.

Without going into details of these well-known cases,[40] the CJEU emphasised in *Van Gend en Loos* that the integration within the then European Communities is made unique by the Communities' "institutions endowed with sovereign rights" and therefore, EU law cannot be a typical international law; rather, it is 'a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only of Member States but also their nationals'.[41] This judgment forms the basis of the doctrine of "direct effect" of the EU law.

Even more consequentially, this thinking was developed in the *Costa v ENEL* case in order to introduce the doctrine of supremacy of EU law:

> The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[42]

It is interesting to note that the very idea of supranationalism was from the outset criticised by notable politicians.[43] Most famously, Charles de Gaulle observed that:

> The ideas of [supranationalism] might appeal to certain minds but I entirely fail to see how they could be put into practice […]. Can we imagine France, Germany, Italy, the Netherlands, Belgium, Luxembourg being prepared on matters of importance to them in the national or international sphere, to do something that appeared wrong to them, merely because others had ordered them to do so?[44]

Whatever the criticism, however, the idea of supranationalism nevertheless managed to establish itself in the CJEU's case-law and more generally, in discourse concerning the characteristics of EU law and European integration as such. Most importantly, amounting to 'a quiet revolution in the legal orders of the Member States',[45] even the authorities of Member States adopted the doctrine and started to apply it in practice without any major complications.[46]

40 The facts of the cases are not decisive for this essay; as argued in Vauchez, 2010, p. 15; 'Van Gend en Loos soon was divested of its litigation identity and turned into a constitutive principle of EC polity. It ceased to be the mere resolution of a dispute between the transport company […] and the Dutch tax authorities, nor just an interpretation […] of the EEC Treaty. Rather, it came to represent a trail-blazing judgment founding EC law's relationship with European integration'.

41 CJEU, 26/62, 5 February 1963; emphasis added.

42 CJEU, 6/64, 15 July 1964; emphasis added.

43 De Witte, 2011, p. 350; 'the idea that EU law can claim its primacy within the national legal system on the basis of its own authority seems as implausible as Baron von Munchhausen's claim that he had lifted himself from the sand by pulling on his bootstraps'.

44 Weigall and Stirk, 1992, p. 134.

45 Weiler, 1981, p. 275.

46 De Witte, 2011, p. 196.

Many national constitutional courts, on the other hand, started to formulate theories limiting the primacy of the EU law by their respective constitutions. This may be explained by the different reference systems, employed, on the one hand, by the CJEU, and, on the other hand by national constitutional courts: whereas the CJEU 'derives primacy from the autonomy of [EU] law, […] from the viewpoint of national law primacy is justified by a specific power of constitutional law'.[47] No clear pattern has emerged yet in this regard,[48] ranging from total acceptance of the EU law's primacy, as e.g. in the Netherlands,[49] to the total primacy of national constitution, as e.g. in France.[50] Most Member States nonetheless accept the primacy of EU law with specific reservations. We will not go into details on these states, as this paper focuses on the situation of Central European Countries; specifically, we will discuss below in detail the situation in the Czech Republic as a case study.

Before that, we will return to the constitutional architecture of the EU and discuss the process of transfer of sovereign rights from Member States to the EU.

3.2. The Transfer of Sovereign Rights

The discussion on the extent of sovereignty of Member States within the EU might be obscured by differences in understanding of the term sovereignty itself, as discussed in the Chapter above. Sovereignty as the abstract power to constitute the state, the *pouvoir constituent*, is evidently indivisible and cannot be transferred. What is being transferred are the *constituted* powers of the state, which in total make the state "sovereign" *vis-à-vis* other entities of international law. In such an understanding of the notion of sovereignty, the sovereignty is divisible[51] and part of it may be transferred, if it is allowed for by the national constitution.

By all means, it might be argued with Dieter Grimm that '[e]ven a loss of sovereignty that conforms to the constitution is still a loss of sovereignty'.[52] I however take the view that this approach is not in line with how the EU actually functions. As summarised by Robert Jackson, state sovereignty is not being lost within the European Union; instead, it is being used to authorise the cooperation on supranational level:

> state sovereignty is being used to authorise certain common rules and activities in cooperation with other EU member states. Their sovereignty has not been transferred

47 Von Bogdandy and Bast, 2011, p. 84.
48 Von Bogdandy and Bast summarise it in Ibid.: 'Although in principle [the primacy of EU law] is nowadays accepted with regard to ordinary statutory law, views on the relationship between national constitutional law and Union law are controversial and inconsistent'.
49 Ibid.
50 Von Bogdandy and Bast, 2011, p. 90.
51 Lake, 2007.
52 Grimm, 2015, p. 95.

> in the permanent, non-refundable way that British sovereignty over its colonies was transferred. The EU does not involve a transfer of sovereignty.[53]

We have noted above that there is no definitive list of powers that makes a state sovereign in practical terms; thus, delegating some powers to the EU does not make the state any less sovereign as a result. This interpretation may seem at odds with the fact that the CJEU itself explicitly refers to the transfer of sovereign rights; what it actually means, however, is the fact that the Member States are delegating specific powers, traditionally associated with a sovereign state, to the EU; however, even though losing the "exclusivity" concerning some competences by delegating them to the EU, the Member States are as a result not any less sovereign than before, even though they may no longer exercise certain competences. As explained by Ole Waever,

> transfer of sovereignty' means that something that the E.U. does was the domain of states at another time. However, it is not designated by the state as an attribute of its sovereignty at the same time. […] This sovereignty is not collected anywhere, nor is the unit afterward less sovereign. Rather, the issue given away is simply no longer included in the list of issues covered by sovereignty. Sovereignty is the form, whose content changes over time.[54]

The European Union is not becoming a sovereign "instead" of its Member States, making Member States "less" sovereign and subordinate to it;[55] it is rather a division of responsibilities. Keohane and Hoffmann have argued that the European Union 'is essentially organised as a network that involves pooling and sharing of sovereignty rather than the transfer of sovereignty to a higher level'.[56] Under this interpretation, Member States do not have to, and indeed, cannot be responsible for all the activities within their territory; some competences remain with the state, and some are passed to the EU.[57]

53 Jackson, 1999, p. 453; emphasis added.

54 Waever, 1995, p. 417; emphasis added. He adds as an illustration that 'At one time, to be sovereign meant having the ability to decide the religion of one's subjects. Although this is no longer included in sovereignty, states have not become less sovereign'.

55 Waever, 1995, p. 430, summarises the situation as follows: 'the E.U. exists as an independent political voice, an independent logic acting vis-à-vis the outside world and with its own "Euro-logic" in relation to European affairs, where it is more than the sum of its members. This is what I have referred to as systemic post sovereignty. However, seen from the perspective of the states, they are still sovereign; there is no post-sovereignty at the unit level'; he concludes at p. 431 that 'This perspective enables us to analyze the curious situation where on the one hand, a post-sovereign unit, the E.U., takes on increasing importance and therefore, in a sense makes the system post-sovereign (since the system can no longer be described in sovereignty terms), while on the other hand, the states remain sovereign'.

56 Keohane and Hoffman, 1991, p. 13; emphasis added.

57 Waever, 1995, p. 422: 'The novelty lies in the fact that there is no longer a primary level. Authority and power are not generally moving toward a larger sovereign unit; the E.U. is not simply becoming

The transfer of powers to the EU is thus in principle not the question of hierarchy. The Member States exercise their powers either directly, or they delegate them to the EU, which exercises these powers instead of the Member States, or – more precisely – Member States exercise these powers on the EU level collectively. Thus, we do not have to solve the issue whether the European Union is superior to the Member States, or *vice versa*.[58]

Understood in this way, the relationship between the EU and its Member States is horizontal.[59] EU law does not have a higher legal power than national law; rather, the Member States have lost their competences in the areas transferred to the EU. Each of the legal orders (the national as well as the EU one) remain sovereign within their areas of competence.[60] National courts have to apply, in the case of a conflict, the EU law instead of the national one because the national one should not have been adopted. As summarised by the Czech Constitutional Court, any action of national authorities in areas where the competences had been transferred to the EU are *ultra vires*.[61]

At the same time, Member States are not losing control *vis-à-vis* the transferred powers: 'Legal authority is transferred to the Union as a whole but not to supranational organs as such. At the end of the day, control over the Union rests with the national governments acting collectively'.[62] In this vein of argument, the crucial advantage of delegating powers to the EU in order to exercise them together with other Member States, or "pooling" them, lies in the fact that Member States are collectively able to address issues that they would not be able to undertake individually. Again, this does not involve the issue of hierarchy – a Member State either exercise its powers individually or collectively with other Member States.

In theory, it is thus possible to reconcile the concept of state sovereignty with the EU membership, and from some point of view even to think about its strengthening, because by pooling some of its competences with other Member States, it may gain powers to solve problems too complex for a single state. Issues such as the

a territorial super-state, rather, power and authority are being disseminated'.

58 Walker, 2002, p. 346, adds another advantage of such an understanding: 'Crucially, the development of sectorally or functionally limited claims is self-reinforcing to the extent that it allows of the possibility of overlap without subsumption'.

59 MacCormick, 1993, p. 8; presents in this regard 'a view of law that allows of the possibility that different systems can overlap and interact, without necessarily requiring that one be subordinate or hierarchically inferior to the other or to some third system'; Walker, 2002; describes it as "constitutional pluralism".

60 Weiler, 2005, p. 20.

61 CCC, Pl. ÚS 50/04, 8 March 2006: 'the Government exceeded its authority; that is, it asserted its power of norm-creation in a field which […] had already been transferred to EC organs […]. [Adoption [of a national regulation] constitutes action ultra vires […], as the Government was not empowered to adopt such legal rules'.

62 Waever, 1995, p. 426; he summarises at p. 420 that 'States as the E.U. have gained to the detriment of states against the E.U'.

environment stand out as an example,[63] but common action may be significantly more effective in some "traditional" areas of cooperation, e.g. the customs union, or may be necessary for some endeavours, e.g. the monetary union.

To summarise, it is true that Member States lose the "exclusivity" of powers within their territory, and arguably, they might not be considered sovereign in the traditional understanding of that notion, as discussed above. The late sovereignty interpretation nonetheless allows for the delegation and pooling of certain powers, without the state being any less sovereign as a result.

3.3. Loss of Full Control

Notwithstanding the discussion above, it however needs to be observed that even if a Member State remains fully sovereign within the contemporary interpretation of the word, the practical position of the state *vis-à-vis* the EU changes nonetheless. The state loses its exclusivity of power; and whatever we call the process, the state is no longer individually, or exclusively empowered to decide on the affairs within its territory.

I profess that what the debate concerning "sovereignty" of Member States in the European Union is really about is the fact that ultimately, under the ordinary legislative procedure, the state loses control concerning the legislation valid in its territory,[64] as the legislation is adopted by a majority of Member States, and the state itself may be overvoted.[65]

This is not in itself a matter of sovereignty – as discussed above, the state remains sovereign even when it decides to delegate some of its powers. It is however a matter of control. Is it feasible for a modern state not to have control about the legislation in its territory? Or put more simply: does a modern state has to tolerate, and perhaps, to enforce, legislation it does not agree with? This leads us back to the question, what the delegation of specific powers to the EU actually means, and more broadly, to what extent it is realistically possible to share them and thus to "pool" the sovereignty.

To start with, this is the reality of the European Union of today. In the vast majority of quotidian issues, decisions are adopted by a qualified majority; arguably, this does not raise any legal or political concerns. Some agendas, by their very nature, should be solved on an international level, and even though such problems may in principle be

63 As summarised in Bifulco and Nato, 2020, p. 15: 'the theory of sovereignty is inadequate with respect to the environmental questions as an internal problem of the state'.

64 As summarised in Weiler, 1991, p. 2462: 'Member States are now in a situation of facing binding norms, adopted wholly or partially against their will, with direct effect in their national legal orders'.

65 Weiler, 1991, p. 2458; describes the passage to majority voting as a key shift in equilibrium between the EU and its Member States, though interestingly, the Member States 'took this step clearly not as a dramatic political step toward a higher level of European integration in the abstract, but rather as a low-key technical necessity in realizing the "non-controversial" objectives" of EU integration'.

solved unanimously, without the "loss of control" inherent in the majority voting, the limited control is the price for effectiveness.[66] The argument of effectiveness becomes more and more persuasive with the growing number of EU Members States.

The fact that the loss of full control may be in some areas, and indeed, in many of them, a "price" worth paying for efficiency of the exercise of "pooled sovereignty", does however not mean that it can be universally applied. For this system to work, several conditions need to be met. First and foremost, Member States need to remain in power to decide in which areas they are willing to abandon their exclusivity and control; they also need to retain the power to scrutinise whether the EU exercises the powers conferred on it within the conditions and limitations of the conferral. In other words, the transfer of sovereign rights needs to be limited. And as far as the supervision of the limits is concerned, the issue of hierarchy may re-emerge.

We will return to the issue of the limits of the transfer of sovereign rights in Chapter 5. Before that, as a case study, we will first outline the jurisprudence of the Czech Constitutional Court on the issue of Czech sovereignty within the EU.

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4. Perception of Sovereignty in the Czech Republic

Discussions concerned with the question, what exactly does the transfer of sovereign rights to the EU mean, have been intense in the Czech Republic. The position was to a large extent defined by the Czech Constitutional Court (hereinafter referred to as "CCC") and thereafter broadly accepted in academic discourse.

The sovereignty of the Czech Republic is recognised in the very first provision of its Constitution; according to Article 1 (1) thereof, Czech Republic is 'a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens'.[67] As will be discussed below, the CCC concluded that this provision is not be challenged by the Czech accession to the EU and the related transfer of sovereign rights.

4.1. Constitutional Basis for the Transfer of Sovereign Powers

The Constitution was amended in 2001 in order to enable the accession of the Czech Republic to the European Union (this amendment is known as the "Euro-amendment" of the Constitution).[68] The provision of the Constitution enabling EU membership, known as the "integration clause", is contained in Article 10a, which

66 Ibid.
67 Constitution of the Czech Republic, emphasis added;
68 Ibid.

reads as follows: 'Certain powers of Czech Republic authorities may be transferred by treaty to an international organisation or institution'.

It is clear from the provision itself that although it enables the transfer of powers, it does not mention anything about the constitutional consequences of such a transfer, and in particular, nothing about the effects of EU law in the Czech legal order. This was heavily criticised and ardently discussed in the years after the Euro-amendment had been adopted; [69] the dispute was however finally settled by the CCC in its very first judgment concerning the EU law, the *Sugar Quotas III* case decided in 2006.[70]

The CCC ruled that the effects of EU law within the Czech legal order are governed by the EU law itself, without it being necessary to adopt any provision in the Constitution;[71] it would not even be possible, as the Czech Republic does not possess such powers.[72] This interpretation has been accepted by scholars[73] and has not caused any problems in practice since its adoption.[74]

4.2. Conditions for the Transfer of Sovereign Powers

It is worth mentioning that the Constitution does not mention the transfer of *sovereignty*, but rather certain *powers* of the authorities of the Czech Republic. As was discussed in Chapter 2.1 above, the sovereignty is associated with the people, who bear the constitutive power (*pouvoir constituent*);[75] this is also clear from the CCC's older jurisprudence.[76]

At the same time the CCC, right in its first EU-relevant *Sugar Quotas* judgment, described the EU as 'an international organisation to which the Czech Republic has, by virtue of its accession pursuant to Art. 10a of the Constitution of the Czech

69 Král, 2004; Kühn, 2004; Kysela, 2002; Kühn and Kysela, 2002; Kühn and Kysela, 2004; Malenovský, 2003; Malenovský, 2004; Malenovský, 2005.

70 CCC Pl. ÚS 50/04, 8 March 2006.

71 CCC Pl. ÚS 50/04, 8 March 2006: 'Article 10a of the Constitution of the Czech Republic […] operates in both directions: it forms the normative basis for the transfer of powers and is simultaneously that provision of the Czech Constitution which opens up the national legal order to the operation of Community law, including rules relating to its effects within the legal order of the Czech Republic […]'. Thus, '[i]n contrast to international law, Community law itself determines and specifies the effects it has in the national law of the Member States'; emphasis added.

72 CCC Pl. ÚS 50/04, 8 March 2006: 'If membership in the EC brings with it a certain limitation on the powers of the national organs in favour of Community organs, one of the manifestations of such limitation must necessarily also be a restriction on Member States' freedom to determine the effect of Community law in their national legal orders'.

73 Bříza, 2009; Komárek, 2008; Král, 2006; Malenovský, 2006; Malenovský, 2009; Maršálková, 2006; Zemánek, 2006; Zemánek, 2007.

74 Bobek, Bříza and Hubková, 2022, p. 119.

75 Belling, 2016, p. 645.

76 CCC Pl. ÚS 19/93, 21 December 1993: the Constitution is based on 'the principle of the sovereignty of the people, who are the bearers of supra-governmental power, constitutive power, while statutes are the product of an already constituted and institutionalised internal state power. Within the concept of a constitutional state, there are no longer sovereign powers, there are only competencies'; emphasis added.

Republic, transferred some portions of its state sovereignty',[77] which seems to be at odds with the traditional doctrine. According to most commentators, however, this is understood as an imprecise formulation, rather than a doctrinal shift.[78] In this interpretation, the CCC was presumably referring to sovereign powers or powers of a sovereign state, not the sovereignty itself.[79] The judgment itself supports this interpretation, distinguishing between the 'conferral of a part of […] powers [of the Czech Republic]" and the fact that "the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the Czech Republic'.[80]

It is however clear that the CCC itself does not distinguish consistently between the terms "sovereignty", "sovereign rights" and "powers of a sovereign", and it frequently uses them all in the same sense, as is clear from the *Lisbon I* judgment: 'It is more a linguistic question whether to describe the integration process as a "loss" of part of sovereignty, or competences, or, somewhat more fittingly, as, e.g., "lending, ceding" of part of the competence of a sovereign'.[81]

For practical purposes, this distinction is not decisive. As we have discussed in Chapter 3, what the accession to the EU actually means and what in practical discourse is referred to as the limitation of sovereignty, is in fact the loss of exclusivity of competences in the state's territory[82] and the loss of control of applicable rules within it.

In any event, the Constitution clearly allows for the transfer of certain powers to the EU and the CCC established its constitutional consequences. At the same time, the CCC formulated two limitations to the transfer of powers; firstly, the transfer needs to be limited in scope, and secondly, it is limited in time, as it is not necessarily permanent; according to the CCC, the transfer of powers is only conditional.

4.2.1. Limited Scope of the Transfer of Sovereign Rights

According to the CCC, the Constitution prohibits the "unlimited transfer of sovereignty".[83] Crucially, the Czech Republic needs to remain a sovereign state, as provided for by Article 1 (1) of the Constitution.[84] The CCC however does not go into

77 CCC Pl. ÚS 50/04, 8 March 2006.

78 Belling, 2016, p. 645.

79 This distinction is characteristic for the German constitutional doctrine and is present in the case-law of the German Constitutional Court, from which the CCC draws inspiration in its jurisprudence. See Grimm, 2015.

80 CCC Pl. ÚS 50/04, 8 March 2006.

81 CCC Pl. ÚS 19/08, 26 November 2008.

82 CCC Pl. ÚS 50/04, 8 March 2006: 'In the moment when the Treaty establishing the European Community […] became binding on the Czech Republic, a transfer was affected of those powers of national state organs which, according to EC primary law, are exercised by organs of the EC, upon those organs. […] Thus, the powers of all relevant national organs are restricted to the extent of the powers that are being exercised by EC organs, regardless of whether they are powers of norm creation or powers of individual decision-making'.

83 CCC Pl. ÚS 19/08, 26 November 2008, para. 109.

84 The CCC explains in the same paragraph that it is not possible to transfer powers, 'the transfer of which would affect Art. 1 par. 1 of the Constitution to the effect that it would no longer be possible

details concerning these limits, or more precisely, what powers need to "remain" with the Czech Republic in order to remain a sovereign state. This goes in line with the modern understanding of state sovereignty, according to which there is no precise "list" of competences of a sovereign state (see Chapter 2 above). The CCC considers this to be a matter of politics, with the court prepared to intervene only 'in a situation where the scope of discretion was clearly exceeded';[85] so far, such a situation has not arisen.

Coming back to the transfer of specific powers, the CCC added two requirements. Firstly, the powers being transferred need to be "clearly delimited", meaning that the transfer is recognisable and definitive.[86] The CCC is however rather lenient concerning the requirements on delimitation in practice,[87] which leads some commentators to question whether this requirement has any real meaning.[88] And secondly, the Czech Republic "as a sovereign state" needs to exercise "sufficient control" over the transfer of powers.[89] Similarly to the previous condition, the CCC is rather lenient here as well. According to the CCC, EU institutions, especially the CJEU, are primarily responsible for review,[90] whereas the CCC only reserves for itself the *ultima ratio* review under exceptional circumstances.[91]

At the same time, the transfer of powers is limited by the "material core" of the Constitution.[92] The "material core" of the Constitution has been extensively discussed in the academia,[93] for the purposes of this paper, however, it suffices refer to the "eternity clause", contained in Article 9 (2) of the Constitution, according to which

> any changes in the essential requirements for a democratic state governed by the rule of law are impermissible",[94] and characterisation of the Czech Republic as "a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizen in Article 1 (1) thereof.

to speak of the Czech Republic as a sovereign state. Thus, the concept of sovereignty, interpreted in the context of Art. 1 par. 1 of the Constitution and Art. 10a of the Constitution, clearly shows that there are certain limits to the transfer of sovereignty, and failure to observe them would affect both Art. 1 par. 1 and Art. 10a of the Constitution'.

85 CCC Pl. ÚS 19/08, 26 November 2008, para. 109; in this regard, the CCC directly refers to an "analogous" interpretation adopted by the Polish Constitutional Court, K 18/04, OTK ZU (2005) ser. A, nr. 5, pol. 49, 11 May 2005.

86 CCC Pl. ÚS 19/08, 26 November 2008, para. 135.

87 For example, the very general and by definition boundless "flexibility clause", contained in Article 352 SFEU, is according to CCC sufficiently delimited; CCC Pl. ÚS 19/08, 26 November 2008, para. 150.

88 Bříza, 2009, p. 204.

89 CCC Pl. ÚS 19/08, 26 November 2008, para. 135.

90 CCC Pl. ÚS 19/08, 26 November 2008, para. 138.

91 CCC Pl. ÚS 19/08, 26 November 2008, para. 139.

92 CCC Pl. ÚS 19/08, 26 November 2008, para. 110.

93 E.g. Holländer, 2005; Molek, 2014.

94 Emphasis added.

The CCC describes these two limitations as "formal" and "material":

> The formal level limits the transfer of powers by compatibility with preserving the foundations of state sovereignty of the Czech Republic. In this regard the formal level is joined with Article 1 par. 1 of the Constitution. The material level concerns the manner of exercising the transferred rights, which may not jeopardise the essence of a material law-based state; this limitation arises from Article 9 par. 2 of the Constitution, under which amending the essential requirements of a democratic state governed by the rule of law is impermissible. As the Constitutional Court emphasised, the material limits for transfer of powers are even beyond the reach of the constitutional framer itself.[95]

It is important to note that these criteria, limiting the transfer of powers to the EU, correspond with the conditions upon which the exercise of powers of the European Union is conditional in the Czech Republic, as will be discussed below. This is understandable, given the fact EU law may be applied only in areas where powers were transferred to the EU.[96]

4.2.2. Conditional Transfer of Sovereign Powers

The CCC pronounced in its *Sugar Quotas III* judgment that the transfer of sovereignty to the EU is only conditional.[97] According to the CCC, the conferral of powers is 'naturally a conditional conferral, as the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the Czech Republic, whose sovereignty is still founded upon Art. 1 par. 1 of the Constitution'.[98] The delegation of powers is conditional on the requirement that the EU exercises these powers in a manner, that is, firstly, 'compatible with the preservation of the foundations of state sovereignty of the Czech Republic', and secondly, which 'does not threaten the very essence of the substantive law-based state' (see above).[99] These conditions thus correspond with the limits to the transfer of sovereignty, as discussed above.

The formulation of the exemptions employed by the CCC may remind us of the *solange* jurisprudence of the German Constitutional Court, to which the CCC expressly refers in both the *Sugar Quotas III* and *Lisbon I* judgments; the Czech approach is however significantly different. Firstly, whereas the German Constitutional Court declared that it would not review individual acts of EU law as long as the EU level of protection of fundamental rights was compatible with the German

95 CCC Pl. ÚS 19/08, 26 November 2008, para. 130; emphasis added.
96 Bobek, Bříza and Hubková, 2022, p. 129.
97 Some authors have argued that because the accession to the EU was approved by a referendum without any further conditions, the transfer of powers needs to be unconditional; Tichý and Dumbrovský, 2013, p. 194; this was however a minority view and the conditionality of the transfer is broadly accepted; Belling, 2016, p. 649.
98 CCC Pl. ÚS 50/04, 8 March 2006.
99 CCC Pl. ÚS 50/04, 8 March 2006; emphasis added.

standard, the CCC is prepared to conduct individual reviews, irrespective of the situation on the EU level.[100] Secondly, and more fundamentally, whereas in the German case, the finding of incompatibility of a specific act of EU law leads to an inapplicability of that act, in case of the Czech Republic, the overall transfer of powers might be put into question.[101] If these conditions would not be met, it would be 'necessary to insist that these powers be once again taken up by the Czech Republic's state bodies'.[102]

This being said, it is important to note that these considerations are only theoretical; the CCC belongs to one of the most pro-EU constitutional courts in the EU.[103] In the only case in which the CCC decided not to apply an *ultra vires* act of EU law, it questioned the applicability of the specific act, not the delegation of powers or the EU membership in general, as will be discussed below in Chapter 4.4.

4.3. How is the Czech Sovereignty Changed?

The CCC has been the first, and in fact, the only European constitutional court, to identify with the concept of "pooled sovereignty" in its jurisprudence. Because, as discussed above, it concedes that EU membership is connected with ceding part of state's sovereignty to the EU, the CCC needed to address the issue of the sovereignty of the Czech Republic within the EU. The court based its considerations on three premises.

First, the CCC understands sovereignty as independence in international affairs and highest and exclusive power within a given territory.[104] The CCC however stresses that 'sovereignty is not an aim in and of itself';[105] thus, the actual powers of the sovereign are not decisive, it is rather what the sovereign may achieve with them. In this understanding, sovereignty is 'a means to fulfilling the […] fundamental values, on which the construction of a constitutional, law-based sate stands'.[106]

Second, the CCC concedes that in today's world, the most fundamental policy goals, including national security, cannot by realised by any state unilaterally; an international cooperation is needed, which leads to intensive integration.[107] In the CCC's view, such

100 Bobek, Bříza, and Hubková, 2022, p. 138.
101 Belling, 2016, p. 650.
102 CCC Pl. ÚS 50/04, 8 March 2006.
103 Kosař and Vyhnálek, 2018, p. 866.
104 CCC Pl. ÚS 19/08, 26 November 2008, para. 98.
105 CCC Pl. ÚS 19/08, 26 November 2008, para. 209.
106 CCC Pl. ÚS 19/08, 26 November 2008, para. 209.
107 CCC Pl. ÚS 19/08, 26 November 2008, para. 101: 'International cooperation and coordination of national policies has become an essential requirement for managing the globalisation of the world. For the first time in history, national security, which was always the core of statehood, can be effectively ensured only by sovereign states acting in concert, unifying resources, technologies, communication and information flows, power, and authority. In the globalised world the centers of power are regrouped according to factors other than simply the power and will of individual sovereign states. There is a spontaneous, undirected process of increasing intensive integration of the world's

an integration 'can ultimately lead to protection and strengthening of the sovereignty of member states vis-à-vis external, especially geopolitical and economic factors'.[108]

This is connected with the third point, that the CCC endorses the view that the traditional understanding of state sovereignty is no longer adequate to describe current international affairs.[109] Instead of trying to redefine the concept of sovereignty, the CCC tries to consider its purpose and stresses that 'sovereignty should not be understood only as a rigid legal concept'. Citing David Calleo,[110] the CCC claims that 'national sovereignty means above all a legitimate government that has at its disposal the formal power to choose between available alternatives, and not to pursue an alternative dictated by a foreign power',[111] or, more practically, that 'practical sovereignty consists in being understood as a player to whom neighbouring states listen, with whom they actively negotiate, and whose national interests are taken into consideration'.

Citing Georg Jellinek,[112] the CCC further argues that the sovereign is entitled to dispose with its sovereignty, or a part of it. Therefore, the fact that a sovereign freely decides not to exercise, or to delegate, some of its powers 'is not a sign of a sovereign's inadequacy, but of its full sovereignty'.[113] Thus, the sovereign may delegate some of its powers and still remain the sovereign.

In conclusion, the CCC endorses the concept of "pooled sovereignty" of Member States within the EU,[114] stressing that even though the EU membership is connected with limiting the State's sovereignty, it may actually lead to its strengthening.[115] The CCC adds three conditions on the actual exercise of the "pooled" powers: the powers need to be 'exercised with the sovereign's participation in a manner that is agreed on in advance and that is reviewable'.[116]

countries in a single economic system. This process, with contributions from the key communication technologies of the mass media, internet, and television, subsequently influences relationships outside and inside individual states in the areas of politics, culture, social psychology and others, including the area of law'; emphasis added.

108 CCC Pl. ÚS 19/08, 26 November 2008, para. 102 ; emphasis added.

109 According to the CCC Pl. ÚS 19/08, 26 November 2008, para. 105: 'The global scene can no longer be seen only as a world of isolated states. It is generally accepted that the state and its sovereignty are undergoing change, and that no state is such a unitary, separate organization as classical theories assumed in the past'.

110 Calleo, 2001, p. 141.

111 CCC Pl. ÚS 19/08, 26 November 2008, para. 107.

112 The CCC refers to the Czech edition of the Allgemeine Staatslehre: Jellinek, 1906.

113 CCC in Pl. ÚS 19/08, 26 November 2008, para. 100. The CCC adds in para.104 that even though 'it may seem paradoxical', the 'key expression of state sovereignty is the ability to dispose of one's sovereignty (or part of it), or to temporarily or even permanently cede certain competences'.

114 CCC Pl. ÚS 19/08, 26 November 2008, para. 104.

115 CCC Pl. ÚS 19/08, 26 November 2008, para. 108: 'the transfer of certain state competences, that arises from the free will of the sovereign, […] is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole. The EU's integration process is not taking place in a radical manner that would generally mean the "loss" of national sovereignty; rather, it is an evolutionary process and, among other things, a reaction to the increasing globalization in the world'; emphasis added.

116 CCC Pl. ÚS 19/08, 26 November 2008, para. 108.

The court finally stresses that the Member States may withdraw from the EU according to Art. 50 TFEU, which 'indisputably confirms […] the continuing sovereignty of member states'.[117]

4.4. Reclaiming Czech Sovereignty

The CCC is viewed as a pro-European court[118] and requires the interpretation of Czech constitutional law in line with that of the EU.[119] This being said, the CCC has already decided to act as an *ultima ratio* defender of the Constitution.

As we have discussed above, the CCC limited the possibility of its intervention against the EU law to situations when the actions of the EU would either infringe on the "material core" of the Constitution or go beyond the powers transferred to it. Whereas in the former case, the CCC has never found a reason to intervene, it has already declared, actually as the first constitutional court in the EU, a specific act of EU law to be *ultra vires*.

We will not discuss this *Slovak pensions* case[120] here, as it has been thoroughly discussed in academic literature, even in English.[121] Even though there is no consensus on the quality of its argumentation concerning the applicability of EU law, and in particular, the fact that the CJEU had decided that the matter is within its competence, the CCC concluded that

> there were excesses on the part of a European Union body that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was ultra vires;[122]

the CCC thus found the judgment of the CJEU in question inapplicable. Interestingly, the CCC has never returned to this judgment in its later case-law; conversely, it arguably returned to its pro-EU interpretation of Czech Constitution.[123]

The CCC thus still retains the (theoretical) possibility to intervene as the *ultima ratio* protector of the Constitution, it however repeats in its latest case-law that it is the CJEU who provides the binding interpretation of the EU law, including in the

117 CCC Pl. ÚS 19/08, 26 November 2008, para. 106.
118 Kosař and Vyhnálek, 2018, p. 866.
119 CCC Pl. ÚS 66/04, 3 May 2006, para.61: 'A constitutional principle can be derived from Article 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the Constitution, should be interpreted in conformity with the principles of European integration and cooperation between Community and Member State organs'.
120 CCC Pl. ÚS 5/12, 31 January 2012.
121 Anagnostaras, 2013; Bobek, 2014; Komárek, 2012; Pítrová, 2013; Zbíral, 2012.
122 CCC Pl. ÚS 5/12, 31 January 2012; emphasis added.
123 Bobek, Bříza, and Hubková, 2022, p. 151.

proceedings before the CCC itself,[124] and that the CCC would be itself obliged to address the CJEU with a preliminary reference in case the interpretation of the EU law was needed.[125]

4.5. Partial Conclusions

The CCC's approach to European law may well be considered a part of a "mainstream" thinking of European constitutional courts. It accepts the primacy of EU law, but not thanks to its autonomy, as the CJEU would argue, but because the Czech Constitution allowed for the transfer of certain powers to the EU.

More importantly for this paper, the CCC argues that even though the Czech Republic has transferred a significant proportion of its powers to the EU, it still remains a sovereign state. The transfer of powers however needs to be limited and their exercise on the EU level needs to remain under the supervision of national institutions. In practice, any excess on part of the EU would amount in such an act being proclaimed *ultra vires* by the CCC.

And finally, even though the powers of the Czech Republic, and in extension, its sovereignty, have been limited by EU membership, the CCC argues that the actual sovereignty, understood as the ability to perform the duties of the state for the benefit of its citizens, may actually be increased.

In the following chapter, we will discuss the conclusions of Chapter 3 in light of the jurisprudence of the CCC and propose a model for a constitutional position of a Member State within the EU.

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5. Member States in the EU

As we have discussed above, the essence of EU membership is the delegation of certain powers of Member States to the EU, where these powers are to be exercised jointly. Such a delegation does not make the Member States "less" sovereign, and the EU is not gaining sovereignty "instead" of the Member States. As a result, however, a Member State loses exclusive powers within its territory, as the competences delegated to the EU are no longer exercised by the state itself, but by the EU. This would be irreconcilable with the traditional understanding of sovereignty, it nonetheless fits with the way in which sovereignty is currently understood by most scholars.

The transfer of powers to the EU takes place on the basis of Treaties, and it needs to remain within the limits set by them. It is therefore necessary to make sure that the powers transferred to the EU are precisely delimited and exercised by the EU in

124 CCC Pl. ÚS 10/17, 3 November 2020, para. 53.
125 CCC Pl. ÚS 30/16, 7 April 2020, para. 159.

accordance with the Treaties; if not, such actions of the EU would not be covered by the Treaties and the EU would not be empowered to do them, making such actions *ultra vires*. However, who is empowered to ultimately decide the question, whether a certain act is indeed *ultra vires*? The jurisprudence of the CCC, discussed in the previous Chapter, may help to answer this question.

5.1. Delimitation of the powers

The European Union does not have its "own", original powers; it only possesses those delegated to it by the Member States; hence, the principle of conferral[126] means that only the Member States, acting in unison, may delegate competences on the EU, and that the EU does not possess any other competences than those thus conferred.[127] This requirement is very clear in the jurisprudence of the German Constitutional Court,[128] according to which the legal basis of all the EU's competences is a treaty among sovereign Member States, who, as the "Masters of the Treaties" (*Herren der Vortrage*) retain the competence to set competences (*Kompetenz-Kompetenz*); similar reasoning has been adopted by other national constitutional courts, including in the Czech Republic, as was described above, as well as other Central European constitutional courts.

The first question concerning the limits on the transfer of sovereign rights therefore is, whether the EU's competences are set in a sufficiently precise way. It is not the ambition of this paper to discuss every single competence provision, contained in the Treaties. Instead, we shall concentrate on the general provisions allowing the EU to exercise powers not expressly provided for by the Treaties, specifically the "harmonisation clause", contained in Articles 114 and 115 TFEU, and in particular the "flexibility clause", contained in Article 352 TFEU.

Starting with the flexibility clause, it allows the EU to exercise "additional" competences, not specifically provided for by the Treaties,[129] and as such, it has been criticised for giving the EU the power to create its own rules, the "self-conferral"[130] or "competence-creep".[131] It however needs to be observed that the EU itself is not

126 Art. 5 (1) of the Treaty on the European Union (hereinafter referred to as TEU).

127 According to Art. 5 (2) TEU: 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.

128 Everling, 1994.

129 According to Art. 352 (1) TFEU: 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament'.

130 Konstadinides, 2012, p. 227.

131 Bausili, 2002.

allowed to "create" any powers; in particular, application of Article 358 TFEU needs an unanimous consensus of all the Member States within the Council. All Member States thus remain fully in control of the EU's competencies, alleviating the risk of loss of sovereignty as discussed above. In addition to that, the conditions for employing the Article 358 TFEU are highly restrictive and academic literature does not find any traces of its abuse.[132] The same applies for the harmonisation clause contained in Article 115 TFEU, where unanimity is also required.[133]

Concerning the harmonisation clause contained in Article 114 TFEU, there is a clear difference between this provision and the provisions discussed in the previous paragraph. In the case of Article 114 TFEU, the ordinary legislative procedure and thus majority voting is employed.[134] This provision is however applicable only in a relatively limited area of the internal market,[135] excluding the most sensitive topics concerning the free movement of persons and the rights and interests of employed persons,[136] for which only Article 115 TFEU may be used. Thus, in the case of Article 114 (1) TFEU, the limitation of "practical" sovereignty of Member States, as discussed in Chapter 3.3 above, cannot be excluded. The same, nonetheless, holds true for other instances of majority voting. The provisions of Article 114 TFEU are drafted in a sufficiently precise way and in themselves do not raise any major concerns regarding the delimitation of powers.

The second general question is connected to the rules, limiting the use of the EU's powers. The exercise of conferred powers is governed by three guarding principles:[137] (i) under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at EU level;[138] (ii) under the principle of proportionality, the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties;[139] and (iii) the EU shall respect the equality

132 Konstadinides, 2012, p. 260, argues that 'even when resort to the flexibility clause will be taken, its application (internal or external) will not be unlimited. It follows that 'competence creep' […] is not an accurate portrayal of the result stemming from the true function of Article 352 TFEU'.

133 According to Art. 115 TFEU: 'Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure […], issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market'.

134 According to Art. 114 (1) TFEU: 'Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market'.

135 TFEU, Art. 114 (1).

136 TFEU, Art. 114 (2).

137 Bifulco and Nato, 2020, p. 38.

138 TEU, Art. 5 (3).

139 TEU, Art. 5 (4).

of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.[140]

The third principle is the most controversial, as the respect for national identities was introduced only relatively recently by the Treaty of Lisbon. Its interpretation in scholarly publications varies, and its jurisprudence, both in terms of the EU and nationally, is far from settled. Given the expansion of the EU's competencies from the traditional, non-controversial ones, e.g. the internal market, to new ones, it may become decisive in the near future. Who has the ultimate jurisdiction to interpret it (as well as other competence provisions of the EU law) and to establish that the EU was acting *ultra vires*?

From the point of view of the CJEU, the answer is clear: it has 'exclusive jurisdiction to give the definitive interpretation of EU law';[141] in case of doubt, a national court, including the constitutional one, needs to make a reference for a preliminary ruling under Article 267 TFEU, but

> the constitutional court of a Member State cannot, on the basis of its own interpretation of provisions of EU law, including Article 267 TFEU, validly hold that the Court has delivered a judgment exceeding its jurisdiction and, therefore, refuse to give effect to a preliminary ruling from the Court.[142]

Even though there is a strong academic support for the "unconditional supremacy" of the CJEU as the "ultimate guardian" of EU law,[143] I respectfully take the view that, due to the architecture of the division of powers between the EU and the Member States, this cannot be the correct answer; arguably, the final decision as to whether EU institutions have exceeded the powers conferred on them must stay with the Members States, as it was the Member States who decided to confer specific rights on the EU.

This seems to be the argument, adopted recently by a number of national constitutional courts in their *ultra vires* proceedings. The first one to adopt such a judgment was the Czech Constitutional Court, as was discussed in Chapter 4.4 above; even though the judgment was arguably not sufficiently reasoned and the CCC failed to make a reference for a preliminary ruling before its judgment had been passed, the CCC clearly showed with whom the ultimate supervision of the exercise of EU's powers should rest.

Other national courts followed, including the Supreme Court of Denmark in 2016[144] and the German constitutional court in 2020;[145] crucially, both these courts

140 TEU, Art. 4 (2).
141 CJEU C-430/21, 22 February 2022, para. 52.
142 Ibid, para. 72.
143 Kelemen, 2018, p. 403.
144 Madsen, Olsen and Šadl, 2017.
145 Dermine, 2020; Herzog, 2021; Wendel, 2020.

first referred a request for preliminary ruling to the CJEU, and only then, as a reaction to that ruling, delivered their *ultra vires* judgment. This may be contrasted with the practice in Central Europe, starting with the CCC, which did not address the CJEU at all, or the 2022 judgment of the Polish constitutional court.[146]

In my view, the requirement for a referral to the CJEU for a preliminary ruling before a supreme national court delivers its final judgment is vital for the *ultra vires* review from a national authority to be viewed as a "loyal opposition".[147] I put forward that even though the national authorities need to reserve this right for themselves, they must exercise it with restraint[148] and in dialogue with the CJEU.

5.2. Freedom of choice

Even though the boundaries of the EU's competences are arguably clear in principle, and the supreme national judicial authorities enjoy *ultra vires* supervision providing the EU institutions do not overstep them, the Member States need to retain the right to choose which powers and under what conditions they should be delegated to the EU.

On the first site, this requirement seems to be superfluous. A prospective Member State is free to decide whether to join the EU or not; the Treaties are known in advance. The EU cannot "create" any new competences without an explicit consent of each of the Member States, and any modifications of the Treaties are subject to unanimity voting. In short, the Member States know the rules they had agreed to follow, and they have full control over their future modifications.

I have argued in this paper that what is actually meant by the limitation of sovereignty of the Member States is their loss of full control over the exercise of delegated powers, either the impossibility to scrutinise the issue of *ultra vires* (discussed in Chapter 5.1 above) or the impossibility to influence the content of the rules, applied in its territory, due to majority voting (discussed in Chapter 3.3 above). Whilst the issue of *ultra vires* supervision seems to be settled to the benefit of national courts, the debate concerning majority voting seems to be expanding.[149]

Admittedly, majority voting enables a more efficient exercise of the powers delegated to the EU, and the connected loss of control may be viewed as a price for that efficiency. It however remains crucial that every Member State has an effective choice whether to "pay" this price. Indeed, any shift from unanimity to majority voting is subject to consensus of all the Member States;[150] but the refusal of one

146 Kiššová, 2022, pp. 43 et seq.

147 Flynn, 2021.

148 Polzin, 2022, p. 300.

149 Interestingly, the CCC did not take any serious position in this regard; it only mentions the possibility of self-limitation of the sovereignty and the obligation to follow the rules once accepted (*pacta sunt servanda*) and concludes in Pl. ÚS 19/08, 26 November 2008, para. 172, that by majority voting, 'the sovereignty of the Czech Republic [is not] reduced below an acceptable level'.

150 TFEU, Art. 48.

of them means that the others cannot proceed, which dramatically increases the political pressure on the dissenting one. A possibility to opt out however needs to remain a legitimate choice.

The "multispeed Europe" has long been discussed in theory, but it may be argued that currently, it is a reality, both economically[151] and politically.[152] It is however also necessary to accept that permanent differences in the level of involvement among the Member States may lead to inefficiencies and fragmentation.[153] I therefore contend that it is necessary to explicitly agree what is the "core" of European integration and from what policies the Member States may opt out, and under what conditions they may do so, perhaps not necessarily to completely avoid common policies but to retain the right of veto.

This means an extensive debate on the part of the Member States; without it, however, the future architecture of the EU may hardly be drawn in a satisfactory way.

6. Conclusions

I have argued in this paper that EU membership does not have a negative impact on the Member States' sovereignty, even though they cannot be understood as "sovereign" in the traditional sense of the world as they lose exclusivity of powers within their territory. The relationship between the EU and its Member States is in principle horizontal: the competences that Member States keep for themselves and the competences delegated to the EU are not hierarchical. Understood in this way, there is, in my opinion, no need to construct new theories of sovereignty or discuss its "pooling"; indeed, certain powers of the Member States are exercised collectively on an EU level, and thus "pooled". The Member States' sovereignty is however not affected.

I do not share the view that in the foreseeable future, this model will shift to an actual sovereignty of the EU. The ethos of an "ever closer Union" seems to be waning in the current political debate and no steps towards a federation are to be expected in the near future. That is not to say that that the Member States will not decide to cooperate more intensively or to delegate additional powers to the EU; even if it was the case, that the fundamentally horizontal relationship between the EU and the Member States would nonetheless not be affected.

Notwithstanding this, the issue of hierarchy comes back to the fore concerning the supervision over the exercise of the EU's powers. Despite the clear position of the CJEU, I take the view that the competence to decide whether EU institutions were

151 Califano and Gasperin, 2019.
152 Brunazzo, 2022.
153 Telle, Badulescu and Fernandes, 2022.

acting *ultra vires* needs to rest with the Member States, though this privilege should be employed in a restrained manner and in dialogue with the CJEU.

Finally, given the expansion of the EU's powers over the last decade, it would be beneficial to reassess the extent of involvement of the Member States in different policies of the EU. They should define a clear "core" of the competences the EU needs to possess in order to be effective, also including the majority voting that might be necessary in this area, policies which should remain common, where Member States should retain the right to veto, and policies that are purely "voluntary". The outcome may be very different from the situation today, and the implementation of this consensus would probably require a modification of the Treaties. Such an exercise is however necessary for the calm cohabitation of the Member States in the future.

References

Agnew, J. (2005) 'Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics', *Annals of the Association of American Geographers*, 95(2), pp. 437–461; https://doi.org/10.1111/j.1467-8306.2005.00468.x.

Anagnostaras, G. (2013) 'Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court', *German Law Journal*, 14(7), pp. 959–973; https://doi.org/10.1017/S2071832200002091.

Bausili, A.V. (2002) *Rethinking the Methods of Dividing and Exercising Powers in the EU: Reforming Subsidiarity and National Parliaments* [Online]. Available at: https://www.jeanmonnetprogram.org/archive/papers/02/020901.pdf (Accessed: 10 January 2024).

Belling, V. (2016) 'Dělitelná nebo nedělitelná? Koncept suverenity v judikatuře Ústavního soudu ČR' [Divisible or indivisible? The Concept of Sovereignty in the Constitutional Court's Case-Law], *Právník*, 2016/8, pp. 641–662.

Bifulco, R., Nato, A. (2020) 'The concept of sovereignty in the EU – past, present and the future', *Horizon Europe Programme Guide* [Online]. Available at: https://ec.europa.eu/research/participants/documents/downloadPublic?documentIds=080166e5ceba74f0&appId=PPGMS (Accessed: 10 January 2024).

Bobek, M. (2014) 'Landtová, Holubec and the problem of an Uncooperative Court: Implications for the Preliminary Ruling Procedure', *European Constitutional Law Review*, 10(1), pp. 54–89; https://doi.org/10.1017/S1574019614001047.

Bobek, M., Bříza, P., Hubková, P. (2022) *Vnitrostátní aplikace práva Evropské unie. 2. vydání [Internal Application of the EU Law. 2nd Edition]*. Praha: C.H.Beck.

Bříza, P. (2009) 'Jaké jsou dopady "Lisabonského" nálezu (nejen) pro ústavní rovinu českého a unijního práva' [What are the Consequences of the "Lisbon" Ruling (not only) on the Constitutional Level of the Relationship between Czech and EU Law?], *Soudní rozhledy*, 2009/6, pp. 201–228.

Brunazzo, M. (2022) 'The Politics of EU Differentiated Integration: Between Crises and Dilemmas', *The International Spectator*, 57(1), pp. 18–34; https://doi.org/10.1080/03932729.2022.2014103.

Califano, A., Gasperin, S. (2019) 'Multi-speed Europe is already there: Catching up and falling behind', *Structural Change and Economic Dynamics*, 51(1), pp. 152–167; https://doi.org/10.1016/j.strueco.2019.08.009.

Calleo, D. (2001) *Rethinking Europe's Future*. Princeton: Princeton University Press.

De Witte, B. (2011) 'Direct Effect, Primacy and the Nature of the Legal Order' in Craig, P., de Burca, G. (eds.) *The Evolution of EU Law*. 2nd edn. Oxford: Oxford University Press, pp. 323–362.

d'Entreves, A.P. (1994) *Natural Law. An Introduction to Legal Philosophy*. Abingdon: Routledge.

Dermine, P. (2020) 'The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union', *European Constitutional Law Review*, 16(3), pp. 525–551; https://doi.org/10.1017/S1574019620000280.

Everling, U. (1994) 'The Maastricht Judgment of the German Federal Constitutional Court and its Significance for the Development of the European Union', *Yearbook of European Law*, 14(1), pp. 1–19; https://doi.org/10.1093/yel/14.1.1.

Flynn, T. (2021) 'Constitutional Pluralism and Loyal Opposition', *International Journal of Constitutional Law*, 19(1), pp. 241–268; https://doi.org/10.1093/icon/moab035.

Grimm, D. (2015) *Sovereignty: The Origin and Future of a Political and Legal Concept*. New York: Columbia University Press; https://doi.org/10.7312/grim16424.

Hamuľák, O. (2015) 'Lessons from the "Constitutional Mythology" or How to Reconcile the Concept of State Sovereignty with European Integration', *Danube: Law and Economics Review*, 6(2), pp. 75–90; https://doi.org/10.1515/danb-2015-0005.

Herzog, B. (2021) 'Judgment of the German Federal Constitutional Court (2 BvR 859/15) on the Public Sector Purchase Programme of the ECB: An Interdisciplinary Analysis', *European Public Law*, 27(4), pp. 653–672; https://doi.org/10.54648/EURO2021032.

Holländer, P. (2005) 'Materiální ohnisko ústavy a diskrece ústavodárce' [Material Focus of the Constitution and the Discretion of the Creator of the Constitution], *Právník*, 2005(4), pp. 313–336.

Jackson, R. (1999) 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape', *Political Studies*, 1999/3, pp. 431–456; https://doi.org/10.1111/1467-9248.00211.

Jellinek, G. (1906) *Všeobecná státověda* [General Constitutional Policy]. Praha: J. Laichter.

Kelemen, D. (2018) 'The Dangers of Constitutional Pluralism' in Davies, G., Avbelj, M. (eds) *Research Handbook on Legal Pluralism and EU Law*. Cheltenham: Edward Elgar Publishing, pp. 392–406; https://doi.org/10.4337/9781786433091.00030.

Keohane, R., Hoffman, S. (1991) 'Institutional Change in Europe in the 1980s' in Keohane, R., Hoffmann, S. (eds) *The New European Community. Decisionmaking and Institutional Change*. Abingdon: Routledge, pp. 1–40; https://doi.org/10.4324/9780429496189-1.

Kiššová, S. (2022) 'An Overview of the Doctrine of Ultra-vires Review from the Perspective of the German Federal Constitutional Court and the Polish Constitutional Court', *Slovak Yearbook of European Union Law*, 2(1), pp. 33–48; https://doi.org/10.54869/syeul.2022.2.330.

Komárek, J. (2008) 'Vztah práva Evropské unie a právního řádu ČR očima tří rozhodnutí Ústavního soudu' [The relationship between EU law and the Czech legal order from the perspective of three judgments of the Constitutional Court], *Soudní rozhledy*, 2008/10, pp. 357–366.

Komárek, J. (2012) 'Playing with Matches: The Czech Constitutional Court Declares a Judgement of the Court of Justice of the EU Ultra Vires', *European Constitutional Law Review*, 2012/8, pp. 323–337; https://doi.org/10.1017/S1574019612000193.

Konstadinides, T. (2012) 'Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause', *Yearbook of European Law*, 31(1), pp. 227–262; https://doi.org/10.1093/yel/yes006.

Kosař, D., Vyhnálek, L. (2018) 'Ústavní identita České republiky' [Constitutional Identity of the Czech Republic], *Právník*, 157(10), pp. 854–872.

Král, R. (2004) 'Znovu k zakotvení vnitrostátních účinků komunitárního práva v Ústavě ČR' [Again on the grounding of interstate effects of Community Law in the Constitution of the Czech Republic], *Právní rozhledy*, 2004/3, pp. 110–112.

Král, R. (2006) 'Uznání i rozpaky nad "komunitárním" nálezem Ústavního soudu ve věci cukerných kvót' [Appreciation and hesitation concerning the „Community" judgment of the Constitutional Court in the sugar quotas case], *Právní rozhledy*, 2006/11, pp. 410–414.

Kühn, Z. (2004) 'Ještě jednou k ústavním základu působení komunitárního práva v českém právním řádu' [Once again on the constitutional basis of the effects of Community law in Czech legal order], *Právní rozhledy*, 2004/10, pp. 395–397.

Kühn, Z., Kysela, J. (2002) 'Aplikace mezinárodního práva po přijetí tzv. euronovely' [Application of international law after the adoption of the „euro-amendment"], *Právní rozhledy,* 2002/7, pp. 301–312.

Kühn, Z., Kysela, J. (2004) 'Na základě čeho bude působit komunitární právo v českém právním řádu' [On the Basis of What Will the EC Law Take Effects in Czech Legal Order], *Právní rozhledy*, 2004/1, pp. 23–27.

Kysela, J. (2002) 'K dalším důsledkům přijetí tzv. euronovely Ústavy ČR' [On further consequences of the adoption of the „euro-amendment" of the Constitution of the Czech Republic], *Právní rozhledy*, 2002/11, pp. 525–533.

Lake, D. (2007) 'Delegating divisible sovereignty: Sweeping a conceptual minefield', *The Review of International Organisations*, 2007/2, pp. 219–237; https://doi.org/10.1007/s11558-007-9012-3.

Lapidoth, R. (1992) 'Sovereignty in Transition', *Journal of International Affairs*, 45(2), pp. 325–346; http://www.jstor.org/stable/24357360.

MacCormic, N. (1993) 'Beyond the Sovereign State', *The Modern Law Review*, 56(1), pp. 1–18; https://doi.org/10.1111/j.1468-2230.1993.tb02851.x.

Madsen M. R., Olsen, H. P., Šadl, U. (2017) 'Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation', *European Law Journal*, 23(1–2), pp. 140–150; https://doi.org/10.1111/eulj.12215.

Malenovksý, J. (2009) 'Evropské nálezy a mezinárodněprávní základy práva ES/ EU: Ústavní soud ČR i česká nauka pokračují v zastřelování' [„European Judgments" and International Bases of the EC/EU Law: The Constitutional Court and Czech Academia Keep on Aiming], *Soudní rozhledy*, 15(8), pp. 281–311.

Malenovský, J. (2003) 'Mezinárodní smlouvy podle čl. 10a Ústavy ČR' [International Treaties According to Article 10a of the Constitution], *Právník*, 142(9), pp. 841–853.

Malenovský, J. (2004) 'Ve věci ústavního základu působení komunitárního práva uvnitř ČR nebylo řečeno poslední slovo' [The Last Word was not Spoken in the Matter of Constitutional Basis of the Effects of EC Law in the Czech Republic], *Právní rozhledy*, 12(6), pp. 227–229.

Malenovský, J. (2005) 'Vítězství "dogmatiků" and "pragmatiky" se odkládá' [The Victory of „Dogmatics" Over „Pragmatics" Postponed], *Právní rozhledy*, 13(11), pp. 408–412.

Malenovský, J. (2006) 'K nové doktríně Ústavního soudu ČR v otázce vztahů českého, komunitárního a mezinárodního práva' [On the New Doctrine of the Constitutional Court on the Relationship Between Czech, EC and International Law], *Právní rozhledy*, 14(21), pp. 774–783.

Maršálková, Z. (2006) 'Jak daleko sahá omezení orgánů ČR po vstupu do EU ve světle nálezu Ústavního soudu ve věci nařízení vlády o cukerných kvótách?' [How Far Reaches the Limitation of Competencies of Czech Institutions After the Accession to the EU in Light of the Constitutional Court's Judgment on Sugar Quotas?], *Právní rozhledy*, 14(15), pp. 553–561.

Molek, P. (2014) *Materiální ohnisko ústavy: věčný limit evropské integrace?* [Material Focus of the Constitution: An Eternal Limit to European Integration?]. Brno: Masarykova univerzita, Právnická fakulta.

Pítrová, L. (2013) 'The Judgement of the Czech Constitutional Court in the "Slovak Pensions" Case and its Possible Consequences', *The Lawyer Quarterly*, 3(2), pp. 86–101.

Polzin, M. (2022) 'Emotion and the Vertical Separation of Powers: Ultra-Vires Review by National (Constitutional) Courts, and EU and International Law', *Vienna Journal on Constitutional International Law*, 16(3), pp. 285–325; https://doi.org/10.1515/icl-2022-0002.

Telle, S., Badulescu, C., Fernandes, C. (2022) 'Attitudes of national decision-makers towards differentiated integration in the European Union', *Comparative European Politics*, 21(1), pp. 82–111; https://doi.org/10.1057/s41295-022-00303-7.

Tichý, V., Dumbrovský, T. (2013) 'Ústavní soud ČR mezi dvěma právními řády: od interpozice k nové evropské doktríně' [*Czech Constitutional Court between two legal orders: from interposition to a new European doctrine*], *Právní rozhledy*, 21(6), pp. 191–198.

Vauchez, A. (2010) 'The transnational politics of judicialization. Van Gend en Loos and the making of EU polity', *European Law Journal*, 16(1), pp. 1–28; https://doi.org/10.1111/j.1468-0386.2009.00494.x.
Volk, C. (2022) 'The Problem of Sovereignty in Globalized Times', *Law, Culture and the Humanities*, 18(3), pp. 716–738; https://doi.org/10.1177/1743872119828010.
Von Bogdandy, A., Bast, J. (2011) *Principles of European constitutional law*. 2nd edn. Oxford: Hart Publishing, Munchen: C.H. Beck.
Waever, O. (1995) 'Identity, Integration and Security: Solving the Sovereignty Puzzle in EU Studies', *Journal of International Affaires*, 48(2), pp. 389–431; http://www.jstor.org/stable/24357597.
Walker, N. (2002) 'The Idea of Constitutional Pluralism', *Modern Law Review*, 65(3), pp. 317–359; https://doi.org/10.1111/1468-2230.00383.
Wallace, W. (1999) 'The Sharing of Sovereignty: the European Paradox', *Political Studies*, 47(3), pp. 503–521; https://doi.org/10.1111/1467-9248.00214.
Weigall, D., Stirk, P. (1992) *The Origins and Development of the European Community*. Leicester: Leicester University Press.
Weiler, J. (1981) 'The Community System: the Dual Character of Supranationalism', *Yearbook of European Law*, 1(1), pp. 267–306; https://doi.org/10.1093/yel/1.1.267.
Weiler, J. (1991) 'The Transformation of Europe', *Yale Law Journal*, 100(8), pp. 2403–2483; https://doi.org/10.2307/796898.
Weiler, J. (2005) *The Constitution of Europe: „Do the new clothes have an emperor?" and other essays on European integration*. Cambridge: Cambridge University Press.
Wendel, M. (2020) 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception', *German Law Journal*, 21(5), pp. 979–994; https://doi.org/10.1017/glj.2020.62.
Zbíral, R. (2012) 'A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed ultra vires', *Common Market Law Review*, 49(4), pp. 1475–1491; https://doi.org/10.54648/COLA2012072.
Zemánek, J. (2006) 'Otevření ústavního pořádku komunitárnímu právu potvrzeno, nikoli však nekontrolovatelné' [Opening of the Constitutional Order to the EC Law Endorsed, Even though not Without Control], *Jurisprudence*, 15(5), pp. 47–51.
Zemánek, J. (2007) 'The Emerging Czech Constitutional Doctrine of European Law', *European Constitutional Law Review*, 3(3), pp. 418–435; https://doi.org/10.1017/S157401960700418X.

Legal Sources

Court of Justice of the European Union, 26/62, 5 February 1963.
Court of Justice of the European Union, 6/64, 15 July 1964.
Court of Justice of the European Union, C-430/21, 22 February 2022.
Czech Constitutional Court, Pl. ÚS 10/17, 3 November 2020.
Czech Constitutional Court, Pl. ÚS 19/08, 26 November 2008.
Czech Constitutional Court, Pl. ÚS 19/93, 21 December 1993.
Czech Constitutional Court, Pl. ÚS 30/16, 7 April 2020.
Czech Constitutional Court, Pl. ÚS 5/12, 31 January 2012.
Czech Constitutional Court, Pl. ÚS 50/04, 8 March 2006.
Czech Constitutional Court, Pl. ÚS 66/04, 3 May 2006.

Chapter 6

The European Union: A Sui Generis Legal Order: Prospects for Development

Bertrand Mathieu

Abstract

The first phase of our collective research focused on the concept of constitutional identity. This raised the question of how this identity could be defined and, if necessary, protected, in the light of the requirements linked to the participation of States in European Union bodies.

The second phase of this research focuses on the nature of the European legal order. The first step is to identify the legal categories that may assist in characterising the European Union. The document setting the context for the research starts from the premise that the European Union, which has embarked on the road to federalism, is halfway along this path, and sets out the prospect of a European Union as a simple structure for cohabitation and cooperation between States.

Between a federation and an alliance treaty, there is probably a middle path, a legal order that is no longer federal but confederal in nature. Confederation means maintaining and guaranteeing the sovereignty of the confederate States. In any case, it seems advisable not to lock ourselves *a priori* in pre-established legal categories which may prove obsolete or inappropriate.

As a first step of this approach, however, it is worth considering the nature of the European Union, resulting from the current Treaties.

Secondly, it is noteworthy how the European Union uses integration mechanisms which go beyond a strict interpretation of the Treaties, with particular reference to the rule of law and the Union's values.

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Finally, the third phase of the study will seek to consider the possible transformations of European institutions in a direction that is more respectful of State sovereignty.

Keywords: European constitutionalism, federalism vs confederation, state sovereignty, CJEU, democratic legitimacy, rule of law.

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1. What is the European Union?

Within this framework, I will briefly analyse the European institutions in terms of three classic concepts of constitutional law: the concepts of constitution, sovereignty and democracy. Indeed, if we examine the federal nature of the Union, reference should be made to the characteristics of the State.

The second step is to put the European Union into perspective with the characteristics of a federal legal order.

Indeed, the European Union is a supranational legal order, to a greater extent than any international legal order. Although the European Union is governed by international law, in that it has been created by a Treaty, the process of integration is underway, both as a result of amendments to the Treaties and the combined actions of the Commission, the Parliament and, above all, the Court of Justice of the European Union.

1.1. Is the European Union a constitutional legal order?

Assuming that the Constitution is consubstantial with the State, a distinction must be made between a material and a formal definition of the Constitution. Materially, the constitution essentially determines the form of the State (unitary State, federal State, etc.), the form of the government (monarchy, republic, democracy), the organisation of powers (head of State, Parliament, judiciary, etc.), the distribution of competences between these powers, and the limits of power within the State (conditions for constitutional revision and fundamental rights). From a formal point of view, the Constitution is the written act which contains these different elements. So, while the existence of a material Constitution is a prerequisite for the existence of a State, a State may not have a formal Constitution, as in the case of France under *the Ancien Régime* or of Great Britain today. These material and formal definitions are essentially descriptive. From a normative point of view, the Constitution can also be seen as a particular norm with specific characteristics. In this sense, the Constitution is a norm, setting the conditions for the enactment of other norms and conferring their validity.

From this point of view, the link between the State and the Constitution is explained by the fact that the State is considered as sovereign, and therefore has a monopoly on the enactment of general and unconditional rules. Within the State,

the holder of sovereignty, i.e. the People in a democracy, is the author of the Constitution, the norm from which both the powers exercised within the State and the produced norms derive.

However, the question of whether only the State can have a Constitution has been raised today. It has come back vigorously, together with questions about the nature of the European Union.

The original definition of the term "Constitution" in our field of interest dates back to Aristotle, according to whom a Constitution is the government of a political community. It is this aspect that will be highlighted here. It is therefore necessary to ask whether the State is the only conceivable form of political community. With E. Zoller (*Droit constitutionnel*, PUF), it is possible to answer negatively. Indeed, accepting that a political community is made up of a number of individuals grouped together in a territory and having a system of government, means that Burgundy in feudal France could be considered as a political community. In fact, the State would be the modern form of a political community, and this identification would result in a distinction between Constitution and State. However, any group of individuals subject to certain common rules should not be treated as a political community. Thus, an association or a trade union is not a political community, essentially because it is subject to the principle of speciality with regards to both its purpose and its competence. Similarly, and to bring us closer to constitutional law, a territorial collectivity is not a political community when it is subject to the principle of speciality and derives its existence and competences solely from State recognition and empowerment. In the same vein, despite the European Court of Human Rights' claim that 'the Rome Convention is a constitutional instrument of European public order' (Court of Human Rights, Loizidou, 23 March 1995), this legal order cannot be a constitutional order, as it is marked by the principle of speciality (essentially the protection of human rights).

However, it should be noted that the organisation of political communities, which might be called "post-modern", is becoming more complex, and is demonstrated by the development of legal orders that are no longer always hierarchical, but rather interconnected. Thus, the traditional classifications and the usual tools of constitutional law have difficulties in grasping certain realities, such as the regional organisation of certain States (Italy or Spain) or the European Union. It is worth pointing out that in all these situations, sovereignty is the stumbling block to classification.

From this point of view, and independently of the failure of the European Constitution project, the question arises as to whether the Community legal order falls within the scope of constitutional law. An affirmative answer could be justified by the apprehension of the European Union as a federal State in the process of development. This issue will be discussed later. Nonetheless, the European Union can be considered as having a material Constitution. Moreover, it constitutes a specific legal order whose existence is recognised by national constitutions. However, it does not meet the conditions for the existence of a normative constitution. The first observation is the existence of a material Constitution.

The construction of the European Union took place by the conferral of competences from the States to a supranational organisation. The nature of this pooling of national competences changes when some of the competences transferred are closely linked to the exercise of national sovereignty. The criteria used by the French Constitutional Council to consider that a conferral of competences affects the essential conditions for the exercise of national sovereignty are, from this point of view, revealing. This is the case when competences in an eminently sovereign domain are transferred to the European Union, or, in the same domain, when the State loses control over decision-making, either through the loss of the power to prevent, or through the switch from unanimity to majority decision-making, or through the loss of the power of initiative, or through the decision-making intervention of bodies in which the States are not represented as such, like the European Parliament.[1]

Such an approach undoubtedly leads to the transfer to the European Union of competences which are the hallmarks of national States. In this way, it may be considered that the European Union is gradually constitutionalising itself by "taking on" competences linked to the exercise of sovereignty. In a system of interconnectedness, this constitutionalisation takes place as and when the States transfer these competences to the Union. In most cases, this operation takes place following a revision of national constitutions, whether this involves a specific authorisation for transfer or a general clause authorising such transfers. While realism requires us to consider that national sovereignty may remain substantially weakened following such operations, in principle, it remains embodied in the State. Indeed, States retain the "competence of competence", which lies at the heart of the very concept of the State.[2]

In fact, as a result of this process of constitutionalisation, the European Union gets the prerogatives of a public authority. Indeed, it is indisputable that the European Union enjoys the prerogatives of a public authority, if one accepts that 'these prerogatives are exercised by public authorities and enable them to unilaterally impose decisions on subjects of law and, when appropriate, to return to enforcement by coercion'.[3] However, this concept of public power is distinct from that of sovereignty, and may be the attribute of a non-State political society.[4] Moreover, the inclusion of "integration clauses" in national Constitutions marks the recognition of a specific legal order.

Many countries, such as France, Italy and Portugal, have enshrined the principle of European Union membership in the text of their national Constitutions. This affirmation constitutes a recognition of the specific nature of the European Union. Article 88-1 of the French Constitution recognises that 'the Republic shall participate in the European Union constituted by States that have freely chosen to exercise some of their powers in common' by virtue of the Treaties of the European Union. This

1 Schoettl, 2004, p. 3.
2 Pernice, 2004.
3 On this issue, see: Denizeau, 2004.
4 Moderne, 1960, p. 51.

wording is important. On the one hand, the European Union's specific status is recognised by national law. On the other hand, this Union has been created by the States that constitute it. It is the product of the free will of States and is vested with the powers transferred to it. A double movement is thus outlined here: on the one hand, the constitutive (in the absence of a constituent) role of States, and on the other the specificity of the legal order thus created.

By choosing to rely on Article 88-1 of the Constitution and not on the provisions of Article 55 C, generally governing the relationship between international law and domestic law, the Constitutional Council has followed this logic.[5] Firstly, it considers that the 'authors of the Constitution have thus enshrined the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order'. On the other hand, it considers that this article imposes, in principle, the prevalence of European Union law over national law, including constitutional law. This prevalence can be considered as one of the elements in the constitutionalisation of the European legal order.[6]

However, this prevalence is applied by a judge, by virtue of a national constitutional provision and not in application of a Community requirement. More precisely, this Community requirement is mediated by the national Constitution.

However, from a normative point of view, the European legal order is not constitutional.

This last element must be taken into account when considering that the European Union is not a constitutional legal order in the normative sense of the term. It is in fact the absence of sovereignty of this political entity that deprives this text of its constitutional nature. Indeed, the European "Constitution" cannot be considered as the norm that confers validity on other norms. This is essentially evidenced by the fact that in many national laws, as pointed out earlier, Union law takes precedence over national law, not by virtue of the European norm, but by virtue of the national constitutional norm. From this point of view, the Court of Justice of the European Union cannot be considered as a constitutional court.[7] Indeed, according to a classic definition, cited by G. Drago (in "*La Constitution européenne: une Constitution?*"), the purpose of a constitutional court, i.e. its *raison d'être*, is, inter alia, to ensure the supremacy of the Constitution *vis-à-vis* all the bodies of the State and the citizens. The Union's lack of sovereignty is also reflected in the fact that this new legal order cannot reform itself, since the revision of its fundamental rules is conditional upon the agreement of all the States in the form of a Treaty. Indeed, if it may be accepted that a Treaty is the founding act of an entity that then becomes sovereign (as in the creation of the United States of America, or the creation of new States in the context of decolonisation), the autonomy of the political entity thus created is manifested

5 On the use of Article 88–1; see Bruce, 2005, pp. 3 et seq.

6 With the principle of direct effect, see Azoulay, 2003, pp. 859 et seq.

7 For a comprehensive analysis of this issue, see Favoreu, 2002, p. 35; see also the analyses of Gaudin, 2000, pp. 209 et seq. and Flauss and Drago, 2006.

by its own capacity to adopt and amend its constitutional rules. It is in this sense that the existence of a genuine Constitution implies the recognition of a constituent power which, in a democracy, can only be the People.

Thus, the existence of a material "Constitution" has the consequence of introducing the European legal order to a constitutional context, even if this introduction is imperfect. While sovereignty is the hallmark of the State, there may be political entities which are lacking this sovereignty, and are however exercising competences that traditionally fall under sovereignty. From a normative point of view, European norms that are directly integrated into national law, have a predominant role in the latter, sometimes going so far as to make the legislator the implementing agent of Community law. Conversely, European law takes into account the 'constitutional traditions common to the member States'. In short, while Europe does not yet have a true "Constitution", its transformation into a political society and a legal order with rules on organisation, functioning and a common system of values make it an undeniable subject of contemporary constitutional law.

It is in fact the principle of sovereignty that has become one of the key instruments for determining the nature of the European Union, even by preterition.

Recognition of the European Union's legal order as constitutional implies dissociating the Constitution from the State. Conversely, it seems impossible to dissociate sovereignty from the State. State sovereignty is a phenomenon that has emerged with the birth of modern States, which can be dated back to the 16th century. This link between these two concepts can be found in classical constitutional law. Thus, Esmein asserts that "the State merges with sovereignty" and corroborates this analysis by quoting Loyseau, according to whom 'Sovereignty is the form that gives *raison d'être* to the State, even the State and sovereignty taken in concreto are synonymous'.[8] This rapprochement allows for identifying the continuity of political thinking on this issue from the 16th century to the beginning of the 20th century. It is perfectly suited to a unitary State.

However, even if the European Union could be recognised as having a legal personality, it cannot hold sovereignty, even though the principle of State sovereignty is not called into question. By its very nature, sovereignty cannot be shared. As long as States have the power to modify the European constitutional system, each with a veto right in this respect, and as long as States retain the option, however theoretical, of withdrawing from the Union, sovereignty remains in their hands.

State sovereignty is thus an obstacle to the formation of a sovereign constitutional legal order. Could we imagine, however, the States being the authors of a founding constitutional act leading to the abandonment of their sovereignty in favour of a new entity? This logic would be part of a contractual vision of the constituent movement.[9]

8 Esmein, 1906, p. 2.

9 On the distinction between this contractual school and the statist school, see Pernica, p. 16; For a hypothesis of contractual and international elaboration of a national Constitution, see Pierre-Caps, 2000, p. 36.

States would then be abandoning their fundamental right of self-determination in favour of the European Union. Carrying out this operation presupposes the sovereignty of the State at the external level, and the intervention of the holder of sovereignty at the internal level. It implies the destruction of both sovereignties, that of the State at the international level, and that of the People at the internal level. When a constituent act stems from a revolution, it is an almost mystical act by which the political fact is transmuted into a founding legal act. When it is the result of a contractual process, the constituent act is nonetheless subject to a strictly legal logic. An act of sovereignty, it destroys that sovereignty, merging distinct sovereignties into a common sovereignty. From this point of view, the paradox of the Constitution of a sovereign legal order is that it implies the self-destruction of its founding States.[10]

1.2. The European Union: a legal order with an undemocratic basis.

As a preliminary point, it should be noted that the term "democratic" is to be understood in the strict sense of the term, as a principle of legitimisation of power, and that it does not have any positive or negative connotation here.

Furthermore, this analysis will not focus on the place of democracy in the functioning of the European Union, and specifically on the role that the European Parliament can play in this respect (cf. below), since the latter institution will be considered essentially as the symbolic representative of a people that is no less symbolic.

The assertion that the European Union has a democratic foundation is based on the democratic nature of the States that constitute it, and in fact leaves open the question of the legitimacy of the Community legal order – not the reality of this legitimacy, but its nature.

In the absence of a genuine democratic foundation for the European Union, one of these bodies, i.e. the Parliament, bases its legitimacy on the fact that it represents the citizens of the Union.

One of the fundamental issues is the legitimisation of the European legal order.

The European Union presents itself as a democratic legal order. This assertion comes at the cost of a number of approximations. At a deeper level, it raises the question of whether the European legal order can be legitimised by the democratic principle. Article 6 of the Treaty on European Union stipulates that the Union is founded on the principles of liberty, democracy, respect for human rights, and the rule of law.

The Treaty gives a specific importance to democracy, which is distinct both from the substantive legitimacy represented by the assertion of rights, and from procedural and substantive legitimacy represented by the rule of law.

Consequently, it is worth considering whether democracy is the founding principle, or one of the founding principles of the Union.

10 For a critique of this logic, see Viala, 2004, p. 367.

The text of the Constitutional Treaty expressed the democratic principle in both its representative and participatory forms, but these references relate more to the functioning of the Union than to its foundations.

If one accepts that the European Union is the result of the association of democratic States, the question remains open as to whether Community legal order is founded on democratic principle. An affirmative answer to this question implies the existence of a European People and the exercise of an initial constituent power by this People. To reverse the question, let us just observe that the European People, if such a thing exists at all, have never been called upon to give their opinion on the founding acts of the European Union. Treaties have been ratified in accordance with the procedure laid down by each State. It is the peoples of the States, or their representatives, who have expressed their views. The existence of referenda in all the States would have had a strong symbolic value; moreover, instead of the People of each State, the People of the Union should have spoken. The failure of a number of national referenda on European integration undoubtedly reveals mistrust or even hostility on the part of the citizens of a certain number of States towards European integration as it is operated, but those referenda do not constitute an expression of the European People against Europe. In reality, the European Union is based on an agreement between States. However, this agreement is specific in terms of the integration mechanisms it puts in place, the way in which national Constitutions apprehend the Community legal order, and the extent of the powers transferred. Its founding legitimacy is nonetheless based on an agreement of intent concluded by States. Yet, the Constitution of a group of States based on the rules of international law is extraneous to the democratic model.

At a deeper level, it should be asked whether a European People exists at all. The Community Treaties and a number of national Constitutions have voluntarily affirmed the existence of a European citizen. This status is the corollary of the status of citizen of a Member State. It has no autonomy in terms of national citizenship. Brexit demonstrated the secondary nature of the reference to the "People" of the Union. Indeed, this European identity does not enjoy any autonomy compared to national identities. In fact, the non-existence of a European *demos* was demonstrated by the loss of European citizenship for British citizens when Great Britain withdrew from the European Union.

However, in any case, these citizens, who benefit from specific protections and limited powers of intervention in the European institutional game, do not constitute a sovereign People. What is more, the absence of a homogeneous political space and of a European public opinion[11] may cast doubt on the very consistency of a potential European People.

The question, then, is whether there can be such a thing as a non-national democracy. This issue has been developed by Doyen Vedel, who has noted both the historically consubstantial nature of democracy and the Nation, at least in modern

11 Gerkrath, 2004, pp. 363 et seq.

history, and the need to go beyond this correlation. Yet, the European Union is not a State, and there is no European Nation. In reality, the European Union must be considered as an original construction which is not, as has already been said, based on the principle of sovereignty which is understood as the exercise of an initial and founding power. It needs to be repeated; indeed, the analysis is distorted and the drafters of legislative texts are sometimes misled by the fact that the recognition of democracy as the sole legitimising principle tends to result in the condemnation of any system of command that is not directly based on this principle.[12] This ideological stance must be overcome.

No people, no sovereign, no democratic legitimacy. These clear-cut assertions must be immediately nuanced by the observation that the absence of democratic legitimacy as a founding principle of the European Union does not, as demonstrated later, exhaust the question of democracy within the European Union.

In fact, the legitimacy of the European Union is manifold: it is based, for example, on the democratic nature of its Member States, on the exercise of democracy within the Union and on the notion of *acquis Communautaire*.[13] From this point of view, the European Parliament is unique in that its legitimacy is based on the election of its Members by citizens. The question is whether, regardless of the absence of a democratic foundation for the European Union, the European Parliament is not, within the Union, the body meant for embodying this share of legitimacy.

1.2.1. Does the European Parliament represent European citizens?

Although representation is not necessarily democratic, it is indeed possible to represent, for example, interest groups, and although democracy is not necessarily representative, the European Parliament represents the integration of a mechanism for representative democracy within European institutions. In this sense, in its "isoglucose" ruling of 29 October 1980, the Court of Justice referred to the European Parliament as the democratic element in the construction of Europe. Only the Parliament can rely on direct democratic legitimacy, as it is elected by direct universal suffrage. While Members of the European Parliament are undoubtedly representatives, the question is what exactly they represent.

In fact, the European Parliament, initially designating itself in a self-proclaimed manner as the Assembly of European Communities, first represented the Peoples of the Nations, before representing European citizens.

This establishes the principle that European citizens participate in the exercise of power through a representative assembly.

Identifying European citizenship is conceptually difficult. Indeed, as it has been said, this status only supplements the status of citizen of a State, to which it is linked.

12 Vedel, 1977, p. 23; see also Habermas, 1998, p. 218.
13 For an assessment of this nature, see Timsit, 2003.

However, irrespective of the nature of European citizenship, the Parliament appropriately represents European citizens who have directly elected its Members.

Nevertheless, the existence and recognition of a genuine representation of European citizens faces a number of obstacles. First of all, Members of the European Parliament are elected in national constituencies according to nationally organised methods of election.

In addition to the national roots of representation at European Union level, there is the absence of a genuine European political space.

The diagnosis can be made quickly, but needs to be clarified. Firstly, although Community law recognises political parties, and parliamentarians nowadays sit on the basis of political affinity rather than nationality, the structuring role of these parties is weak. The Maastricht Treaty appropriately emphasised this point by stating that 'Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.' (Article 191). This provision must be interpreted as postulated. Indeed, the political will of the citizens of the Union, which political parties should help to formalise and MEPs to represent, is still nowhere to be found. The Parliament's functioning does not really follow a majority logic. Moreover, culturally, European institutions, including the Parliament, have retained a taste for expert advice and listening to lobbies, rather than political debate,[14] from their international origins. The search for consensus is preferred to confrontation.[15] European citizens thus find it difficult to identify themselves with a European Parliament that does not represent them within a European political space that the EP is unable to forge. The political nature of European elections reflects national dividing lines, not European ones. Moreover, communication between European citizens and MEPs is essentially non-existent. From this point of view, European patriotism invoked by Habermas remains merely theoretical.

Democracy implies both political choices and the universal recognition of shared values.[16] In that sense, the Parliament, as the body of representative democracy within the Union, has the task of initiating this political debate and formalising the common values proclaimed in the Treaties, which have, however, difficulty in emerging as a factor of cohesion within Europe.

The question arises differently when our focus is put on the democratic functioning of the European Union.

First of all, it should be noted that the European Union is facing a crisis of liberal democracy, which is affecting most Member States and, in a broader perspective, Western political systems, or those inspired by them.[17] The causes of this situation are numerous and of varying nature: individualism, communitarianism, disintegration

14 In this regard, see Magnette, 2000.
15 In this regard, see Chaltiel, 2008.
16 Rosanvallon, 2008.
17 Mathieu and Katrougalos, 2023.

of shared values, multiculturalism, globalisation, financial crises, the loss of influence of religions. This issue will be discussed further in connection with "values". This phenomenon is amplified in the European legal order by the disconnection of the link between institutions and a real people, the construction of a "*cratos*" without a "*demos*".[18]

The legitimisation and the functioning of the Union essentially follow procedural logics. From this point of view, it is both a paradox and a dead end to assert, as we shall see, that certain values impose themselves as the substratum of the Union, while denying the existence of substantial constraints in shaping opinions, notably in the name of multiculturalism. We use concepts such as "environmental democracy"[19] which, in addition to its lack of rigor, confuses an objective, i.e. the protection of the environment, with a mode of legitimisation of power, i.e. democracy, thus creating a "curtain of smoke".

Furthermore, the rise in power of the European Parliament should not conceal a phenomenon of depoliticisation reinforced by the essential role played by bodies that reinforce the feeling of democratic dispossession: independent agencies, whose tasks are technical, the Court of Justice, the Central Bank and, above all, the European Commission. This is how legalism and technocracy prevail over democracy.

This situation is compounded by the weight of lobbies, often embodied in powerful NGOs, for which transparency requirements, particularly in terms of funding, are weak.

In this way, the European Union both reveals and amplifies democratic disillusionment.[20]

The discrepancy between the place granted to the democratic principle in European legislation and the role played by its requirements in the actual operation of the Union is striking. As Olivier Beaud notes,

> The authors of the Lisbon Treaty have put the Constitution of a club of democracies ... at the forefront ... and have been concerned with the political homogenisation of Member States ... The inconsistency becomes apparent when we ask ourselves, almost naively, whether the essential conditions of democracy are really fulfilled in the very sphere of the European Union. In other words ... there is no doubt that ... the institutional system of the European Union is far from satisfying the conditions of the concept of democracy, which leads in the final analysis to leaving the power of the last word to the people or their representatives, it is not the election of the European Parliament that can counterbalance the initial structure of Europe, which is based on the pre-eminence of the Commission and the Council of Ministers, nor is there any further political responsibility for the leaders of the European Union. Consequently, there are some paradoxes in the fact the European Union imposes on its Member

18 Manent, 2006, p. 10.
19 Spector, 2021, p. 92.
20 Spector, 2021, p. 25.

> States the rule ... on a democratic form of government, whereas it is not really in a position to meet this standard for itself.[21]

This issue raises another issue on the nature of the European political order, and in particular the legal form it takes.

1.3. The European Union: a federal legal order?

For a non-specialist in EU law, defining the legal order it constitutes is a delicate exercise, but as Olivier Beaud[22] points out: 'it is possible to account for Europe's originality without trapping it in the self-referential understanding it may have of itself'.

Europeanist or constitutionalist doctrine has produced conflicting analyses on the legal nature of the European Union. Reference to existing categories have proven to be disappointing or approximate, this is why we give in to the temptation of speaking about a *sui generis* legal order, which is equally approximate. Nonetheless, comparing the European structure with existing categories is one way of better understanding its nature.

Several political structures can be invoked, among others: empire, confederation and federation.

1.3.1. Empire

Empire is a political form based on a centre, a metropolis, around which dominated or colonised entities gravitate on the periphery.[23] It can be either a colonial Empire, like that of former France or Great Britain, or an Empire embracing vast territories, as was the Soviet Empire, and still is the Russian Empire (whose policy of aggression is explained, if not justified, by the reconquest of certain lost territories).

However, the pathway of empire is not a very fruitful one, as the European Union is not based on a logic of conquest and domination, but on the principles of equality and freedom. However, the fact remains that the European Union can give an imperial feeling to some of the smaller or more recently participating Nations. This is probably true of States that have experienced imperial domination, or successive dominations, and which see in the fussy imposition of rules, or even common "values", an imperium. Against a backdrop of revived imperial models, such as the Russian and Ottoman Empires, Europe is trying to carve out a place for itself, albeit as a weak Empire, both militarily and geostrategically (as could be the case with the Holy Roman Empire). While, in legal terms, it is difficult to adapt the concept of

21 Beaud, 2022, p. 551.
22 Beaud, 2007.
23 French Constitutional Council, Decision No. 92-308 DC of 9 April 1992, Treaty on European Union.

Empire to the European Union, it is not foreign to the feelings of certain nations or certain peoples.

This issue also raises the issue of Europe's borders.

1.3.2. Confederation

A confederation of States is a suitable model for advocates of a Europe of Nations.

A confederation is an entity to which the Member States delegate a number of external competences, often in the field of foreign and defence policy, but retain the essence of their sovereignty, which is reflected in particular in the unanimity requirement for all major decisions. So, it is essentially an alliance meant for common defence. In reality, there is no permanent central body. In his treatise on the law of nature and people, Pufendorf had already proposed a definition for Confederation by the power of States to block the decisions of the federative assembly, in such a way that any action by the confederate body depends on the ability of the associate members to reach a negotiated consensus at the time of deliberation. According to Montesquieu, a confederation has two decisive characteristic features: firstly, it is a form of association within which each State retains its sovereignty and remains free to break the ties which bind it to the others at any time; secondly, decisions within the Council of the Confederation, where the elected representatives of confederate States sit, are taken unanimously, which is tantamount to granting a right of veto. According to the same author, a confederation only works on a small scale, i.e. when the number of united members is small.[24] This also raises the issue of the Union's territory.

1.3.3. Federation

The prospect of a federal State or a federation, which is more realistic and will be covered later, has often been invoked to characterise the path towards which the European Union is heading. This perspective is in conflict with the perspective of a kind of confederation, which has just been invoked.

The founding act of a federal State is a *Constitution* (and not a treaty, as in a Confederation). Federated entities organise (through a Constituent Assembly) the institutions of the new State, and distribute competences between the Union (i.e. the central State) and the federated States.

Consequently, a federal State has its own Constitution. It may be amended, generally not unanimously, but with the agreement of a reinforced majority of the federated States. In other words, "the initial agreement may be overturned against the will of a number of associates". Even if such measures cannot be taken without all interested parties having defended their views (principle of participation), this situation shows the considerable abdication of freedom agreed to by Member States

24 Spector, 2021, pp. 147 et seq.

when they joined the Federation. Ultimately, one of the Member States can be prohibited from leaving the Federation (as is the case in the United States).

A federal State is characterised by "the superimposition of two legal orders": citizens are subject to both a law elaborated by the federal State and a law emanating from its federated State. So, while federal law applies to every citizen, in the areas assigned to the Member States, citizens are subject to rules that can vary profoundly from one federated State to another. Indeed, "within the fields recognised to them", each federated entity decides which competences it wishes to exercise and how it wishes to exercise those competences, i.e. it elaborates the rules of law in its interpretation. This can lead to major disparities in status between individuals depending on their place of residence (it is true that the situation is the same, with less striking disparities, in unitary States due to decentralisation).

The areas open to the partners' intervention vary across different systems; the Constitution lays down the rules for the distribution of competences between them, but federated States never have the full competences of a sovereign State. Upon joining the Federation, they have had to sacrifice some of their powers to the Union.

However, a federation does not necessarily take the form of a State. According to Olivier Baud, a federation is not a federal State but a federative association, or a political order lacking sovereignty. In his view, the concept of sovereignty is inadequate for considering the federal phenomenon, because, unlike the unity of sovereignty, a federation presupposes a duality of powers: federal power and federated powers. From this point of view, it should be noted that while the idea of shared sovereignty is conceptually impossible, given its indivisible nature, it is conceivable to share the exercise of competences that fall under sovereignty.

A federation differs from a confederation in that it has coercive force in law to compel each State to submit to common deliberations, without forming a federal State in the strict sense of the term; rather, it is a form of post-State transnational integration.[25]

As O. Beaud points out, political homogenisation is a historical law of federations.

From this point of view, it is interesting to take account of the federal process in the United States.

In the United States, the federation of States was constituted in a period when the thirteen colonies did not yet have a strong institutional framework, nor a long political history. Those States did not aim at relinquishing their sovereignty, but rather at strengthening it by uniting.[26]

When the States of America were constituted, and in the very spirit of the Philadelphia Convention, the federation was not conceived as a State. The federal government is not a State, but the government of a federation of States. From this point of view, the concept of sovereignty is not an effective one for describing this reality[27],

25 Spector, 2021, pp. 64, 169.
26 Spector, 2021, p. 38.
27 In that sense, see Beaud, 1998, pp. 83 et seq.

particularly since there is no federal State vested with the "competence of competence". In the words of Elisabeth Zoller, the evolution of this system is the result of a "spiral that eludes its authors". This spiral was essentially manoeuvred by the Supreme Court and was symbolised by the 1803 *Marbury v. Madison* ruling. Two key elements mark this evolution. On the one hand, a Federal Constitution is understood as the act of sovereign People, and on the other, a federation is recognised as having the power to interpret the provisions of a Federal Pact. These elements are complemented by others, such as the role played by the protection of human rights and the recognition of dual citizenship for individuals.[28]

In this hypothesis, the constitutionalisation movement of a federal legal order, its "transformation into a State", is the work of the Federal Supreme Court.

Incidentally, it will be pointed out that in U.S. federalism, the law is no longer the expression of the general will, it represents a compromise of interests and passions tempered by the power to judge.[29]

Before considering the nature of the European Union in terms of the concept of federation, it is worth taking a brief look at its institutional structure.

The institutional structure of the European Union is highly complex, which makes it difficult to fit it into any single category, while at the same time it allows for a degree of flexibility that is conducive to the development of the competences of certain bodies, to the benefit of becoming independent from both the text of the Treaties and from the Member States. It is a multi-level political association, governed by an institutional triangle: intergovernmental bodies, the European Council and the Council of the European Union, which set the Union's broad guidelines; the European Commission, responsible for pursuing the general European interest and preserving the *acquis communautaire*, which has sole legislative initiative; the European Parliament, which benefits from a co-decision procedure enabling it to legislate on an equal footing with the Council of Ministers in all areas falling within the competence of the Community; and the Court of Justice of the European Union.

This architecture was built in several stages, the most essential ones can be summarised as follows.

The Maastricht Treaty (1992) made major changes to the institutions, by strengthening the role of the European Parliament, which gained co-decision powers with the Council of Ministers in the adoption of legislative texts, as well as the power to block the appointment of European Commissioners, and introduced European citizenship. The Amsterdam Treaty (1997) allowed the Council to suspend a Member State's voting right upon finding a serious and persistent violation of the principles of democracy, human rights or the rule of law. Finally, a European Charter of Fundamental Rights of the European Union was adopted alongside the Treaty of Nice (2000).

Consequently, while the Union's institutions exercise their competences by virtue of the principle of attribution, these competences are not easily deduced from the

28 Zoller, 2003, pp. 43–166.
29 Spector, 2021, p. 53.

stipulations of the Treaties.[30] Determining them involves an interpretation of the Treaties. This takes into account both the competences explicitly granted to the European institutions and their objectives. This is how 'it turns out that the delimitation of the Union's competences depends on a dialectic between objectives and powers, maximised by the teleological interpretation adopted by the Court of Justice'.[31]

1.3.4. An apparent federalisation

We will rely on an analysis by Olivier Beaud, which aims to determine certain points of analogy between a federation and the European Union, even though the author concludes that there is no identification.[32]

First of all, there is a structural homology between the European Union and a federation. Indeed, the European Union is both a union of States and an institution characterised by a strong differentiation between the Union and the Member States. There is, moreover, a strong analogy between the constituent power in a federation and the way in which Europe was constructed. The way in which European and national legal orders are intertwined bears a strong resemblance to the way in which federal and federated legal orders are interconnected, both of which are characterised both by autonomy and interdependence. Finally, the system is characterised by the duality of legal orders.

On the other hand, there is dual nationality: that of the federation and that of the Member State.

In addition, the Court of Justice of the European Union, responsible for solving disputes between the Union and the Member States, as well as those between Member States concerning the application of European law, is the guardian of the Treaties and a veritable federal arbitrator. The principle of exception for non-performance of a contractual obligation, which applies in general international law, is not applicable in Union law.

Finally, the Treaty of Lisbon has developed a system for distributing competences close to that of a federal system, by providing that the Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties. This logic means that the Union's objectives must respect the distribution of competences, and that any competences not attributed to the Union in the Treaties belong to the Member States. Article 5 of the TEU on the distribution of competences lists the types of competences, including exclusive and shared competences. In the latter area, the States may legislate and adopt legally binding acts, but they exercise their competences to the extent that the Union has not exercised its own.

30 Arenas, 2022.
31 Martucci, 2021, p. 212.
32 Beaud, 2022, pp. 490 et seq.

However, the question of whether the European Treaty would be equivalent to a constituent pact is the "unresolved issue of European construction" (cf. above).

From another point of view, although in the context of intergovernmental cooperation at the European Council, the unanimity rule prevails for decisions pertaining to the fundamental interests of the States, once a decision has been taken, it is no longer possible to exempt oneself as one pleases. Domestic legal systems must adapt to European policies and comply with certain forms of normative harmonisation. Monetary policy is dictated by the European Central Bank (ECB), which reports to the European Parliament without the latter being able to order any change in its policy. In the euro zone, Member States can no longer issue money for the purpose of repaying their debts.[33]

In this way, it is possible to consider that a quasi-federal model has been developed, characterised by the constant expansion of the European Union's competences, the broadening of the range of matters on which qualified majority voting is admitted, and the supremacy of Community law, implemented by the Court of Justice (which will be reviewed later).

1.3.5. The European Union is not legally a federation

First of all, in the Preamble to the Treaties, the Union cautiously does not define itself as a federation. No reference is made to the existence of a political union, even if it could be argued that a union of the peoples of Europe could only be political. The Union is supposed to be ever tighter, but it is not specified what kind of entity this would be. As Olivier Beaud points out, "there is both caution and emphasis".[34]

Moreover, there are both enhanced cooperations (such as the European Monetary System or the Schengen Agreements), as well as reverse processes in which protocols endorse derogatory practices conflicting with the idea of a federal pact.[35]

Finally, the recognition of a member's recognised right to withdraw from a Treaty is also foreign to a federal pact.

However, above all, what separates the Union from a true federation is that the institutions of the Union do not have the competence to make final decisions or to amend the Constitution. Member States have retained the competence of competence. They have (in principle, as we shall see) a right of veto when their fundamental interests are at stake.

Therefore, it can be argued that the European Union is neither a confederation nor a federation, but a mixed form. It combines certain confederal features (European Councils) with certain federal features (Commission, Parliament, Court of Justice and European Central Bank). In this respect, the German Constitutional Court has defined the European Union as an association of States supported by the Member

33 Spector, 2021, p. 170.
34 Spector, 2021, p. 541.
35 Beaud, 2022, p. 561.

States and respectful of their national identities. According to the Court, Germany's fundamental law envisages the Union as more solidary than a Confederation but less solidary than a Federation, by specifying that a European State cannot be created without a European People, the people being the sole medium of sovereignty indispensable to democratic legitimacy.

As C. Spector points it out, it could be argued that the European economic order is federal and that the political order remains cooperative, which causes dysfunctions.[36]

1.3.6. A creeping federalisation

Independently of the Treaties or the will of the Member States, this federalisation is taking place essentially under the influence of two factors: the role played by the Court of Justice of the European Union (which will be covered in relation to the "values") and the budgetary and financial operations.

1.3.6.1. The "federative" action of the Court of Justice of the European Union

The European Union confers an outstanding role to the Court of Justice, which invokes a teleological interpretation of the Treaties, starting from the goals assigned to the European Union in order to extend the scope of European law. Thus, it admits simplified revision clauses for the Treaties without unanimous ratification.

More specifically, the two major principles structuring European law, i.e. direct applicability and the primacy of Union law, have been established by the Court of Justice of the European Union (back then known as the Court of Justice of the European Communities).[37]

In general, the Court of Justice interprets the Union's competences broadly, by referring to the theory of implicit competences.[38] This case law, which formulates means and objectives, has had the effect of drawing into the orbit of the European entity matters which seemed, *a priori*, to fall outside its scope.

Moreover, the preliminary ruling procedure has given the European Union a highly effective weapon for maintaining the unity of European law within the Member States' jurisdiction. This is one of the areas where the phenomenon of federalisation is the most pronounced.

Although the unanimity rule applies when the vital interests of the State are at stake, it is ultimately the Court of Justice that decides whether such interests are at stake. This is an essential issue, to which we shall return in the final part of this study.

Thus, the federalisation movement of the federal legal order is the work of the Court of Justice, which has positioned itself as the supreme federal court.

36 Beaud, 2022, p. 169.
37 Costa v. ENEL, 1964, Case 6–64; Van Gend & Loos, 1963, Case 26–62.
38 European Agreement on Road Transport of 31 March 1971, Case 22–70.

However, the Court of Justice of the European Union cannot be considered as a true constitutional court.[39] Indeed, the purpose of a constitutional court is to ensure the supremacy of the Constitution *vis-à-vis* all the bodies of the State and the citizens. Yet, in many countries, including France, European law takes precedence over national law, not by virtue of the European norm, but by virtue of the national constitutional norm.

1.3.6.2. Fiscal and financial federalisation

In order to deal with exceptional economic or financial circumstances, European institutions have been given new tasks, sometimes surreptitiously, even *contra legem*,[40] sometimes explicitly, at the Member States' request.[41] In 2020, the Commission was vested with the competence to issue common debt securities to finance a temporary instrument for recovery from the health crisis, called "Next Generation EU", with a budget of €750 billion.[42] This decision was taken on the basis of Article 311 of the TFEU, the first paragraph of which stipulates that 'The Union shall provide itself with the means necessary to attain its objectives and carry through its policies'. This is a fundamental development, falling into the scope of a certain kind of fiscal federalism that is absent from the Treaties. For the first time, the European Union has resorted to massive borrowing. This loan has given rise to financial solidarity between States, *a priori* prohibited by Article 125 of the Treaty on European Union.

From that perspective, the reference to U.S. federalism is instructive. This procedure is similar to that used in the United States after the War of Independence, when the federated States wanted to offload their war debts onto each federal State.[43] The creation of a Fund for the Recovery and Redemption of State Debts by the U.S. Federal State in 1790 reinforced federalism.

This procedure, used in the wake of the COVID crisis, constitutes what could be referred to as a "Hamiltonian" movement. In the 1780s, Hamilton advocated the mutualisation of war debts between the Confederate States, whose public finances were very disparate. It is to be feared, or hoped, depending on particular points of view, that this decision paves the way for the constitution of a political Europe which, once again, would not have really been decided.

Nevertheless, in December 2022, the German Constitutional Court reacted to this procedure, by accepting it with reservations. The Court took this opportunity to reiterate that the construction of Europe was limited by the respect for the fundamental

39 For a comprehensive analysis of this issue, see Favoreu, 2002, p. 35; see also the analyses of Gaudin, 2000, pp. 209 et seq. and Flauss and Drago, 2001, 2002, pp. 703–721.

40 See in particular: BVerfG, 2020, 2 BvR 859/15.

41 Arenas, 2022.

42 This is a considerable sum on the scale of the Union, representing almost three quarters of its multiannual budget (2021–2017), i.e. around four times the annual budget.

43 Guaino, 2023, p. 329.

principles of the States, and that it should not lead to the disappearance of State sovereignty. This closes the door on a federal-type development.

Nonetheless, it must be asked whether the legal-political model with *federal tendencies* corresponds only to a moment in history, when the two State and supra-State structures coexisted in a more or less balanced way, before leading to a true federal structure, as demonstrated by the history of the United States, Germany and Switzerland. The real issue at stake is to find out whether such a development would be the result of the political will of peoples and States, or the result of an undermining process by jurisdictional and technocratic institutions.

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2. The Union's values: a European integration tool

The European Union is in search of its identity through reference to the values on which it considers itself to be founded. In fact, the reference to these common values, of which the Court of Justice is the guardian, is a highly effective tool for integration that goes far beyond the Union's objectives, and contributes to the development of conflicts between the Union and certain States that wish to assert their own identity.

2.1. "Values" as markers of European identity

As it has been pointed out, despite the *petitio principii*, the European Union is not a legal order based on the democratic principle. Unable to find its justification in competences of an essentially economic or financial nature, the European Union refers to values that are supposed to constitute its identity.

In the absence of *demos*, the Union refers to the abstract universalism of fundamental rights.

As O. Beaud points out, the reference to values as a basis for the legitimacy of the European Union has become virtually ubiquitous in the programmatic provisions of recent Treaties on the Union. The invocation of values would thus aim to reintroduce meaning into the European Union. Europe is supposed to assert its identity to the rest of the world, and the only demarcation line drawn by the European Union is that of democracy and human rights.[44]

Article 2 of the TEU provides the following:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States

44 Guaino, 2023, p. 545.

> in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

This list features a number of characteristics. On the one hand, it refers to rights which constitute the core values shared by Western States, notably dignity and freedom, which are complemented by specific rights such as minority rights, non-discrimination and tolerance. If, abstractly, those values can be considered as consensual, they are much less so when it comes to putting them into practice: how to articulate universalism and minority rights; non-discrimination and differences between nationals and (non-European) foreigners; traditional values and specific recognition of sexual minorities. The second feature of this enumeration is that it formulates undefined principles of different nature: Which concept of the rule of law is referred to in this text: substantive, formal, strict or broad? Who defines its scope? Are dignity and freedom distinct from human rights? In what manner are freedom and dignity articulated? Finally, it is postulated that these values are common to all Member States. Although it may be considered that sharing these principles is a condition of EU membership, the basic issue is whether it should be presumed that the States have accepted any constructive interpretation that the Court of Justice may give to them, as regards their definition, scope and articulation.

This form of legitimisation also comes up against an issue of embodiment. The issue is whether a political project can be constructed without history, myths and symbols. Refusing to refer to Europe's Christian roots, a purely descriptive statement that did not pre-empt the place of religion in the European legal order, is not really counterbalanced by the existence of an anthem and a flag.

In addition to this abstraction there is the fact that these values come with a legal scope that is supposed to mark the overcoming of politics by law,[45] but a disembodied law. This process is indicative of the fact that the European project aims to construct a people through law, and not to develop a law that a people would grant to itself.

This construction also comes up against another obstacle. The principles and values referred to are universal; if not, they are at least intended to be so. In the Western imagination, these values are supposed to be shared by any political society, regardless of its history, geography or mores. These are, moreover, quite exactly the values affirmed within the framework of the Council of Europe. Then, the question that arises is how it is possible to conceive of a European identity, based on or around those values. This question is all the more pressing given that those values are supposed to replace those that are part of the identity of a particular country, and which might not be soluble in the common identity.

Thus, despite the affirmation of those shared values, the Union is undergoing an identity crisis, without overcoming its weak democratic legitimacy.

This situation is aggravated by the fact that the scope of the values referred to owes little to a determination by political bodies, but is the result of apolitical, or

45 Spector, 2021, p. 61; Mathieu, 2023.

at least ademocratic bodies, such as the European Court of Human Rights, and the Council of Europe's Venice Commission. Moreover, NGOs, whose belonging to "civil society" serves as a testimony of legitimacy, hardly subject to transparency obligations, and pursuing specific and diverse interests, play a non-negligible role, accentuating a communitarian conception of recognised rights, that further blurs the lines of identity. Indeed, how can we affirm the existence of common and intangible values, when those values include relativism and the recognition of any identity-based value system? The rejection or acceptance of such identity-based systems, which are likely to conflict with the common foundation, is based on essentially ideological considerations. Conversely, the promotion of the Union's values can be accompanied by the removal of legal guarantees to the detriment of those who do not share the same value system, the heterodox or the marginal.[46]

There is a need to create, almost *ex nihilo*, a European people based on shared values, and this requires education. As C. Spector observes:[47] 'History, philosophy and civic education courses must include a reflection on the fratricidal memory of European peoples, decentralisation studies, the struggle of women, migrants, workers with insecure jobs, LGBTIQ+ persons, etc.'. One can understand why the European Union has protested against a Hungarian law banning the promotion of gender theory or the possibility of sex reassignment in schools.

Moreover, the fact that European integration is part of a system of values, reinforces subjects of law who are entitled defend their fundamental freedoms before the Court of Justice of the European Union, to the detriment of citizens who exercise their sovereignty, deliberate on common affairs and decide on their destiny within the framework of a democracy.[48]

Consequently, history and culture must have a secondary role, what matters from this point onwards is loyalty to rights and procedures, attachment to the rule of law and the welfare state.[49]

Thus, in a somewhat caricatured way, the structuring of the Union can only be achieved by destroying the singularity of States, i.e. the very thing that justifies their existence.

2.2. The Union's values as instruments for broadening its competences

Among the Union's values, the concept of the rule of law, an all-in-one concept, now plays a strategic role in both delegitimising sovereign functions and legitimising the infringements of national sovereignty by European institutions.[50]

46 Beaud, 2022, p. 545.
47 Beaud, 2022, p. 255.
48 Spector, 2021, p. 241.
49 Spector, 2021, p. 307.
50 Schoettl, 2022.

Independently of the difficult-to-implement procedure set out in Article 7 of the Treaty, which makes it possible to penalise a State which fails to comply with the requirements of the rule of law, in particular by suspending voting rights, another simpler and more effective procedure, designed to enforce compliance with this same principle, has been implemented outside the provisions of the Treaty.

Particularly topical, and pointing towards budgetary and financial federalisation, the conditionality of aid channelled under the Recovery Fund subject to the respect for the rule of law enables the Commission, in the event of a violation of the rule of law likely to affect the management of the funds or the financial interests of the Union, to deprive "guilty" States of aid under the European Recovery Plan. In this way, the 'fundamental values of the Union, including the independence of the judiciary' are invoked.

This procedure has its origins in a resolution of the European Parliament, which considered the following to be violations of the rule of law: 'attacks on freedom of the media and journalists, migrants, women's rights, LGBTQIA+ rights and freedom of association and assembly'. An objective reading would suggest that the criteria are quite removed from the requirements of sound management of European funds.

A more serious argument relates to the proper functioning of the justice system. It is this issue that is at the core of the ruling of 16 February 2022 (C-175/21) by which the Court of Justice of the European Union dismissed Poland's and Hungary's appeal against this sanction mechanism, which empowers the Commission to suspend aid to member countries that do not respect the "values of the European Union".

This ruling deserves to be analysed in some detail, given the extent to which the Court's reasoning suggests a broadening of the Union's competences.

The Court postulates that

> Once a candidate country becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 [TEU] ...". The laws and practices of Member States should continue to comply with the common values on which the Union is founded.

It is immediately noticeable that the scope of those values is particularly broad.

According to the Court, the rule of law has a prominent place among those values. To verify compliance with the requirements of the rule of law, the Court takes into account

> relevant information from available sources and recognised institutions, including judgments of the Court of Justice of the European Union, reports of the Court of Auditors, the Commission's annual Rule of Law Report and EU Justice Scoreboard, reports of [OLAF] and the [EPPO] as relevant, and conclusions and recommendations of relevant international organisations and networks, including Council of

> Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the [European Commission for Democracy through Law (the Venice Commission)], in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary. The Commission could consult the European Union Agency for Fundamental Rights and the Venice Commission if necessary for the purpose of preparing a thorough qualitative assessment.

This analysis will cover the heterogeneity of the "authorities" empowered to define the scope of the rule of law, and therefore the potentially undefined and extensive nature of the concept.

The Court refers to the contested regulation which states that the value of the rule of law 'includes the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, separation of powers and non-discrimination and equality before the law' (§154). In addition to this definition, which refers to a concept that may be accepted by consensus, according to which the rule of law is in fact protection against arbitrariness, the Court validates an extensive concept enshrined in the contested regulation

> the concept of "the rule of law", as defined for the purposes of the application of the said regulation, 'shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU'. It follows that respect for those values and principles – in so far as they form part of the very definition of the value of 'the rule of law' contained in Article 2 TEU or, as is apparent from the second sentence of that article, are closely linked to a society that respects the rule of law – may be required in the context of a horizontal conditionality mechanism such as that established by the contested regulation.

For good measure, the Court adds that 'the values of equality, non-discrimination and equality between women and men [...] allow the EU legislature to adopt secondary legislation intended to implement those values' (§194). Further on (§324), it states even more clearly that 'it is clear that a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value'. Lastly, it refers (§325) to the definition adopted by the Venice Commission, according to which

> the concept of "the rule of law" requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures.

Although this definition may be conceived at an abstract or doctrinal level, it is conceded that it leaves plenty of room for interpretation, particularly as regards the terms “dignity”, “rationality”, “impartial” and “fair”.

Thus, the rule of law is merely the generic term for the set of values enshrined in the Treaty, and compliance with it, such as its implementation, is the basis for intervention by European institutions and control under European jurisdiction.

More specifically, the Court held that

> The Court has also ruled that the second subparagraph of Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, imposes on the Member States a clear and precise obligation as to the result to be achieved that is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law, with the result that it is for a national court to disapply any provision of national law which infringes the second subparagraph of Article 19(1) TEU, if necessary after obtaining from the Court an interpretation of that provision in the context of a reference for a preliminary ruling (§198).

Furthermore, respecting ‘the national identities of the Member States, inherent in their fundamental structures, political and constitutional’ does not imply that this result-based obligation may vary from one Member State to another (§265).

Thus, having established the Union’s competence with regard to the institutional organisation of the State (in this case, its jurisdictional organisation), the Court rejects the reservation linked to the respect for State competences relating to their constitutional structure, thus marking the subordination of the States’ constitutional law, both in terms of the interpretation of common values and with regard to institutional matters, to the previously defined principles.

The Polish plan, which was approved by the Council in June 2022, calls not only for transferring the judges’ disciplinary system to another body and for implementing the right for Polish courts to submit questions for preliminary rulings to the Court of Justice of the European Union, but also for improving legislative work, in particular through the introduction of public consultations and the limited use of fast-track procedures at the Parliament.

There are many other examples, albeit less emblematic, of the way in which reference to the Union’s values is used to support an extension of its competences.

Thus, MEPs generally feel relatively unbound by the Union’s competences. One of them noted that, in the first year of the 2019-2024 parliamentary term, only half of those deliberations related to the Union’s competences; for around a third, the subjects debated were only remotely related to these competences; and the rest, i.e. one deliberation in five, was utterly foreign to them.[51]

In April 2023, the Commission and fifteen Member States brought an action against Hungary before the CJEU, alleging that Hungary had breached the rule of

51 Bellamy, quoted by Schoettl, 2022, p. 8.

law by adopting a law discriminating against LGBT people, the purpose of which was, as mentioned, to ban propaganda in favour of homosexual relationships and gender reassignment in schools.

In December 2022, the Commission proposed[52] a regulation aimed at harmonising at EU level the rules of private international law on filiation, with filiation established in one country to be recognised in the others. It is stated that this proposal is one of the key actions mentioned in the EU strategy for children's rights and equal treatment of LGBTIQ people. Thus, for example, the recognition of the civil status of children born through surrogate motherhood, which tends to be integrated in the norms even in States which consider that surrogate motherhood, is contrary to public order.

In November 2023, a proposal for a directive, emanating from the Council and the Parliament, intends to counter "Strategic lawsuits against public participation", known as "gagging procedures".[53] It aims to prevent those persons most exposed to media, political and litigation attacks, i.e. business leaders, public officials, political parties, companies and State bodies themselves, from seeking justice for infamous imputations when the authors present themselves as "human rights defenders", i.e., according to the text,

> individuals or organisations engaged in the defence of fundamental rights and various other rights, such as environmental and climate rights, women's rights, the rights of LGBTIQ people, the rights of people from racial or ethnic minorities, workers' rights or religious freedoms.

One of the privileges often enjoyed by powerful NGOs is the reversal of the burden of proof. It is the petitioner who must demonstrate to the judge the seriousness of his/her action. On the other hand, if the judge deems the "powerful" person's appeal unfounded, the latter will have to reimburse legal fees, travel expenses, medical expenses for psychological support and compensate the detractors for damage to their reputation or 'emotional distress related to the court proceedings'. This person is also subject to 'effective, proportionate and dissuasive penalties'. Moreover, NGOs not involved in the case may intervene in the proceedings in support of the defendant. In the name of the values supposedly defended by the "accusers", this mechanism unquestionably infringes the right to an effective legal remedy, and violates the principle of equality before the law, which prohibits discrimination between good and bad litigants.

It is thus on the basis of rather vague concepts, whose legal scope is quite largely undetermined, that the bodies of the Union, and especially the Court of Justice, intervene outside the scope of the Treaty to impose on States both respect for certain values, sometimes alien to their own identity, and institutional organisation methods falling within their sovereignty.

52 European Commission, Press release, 2022.
53 Lenoir, 2023.

3. How to transform European institutions to generate a more balanced relationship between the Union and its Member States?

The developments that follow are merely intended to outline some alternatives.

These alternatives could be the subject of a third phase of research, in order to verify their relevance and to implement them, where appropriate.

The first question concerns the aims of the European Union, while the second one concerns the organisation of the Union and its relations with the Member States.

3.1. What kind of European project is envisaged?

The question on which any reflection on the future of Europe must be based is: what kind of Europe do the peoples and governments of Europe want?

First of all, the key point is to determine Europe's place in a rapidly changing geopolitical world. Russia and Turkey behave like Empires, the United States is concentrating on its relations with China, the countries of the South see their future outside the Western model, and a hotbeds of wars, religious or ethnic conflicts are emerging everywhere, even on the borders of political Europe and within geographical Europe. This raises the question of whether Europe sees itself as a power, whether economically, financially or militarily. Europe may conceive itself as a model embodied in the promotion of human rights; however, it should be noted that the concept of human rights, based in particular on individualism and the promotion of minorities, including sexual minorities, which Europe defends, is not universal in character and, what is more, is rejected by peoples attached to other cultural or even religious traditions. Moreover, in a world where power relations are intensifying, Europe cannot limit itself to asserting its values. By all means, as it is recalled over and over again, denying one's values is breaking with one's identity (this principle, which Europe defends for itself, could also be asserted by Member States), but as F. Mitterrand said, in another context, pacifists cannot be on one side of the border and tanks or bombs on the other. In economic terms, the unregulated globalisation of trade, goods and capital flows has destructive effects. Europe can play an obvious protective role in this area, which will be discussed later, but Europe must be given competences to deal with issues that States cannot resolve on their own level. In this sense, Europe can represent a guarantee for States against external threats of all kinds, and can even exert pressure as a powerful player on the global stage.

The second question relates to Europe's borders. It has never really been resolved. Between a continental Europe "from the Atlantic to the Urals" and a political Europe as a club of liberal democracies, as well as a strategic Europe, the choice is not really made. Europe builds itself by imposing a multitude of rules (the *acquis communautaire*) and principles on candidate countries, which are likely to affect the societies concerned, whereas it is not really reflecting on its destiny. On the one hand, the

promised accession of Turkey is running up against economic and social problems, as well as ideological ones that we do not dare to assert, as they would conflict with the image Europe wants to project of itself (how to integrate a population with a Muslim majority). On the other hand, for understandable reasons, Ukraine's promised accession to the EU ignores all the obstacles it will face.

From this point of view, the larger Europe becomes, the more it will move towards an imperial model. The European integration of the old Central European States formerly under Soviet domination, an unfortunate parenthesis in their history, was part of the logic of reconstructing Europe following the fall of the Soviet Empire. It is not certain that the model can be replicated *ad infinitum*. This imperial model can take two forms. The first one is about the creation of a multi-speed Europe (which already exists in the case of Schengen and the monetary union), consisting of powerful States and satellite States. The idea would be to develop mechanisms for enhanced cooperation or differentiated integration, whereby certain States choose to extend their integrated cooperation, without imposing it on others. The second, probably more virtuous and promising model, advocated in particular by E. Macron, aims to establish an enlarged European structure (European political community), without the countries belonging to it necessarily having a vocation to join the Union. This imperial logic can have certain advantages, both economically and in terms of protecting peace in Europe. Incidentally, enlargement by simply integrating new States can only strengthen the most powerful States, on the one hand, and European technocracy embodied in the Commission, on the other. These issues are of interest for the distribution of competences between the Union and the States.

The other issue, which will not be discussed again, is that of the choice between a federal system, aiming in the long term to put an end to State sovereignties and merge them into a common entity, and a Union of sovereign States, sharing competences which they cannot assume themselves with sufficient power. This issue directly concerns the governance of the Union and the choice between a predominantly institutional or a predominantly intergovernmental mechanism.

Taking these options into account, and naturally, without being able to arbitrate between them within this framework, it would be more modest to envisage reforms that are likely to reduce tensions between the Union and the States, and to protect the European construction without leading to the progressive dissolution of State sovereignties.

3.2. What kind of European governance is envisaged?

The following proposals and summaries are structured around three questions: How to govern the European Union, how to clarify the distribution of competences between the Union and the States, and how to move from a vertical relationship between the Union and the States, to a horizontal one?

3.2.1. Reforming the "governance" of the Union

The aim here is to disentangle neither the complexity of competences of the Union's bodies, nor to develop a new institutional model, but merely to outline some guidelines.

The institutional nebulosity that characterises the European Union certainly contributes to strengthening the powers of the bodies that represent the Union's own interests, namely the Commission, the Court of Justice and, to a lesser extent, the Parliament.

As O. Beaud[54] notes, 'somehow, the most democratic element in the European Union is still the emergence of the European Council, which has real political decision-making power, considering that these Heads of State and Government represent the peoples of Europe, albeit indirectly'. The European Council, like the Council of Ministers, are bodies responsible for intergovernmental cooperation. They should determine the Union's objectives and have the ultimate decision-making power. Within the Council, it is conceivable that majority rule is enforced for the most important decisions and for the most interventionist ones in the lives of States, and a qualified majority may be required for less important decisions. However, in view of the developments that may take place in the context in which such decisions are applied, it is appropriate that States retain a right of veto. Indeed, respect for the autonomy of Member States implies the existence of a right of veto over decisions relating to what they consider to be their vital interests (more on this later). The President of the Council must be the true representative of the Union, whereas today, with a particularly short term of office, this person is unable to bring projects to fruition, 'which paradoxically leads to the Commission's supervision of the Council's work, and the latter's reduction to the role of merely recording proposals submitted by the supranational body'.[55]

As far as the Commission is concerned, its current pre-eminence stems from the fact that it has been entrusted with the task of primarily representing, and even embodying, Europe's general interest, as opposed to the Council, which represents the national interests of the Member States, and the Parliament, which, by virtue of the way it is elected, remains dependent on the same interests.[56] The Commission is thus the governing body of the Union.

It ensures that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied. The Commission has both political and administrative benefits.

In reality, a fundamental institutional development would aim to transform the Commission into a body primarily implementing the general decisions taken by the Council. The Commission has no legitimacy of its own, and must once again become

54 Lenoir, 2023, p. 551.
55 Blumann, 2023, pp. 315 et seq.
56 Ibid.

an essentially administrative body implementing the broad guidelines set by the Council. If the Commission's action has a certain political character, it should be inspired by the following formula: the Council determines the policy of the Union, and the Commission governs it. In that sense, the powers and political role of the Commission's President should be drastically reduced.

This reinforcement of the Council's competences at the expense of those of the Commission is necessary for the purpose of ensuring real accountability as a result of the decisions taken. Elected representatives are accountable to their people, whereas the Commission's accountability to the European Parliament is not a true form of democratic accountability, in view of the low level of representation of MEPs.

As C. Spector[57] points out,

> the Union does not establish the European Parliament as a new forum for expressing the people's will. This Parliament is not a representative body of the sovereign European people, as it is made up of quotas of MEPs elected in various procedures, with considerable inequalities in representation.

It is thus advisable to reflect upon the improvement of the representativeness of the European Parliament.

Genuine representativeness - which, it should be borne in mind, would risk pushing the Union even further down the road to federalism - would mean electing MEPs from transnational lists. This is probably the most effective way of democratising the functioning of European institutions, by creating a European political debate around which European political parties would be structured. The European Union needs to be re-politicised from the level of two institutions, the Council and the Parliament, with the Parliament being primarily responsible for defending the Union's interests. While this development would help in incarnating the existence of a European people, which today is no more than a fiction, the representation of the peoples of the States should also be strengthened. This is why it would be conceivable for national parliaments to be represented in the European Parliament, but within the same Chamber, so as to avoid the federal shifts that bicameralism would inevitably bring about. This reform would, however, encounter a material obstacle arising from the fact that it would be difficult for the same person to attend both national parliament and European Parliament sittings. Nonetheless, solutions could be found, for example through the intervention of alternates in a single-member constituency system, or the next-in-line in a proportional-type electoral system.

The role of national parliaments in European politics also needs to be strengthened in order to support the preponderance of national government bodies (Presidents or Prime Ministers) in determining national European policies. The additional involvement of national parliaments in the European Union's decision-making processes is not only another way of reducing the democratic deficit. According to

57 Blumann, 2023, p. 177.

Pascal Lamy, the Union is indeed a laboratory of governance, but it is not experienced by citizens as a real political space.[58] Enhancing the involvement of national parliaments in European policy enables them to act as bodies of democratic control, on the one hand, and to create a democratic network across the European continent through their cooperation, on the other hand.

The contribution of national parliaments to the "proper functioning" of the European Union is mentioned in the very text of the Treaty. Nevertheless, subject to a comparative study, the influence of national parliaments on European policy and decision-making is currently low.

3.2.2. Distribution of competences between the Union and the States

This definition must be elaborated on by national political leaders.

In fact, the goal is to clearly determine which competences and powers should be entrusted to European structures, and which ones should remain in the hands of the States. To do so, distinction should be made between the scope of European identity, justifying the association of a number of States, and the scope of national identities. This distribution must be as clear as possible. It must avoid the shifts noted above, which urge the Union to broaden its competences without any real limits, particularly in the name of protecting the rule of law. From this point of view, it must be stated clearly that the values enshrined in Article 2 of the Treaty cannot form the basis of the Union's own competence.

As far as these "values" are concerned, reflection is required on what States really intend to share. So, for example, respect for human dignity, the right to a fair trial and protection from arbitrary action are undoubtedly shared values. The same cannot be said for the concept of the family, the definition of marriage, and the place of religion.

Control over the distribution of competences cannot be exclusively conferred upon the Court of Justice of the European Union, as both a judge and a party. Thus, the principle of subsidiarity, initially conceived to limit the uncontrolled extension of the Union's competences, has been turned upside down by the Court of Justice which has assigned to itself control of its interpretation and application.[59]

National constitutional or supreme courts should therefore be involved in the exercise of this control.

3.2.3. Moving from a submission obligation to an obligation of dialogue

On 8 May 2020, the Court of Justice of the European Union reminded the Karlsruhe Court that it had sole jurisdiction to determine whether or not an act of a European Union institution was contrary to Union law. Thus, the Court acts a federal

58 Lamy, 2004, p. 56.
59 Spector, 2021, p. 156.

supreme court, responsible for ruling in the last resort on the distribution of competences between the Member States and the Union.

Article 4(2) of the TEU stipulates that the Union shall respect the national identities of its Member States, which are inherent in their fundamental structures, and the essential functions of the State, in particular those of ensuring its territorial integrity, maintaining law and order and safeguarding national security, i.e. the sovereign functions. Nevertheless, the Court of Justice considers that rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law in the territory of that State (opinion of 8 March 2011, No. 1–09).

Thus, the European Court of Justice imposes a hierarchical relationship between Union law and national law, including constitutional law.

Faced with this imperium, the German Constitutional Court has recognised its power to control whether the Union respects those competences. Indeed, it ruled[60] that as long as the Member States remain masters of the Treaties, it is on the authorising legislation adopted by the Parliament that the democratic legitimacy and the very existence of the Union is based. Consequently, when a Union act is adopted outside the scope of the competences specified by the authorising law, the German Court considers that it necessarily loses its democratic legitimacy and that Germany is certainly obliged to ensure the application of Union law, but only within the strict limits of the integration programme specified by the authorising law. However, the Court paves the way for a dialogue by considering itself obliged to refer a question to the Court of Justice for a preliminary ruling before exercising *ultra vires* control, and by considering itself bound by the interpretation provided by the Court of Justice of the European Union. Thus, the German Constitutional Court places European integration in a logic of complementarity and dialogue, rather than in a logic of confrontation and hierarchisation of rights.[61]

This, in fact, is the direction in which the relationship between Union law and national law should shift, both in terms of respect for the distribution of competences between the two levels and in terms of the fundamental requirements resulting from national Constitutions.

The difficulty lies in the fact that, on the one hand, it cannot be left to national courts alone to define what constitutes national identity, as otherwise the European Union's competences could be devoid of their substance at the whim of national decisions, and that, on the other hand, the European judge cannot define the scope of national identity issues as a last resort, as this would deprive States of all sovereignty. In either case, it is impossible to be both a judge and a party. This is a difficult issue and attempts should be made to resolve it.

60 BVerfG, 2009, Judgment of 30 June, 2 BvE 2/08 et al., BVerfGE Compendium No. 123, p. 267.
61 Montebourg, Forthcoming.

It is thus conceivable that, with regards to relations between courts, national courts could consult European courts each time a conflict arises or is likely to arise. Consideration could also be given to the creation of a flexible, *ad hoc* conciliation body, a kind of Court of Jurisdictional Conflict, made up of representatives of the supreme courts of the State concerned and European judges, responsible for ruling on conflicts of jurisdiction.

However, in the case where a conflict is not resolved, or assuming that a conflict is resolved in such a way as it could violate a fundamental principle recognised by the constitutional order of the State concerned, the political authorities should be given the final say in the matter. It is then within the Council that the State could interpose its veto on the basis of specific constitutional provisions. As E. Balladur points out, 'the supremacy of national Constitution over any other national or international rule of law prevents the Union from seizing the competence of competence under cover of the rule of law'.[62]

4. Conclusion

It appears clear that the European Union is at a turning point in its history. While institutional evolution is taking place without any real political decisions by the Member States, but under the influence of internal bodies such as the Commission and the Court of Justice, the outcome is the creation of a hybrid organisation that is more than a confederation of sovereign States, but less than a federal structure. From that perspective, references to the concept of sovereignty, whether invoked to support States' control of their own destiny or, on the contrary, to design a federal type of Union, are revealing of what is at stake. The intention to impose a common ideology and social conceptions on States with different mentalities and histories is a factor of resistance to European construction, which is also reflected in the ballot box. On the contrary, economic and geopolitical challenges, and the war at Europe's borders, call for stronger cooperation mechanisms between States. In search of its borders, Europe is also faced with the challenges of a potential enlargement. The construction of a new institutional model and new relations between the States and the Union aim to respond to the need to ensure Europe enjoys a future that is both respectful of national identities and a factor of power.

62 Ibid.

References

Arenas, G. (2022) *Typewritten thesis*. Paris: Paris 1 University.

Azoulay, L. (2003) 'Constitution et intégration, les deux sources de l'Union européenne en formation', *Revue française de droit administratif,* 2003/05, pp. 859.

Beaud, O. (1998) 'Fédéralisme et souveraineté', *Revue du droit public et de la science politiqueen France et a l'etranger,* 1/1998, pp. 83–122.

Beaud, O. (2007) *Le pacte fédératif: essai sur la Constitution de la fédération et sur l'Union européenne* [*The Federal Pact: An Essay on the Constitution of the Federation and on the European Union*]. Paris: Seuil.

Beaud, O. (2022) *Le pacte fédératif: essai sur la Constitution de la fédération et sur l'Union européenne*. Paris: Dalloz.

Blumann, C. (2023) *Droit institutionnel de l'Union européenne*. Paris: LexisNexis.

Bruce, E. (2005) 'La primauté du droit communautaire', *Les Petites Affiches*, 2005/192, pp. 3–10.

Denizeau, C. (2004) *L'idée de puissance publique à l'épreuve de l'Union européenne*. Paris: L.G.D.J.

Esmein, A. (1906) *Éléments de droit constitutionnel français et comparé*. Paris: Société anonyme de Recueil Sirey.

Favoreu, L. (2002) 'Les cours de Strasbourg et de Luxembourg ne sont pas des cours constitutionnelles', in *Mélanges Dubouis*. Paris: Dalloz.

Flauss, J.F., Drago, G. (2001/2002) 'La constitution européenne: une Constitution?', *Revue des affaires européennes*, (6), pp. 703–721.

Flauss, J.F., Drago, G. (2006) in *Constitution et construction européenne*. Paris: Dalloz.

Gaudin, H. (2000) 'La Cour de justice, juridiction constitutionnelle?', *Revue des affaires européennes*, (3), pp. 209–222.

Gerkrath, J. (2004) 'Les conditions de la démocratie dans l'Union européenne', *Revue des droits de l'homme*, 16(9–12), pp. 363–376.

Guaino, H. (2023) *A la septième fois, les murailles tombèrent*. Paris: Rocher.

Habermas, J. (1998) *L'intégration républicaine*. Paris: Fayard.

Lamy, P. (2004) *La démocratie-monde: pour une gouvernance globale*. Paris: Seuil.

Lenoir, N. (2023) 'Proposition de directive SLAPP : quand l'Union européenne met une gifle au principe d'égalité devant la justice', Almendron, 22 May. [Online]. Available at: https://www.almendron.com/tribuna/proposition-de-directive-slapp-quand-lunion-europeenne-met-une-gifle-au-principe-degalite-devant-la-justice/ (Accessed: 23 April 2024).

Magnette, P. (2000) 'Le principe démocratique au-delà de la représentation', in Chaltiel, F. (ed.) *Quelle Europe après le Traité de Lisbonne?*. Paris: LGDJ.

Manent, P. (2006) *La raison des nations*. Paris: Gallimard.

Martucci, F. (2021) *Droit de l'Union européenne*. Paris: Dalloz.

Mathieu, B. (2017) *Le droit contre la démocratie?*. Paris: Lextenso. Hungarian translation, Századvég, 2018. English translation, *European Public Law Series*, EPLO, 2023.

Mathieu, B., Katrougalos, G. (2023) *The Crisis of Liberal Democracy: Diagnostics and Therapies*. Cambridge: Intersentia.

Moderne, F. (1960) *Recherches sur la puissance publique et ses prérogatives en droit administratif français*, Doctoral thesis (typescript), Bordeaux, (1).

Montebourg, A. (Forthcoming) 'L'aménagement du contrôle ultra vires par la cour constitutionnelle d'Allemagne', forthcoming in: *Semaine juridique*.

Pernice, I. (2004) *Fondements du droit constitutionnel européen*. Paris: Pedone.

Pierre-Caps, S. (2000) 'La Bosnie-Herzégovine, un État international?', *Civitas Europa*, 2000/4, pp. 35–50.

Rosanvallon, P. (2008) *La légitimité démocratique*. Paris: Le Seuil.

Schoettl, J.E. (2004) 'Note under Decision No. 2004-505 DC of the Constitutional Council', *Les Petites Affiches*, No. 238.

Schoettl, J.E. (2022) *La notion européenne d'État de droit et les souverainetés nationales*. Version actualisée de la note publiée en février 2022. Paris: Foundation Res Publica. [Online]. Available at: https://fondation-res-publica.org/wp-content/uploads/images-wmaker/2384961/file.pdf (Accessed: 25 July 2024).

Spector, C. (2021) *No demos? Souveraineté et démocratie à l'épreuve de l'Europe*. Paris: Seuil.

Timsit, G. (2003) 'Intervention to the GEDP', *Revue européenne de droit public* (REDP).

Vedel, G. (1977) 'Les racines de la querelle constitutionnelle sur l'élection du Parlement européen', *Pouvoirs*, (2), pp. 23–36.

Viala, A. (2004) 'La supraconstitutionnalité comme ressource paradoxale du souverainisme', *Politeia*, No. 6.

Zoller, E. (2003) 'Contribution à la théorie de la fédération d'États', in Académie de Droit International de la Ha (eds.) *Aspects internationaux du droit constitutionnel, Collected Courses of the Hague Academy of International Law*, (294), pp. 39–166. Leiden: Martinus Nijhoff Publishers.

Legal Sources

BVerfG (2009) Judgment of 30 June, 2 BvE 2/08 et al., *BVerfGE* Compendium No. 123.

BVerfG (2020) Ruling of 5 May 2020, 2 BvR 859/15.

Costa v. ENEL (1964) Case 6/64, 15 July, ECR 585.

European Agreement on Road Transport (1971) Case 22/70, 31 March, ECR 263.

European Commission (2022) 'Proposal for a Regulation on harmonizing EU rules of private international law relating to parenthood', *Press release*, 7 December 2022.

French Constitutional Council (1992) *Decision No. 92-308 DC of 9 April 1992, Treaty on European Union* [Online]. Available at: https://www.conseil-constitutionnel.fr/decision/1992/92308DC.htm (Accessed: 15 November 2024).

Van Gend en Loos v. Nederlandse Administratie der Belastingen (1963) Case 26/62, 5 February, ECR 1.

Chapter 7

Finalité Revisited: On the Dynamics of Supranational Integratedness

Alexander Graser

Abstract

Interpreting European supranationality as a long-standing, highly institutionalised practice of multilevel liberal communitarianism, the present contribution reflects on the current situation and future prospects of the EU. Its tentative diagnosis is that there may no longer be any clear directionality, while a sustained dynamism persists. The contribution hence calls for a terminological de-rigidification to better grasp the current set-up, and it proposes the concept of institutional fluidity as a potential desideratum for a new constitutional balance.

Keywords: European integration, finalité, liberal communitarianism, terminological de-rigidification, institutional fluidity.

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'Getting the boundaries right, not only in geographic but also in functional terms, is enormously difficult (…)'[1]

1. Liberal communitarianism for a multilevel polity

There are various reasons why the quote at the top of this paper seemed a suitable way to begin. It reads like a diagnosis which might well have been the starting point of the working group whose deliberations have resulted in the present book, or rather like a defeatist summary of its findings. In fact, the quote may easily qualify as a timeless companion to European integration, seeing as any of the recurrent debates on its *finalité*, which have been present since at least the 1960s, can be read as a variation on this theme.

The quote's original context, however, is different. It has been taken from an article by Michael Walzer, a leading communitarian thinker. One may consider it a symptom of this orientation that he speaks of boundaries, emphasising, thus, the inclusive, community-enhancing dimension of what would otherwise, and more commonly, be referred to as borders.

The article was published in 1997, and it provides a general and mostly conceptual reflection on "Statehood and Toleration in a Multicultural World". There is no mention of Europe in his article, and we have little indication[2] as to whether its US-based author was aware of how much a case in point European integration had for long been at the time of publication – and still was, especially in the post-Maastricht years when the functional boundaries had just been redrawn, and when the geographic ones were about to be. This is unfortunate, since a Walzerian perspective could prove fruitful in a debate about the development of the European Union (EU).

"Liberal communitarianism"[3] is a term which has become an established label for Walzer's approach and that of some related thinkers. Their quest is to set limits to the inherent universalistic (and by implication atomistic) tendency of liberalism,[4] to emphasise the value of community (mainly as a precondition of identity), and to calibrate the antagonism between the two concepts.[5] "Toleration" is hence a key concept in Walzer's thinking.[6]

1 Walzer, 1997b, p. 174.
2 There is a recognition of Europe as a complicated case in this regard, in Walzer, 1997a, pp. 48 et seq.; however, he does not pursue this in depth.
3 For an overview (with a critical ambition), see Watson, 1999, pp. 211 et seq.
4 For a discussion of Walzer's view on that tendency, see Graser, 2008, pp. 131 et seq., 316.
5 For a discussion of that antagonism, see, e.g., Kymlicka, 1988, pp. 181 et seq.
6 For a focused treatment of the relevance of this concept in Walzerian thinking, see his own short volume entitled "On Toleration", Walzer, 1997a.

The same is true, as can be seen above, for "boundaries".[7] And mind the plural form! The multiplicity of coexisting associations is a central premise for Walzer, undoubtedly in empirical terms, but perhaps normatively as well.

However, the kind of plurality that has received most attention in that approach is different from the one we are dealing with here. Liberal communitarianism is typically interested in coexisting affiliations based on kinship, creed, or culture – next to nationality, of course. However, calibrating the competing political affiliations within a multilevel polity is not a prominent theme of it. It has developed as a theory of multiculturalism, not of supranationalism.

We cannot, accordingly, expect this literature to provide any specific lessons for the design of such a polity. Nevertheless, it can offer some prompts for our analysis. This may, first and foremost, apply to the concept of "liberal communitarianism" itself, and the inherent tension it encapsulates. Do its two components not seem, in many ways, to reflect the dilemma which a supranational polity needs to manage? Moreover, is it not the appropriate extent of "toleration" on either side that is the key matter to be settled when drawing the "right boundaries"?[8]

The present article seeks to elaborate on these questions within the specific setting of the EU. It should be borne in mind, however, that it is not about any solutions to the above dilemma, but rather focusing on its management and the intricacies involved in it. This is because, firstly, "solving a dilemma" might be a conceptually problematic notion to begin with; secondly, because in the present context, there is certainly nothing that could plausibly be labelled "a solution" while being at least remotely realistic; and thirdly, because the EU might indeed best be understood as the institutionalisation of an unresolvable tension. We shall return to this idea towards the end of this contribution.[9]

7 On the relevance of this concept see, in particular, Walzer, 1981, pp. 1 et seq. The text is reprinted as chapter 2 of 'Spheres of Justice: A Defense of Pluralism and Equality', New York, 1983, which is among Walzer's most influential works. For a more recent appraisal of the relevance of the concept see Miller, 2013, pp. 142 et seq.

8 In a similar context, albeit 25 years ago, Weiler has elaborated on this idea in a response to Fischer, who at the time was the German Minster of Foreign Affairs. Fischer had presented his vision for a new, federal constitution for the EU in his widely debated speech 'Vom Staatenbund zur Föderation: Gedanken über die Finalität der europäischen Integration', delivered at the Humboldt University, Berlin, on May 12, 2000, reprinted and translated in Joerges and Mény and Weiler, 2000, pp. 5 et seq. (The volume contains a variety of prominent voices which, the different historical context notwithstanding, in many respects seem still relevant to the present debate. Weiler responded in his contribution within that volume by praising and elaborating on what he calls 'one of Europe's most important constitutional innovations, the Principle of Constitutional Tolerance' (capitalization in the original); cf. Weiler, 2000, pp. 244 et seq. The present article owes much to that contribution (and to its author).

9 See in particular section 7 and 10 (at their respective ends).

2. A questioned community

Why Europe? Or, to frame the question more precisely: What is European integration good for? There have been quite a few answers to this question. However, before we have a closer look at them, it may be worth pausing for a moment and noting one important assumption already implied in that question.

Unlike many nation states, the EU is commonly expected to be justifiable in functional terms. It does not typically feature as an existential given, and understandably so. The EU is an artefact of political creation by pre-existing nation states. Hence it would appear to be a matter of choice, rather than of historical destiny.

This is not to say that nation states were not artefacts as well, the "destinedness" of which has typically emerged (or been crafted) only post-hoc in performative historical narratives.[10] However, this does not render nation states a phenomenon any less "real", nor their difference to the EU any less pronounced.

That this supranational entity may, in our perception, turn from an option into a given seems unrealistic at present, and a distant trajectory at best. So far, the EU has always needed to have a *raison d'être*, and ideally also to have it close to hand as an answer to the euroscepticism which has been a permanent companion from its early days.[11] More precisely, though, it has never been just one answer, but many different ones, with varying weight depending on time, space, and the actual addressee.

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3. Raisons d'être

So, again: Why Europe? Notoriously, in the aftermath of World War II, the strongest motive to justify the project of integrating (core, continental and de facto only Western) Europe was the preservation of peace.[12] Economic considerations were present in that initial period, too: facilitating the reconstruction of the war-ridden countries was an evident desideratum per se. Also, enhancing the economic interdependence of the involved nations states seemed the most promising means to the end of preventing any future military confrontation between them.

10 This observation has been made frequently; for an influential account, see Anderson, 1983.

11 The term "euroscepticism" refers to a political position which is opposed to European integration – thus the definition by McEvoy, 2024a, who claims that it has been 'a fixture of European politics for decades' and presents recent data on the issue. The attitude seems to predate the term considerably, as the latter is said to have been coined only in 1985 by The Times newspaper; Alibert, 2015.

12 The "classical reference" is the Schumann Declaration, proposing the creation of a European Coal and Steel Community, and presented by French Foreign Minister Robert Schuman on May 9, 1950, cf. Schumann, 1950. See, most notably, the following quote: '… this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace'.

Soon, economics would begin to move to centre stage,[13] based on the expectation of increasing wealth in a single common, i.e. post-protectionist European market. Concurrently, albeit a bit slower maybe, the preservation of peace as a rationale lost traction as war became an increasingly remote scenario. Pinpointing these developments to an exact period is difficult and beyond the ambition of the present analysis. However, we may safely assume that by the late 1970s, peace preservation was not a function by reference to which European integration could forcefully be promoted, whereas increasing prosperity would no doubt seem plausible.

Similarly, as the common market was approaching its completion in the late 1980s,[14] the economic rationale called for a renewal. Extrapolating its development from an internal perspective, it was almost self-suggesting to embark upon further Europeanisation, thereby pushing economic integration yet a step further by working towards a currency union, and, more ground-breaking still, to expand upon the political dimension and transform the EU into a platform for effective policymaking in various new sectors. There is, no doubt, also some plausibility to this latter aspect. There are policy areas that would seem almost certain to need political responses on a level beyond those of national governments. One may think of the challenges of environmental protection or of migration management that certainly transcend national borders. In foreign policy, too, it would seem, at the very least, helpful to join forces if the Member States would want to be heard in the global arena. Hence there were new visions for European integration that could complement the previous ones.

At the same time, however, the picture became more diffuse. With the fall of the Iron Curtain, geopolitics would resume a more prominent role in European integration. Next to a further deepening of the EU, its territorial expansion became a priority. Of the next Member States to join the EU, the vast majority had been contained within the sphere of the Soviet hegemony. One may have thus hoped to achieve a new stabilising framework for the European continent, and more sustainably so than with the previous antagonistic one based on mutual threats between East and West. Looking back now, in the third year of the war between Russia and Ukraine, any

13 See, for example, the address given by Walter Hallstein, first President of the Commission of the European Economic Community, in Milan on Dec. 13, 1958; cf. Hallstein, 1958. At that point, the economic rationale had already become so prominent that Hallstein dedicated the entire speech to emphasising that there were more (important) reasons underlying European integration. We can find the following lines on page 1 of his manuscript: 'The danger therefore exists (…) that what we have been pursuing with so much energy and perseverance since the end of the second world war may be misinterpreted as being no more than a material, or economic, exercise. Moreover, we would not even be justified in blaming the victims of this misapprehension. What words do they hear when there is talk of European integration? Coal and steel, free movement of goods, circulation of capital, customs tariffs, quotas. They hear of commercial policy, transport policy, agricultural policy, social policy, monetary policy, market policy, investment policy, etc. This is calculated to give the impression that the only objectives are increased trade, greater output and productivity, a better division of labour, more extensive markets and a higher material standard of living. These are in all truth essential aims, but they are not the only aims'.

14 A milestone was the Single European Act of 1986 which set the end of 1992 as a deadline for the completion of the internal market.

such hope for lasting stability on European soil may seem less plausible. This does not imply, however, that EU enlargement towards the East had been a geopolitical failure. For it is unknown how the continent would have been faring since without these steps.

In any event, the eastern enlargement changed the EU with regard to its size, heterogeneity and internal dynamics. And while, as a response, its operational set-up was also adjusted,[15] the EU's policy-making capacity appears to have lagged behind at least some of the challenges it has since faced, perhaps most prominently those in the field of migration.[16] Additionally, in two more recent crises, namely COVID and the war in Ukraine, the EU has not seemed to be equipped for playing a leading role in their effective management.[17]

Most recently, the war has moved geopolitical considerations to the centre again. For a number of countries in the EU's periphery, the prospect of an accession within the foreseeable future seems to have improved.[18] However, it is unclear whether this will actually materialise, whether it would actually promote peace, and whether the EU's institutional set-up would be ready for this.

4. Variable balance sheets

Hence, peace initially, prosperity then and throughout, and remarkably late also governance capacity, give a broad indication of how the functional justifications have changed over time. Their respective force has not been constant either. Nevertheless, such variation notwithstanding, being part of (that European integration project which has eventually come to be labelled) the EU appears to have retained considerable appeal up until the present day. Twenty-two states have joined the six founding members, only one has left, and the list of candidate countries is long. This is an indication that, on balance, it still pays to be a member.

15 Namely in the Treaty of Lisbon, concluded in 2007 and entered into force in 2009.

16 The Common European Asylum System (CEAS) had for long proved dysfunctional in many respects. There had, for many years, been efforts towards a comprehensive reform, with consensus having been reached as recently as May 14, 2024. It remains to be seen how effective the new regime will be.

17 However, the assessments of the EU's performance differ, depending, most likely, on the level of expectation. There have been very critical appraisals especially from an outside perspective: for COVID, see, e.g., Pitty, 2022, pp. 4 et seq.; for the Ukraine war, see, e.g., Naylor, 2024; on the other hand, there have also been accounts that are more differentiated, such as the ones by Anghel and Jones, 2022, pp. 766 et seq.; and Börzel, 2023, pp. 14 et seq., both addressing also the question of how these crises might affect European integration.

18 At the time of writing, this appears to be true for the Western Balkan states, Ukraine, Moldova and perhaps Georgia, although most recently the enactment of the Law on Foreign Agents seems to have diminished the Georgian prospects, illustrating the current volatility of this matter.

The key phrase, however, is "on balance", and for a number of reasons. The most obvious among them is that EU membership comes at a price. It is to be paid in terms of national autonomy, and potentially a number of other negative effects as well. To be sure, this price may be offset by corresponding gains in various other respects. However, there is still a price.

Further, it is important to note that both the price to be paid and what is gained in return, will likely be different for each Member State. Their size matters, for example when it comes to their corresponding political weight within the EU. Evidently, the membership deal is different in this regard for, say, Malta and Germany. And it is different not just because of the size of a country, but also for many other reasons, maybe most prominently because of the structure and actual situation of the respective economy, including wage levels, tax rate, investment capacity, and preferred export markets. Factors like these will determine the effects of EU membership on a country. Furthermore, even the geographic location within the EU makes a difference. When it comes to, for example, migration policy, the situation of a Member State will, by all means, depend significantly on whether it is situated at an external border of the EU, especially on the Mediterranean Sea.

This list could be expanded, but the point should already be clear. When we disaggregate the common narratives pertaining to the functional justifications of the EU, we may imagine there to be individual balance sheets at Member State level listing the advantages and disadvantages arising from EU membership. There are a multitude of factors determining this balance, and since these factors differ across countries and over time, so too will the balance sheets.

Such disaggregation, moreover, does not have to stop at the level of individual countries. There too is a lot of variation within the Member States, since some groups of people may benefit from a certain aspect of EU membership, while others may not. Entrepreneurs might be in a different position than employees; the sector within which one works might matter; one's education; even age; and again, the grouping of such "winners" and "losers" will vary across countries and time.

So, we can imagine there to be even more balance sheets, each potentially different and variable. To actually prepare them, however, would be a hard task, not just because of their level of differentiation. Also, and maybe more importantly, the individual entries would be difficult to assess, especially as it is often about prognoses. How, for example, should one predict whether a country's (or a group's or individual's) situation would be affected positively or negatively by, say, (not entering) the Schengen Agreement or the Currency Union? And moreover, how to produce a net total, when effects of the individual entries into the sheet(s) are hardly commensurable?

Brexit may serve as an example. The public debates were characterised by a high degree of uncertainty and disagreement on how to assess the consequences with regard to both the individual aspects of this step, and to their aggregate. And this was the case not only before the step was taken, but is true even now when discussed with hindsight.[19]

19 For a recent account of the pertinent evidence and its persistent ambivalence, see Portes, 2023.

The observations presented here may be rather unsurprising. Such multidimensionality, ambivalence, and incommensurability are features of modern politics in general. So, most of the above could similarly be said about national politics, and about any balance sheet that could be imagined in that context as well. For the EU, however, there is an important difference, related to the kind of its *raisons d'être*. Due to its dependence upon functional justifications, the balance sheets matter more. They are relevant not just for individual policy choices, general political preferences, or the support of any given government. Rather, (a predominance of) negative balance sheets might turn into an existential question for the polity itself.

Their variability, hence, poses a threat to the EU for which there is no pendant on the national level. The EU needs to maintain (a continuous perception of) positive returns on part of its constituent parts. That is, on the part of its Member States primarily, as this is the level upon which the issue of EU membership may be debated and ultimately decided. Arguably, that threat is further enhanced by the complexity of those imaginary balance sheets, their ambivalence, and their resulting susceptibility to misleading public portrayal. A swing, not necessarily in the EU's actual performance, but even in its mere public perception might be sufficient for that threat to materialise.

The relative stability, gradual expansion and persistent attractivity of EU membership over time may be taken, against this background, as an indication that there has so far been a positive net total summed up on those imaginary balance sheets, at least most of the time. Such an agreement, however, may not be all that stable. There are strong eurosceptic discourses in a number of Member States,[20] and Brexit has shown that they could have manifest consequences. So, there is a point in keeping an eye on the development of these balance sheets.

However, it is not only as a predictor of centrifugal tendencies that the balance sheet notion can be applied. It may also be useful when it comes to understanding the disparate visions on the structure of the EU and its future development. For these are likely to be driven not just by abstract political convictions, but also by concrete parochial interests.[21] The variability of the balance sheets gives reason to expect some dynamism in this regard as well. The recurrent debates about the EU's desired role and shape testify to this point.

20 On the respective strength of this position in selected countries, see the analysis by McEvoy, 2024b.

21 For an influential elaboration of how this "insight" may translate into a theoretical approach see Moravcik and Schimmelpfennig, 2019, pp. 64 et seq.

5. Dynamism without directionality

Its dynamism has always been a characteristic of the European integration project which has eventually come to be labelled the EU. Only in part, this is due to the disparate and variable interests of its constituent units. Part of it, by contrast, was intentionally built into the system already from the outset. The goals that provided its functional justification were distant and ambitious. Their pursuit could hence serve as a *raison d'être* for a long time. This is certainly true for the creation of a common market – an endeavour that would span the first decades of European integration. However, it may also apply to the formation of a political union, the somewhat more amorphous undertaking embarked upon in the early 1990s.

With hindsight, being on such a long-term mission appears to be a relatively comfortable situation. This is because it affords some stability to the overall project. Or more precisely, it helps cope with the instability that comes with being grounded on functional justifications rather than being a nation-like community which is conceived of as primordial.

Without doubt, some challenges have remained. Not making any progress is problematic even when the goals are distant. Walter Hallstein's famous metaphor comes to mind, likening European integration to a cyclist for whom standing still means falling off.[22] In retrospect, one is tempted to add that reaching a goal may entail the same risk. Nevertheless, as we have seen before, this risk has not materialised so far. The aims of integration have varied over time. Earlier ones have been (not quite replaced, but) reframed, renewed, or complemented by new ones, so that to this day, the cyclist has never needed to stop.

Against this background, it seems to be symptomatic that the debates about Europe's *raison d'être* would often be presented as the question about its finalité.[23] While both terms translate as "purpose", the latter comes with a strong connotation of directionality. And indeed, it is not just the dynamism, but also its directionality that have been defining features of the EU (and its predecessor organisations) so far.

European law has indeed always been explicit about this directionality, namely 'an ever closer union among the peoples of Europe', which is probably the most famous phrase of primary law.[24] The formulation may be rather unspecific as to its aim, but it does prescribe a direction.

The phrase is remarkable in several respects. It is not all that uncommon, to be sure, for a polity to programmatically declare its constant orientation towards progress. We find a statement to this extent, for example, on the Brazilian flag (which

22 Although this metaphor is often cited (see e.g., Schwarz, 2023; Eppler, 2016), tracing it to Hallstein seems to be difficult. Typically, it is just said to be commonly ascribed to Hallstein and cited indirectly – thus the two texts, and the present contribution, too.

23 A prominent example is the speech 'Vom Staatenbund zur Föderation: Gedanken über die Finalität der europäischen Integration', delivered by Fischer, 2000.

24 Currently, the phrase is found in Art. 1 section (2) of the TEU as well as in the preambles of both, the TEU and the TFEU. It was included already in the preamble of the Treaty of Rome.

reads "*ordem e progresso*"[25]). Similarly, the Australian coat of arms is commonly said to include the kangaroo and the emu because both animals can hardly move backwards.[26] However, there is no indication in these cases that the envisaged development pertains to the set-up of the polity itself. Presumably, they are about progress with regard to economic and social conditions, and maybe, using a more recent interpretation, also environmental ones. In the EU, by contrast, forging a closer union must, against the background of European integration, be understood as referring, at least inter alia, to the organisational set-up of the polity itself. This does not rule out, of course, to read it as an aspiration that covers more social cohesion as well.

Furthermore, the EU's progressive commitment resembles a phrase in the preamble of the constitution of the USA, expressing the intention "to form a more perfect Union".[27] Yet again, there are notable differences. For one, there is no explicit progressivity in the American phrase as it may be taken just to express the intention behind the constitution, i.e. an aim which inspired the wording of the constitutional text and which was accomplished by its enactment, rather than entailing a continuous mandate and task for the future. It should be noted, though, that such a prospective understanding is frequently expressed in references to this phrase when adding "toward(s)" to "a more perfect Union". Second, and more importantly, "more perfect" is less specific in its directionality than "ever closer". In this regard, the European commitment resembles the Australian one in that it allows for one direction only. It contains an integrationist mandate, even if, at some point, "perfection" were to be found in the opposite direction.

Given this specific directionality, it is, moreover, noteworthy that there is some inherent tension within the European phrase. Despite its mandate towards more integration, it also implies that this process would have to stop before reaching any nation-like level at which the (distinct) "peoples" to whom it refers would be merged into one. Prescribing continuous movement in a certain direction while disallowing the attainment of a goal which may be distant, but lies in that very direction sounds like a paradox. It could be solved only by imagining a process of asymptotic approximation, a notion which in the present context seems rather far-fetched, if not silly.

Be that as it may, it draws our attention to a more serious aspect: The program of constant integration becomes potentially more questionable with every step of its progression in that very direction, and it may at some point lose its appeal completely. One may disagree on where this point is, for how long the EU could still keep going until reaching it, or maybe for some, for how long it has already travelled since passing it. Regardless, there is reason to consider what the new situation would and should be after the EU may have crossed that point.

25 See, e.g., Smith, 2001.

26 Thus the Australian Government, no date.

27 The full quote reads as follows: 'We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America'.

Presumably, there would not be any distinct directionality anymore then. One can always commit to (further) progress, and strive for (more) perfection. The examples cited above have illustrated this. However, these goals are so general that not proclaiming any of them would not make much of a difference either.

Directionality does not seem indispensable. Even for a polity in need of functional justifications, these do not have to imply any directionality, although some of the EU's have done so and would need to be adjusted. Also, the EU would retain some of its dynamism. For not all of it seems to be due to the EU's intentional directionality. We have seen this in the previous section, and the next will address a related aspect.

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6. (Persistent) Imbalances of European supranationality

Hallstein's metaphor likening European integration to a cyclist raises an essential question about the EU: Is there any stable equilibrium to this system? And in fact, it seems to be not just the variability of balance sheets across countries and points in time that may destabilise any status quo. It is also the set-up of the EU itself that entails some inherent tensions which, in turn, may have contributed to keeping the system in motion, at least so far.

This observation is by no means new, and there have been various related diagnoses. Maybe the most influential account of such an inherent tension is associated with the juxtaposition between what is termed "negative" as opposed to "positive integration", and with an alleged imbalance between the two.[28] It is a claim about EU law and its operation within the common market. Integration, accordingly, refers to the process of making the law, both of the Member States and of the EU itself, compatible with the demands of an integrated market. Negative integration is the process of eliminating features of the law of individual Member States that are found to be incompatible with these demands. Positive integration, by contrast, is the process of creating new rules that apply jointly for all Member States on the EU level. Negative integration, is what the EU's judiciary does, based on the rules of market integration, and it is deregulatory in nature. Positive integration, by contrast, is what the EU's legislature does, by enacting common rules that may restore or even exceed the rules that were in place on a national level, and it is regulatory in nature.

This description comes with the diagnosis of an imbalance. Put simply, the claim is that European law has set off a strong machinery of negative integration from its

28 The concepts have been used in many different analyses. For an influential – and arguably classical – application see Scharpf, 1995. For a more focused (and in the author's own words: legible) rendition of his thinking on this matter see the (German) text at Scharpf, 2008, pp. 49 et seq. The present section is largely inspired by Scharpf's approach.

very inception in the Treaty of Rome onwards, and that it has always been difficult for the resulting deregulatory drive to be outweighed by regulatory measures, i.e. by positive integration, because the central level is restricted by limited legislative competences and procedures requiring a high level of consensus. The effect, so the argument states, is a deregulatory bias within the EU, leading to an incremental erosion of the overall level of market regulation.

This analysis calls for some qualification. For one, it is true that in its jurisprudence on fundamental freedoms, the European Court of Justice has not always focused exclusively on promoting market integration. It has also defined limits to this program and repeatedly upheld measures of market regulation by Member States despite their disintegrative effect.[29] So, the claim cannot be that this had been negative integration at maximum speed. Nevertheless, the point remains that the Court could not do anything else but to either uphold such measures or to sweep them away. It could not act positively, i.e. by restoring restrictive measures on a central level.

Such a restoration of market regulation could only be achieved by the legislature, and there has indeed been a wealth of areas in which this has been done,[30] hence the second objection. The capacities of positive integration have never been at zero level, and they have grown over time, with the EU's incremental transition from a common market paradigm into that of a political union. So, just as the negative integration machinery has never been at maximal operation, neither has the positive mechanism ever been totally inoperative.

So, again, the claim is not one of rapid, irreversible deregulation. It is just about an imbalance that may incrementally bring about the bias mentioned before. What is important about this diagnosis in our context is that the imbalance induces some integrative dynamic within the system, a demand that is, for further political integration, in response to that of the common market. This makes it more unlikely for the system to remain static as long as this demand is not met.

It was mentioned at the beginning of this section that there are various diagnoses of such inherent tensions within EU law, such as the one sketched above. Indeed, it is not just the common market that may drive the EU forward. Similar accounts could be given about Schengen Agreement, with open borders calling for a joint European migration policy, and the Eurozone, requiring more centralisation with regard to fiscal policy. These steps, too, would seem to have created imbalances, and hence suggest that the system might not remain static as long as the resulting demands are not met.

29 Maybe, the most spectacular example is the court's partial revision of its earlier jurisprudence on free trade in goods in its 1993 decision of the joint cases Keck and Mithouard, C-267/91 and C-268/91.

30 An example might be the advanced level of European regulation in the realm of consumer protection. The viability of such measures of positive integration is dependent not only on legal factors, i.e. the existence of a legislative competence of the union and the respective decision-taking procedure, but also the constellation of national interests with regard to the matter at hand; for details, see Scharpf, 2008, pp. 80 et seq.

On the other hand, why is it that these tensions and the resulting imbalances have not already been resolved for a long time? Are they really just transitory phenomena? While the answer to the first question is rather obvious, the second is much harder.

Giving in to the system's inherent drive towards centralisation would come at a high price. In order to re-establish regulatory capacities at a central level, the Member States would have to trade in the respective dimensions of their autonomy, not an easy step from the perspective of individual Member States, but all the more problematic in that democratic participation on an EU level is widely viewed as suboptimal.[31] To be sure, one could, when extending central competences, also concurrently expand the role of the parliament and widen the scope for majority voting. However, the cure for any perceived democratic deficit on an EU level does not rest solely in institutional reforms. There are social factors that would have to go hand in hand with it[32] – a pan-European landscape of interest groups and public media, a defragmented public discourse about European politics, maybe also more of a collective European identity. While it is uncertain whether these conditions are attainable, it is clear that as long as this has not yet been achieved, institutional reforms would not suffice to do the job and might even be counterproductive. The resulting shift of politics from the national to the supranational level may be viewed as hollowing out national democracies, and depending on one's assessment of their current quality, the shift to the European level may actually imply a net loss in this regard.

Thus far the discussion has focussed on the reasons why the sketched imbalances have persisted so far, and why it might be considered desirable for them to last even longer. By all means, they may still be transitory. Who would be in a position to predict the long-term trajectory? The pressure towards centralisation might rise, and concerns about national autonomy decline, and democratic participation be viewed as less important, or the conditions on an EU level at some point as satisfactory. So, the tensions could be alleviated, and one day the imbalances reduced.

However, as long as they are present, they will add to the system's inherent dynamism, with some players seeking to continue driving the wheel forward, and others advocating that it rather should be turned back at least a little. History has shown that this does not mean that the EU was unable to function. Nevertheless, it seems unlikely for it to remain static, at least in the foreseeable future.

31 For an overview on the debate, see Neuhold, 2020.

32 As the German Federal Constitutional Court has been particularly concerned with (the absence of) these conditions in the context of European integration, a compilation of relevant factors can, e.g., be found in its decision on the (German ratification of) the Lisbon Treaty, see BVerfGE 123, 267, 358 et seq. – Lissabon.

7. Conceptual reorientation

Reflections about the future of the EU are no less warranted than ever. However, the previous analysis suggests that some parameters are changing, and that it is therefore time to reconsider some of the core concepts of these debates.

The most important aspect may be the EU's directionality. "An ever closer union" – once this central mission loses traction, be it because it has mostly been attained, or because euroscepticism has gained ground, this may mean that recalibration becomes necessary. This applies at least on the condition that the EU has not turned into a community that is perceived as primordial, but instead requires some functional justification.

While we will hence still need to ask, and answer, the question of "Why Europe?", we may want to drop the term "*finalité*" as the headline for the related debates. The reason, as we saw, is its implicit directionality. We might not be moving steadily towards a more or less distant goal anymore. While we might still need to be constantly "perfecting our union" (to borrow from the American framing), this could involve moving in different directions at different times, depending on the respective contexts and preferences.

Maybe, we should even limit our usage of the term "European integration". For a long time, studying the EU and its predecessor organisations was synonymous to studying "European integration", and this term retains its accuracy when speaking of the historical process that has led us where we are today. For this has been a story of steady progress, not without the occasional stand-still, to be sure. But there have not been any turns, and no change of direction has been seriously considered. In a post-directional future, this may be different.

Admittedly, the key question to be discussed will be very similar. What level of integration could and should we aim for? However, this is about the envisaged level of integration, of the state of "integratedness",[33] if you will, rather than an ever progressing process of "integration". For this can no longer be presupposed as a commonly consented goal.

The adjusted framing of the question does not imply any diminished salience. A potential end of consented directionality does not equal a final "mission accomplished", nor does it mean general satisfaction with the status quo. The inherent tensions and imbalances within the EU's set-up, its Member States' varying balance sheets, and the resulting dynamism are likely to bring up the issue of desirable "integratedness" once and again for the foreseeable future.

33 Hence the awkward-sounding phrase in the title of the present contribution.

8. Terminological de-rigidification

European supranationality has always been difficult to grasp, for lawyers in particular. Their terminological toolkit is notoriously rigid, and understandably so, with coherence and predictability being of paramount concern for this discipline. European integration has in this regard been a challenge from its early years onwards, beginning, arguably, with the groundbreaking decisions in Van Gend[34] and Costa ENEL[35]. Without doubt, that novel supranational entity, "*sui generis*" as it would soon be labelled[36], could easily be located somewhere on the continuum between a nation state and an international organisation.[37] However, the terms used for either end of the scale did not quite fit. They were not made for a hybrid organisation, let alone for one that was in (almost) continuous motion towards its distant target.

Paradoxically, the fact that it was not only a hybrid, but also a moving target may have fostered terminological conservativism. It invited observers to consider the "*sui generis*" a transitional stage, not warranting hence any principled terminological overhaul. Instead, one could just wait until the EU would one day have morphed into a large, federal state, and in the meantime assert that it had not yet achieved this stage, and that, until then, it basically remained an (exceptionally advanced) international organization, composed of member states which were (still) sovereign.

It may have further contributed to the persistence of such terminological conservativism that it is compatible with both, euroscepticism and europhoria alike: While proponents of the latter would optimistically maintain that the EU was (soon) ready to become a federalist state and push for a fast transition, those of the former would consider this unrealistic or undesirable and insist on preserving the status quo. Fighting their battle, both sides could thus employ the same terminological weaponry.

This has for long been reflected in the debates about European integration and its *finalité*: Is the EU (becoming) a federal state? Are the Member States (still) sovereign? Is there (to be) a European constitution? These are the questions that have set the scene for many pertinent debates up until today. However, with EU's directionality coming to an end, so would the transitionality of its condition sui generis, and this might, in turn, underscore the need for a de-rigidification of the terms that feature prominently in these key questions.

To avoid any misunderstanding, there is nothing wrong about asking these questions. Dealing with them has been as instrumental in the past, as it will likely be in

34 Case 26/62 *Van Gend en Loos,* 1963.

35 Case 6/64 *Costa* v. *ENEL,* 1964.

36 For an early use of that term, see Hallstein, 1962, distinguishing this new kind of a political animal from other types of organisation, p. 25 et seq.

37 This is a paradigm that works up to this day; e.g., Hlavac, 2010.

the future. For it can indeed pave the way towards a nuanced understanding of some of the characteristics of European supranationality. However, this is when they are used for purely analytical purposes, and not when they come with the normative overtones that they often comprise.

Let us, by way of illustration, focus first on the term "constitution". This could be understood broadly as any set of rules pertaining to the functioning of an organisation, setting out its competences, actors and procedures. When people speak of the constitution of the United Nations, for example, or of the Council of Europe,[38] this is evidence for such an understanding of the term. For others, however, it entails, and requires, more.[39] When the EU failed in consolidating its primary law within a comprehensive Constitutional Treaty some 20 years ago,[40] this was probably because the first component of this name was understood more narrowly as implying a state-like level of integration, and because this idea appeared undesirable at the time, at least for sufficiently many people to veto that step.

Analytically, both a broad as well as a narrow understanding could work, as long as there is an agreed definition in any given context. Indeed, any term could in theory be filled with any stipulated meaning, of course. Nevertheless, if using the term constitution, as in our example, is taken to entail a normative spin towards a higher level of integratedness, it may be preferable to avoid it, at least when there is no common normative consensus to this extent.

The same might apply, mutatis mutandis, to the respective terminology of international law. Although EU primary law would certainly qualify as a special case, it could be brought under the category of a treaty under public international law, depending on how the term is understood. However, if the adopted usage were to impart a (potentially controversial) normative message regarding the EU's integratedness, it would again be conducive to the discourse if a more neutral terminology were used. And as has been said before, this seems all the more warranted when there might be no end in sight anymore for the EU's hybridity.

Similar considerations apply when it comes to the other key terms. Let us begin with federalism. What would be the criterion for labelling the EU "federal"? A broad understanding might put this label on any stabilised system of vertically shared competences for the exercise of public power. The EU would clearly pass this test. A more restrictive one, by contrast, could be whether sovereignty rests with the central level, or with the subunits. Then, the EU would not qualify as federal as long as its constituent units are considered sovereign states, provided, of course, that sovereignty were to be viewed as indivisible.

This takes us to the third key term, sovereignty. This is typically understood as legitimate authority (or just actual power) to govern (within a certain polity). Yet again, there are several definitions, broad and narrow, differing inter alia on

38 See, for example, Fassbender, 1998; and Walter, 1999.

39 For an elaborate account of the various facets of the concept, see Grimm, 2012.

40 For an account of this failure, see Baldwin, 2006.

the above question as to whether such sovereignty can be shared between different entities. If yes, that would be the case for the EU and its Member States. If not, one would have to identify where sovereignty actually lies.

The criteria may not be all that obvious, and neither is their application to the EU. Legislative competences have long been split, and the final say on judicial conflicts has been contested over and over.[41] Maybe sovereignty could rest on the authority to distribute competences between the levels – the *Kompetenz-Kompetenz*, to use an odd German expression for this.[42] This power, however, is vested neither in the EU, nor in any individual Member State. So, it may ultimately turn on the right to withdraw from the Union, or to deny such a desired withdrawal. However, would such reference to an extreme and mostly hypothetical situation provide an operable criterion?[43]

Be that as it may, a narrow understanding exists for federalism as well as sovereignty. As such, it is susceptible to being laden with normative premises regarding the EU's desired level of integratedness. Just as for the term constitution, it seems advisable, when thinking about, and discussing the future of the EU, to avoid the spin that such terms may impart. This might have been preferable even in earlier times when supranationality was predominantly considered an interim stage, but it definitely is once supranationality is viewed as being here to stay.

The terms used to describe such supranationality should no longer imply any insistence on this being a transitional stage between the ideal type notions of a state and an international organisation. The corresponding bifurcation of the terminological toolkit, which has been especially characteristic of legal discourses, should be overcome. We need this terminological derigidification so as to render our analyses of and our debates on the EU`s current and future shape more neutral and better able to account for the peculiarities of a persistently hybrid polity.

41 See, for example, on the recurrent contestation on part on the German Federal Constitutional Court, Graser, 2023.

42 While the term has got a long history in German legal discourse, it seems to have spread internationally with the 1993 decision of the German Federal Constitutional Court regarding the ratification of the Maastricht Treaty, in which the conferral or assumption of competences was a core issue; for the decision, see BVerfGE 89, 155 – Maastricht.

43 Admittedly, it would not be an unknown technique. Probably the most prominent example is the thinking of Carl Schmitt, encapsulated most succinctly in his definition of sovereignty at the very beginning of his work of 1922 on "political theology": '*Souverän ist, wer über den Ausnahmezustand entscheidet*.' (Sovereign is he who decides on the exception.); for an English version, see Schmitt, 2005; for a discussion of this element in Schmitt's thinking see Graser, 2008, pp. 51 et seq.

9. Institutional fluidity

Among the tasks, which a prospective conceptualisation of the EU might need to tackle (and which a de-rigidified terminology might help accomplish), is the promotion and delimitation of a heightened degree of institutional fluidity. Why is that?

We have seen that a post-directional EU will retain some of its potential dynamism. It will most likely not be static even if it no longer strives for the creation of an ever closer union. It may have to adjust to internal shifts in aggregated preferences, i.e. the balance sheets, to accommodate further enlargements and other changing context factors, most notably in the geopolitical sphere, and maybe also to take account of new insights into its functioning, based on the somewhat optimistic assumption that such self-reflective learning is possible and we are not left with evolutionary selection as the only mechanism for improvement. All of these factors, to be sure, may still point towards further integration. However, occasionally, they may also require steps that go backwards or sideways.

So, the quest is for an appropriate degree of institutional fluidity, that is a set-up which allows for recurrent recalibration while not compromising too much on the stabilising function of the present structures. The actual scope and exact contours of this task are yet to be explored. It is likely be a difficult, maybe daunting one, and it certainly exceeds the capacities of the present contribution. However, we can at least consider a few aspects that could help understand its intricacy.

For one, the fluidity of an institutional set-up as it is used here should be distinguished from its flexibility. While the latter shall refer to the leeway an institutional set-up gives without being changed itself, the former shall denote that set-up's own adaptability. Admittedly, it may not always be evident where to draw a line between changes within and of a set-up. Nevertheless, in most cases, this distinction should be workable as it corresponds to that between changes to a constitutional framework as opposed to those of simple statutory measures or policies.

Further, fluidity is not what one typically looks for when it comes to assessing a polity's institutional set-up. It is stability that rather tends to be appreciated.[44] However, with one being the flipside of the other, this is mostly a question of perspective. And there is widespread recognition of the possibility that stability can turn from a "good" into a "bad" when there is too much of it. Occasional discussions regarding a potentially excessive level of constitutional entrenchment testify to this point.[45]

44 For a thorough theoretical treatment of this feature (and predominant function) of legal institutions see Engel, 2005.

45 For a discussion of the example of the so-called eternity clause in the German Basic Law and of, i. a., its potentially adverse effects see Preuss, 2011; for the same concern applied to – the special case of – constitutional adjudication see Graser, 2001, based on a related earlier treatment of that issue within the US legal system by Monaghan, 1975.

Nonetheless, the focus is typically on stability rather than fluidity. This is despite the fact that a need for adjustment may arise also in other polities, namely states. Geopolitical context, aggregated internal preference – all of the above factors play a role here as well, and, naturally, they may change, too. When the need for fluidity is still less pronounced in these contexts than it might be in case of the EU, this may be for two reasons. Firstly, the EU is not the only polity for anyone, but always an additional one. This may render stability less essential. Secondly, and relatedly, the need for adjustments to circumstantial change may be much more immediate in a polity based on functional justifications.

In light of such heightened importance of fluidity for the EU, however, would one not have to expect it to have been provided for already? For indeed, the institutional set-up of the EU and its predecessor organisations has been adjusted numerous times over the past decades. So, what is new about the suggested need for fluidity? Here, again, directionality and its potential abandonment become relevant.

So far, and still owing to the EU's rootedness in international law, the threshold for any changes of the institutional set-up has been set very high. Basically, every Member State retains veto power. Formally, this applies to all changes, regardless of their direction. Hence, moving forward has been very demanding. But arguably, the arrangement renders backwards movements even more unlikely, because once there has been agreement for progress, a complete reversal of such a consensus does not seem realistic. In addition, there is the inherent forward drive resulting from previous integrative steps as discussed before.[46] Moreover, it should be noted that judicial interpretations of primary law take part its entrenchedness. So, progressive interpretations can be reverted (by the judiciary itself, if the opportunity arises, but typically) only by consensual amendment of primary law by all Member States.

In summing up, this is a system that is generally hostile to change and particularly geared towards locking in the respective "acquis" at any point in time against future fallback. This makes sense for a community that is committed to forge an ever closer union. It seems quite intuitive that in a post-directional EU, this regime should be reconsidered. More fluidity might be preferable.

The challenge, however, lies in determining both, the appropriate scope (as some matters should certainly remain stable) and the modes of implementing fluidity. The latter is a novel task in that it requires an inversion of the stability-oriented perspective of traditional constitutional design. This is a desideratum for further research on the future of the EU and its potential trajectories. The target would not have to be a comprehensive plan on how to increase institutional fluidity within the EU. For, realistically, such rearrangement would anyways not be brought about at once by a single reform, but could only develop incrementally through multiple

46 On this drive, see section 5.

steps. Nonetheless, as the suggested direction is rather new, it seems that more orientation would certainly be helpful.

10. A contingent civilizational achievement

A normative premise implicit in the present contribution has been its positive attitude towards European integration, understood as the past process that has brought us to where we are, and as a potential future one that maintains or even optimises European integratedness prospectively. While a full-fledged treatment is, again, clearly beyond the scope of this article, it may still be warranted, before closing, to add a few words of reflection on this premise, and in its defence.

This is important as not everybody will share this optimistic premise. The perception of European integration is not always positive. Some may view it as an example of hypertrophic federalism, far too advanced in its integrative ambitions and incapable of managing the community's heterogeneity. Some may see it as a fragmented system of divergent nationalism, thus coming to a similar diagnosis, but ascribing failure to the constituent units rather than to the central level. Others, by contrast, may perceive European integration as a success story of covert hegemonialism, through which one or a few large Member States stabilise (and economically exploit) their dominating position within Europe. Relatedly, such hegemonialism may, from an outside perspective, also be ascribed to the EU as a whole, following a neo-imperial agenda and positioning itself as an actor of global politics. Again, this might not be a narrative of failure, but certainly one of a success that would be morally reprehensible.

So, there are many perspectives on European integration that are negative. And how could it be otherwise, when talking about such a complex, multifaceted phenomenon? There are, and probably will always be, multiple ways in which it can simultaneously be good and bad.

These pros and cons will often be incommensurable. How large should an increase in prosperity be so as to outweigh the hegemonial imbalance that comes with it? How much more improbable must war be rendered by European integration so as to make up for the dilution of the democratic participation which accompanies it? Posing these questions is not to suggest that one could not decide, when faced with these or similar trade-offs, for one alternative or the other. However, such choices will be based on preferences that are subjective and potentially divergent. Consensus is by no means guaranteed. It is just possible, at best.

All the more, it is important that all views be included in the discourse. And with abounding expressions of discontent everywhere, optimistic perspectives may at present need to be remembered explicitly. One such view has been the implicit premise of the present text. It reads European supranationality as a long-standing,

highly institutionalised practice of multilevel liberal communitarianism, a rich reservoir of experience and reflection on getting the boundaries right, on calibrating the "us versus them" in its multiple permutations, and hence on one of the fundamental questions of human civilisation in the most literal sense.[47]

The European answer that has developed so far may be far from satisfying, it will need much, and possibly constant, adjustment in the future, and it might even eventually fail. However, this could also apply to a Europe without supranationality, just as, in fact, a European continent composed merely of nation states would hardly seem to be any better prepared for the main challenges of our time.

47 From this perspective, one would indeed expect there to be a keen interest from other regions of the world in drawing lessons, positive or negative, from the European experience. For an exploration of the – relatively limited – extent to which such transfers of ideas (and still less so: institutions) have so far taken place, see the report on the research cluster 'The Transformative Power of Europe: External and Internal Diffusion of Ideas in the European Union' by Tanja Börzel and Thomas Risse written in 2018.

References

Alibert, J. (2015) *Euroscepticism: the root causes and how to address them*, Heinrich Böll Foundation [Online]. Available at: https://eu.boell.org/en/2016/03/07/euroscepticism-root-causes-and-how-address-them (Accessed: 22 July 2024).

Anderson, B. (1983) *Imagined Communities – Reflections on the Origin and Spread of Nationalism*. London: Verso.

Anghel, V., Jones, E. (2022) 'Is Europe really forged through crisis? Pandemic EU and the Russia-Ukraine war', *Journal of European Public Policy*, 30(4), pp. 766–786; https://doi.org/10.1080/13501763.2022.2140820.

Baldwin, R.E. (2006) 'Trail to Failure: History of the Constitutional Treaty's Rejection and Implications for the Future', *Centre for European Policy Studies (CEPS) Policy Briefs No.104*. [Online]. Available at: https://www.files.ethz.ch/isn/24417/PB104.pdf (Accessed: 22 July 2024).

Börzel, T. (2023) 'European Integration and the War in Ukraine: Just Another Crisis?', *Journal of Common Market Studies*, 61(1), pp. 14–30; https://doi.org/10.1111/jcms.13550.

Börzel, T., Risse, T. (2018) *The Transformative Power of Europe: External and Internal Diffusion of Ideas in the European Union* [Online]. Available at: https://gepris.dfg.de/gepris/projekt/56726743/ergebnisse (Accessed: 22 July 2024).

Engel, C. (2005) *Generating Predictability. Institutional Analysis and Institutional Design*. Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9780511490033.

Eppler, A. (2016) 'Doch nicht wie ein Fahrrad: Desintegrative Momente der europäischen Einigung', *Aus Politik und Zeitgeschichte* [Online] Available at: https://www.bpb.de/shop/zeitschriften/apuz/238141/doch-nicht-wie-ein-fahrrad/ (Accessed: 22 July 2024.)

Fassbender, B. (1998) 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of Transnational Law*, 36(3), pp. 529–619.

Fischer J. (2000) 'Vom Staatenbund zur Föderation: Gedanken über die Finalität der europäischen Integration' in Joerges, C., Mény, Y., Weiler, J.H.H. (eds.) *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer*. Florence: European University Institute, pp. 31–45. [Online]. Available at: https://cadmus.eui.eu/bitstream/handle/1814/17255/ResponsesToJ.FISCHER_2000.pdf?sequence=1 (Accessed: 22 July 2024).

Graser, A. (2001) 'Dispositives Verfassungsrichterrecht', *Der Staat*, 40(4), pp. 603–621.

Graser, A. (2008) *Gemeinschaften ohne Grenzen? Zur Dekonzentration der rechtlichen Zugehörigkeiten zu politischen Gemeinschaften*. Tübingen: Mohr Siebeck; https://doi.org/10.1628/978-3-16-151259-9.

Graser, A. (2023) 'The Dilemma of the Presumptuous Watchdog: Constitutional Identity in the Jurisprudence of the German Federal Constitutional Court' in Varga A. Zs, Berkes, L. (eds.) *Common Values and Constitutional Identities: Can Separate Gears Be Synchronised?*. Miskolc: CEA Publishing, pp. 13–49; https://doi.org/10.54237/profnet.2023.avlbcvci_1.

Grimm, D. (2012) *Die Zukunft der Verfassung II: Auswirkungen von Europäisierung und Globalisierung*. Berlin: Suhrkamp.

Hallstein, W. (1958) 'Address delivered at Milan on Dec. 13, 1958', *Archive of European Integration at the University of Pittburgh* [Online]. Available at: http://aei.pitt.edu/14887/1/s51.pdf (Accessed: 22 July 2024).

Hallstein, W. (1962) *United Europe, Challenge and Opportunity*. Oxford: Oxford University Press; https://doi.org/10.4159/harvard.9780674494299.

Hlavac, M. (2010) 'Less Than a state, more than an international organization: The Sui generis nature of the European Union', *Munich Personal RePEc Archive* [Online]. Available at: https://mpra.ub.uni-muenchen.de/27179/ (Accessed: 22 July 2024).

Joerges, C., Mény, Y., Weiler J.H.H. (eds.) (2000) *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer*. Florence: European University Institute [Online]. Available at: https://cadmus.eui.eu/bitstream/handle/1814/17255/ResponsesToJ.FISCHER_2000.pdf?sequence=1 (Accessed: 22 July 2024).

Kymlicka, W. (1988) 'Liberalism and Communitarianism', *Canadian Journal of Philosophy*, 18(2), pp. 181–203; https://doi.org/10.1080/00455091.1988.10717173.

McEvoy, O. (2024a) 'Euroscepticism – Statistics & Facts', *Statista,* 2024/July. [Online]. Available at: https://www.statista.com/topics/10425/euroscepticism/#editorsPicks (Accessed: 22 July 2024).

McEvoy, O. (2024b) 'Share of Europeans who think their country would be better off outside EU 2023', *Statista*, 2024/July. [Online]. Available at: https://www.statista.com/statistics/1360467/euroscepticism-europeans-future-leave-eu/ (Accessed: 22 July 2024).

Miller, D. (2013) 'Justice and boundaries', *Justice for Earthlings: Essays in Political Philosophy*. Cambridge: Cambridge University Press, pp. 142–164. https://doi.org/10.1017/CBO9781139236898.

Monaghan, H.P. (1975) 'Constitutional Common Law', *Harvard Law Review*, 89(1), pp. 1–45; https://doi.org/10.2307/1340264.

Moravcik, A., Schimmelpfennig, F. (2019) 'Liberal Intergovernmentalism' in Wiener A., Börzel, T., Risse, T. (eds.) *European Integration Theory*. 3rd edn. Oxford: Oxford University Press.

Naylor, A. (2024) *Europe's Decade of Failure in Ukraine*. Center for European Policy Analysis [Online]. Available at: https://cepa.org/article/europes-decade-of-failure-in-ukraine/ (Accessed: 22 July 2024).

Neuhold, C. (2020) 'Democratic Deficit in the European Union', *Oxford Research Encyclopedia of Politics*, 29 May 2020. [Online]. Available at: https://doi.org/10.1093/acrefore/9780190228637.013.1141 (Accessed: 22 July 2024).

Pitty, R. (2022) 'The historic failure of the EU and nationalism in the Covid 19 pandemic', *Australian and New Zealand Journal of European Studies*, 14(2); https://doi.org/10.30722/anzjes.vol14.iss2.16167.

Portes, J. (2023) 'The impact of Brexit on the UK economy: Reviewing the evidence', *Centre for Economic Policy Research* [Online]. Available at: https://cepr.org/voxeu/columns/impact-brexit-uk-economy-reviewing-evidence (Accessed: 22 July 2024).

Preuss, U.K. (2011) 'The Implications of 'Eternity Clauses': The German Experience', *Israel Law Review*, 44(3), pp. 429–448; https://doi.org/10.1017/S0021223700018124.

Scharpf, F.W. (1995) 'Negative and positive integration in the political economy of European welfare states', *1995 Jean Monnet Chair Papers*, 28. Florence: European University Institute [Online]. Available at: https://hdl.handle.net/1814/23634 (Accessed: 22 July 2024).

Scharpf, F.W. (2008) 'Positive und negative Integration' in Höpner, M., Schäfer, A. (eds.) *Die Politische Ökonomie der europäischen Integration*. Frankfurt am Main: Campus, pp. 49–87.

Schmitt, C. (2005) *Political Theology: Four Chapters on the Concept of Sovereignty*. Chicago: The University of Chicago Press; https://doi.org/10.7208/chicago/9780226738901.001.0001.

Schuman, R. (1950) *Schumann Declaration* [Online]. Available at: https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en (Accessed: 22 July 2024).

Schwarz, M. (2023) 'Keeping the European Bicycle Rolling', *International Politics and Security*, 13 September 2023. [Online] Available at: https://www.ips-journal.eu/topics/european-integration/keeping-the-european-bicycle-rolling-6986/ (Accessed: 22 July 2024).
Smith, W. (2001) 'Flag of Brazil', *Britannica*. [Online]. Available at: https://www.britannica.com/topic/flag-of-Brazil/additional-info#history (Accessed: 22 July 2024).
Walter, C. (1999) 'Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozess', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law*, 1999/59, pp. 962–983.
Walzer, M. (1981) 'The Distribution of Membership' in Brown, P., Shue, H. (eds.) *Boundaries: National Autonomy and Its Limits*. Totowa: Roman and Littlefield.
Walzer, M. (1983) *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books.
Walzer, M. (1997a) *On Toleration*. New Haven: Yale University Press.
Walzer, M. (1997b) 'The Politics of Difference: Statehood and Toleration in a Multicultural World', *Ratio Juris,* 10(2), pp. 165–176; https://doi.org/10.1111/1467-9337.00051.
Watson, B.C.S. (1999) 'Liberal Communitarianism as Political Theory', *Perspectives on Political Science*, 28(4), pp. 211–217; https://doi.org/10.1080/10457099909602362.
Weiler, J.H.H. (2000) 'Fischer: The Dark Side', in Joerges, C., Mény, Y., Weiler J.H.H. (eds.) *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer*. Florence: European University Institute, pp. 235–247.

Legal Sources

Australian Government (no date) *Commonwealth Coat of Arms* [Online]. Available at: https://www.pmc.gov.au/honours-and-symbols/commonwealth-coat-arms (Accessed: 22 July 2024).
Case 26/62 Van Gend en Loos (1963) ECR 1.
Case 6/64 Costa v. ENEL (1964) ECR 585.
Joint Cases Keck and Mithouard (1993) C-267/91 and C-268/91, ECJ, 24 November 1993.

Chapter 8

Cultural Diversity and Identity Building for the European Union

Lilla Berkes

Abstract

The study aims to formulate a thought experiment on how loyalty and attachment to the state can be created in a (future) federally structured Europe. At the core of the paper is the premise that the European Union is a culturally diverse entity, with different cultural units (dominant cultures, minority cultures, indigenous peoples, immigrants), all having different and sometimes not necessarily compatible needs. However, for the European Union to be able to function as a state (under any system) in the long term, these needs and interests must be balanced, and thus a European identity and, through it, a sense of attachment and loyalty to the European Union can be created. By all means, the diversity of the European Union is not only cultural, and it is not only these needs that need to be balanced in order to be able to function effectively. However, these cultural factors play a prominent role in the identity-based attachment necessary for harmonious coexistence. It is through this attachment, this bond, this identification, that a solid unity can be created, while without this, the individual components of the unit potentially become more difficult to hold together. To examine this question, the study reviews the role of culture within society and in the state, the European Union's cultural diversity, its connection to social peace, the connection between culture and identity, how identity can lead to loyalty and how a common European identity can be created in order to achieve this loyalty and through this, stability.

Keywords: European Union, diversity, cultural pluralism, identity-building, federalism, loyalty, cultural integration.

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1. Introduction

A federal political order's specificity is a political organisation with the combination of shared rule and self-rule where the decision-making bodies of member units may also participate in central decision-making bodies, and the member unit and the common government both have a direct effect on the citizens.

In the European Union, the common market is inherently federal. Still, as a result of the transformation of the European Union since the entry into force of the Lisbon Treaty, the European Union has embarked on a path of wider federalism, which now encompasses institutional, economic, and legal systems. At the same time, it is currently in an intermediate state, where national and European Union processes are from time to time in conflict, and where the impact of globalisation is also pervasive. This conflict has emerged along the lines of what, and to what extent, sovereignty is affected by the increasingly comprehensive changes in institutional, economic, and legal systems.

The question of concern for many is whether we can and should move towards federalism or embrace a system where central power exercises only the power delegated by its member units, is given power only for specific tasks, does not exercise power directly over citizens, and member units do not permanently cede power to the centre.

The research problem of "federalism or coexistence" also raises this dichotomy. It symbolises the difference between the two systems in terms of what is a stopgap: there is a unified system and you can put your own characteristics into it or vice versa, everybody takes their own characteristics and certain elements of it are ground together.

This intermediate state where the European Union lies now is different from the process of federation that we know from history, and the role of the actors – the Member States – is not equal either. Like a game of cat and a mouse, there is a difference between the aims and powers of the European Union institutions and the aims and powers of individual Member States. The creation of an ever closer union among the peoples of Europe, its relationship to subsidiarity, and the process of federalisation also creates tension. The future of the European Union, and the possibility of federation is not a new issue, but what is new is the increasingly polarised world order, which brings differences to the fore.

Our region has a particular experience of bringing together communities with such diverse and divergent goals into a polity. This experience makes the goal of peaceful and cooperative coexistence, cohabitation, rather than federalism, seem preferable.

The different forms of federalism are the result of historical changes – the historical situation, political culture, and the resulting necessities have created and shaped the way they function today. In this sense, each federalist order is specific, and it is undeniable that the development of the postmodern era itself requires and offers new solutions in relation to the historical specificities already known. As Rieker

pointed out, although in the nineteenth and twentieth century federations became a widely used constitutional form and are now approved, this was also an era of nationalism when the nation-state, the sovereign political organisation of the folk, was also approved. Thus a difficult problem for interpreting federalism is to explain the modern approval of this constitution in an era that simultaneously embraces the loyalties of nationalism.[1] It is from this contradiction that the present book illustrates the diversity of perceptions, the shift of emphasis, and the shifting conceptions of sovereignty, but also the lack of a clear answer as to where the European Union stands on the path of federal development. Therefore, the present study does not necessarily focus on these issues but rather aims to formulate a thought experiment on how loyalty and attachment to the state can be created in a (future) federally structured Europe.

2. Balancing diversity: The role of cultural identity in the European Union's cohesion and statehood

At the core of the paper is the premise that the European Union is a culturally diverse entity, with different cultural units having different and sometimes not necessarily compatible needs. However, for the European Union to be able to function as a state (under any system) in the long term, these needs and interests must be balanced, and thus a European identity and, through it, a sense of attachment and loyalty to the European Union can be created.

If we think of the European Union as a state, we can also think of it as a kind of postmodern entity. It is not a traditional nation-state, and its process of creation is different from that of the states that make it up. Not only is its history different, but it also has not gone through historical processes – in many cases lasting hundreds of years – which have given rise to the modern state, the particular organisation of each state and the attachment of its population to this entity. It was not shaped by an organic process of development, but by a thought experiment, an agreement, and at a time when conditions were very different from the 19th century, in that nation states were being created. By stretching and redefining traditional nation-state sovereignty, borders and governance, it operates in a way that is very different from the way the state operates and understands itself.

Ideas to unite the peoples of Europe were born at the turn of the 18th and 19th centuries when movements began to emerge that sought to implement integration plans. Old state traditions also played an important role in this process together with ethnic and cultural relationships. During this period, ideas emerged for cooperation because small groups of peoples living in the grip of the great powers realised that they could

1 Rieker, 2007, p. 612.

not survive on their own. Later, between the two world wars, new state units emerged, the national principle came to the fore, a global international organisation, the League of Nations, was formed and another integration plan, the German Mitteleuropa plan, based on economic interests, was also formed.[2] However, as the European Union increasingly begins to function as a distinct, postmodern state, the question arises as to whether it can be understood through traditional concepts. What are the factors that unite a postmodern state, a federation of states? Are traditional concepts such as identity and loyalty to the state, which describe the traditional relations between the state and its population, and at the same time define the belonging of peoples, still relevant?

In the long term, a postmodern entity also needs factors that create cohesion and thus provide a basis for stable functioning. Such factors include shared values, traditions, a common identity and the identification of citizens with this entity, which gives it legitimacy. In federal arrangements both identity and loyalty are shared, but it is difficult to imagine that while people identify with the traditional state in terms of identity and loyalty, they do not identify with the federated state. This is a pattern much closer to separationist notions.

In the case of the European Union, diversity is a specific factor along which the sense of belonging can be described in a very complex way. In the initial loose arrangement based on economic relations, this was not yet a factor to be taken into account, but in the case of the entity taking shape after the Lisbon Treaty, in order to ensure long-term cohesion and stability, it is appropriate to establish closer links with the peoples living in the territory of the European Union (in addition to the States and government), which can give recognition to the functioning of this entity. In this case, there is a need for an identity-building, and identity-forming process.

Even in postmodern circumstances, cultural identity plays a key role in this identity-forming process, as it is a central part of human identity that can only be changed with great difficulty, but typically cannot be abandoned. Everyone identifies himself or herself by where he or she comes from, where he or she belongs, or, if he or she wants to become part of a new community, by where he or she wants to belong. These categories are typically described by cultural characteristics. If commands, rules of behaviour, frameworks of operation, institutions that influence everyday life are defined by an entity that is not part of this 'where I came from', then it can only aspire to be an entity that one wishes to become part of, which also requires these cultural patterns. This is not to say that these factors cannot change over time, but at the moment culture is an essential part of self-definition and therefore cannot be ignored in the federalisation process.

Naturally, the diversity of the European Union is not only cultural, and it is not only these needs that must be balanced in order to be able to function effectively. However, these cultural factors play a prominent role in the identity-based attachment necessary for harmonious coexistence. It is through this attachment, this bond, this identification, that a solid unity can be created, while without this, the

2 See in detail Gedeon and Halász, 2022, pp. 11–23.

individual components of the unit potentially become more difficult to hold together and ultimately the process of secession[3] may also be set in motion.

3. Cultural determination in society and the state

Basically, neither the people nor the state are fully aware of their cultural determinants. Until societies were relatively homogeneous, this issue was not even raised, so the state did not even bother with it, and the diversity of societies came to the fore. The culture in which we grow up is deeply embedded in us and can lead to clashes in the smallest aspects of everyday life if the other person does things differently. However, the ability to be sensitive to differences can make it easier for cultures to adapt to each other.[4]

Culture and, related to it, identity and their diversity, have two dimensions from a state perspective: they can be private, which the state does not have to deal with, or public. Where diversity goes beyond the private sphere and individual interests, where it affects the whole or a significant part of the community or the functioning of the country, it becomes a matter of public concern,[5] to which the state must respond. On the other hand, the state may also need to intervene if it is the divergence that it wants to protect. The practice of customs, the expression of identity, and the free exercise of identity depend in many respects on what the state considers to be the ideal society and what it wishes to promote, i.e. it is primarily a matter of political decision-making – the state can provide the framework within which it can be exercised, but it can also suppress it.

The state has traditionally favoured a certain degree of homogeneity in society, and it has actively contributed to achieving it (*homogenisation*). However, by the 20th century states had typically abandoned national homogenisation, partly as a consequence of the failure of forced assimilation.[6]

Looking at the side of the society, we can state, that every society tries to preserve its beliefs and customs, its language and religion, and its economic and political independence.[7] Culture is an attribute of society, and therefore culture and society are interlinked, but at the same time there can be several cultures within a society and it is this culture or these cultures that define society.[8] There is no need to explain that nowadays there is already a complex cultural diversity within most of

3 Gardner, 2018, pp. 53–532.
4 Boglár, 2007, pp. 130–131.
5 A public matter is a matter of general interest which affects the community, a matter which goes beyond individual interests and deserves to be pursued by the public authorities. Varga, 2017, p. 78.
6 Gulyás, 2018, pp. 21–25.
7 Frasin, 2012, p. 38.
8 Fikentscher, 2009, p. 108.

the Member States, while at the level of the European Union there is, certainly, even greater diversity. These mixture of cultures shapes the societies, but the presence of multiple cultures can also cause a society to fragment.

The emergence of a culture from the discreet, personal (private) sphere into the public typically occurs with its politicisation, when people belonging to a given cultural community perceive that their culture is being ignored. It is to their detriment when their culture is marginalised and they can largely do nothing about it. In these cases, ignoring culture is a denial of cultural integrity, so culture becomes strongly linked to identity and thus becomes a political issue.[9] The significance of this issue is that, in the final analysis, this kind of marginalisation, which can be precipitated by repression and the absence of political freedoms, can even lead to a loss of loyalty to the state.[10]

There are countless factors that determine and influence culture and, through it, identity and ultimately human behaviour, and these factors are changing. However, not all of them are relevant to the state, which does not need to address all of them. Factors that remain in the private sphere are not subject to state intervention, whereas those that become a matter of public concern, i.e. which affect the community, may require intervention. What these relevant factors are, may vary considerably from one state to another, depending on the historical background, the state system, the society, and the importance of these factors may change over time – see for example the question of language and religion. The state needs to pay particular attention to cultural elements that may become or have already become a part of the political discourse.

At the same time, the decision-making and the use of different instruments by the state are not unlimited in a democratic system. State power is not absolute power, it is subject to constraints, such as constitutional limits, international relations, and political trends. Today, in a democratic system, it is no longer possible to forcibly assimilate culturally different communities into the majority by forcing them to assimilate, by forcing them to adopt a different language or religion, or by completely forbidding them to do so.

The instruments of intervention must keep in line with the dominant culture and must be chosen to reflect it, otherwise they will not be effective. It is useless for the state to introduce new rules of behaviour if they are fundamentally alien to the dominant culture, and will not be effectively enforced in society. On the other hand, the main characteristics of the cultural community seeking recognition must also be identified. This also limits the scope of political decision-making in that, although the political power players may change, and hence the objectives pursued, the social reality, the characteristics of society, which are largely the result of historical development, and its main elements cannot be ignored. This is also the reason why the role of the law as an instrument is ultimately limited: it is no use being a generally binding rule if it is not actually enforced or is not enforced in accordance with the legislator's objectives because of social resistance.

9 Cohen, 1993, p. 199.
10 James, 2016, p. 129.

For the European Union, this situation is more complex in the sense that there are several dominant cultures, none of which have a decisive influence upon the European Union as a whole and at the same time, their cultural dynamics also vary from state to state. This also means that the definition of a common European identity has to focus on the European culture, while at the same time, it has to be accompanied by dominant national or minority cultures and the identities they carry.

4. United in diversity

The European Union has a very attractive motto, which is "united in diversity". According to the European Union, it signifies that Europeans have come together, in the form of the European Union, to work for peace and prosperity, while at the same time being enriched by the continent's many different cultures, traditions, and languages.[11] The European Union, because it has become an identity-forming institution in its own right over time,[12] could initially be seen as an entity that poses a threat to cultural diversity. However, the motto has instead paved a different way forward, one in which diversity and its acceptance and recognition have emerged as some sort of humanitarian achievement.

4.1. Unity

There are two parts to the motto: unity and diversity. Let us first look into unity. If we are talking about cultural differences, to which the second element, diversity, refers (at least partially) and which is one of the contemporary challenges, why, in what way, is unity important?

In general, unity is not about uniformity. It is about finding common ground and shared values despite our differences. Behind the thought of unity lies an idea that

> Europe can be conceived as an organic cultural structure despite disruptions that may occur between the elements making up its complex structure. Considering this approach, European culture is built on an intricate system of common values characterising the European cultural area. Just like islands making up an archipelago, despite some areas delimitating it, the European cultural area is made up of elements that can be characterised as organic structures with a certain composition in point of shape and expression.[13]

11 European Union, no date; The EU motto: United in Diversity.
12 Tekiner, 2020, p. 1.
13 Brie, 2010, p. 86.

However, the perception of unity is just a surface. What lies beneath this surface is one of the primary, one might say the most important, objectives of the existence of the state as an entity that is the ensuring of social peace. Ensuring social peace is the most important public issue. There is unity if we can create tranquillity and security, therefore the state must not seek solutions that would pull society apart and plunge it into chaos. If anything can create unity, it is that the realisation of this goal is ensured – whether at the state or pan-European level. However, it will not work without intervention, action, complex ideas, programs, and cooperation between the actors.

4.2. Cultural diversity

How does cultural diversity relate to all this? The European Union is indisputably culturally diverse in terms of its peoples. This term is nowadays used to refer to diversity due to immigrant communities, but it also has a broader concept. At the very narrowest level, European diversity is based on the dominant cultures of the Member States, the indigenous groups of Europe (like the Sami, the Inuit, maybe the Basques, and for the possible future there are the Crimean Tatars – but there is not even a consensus here in Europe as to which groups are indigenous and which are more national minorities), national and ethnic minorities and the different groups of immigrants.

To put it simply, the basis for diversity can be any cultural characteristic. The initial difficulty is that these groups all have different needs. The aim of unity should be to balance these needs.

National minorities have been present in Europe for centuries, mostly perceiving themselves as a kind of distinct society and wanting to establish some form of self-government or autonomy for themselves. In contrast, immigrant communities wish to be integrated into society as equal members of society, and their demands are not specifically aimed at acquiring self-government, but rather at creating a legal environment and institutions that will eliminate the economic and political disadvantages of these groups and ultimately help society to become more accommodating towards them. At the same time, there are some groups or individuals who are unable to integrate themselves into society. Whereas, in the case of Indigenous peoples around the world, we see that they are often viewed by states groups without the political development to be perceived as a nation, unable to govern themselves and in need of paternalistic protection, or even seen as an unfortunate ethnic group or racial minority to be integrated into society.[14] At the same time, their demands may focus on historical justice or the restitution of land ownership, as the survival of the indigenous peoples' distinctive culture (often called pre-modern lifestyles) is closely linked to land and resources, which in fact requires a completely different perspective. In their case, for example, they have to be protected from various

14 Kymlicka, 1995, pp. 10–11, 22.

influences such as modernisation, westernisation, urbanisation, secularisation, etc.[15] Furthermore, the dominant cultures are obviously concerned with maintaining this dominance culturally, politically, and in terms of resources. Naturally frictions can arise in any relationship.

What is our response to all this? Mostly some sort of non-discrimination politics, which allows groups to be recognised, and to exercise their rights. However, what this often fails to achieve is to create balance, to prevent social frictions, unrest. What risks are there in these frictions? It is also group-dependent.

Indigenous peoples, for example, are smaller in number and geographically isolated and therefore pose much less of a threat to the state[16] from the state's perspective, which is why their needs have not been addressed for so long. For national minorities, there are well-developed support systems across Europe – or at least we see some good examples – but their need for self-government and autonomy and the state's need for sovereignty can be in sharp conflict. Maybe not in reality, only at the level of assumptions, out of mistrust, but this is enough to say that this is like a landmine in some regions of the European Union.

For immigrants, however, diversity has a much wider range. Some of the cultural differences are not relevant for the state and other groups in society, as long as it remains within the boundaries of private life. The state takes note of the diversity of immigrant groups when the different cultural groups become active in maintaining their culture. In other words, when the question of belonging to a particular culture is politicised, it then activates the community whose culture is perceived to have been ignored.[17] When a community acts to defend its culture against those who ignore it, it can become a factor that triggers the need for a state response.

4.3. Creating social peace

The resulting conflict situations ultimately threaten social peace, which was one of the most powerful reasons for the creation of the state. In addition, the question is whether it is not too late for the state to take regulatory action, to intervene, or whether it has any chance at all in a situation where it has to create a balance not only between the majority and minority but also between different types of minority groups. At the same time, it is important to avoid, as far as possible, a situation in which national minorities are dissolved in the process of recognising immigrant groups and their needs, and the state itself loses control over this whole process.

This balance requires the creation of solidarity between communities and through this, loyalty to society and through it to the state, a cohesive society, and thus social peace can be ensured. These groups together form a nation, if they are

15 Kymlicka, 1999, pp. 286–287, 288–289.

16 Threats here refer to the process of incompatibility between the need for autonomy and the state's need for unity.

17 Cohen, 1993, p. 199.

not bound together by a certain level of solidarity, it can lead to the disintegration of society. Solidarity, loyalty, accommodation, and therefore social peace are the goals to be achieved, this is when we are truly united in diversity.

If there is tension, if there is a lack of loyalty, if there is a threat of social frictions, then we can talk about heterogeneity instead of diversity.[18] Then, instead of coexisting cultures and nations, we have opposing cultural entities, each with its own nationally, ethnically, or religiously defined systems, which effectively act against the state and are a serious source of tension.

What can the state do? First, it recognises the need to intervene. For example, when the emphasis is not on the common cultural elements between culturally different groups, and thus on a sense of common belonging, but rather on cultural differences, those that divide rather than unite. The range of tools is diverse.

Migration policy is obviously one of them, and if it is not controlled by the state, it can only run after the outcome. Educational integration is a huge challenge too. If the state is to accommodate the needs of culturally diverse groups, it must take these elements into account and adapt its education. It is then, that the question of who should be at the centre of regulation can be answered, distinguishing a solution based on different needs. For example, the group of people who have been living in the country for centuries and the group of immigrants who do not speak the same language and/or who have significant cultural differences cannot be grouped together. Different needs arise along ethnic and linguistic, religious, or sexual lines. In some cases, these may even be mixed. The vector of regulation may also be completely different: reversing the assimilation process in the case of ethnic minorities or promoting integration in the case of immigrant groups. It is also not only about being sensitive to different races, cultures, social groups, and cultural values, but also about a paradigm shift that involves accepting different ways of thinking as values, and simply taking pluralism, and diversity of human thought and culture for granted.

Theoretically, federalism could also be a solution. At the very least, it is considered to be an ideal arrangement for nationalities striving for the widest possible autonomy, as it can be described as a constitutional instrument that balances the principles of unity and diversity: federalism can work well when territorial differences are combined with ethnic or cultural differences, as federalism allows for

18 The concepts of "diversity" and "heterogeneity" are used in the literature in a mixed way, usually without distinguishing between the two. If they do, there is also a difference in which of the two is the positive term. Some studies argue that heterogeneity has the capacity to integrate different people, identities, and perspectives, while diversity is simply a difference that cannot withstand social injustice. Columbus, Shavit and Ellison, 2016. The paper basically follows Bernhard Schlink's distinction that diversity is when new forms and structures emerge in the social sphere of religion and culture without anyone questioning the legitimacy of social differentiation. This means a society that is open, diverse, and multi-voiced. Heterogeneity, on the other hand, involves coexisting and opposing cultural entities, each with its own ethnically or religiously defined educational, cultural, and economic system, and possibly even political autonomy. This arrangement is at odds with both social differentiation and social integration; Schlink, 1997, p. 33.

internal self-determination of constituent units.[19] However, for it to work effectively, it is necessary to build basic trust and a consensus between the parties.[20] This is the way to avoid, for example in the case of national minorities, that minority demands are perceived by the majority as an attempt to secede, and the majority demands an attempt to assimilate.

In the European Union, however, such a solution would require a complete rethink of the division of powers and competencies. Some of the issues that arise are how to deal with education, language rights, what is our response to autonomy demands, what is the scope for more multicultural units, and those that are less culturally diverse. These must be discussed, objectives jointly set, and decisions taken by Member States and European Union institutions. If there is no consensus, no clarification of competencies, no clear margin of manoeuvre, and no due consideration of local specificities, this could lead to disintegration.

In addition to identifying the core values that must be protected, the management of specific frictions requires a state of accommodation and balance that counteracts heterogenisation. This is the result of a kind of reasoned reflection, in which the limits of accommodation are defined.

5. Identity and loyalty

Federalism is a special kind of agreement based on trust and common benefits. The agreement is permanent and its content is the division of functions among tiers which ensures that governments at the constituent and central tiers always exist and retain their assigned duties. The constituent units have agreed with each other that each will retain its identity and its unique functions, and they adopted this system because it was a way to accomplish some objective that was not feasible independently or in alliance.[21] However, the agreement of the constituent actors is not enough for the durability of such a system in the long run, as the loyalty of the people is also necessary for its stable functioning. Without loyalty, and the emotional attachment that underpins it, it is much more difficult to hold together a highly diverse and, in some cases, conflicting entity.

5.1. The formation and construction of identity

Identity is one of the cornerstones of loyalty to the state: it is through identity that we belong, that we identify ourselves, and that we have an emotional attachment to

19 Adler, 2002, p. 147; Trudeau, 2015, pp. 37–39.
20 Manzinger, 2018, p. 78.
21 Rieker, 2007, p. 613.

a group, be it national, linguistic, cultural, gender, or other. National identity is the defining element of our identity, which is the challenge of an emerging federalism: are we French, German, Czech, Polish, Hungarian, etc., or are we European, or both? Identity can also be understood as being essentially a social construct that is both coherent and malleable, part of a group or community with a common culture and language.[22] This is also difficult since such an identity would have to be accompanied by a sense of belonging to, identifying with, and loyalty to the federal state.

In the European Union, on the other hand, national-cultural identities based on cultural differences are extremely diverse, as discussed above. This is not even comparable to the culturally diverse Canadian system, which was originally created by a kind of agreement between the two founding nations, the British and the French.[23] Based on this the Canadian identity[24] was formed, and only then, in the second half of the 20th century, were broad rights granted to other culturally diverse groups, i.e. it can be seen as a kind of gradual development, whereas in the case of the European Union, a more complex basis for a common identity needs to be built.

Cultural diversity means diversity of identities. Huntington's theory is that in the post-Cold War world, world politics has become multipolar and multicultural and that the most important distinguishing features between peoples in this world are now cultural rather than ideological, political, or economic. In his most famous work, he argues that the deepest, most important, and most dangerous conflicts are between peoples belonging to different cultural entities. The most important groups of states are the seven or eight main civilisations of the world, and non-Western societies are increasingly asserting their own cultural values alongside Western societies and rejecting those previously imposed by the West, which ultimately leads to conflict.[25] This theory has since been partly disproved, since, although cultural conflicts exist, they are not exclusively civilisational (e.g. between the "West" and the Islamic world), and ideological, political, and economic conflicts are also significant. On the other hand, it is also true that cultural differences do not necessarily lead to conflicts, at least not for all cultures, nor do they necessarily have serious social or state-threatening consequences. Multiculturality, the

22 Conway, 2017, p. 10.

23 The reception of the British North America Act (1867) was mixed on the French side: French Canadians were uncertain about the fact that Quebec would become part of a larger nation, but they were confident in the guarantees provided by the B.N.A. Act that they could preserve their language, religion, and cultural values. The French were also convinced that the B.N.A. Act was an agreement between the British and the French as two founding nations, even if this was not thought so by others and was not confirmed by judicial practice. Lavergne, 1993, p. 68.; Marchildon and Maxwell, 1992, p. 593.

24 In 1949, the Canadian government established the Massey Commission (Royal Commission on National Development in the Arts, Letters, and Sciences), whose purpose was to develop a national cultural policy, as Canada had no national culture of the same value as England or France. Report. Royal Commission on National Development in the Arts, Letters and Sciences. 1949-1951. Library and Archives Canada, no date, The Massey Commission.

25 Huntington, 1998, pp. 49–50.

need for different cultural groups to preserve and live their specificities, and cultural differences within a country are existing facts, so the focus should rather be on how countries deal with the need for intervention, whether positive or negative, when these differences trigger a need for intervention.

Identity is on the one hand about the "self", the individual's self and his/her role in society, and on the other hand about the community, its self-definition. In both senses, culture is the determinant of identity.[26] Some of the elements of identity are individual, while others are collective. There are many different types of identity, including gender, religion, class, class stratification, and political or moral identity.[27] However, in the postmodern era, identities are less fixed, increasingly fluid, and can be influenced by several cultures at once.[28]

The culture that determines individual and community identity is also linked to the nation-building process, the image of national unity,[29] the ability to influence the emotional consciousness relationship with the national community, the national-ethnic group, i.e. national identity.[30] Origin, mother tongue, and acceptance of cultural values and norms are the basis of cultural-national identity,[31] in which the cultural unity of the community (in principle) has been linked over time to a political dimension, to political determination, and finally to determination through nationalism.[32] The concept of nation can be defined as this intersection of culture and politics, typically linked to the territory of a state on the one hand, and to the unifying policies of the state on the other.[33] It is along these lines that the concepts of a majority and minority nation can be used, although the distinction here is also political, essentially symbolic, the result of a kind of struggle for classification.[34] There is no universally valid definition of the concept of a nation, but in addition to the political definition mentioned above, there is also a sense of belonging, which is the sense of a community's cultural, origin, or political or institutional ties with the majority of the population living in a given area.[35] Each of these is in fact an element that the European Union does not have in this capacity, specifically linked to this capacity.

In broad terms, culture is a deeply embedded set of practices, beliefs, and meanings, while identity is the sense of belonging to a community.[36] It is motivated by the human need for community.[37] However, a community is woven through the

26 Bakk, 2008, pp. 25–27.
27 Koller, 2006, pp. 46–47.
28 Hall, 1992, p. 277.
29 Gheorghe and Acton, 1996, p. 207.
30 Gereben, no date, p. 1.
31 Gödri, 2010, p. 104.
32 Hobsbawm, 1992, p. 18.
33 Brubaker, 2004, pp. 390–392.
34 Kántor, 2004, pp. 276–277.
35 Koller, 2016, pp. 12, 19.
36 Grimson, 2010, p. 63.
37 Hódi, 1992, p. 23.

cultural web and thus plays an irreplaceable role in the survival of communities. As the basis of identity, it allows for self-definition and separation from others.[38] Culture can be seen as a kind of group identity, or rather as its defining factor, i.e. culture defines the identity of a community. However, culture can also be understood in terms of identity, i.e. as a result of identities. According to this understanding, culture is a pattern of learned understandings, accepted and expected by an identity group, which includes verbal and non-verbal language, attitudes, values, belief systems, disbelief systems, and behaviours.[39]

The link between culture and identity is established by the socialisation process, as a result of which the human personality, the identity of a person, is influenced by culture. Socialisation is the process of acquiring values and norms, through which individuals imitate certain patterns of behaviour and react to certain situations, learn to adapt to environmental challenges, seek understanding, and develop a set of values. Socialisation is a lifelong process. Most patterns are established in childhood and by adulthood the most important identity issues are clarified (but this does not mean that personality cannot change as a result of adult influences).[40] Thus, in the process of socialisation, individuals adapt their personality traits, tendencies, and characteristics to the social framework. In the society of which the individual is a member, the relationship between the individual and society is maintained and regulated by a sense of identity. It is this sense of identity that constitutes identity.[41] When, in the course of socialisation, an individual becomes part of a group and develops an identity associated with it, he or she becomes part of the components of culture and society.[42]

5.2. The development of loyalty

Belonging to a group is essentially a given, but it is subject to change and, to some extent, can be changed as a result of the individual's decision. If one wants to change one's group membership, one has to change one's habits and tastes, and adopt the culture of the other group, which is a lengthy and rarely completed process. This process may also come about because the individual is unable to socialise with his or her own culture or is not seen as part of the group. Ultimately culture deeply permeates one's identity. The most basic layer of identity is cultural belonging, which is a fairly solid factor, while performance (i.e. how one acts, what one is able to achieve, etc.) is only built on this layer of identity.[43]

The European Union is a culturally plural entity, taking into account the nationalities, languages, religions, customs, etc. Cultural pluralism, in a very basic sense,

38 See Egedy, 2001.
39 Baldwin et al., 2006, pp. 156, 200, 205, 211.
40 Zsolt, 2005, pp. 35–37.
41 Papp, 2007, pp. 109–110.
42 Byron, 2002, p. 442.
43 Margalit and Raz, 1990, pp. 444, 446–447.

is about the interaction of diverse cultural, ethnic, and religious groups. Although the concept of cultural pluralism is dynamic itself, the point is that cultural pluralists advocate the ideal of a democratic society enriched by differences.[44] This idea is also reflected in the aforementioned motto of the European Union.

The point of this argument is that taking all this as a starting point, a European identity can in fact be constructed, and in this (otherwise slow) process, attachment to a new unity can be formed, and loyalty to that integrity can be built on the basis of this new unity. The requirement of loyalty to the state is not usually explicit in the constitutions of individual states, but it is an essential element of the functioning of a state and of the relationship between the state and its citizens.[45]

> Loyalty can be characterised as a practical disposition to persist in an intrinsically valued (though not necessarily valuable) associational attachment, one that involves a potentially costly commitment to secure or at least not to jeopardise the interests or well-being of the object of loyalty. For the most part, an association that we come to value for its own sake is also one with which we come to identify (as *mine* or *ours*).[46]

An organisation, whether a state, a confederation, or a federal state if it is culturally plural, must ensure that the interaction of cultural communities is in reality an essentially peaceful coexistence. A peaceful coexistence that creates loyalty to the state and society, and solidarity between communities, thus leading to social peace as the most important goal of the state.

Loyalty is a commitment but it is not necessarily a patriotic commitment. Nationalists argue that citizens are loyal to their own state because it preserves and reflects their national culture, which is an important part of their identity, and ought to be morally respected. Meanwhile – according to e.g. Habermas – a citizen can be loyal to a particular democratic state on the grounds of principle, without reference to any shared culture or national identity.[47]

In the case of the European Union, the cultural specificities already mentioned make it more likely to be the latter. This implies that in the process of building a common European identity, a looser attachment than national identities can also provide the basis for a sense of belonging and, through this, for loyalty at the European Union level.

44 Bernstein, 2015, pp. 347–356.
45 Basta Fleiner and Gaudreault-DesBiens, 2013, p. 151.
46 Small, 2022.
47 Stilz, 2009, pp. 24, 138.

6. Identity-building of the European Union, by the European Union, for the European Union

If we look at the question of the interconnection of culture and power, in reality, we see that there are one or more so-called dominant cultures. All societies are politically and economically organised, and it is through the possession of power that scarce resources are distributed. The leading group or groups that have power determine this distribution and also determine the traditions and disseminate them among the population, that is, they determine, so to speak, the culture that permeates and thus influences society. Defined in another form, a dominant culture is one that is able to impose its values, language, and patterns of behaviour on other cultures through its economic or political power, that is it can actually achieve acculturation.[48]

Obviously, under democratic conditions, in the 21st century, it is not a question of a few dominant cultures dominating all the others in a culturally diverse space. Rather, it is a question of achieving a kind of compromised balance, in which the dominant group takes guaranteeing steps towards the minority groups in order to preserve the community, while the minority groups, if they consider this to be in line with their goals, cooperate with the majority group.

However, it should also be remembered that the dominant culture is the one that is linked to society and social institutions, which for minority cultures is only given if they have territorial autonomy (that is individuals belonging to a particular culture live in a specific area, with their own institutions and rights), but even then not equal power potential. In other cases, the minority culture can only rely on its own capacity to assert its interests. The majority culture also has political control, even if it chooses to adapt and relinquish some of its power in favour of minority groups. So the fact that in cultural pluralism cultures are equal, and none is better or worse than the other, does not mean that their political power and advocacy are or should be equal.

In an entity that is moving towards some form of federalisation, this means rethinking existing power relations and institutional arrangements. What would be the basis of common existence, of unity, in a federation (or similar) arrangement? Is it simply the will, or is it language, culture, history, and geography? How can a federal system strike a balance in pluralism through compromise and agreement? Compromise can only be achieved when consensus cannot be reached on all issues. Then the issues on which consensus must be reached can be reduced by it. And agreement in the sense that the terms of compromise cannot be unilaterally changed.[49] In this way, federalism can ensure that the minority remains within the state because it offers greater benefits than secession would. It can also strengthen nationalism, which is more attractive than separatism. Ultimately, a shared identity can be created.

48 Scott and Marshall, 2009, p. 190; Baldwin et al., 2006, p. 17.
49 See, e.g., Rossi, 2013; Bellamy and Hollins, 1998, pp. 54–78.

6.1. European culture, European identity

What does this mean for the European Union? In federal arrangements, we can see that, either naturally or with central "help", a common identity has been created. For this to happen, European culture must be at the forefront of Europe's identity – but European culture must be made the basis of identity in such a way that cultural pluralism, and hence pluralism of identities, is preserved. It is not, surely, a question of creating this European culture entirely from its foundations, since it is in practice a culture of the spirit and has lived with us since antiquity.

At the same time, it must grow up alongside our current national identity, so that it can become the basis of a sense of belonging and thus a basis of common loyalty. However, the development of a common European identity has been strained by certain contradictory processes since the 19th century. In Hungary, Ágnes Heller stated that Europe perceives itself as the "West", which is democratic, progressive, and modern, but that on the other hand, it is not moving towards the creation of a common culture, but in the opposite direction. In this process, in the process of cultural relativism, European culture is becoming less and less. The problem is that the European identity is not present, neither in literature nor in philosophy. Even works created in a universal medium, such as opera, retain their national character. In this process, it makes no difference where European culture comes from, whether it is Latin or Greek because each people has their own culture and each is equally valuable. And even if there is a European culture, it does not derive from the European consciousness, because European culture is in fact a collection of national cultures.[50]

It is also questionable whether Europeanism, as the basis of a common identity, is capable of transmitting values. Some critics argue, for example, that it does not offer a conceptual basis for dealing with the challenges posed by globalisation and integration processes, and the fragility of national identities. However, as an ideal, it is rooted in a general political and moral ideal that has defined the history and present of Europe, and it is a specific cultural entity that is the basis of a collective "European" identity. In other words, the idea of Europeanness is ultimately nothing other than a specific collective identity, based on a general political, moral, and cultural foundation, and lived in a context of autonomous cultures.[51]

Europe's cultural identity is mainly a constructed identity, and this construction is essentially based on the activities of European intellectuals – clerics, scientists, artists – and is characterised by Christian religious faith, humanism, scientific rationalism, and Enlightenment ideas. Nevertheless, it is also a state of lawful civil coexistence. Indeed, the early ideas of federalism foreshadowed the emergence of a political culture based on the orderly resolution of conflicts, constitutional rule of law, power-sharing, and multi-centredness, and the creation of a European order

50 Heller, 1997.
51 Szécsi, 2001.

of peace. Thus, the democratic rule of law is also part of the common European tradition. It is on these cultural foundations that the institutional aspects of the European Union are built. Alongside the initial economic unity, a cultural and political consciousness has been and is being built up beyond it.[52]

In terms of the formation and development of European identity, we can see contradictory processes, in which nationalism, sovereignism, globalism, and loss of identity are spreading simultaneously. The European Union, if it is to become a federation, or at least to centralise more power for itself, must confront these contradictory processes and promote the creation of an autonomous European culture and identity based on it, because, without this emotional attitude, loyalty is difficult to achieve. There is a limit to the extent to which interest can hold such an entity together because interests change and maintaining a balance of interests is not an easy task. To achieve the goal of united in diversity, unity must be based on a solid foundation that is natural for all.

What kind of identity-building can the European Union achieve? This is a question that has been around for decades, and there have been attempts, albeit on different (cultural, economic) grounds, to build some kind of European identity since the 1970s. These changes can be traced back in part to the indecisiveness of European elites, who waver between cultural Europeanism and a pan-European macroeconomic model. Later the European identity promoted the agendas of globalisation and deregulation in the European context, and then the European cultural identity politics. The latter brought the introduction of many symbols, although ineffective. Since the Maastricht Treaty, the legal and constitutional dimensions have been put in the centre.[53]

6.2. Sense of belonging through cultural means: the role of common symbols, common history, common language, and common institutions

The common, collective identity is constructed by the political authorities of the European Union (Karolewski calls them "identity producers") which, in order to generate a collective identity, introduce various identity technologies including the promotion of positive self-images, the generation of common symbols, the enhancement of common values etc. This positive self-image does not necessarily mean that it is true, rather being a tool for the European Union to model itself as a better "Self". According to Karolewski, there are three main types of self-images promoted by the European Union: the images of cosmopolitan Europe, civilian power, and normative power. Through these images, the European Union projects images of superiority, which serves as a moral underpinning for identity-making. At the same time, this symbolic identity draws on shared symbols of commonality such as common currency, a common anthem, common holidays, or even a common past. And the

52 Bayer, 2001.
53 Tekiner, 2020, pp. 5–6.

common values, which are democratic and liberal values, such as standards of democratic governance, human rights, and the rule of law, create a European Union as a community of values. Thus at the core of this identification lie principles of democracy, human rights, the rule of law, and "good governance".[54]

This paper advocates the cultural approach, as a basis of the sense of belonging. From this basis we approach the question of how this sense of belonging can be constructed and through this, how can we build a common European identity which is capable of being a fundament of loyalty to the European Union as a state.

One of the tools of identity building is the creation of common symbols. The use of symbols is a way of speaking culture. Symbols are crucial elements in the organisation of the culture of human communities. The symbolic system of any society plays a key role in expressing its values and goals, in creating community identity, and is one of the main means of passing on traditional experiences and transmitting culture. Symbolism embodies a sense of identity in that symbols are endowed with subjective meaning in addition to their universal objectivity.[55] This process of subjective meaning and the emotional attachment to it, the process of forming a sense of identity, is currently taking place in the European Union, where there is a common flag, a common anthem, a common motto, and a common currency. However, the impact of all this on identity is not yet at an advanced stage, and it is a well-known criticism that the symbols of the European Union do not have sufficient emotional content – at least compared to the symbols of national cultures.

Part of identity formation is the representation of history in the collective memory. The essential core of culture consists of traditional (historically derived and selected) ideas and, in particular, the values attached to them.[56] What culturally separates communities from each other is to a large extent the result of historical influences. Historical relationships have had an impact on a given culture.[57] Indeed, each cultural group has its own unique history, based partly on the particular internal development of the social group and partly on the external influences to which the group is exposed.[58] Thus history is an important element of culture and, through it, of identity. A common European identity therefore requires common elements of history. It is not a matter of facts from the past, but rather of the collective memory of those facts, which preserves a reconstructed version of the past and thus becomes part of cultural memory.[59] In fact, it is the emphasis on, the focus on, the events and stories that bind groups together that can form the basis of a sense of history and then of identity and thus of identity formation. It is a constructed memory that needs to be founded and then disseminated. In the case of the European Union, however, there is an inherent contradiction in that the European Union itself does not have

54 Karolewski, 2012.
55 Foster, 2003, pp. 366–367.
56 Kroeber and Kluckhohn, 1952, p. 181.
57 Boas, 1896, pp. 905–907.
58 Boas, 1920, pp. 316–317.
59 Pataki, 2010, pp. 778–779.

a past that can in itself become the basis for such a memory, which requires going back to earlier periods, but which also requires serious work, responsibility and agreement to highlight events that can have a positive content for everyone.

Another element of a common identity is the common language which is one of the most, if not the most, powerful tools for identity building. Language is a complex, symbolic system for organising experience and one of the most important means of transmitting thought. Language and culture are interdependent, and language influences the way we think and the way we see the world.[60] The loss of the ability to preserve language is one of the most important causes of the loss of culture.[61] This is also a sensitive issue since the loss of the mother tongue is the completion of the assimilation process.[62] This is probably the reason why the European Union does not promote the introduction of a common language used by all. On the contrary, as Láncos stated,

> with the entering into force of the Lisbon Treaty, we are witnessing a proliferation of the guarantees of linguistic diversity: ranging from the negative obligation to safeguard linguistic diversity and the principle of non-discrimination to the positive obligation of the Union to promote its linguistic diversity.[63]

Finally, another identity-building tool is the institutional system. The system of European Union citizenship, but above all the rights that go with it – freedom of movement, consular protection, and the right to vote – deserve a mention here. One of the elements of this was the adoption of the Charter or even the strengthening of the idea of solidarity. It should be noted, however, that there is a much stronger attachment to one's own nation, or to regional units or cultural groups.

Another issue of institution-building is state-building. Here, the basic historical experience is that successful state-building is usually part of some kind of post-war settlement and that the existence of an internal social demand is an important part of success. The existence of such internal, social demand for institutions is at least doubtful in the case of the European Union. There are few means to create such demand, and, according to Fukuyama, such attempts by the international community have been more destructive, for example in developing countries.[64] It is therefore very difficult to create a basis of legitimacy for central power.

60 Balázs and Takács, 2009, pp. 39, 45–47.

61 Boglár, 2003.

62 Assimilation stems from the modern state's desire to unify, to nationalise, linguistically, culturally, and ideologically, the population under its jurisdiction. At its root was the idea that cultural differences, i.e. customs that deviated from or did not conform to the cultural pattern promoted by the authorities, could be used to subvert national and political unity. In this process, political loyalty and trust were combined with cultural conformity, citizenship, and cultural conformity were merged, and culturally diverse groups gave up their original cultural habits in order to share in rights and goods (or, as Bauman puts it, to prove their excellence); Bauman, 1997, pp. 54–55.

63 Láncos, 2013, p. 93.

64 Fukuyama, 2014, pp. 2, 11–12.

Beyond the creation of social demand, the greatest challenge is obviously the division of powers, especially since typical identity-building tools such as education in culturally very diverse units can rarely work if they are directed solely from the centre, and it is more justifiable to refer the issue to the territorial level, because of the need to adapt to territorial specificities. There is a tension between the territorial state model and the ethno-cultural state model too. There is also no consensus on how to deal with those who are culturally different (be they national minorities or immigrants), although the latter is something that a federalist system might be better able to deal with if it does not seek to dominate all aspects of the issue but allows room for territorial specificities.

7. Conclusions

The study explored the question of what cultural diversity means for nation-building in a culturally diverse Europe, what challenges it poses for the European Union, and how to build a stable European Union on this basis, by creating a common European identity and, through it, loyalty to the European Union.

Through the concepts of culture, identity, loyalty and cultural diversity, it was possible to explore how to create a bond with a pan-European entity alongside one's own national identity. The paper argued that this can be done on a cultural basis and that the various means of identity building are of paramount importance towards this. Obviously, there are many unifying factors beyond these, such as the promotion of democracy or liberal values. These are only touched upon in this study because their role in identity is not primarily cultural.

The federalisation process is not simply about a balance and division of powers between the centre and the territorial levels, centralisation or the opposite process, but must involve identity building, the emphasis on the specific elements that bind communities together, the development of loyalty and the creation of social peace as a result. Part of this process is deciding what we think of ourselves, what holds us together, and what the basis of a distinct European culture is. However, it is also part of defining ourselves not only for ourselves, but also against others – this is part of identity – of knowing who we are and who the "others" are. At European level, this definition of identity is necessary because it is crucial for the maintenance of a common statehood. This is true even if we approach the issue on a culturally relativist basis, or if the processes of identity loss are intensifying. These identity-building processes started in the European Union, but in many respects, they are in their infancy and by any means far from consensus. This is also a reflection of the fact that the European Union and its Member States are wavering in the process of federalisation, that the process is less conscious and more haphazard, and that, since the formulation of the question and the related debates and decisions are being

avoided for the time being, there is no clear methodology on how to promote the emergence of a European identity, although it is still naturally taking shape.

Martinelli's words in 2017 are still relevant today.

> In a Europe that faces the challenges of the financial crisis, refugees from violence and hunger, fundamentalist terrorism, there is a risk of closure within national boundaries, disseminating national-populist rhetoric, affirming separate and diffident identities, by resigning or even abandoning the European project of political integration. To counteract these trends, the current European project of political unification needs to be re-emphasised, finding the way to a European collective identity, not contrasted but alongside the different national identities, which refers to loyalty and shared commitment to the whole of cultural values, social norms and common political institutions we have outlined: fundamental human rights, civil liberties, democratic political institutions, rule of law, freedom of movement of people, goods and capital, social justice and non-violent resolution of conflicts. (…) But these identity values must above all be practiced in everyday citizens' attitudes and respected in the decision-making process of European institutions, promoting a European citizenship. The European identity, made possible by the common cultural heritage which innervates in various forms and degrees different European ethonoi, can only be developed through the growth of a European demos defined in terms of a set of shared rights and duties, capable of consolidating the constraints of citizenship within democratically elected institutions.[65]

65 Martinelli, 2017, pp. 33–34.

References

Adler, J. (2002) *General Principles of Constitutional and Administrative Law.* 4th edn. London: Palgrave MacMillan.

Bakk, M. (2008) *Politikai közösség és identitás.* Kolozsvár: Komp-Press Kiadó.

Balázs, G., Takács, Sz. (2009) *Bevezetés az antropológiai nyelvészetbe.* Budapest: Pauz-Westermann – Inter – PREAE.HU.

Baldwin, E., Longhurst, B., Smith, G., McCracken, S., Ogborn, M. (2006) *Introducing Cultural Studies.* Peking: Peking University Press.

Baldwin, J. R., Faulkner, S. L., Hecht, M. L., Lindsley, S. L. (eds.) (2006) *Redefining Culture: Perspectives Across the Disciplines*. London: Lawrence Erlbaum Associates, Inc., pp. 139–226.

Basta Fleiner, L. R., Gaudreault-DesBiens, J-F. (2013) 'Federalism and autonomy' in Tushnet, M., Fleiner, T. (eds.) *Routledge Handbook of Constitutional Law.* London and New York*:* Routledge, pp. 141–158; https://doi.org/10.4324/9780203072578.ch12.

Bauman, Z. (1997) 'Modernség és ambivalencia' in Feischmidt, M. (eds.) *Multikulturalizmus.* Budapest: Osiris Láthatatlan Kollégium, pp. 47–59.

Bayer, J. (2001) 'Európai kultúra – európai identitás' in Karikó, S. (eds.) *Európaiság. Politikai és morális kultúra.* Budapest: Áron Kiadó, pp. 23–40;

Bellamy, R., Hollins, M. (1998) 'Compromise, Consensus and Neutrality', *Critical Review of International Social and Political Philosophy,* 1(3), pp. 54–78; https://doi.org/10.1080/13698239808403248.

Bernstein, R.J. (2015) 'Cultural pluralism', *Philosophy & Social Criticism,* 41(4–5), pp. 347–356; https://doi.org/10.1177/0191453714564855.

Boas, F. (1896) 'The Limitations of the Comparative Method of Anthropology', *Science,* 4(103), pp. 901–908; https://doi.org/10.1126/science.4.103.901.

Boas, F. (1920) 'The Methods of Ethnology', *American Anthropologist,* 22(4), pp. 311–321; https://doi.org/10.1525/aa.1920.22.4.02a00020.

Boglár, L. (2003) 'Az adaptáció művészete', in Gergely, A.A. (ed.) *Kulturális antropológia.* Budapest: Áron Kiadó, pp. 17–32.

Boglár, L. (2007) 'A tolerancia tudománya. Sztereotípiák és tipikus jelenségek' in Boglár, L., Papp, R. (eds.) *A tükör két oldala. Bevezetés a kulturális antropológiába.* Budapest: Nyitott könyvműhely, pp. 130–149.

Brie, M. (2010) 'European culture between diversity and unity', *Annals of the University of Oradea – International Relations and European Studies*, 2010/2, pp. 79–92.

Brubaker, R. (2004) 'A nemzet mint intézményesült forma, gyakorlati kategória, esetleges esemény' in Kántor, Z. (ed.) *Nacionalizmuselméletek (szöveggyűjtemény).* Budapest: Rejtjel Kiadó, pp. 387–395.

Byron, R. (2002) 'Identity' in Barnard, A., Spencer, J. (eds.) *Encyclopedia of Social and Cultural Anthropology.* London: Routledge, pp. 441–442.

Cohen, A.P. (1993) 'Culture as Identity: An Anthropologist's View', *New Literary History,* 24(1), pp. 195–209; https://doi.org/10.2307/469278.

Conway, S. (2018) 'From Britishness to Multiculturalism: Official Canadian Identity in the 1960s', *Études canadiennes / Canadian Studies. Revue interdisciplinaire des études canadiennes en France*, *Le Canada et ses définitions de 1867 à 2017: valeurs, pratiques et representations,* 84(2), pp. 9–30; https://doi.org/10.4000/eccs.1118.

Egedy, G. (2001) '(Multi)kultúra–konzervatív olvasatban', *Magyar Szemle,* 10(3–4), pp. 53–70.

Fikentscher, W. (2009) *Law and Anthropology.* München: Verlag der Bayerischen Akademie der Wissenschaften in Kommission beim Verlag C.H. Beck.

Frasin, I. (2012) 'Identity and Cultural Diversity Arising From Globalization', *European Journal of Science and Theology*, 8(3), pp. 37–45.

Fukuyama, F. (2014) *State-Building: Governance and World Order in the 21st Century.* Ithaca: Cornell University Press.

Gardner, J.A. (2018) 'The Theory and Practice of Contestatory Federalism', *William & Mary Law Review*, 2018/60, pp. 507–588; https://doi.org/10.2139/ssrn.3068259.

Gedeon, M., Halász, I. (2022) 'Introduction' in Gedeon, M., Halász, I. (eds.) The *Development of European and Regional Integration Theories in Central European Countries*. Miskolc: Central European Academic Publishing, pp. 11–23; https://doi.org/10.54171/2022.mgih.doleritincec_1.

Gereben, F. (no date) *Nemzeti és vallási identitás kisebbségi és többségi helyzetben* [Online]. Available at: http://terd.unideb.hu/doc/konyv/4/v_gereben.pdf (Accessed: 15 October 2024).

Gheorghe, N., Acton, Th. (1996) 'A multikulturalitás problémái: kisebbségi, etnikai, nemzetiségi és emberi jogok', *Replika*, No. 23–24, pp. 207–218.

Gödri, I. (2010) 'Bevándorlás és etnicitás – összefüggések nyomában' in Hárs, Á., Tóth, J. (eds.) *Változó migráció, változó környezet.* Budapest: MTA Etnikai-nemzeti Kisebbségkutató Intézet, pp. 87–124.

Gordon, M.M. (1964) *Assimilation in American Life. The Role of Race, Religion, and National Origins.* New York: Oxford University Press.

Grimson, A. (2010) 'Culture and identity: two different notions', *Social Identities,* 16(1), pp. 61–77; https://doi.org/10.1080/13504630903465894.

Gulyás, É. (2018) *Etnikai konfliktusok és válsághelyzetek a nemzetállamban. Állam, xenofóbia, genocídium.* Doktori értekezés. Budapest: Nemzeti Közszolgálati Egyetem, Közigazgatástudományi Doktori Iskola.

Hall, S. (1992) 'The Question of Cultural Identity' in Hall, S., Held, D., McGrew, T. (eds.) *Modernity and its Futures.* Cambridge: Polity Press in Association with the Open University, pp. 273–325.

Heller, Á. (1997) 'Európai identitás, modernitás és történelmi emlékezet', *Lettre Internationale,* 26(Autumn).

Heller, Á. (1999) 'Európa, Európa…' in Csejtei, D., Laczkó, S. (eds.) *Európai integráció – európai filozófia: [nemzetközi konferencia].* Szeged: Pro Philosophia Szegediensi Alapítvány, pp. 21–32. [Online]. Available at: https://acta.bibl.u-szeged.hu/38129/ (Accessed: 15 October 2024).

Hobsbawm, E.J. (1992) *Nations and nationalism since 1780. Programme, myth, reality.* 2nd edn. Cambridge: Cambridge University Press; https://doi.org/10.1017/CCOL0521439612.

Hódi, S. (1992) *A nemzeti identitás zavarai.* Újvidék: Forum Könyvkiadó.

Huntington, S.P. (1998) *A civilizációk összecsapása és a világrend átalakulása.* Budapest: Európa Kiadó.

Jakab, A. (2016) *Az európai alkotmányjog nyelve.* Budapest: MTA TK Jogtudományi Intézet. [Online]. Available at: http://real-d.mtak.hu/836/7/dc_781_13_doktori_mu.pdf (Accessed: 15 October 2024).

Kántor, Z. (2004) 'Nemzet és intézményesülés' in Fedinec, Cs. (eds.) *Nemzet a társadalomban.* Budapest: Teleki László Alapítvány, pp. 275–290.

Karolewski, I.P. (2012) 'European Identity Making and Identity Transfer' in Lane, D.S. (eds.) *Elites and Identities in Post-Soviet Space.* London: Routledge, pp. 117–134.

Kleinig, J. (2022) 'Loyalty', *The Stanford Encyclopedia of Philosophy*, 22 March 2022. [Online]. Available at: https://plato.stanford.edu/archives/sum2022/entries/loyalty/ (Accessed: 25 October 2024).

Koller, B. (2006) *Nemzet identitás, politika Európában*. Budapest: L'Harmattan Kiadó – Zsigmond Király Főiskola.

Kolumbus, A., Shavit, A., Ellison, A.M. (2016) 'Two Roads Diverge in a Wood: Indifference to the Difference Between 'Diversity' and 'Heterogeneity' Should Be Resisted on Epistemic and Moral Grounds'*, Philosophy of Science,* 83(5), pp. 861–872.

Kroeber, A.L., Kluckhohn, C. (1952) 'A Critical Review of Concepts and Definitions', *Papers of the Peabody Museum of American Archeology and Ethnology*, XLVII.(1). Cambridge, Massachusetts: Harvard University, pp. 1–223.

Kymlicka, W. (1995) *Multicultural Citizenship. A Liberal Theory of Minority Rights.* Oxford: Clarendon Press; https://doi.org/10.1093/0198290918.001.0001.

Kymlicka, W. (1999) 'Theorizing indigenous rights', *The University of Toronto Law Journal,* 49(2), pp. 281–293; https://doi.org/10.2307/826021.

Láncos, P.L. (2013) 'From the Principle of Linguistic Diversity to Enforceable Language Rights in the European Union', *Hungarian Yearbook of International Law and European Law*, 1(1), pp. 93–122; https://doi.org/10.5553/HYIEL/266627012013001001006.

Lavergne, S. (1993) 'The Future of Canadian Federalism', *Georgia Journal of International and Comparative Law*, 23(Spring), pp. 63–88.

LeCron Foster, M. (2003) 'Symbolism: the foundation of culture' in Ingold, T. (eds.) *Companion Encyclopedia of Anthropology.* London: Taylor & Francis e-Library, pp. 366–395.

Manzinger, K. (2018) *A területi alapú hatalommegosztás mint a multikulturális európai államok demokratikus stabilitásának lehetséges modellje.* Doktori értekezés. Budapest: Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskola.

Marchildon, G., Maxwell, E. (1992) 'Québec's Right of Secession Under Canadian and International Law', *Virginia Journal of International Law,* 32(Spring), pp. 583–623.

Margalit, A., Raz, J. (1990) 'National Self-Determination', *The Journal of Philosophy,* 87(9), pp. 439–461; https://doi.org/10.2307/2026968.

Martinelli, A. (2017) 'The European Identity', *Glocalism: Journal Of Culture, Politics And Innovation,* 2017/2, pp. 1–35; https://doi.org/10.12893/gjcpi.2017.2.11.

Papp, R. (2007) 'A kulturális antropológia főbb részterületei. Identitás és etnicitás' in Boglár, L., Papp, R. (eds.) *A tükör két oldala. Bevezetés a kulturális antropológiába.* Budapest: Nyitott könyvműhely, pp. 13–112.

Pataki, F. (2010) 'Kollektív emlékezet és emlékezetpolitika', *Magyar Tudomány,* 2010/7, pp. 778–798.

Rieker, W.H. (2007) 'Federalism in Goodin' in Pettit, R.E., Pogge, Th. (eds.) *Companion to Contemporary Political Philosophy.* 2nd edn. Vol. 1. Blackwell Publishing, pp. 612–620;

Rossi, E. (2013) 'Consensus, compromise, justice and legitimacy', *Critical Review of International Social and Political Philosophy,* 16(4), pp. 557–572; https://doi.org/10.1080/13698230.2013.810393.

Royal Commission on National Development in the Arts, Letters and Sciences (1949–1951) *Report* [Online]. Available at: https://www.collectionscanada.gc.ca/massey/h5-403-e.html (Accessed at: 15 October 2024).

Schlink, B. (1997) 'Szekularizáció és multikulturalizmus között', *Fundamentum*, 1997/2, pp. 30–34.

Scott, J., Marshall, G. (2009) *A Dictionary of Sociology.* Oxford: Oxford University Press; https://doi.org/10.1093/acref/9780199533008.001.0001.

Stilz, A. (2009) *Liberal Loyalty Freedom, Obligation, and the State.* New Jersey: Princeton University Press; https://doi.org/10.1515/9781400830701.

Szécsi, G. (2001) 'Elit és európaiság' in Karikó, S. (ed.) *Európaiság. Politikai és morális kultúra.* Budapest: Áron Kiadó, pp. 41–58.

Tekiner, U. (2020) 'The 'European (Union) Identity': An Overview', *E-International Relations,* 15 April 2020. [Online]. Available at: https://www.e-ir.info/2020/04/15/the-european-union-identity-an-overview/ (Accessed at: 25 October 2024).

Trudeau, P.E. (2015) 'Federalism, Nationalism, and Reason' in Thompson, D., Rocher, F., Russell, P. (eds.) *Essential Readings in Canadian Government and Politics*. 2nd edn. Toronto: Emond Montgomery, pp. 34–44.

Varga, A.Zs. (2017) *A közigazgatás és a közigazgatási jog alkotmányos alapjai.* Budapest: Dialóg Campus Kiadó.

Zsolt, P. (2005) *Szociálpszichológia. Proszociális és antiszociális alapviselkedések.* Vác: EU-Synergon Kft.

Chapter 9

The Future of Coexistence in the EU and Centripetal Forces, Constitutional Courts and Constitutional Justice

European Union, an Ideal Without a Model[1]

Marieta Safta

Abstract

The study begins with the premise that in order to gain a better understanding of the European Union as a state structure, it is important to examine the actions of the Court of Justice of the European Union and its collaboration, or lack thereof, with the Constitutional Courts of Member States. Although the Treaties of the EU may not explicitly include the constitutive element of self-determination, the internal actions of the Court of Justice of the European Union, along with the external actions of the Constitutional Courts, seem to be significantly filling this gap. This trend, characterised by an increase in the capacity of the courts (international and supranational) to shape the fragmented and explicitly or predominantly implicitly transferred state sovereignty, is assigned the role of the centripetal force of European integration. The research aims to analyse the integrative mechanism involving the ECJ and national courts, particularly CCs, with the intention of comprehending the intricacies of this collaborative mechanism, how it presents itself, the perspective of evolutions and the impact of constitutional justice on the future of the EU.

Keywords: constitutional justice, European Union, constitutional courts, European Court of Justice, centripetal forces.

1 Torchia, 2016, pp. 741–752.

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1. Introduction

It has been rightfully noted that the European Union (EU) is a model that is constantly in a state of progress,[2] evolving due to a complex interplay between various movements, actors, and institutions. The EU's normative and institutional system has been shaped by past and current crises, leading to its current legal autonomy. [3] The impact of the crisis "has unleashed a number of centrifugal forces that are straining the EU". [4] It seems, at various times, that under this pressure, the EU is loosening the ties that brought together six and after that more and more States. At the same time, centripetal forces have acted to change the Union's "physiognomy", and founding Treaties, transforming them into quasi-constitutions that serve as the basis for a *sui-generis* constitutional order. This transformation raises important questions about the functioning of "centripetal forces" and their impact on the future of the EU, including whether it will function as a federation of nations or choose a different way of coexisting.

Given the idea[5] that the legal basis of the EU does not derive from the EU itself, but from Member States (MS) by way of treaties, we consider that, within the discussions regarding the future of the Union, special attention should be paid to the constitutions of the MS and their "tectonics", whether we are talking about amendments or interpretations of the constitutions (which most of the time replace or supplement the need for amendment). Theoretically, "the legal basis of the EU is not put at the disposal of the EU";[6] they remain in the will of the MS ("masters of the treaties") because only the states are authorised, in accordance with their own constitutions or adapting them accordingly, to amend the treaties and autonomously determine which sovereign rights/powers they assign to EU. However, according to a famous formula, "Constitution is what the judges say it is",[7] the issue of the will of the States in the said process must be approached nuancedly, taking into account, *inter alia*, the evolution of constitutional justice in Europe.

By the concept of "constitutional justice" we understand, mainly, the "judicial review of laws",[8] to which, over time, complex developments have been added, both regionally and globally. Recent comparative research[9] highlights the role of a constitutional review in limiting the discretion and actions of political decision-makers, extending the idea of constitutionality, and enforcing the supremacy of the constitution. Even the powers of constitutional courts (CCs) somewhat controversially, have increased over time. In addition to their classic role as negative legislators,

2 Cartabia, 2018, p. 744.
3 For the concept of the autonomy of the legal order, see Lenaerts, 2021a, pp. 47–87.
4 Cartabia, 2018, p. 744.
5 Grimm, 2015, p. 275.
6 Ibid.
7 See Walsh, 1951.
8 Criste, 2017, p. 71.
9 Roznai, 2020, pp. 355–377.

these courts now prohibit political parties, cancel election results, disqualify political appointees, and solve conflicts of a constitutional nature. Likewise, despite not always being explicitly given the power to review constitutional amendments, CCs have taken it upon themselves to do so. They no longer solely enforce the constitution but also play a role in policy-making, as a vital component of democratic self-government. This trend towards the "judicialisation of politics",[10] noticed worldwide in recent decades is also important in the light of the "modelling" of the EU as a structure of States.

However, the evolution of constitutional justice in Europe has specific features. As noted, for example, ten years ago, during a Congress covering the topic of 'The Co-operation of CCs in Europe – Current Situation and Perspectives'[11], which brought together the Conference of European CCs, these courts

> are no longer limited to the interpretation of national constitutional law in isolation. The impact of European law on national constitutional law, as well as the interactions between European law and national law, has increased in recent years. For the constitutional courts of the Member States of the European Union, Union law is the primary factor of influence.

In turn, the decisions of the CCs influence the evolution of EU law. Constitutional interpretation considers various factors such as traditions, historical and social context, and their connection to EU law. This process aims to resolve differences and align national legal systems to the EU model. Constitutional adaptation through interpretation may also result in disagreements, which has been evident in the constitutional history of the EU. In this regard, it is helpful to distinguish between "good" and "bad" disputes and their effect on integration.

Therefore, to better understand the construction of the EU as a structure of State, it is necessary to examine the actions of the Court of Justice of the European Union (ECJ) and its collaboration (or lack thereof) with the CCs of MS. Statements such as "EU is externally controlled"[12] should be nuanced from this perspective, since it has been observed that 'in many cases, states are gradually losing control over international and supranational courts' due, amongst other reasons, to the increasing incapability to adequately address the challenges of the shifting reality and the vagueness of many international and EU law provisions allowing for their virtual amendment by the courts.[13] Constitutions and Treaties bind together legislature, which means that the Court's interpretations of Constitutions and treaties, influences the action of legislators considerably. Although the Treaty may not include the 'constitution

10 For the concept, see Tate, 1995.
11 Grabenwarter, no date.
12 Grimm, 2015, p. 275.
13 Belov, 2019, p. 101.

constitutive element of self-determination',[14] the ECJ's internal actions, along with the CCs' external actions, seems to be significantly filling in for this absence.

To this trend, characterised as an increase in the capacity of the courts (international and supranational) 'to shape the fragmented and the explicitly or predominantly implicitly transferred state sovereignty'[15] we assign the role of the centripetal force of European integration. Our study aims to analyse the integrative mechanism involving the ECJ and national courts, particularly CCs. We want to comprehend the intricacies of this collaborative mechanism, how it presents itself, and the impact of constitutional justice on the future of the EU. The book chapter is organised into five parts: Part 1 is the Introduction, Part 2 discusses the state of the EU's constitutional framework and the regulation of constitutional justice, Part 3 analyses the divergence and convergence elements in European constitutional justice, Part 4 examines developments complementary to the action of constitutional justice, such as the establishment of the Rule of Law Mechanism, and Part 5 will offer some final thoughts on the future of coexistence in the EU from the perspective of the constitutional justice.

2. State of play. The EU's constitutional framework and the regulation of constitutional justice

2.1. National constitutions and the legal integration of the EU order

The 27 member states of the EU have codified constitutions that establish the fundamental principles of how the state operates, protect basic rights, outline the relationships between public authorities, and include specialised institutions that ensure the constitution is upheld. When it comes to regulating relationships between legal orders, there are various approaches to consider.[16]

A category of constitutions places the issue of relationships between the national legal order and that of the EU within the scope of the general rules relating to international law, settling it according to the same rules [Constitution of Denmark,[17] Estonia,[18] France,[19] Luxembourg,[20] Netherland,[21] Poland[22]]. Another category of

14 Grimm, 2015, p. 275.
15 Belov, 2019, p. 101.
16 For a general approach of the topic, see Safta, 2022b.
17 Constitution of the Kingdom of Denmark, 1953.
18 Constitution of Estonia, 1992, with Amendments through 2015.
19 Constitution of France, 1958, with Amendments through 2008. See Title VI. On treaties and international agreements.
20 Constitution of Luxembourg, 1868, with Amendments through 2009. See Article 49 bis.
21 Constitution of The Netherlands, 1814, with Amendments through 2008.
22 Constitution of Poland, 1997, with Amendments through 2009. Chapter 3, Sources of Law.

constitutions distinctly refers to legal relationships and EU institutions. This category can be further divided into two subcategories. The first subcategory establishes the relationships between norms and emphasises the supremacy of EU law. The second subcategory incorporates elements concerning the European legal system to varying degrees without explicitly addressing priority or primacy/supremacy relationships.

Thus, the Constitution of Austria[23] contains 11 articles grouped in Section B – European Union, from Chapter I – General Provisions. European Union. Relationship and obligations of an institutional nature, the elections for the European Parliament, as well as Austria's participation in the Common Foreign and Security Policy are detailed.

The Belgian Constitution[24] regulates international relations in Title IV, with reference also to the rules regarding the revision of the EU treaties, as well as to the elections of the European Parliament.

The Constitution of Bulgaria[25] does not provide any special title or chapter to relations with the EU, but includes provisions that refer to it when the powers of the constitutional authorities are regulated [see Article 85 (1) 9].

The Constitution of Croatia[26] provides in Chapter VIII – European Union, the legal grounds for Membership and transfer of constitutional powers (Section I), the participation in EU institutions (Section II), EU Law (Section III) and the Rights of EU Citizens (Section IV).

The Constitution of the Republic of Cyprus[27] enshrines the primacy of EU law in Article 1a of Part I – General Provisions and similar provisions are contained in the Constitution of Ireland,[28] in Article 29 – International relations.

The Constitution of Czech Republic[29] establishes, in Art.3, 'that The Charter of Fundamental Rights and Basic Freedoms forms part of the constitutional order of the Czech Republic'.

According to Article 1 of the Constitution of Finland,[30] the country 'is a Member State of the European Union'. Other articles refer to this framework, such as Article 66 which refers to the powers of the prime minister.

The Constitution of Germany[31] contains detailed provisions in Article 23 – European Union – Protection of basic rights – Principle of subsidiarity regarding Germany's participation in the EU, the legal transfer of sovereign powers, the right of the Bundestag and the Bundesstrat to bring an action to the ECJ in order to challenge a

23 Constitution of Austria, 1920, Reinstated in 1945, with Amendments through 2013.
24 Constitution of Belgium, 1831, with Amendments through 2014.
25 Constitution of Bulgaria, 1991, with Amendments through 2015.
26 Constitution of Croatia, 1991, with Amendments through 2013.
27 Constitution of Cyprus, 1960, with Amendments through 2013.
28 Constitution of Ireland, 1937, with Amendments through 2019.
29 Constitution of the Czech Republic, 1993 with Amendments through 2013.
30 Constitution of Finland, 1999, with Amendments through 2011.
31 Constitution of Germany, 1949, with Amendments through 2014.

legislative act of the Union that violates the principle of subsidiarity, and the participation in the EU legislative process.

The Constitution of Greece[32] rules, in Article 28, on the relationships between national and international law, including on the limitation of the exercise of sovereignty, and by the interpretative clause it stipulates that 'Article 28 constitutes the foundation for the participation of the Country in the European integration process'.

According to Article 11 of the Constitution of Italy,[33] the country accepts 'the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations'. The Constitution also refers to the normative framework of the EU, for example through Article 97 (1) concerning public administration, or Article 117 which states that the 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'. Similarly, the Constitution of Latvia[34] refers in Article 79 to the accession to the EU and possible 'substantial changes in the terms regarding such membership'.

An interesting way of incorporating the rules that establish a relationship with the EU can be found in the Constitution of Lithuania,[35] which lays down in Article 150 that they are an integral part of the Constitution of the Republic of Lithuania, inter alia, The Constitutional Act 'On Membership of the Republic of Lithuania in the European Union' of 13 July 2004. This Act provides in point 2 that

> The norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania.

The Constitution of Malta[36] refers to the competence of the Parliament to enact laws in accordance with full compliance with Malta's obligations 'in particular those assumed by the treaty of accession to the European Union' (Article 65).

The Constitution of Portugal[37] provides a distinct chapter to the relationships with EU law, Article 8 point 4 establishing in this regard that

> The provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.

32 Constitution of Greece, 1975, with Amendments through 2008.
33 Constitution of Italy, 1947, with Amendments through 2020.
34 Constitution of Latvia, 1922, Reinstated in 1991, with Amendments through 2016.
35 Constitution of Lithuania, 1992, with Amendments through 2019.
36 Constitution of Malta, 1964, with Amendments through 2016.
37 Constitution of Portugal, 1976, with Amendments through 2005.

Likewise, the Constitution of Slovakia[38] provides a distinct regulation for the relationship with the EU (Article 7 point 2). A similar regulation regarding the possibility of transferring the exercise of a part of the sovereign rights to international organisations, but without expressly mentioning the EU, is established by in the Constitution of Slovenia (Article 3 a).[39]

The Constitution of Spain[40] refers in Article 135 point 2 to the limits of "structural deficit" applicable by the EU for its Member States.

The Constitution of Sweden[41] regulates, in Chapter 10 – International relations, a Part 4, detailing 'Transfer of decision-making authority within the framework of European Union cooperation'.

The Constitution of Hungary[42] provides in Article E, Paragraph 2 that

> With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union and in Paragraph 3 that 'The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in Paragraph (2)'.

The Romanian Constitution[43] incorporates a specific article, 148, that addresses the country's integration into and its relationship with the EU. Paragraph (2) of this article states that, following accession, the provisions of the EU's constituent treaties and other mandatory community regulations will take precedence over any conflicting national laws, in line with the accession act. The following paragraphs outline the duties of various public authorities, such as the Parliament, the President, the Government, and the judicial system, to ensure that the obligations resulting from the accession act are fulfilled. These constitutional provisions should be viewed in conjunction with Article 11, which deals with the connection between international law and national law, and Article 147, which addresses the effects of decisions taken by the Constitutional Court.

This brief presentation highlights a diverse approach to regulating the relationship between national and EU law. Some Constitutions explicitly state the supremacy of EU law, while others prioritise certain EU regulations over internal rules. Some of them "naturally" integrate institutional relations with the EU in the scope of the relations of constitutional authorities, others regulating separately, by express rules, or simply not distinguishing within the framework between the EU and other

38 Constitution of Slovakia, 1992, with Amendments through 2017.
39 Constitution of Slovenia, 1991, with Amendments through 2016.
40 Constitution of Spain, 1978, with Amendments through 2011.
41 Constitution of Sweden, 1974, with Amendments through 2012.
42 Constitution of Hungary, 2011, with Amendments through 2016.
43 The Constitution of Romania, 1991, with Amendments through 2003.

international structures. The lack of clarity of the constitutional framework can lead to conflicts between national and EU legal systems. In practice, the responsibility of the coherence in this regard falls on the CCs and courts of law, called to interpret and apply the national constitutional framework, on the one hand, and the EU constitutional framework, on the other.

2.2. Courts and models of constitutional review

Despite its small size, the EU has various models and types of constitutional review.[44]

Thus, in most EU States, CCs on the Kelsenian model (i.e., specially created authorities, independent, distinct from the court of law system, whose role is to guarantee the supremacy of the Constitution) operate under various names (in Austria, Belgium, Bulgaria, Croatia, France, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Czech Republic, Slovakia, Romania, Slovenia, Spain, and Hungary). In Germany, the Federal Constitutional Court, which is entrusted with the constitutional review, belongs to the judiciary (Article 92), but is a separate, special and specialised court for carrying out constitutional reviews. Similarly, in Malta, a court belonging the judiciary system operates under the name of the Constitutional Court, whose role, expressly established by the Constitution, is to guarantee the supremacy of the Constitution, to defend the fundamental rights of the individual and to protect citizens aggrieved by acts by the Government. In other States, such reviews are entrusted to the courts of law, namely in Denmark (any level of court), Greece (each court being considered competent to rule upon the compliance of the legal norms with the Constitution, but only the Special Supreme Court[45] being able to exclude such norms from the legal order), Estonia (the Supreme Court),[46] Finland (any court of law),[47] Ireland (the Supreme Court and the High Court), and Cyprus (the Supreme Court). In one single EU State (the Netherlands),[48] the Constitution does not allow the constitutional review of laws. Each court has unique characteristics that either align it with or differentiate it from traditional models of constitutional review. For instance, constitutional review in Cyprus has been identified as 'an example of local adjustment in extremis'[49] of the Kelsenian model.

This heterogeneous character is enhanced by the differences of the powers of the CCs and the extent of the review they carry out. As mentioned in the *Introduction*, in addition to the classical constitutional review, there are now other powers attributed to CCs that positions them in the role of arbitrators between constitutional

44 See Safta, 2022a.
45 Constitution of Greece, Art. 100.
46 Constitution of Estonia, Art. 149.
47 Constitution of Finland, Section 106 – Primacy of the Constitution.
48 Constitution of The Netherlands, Art. 120.
49 Kombos, 2020.

authorities, particularly in situations where it is challenging to differentiate between political and legal matters.

It is also important to consider the contribution of each court's case-law to their own competence. Typically, the legislation governing the CCs' organisation and functioning supports this approach. For instance, Article 3 of Law 47/1992 on the organisation and functioning of the CCR[50] states that the Constitutional Court's powers are determined by the Constitution and the law. Additionally, the Constitutional Court 'is the sole authority that can determine its competence", and "this cannot be challenged by any public authority'. From this perspective, the activism and profile of judges should be carefully considered. Just as at EU level, where the ECJ appears as a "zealous architect"[51] of integration and, implicitly, of defining its own competence, at national level the CCs "build", on the one hand, to strengthen their legitimacy, and on the other hand, to expand their jurisdiction.[52] This is a topic of high interest for the CCs itself, as demonstrated by thematic conferences such as the one entitled Judicial Activism of CCs in a Democratic State.[53] Hosted by the Constitutional Court of Latvia, the conference highlighted the special role of CCs in a democratic society, explaining, in essence, that the cases they review are complex, which may cause them to depart from the classical Kelsenian concept of constitutional review. It was also emphasised that CCs may engage in judicial activism, which may lead to discussions about their place within the system of separation of powers.[54]

2.3. EU Treaties as a quasi-constitution and ECJ acting as quasi-constitutional court

In the legal literature[55] the question was raised as to whether there is a European constitution. We agree that the answer should be nuanced:

> if we define a constitution as those founding laws that regulate the society, then the EU undoubtedly has a constitution. Nevertheless, if we formally limit the concept of constitution by referring to the concept of State, then the EU cannot have a constitution, because the EU is not a State, but a Union of States.

In this sense, some authors[56] have thoroughly examined the idea of the EU's legal autonomy.

50 Law No. 47 of 1992, On the Organisation and Operation of the Constitutional Court, Romania.
51 Gáspár-Szilágyi, 2016.
52 See Safta, 2022c, pp. 98–113; Safta, 2012, pp. 1–20.
53 Venice Commission, 2016; Constitutional Court of the Republic of Latvia & European Commission for Democracy through Law.
54 For the issue regarding the legitimacy of the Constitutional Courts, see De Visser, 2018.
55 Schutze, 2021, p. 44.
56 See, for example, Lenaets, 2019.

Based on the answer/perspective, we also can qualify the ECJ as the supreme interpreter of the treaties of the EU. However, the debate is purely theoretical with regards to the qualification of the ECJ, since it is obvious that it behaves as and over time has upgraded itself to a genuine constitutional court. Thus, the diversity among MS constitutional provisions, the fragmentation that is evident, and the unfeasibility of a normative solution such as the European Constitution has led to the ECJ's centripetal action. This has created a favourable environment for the ECJ to interpret and fill in the gaps in a heterogeneous normative content, resulting in a coherence governed by its own rules of interpretation. Starting with the so-called historic judgments in cases such as *Van Gend & Loos, Case C-26/62, Flaminio Costa v. E.N.E.L., Case C-6/64, Amministrazione delle Finanze dello Stato v. Simmenthal SA, Case C-106/77*,[57] the ECJ has 'planted the seeds of an autonomous legal order',[58] whose supremacy consistently states and protects it: '[EU] establishes a new legal order of international law, in favour of which the States have limited their sovereign rights, even if in a limited number of areas, and whose subjects-maters are not only the Member States, but also their nationals'. The solutions pronounced in the preliminary references have essentially contributed to the "drawing" of a distinct constitutional architecture. As also noted, the ECJ 'played a formative role in the evolution of the EU from a free-trade zone to something approaching a nation'.[59]

2.4. Horizontal and vertical relationships between Courts in the EU

Fragmentation in terms of constitutional regulations and constitutional judicial reviews results in legal consequences, in terms of the effects of the decisions pronounced by the courts, as well as in horizontal and vertical relationships between them. These relationships are essential for the role of the centripetal force of constitutional justice in the EU.

Concerning the horizontal relationship, the situations are different as we are dealing with a constitutional review carried out within a justice system, compared to the one carried out by a court outside of this system. In the latter situation, specific challenges arise, concerning the relationships between specialised courts and courts of law, in terms of interpreting and applying EU law.

This issue is complex and not easy to resolve. Establishing the boundaries of jurisdiction for different courts in relation to EU law and ECJ jurisdiction, as well as enhancing these relationships, requires a significant time and effort through judicial dialogue, sedimentation, and refinement. For example, in Italy, where a Kelsenian model constitutional court operates, acceptance of international and supranational law has gradually been embraced by both the courts of law and the Constitutional Court. In this light, it was shown that 'one of the most interesting features of the

57 Case 106/77.
58 Pernice, 2013, p. 56.
59 Maduro, 1998, p. 152.

Italian justice system is the progressive sharing of tasks and liabilities between the constitutional court and the courts of law within the judicial review of legislation and the enforcement of fundamental rights'. The first 40 years (1956-1996) of constitutional review of the Italian court were compared to a long "orchestral rehearsal", in which 'the Constitutional Court and its judges gradually prepared the procedural instruments at their disposal in order to fill the blank spaces' within the legal framework. In years, especially at the beginning of the new millennium, 'it was instead dedicated to the strengthening of the connection rules and above all to the confirmation of the collaboration of the two types of entities, the mutual interdependence of their work and the sharing of the same goals.'[60]

In Romania, where the Kelsenian/European model of constitutional review operates, the judge from the courts of law has a monopoly in interpreting the infra-constitutional legislation, but also obligations arising from Articles 20 and 148 of the Constitution, which lay down the priority of international treaties in the field of human rights when they offer higher protection than the national legislation and, respectively, the priority of mandatory EU norms when they violate the national legislation. The interpretation and enforcement of the same constitutional texts, with *erga omnes* binding nature, is carried out by the Constitutional Court (CCR). Over time, significant steps have been taken to refine the powers of the two categories of courts in the interpretation and enforcement of EU law. Various stages have been passed, starting with the assumption of a competence to control internal rules in relation to EU legislation, continuing with the rejection of this competence and emphasising the competence the courts in the field (somewhat following the French model)[61] and later by creating a so-called doctrine of "interposed norms", which allows the compatibility of internal norms with EU law based on art. 148 of the Constitution to be verified in a nuanced way. According to the CCR:

> the use of a norm of European law within the constitutional review as a norm interposed to that of reference [A/N the Constitution] implies, based on Article 148 (2) and (4) of the Romanian Constitution, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unequivocal by itself or its meaning must have been established clearly, precisely and unequivocally by the Court of Justice of the European Union and, on the other hand, the norm must be limited to a certain level of constitutional relevance, so that its normative content supports the possible violation of the Constitution by the national law – the only direct norm of reference within the constitutional review. In such a hypothesis, the approach of the Constitutional Court is diffrent from the simple enforcement and interpretation

60 Lamarque, 2012, p. 192.

61 Dec no 2010-605 of 12 May 2010: 'it is not for the Conseil constitutionnel, but for the ordinary and administrative courts to examine whether legislation is consistent with EU law, to apply EU law themselves on the basis of their own assessment, and to refer questions to the ECJ'; Bossuyt, 2012, p. 53.

> of the law, a power that lies with the courts and administrative authorities, or from the possible issues related to the legislative policy promoted by Parliament or the Government, as the case may be.[62]

It is still not sufficiently clear how tasks and responsibilities for interpreting and enforcing EU law are divided between the CCR and courts of law, particularly concerning the doctrine of interposed norms, since the notion of "constitutional relevance" of European law norms lacks a clear definition. Things have become even more complicated due to recent ECJ jurisprudence,[63] which allows courts of law to disapply the judgments of the CCs.

Other countries are also working to clarify their court relationships. Even where the CCs fall under the judiciary, it has taken time to establish horizontal relationships between them, while considering the constitutional order of the EU and the ECJ.[64] As was emphasised, for example with regard to Germany, in order to prevent a fragmented enforcement by the multitude of national courts of EU law with reference to the identity clause, alongside the Solange limit and the *ultra vires* concept developed equally in the case-law of the Federal Constitutional Court, the monopoly of verifying compliance with the national constitutional identity was undertaken by the Federal Constitutional Court. Procedurally, the review can follow various paths, including the path of the constitutional complaint based on Article 93.1 no. 4 a) of the Fundamental Law. Thus, if a court of law refers to the priority of EU law in a way that is not in accordance with the constitutional identity, the aggrieved party has the possibility of formulating a constitutional complaint.[65]

The interaction between courts on the same level also affects their relationship with the ECJ, with significant consequences arising for the constitutional order of the EU. The preliminary reference system should especially serve as a central nervous system in this regard, ensuring the consistent and complete application of EU law, as well as promoting the harmonisation of the constitutional framework. Recent developments shows a new role for the ECJ as an "arbiter" in internal jurisdictional conflicts, which leads to a reconfiguration of relationships between courts.

In the construction of this "puzzle" of European constitutional justice, we should not ignore the role of the European Court of Human Rights (ECtHR), which, as we will explain further, has become increasingly involved in the EU construction.

62 Decision No 668/2011, Official Gazette no. 487 of 8 July 2011; See also Decision No 414/2019, Official Gazette no. 922 of 15 November 2019.
63 See Case C-430/21; Case C-107/23 PPU.
64 See Fabbrini and Maduro, 2017.
65 Grosche, 2018, p. 136.

3. Convergences and divergences within the cooperation of the courts

3.1. Constitutional review of Treaties – "the filtering effect"[66]

The constitutions of MS act as "filters" in the development of primary European law since any changes made to constitutive treaties must be coherent with the constitutional framework of the MS.[67] As this compliance is verified, with regard to the particularities stated above, by the MSs' CC, their "voices" carry a particular weight, in respect to the establishing of the EU's normative/constitutional framework. Although less addressed, this contribution particularly expresses the role of the centripetal force of constitutional justice, as long as, bridges are built in this way between the national structures regulated through the constitutions and the constitutional core of the EU and its founding treaties. Through the decisions they issue, the CCs provide the "green light" to ever closer integration and, simultaneously, a national perspective on this integration, emphasising limits, but also necessary steps to develop the EU's constitutional order.

Given its vast scale and importance, this topic deserves a thorough examination, in terms of the powers of the CCs and their envolvment in the constitutional review of international agreements. However, to ensure that all CCs in the EU have their voices heard, it is necessary to regulate appropriate and effective powers for the "filtering effect". In Romania for example, the CCR's power to review treaties before their ratification by the Parliament is merely decorative.[68] In 2003,[69] during the revision of the Constitution,[70] a provision was established (currently Article 146 letter b) of the Constitution) that gave the CCR the power to exercise prior control over international treaties before they were ratified by Parliament. However, this provision has never been put into practice because the Court has not been notified of any such cases. For example, the Treaty of Lisbon was ratified in a timely manner by the Romanian Parliament through Law No 13/2008[71] without any objections to its constitutionality.[72] The rapid and undisputed ratification is not a problem in itself, but in

66 For the concept of the "filtering effect", see Grimm, 2015, p. 276.
67 Ibid.
68 Toader and Safta, 2023.
69 The law on the revision of the Constitution of Romania No 429/2003 was approved by the national referendum of 18-19 October 2003, and came into force on 29 October 2003, the date of the publication on the Official Gazette of Romania of the No. 3 of 22 October 2003 for the confirmation of the ballot returns of the national referendum of 18-19 October 2003 regarding the Law on the revision of the Romanian Constitution.
70 In its initial form, the Constitution was adopted at the meeting of the Constituent Assembly on 21 November 1991 and came into force following its approval by the national referendum on 8 December 1991.
71 Official Gazette No. 107 of 12 February 2008.
72 Parlamentul României, 2008.

the light of recurrent discussions that exist in Romania on the subject of supremacy versus priority of EU law with respect to the Constitution it, would have been helpful to have the perspective of the CCR on these relations, as established by the Treaty of Lisbon (especially since this treaty consistently took over from the provisions of the draft Constitution for Europe).

At the opposite pole regarding the constitutionality control of EU treaties, the example of Germany (*Bundesverfassungsgericht)* is well known. Both in the Maastricht[73] and the Lisbon judgment,[74] the *Bundesverfassungsgericht* has the possibility to share its perspective on the EU's structure and developments, serving as a model for other CCs as well. Thus, in the *Maastricht judgment*, the Court characterised the Treaty as being likely to give 'further substantial functions and powers to European institutions, in particular by extending the powers of the EC and by incorporating the monetary policy'. However, 'these functions and powers have not, as yet, been supported at treaty level by a corresponding intensification and extension of the principles of democracy'. According to the Court, if a group of democratic States has sovereign powers and carries out the duties of public authority, the peoples of the MS are the ones who must legitimise it democratically, through national parliaments. Therefore, the democratic legitimisation is achieved by recuperating the action of the European bodies to the parliaments of the MS. As the nations of Europe continue to integrate, the additional fact that the institutional structure of the EU transmits democratic legitimacy through the European Parliament elected by the citizens of the MS becomes apparent. In this regard, the German Constitutional Court concluded that

> it is therefore crucial, both from the point of view of treaty law and that of constitutional law, that the principles of democracy upon which the Union is based are extended in step with its integration, and that a living democracy is retained in the Member States while the process of integration is proceeding.

These conclusions underline a problem of EU constitutionalism, also discussed in the specialised literature, namely the fact that it has not been adequately paralleled by its democratisation.[75]

Likewise, in the Lisbon judgment, referring to the structure of the EU, the *Bundesverfassungsgericht* held that

> the structural problem of the European Union is at the centre of the review of constitutionality: The extent of the Union's freedom of action has steadily and considerably increased, not least by the Treaty of Lisbon, so that meanwhile in some fields of policy, the European Union has a shape that corresponds to that of a federal state,

73 German Federal Constitutional Court, 1993, Decision of October 12, 1993, In Re Maastricht Treaty, Cases 2 BvR 2134/92, 2 BvR 2159/92.

74 German Federal Constitutional Court, 2009, BVerfGE 123, 267 – Lisbon Decision (Lissabon-Urteil).

75 See also Belov, 2019, p. 103.

> i.e. is analogous to that of a state. In contrast, the internal decision-making and appointment procedures remain predominantly committed to the pattern of an international organisation, i.e., are analogous to international law; as before, the structure of the European Union essentially follows the principle of the equality of states. As long as, consequently, no uniform European people, as the subject of legitimisation, can express its majority will in a politically effective manner that takes due account of equality in the context of the foundation of a European federal state, the peoples of the European Union, which are constituted in their Member States, remain the decisive holders of public authority, including Union authority.

According to the German Federal Constitutional Court,

> in Germany, accession to a European federal state would require the creation of a new constitution, which would go along with the declared waiver of the sovereign statehood safeguarded by the Basic Law. There is no such act here. The European Union continues to constitute a union of rule (*Herrschaftsverband*) founded on international law, a union which is permanently supported by the intention of the sovereign Member States. The primary responsibility for integration is in the hands of the national constitutional bodies which act on behalf of the peoples. With increasing competences and further independence of the institutions of the Union, safeguards that keep up with this development are necessary in order to preserve the fundamental principle of conferral exercised in a restricted and controlled manner by the Member States. With progressing integration, fields of action which are essential for the development of the Member States' democratic opinion-formation must be retained. In particular, it must be guaranteed that the responsibility for integration can be exercised by the state bodies of representation of the peoples.

Also, the Constitutional Court of the Czech Republic was twice called upon to verify the constitutionality of the Treaty of Lisbon. Rejecting the referrals,[76] the Court found*, inter alia*, that

> in a modern democratic state governed by the rule of law, state sovereignty is not an aim in and of itself, i.e. in isolation, but is a means to fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands [...] The transfer of certain competences to the state, which arises from the free will of the sovereign and will continue to be exercised with its participation in a pre-agreed, controlled manner, is not a sign of the weakening of sovereignty, but, on the contrary, can lead to strengthening it in the joint process of an integrated whole.

Both courts took into consideration the states' will in achieving deeper integration and were careful in balancing various factors when characterising the EU's profile. We

76 See Constitutional Court of the Czech Republic, 2009, Press Release.

believe that these considerations are also applicable to Romania. According to Article 152 of the Constitution, Romania has a "unitary" character, which comprises a fundamental component. If Romania were to become a part of a federal structure in the traditional sense, adopting a new Constitution would be put into question.

Somewhat symmetrically, in addition to the "filtering effect", it is important to consider the power of CCs to verify amendments to their own constitutions. It is essential to analyse this dimension, because as the German Federal Court has stated, 'every transfer of sovereign rights results in an alteration of the constitutionally defined system of competences and thus in substance a constitutional amendment'.[77] For example, the CCR ruled the unconstitutionality of a proposal to revise the Constitution, aiming to amend the relationships between the national legal order and that of the EU,[78] with important consequences in terms of the general interpretation of these relationships.

However, as noted,[79] 'this filtering effect cannot prevent every deviation from the national constitutions that is associated with the exercise of sovereign rights by supranational institutions'. Its proper functioning is nevertheless crucial to support the integration process, offering a better understanding of the constitutional boundaries of integration and the perspective of CCs in this regard.

3.2. Implementation of EU Law in the Member States

3.2.1. Ways of reception EU law through constitutional jurisprudence

Based on the previous section's overview of the constitutional framework, it is evident that several states recognise the primacy of Union law and its direct applicability. In other states, constitutional provisions are open to interpretation, making it more challenging for CCs to fulfil their mission when dealing with the relationship between legal orders. Also taking into account this specificity of the constitutional regulation, we can analyse the role of CCs in promoting integration through at least three different aspects. The first aspect involves the interpretation of constitutional provisions in such a way that avoids conflicts. The second aspect involves the referral of their decisions to ECJ jurisprudence. The third aspect involves the utilisation of the mechanism of preliminary reference as a direct way to communicate with the ECJ. Each of these aspects is susceptible to extensive analysis and consideration, but in this context we will point only a few relevant points out.

Concerning the first aspect, we can consider "conformity interpretation",[80] meaning the role of the courts to interpret 'national constitutional law and, possibly, ordinary law in a spirit that is open to European law and/or open to international

77 German Federal Constitutional Court, 1981. BVerfGE 58, 1(36).
78 See Decision No 80/2014, Official Gazette No. 246 of 7 April 2014.
79 Grimm, 2015.
80 See Grabenwarter, no date.

law'. For example, the Portugal Constitutional Tribunal, in its Ruling no. 422/2020,[81] containing a detailed analysis of the legal nature of the EU and the relationships it generates, stated that 'it can only be workable with a dynamic based on factors and practices which induce some kind of systemic coherence, based on something other than hierarchical normative integration.' (para 2.4.1) Concerning the primacy of the EU Law, the Portuguese Tribunal consider that

> This issue is unequivocally resolved in the Portuguese legal system by Article 8(4) of the CRP, which states that [t]he provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law. (para. 2.5.1)

Also, in the Ruling No. 268/2022[82] the Portugal Constitutional Tribunal stated that the principle of conforming interpretation – which emerged in the 1970s in connection with the obligation of national courts to interpret national law in such a way as to render effective directives that do not have a direct effect (cf., among many others, the *CJEU Judgments Mazzalai*, of 20.05.1976, Case 111/75, and *Von Colson*, of 10.04.1984, Case 14/83; *Marleasing*, of 13.11.1990, Case 106/89) – has been developed into a general canon for interpreting national law (all national law) in order to render European Union law fully effective. This principle states that national courts, when applying domestic law, are required to interpret it, as far as possible, in the light of European law: "This obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them".[83]

Consequently,

> as the provisions under review fall within the scope of EU law, an interpretation of the constitutional parameters to which the rules at issue are subject takes into account European provisions, seeking to establish the interpretation that is closest to European law.[84]

81 Ruling No. 422/2020, Case No. 528/2017.

82 Ruling No. 268/2022, Case No. 828/2019.

83 CJEU Judgment of 24.01.2012, Maribel Dominguez, Case C-282/10.

84 See also Ruling of the Portuguese Constitutional Court No. 464/2019: 'by virtue of Article 8 of the Constitution, which establishes the importance of international law and Union law in the domestic legal order, and also of the open-ended clause in respect of fundamental rights enshrined in Article 16 of the Constitution, this Court cannot fail to consider the fundamental rights enshrined in the CFREU and in said Convention. It must also take into account, in a spirit of inter-jurisdictional dialogue, their interpretation by the competent bodies for the purpose of their application, particularly the Court of Justice of the European Union ('CJEU') and the European Court of Human Rights ('ECtHR').'

We specifically mentioned these rulings to illustrate the idea that the priority of EU law does not necessarily imply a normative or institutional hierarchy. This can and must be accepted as an effect within the limits of the states' will legal and constitutional interpretation.

The second aspect shows the role of the CCs to enhance the coherence of the EU legal order by citing ECJ jurisprudence. The so called "power of legitimisation" could be discussed in a way "by acknowledging and citing European decisions, they [CCs] underpin the legitimacy on the latter. With Constitutions containing provisions derived from European law, the CCs specify the constitutional obligations and requirements through reference to European provisions".[85]

The third aspect concerns the operation of the mechanism of preliminary reference provided by Article 267 TFEU, being an "engine" of integration and constitutionalisation. It is widely accepted that no other institution has had such a significant impact on defining the main characteristics of the EU order, accelerating its development, and enhancing the integration process.[86] From the perspective of the CCs, this collaboration strengthens the impact of ECJ case law and enables CCs to present their interpretations based on a constitutional order that incorporates European law. By posing questions to the CJEU and presenting their own stance and solutions, CCs can engage in a constructive dialogue with CJEU case law. This is especially significant for novel issues like competition and conflicts between individual fundamental rights, where the preliminary ruling procedure helps to synchronise national and European approaches.[87] This viewpoint is a desirable perspective on the cooperation in European constitutional justice, which generally reflects the state of play. However, it is important not to overlook the potential issues that arise from this cooperation, including disputes of authority between the CCs and the ECJ.[88] The preliminary reference mechanism may not invalidate norms, but it does place constraints on national constitutions and courts. They no longer have the sole authority to reject national laws. Consequently, the CCs have diverse reactions towards developments in the use of the instrument of preliminary references. As was expressed casually with reference to the developments in the use of the instrument of preliminary references (especially in the States which have more recently become EU member),

> the time of curious discoveries and innocent delight has passed rather quickly. A few years later, darker shadows crept in as well. While certain courts in the new MS have indeed learned to discuss, others have started to yell and others have remained knowingly silent. Furthermore, certain courts have learned with remarkable speed to use the procedure of preliminary references for their own purposes.[89]

85 Grabenwarter, no date.
86 Tizzano, 2012.
87 Grabenwarter, no date.
88 Ibid.
89 Bobek, 2014, p. 782, with reference to Bobek, 2014, p. 54.

On the other hand, the authoritarian tone of the ECJ and the progressive construction of what some authors call an "imperial" profile is not exempt from criticism.[90] In other words, even when it has qualified as a keystone of European integration, the preliminary reference does not settle all disputes. In fact in some cases, it can lead to conflicts if the courts take an overly authoritative stance. This will be explored further in the upcoming sections, where the difference between constructive and destructive conflicts will be illustrated.

However, even if not as "enthusiastic" as the courts of law, one by one the CCs have addressed the ECJ with preliminary references, especially concerning fundamental rights.[91] This cooperation has a significant impact on the legislation of the MS. Thus, for example, following the preliminary reference submitted by the CCR and the Ruing of the ECJ in the Case Coman C -673/16, the Romanian court upheld the exception of unconstitutionality raised in that case and found that the provisions of Article 277 (2) and (4) of the Civil Code were constitutional in so far as they permitted the granting of the right of residence on the Romanian State, under the conditions laid down in European law, to the spouses – citizens of the Member States of the European Union and/or citizens of non-member countries – of marriages between persons of the same sex concluded or contracted in a MS of the EU.[92] It is a significant change in terms of the Romanian legislation (its interpretation) and further developments.

In terms of ECJ jurisprudence, a significant step that could "encourage" courts of last instance (including CCs) to use the mechanism of preliminary reference is represented by Cases C-283/81, Cilfit S.R.L. and Lanificio di Gavardo SpA v. Ministry of Health, Judgment of 2 October 1982,[93] as well as more recently, C-561/19 Consorzio Italian Management and Catania Multiservizi, Judgment of 6 October 2021.[94] The ECJ established that

> Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to bring before the Court of Justice a question concerning the interpretation of EU law that has been raised before it, unless it finds that that question is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt.[95]

Emphasising the importance of the judicial dialogue, the ECJ also confirmed that a national court of last instance must refer a new question if, after a first preliminary

90 See Belov, 2019, p. 107. With reference to the "Gobal Judicial Empire".
91 For a detailed presentation, see Toader and Safta, 2016.
92 Decision No. 534/2018, Official Gazette No. 842 of 3 October 2018.
93 Case 283/81.
94 Case C-561/19.
95 Points 59 and 66; In this regard, see also Joined Cases C-569/16 and C-570/16, point 21.

ruling, it continues to face doubts about the interpretation of Union law in the case in which it was notified. When a new request for a preliminary ruling is made, the national court of last instance will transparently state its concerns in such a way, so as to allow all Member States to submit their observations in the proceedings before the Court of Justice, which after deep reflection and taking into account all the submitted observations, will bring up additional clarifications or specify its case law.

In recent times, the ECtHR has been increasingly involved in the "multilevel sovereignty games"[96] by backing the ECJ, particularly concerning the responsibility of courts to send preliminary references. Thus, for example, in the Case *Georgiou v. Greece, Judgment of & July 2023*[97] it has found a violation of Article 6 § 1 of the Convention "on the ground that the Court of Cassation did not examine the applicant's request for a preliminary ruling to be sought from the CJEU." This practice of the ECtHR seems to offer a solution to the issue raised in legal doctrine[98] about finding a "useful remedy" when national courts fail to address preliminary referrals, despite being required to do so.

3.2.2. Bridges and walls. Protection of human rights and counter-limits

3.2.2.1. The process of convergence in the field of human rights – lights and shadows

Within the process of implementing EU law, the area of protection of human rights perhaps illustrates to the highest degree the functioning of the centripetal mechanism that we associated with constitutional justice ('in the field of fundamental rights a process of convergence is going on in Europe').[99]

This "process of convergences" is a very complex one, due to the coexistence of different catalogues of human rights (constitutions, the Charter of Fundamental Rights of the European Union,[100] and the Convention for the Protection of Human Rights and Fundamental Freedoms).[101] Each catalogue offers standards of protection, and each level has its own "guardian", which includes the CCs, the ECJ, and the ECtHR. Given the vital role of fundamental rights, the question of how to reconcile these sources and voices to prevent legal insecurity for European citizens arises. The identification of solutions to this problem leads to the creation of "bridges", in the sense of a higher coherence of the European legal order.

The ECJ has developed, with regards to the relationships between national (constitutional) law and EU law, a "doctrine" which offers a methodology for the interpretation and enforcement of various standards of protection of fundamental rights.

96 See Belov, 2019, p. 103.
97 European Court of Human Rights, 2023, *Case of Georgiou v. Greece*, Application no. 57378/18.
98 See Broberg, 2015, pp. 9–37.
99 Arnold and Feldbaum, 2016.
100 Charter of Fundamental Rights of the European Union, 2012 (2012/C 326/02).
101 European Convention on Human Rights, 1950.

The distinction is based on the degree of harmonisation at the EU level, essentially being explained by the President of ECJ at the most recent Congress of the Conference of European CCs in 2021, as follows:

> in the light of the seminal judgment of the Court of Justice in *Melloni*, this means, in essence, that where a normative conflict between provisions of national (constitutional) law and EU law occurs, in a situation where the EU legislator has fully harmonised the level of protection of a fundamental right, the compatibility of a national measure with such a right is to be examined in the light of EU law, and not according to national constitutional standards.[102]

Conversely, in line with the judgment of the Court of Justice in *Åkerberg Fransson*, where there is no such harmonisation, national standards that are higher than those guaranteed by the EU Charter may apply, provided that 'the primacy, unity and effectiveness of [EU] law are not thereby compromised".[103]

This approach raises sensitive issues concerning the national and EU law standards, all the more so national constitutions and practices incorporate the standards of the European Convention for Human Rights, as interpreted by the ECtHR. For example, in Austria, the European Convention on Human Rights was granted the rank of constitutional law by explicit constitutional order.[104]

As for the Constitutional Courts, an example of convergence in terms of the interpretation and application of the instruments of protection of human rights in Europe is offered, for example, by the Portugal Constitutional Tribunal, in its Ruling no 268/2022 where it was noticed that

> in the context of protecting fundamental rights, there is a tendency towards consistency between the European legal order and the national legal order. This is understandable, given the network of constitutional protection generated by constant communication between the national and European legal orders. The European legal order feeds on the national catalogues.

Indeed, the Treaty states that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law' (Article 6(3) TEU), while the European Union itself is bound by the CFREU, which contains a catalogue of fundamental rights drawn up in the image of the national constitutions. According to Freitas Do Amaral and Nuno Piçarra, this is the "counterpart of the principle of primacy: the guarantee of substantive congruence between the legal order of the

102 Case C-399/11.
103 Case C-617/10, para. 29.
104 See Holoubek, no date.

European Union and the national legal orders as regards fundamental constitutional principles" ('*O Tratado de Lisboa e o princípio do primado do direito da União Europeia: uma 'evolução na continuidade*'', Revista de Direito *Público, no. 1, 2009). This follows very clearly from the absorption into the acquis* communautaire of the 'constitutional traditions common to the Member States' in the area of fundamental rights, as a standard for interpreting the Charter itself (Article 52(4) CFREU).

In this context, the Constitutional Tribunal stated that 'In plain terms, this multi-level interconnection does not occur in this direction alone'. In fact, in accordance with Union law, any interpretation of national law (in any of its sources) takes European law into account: 'It is for the national court, within the limits of its discretion under national law, when interpreting and applying domestic law, to give to it, where possible, an interpretation which accords with the requirements of the applicable Community law' (CJEU Judgment of 4 February 1988, Murphy, Case 157/86). This is the case in the domain of fundamental rights which are simultaneously provided for in the Constitution and in the CFREU, especially when the latter provides for a higher level of protection (Article 53 CFREU). As such, international sources of fundamental rights are considered when applying domestic constitutional provisions and principles. It follows that when the State applies European Union law (Article 51(1) CFREU), the fundamental rights determining the validity of domestic provisions should be interpreted in a way that prioritises consistency with the European provisions to which the State is bound, thereby establishing an interactive rather than hierarchical relationship. And, should conflicts occur between these parameters, the solution will be found 'by seeking to interpret the Constitution according to Community law' (Rui Moura Ramos, 'The adaptation of the Portuguese Constitutional Order to Community Law').

However, the issue of fully harmonising protection standards across the EU is a complicated one. Most of the challenges have been determined by mixed reports, which involve all three categories of courts (and international instruments), national, the ECtHR and ECJ, due to the risk of different interpretations of the same rights.

Emphasising the importance for European harmony, this complex issue was the subject of the most recent Congress of the Conference of European CCs, hosted in 2021 by the Constitutional Court of the Czech Republic.[105] The speeches of the presidents of the ECtHR, the ECJ, the Venice Commission, and the CCs expressed various aspects of the protection of fundamental rights and the role of European judges in articulating the various interpretations of the competing norms in the matter, emphasising the role of the Conference "to understand it, is to analyse and rationalise these differing catalogues of rights and their relationship with one another".[106] Metaphors were commonly utilised to provide valuable insights into effectively resolving potential conflicts. Thus, with regards to the relationships

105 Conference of European Constitutional Courts; Conference of European Constitutional Courts. National Reports.

106 Robert Spano, President of the ECHR; Ibid.

between the catalogues of rights and the courts in Europe, a speech by the former President of the German Federal Constitutional Court, Prof. Dr. Andreas *Voßkuhle*[107] was mentioned, where he compared it to a mobile, meaning a 'a kinetic sculpture which consists of an ensemble of balanced parts that can move but are connected by strings or wire'. This image is opposed to that of a pyramidal structure, where "pyramid" is understood as a fixed geometric structure that has a base and a top. It seems that the European human rights protection was better understood as "mobile", with the CCs and the European courts having distinct but complimentary roles which are inherently linked to each other. Fixing the cooperation between these sources more concretely or pragmatically, the president of the ECJ expressed that 'as to the ECHR and the Charter, it is worth noting that although both catalogues are committed to protecting fundamental rights, their respective systems of protection do not function in precisely the same way'.[108] Whilst the Convention operates as an external check on the obligations imposed by that international agreement on the Contracting Parties, the EU's Charter is an internal component of the rule of law within the EU. As a result, the meaning and scope of the rights recognised by the Charter that correspond to those protected under the Convention are constantly and directly influenced by the case law of the ECHR, on the contrary, the Charter invites cooperation with *Strasbourg*, even where EU law has followed its own autonomous path. In the same vein, it is the Charter itself that requires the ECJ to interpret fundamental rights in harmony with the constitutional traditions common to the Member States. That harmony 'does not, however, rule out the adoption of a uniform standard of protection at EU level that prevents national (constitutional) courts from applying higher standards'. Likewise, the opinion that an orderly application of fundamental rights does not necessarily entail a "separated application" of those rights according to their national, supranational, or international origin was expressed. Instead, in the European legal space, 'the highest level of protection may be achieved by different layers of protection that interact and complement one another'.[109] All these ideas sound fine in theory, but in practice, this interaction is a continuous source of challenges, as it is difficult to identify a clear methodology to be followed by all parties involved, especially when there are "overlaps" of various incident regulations and the application is carried out by the judge of a national court.

As for recent developments, the manner in which the ECtHR and ECJ are each gathering forces is notable, in what was called the growing 'interplay between the European Convention on Human rights and EU law'.[110] As noted, for a long time, the ECJ and the ECtHR have been seeking to adjust to each other's case law, but

107 Voßkuhle, 2014.
108 Lenaerts, 2021b.
109 Polakiewicz, 2016.
110 See Callewaert, no date.

> this trend has gained momentum in the last couple of years, as a result of a rapidly growing number of issues of relevance to both legal systems. Both European courts seem well aware that any discrepancies in the interpretation of the same fundamental rights would be detrimental for citizens and MS alike, if only because the latter are bound to apply EU law at the same time as being within the jurisdiction of the Strasbourg Court.[111]

For example, in the case of Spasov v. Romania,[112] the ECtHR found that the applicant had been the victim, inter alia, of a denial of justice (Article 6 of the Convention) because he had been convicted on the basis of Romanian criminal law which previously had been found to be in breach of EU law. By not applying these rules, which had a direct effect on the Romanian legal order and took precedence over national law, the Romanian courts had made a manifest error of law.[113] Likewise, in the case of Moraru v. Romania,[114] the ECtHR found a violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1 to the Convention on account of the failure by the domestic authorities to put forward any reasonable and objective justification for the disadvantage faced by the applicant, whose height and weight were below the statutory thresholds, in order to be admitted to study military medicine. The ECtHR found, among other considerations, that in adjudicating the applicant's case, the Romanian courts failed to "meaningfully engage" with the relevant case-law of the ECJ, giving rise to the ruling in Kalliri (C-409/16) (§§ 24 and 54).[115] It can be considered that this approach strengthens the position of the ECJ, but also of the ECtHR. As noted,[116] compared to EU law, the ECHR is in a weaker position as it lacks the ability to claim precedence over national law and unify the law in Europe. However, by condemning EU member states for violating the ECJ rulings, the ECtHR associates the effects of the ECJ decisions, both of priority and uniformity.

What should be the role of the national judge in this "game of sovereignty"? The analysis laid out here leads us to believe that the national judge should be proactive and should engage in discussions with both international courts, rather than acting as a passive recipient. This is especially important given the vague language used by the ECtHR, for example in the case of Moraru v Romania, ("meaningfully engage") that leaves a wide margin of appreciation to the international court. The coherence of protection of fundamental rights must be supported through judicial dialogue: "since a harmonious fashion to apply these sources of law is needed, it is equally essential that the national courts, the CCs, the ECJ, and the ECtHR engage in constant dialogue based on mutual trust".[117]

111 Callewaert, 2009.
112 Case *Spasov v. Romania* (Application no. 27122/14).
113 See Callewaert, no date.
114 Case of *Moraru and Marin v. Romania* (Applications nos. 53282/18 and 31428/20).
115 Ibid.
116 Grimm, 2015, p. 285.
117 Lenaerts, 2021b.

3.2.2.2. The doctrine of counter-limits

In a legal order established to a significant extent by interpretation, different positionings, and attempts to draw fundamental boundaries around some core statal functions are inherent. The ECJ's interpretation of EU law in the *Van Gend and Loos, Costa v Enel, and Siementhal* cases marked a new era. However, it also increased the power of the ECJ and sparked debates on the primacy versus priority of EU law and the importance of cooperation between national courts. While 'the ECJ began to interpret the EU treaties in a constitutional mode, namely as more or less detached from the member states will and oriented instead by an objectivised purpose',[118] the CCs opposed the "expansionism" of the ECJ limits derived from the interpretation of national constitutions (so called "doctrine of counter-limits").

These counter-limits were mainly developed in the jurisprudence of the German Federal Constitutional Court, but are also present, with inherent particularities, in the jurisprudence of other states. Professor Andreas Paulus, judge of the German Federal Court summarised this in a Conference organised by CCR in 2019[119] explaining that, according to the principle of mutual respect, the Federal Constitutional Court had developed three doctrinal instruments, the so-called "counter-limits", regarding the obligation of the international treaties, namely: 'the effective protection of human rights (Solange), the constitutional review of *ultra vires* acts and the absolute protection of constitutional identity'. Thus, 'the constitutional judiciary buttressed the concept of Open Statehood by reconciling at times diverging interests of national democracy and international integration'.[120] The doctrine of counter-limits is activated, according to German case law, 'only in case of manifest violation' and, moreover, before finding an EU act as *ultra vires*, 'the Federal Constitutional Court addresses a request for a preliminary decision on the legal aspect underlying it to the CJEU pursuant to Article 267 TFEU'.[121] The Federal Constitutional Court

> does not consider this national reservation to be a violation of Article 19 TEU, which assigns the CJEU the task of interpreting and applying European treaties. On the whole, *ultra vires* acts of EU institutions, bodies, offices and agencies violate the European integration agenda (...) and therefore the principle of peoples' sovereignty (...) The review of *ultra vires* acts aims at protecting against such violations of the law.[122]

Similar ideas are enshrined in the case-law of other CCs like, for example, of the Italian Constitutional Court, which identified barriers, "*contralimitti*" to entry the EU law into the legal system, like fundamental principles of the constitutional legal

118 Grimm, 2015, p. 302.
119 Dorneanu and Krupenschi, 2019.
120 Paulus, 2019, pp. 36–49.
121 With reference to the German Federal Constitutional Court, 2010, BVerfG 126, Honeywell.
122 With reference to BverfG 126 Honeywell and BverfGE 142 –OMT.

order and inviolabile human rights[123] or the Portugheze Constitutional Tribunal, where it was stated[124] that the final part of Article 8(4) of the Constitution contains a "limiting clause", meaning 'the fundamental principles of a democratic state based on the rule of law'.

Examining the jurisprudential developments in the MS, it is evident that the CCs have assigned varying degrees of significance to different counter-limits, which have contributed to shaping the legal framework of the EU. Over time the focus has evolved, with safeguarding fundamental rights being a primary concern in the past ("*Solange story*")[125] due to the lack of a comprehensive list of such rights in the EU. However, the introduction of the Charter of Fundamental Rights of the EU has resulted in a decrease in resistance from the CCs concerning this matter. The most recent and significant developments refer to the constitutional identity that has developed as a "key" concept of the relationships between the MS and the EU, started from the normative content of Article 4 (2) of the TEU (as amended by the Treaty of Lisbon) according to which

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Article 4 (2) of the TEU was described in the legal literature as a 'Europeanised counter-limit',[126] consisting of a binding obligation for the EU to respect national constitutional identities. As for the identity of the constitutions themselves, the attempt to define it has given rise to waves of debate. For example, Professor Bosko Tripkovic, in his work 'Constructing the Constitutional Self: Meaning, Value and Abuse of Constitutional Identity',[127] outlining the difficulties of formulating a definition, distinguishes between the constitutions that include the so-called identity clause (a set of values that could be subject to the concept of constitutional identity), and the constitutions that do not include such a clause, but for obvious reasons, lays down principles which can be interpreted as defining this identity as a set of fundamental values for a given community at a specific time. From this point of view, a constitutional identity necessitates a unique set of principles or standards to support it, like an identity clause, or a truly fundamental set of values which define identity.

123 Tesauro, 2012, p. 211.
124 Ruling No. 422/2020, para. 2.6.2.2.
125 Sadurski, 2006.
126 Martinico, 2022, cited in Faraguna, 2016, p. 500.
127 Tripkovic, 2020.

As the power to interpret constitutional texts and determine the concept of constitutional identity lies with specific courts, their margin of appreciation in defining the concept of constitutional identity is also subject to debate. Without clear criteria, there is a risk of the abusive use of constitutional identity. Even if a Constitution includes an identity clause, national CCs may still consider other values essential and related to constitutional identity. As noted in the doctrine, 'the identity clause has been seen as a twofold invitation to struggle, involving its interpretation and the definition of the competent authority in charge of that interpretation'.[128] It was noted in this regard that the identity discourse has become a part or a dimension of a so-called "counter-constitutionalism"[129] phenomenon, 'a paradigm that has increasingly come to the fore (...) in addition to the European constitutionalisation process',[130] a "reaction" of some CCs in the Member States to the union constitutionalisation process, which manifests itself on two levels: the possibility of declaring an EU act *ultra vires* and a more refined one, developed over years, to oppose this development, namely by invoking a kind of hard core of fundamental principles on which the existence and structure of each State is based, designated by the concept of "constitutional identity". There is a very rich seam of legal literature on this topic, with reference to landmark decisions of the CCs in which the subject of constitutional identity was invoked, more or less authoritatively, malignantly, or benignly.[131] National courts and ECJ struggle with issues (sometimes in a tensioned manner) and this evolution continues to shape EU constitutionalism. In this regard, it is therefore necessary to distinguish between "bad fights" and "good fights".

3.3. Good fights and bad fights

3.3.1. Pathology of the constitutional conflicts. General aspects

Constitutional justice in the EU and, in itself, its centripetal potential, does not always equate to harmony. Fairly recent examples of divergent jurisprudence or even conflicts involving ECJ and CCs from the Czech Republic,[132] Germany,[133] Poland,[134] and Romania[135] have paved the way for the emergence of an actual juridical order of the EU. There are also divergences involving the courts of the judicial system as, for example, the Romanian cases regarding the Mechanism for Cooperation and Verification of Progress (MCV) and the specialised section of the Public Prosecutor's

128 Faraguna, 2016.
129 Concept used in Arcari and Ninatti, 2017.
130 Galimberti and Ninatti, 2020, p. 416.
131 See, for example, Galimberti and Ninatti, 2020.
132 Komárek, 2012.
133 Not only the Solange saga, but also the recent judgment delivered on 5 May 2020 regarding the European Central Bank's PSPP programme; the reaction of ECJ: Press Release No. 58/20.
134 See Alexander, 2021.
135 Selejan-Gutan, 2022.

Office with exclusive competence to investigate offenses committed by judges and prosecutors.[136] The outcome of arbitration by the ECJ in such disputes can significantly affect power and authority relationships within the EU and even shape national legislation.

Concerning the relationship between the ECJ and the CCs, the usual tensions were pointed out a decade ago, in the Conclusions of the Congress dedicated to the cooperation of CCs in Europe[137] as follows:

> Such divergences are not due to different interpretations of the law, but to differences in approach in certain constellations. They are attributed to the fact that CCs have to respect the national constitution and protect national interests, which may lead to differences in assessment in certain constellations. (…) The ECJ holds that Union law supersedes the constitutions of the Member States, while the CCs accept the primacy of Union law over ordinary, national law, but not over the constitution. Unlike the ECJ, these CCs do not accept the comprehensive primacy of Union law over national constitutional law.

As time passes, these tensions, which were qualified as "usual", become complicated when other ingredients, which call into question the respect for democracy and the rule of law, are added. Likewise, at the origin of these conflicts are concepts that are not yet sufficiently clarified, such as national constitutional identity mentioned above, a kind of "shield" more or less outlined, and coherently used. As Professor J H Weiler emphasised in a comprehensive study of judicial review in the modern world,[138] identity can be worn out or abused as part of a political or constitutional argument; this return to identity in the case law of CCs can be a more or less sincere, reactive or constitutive display of political and social sensitivity. As will be highlighted, however, the argument of constitutional identity as a coherent and well-founded discourse can produce constructive vertical dialogue, taken as such by the case law of the ECJ, as demonstrated at various moments in the history of the EU.

As has been previously mentioned, it is necessary to distinguish between "healthy" and "pathological" ways to deal with conflicts. What is the limit where conflict can be differentiated from pathology? What is the standard for qualifying a behaviour as pathological? The answer to these questions could provide an overview of "reasonableness" also regarding the reactions of international courts, which must equally demonstrate balance in their approaches.

The constructive vision (which we embrace), emphasising the desirable ("healthy") nature of such conflicts, was expressed in the same conclusions of the Congress dedicated to the cooperation of CCs in Europe[139] as follows:

136 For example Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19.
137 Grabenwarter, no date.
138 Lustig, 2018, pp. 315–372.
139 Grabenwarter, no date.

> despite mutual influences and adaptations, divergences in jurisprudence of a short-term, medium-term or – in individual cases – even long-term nature are bound to occur, which, under certain circumstances, is considered to be not only acceptable, but desirable. It is incumbent on the CCs to arrive at adequate solutions in cases of conflict. **A** process of mutual acknowledgement and adaptation between national and European Courts may provide valuable input in this context (…). In the majority of cases, divergences are resolved after some time and tend to result in a higher level of protection.

However, while some conflicts have led to significant and desirable developments in the European legal landscape, others have created very sensitive problems even today, with uncertain prospects for resolution.

3.3.2. Effects following conflicts. How constitutional courts affect political transformations

Perhaps the most analysed example of positive effects in the specialised literature, concerns the fundamental rights, namely the "opposition" of the CCs of the Solange type, determined by the lack of a catalogue of fundamental rights at EU level. The "battle" of the courts to comply with the constitutional standards of fundamental rights led to the adoption of the Charter of Fundamental Rights of the EU and, through this, a fluidisation of the centripetal mechanism of constitutional justice, by annihilating a source of conflict. The adoption of the Charta was a significant legal and political movement in the EU's constitutional order.

Another suggestive example of positive effect is the invalidation by the ECJ of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communication services, or of public communication networks and the amendment of Directive 2002/58/EC,[140] after several national courts had deemed it unconstitutional. The CCR was the first constitutional court which found the unconstitutionality of the law transposing that Directive (Law No 298/2008 on the retention of data generated or processed in connection with the provisions of publicly available electronic communications services or of public communications networks and for the amendment of Law No 506/2004 on the processing of personal data and the protection of private life within the electronic communications sector),[141] essentially for lack of clarity and precision. The CCR's decision was influenced by the ECtHR' standards on these issues.[142] The subsequent rulings by the ECJ and the CCR demonstrated the effectiveness of judicial dialogue on these

140 Joined Cases C-293/12 and C-594/12.

141 CCR found the unconstitutionality of the law through Decision No. 1258/2009.

142 *Sunday Times v. United Kingdom*, Application no. 6538/74; *Rotaru v. Romania,* Application no. 28341/95.

matters across Europe. Other CCs, such as those in Germany, Czech Republic,[143] Bulgaria, and Cyprus, have also drawn similar conclusions. Next, the EU legislator will have to find solutions compatible with fundamental rights, in the light of the considerations of the ECJ and CCs.

Another well-known example of "positive conflict" concerns the so called "saga Taricco", expression of the dialogue between the ECJ and the Italian Constitutional Court. Briefly, in the judgment of 5 December 2017 in Case C-105/14, at the request of the Tribunale di Cuneo (Italy), the ECJ ruled that national legislation on criminal liability, such as that provided for the Italian Criminal Code, which stated that the act of interruption in criminal proceedings concerning serious fraud in the field of value added tax had the effect of prolonging the limitation period by only one quarter of its original duration, may prejudice the obligations imposed on MS by Article 325 (1) and (2) TFEU in the hypothesis in which this national regulation would prevent the application of effective and dissuasive sanctions in a significant number of cases of serious fraud affecting the financial interests of the EU, or would provide for longer limitation periods for cases of fraud affecting the financial interests of MS concerned than for cases of fraud affecting the financial interests of the European Union, which should be a matter for the national court to verify. According to the ECJ, it was up to the national court to ensure the full effect of Article 325 (1) and (2) TFEU not applying, if necessary, the provisions of national law which would have the effect of preventing the MS concerned from complying with the obligations imposed on it by Article 325 (1) and (2) TFEU. As this solution clashed with the principle of the lawfulness of offenses and punishments, as regulated by the Constitution of Italy, the Constitutional Court was notified, which referred the above to the ECJ, raising the issue of a possible breach of the principle of the lawfulness of offenses and penalties which could result from the obligation laid down by the Taricco judgment to not apply the concerned provisions of the Criminal Code. The doctrine commented that the Italian Constitutional Court had decided to give ECJ a chance to clarify or better substantiate its point of view in Taricco and to interpret Article 325 of the TFEU in a way that went beyond the conflict with the supreme constitutional principle of legality, to avoid a constitutional collision between the two legal orders.[144] Consequently, in the Case C42/17, M.A.S,[145] the ECJ decided that the national courts were obliged to leave the rules in question unapplied

> unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.

143 PL. ÚS 24/10, 2011; Data Retention in Telecommunications Services, Constitutional Court of the Czech Republic.

144 Fabbrini and Pollicino, 2017.

145 Case C-42/17.

It was commented that the ECJ 'has thought things twice and its decision is different now. It is wiser too';[146] 'instead of firmly rejected the counter limit doctrine, the ECJ has been able to transform them into a vital and dynamic part of the judicial dialogue'.[147] Criticisms were also formulated, even invoking political pressure.[148] However, it must be taken into account that the sensitive area in which these decisions were pronounced, namely that of criminal law, continues to be a challenge for the dialogue of the courts and the legal order of the EU.

Progress and positive results of conflicts can also be noted in defining constitutional identity. The CCs' initiative to organise conferences and debates for constructive solutions in this regard is remarkable. These conferences range from bilateral to wider formats, usually including the participation of the ECJ.

For example, the CCR organised a Conference on this topic in 2019, which presented a great opportunity for debates.[149] Yvonne Ott, the judge of the German Federal Constitutional Court, emphasised the context that 'identity review is ultimately a lifeline used only in the event that domestic courts or, in an emergency, possibly even the European systems fail. Invoking constitutional identity remains the extreme exception'.[150] These are important clarifications and nuances especially since, at least with regard to the doctrine of the constitutional identity, the German Federal Constitutional Court was characterised as 'a sort of commander-in-chief of the national constitutional army'.[151] Likewise, in 2021 a large Conference was organised on the topic 'EUnited in diversity: between common constitutional traditions and national identities'. It was hosted by the Constitutional Court of Latvia, and opened by the President of the ECJ. The president of the Latvian Court emphasised in the context that 'It is essential to draw figurative borders between the common constitutional traditions of Europe as a whole and the sacrosanct core of constitutional identity in each Member State',[152] because it cannot be contradictory to the European constitutional tradition. More recently (26 May 2023), on the occasion of the meeting of the judges of the CCs of the Baltic States on the occasion of the anniversary of the Supreme Court of Estonia, the message transmitted was that

> it is important not to seek conflicts between national constitutional fundamental principles or constitutional national identity, on the one hand, and European identity and values, on the other, but, on the contrary, to regard harmony between them as a starting point (...) membership of the Republic of Lithuania in the European Union has become an inseparable part of the national constitutional identity.[153]

146 Manes, 2018, p. 17, cited in Allegrezza, 2019, p. 183.
147 Ibid.
148 Ibid.
149 Dorneanu and Krupenschi, 2019.
150 Ott, 2019, pp. 15–21.
151 Faraguna, 2016, p. 522.
152 CJEU, 2021, Conference proceedings, p. 13.
153 The Constitutional Court of the Republic of Lithuania, 2023.

Other bilateral meetings added new inputs concerning the cooperation of the courts to a convergent meaning of the constitutional identity.[154] In this light, some "accents" in certain decisions of the CCs[155] would seem to be just 'accidents on the road' compared to the approach oriented towards a constructive meaning of the topic of identity.

A significant evolution for the centripetal judicial mechanism of integration was the affirmation of the EU's own identity, having at its core the values laid down in Article 2 of the Treaty on European Union. Thus, in a more recent judgment concerning an action for annulment based on Article 263 TFEU, brought on 11 March 2021 by Hungary, and advocated by the Republic of Poland, v. the European Parliament and the Council of the EU (Case C156/21),[156] the ECJ held, *inter alia*, that

> 127. The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties. (…) 232. In that regard, it must be borne in mind that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.

Discussing the case law of the ECJ with special reference to the case cited above, professors Pietro Faraguna and Timea Drinoczi identify three dimensions of European identity revealed by the CJEU: identity can emerge in the interaction of one legal system with another (this happened in the EU with the Kadi judgment, where the Court of Justice put constitutional limits on international law, aiming at protecting parts of the EU's constitutional identity. In that seminal decision, the Court of Justice discerned between limitations placed on fundamental freedoms of the internal market, which are to be held permissible under exceptional circumstances, and limitations entailing a violation of the untouchable core of the EU's fundamental principles, to be rejected under all circumstances.); another dimension unfolds in the procedure established by Article 7 TEU and the new rule of law conditionality mechanism, which the CJEU has declared to be in conformity with the Treaties (this procedure intends to protect the values expressed in Article 2 TEU); a procedural dimension (even though Article 48 TUE, which provides for the ordinary and simplified revision procedure of the Treaties, does not include any textual hints to determine a

154 See, for example, Curtea Constituțională a României, 2022; 'Comunicat de presă – 30 septembrie 2022'.

155 Like the atypical Decision No 390/2021 of the Constitutional Court of Romania.

156 Case C-156/21.

European eternity clause, substantive constraints to the Treaty amending power may derive from theories of implicit unamendability).[157]

Establishing the identity core of the EU around the values enshrined in Article 2, with the principle of the rule of law at its centre, decisively influences the borders of the constitutional identity of the MS, bound by the same shared values. The case law of the ECJ establishes a counter-limit for the affirmation of the "distinct national identities" of the MS, meaning that this cannot be opposed to the rule of law as an integrative principle of the values enshrined in Article 2 of the TEU.

Despite all these developments, the debate regarding the definition and limits of constitutional identity remains relevant. Although the EU shares core values with its MS, there are still distinct elements that differentiate each State and contribute to its specific profile. As noted,[158] 'no other corner of the planet bears such an intensity of differences and contrast. Compared with the rest of the world, a major part of Europe's character is the richness brought by the many different languages spoken and many histories and traditions contained in an area of only half a million square kilometres'. It is not possible for these elements to blend together on their own and form a single identity. Having a dialogue is essential to support the process of modelling and remodelling. This helps to ensure that everyone understands, defines and respects the common core, while also retaining the unique characteristics of each state. As concerns the power to establish the content of constitutional identity, we agree the distinctions made, for example, by the Advocate General Nicholas Emiliou[159] in Case C-391/20 having as subject-matter a reference for a preliminary ruling formulated by Constitutional Court of Latvia, explaining, with reference to the "dual nature" of Article 4(2) TEU*:*

> it is not for the EU to determine, for each MS, the elements that form part of that kernel of national identity. MS enjoy significant leeway in that respect. However, MS' discretion cannot be without limits. Otherwise, Article 4(2) TEU would amount to an all-too-easy escape clause from the rules and principles of the EU Treaties that could be triggered by any Member State at any time. An obligation for the EU to 'respect' MS' national identities cannot be tantamount to a right of a MS to disregard EU law at its convenience. (para.86)

In other words, the strategy of avoiding conflicts involves assigning the same meaning to the common values of the EU and the Member States, and establishing a coherent and mutually accepted doctrine of constitutional identity. The recent Rule of law mechanism, imposed on all MS, can be a tool to lead to this goal, depending, by all means, on how it is implemented.

157 Faraguna, 2022.
158 Faraguna, 2022, p. 492.
159 Opinion Of Advocate General Emiliou, 2022; Case C-391/20.

3.4. The "art of uncertainty"[160]. Application of the decisions of the CCs and delimitation of powers in the relationships between the courts at the EU level

In more recent cases, the expression of tense dialogue between the ECJ and the CCR, against the background of several waves of preliminary referrals by the Romanian courts of law, led to a jurisprudence that we consider raising sensitive issues in the current moment regarding the relationships between EU courts. This topic is extensive, and here the issue will only be mentioned, leaving space for analysis in the next stages of the Project concerning the future of coexistence in the EU.

Thus, the main issue lies in the application of the CCs decisions by the courts of law. Although these decisions are typically considered to be generally binding according to the constitution, recent ECJ rulings have clarified that national courts of law can choose not to apply them, much like domestic laws that conflict with EU laws. Thus, responding to the Romanian courts in Case RSEuro Box Promotion and others, Joined Cases C357/19, C379/19, C547/19, C811/19 and C840/19,[161] the ECJ established that

> The principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928.

Likewise, with reference to the risk of incurring the disciplinary liability of judges who disapply de CCR decisions, the ECJ established in the case RS C-430/21[162] that

> The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court, thereby departing from case-law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law.

The context in which this decision was pronounced cannot be ignored. We notably refer to the issues raised by the Romanian courts when the CCR established in

160 The concepts belong to Allegrezza, 2019, p. 183.
161 Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19.
162 Case C-430/21.

Decision No 390/2021,[163] that, in accordance with Article 148(2) of the Romanian Constitution, as interpreted by the CCR, national courts may not examine the conformity with EU law of a provision of national law, that has been found to be constitutional by a decision from the CCR. However, despite this regrettable context, the approach of the ECJ may lead to conflicts between courts of law and the CCs if the collaboration mechanism is not effectively established in terms of the judges' competence, knowledge, and balance.

From this perspective, the ruling that followed, in Lin (Case C-107/23 PPU) of 24 July 2023, falls under what we called "the art of uncertainty" since the ECJ decided that Article 325(1) TFEU and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the TEU, on the protection of the European Communities' financial interests, must be interpreted as meaning that the courts of a MS

> are not required to disapply the judgments of the constitutional court of that MS invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if, as a consequence of those judgments, a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability,

stating, in the same time, that the courts of law have the authority to dissaply not only CCR decisions, but also those of the High Court of Cassation and Justice in the circumstances described as follows:

> The principle of the primacy of EU law must be interpreted as precluding national legislation or a national practice under which the ordinary national courts of a Member State are bound by the decisions of the constitutional court and by those of the supreme court of that Member State and cannot, for that reason and at the risk of incurring the disciplinary liability of the judges concerned, disapply of their own motion the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to provisions of EU law having direct effect.

To decide in this way, the ECJ places the analysis in the scope of the protection standards of fundamental rights, offering the national courts the tools to balance them according to a European practice established over ten years ago in the *Meloni* and A*kerberg Fransson* cases:

163 Decision No 390/2021.

> where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C399/11 Melloni [2013] ECR, paragraph 60). (para.29)

This ingenious and, nevertheless, logical construction creates a bridge between ECJ and national courts of law, showing that they have a "free hand" in assessing in each case, and to apply or disapply the decisions of the supreme courts of the land, when it comes to the interpretation and application of EU law. Thus, the problem of the limits of the powers of the courts in the EU and the relationship between them become a topic of extensive debates, imposing adequate solutions to avoid legal uncertainty.

However, although conflicts may arise, situations in which a court of law disapplies a decision of the Constitutional Court could serve as a warning signal regarding the constitutional coherence of the EU. This could have positive consequences in the long run, as it would require identifying the cause of such conflicts[164] and find solutions.

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4. Complementary mechanisms for strengthening constitutional justice at EU level

4.1. No war of the judges? The importance of cooperation in strengthening constitutional justice

The concept of "European judges" is often used when it comes to the relationship between the courts in the EU. However, the concept is not "magical" in terms of a solution for resolving disputes. It should be seen rather as an awareness of the new responsibilities that comes with membership of the EU. National judges are expected to uphold the principle of the EU law's supremacy, interpret national law in accordance with EU law and invalidate national provisions that conflict with EU law, apply EU law as needed, and refer questions to the ECJ when necessary to resolve domestic legal disputes. Constitutional judges have the same duties as other judges, but with the added responsibility of upholding the supremacy of the Constitution. It

164 We will analyse the topic in extenso in a next stage of the Project (Conference).

requires time, efforts and open communication to ensure consistency within the EU's legal system. Different contexts in which national and international courts operate "promote a cooperative relation", in which dialogue is crucial, even when discussing the dialogue within international structures, namely associations of CCs, the Venice Commission and the cooperative relations created at the level of the ECHR and the CJEU, or within the various forms of bilateral cooperation.

Declarations and resolutions made during these events reflect shared positions and mutual support in addressing common interests, which positively contributes to institutional dialogue. For this reason, such documents are specifically mentioned in this study, especially the conclusions and reports of the Congresses of the Conference of European Constitutional Courts.[165] If the topics of the last four Congresses, held over a decade (XVth Congress in 2011 – Constitutional justice: functions and relations with the other public authorities, XVIth Congress in 2014 Cooperation of CCs in Europe – Current Situation and Perspectives, XVIIth Congress in 2017 Role of the CCs in Upholding and Applying the Constitutional Principles, XVIIth Congress in 2021, Human rights and fundamental freedoms: the relationship of international, supranational and national catalogues in the 21st century) are analysed, it is found that they all aim, in one way or another, towards the harmonious coexistence of constitutional justice in Europe. Interventions and taking positions on such occasions highlight the clear will of a dialogue between equals, excluding the idea of hierarchy. Even though the diplomacy involved in such situations may make things seem smoother than in reality, its ultimate goal of reducing conflict intensity is commendable. The aim is to prevent fights and arrive at generally acceptable and agreed-upon solutions.

Currently (from 31.08 to 1.09 2023), a notable event is taking place (especially in the context of recent developments), namely the Conference "EUnited in Diversity II: the Rule of Law and Constitutional Diversity", held in The Hague, The Netherlands, with the participation of the presidents of the ECJ and the ECtHR. According to the organisers[166]

> the conference aims to continue the dialogue between the highest courts on how to balance the dimensions of unity and diversity of European Union law and human rights national constitutional provisions, while preserving the protection of fundamental rights. Of the representatives of the constitutional and supreme courts of the Member States, of the Court of Justice of the European Union and the European Court of Human Rights will participate in this dialogue in The Hague. They will discuss the role of their jurisdictions in safeguarding fundamental values on which the European Union is founded, such as the rule of law and the human rights.

165 Conference of European Constitutional Courts, no date.
166 Constitutional Court, no date; Press Release.

It is noteworthy that, if the key concept of the first conference with this title was constitutional identity, the key concept of the second edition is *the rule of law*, which is in itself an expression of recent developments.

However, from the perspective of desired "equal partners", even using concepts such as "vertical" or "horizontal" legal relations seems inadequate as it would suggest a hierarchy. As far as we are concerned, we still use these concepts to indicate different reference systems.

4.2. The support of other international bodies. The role of the Venice Commission

As for the involvement and support of international bodies, the most notable is the Venice Commission,[167] an invaluable participant in the various meetings of the CCs and mediator of the constitutional conflicts, especially when political interference occurs. Established in 1990 by the Council of Europe as an advisory body for constitutional law, it has become a global reference for democratic developments, influencing not just Europe but also the rest of the world. The Venice Commission provides opinions on fundamental laws, amendments, and various other documents related to democracy such as the rule of law, justice, elections, referendums, and political parties. In addition, it contributes to the dissemination and consolidation of a "common constitutional heritage", with a significant impact of the constitutional judicial review as well. This "modelling" inherently means the standardisation of fundamental laws and a constitutional review on the mentioned democratic coordinates, which over time has produced a common constitutional framework.[168]

The Venice Commission can be also credited for the gradual development of certain forms of cooperation among CCs, the most extensive being The World Conference on Constitutional Justice which unites 121 CCs and Councils and Supreme Courts in Africa, the Americas, Asia, Australia/Oceania and Europe.[169] From this perspective, the Venice Commission can also be characterised as a "mediator" in the dialogue between the CCs, regardless of the organisation and model of constitutionality review.

Among the many relevant opinions and documents about constitutional justice, the Rule of law checklist, adopted at its 106th Plenary Session, Venice, 11–12 March 2016,[170] should be mentioned. It has had direct inputs into the Rule of Law Mechanism in the EU. In its document, 'Further strengthening the Rule of Law within the Union',[171] the European Commission expressly mentioned the cooperation with the institutions of the Council of Europe and quoted Venice Commission statements concerning the rule of law.

167 See Events of the Venice Commission.
168 See also Safta, 2022d.
169 World Conference on Constitutional Justice , no date.
170 European Commission for Democracy through Law (Venice Commission), 2016.
171 COM(2019) 163 final.

4.3. The integrative role of the Rule of law mechanism

The various forms of cooperation mentioned have a positive role, but do not impose binding rules and effective sanctions in case of "bad" conflicts. Such an instrument was outlined with the establishment in the EU of the Mechanism of Rule of Law, 'a preventive tool, aiming to promote the rule of law and prevent challenges from emerging or deteriorating'.

The first European Commission Report[172] drawn up in this framework, in 2020, outlines the role of the Mechanism 'as a key building block in the common commitment of the EU and the Member States to reinforce the rule of law' and emphasises the integrative role of this principle:

> The rule of law is a well-established principle. While Member States have different national identities, legal systems and traditions, the core meaning of the rule of law is the same across the EU. Respect for the rule of law is essential for citizens and business to trust public institutions, and its key principles are supported by citizens in all Member States; Respect for the rule of law is also at the core of the functioning of the internal market, of the cooperation in the justice area based on mutual trust and recognition, and of the protection of the financial interests of the Union as recently underlined by the European Council.

Analysing the reports drawn up to date, the reference to the role of justice in the MS in the application of EU law has been noticed. For example, in the latest Report, from 2023[173] the importance of an effective justice systems and judicial independence for the application and enforcement of EU law was underlined, upholding the rule of law and safeguarding the values set out in Article 2 TEU: Is was also stated that:

> When reforming their justice systems, Member States must fully respect the requirements set by EU law and the case-law of the Court of Justice of the EU. It is also important that Member States take European standards into account when designing reforms.

Since the impact of supranational courts on the domestic constitutional order 'can be justified predominantly via recourse to the principle of rule of law',[174] it is no coincidence that one of the reference areas of the Mechanism is that of judicial systems, including both courts of law and CCs, as the central pillar of EU constitutionalism. The assessments and measures within this Mechanism shall be in conjunction with

172 COM/2020/580 final.

173 European Commission, Addressing the impact of demographic change in the EU: The way forward, COM(2023) 800 final, 6 December 2023.

174 See Belov, 2019, p. 105.

the policies developed at EU level in the field of justice, which should be properly coordinated with the national strategies in this field.

4.4. Upholding the independence of constitutional judges

A central objective and concern within all the mentioned formats of cooperation, discussions, and support is the issue of the independence of constitutional judges. This is, moreover, a key to the proper functioning of the centripetal mechanism of European integration based on the cooperation of the courts. Professor and constitutional judge Christoph Grabenwarter[175] identifies in this regard three Achilles' heels of the CCs: the nomination of judges, targeted changes in procedural law, and the disrespect of decisions. In our view, these vulnerabilities are closely related, and the greatest one relates to the appointment of judges, which can be a distinct topic in itself. Regarding the appointment procedure, the issue of political influence is usually discussed, but professional competence must be addressed to the same extent. Concerning the CCs, the requirement of "high professional competence" is usually regulated in Constitutions or laws, without being detailed, which makes it difficult to determine and evaluate in practice. This formula aims to ensure that the judges of the CCs have a special, "higher" knowledge.[176] As the Venice Commission emphasised,[177] 'a lack of professional capacity can often be corrected through training, but it is a strong reason not to recruit a person'. In other words, the judges of the CCs are not appointed for such an office with the perspective of being trained, and as far as they are concerned, the CCs are not a place of "professional training". In any case, the professional profile must take account of the activity that they will actually carry out during the term of office, as well as the fact that the judges will immediately start the activity, settling cases referred to the Court. However, it is even questionable that the will to evaluate the fulfilment of the requirement of high professional qualities, as long as it remains within the exclusive margin of appreciation of the authority that made the appointment, cannot be challenged in this respect.

Concerning the ECJ, the Treaty of Lisbon provides in Article 255 the establishment of a panel, known as the "Article 255 panel", whose mission is to give an opinion on a candidate's suitability to perform the duties of Judge and Advocate General. Bringing together the representative members of the various European legal systems, the European Court and the supreme national jurisdictions of the member states, appointed for a period of four years, the art. 255 panel possesses the necessary prerogatives to accomplish its mission. The existence of the website of the panel should be noted, where useful information concerning procedural rules and

175 See: Grabenwarter, 2018.
176 Venice Commission, 2017, paras. 12–13.
177 Venice Commission, 2017, para. 11.

its activity can be found. It could be a good example also for the MS in terms of the organisation of the selection of the constitutional judges.

It is also clear that there are no infallible appointment procedures, not even with regard to international or supranational courts where such "filters", as mentioned above, have been established. In this regard it was noticed[178] with reference to the ECJ that

> it is true that the treaties require that judges be chosen among persons whose independence is beyond doubt, and the appointment procedure includes the consultation of a special committee, in order to ensure the qualities of the candidates to exercise the offices of a judge to the relevant EU court. However, the very fact that judges can be appointed again could be considered to jeopardise their independence; it could be argued that judges would be more likely to be re-appointed (or at least proposed for re-appointment) if the judgments in which they participated were favourable to the interests of the MS and even, more precisely, to the interests of the MS of origin, which traditionally has prerogatives to propose.

Likewise, the fact that the selection of candidates, namely the proposals that will reach the special committee, will be conducted at national level, following more or less transparent procedures, which supports the cited criticism.

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5. Conclusions. Constitutional justice and the future of the EU

We tried to identify in our study some of the main challenges of constitutional justice as centripetal force in the EU, leaving room for further analysis and considerations within the topic.

Based on the points presented, an initial conclusion is that constitutional justice is a driving force of EU constitutionalism. Whatever "good" or "bad" moments occur, the relationship between courts continuously shapes the EU legal order.

A second conclusion (or rather reflection) refers to the operating of this "judicial network" itself, meaning the bases and type of relations between the Courts in the EU.

Concerning the bases, the cooperation of the constitutional courts should be grounded on values like independence, loyalty and honest collaboration. These principles act as a cohesive force in addressing the issues linked to constitutional diversity and consist of numerous elements, including the selection and status of judges.

The risk for the CCs that disrespect such values is to remain "outside the game," ignoring or replacing them if they do not correspond democratically or are "left back"

178 Azizi, 2012.

regarding professional credibility. We note as suggestive the situation analysed by M Florczak-Wątor in his work 'Judicial Law-Making in European CCs'[179] with reference to the Central and Eastern European countries where power was taken by populist governments, affecting the credibility of the CCs, as parliamentary majorities filled them with 'their own' judges As a result, 'the role of the CCs in the countries affected by constitutional crises started to be taken over by the international courts; namely, the ECtHR and the CJEU'.[180] This evolution could be seen as a specific functioning of the doctrine of "layers of protection" that interact and can replace each other (mentioned above), as a kind of safety net when problems arise in the functioning of constitutional justice, typical for the constitutional pluralism of the EU.

Another way to diminish the role of the CCs could be by enforcing the courts of law. The regular court system is larger and therefore more challenging to gain political control over. Therefore, it may be more reliable in terms of upholding democracy as the central principle of governance for states within the EU. Recent developments in Romania show such a strengthening of the courts of law. This comes amidst some tensions in recent years, as well as the development of jurisprudence by the CCR and the ECJ. Thus, beyond the national debates regarding the application of the CCR decisions in the light of this ECJ decision (equally of interest in all MS, due to the general binding nature of the ECJ decisions), in Romania the effects were also felt regarding legislation on the status of judges and prosecutors. Following the case law of the ECJ, in the new laws of justice (adopted in Romania at the end of 2022) the disciplinary liability of judges for non-compliance with the CCR decisions was no longer regulated as a separate offence.[181] Called to rule on the constitutionality of the new regulation, the CCR found 'this does not mean that failure to comply with them cannot give rise to disciplinary liability of the judge or prosecutor to the extent that it is demonstrated that he has exercised his office in bad faith or gross negligence' (para. 139).[182] To this effect, the CCR invoked the general constitutional framework of judges' liability, applicable when they act "in bad faith or gross negligence". Seemingly (with inherent controversies and debates) a way to comply with the general binding nature of the CCR decisions, the binding nature of the ECJ judgments and the independence of judges in the current constitutional framework of the relationships between national and EU law was found. However, the possibility of conflicts remains latent. Regarding the ECJ, it is also a risk to take an excessive authoritarian approach. We do not believe that CCs would form an alliance against the supremacy

179 Florczak-Wątor, 2020.

180 Florczak-Wątor, 2020, p. 266.

181 The disciplinary offense related to 'non-compliance with the decisions of the Constitutional Court and the decisions issued by the High Court of Cassation and Justice in the resolution of appeals in the interest of the law' was introduced by Article I point 3 of Law no. 24/2012 for the amendment and supplement of Law no. 303/2004 on the status of judges and prosecutors and Law no. 317/2004 on the Superior Council of Magistracy; the new laws on justice abrogated the previous regulations.

182 Decision No 520/2022.

of EU law,[183] since doing so would endanger a state's membership in the EU, but such an attitude could however lead to erosion of the ECJ's authority.

Concerning the types of relations, we consider that it is important to balance constitutional instruments in order to ensure optimal efficiency.

It seems that, particularly in the view of the CCs, the harmonious functioning of the EU does not involve a "solar system" type relation (with a strong ECJ in the centre and the CCs-planets gravitating around), but instead a "constellation" type, meaning equal partners. It is clear that CCs, even when considering the ECJ as a constitutional court, are not skilled at creating a hierarchy among themselves. The language used in conferences envisages a collection of pieces (such as a puzzle, a mosaic, etc.), rather than a hierarchy, emphasising the importance of dialogue in clarifying and harmonising each court's position. In this regard, an interesting distinction has been made in the legal literature between dialogue – conversation and dialogue – deliberation.[184] CCs in the EU do not need simple conversations, but dialogue – deliberation involving, *inter alia*, equal partners and respect of the peculiarities of both European and national legal systems. Also in our opinion, these type of relations, based on the competence, independence, and authority of each category of courts might be beneficial for the functioning of the EU, as it would exist as a counter-limit to the excess from whichever side it comes from. Professors and constitutional judges Christoph Grabenwarter, Peter M. Huber, Rajko Knez, Ineta Ziemele[185] have underlined that constitutional justice in the EU has evolved towards a specific branch of the judicial network, 'not only assigned with the common task to enforce EU law, but also to preserve its limits, first and foremost the principle of conferral and the constitutional identities of the Member States'.

However, we are already witnessing a shift in the traditional models of constitutional review driven by the unique pluralism of the EU. By accession to the EU, even in the classical Kelsenian systems, a review carried out by the courts of law within the justice system has overlapped, which aims at ensuring the primacy of EU law, by preventing the contrary rules of domestic law from being enforced. When courts prevent the enforcement of domestic law that conflicts with EU law, they are essentially carrying out a form of constitutional review in relation to a supranational reference system (the EU's quasi-constitution). This unique form of constitutional review is carried out by the courts alongside the review carried out by the CCs on primary rank norms in domestic law, with respect to the national Constitution. This evolution has led to a dynamic of court relationships, not just in terms of dialogue, but also in competition.

183 See in this regard Rasmussen, 2021. 'the worst threat to the room of maneuver of the Court was a possible alliance of national courts of last instance rejecting the key doctrines of European law'

184 Tremblay, 2005, pp. 617–648.

185 Grabenwarter et al., 2021, pp. 43–62.

The third conclusion (reflection) concerns the future of EU. Accepting the centripetal role of constitutional justice in the EU, it would be interesting to answer the question as to where this centripetal force leads us to, as a structure of States.

During a recent intervention on the occasion of awarding the title of doctor honoris causa of the Alexandru Ioan Cuza University in Iași,[186] the President of the ECJ, professor Koen Lenaerts underlined the importance of preserving the diversity of the EU, pointing out, *inter alia*, that there are enough States in Europe and that there is no need for any more, but instead for a harmony in diversity. In agreement with this idea, we consider that EU is an "ideal without a model" or, as expressed by Joseph Weiler 'Europe has charted its own brand of constitutional federalism'.[187] From a constitutional point of view, the EU is an original construction. Its diversity, which is unique, fundamentally distinguishes it in relation to any current federal structure. Unity in diversity is the official motto of the EU, suggesting a centripetal tendency (unity), yet unattainable differences (diversity), reflected in both State entities and constitutions. In this type of constitutional structure, undergoing continuous development, perhaps the key is precisely to abandon the standard classifications of State structures. Not every State structure is a geometrical construction, and not everything can be put into traditional/conservative forms and formulas. The dilemmas of the constitutional review and the dispute of priority versus primacy in the EU come in a large extent from the "captivity" in such a stereotypical vision, with the attempt to place the national and European legal order in the paradigm of the classic Kelsenian pyramid. It was rightly said in this regard: 'forget Kelsen and all the pyramidal frameworks'.[188]

These ideas are expressed in clear terms by the CCs themselves, for example the Portugal Constitutional Tribunal, according to which:

> One of the aspects of the principle of autonomy is precisely the fact that, in the relationship between European law and national law, the "pyramid paradigm" has been renounced, so that any normative conflict does not result in national provisions being annulled or repealed, instead 'moving towards a network paradigm, where no one point has precedence over another, and no point is unequivocally subordinate to another' (Nuno Piçarra, 'A justiça constitucional da União Europeia', Estudos jurídicos e económicos em homenagem ao Prof. Doutor António de Sousa Franco, vol. III, 2006, p. 479). Antinomy between national and European provisions that apply simultaneously in a given case is thus resolved from the point of view of effectiveness: national rules that conflict with European provisions which can be applied simultaneously are disapplied in a given case without the former losing their validity. This is the meaning of the principle of primacy or precedence in the application of European Union law, which is 'a collision rule conducive to the preferential application of European law (pre-emption, Vorrangsanwendung)

186 Universitatea "Alexandru Ioan Cuza" din Iaşi, 2023.
187 Weiler, 2003.
188 Tulkens, 2016.

and not a strict rule dictating normative supremacy, which might lead to the invalidation of national law' (Gomes Canotilho and Vital Moreira, Constituição da República Portuguesa Anotada, vol. I, 4th Edition, 2007, p. 266). (Ruling No. 268/2022).[189]

As for the crises, we agree that they must be seen as potential opportunities rather than verdicts. However, a positive outcome cannot be taken for granted, as crises require fresh, open, dynamic and creative thinking suitable to changing conditions.[190] An important step is that of "breaking" the stereotypes we were referring to, starting with the very idea of the constitution. As noted, 'what separates the treaties from a constitution in the strict sense of the term, is the lack of reference to those subject to rule'[191] (the MS and not the citizens of the EU); the treaties do not fulfil the legitimation function that derives from constituent power of the people under state rule. Also, this state of play can be changed and somehow the right of self-determination would be exercised by EU citizens as a source of European public power. Similarly, the myth of the final authority must be removed. National courts are not subordinate to the EU, but national and supranational judges are European judges with a shared responsibility to apply EU law and guide the change of the legal order.

It is also essential to understand that the constitutional construction of the EU is not solely about the constitutional judicial review and the relationship between courts. Some studies[192] discuss a process 'of self-ordering of the regional supranational empire through judicial dialogue between the ECJ, the ECHR and the CCs of the EU Member States'. The harmonisation of legal systems through constitutional justice, and the ever-closer connection with the consequence of the development of

189 Ruling of the Portuguese Constitutional Court No. 268/2022; See also Spanish Constitutional Court, (Declaration No. 1/2004, of 13 December 2004), according to which: 'The proclamation of the primacy of Union Law by Article I-6 of the Treaty does not undermine the supremacy of the Constitution. Primacy and supremacy are categories which operate in distinct spheres. The former, in terms of applying valid provisions; the latter, in terms of regulatory procedures. Supremacy is based on the hierarchical superiority of a norm and, therefore, it is the source of legitimacy for any subordinate provisions, with the consequence, therefore, that the latter are rendered invalid if they contravene the imperative provisions of the former. Primacy, on the other hand, is not based on hierarchy, but on the distinction between the scope of different provisions, each valid in principle, but with one or some of them being able to displace others by virtue of their preferential or prevailing application based on a variety of reasons. Supremacy implies primacy, in principle (hence its occasional use as an equivalent, as in our Declaration 1/1992, FJ 1), unless the supreme norm itself has provided, in some area, for its own displacement or non-application. The supremacy of the Constitution is, therefore, compatible with enforcement regimes that grant applicative preference to provisions of a legal system other than the national one, provided that the Constitution itself has so provided, which is exactly what happens with the provision contained in Article 93, by means of which it is possible to cede powers derived from the Constitution to an international institution thus constitutionally empowered to rule on matters hitherto reserved for domestic constitutional powers and to apply such rulings to these powers.'

190 Cartabia, 2018, p. 744.

191 Grimm, 2015, p. 292.

192 Belov, 2019, p. 109.

the area of law where the States meet/overlap in the EU, results in an increasingly pronounced growth of the autonomy of the EU's legal order. This, in turn, reduces the autonomy of the legal systems of the MS (also sovereignty, which reflects in the legal system, means autonomy), in the absence of formal intervention by the legislator. We need to pay attention to this consequence to achieve a proper balance between enforcing the constitution and avoiding the courts' exercise of a policy-making function that is better left to legislatures. In other words, constitutional judicial review is a limited resource in terms of EU integration. It is necessary to identify specific political and legislative solutions to strengthen EU constitutionalism as a whole, while preserving the shared competencies of the public authorities at a national and supranational level. The Courts themselves must know when to exercise restrain, be deferent and allow the political process, "even a highly imperfect one",[193] to politically branch itself.

193 See Komesar, p. 152.

References

Alexander, T. (2021) 'Whoever equates Karlsruhe to Warsaw is wildly mistaken', *VerfassungsBlog*, 10 of October 2021; https://doi.org/10.17176/20211010-181242-0.

Allegrezza S. (2019) 'On Legality in Criminal Matters between Primacy of EU Law and National Constitutional Traditions. A Study on Taricco Saga', *University of Luxembourg Law Working Paper*, No. 002-2019; https://doi.org/10.2139/ssrn.3356412.

Arcari, M., Ninatti, S. (2017) *Exploring Counter-Constitutionalism: The Backlash Effect of Constitutional Vocabulary of the European Court of Justice and the European Court of Human Rights*, Workshop Draft Paper, cited in Galimberti, M., Ninatti, S. (2020) 'Constitutional Resistance to EU Law: The Courts and Test of constitutional Identity conflicts', *Pravni zapisi*, 11(2), pp. 413–460; https://doi.org/10.5937/pravzap0-28877.

Arnold, R., Feldbaum, E. (2016) 'Aspects of Fundamental Rights Convergence in Europe with Some Comparative References to the Developments in Germany, United Kingdom and France' in Arnold, R. (ed.) *The Convergence of the Fundamental Rights Protection in Europe. Ius Gentium: Comparative Perspectives on Law and Justice*. Vol. 52. Dordrecht: Springer, pp. 1–12; https://doi.org/10.1007/978-94-017-7465-9_1.

Azizi, J. (2012) 'Bringing to light the internal decision-making process by the EU courts: a justification for dissenting opinions?', *Romanian Journal of European (Community) Law*, 30(2).

Belov, M. (2019) 'Global Rule of law instead of Global Democracy? Legitimacy of Global Judicial Empire on the edge between Westphallian and post Westphalian constitutionalism', in Belov M. (ed.) *The role of the Courts in contemporary legal orders*. Den Haag: Eleven International Publishing.

Bobek, M. (2014a) 'Landtova, Holubec and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure', *European Constitutional Law Review*, 10(1), pp. 54–89; https://doi.org/10.1017/S1574019614001047.

Bobek, M. (2014b) 'Talking now? Preliminary Rulings in and from New Member States', *Maastricht Journal of European and Comparative Law*, 21(4), pp. 782–789; https://doi.org/10.1177/1023263X1402100412.

Bossuyt, M. (2012) 'EU law and constitutionally and internationally protected rights', *Classical and Modern Trends in constitutional Review*. Sofia: Feneya, 2012, pp. 53–61.

Broberg, M. (2015) 'Judicial Coherence and the Preliminary Reference Procedure', *Review of European Administrative Law*, 8(2), pp. 9–37; https://doi.org/10.7590/187479815X14465419060262.

Callewaert, J. (2009) 'The European Convention on Human Rights and European Union Law: a Long Way to Harmony', *European Human Rights Law Review*, 2009/6, pp. 768–783.

Callewaert, J. (no date) *Interplay between the European Convention on Human rights and EU law*. [Online]. Available at: https://johan-callewaert.eu/recent-relevant-case-law/. (Accessed: 8 July 2023).

Cartabia, M. (2018) 'Europe today: Bridges and walls', *International Journal of Constitutional Law*, 16(3), pp. 741–752; https://doi.org/10.1093/icon/moy083.

Criste, M. (2017) *Constitutional Law. A Right of the State*. Bucharest: Universul Juridic Publishing House.

De Visser, M. (2018) 'Constitutional Courts Securing Their Legitimacy – An Institutional-Procedural Analysis', in von Bogdandy A., Peter M. H., Grabenwarter, C. (eds.) *The Max Planck Handbooks in European Public Law, Vol. IV, Constitutional Adjudication: Common Themes and Challenges*. Oxford: Max Planck Handbooks in European Public Law, pp. 223–254; https://doi.org/10.1093/oso/9780192846693.003.0006.

Dorneanu, V., Krupenschi, C.M. (eds.) (2019) *International Conference 'The national constitutional identity in the context of European law'*. Bucharest: Hamangiu Publishing House.

Fabbrini F., Maduro, M.P. (2017) 'Supranational Constitutional Court', *iCourts Working Paper Series*, 2017/98.

Fabbrini, F., Pollicino, O. (2017) 'Constitutional identity in Italy: European integration as the fulfilment of the Constitution', *EUI LAW*, 2017/06; https://doi.org/10.2139/ssrn.2930106.

Faraguna, P. (2022) 'Taking Constitutional Identities Away from the Courts', *Brooklyn Journal of International Law*, 41(2), pp. 492–578.

Faraguna, P., Drinóczi, T. (2022) 'Constitutional Identity in and on EU Terms', *VerfassungsBlog*, 21 February 2022; https://doi.org/10.17176/20220222-001059-0.

Florczak-Wątor, M. (ed.) (2020) *Judicial Law-Making in European Constitutional Courts*. London: Routledge; https://doi.org/10.4324/9781003022442.

Gáspár-Szilágyi, S. (2016) 'The CJEU: an overzealous architect of the relationship between the European Union legal order and the international one?', *Revista de Drept Constituțional [Constitutional Law Review (Romania)],* 2016/1, pp. 44–64; https://doi.org/10.47743/rdc-2016-1-0003.

Grabenwarter, C. (2018) 'Constitutional Resilience', *VerfassungsBlog,* 06 December 2018; https://doi.org/10.17176/20190212-110238-0.

Grabenwarter, C. (no date) *General Report and Outline of Main Issues* [Online]. Available at: https://www.confeuconstco.org/reports/rep-xvi/Generalbericht%20EN.pdf (Accessed: 1 July 2023).

Grabenwarter, C., Huber, P. M., Knez, R., Ziemele, I. (2021) 'The Role of the Constitutional Courts in the European Judicial Network', *European Public Law*, 27(1), pp. 43–62; https://doi.org/10.54648/EURO2021003.

Grimm, D. (2015) *Constitutionalism Paste, Present and Future*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780198766124.001.0001.

Grosche, N. (2018) 'Effectiveness and application of EU Law in German Courts' in Franklin N.K. (ed.) *The Effectiveness and Application of EU and EEA Law in National Courts: Principles of Consistent Interpretation*. Cambridge: Intersentia; https://doi.org/10.1017/9781780688022.005.

Holoubek, M. (no date) *The Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives Austrian National Report* [Online]. Available at: https://www.vfgh.gv.at/cms/vfgh-kongress/downloads/landesberichte/LB_Autriche_EN.pdf (Accessed: 31 August 2023).

Komárek, J. (2012) 'Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution', *VerassungsfBlog*, 22 February 2022; https://doi.org/10.17176/20170505-090350.

Kombos, C. (2020) 'Idiosyncratic Constitutional Review in Cyprus: (Re-)Design, Survival and Kelsen', *ICL Journal*, 14(4), pp. 473–496; https://doi.org/10.1515/icl-2020-0021.

Komesar, N. (2015) 'Constitutions as Basic Structure', in Tushnet M., Graber M. A., Levinson S. (eds.) *The Oxford Handbook of the U.S. Constitution*. Oxford: Oxford Academic, pp. 137–154; https://doi.org/10.1093/oxfordhb/9780190245757.013.7.

Lamarque, E. (2012) 'Corte costituzionale e giudici nell'Italia repubblicana', *Editori Laterza*, cited in Guarnier, T., Lamarque, E. (eds.), *The Effectiveness and Application of EU and EEA Law in National Courts: Principles of Consistent Interpretation*. Cambridge: Intersentia.

Lenaerts, K. (2019) 'The Autonomy of European Union Law', *Convegni annuali e interinali Aisdue*, 2019/1. [Online]. Available at: https://www.aisdue.eu/wp-content/uploads/2019/04/001C_Lenaerts.pdf. (Accessed: 29 August 2023).

Lenaerts, K. (2021b) *Congress proceedings at The XVIIIth Congress of the Conference of European CCs* [Online]. Available at: https://www.cecc2017-2020.org/congress/xviiith-congress/ (Accessed 29 August 2023).

Lenaerts, K., Gutiérrez-Fons, J.A., Stanislas, A. (2021a) 'Exploring the Autonomy of the European Union Legal Order', *Zeitschrift fur auslandisches offentliches Recht und Volkerrecht (ZaoRV),* 81(1), pp. 47–87.

Lustig, F., Weiler, J.H.H. (2018) 'Judicial review in the contemporary world–Retrospective and prospective', *International Journal of Constitutional Law*, 16(2), pp. 315–372; https://doi.org/10.1093/icon/moy057.

Maduro, M. (1998) 'We, the Court' cited in Tushnet M., Graber M., Levinson S. (eds.) *The Oxford Handbook of the US Constitution*. Oxford: Oxford University Press.

Manes, V. (2018) 'Some Lessons from the Taricco Saga', *New Journal of European Criminal Law,* 9(1), pp. 12–17; https://doi.org/10.1177/2032284418761393.

Martinico, G. (2022) *The Tangled Complexity of the EU Constitutional Process The Frustrating Knot of Europe*. London: Routledge; https://doi.org/10.4324/9781003056522.

Ott, Y. (2019) *The development of constitutional identity, on the basis of the eternity clause, in the Volume of the International Conference The National Constitutional Identity in the context of European Law.* Bucharest: Hamangiu Publishing House.

Paulus, A. (2019) 'The Relationship between National Constitutional Identity and the Principle of Predominance of the Law of Treaties: A German Constitutionalist View' in Dorneanu, V., Krupenschi, C.M. (eds.*) The national constitutional identity in the context of European law. Proceedings of the International Conference of the Constitutional Court of Romania*. Bucharest: Hamangiu Publishing House, pp. 29–37.

Pernice, I. (2013) 'The Autonomy of the EU Legal Order — Fifty Years After Van Gend', *WHI – Paper*, 2013/8. Berlin: Walter Hallstein-Institut für Europäisches Verfassungsrecht, Humboldt-Universität, pp. 55–80.

Polakiewicz, J. (2016) *Europe's Multi-Layered Human Rights Protection System: Challenges, Opportunities and Risks*, lecture at Waseda University, Tokyo.

Rasmussen, M. (2021) 'A More Complex Union: How will the EU react to the Polish Challenge? A Historical Perspective', *VerfassungsBlog*, 4 of November; https://doi.org/10.17176/20211105-011429-0.

Roznai, Y. (2020) 'Introduction: CCs in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review', *ICL Journal 2020*, 14(4), pp. 355–377.

Sadurski, W. (2006) 'Solange, chapter 3: CCs in Central Europe – Democracy – European Union', *EUI LAW Working Paper*, 2006/40.

Safta, M. (2012) 'Developments in the constitutional review: Constitutional court between the status of negative legislator and the status of positive co-legislator', *Perspectives of Business Law Journal*, 1(1), pp. 1–20.

Safta, M. (2022a) 'European constitutional justice. Too much constitutional law in the European Union?', *Juridice*, 11 February 2022. [Online]. Available at: https://www.juridice.ro/essentials/5257/justitia-constitutionala-europeana-prea-mult-drept-constitutional-in-uniunea-europeana (Accessed: 29 August 2023).

Safta, M. (2022b) *Constitutional Justice in the European Union*. Bucharest: Hamangiu Publishing House.

Safta, M. (2022c) 'To be or not to be self-restraint? The role of the CCs in shaping their powers and the consequences on constitutional reform', *Revista de drept constitutional[Constitutional law review],* 2(2022), pp. 98–113; https://doi.org/10.47743/rdc-2022-2-0005.

Safta, M. (2022d) 'The Role of the Venice Commission in shaping European Constitutionalism', *Perspectives of Law and Public Administration*, 11(1), pp. 71–78 [Online]. Available at: https://adjuris.ro/revista/articole/An11nr1/9.%20Marieta%20Safta.pdf (Accessed: 29 August 2023).

Schutze, R. (2021) *Constitutional Law of the UE*. Bucharest: Universitară Publishing House.

Selejan-Gutan, B. (2021) 'Who's Afraid of the „Big Bad Court"?', *VerfassunsBlog*, 10 January 2022; https://doi.org/10.17176/20220110-195203-0.

Tate, C.N. (1995) 'Why the Expansion of Judicial Power?' in Tate, C.N., Vallinder, T. (eds.) *The Global Expansion of Judicial Power.* New York: New York University Press, pp. 27–38; https://doi.org/10.18574/nyu/9780814770078.003.0006.

Tesauro, G. (2012) 'Constitutional review in the relation to EuropeanLaw and the ECHR', *Classical and Modern Trend in Constitutional Review.* Sofia: Feneya.

Tizzano, A. (2012) 'Some considerations regarding the role of the Court of Justice', *Revista Română de Drept European (Comunitar) [Romanian Review of European Law]*, 2012/6, pp. 21–31.

Toader, T., Safta, M. (2016) *The dialogue of constitutional judges*. Berlin: Peter Lang Publishing House; https://doi.org/10.3726/978-3-653-07031-6.

Toader, T., Safta, M. (2023) 'The Constitutional Review Of International Treaties, A Purely Decorative Power Of The Constitutional Court Of Romania', *The Annals of "Dunarea de Jos" University of Galati. Legal Sciences*, 6(1), pp. 110–127.

Torchia, L. (2016) 'In crisi per sempre? L'Europa fra ideali e realtá', *Rivista trimestrale di diritto pubblico*, cited in Cartabia, M. (2018) 'Europe today: Bridges and walls', *International Journal of Constitutional Law*, 16(3), pp. 741–752; https://doi.org/10.1093/icon/moy083.

Tremblay, L.B. (2005) 'The legitimacy of judicial review: The limits of dialogue between courts and legislatures', *International Journal of Constitutional Law*, 3(4), pp. 617–648; https://doi.org/10.1093/icon/moi042.

Tripkovic, B. (2022) 'Constructing the Constitutional Self: Meaning, Value, and Abuse of Constitutional Identity', *Union University Law Review*, 11(2), pp. 359–384.

Tulkens, F. (2016) 'Asylum and Migration Today: An Indispensable Reflection on the Notion of Border. [Online video]. Keynote speech presented at IconS Conference, Borders, Otherness and Public Law, Humboldt University, Berlin, June 17–19. Available at: https://youtu.be/ifxyACZ7Mk0?list=PLljW4VOt-et-Qc1RnHMje6YBtu1bSOs8V (Accessed: 29 August 2023).

Voßkuhle, A. (2014) 'Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts' in *Proceedings of the Seminar: "Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?"*, 31 January, Strasbourg. Federal Constitutional Court, Germany, pp. 36–40. [Online]. Available at: https://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf#page=36 (Accessed: 29 August 2023).

Walsh, J.H. (1951) 'The Constitution is What the Judges Say It is', *The Social Studies*, 42(8), pp. 338–342; https://doi.org/10.1080/00220973.1938.11017667.

Weiler, J.H.H. (2003) 'Federalism Without Constitutionalism: Europe's Sonderweg', in Nicolaidis, K., Howse, R. (eds.) The Federal Vision: *Legitimacy and Levels of Governance in the United States and the European Union*. Oxford: Oxford Academic; https://doi.org/10.1093/0199245002.003.0003.

Legal Sources

Charter of Fundamental Rights of the European Union (2012/C 326/02).
Conference of European Constitutional Courts (no date) Webpages of the Conference of European Constitutional Courts. [Online]. Available at: https://www.confeuconstco.org/en/common/home.html (Accessed: 9 July 2023).
Conference of European Constitutional Courts. 'The XVIIIth Congress of the Conference of European CCs- General Report' [Online]. Available at: https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/General_Report/Rapport_General_General_Report_e-version.pdf (Accessed: 29 August 2023).
Conference of European Constitutional Courts. National Reports. [Online]. Available at: https://www.cecc2017-2020.org/congress/xviiith-congress/national-reports/ (Accessed: 29 August 2023).
Constitution of Austria (1920) reinstated in 1945, with Amendments through 2013.
Constitution of Belgium (1831), with Amendments through 2014.
Constitution of Bulgaria (1991), with Amendments through 2015.
Constitution of Croatia (1991), with Amendments through 2013.
Constitution of Cyprus (1960), with Amendments through 2013.
Constitution of Estonia of (1992), with Amendments through 2015.
Constitution of Finland (1999), with Amendments through 2011.
Constitution of France (1958), with Amendments through 2008.
Constitution of Germany (1949), with Amendments through 2014.
Constitution of Greece (1975), with Amendments through 2008.
Constitution of Hungary (2011), with Amendments through 2016.
Constitution of Ireland (1937), with Amendments through 2019.
Constitution of Italy (1947), with Amendments through 2020.
Constitution of Latvia (1922) was reinstated in 1991, with Amendments through 2016.
Constitution of Lithuania (1992), with Amendments through 2019.
Constitution of Luxembourg (1868), with Amendments through 2009.
Constitution of Malta (1964), with Amendments through 2016.
Constitution of Poland (1997), with Amendments through 2009.
Constitution of Portugal (1976), with Amendments through 2005.
Constitution of Romania (1991), with Amendments through 2003.
Constitution of Slovakia (1992), with Amendments through 2017.
Constitution of Slovenia (1991), with Amendments through 2016.
Constitution of Spain (1978), with Amendments through 2011.
Constitution of Sweden (1974), with Amendments through 2012.
Constitution of the Czech Republic (1993), with Amendments through 2013.
Constitution of the Kingdom of Denmark (1953).
Constitution of The Netherlands (1814), with Amendments through 2008.
Constitutional Court (no date) 'Press Release: The Court, together with the Constitutional Court of Luxembourg, the Supreme Court of the Netherlands, and the CJEU', at the conference ‚EUnited in Diversity II: the Rule of Law and Constitutional Diversity' on 31 August and 1 September in The Hague. [Online]. Available at: https://www.const-court.be/public/pbcp/f/pbcp-2023-003f.pdf (Accessed: 30 August 2023).

Constitutional Court of the Czech Republic (2009) 'Press Release: The Treaty of Lisbon is in conformity with the constitutional order of the Czech Republic and there is nothing to prevent its ratification', *Constitutional Court*, 3 of November. [Online]. Available at: https://www.usoud.cz/en/current-affairs/press-release-the-treaty-of-lisbon-is-in-conformity-with-the-constitutional-order-of-the-czech-republic-and-there-is-nothing-to-prevent-its-ratification (Accessed: 29 August 2023)

Constitutional Court of the Republic of Latvia & European Commission for Democracy through Law (Venice Commission). (2016). International conference 'Judicial Activism of Constitutional Courts in a Democratic State'. 17 February. Conference held at Riga, Latvia, 26–27 May 2016. [Online]. Available at: https://www.satv.tiesa.gov.lv/en/2016/02/17/judicial-activism-of-constitutional-courts-in-a-democratic-state/ (Accessed: 1 August 2023).

Court of Justice of the European Union (2021) 'EUnited in diversity: between common constitutional traditions and national identities. Conference proceedings', Riga, Latvia, 2-3 September 2021.

Court of Justice of the European Union (2020) 'Press release following the judgment of the German Constitutional Court of 5 May 2020', *Press Release No. 58/20*, 8 of May.

Decision of the CCR No 1258/2009, Official Gazette No. 798 of 23 November 2009.

Decision of the CCR No 390/2021, Official Gazette No. 612 of 22 June 2021.

Decision of the CCR No 414/2019, Official Gazette No. 922 of 15 November 2019.

Decision of the CCR No 520/2022, Official Gazette No. 1100, 15 November 2022.

Decision of the CCR No 534/2018, Official Gazette No. 842 of 3 October 2018.

Decision of the CCR No 668/2011, Official Gazette No. 487 of 8 July 2011.

Decision of the CCR No 80/2014, Official Gazette No. 246 of 7 April 2014.

European Commission (2019) 'Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the Rule of Law within the Union', *COM(2019) 163 final*. 3 April, Brussels.

European Commission (2020) 'Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions 2020 Rule Of Law Report The Rule Of Law Situation In The European Union', *COM/2020/580 final*. 30 September, Brussels.

European Commission (2023) 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Addressing the impact of demographic change in the EU: The way forward', *COM(2023) 800 final*. 6 December.

European Commission for Democracy through Law (Venice Commission) (2016) 'Rule of Law Checklist. Study No. 711 / 2013, CDL-AD(2016)007'. Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016). 18 March, Strasbourg.

European Commission for Democracy through Law (Venice Commission) (2017) 'Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia', Opinion no. 883/2017*, CDL-AD(2017)011*. 19 June, Strasbourg.

European Commission for Democracy through Law (Venice Commission) (2022) Compilation Of Venice Commission Opinions And Reports Concerning Vetting Of Judges And Prosecutors', *CDL-PI(2022)051*. 19 December, Strasbourg.

European Convention on Human Rights (1950).

European Court of Human Rights (1979) Case of The Sunday Times v. The United Kingdom.

European Court of Human Rights (2000) Case of Rotaru v. Romania, application no. 28341/95.

European Court of Human Rights (2022) Case of Moraru and Marin v. Romania, applications nos. 53282/18 and 31428/20.

European Court of Human Rights (2022) Case Spasov v. Romania, application no. 27122/14, Judgment of 6 December 2022, Section IV.

Events of the Venice Commission (no date). [Online]. Available at: https://www.venice.coe.int/webforms/events/ (Accessed: 30 August 2023).

German Federal Constitutional Court (1993) 'Decision of October 12, 1993, In Re Maastricht Treaty', Cases 2 BvR 2134/92, 2 BvR 2159/92. BVerfGE 89, 155, Maastricht.

German Federal Constitutional Court (2009) 'BVerfGE 123, 267 – Lisbon Decision' (Lissabon-Urteil).

Judgment Of The CJEU (Full Court) of 16 February 2022, Case C-156/21, ECLI:EU:C:2022:97.

Judgment of the CJEU (Grand Chamber) of 21 December 2021, Criminal proceedings against PM and Others, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19. ECLI:EU:C:2021:1034.

Judgment of the CJEU (Grand Chamber) of 22 February 2022, Proceedings brought by RS, Case C-430/21. ECLI:EU:C:2022:99.

Judgment of the CJEU (Grand Chamber) of 24 July 2023, Criminal proceedings against C.I. and Others, Request for a preliminary ruling from the Curtea de Apel Braşov, Case C-107/23 PPU. ECLI:EU:C:2023:606.

Judgment of the CJEU (Grand Chamber) of 5 December 2017, Case C-42/17. ECLI:EU:C:2017:936.

Judgment of the CJEU (Grand Chamber) of 6 November 2018, Joined Cases C-569/16 and C-570/16. ECLI:EU:C:2018:871.

Judgment of the CJEU (Grand Chamber) of 6 October 2021, Consorzio Italian Management and Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA, Case C-561/19. ECLI:EU:C:2021:799.

Judgment of the CJEU (Grand Chamber) of 8 April 2014, Joined Cases C-293/12 and C-594/12. ECLI:EU:C:2014:238.

Judgment of the CJEU (Grand Chamber), of 26 February 2013, Åklagaren v Hans Åkerberg Fransson, Case C-617/10. ECLI:EU:C:2013:105.

Judgment of the CJEU (Grand Chamber), of 26 February 2013, Stefano Melloni v Ministerio Fiscal, Case C-399/11. ECLI:EU:C:2013:107.

Judgment of the CJEU of 6 October 1982, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, Case 283/81. ECLI:EU:C:1982:335.

Judgment of the CJEU of 9 March 1978, Amministrazione delle Finanze dello Stato v Simmenthal SpA, Case 106/77. ECLI:EU:C:1978:49.

Law No. 47 of 1992, On the Organisation and Operation of the Constitutional Court, Romania.

Opinion Of Advocate General Emiliou, delivered on 8 March 2022(1), Case C-391/20. ECLI:EU:C:2022:166.

Parlamentul României (2008) 'PL-x nr. 1/2008: Proiect de Lege pentru ratificarea Tratatului de la Lisabona de modificare a Tratatului privind Uniunea Europeană şi a Tratatului de instituire a Comunităţii Europene, semnat la Lisabona la 13 decembrie 2007' [Online]. Available at: http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=9041&cam=2 (Accessed: 25 August 2023).

Ruling of the Portuguese Constitutional Court No. 268/2022, Case no. 828/2019.

Ruling of the Portuguese Constitutional Court, No. 422/2020. Case No. 528/2017.

The Constitutional Court of the Republic of Lithuania (2023) 'The justices of the constitutional justice institutions of the Baltic States participated in a trilateral meeting and the celebration of the 30th anniversary of the re-establishment of the Supreme Court of Estonia in Tartu'. [Online]. Available at: https://lrkt.lt/en/the-justices-of-the-constitutional-justice-institutions-of-the-baltic-states-participated-in-a-trilateral-meeting-and-the-celebration-of-the-30th-anniversary-of-the-re-establishment-of-the-supreme-court-of-estonia-in-tartu/2155 (Accessed: 9 July 2023).

Universitatea "Alexandru Ioan Cuza" din Iaşi (2023) 'Ceremonia de decernare a titlului de Doctor Honoris Causa domnului Prof. univ. dr. Koen Lenaerts' [Online video]. YouTube. [Online]. Available at: https://www.youtube.com/watch?v=CGK837u5Y60 (Accessed: 9 July 2023).

World Conference on Constitutional Justice (WCCJ) (no date). [Online]. Available at: https://www.venice.coe.int/WebForms/pages/?p=02_WCCJ&lang=EN (Accessed: 9 July 2023).

Chapter 10

The Emergence of European Criminal Law in Relation to the European Union Development

Tudorel Toader

Abstract

EU law has expanded beyond the economic issues related to the internal market's establishment and functioning. With successive treaty reforms, it now covers rules that were once reserved for national states, such as criminal law. Additionally, mechanisms aimed at strengthening the uniform application of EU law at the level of the Member States, where political consensus is difficult to attain, have been applied. The EU's involvement in criminal law has posed significant challenges and tensions over time. However, the creation of criminal laws is the most significant evidence of EU autonomy. Progressively, both at a political and a regulatory level, and with the consistent involvement of the European Court of Justice, a convergence has been achieved, adding new elements for the unification of criminal law in the EU. General principles like mutual trust, supported by an enhanced activism of the ECJ in the promotion and protection of the values that establish the constitutional core of the EU, is seen as the strongest engines of development in recent years. This has led to extensive amendments in the criminal regulations in the MS. After discussing the milestones of the evolution of European criminal law (history, regulation, institutions), the analysis focuses on the principles of mutual recognition, mutual trust, sincere cooperation, the effectiveness of EU law in protecting the Union's financial interests, and their roles in the construction of the EU's legal order. Distinct references will be made to the latest developments determined by preliminary referrals of the Romanian Courts.

Keywords: European criminal law, European Union, mutual trust, mutual recognition, Cooperation and Verification Mechanism

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1. Introduction

Legal integration, as a complex dimension of the European Union (EU) development, largely depends on the nature and scope of legal norms. Some areas of regulation, such as criminal ones, raise more sensitive issues by approaching or even identifying with the core of national sovereignty. Moreover, developments in these areas are significant for the future of the EU as a structure of states. From this perspective, the branch of criminal law and the emergence of European criminal law deserve to be carefully pursued, since, as it was shown, 'it represents high constitutional significance for the EU, and it can potentially act as an intriguing laboratory for EU constitutionalism'.[1] That is why we choose this dimension of analysis, focused not so much on the development of criminal law institutions themselves, but on the constitutional significance of the emergence of European criminal law.

Over time, EU's involvement in criminal law has led to significant challenges and tensions: 'the emergence of European criminal law is a product of debate and crisis. Its creation is a reaction to perceived security risks, rather than anything else – provision of security having been the driver in the creation of European criminal law'.[2] In fact, when the convergent interpretation of criminal law institutions at the European level was sustained, the citizen and his need to be defended against such crises, as well as cross-border crime, was brought up as an argument. According to the European Commission, the increasingly uniform treatment at EU level thus appears justified by the fact that it

> can tackle gaps and shortcomings wherever EU action adds value. In view of the cross-border dimension of many crimes, the adoption of EU criminal law measures can help ensuring that criminals can neither hide behind borders nor abuse differences between national legal systems for criminal purposes.[3]

As a result, the context of the evolution of European criminal law was often turbulent, against the background of events that marked humanity not only regionally but also globally, such as terrorist attacks. A recent example is the war in Ukraine, which led to the expansion of the Eurojust's mandate, motivated by the need to strengthen its cooperation with the courts and criminal mechanisms, established in order to settle situations where international law is violated.[4]

The evolution of European criminal law is complicated by the sensitive issue of the relationship between the European Court of Justice (ECJ) and national constitutional courts (CCs). The national courts are hesitant to accept the new reconsiderations of national sovereignty that a supranational criminal law implies. In addition,

1 Wieczorek and Vavoula, 2015, pp. 5–7.
2 Fichera and Kremer 2013, cited in Nuotio, 2014, p. 1121.
3 European Commission, COM/2011/0573.
4 See EU Regulation 2022/838, pp. 1–5.

the intrusive nature of criminal law norms raises concerns about guaranteeing fundamental rights and freedoms, as well as the interaction between the multiple spheres of protection and the courts at different levels. For the development of the EU, it would be a significant step to harmonise criminal legislation, which would eliminate or at least reduce the disputes that still exist concerning the differences in standards of protection of fundamental rights at national, supranational, and international levels.

This field's complexity is reflected in its definition and normative framework set by both the EU and Council of Europe. Thus, European criminal law was suggestively characterised[5] as

> a kind of umbrella concept covering all those norms and practices of criminal law and criminal procedural law based on the provisions and actions of the EU (European law in the narrow sense) and of the Council of Europe (European law in a broad sense), and leading (or intending to lead) to the extensive harmonisation of national criminal (and criminal procedural) law.

It is a specific configuration, a veritable "amalgam" of criminal rules, complicated and sometimes "convulsive" in terms of how each of the EU Member States (MS) accepts European law in a broad sense. There is still no codification of criminal law on the model of the MS, but a sphere of specific legal rules, both substantive and procedural, in a continuous process of reconfiguration, with the particularity given by the interference of different law systems and legal orders. This process of "normative Europeanisation" goes "hand-in-hand" with institutionalisation, namely the establishment of specialised European institutions in the field. It follows that, at this moment, we can identify a European criminal law that includes norms of substantive, procedural, institutional and international cooperation law, on two levels, corresponding to a "broad approach" (in the meaning of substantiation on "the provisions and actions of the EU and of the Council of Europe") and a "narrow approach" (only the "provisions and actions of the EU").

In our study, we will mainly refer to the narrow understanding of European criminal law (the provisions and actions of the EU), also taking into account the importance of the role of the national Courts and the European Court of Human Rights (ECtHR) in terms of guaranteeing the standards of protection of fundamental rights. From this perspective, it is relevant to discuss European rules that impose sanctions applicable in all EU Member States (MS), procedural rules, namely institutions and instruments whose purpose it is to ensure the effectiveness of prosecution and criminal sanctions in Europe, and provisions from national law that are influenced by European law (Europeanisation of criminal law). Given the tectonics of the acceptance of European criminal law by the MS and, in this light, the integrative role of the ECJ, the "core" of principles that coagulate and gradually order the autonomous

5 Ambos, 2018, p. 14.

legal order of the EU as a structure of States are highly relevant. Thus, after marking some milestones of the evolution of European criminal law (history, regulation, institutions), we will focus on the analysis of the principles of mutual recognition, mutual trust, the effectiveness of EU law in protecting the Union's financial interests, and their role in the construction of the legal order of the EU, with particular reference to the latest developments in the matter, determined by preliminary referrals of the Romanian Courts.

2. A historical and general insight

2.1. A "prehistory": European criminal law before the Treaty of Lisbon

After examining the Founding Treaties and their successive amendments, it can be observed that the creation of the first European Community (CEEC) on signing the Treaty of 18 April 1951, in Paris, and the establishment of the European Economic Community (EEC) and the European Atomic Energy Community (CEEA) on signing the Treaty of 25 March 1957, in Rome, along with the entry into force of the Single European Act (SEA) on 1 July 1987, were significant steps in establishing the general institutional framework of the EU. These steps also played a crucial role in the onset of European criminal law. During the reference period, various actions were taken to provide direction and meaning in this field, and these actions were reflected in programs, action plans, and roadmaps. These initiatives formed the basis for the subsequent amendments to the Treaties and the current framework of the European legal order.

Thus, a significant moment in the "prehistory" of European criminal law was the establishment in 1975 of the Trevi Group,[6] an intergovernmental network of representatives of the Ministries of Justice and Home Affairs, to coordinate the fight against terrorism. In 1985, its mandate was expanded to include serious international crimes such as drug trafficking, bank robbery and arms trafficking.[7] According to the doctrine,[8] which emphasises the importance of this moment, Trevi became a kind of organisational platform for the third pillar established by the Maastricht Treaty.

During that period, one of the most ambitious projects was the establishment of an internal market allowing for the free movement of people. This was made possible by the signing of two agreements – the Schengen Agreement of 14 June 1985 and the Convention for the Implementation of the Agreement, which was signed on 19 June 1990 and came into effect on 26 March 1995. To enable the free movement of

6 Terrorism, Radicalism, Extremism, Political Violence.
7 Graig and de Burca, 2017, p. 1088.
8 Harding, 2015, pp. 835–865.

people within the signatory states, common rules were adopted for visas, the right to asylum, and checks at external borders.[9] The freedom of movement thus established was accompanied by so-called "compensatory" measures, which entailed improving cooperation and coordination between the police and judicial authorities, to ensure internal security and, in particular, to fight organised crime.[10]

The Maastricht Treaty (TMs) was enforced on November 1st, 1993, and marked significant progress in the field. The treaty brought about the creation of a single structure, the European Union, based on three pillars: the European Communities (also known as the community pillar), the Common Foreign and Security Policy (CFSP), and Cooperation in the area of justice and home affairs (JHA). The original form of the Justice and Home Affairs pillar, Article K1-K9 of the Maastricht Treaty, regulated policies such as asylum, rules regarding the crossing of external borders, immigration, a policy for nationals of third countries, judicial cooperation in civil and criminal matters, combating drug addiction, customs cooperation, police cooperation to prevent and combat terrorism, drug trafficking and other serious forms of international crime. The establishment of a European Police Office (Europol) was regulated for the exchange of information. However, in terms of the decision-making process within the third pillar, it was more intergovernmental and less supranational.[11]

The Treaty of Amsterdam, entered into force on May 1st 1999, significantly modified the third pillar, paving the way for a progressive development of general criminal law and criminal procedure within the process of European integration. Thus, the third pillar of the JHA, renamed judicial and police cooperation in criminal matters, was partially transferred to Pillar I, the field of visas, asylum and citizenship, being incorporated into Title IV ECT, the rest of the provisions being subject to institutional reviews closer to those from the community pillar. Under these conditions, pillar III has become the most dynamic field of the EU. The Treaty of Amsterdam brought new effective legislative instruments leading to better coordination between national legislations, the most important of which is the framework decision (as main normative instrument in the field of criminal law before the entry into force of the Treaty of Lisbon). A significant step was the integration of the Schengen *acquis* (the Schengen Treaties, Accession Agreements, decisions and declarations of the Executive Committee), in the form of a Protocol annexed to the Treaty.

The Treaty of Nice, entered into force on February 1st 2000, made further amendments to the third pillar. A formal legal basis was created for Eurojust, which according to Article 32 (2) TEU, "is enabled to facilitate proper coordination between Member States' national prosecuting authorities". The treaty amended the enhanced cooperation with the purpose of enabling the Union to develop more rapidly into an

9 See: Schengen Area and Cooperation, 2023.
10 EC Regulation No 1987/2006.
11 Craig and Burca, 2017, p. 1089.

area of freedom, security and justice, while respecting the powers of the European Community.

The Convention for the Future of Europe had a notable contribution to the development of substantive, procedural, and institutional criminal law. Within Working Group X, "Freedom, Security and Justice", it was recommended to encompass the third pillar into the main body of the Treaties and separate regulations in substantive criminal law and criminal procedure matters.[12] The Working Group recommended that certain areas of substantive criminal law be approximated, which could be achieved by including a legal base in the new Treaty that would permit the adoption of minimum or common rules on the constituent elements of criminal acts and penalties in certain fields of crime. It was also suggested that the types of crime considered to have a transnational dimension be enumerated in the Treaty, and that an approximation of substantive criminal laws be carried out only through directives (or their successor). The Working Group recognised the need for approximation of some aspects of criminal procedure, which is widely acknowledged by practitioners and considered more urgent than the approximation of substantive criminal law. Such procedural approximation can facilitate the collaboration between law-enforcement agencies of the Member States and the Union bodies acting in the field, and the application of the principle of mutual recognition, as well as strengthening mutual confidence. Strengthening the operational cooperation was also a point of the discussions. Even though the European Constitutional Treaty project failed, these recommendations were partially implemented by the Treaty of Lisbon, signed in 2009, which brought significant amendments to the regulation of freedom, security, and justice.

It should be mentioned that for the same period, as complementary efforts to the amendment of the Treaties, policies were articulated in the field, such as the successive 5-year programs adopted at the European Council in Tampere, Hague, and Stockholm, which set targets for legislative actions.

Thus, according to the Tampere Program (15-16 October 1999) devoted to the establishment of an area of freedom, security and justice in the EU,[13]

> People have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime (…) The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the Union.[14]

The Tampere European Council of 1999 established 'the first multiannual policy framework for justice and home affairs'.[15] Over the next five years, the foundations were laid for a common asylum and immigration policy, namely, the harmonisation

12 CONV 426/02.
13 Calderoni, 2010, p. 14.
14 European Parliament, 1999.
15 Commission of the European Communities, 2009.

of border checks, and closer police and judicial cooperation based on the principle of mutual recognition and trust.

The terrorist attacks in New York in 2001 and in Madrid in 2004, the pressure caused by the intensification of migration flows, and the increase in the threat from organised crime have emphasised the need at European level to have a permanent strategy to respond to cross-border challenges, maintaining at the same time the fundamental rights of citizens in full. The Hague Program – strengthening freedom, security and justice in the EU, and adopted by the European Council in 2004, represented the EU's response to this need, having the following objectives:

> to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organised cross-border crime and repress the threat of terrorism, to realise the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications.[16]

Through the Stockholm Program of 2009, entitled 'An open and secure Europe serving and protecting citizens', the priorities of the EU for the period 2010-2014 were established in the area of freedom, security and justice, namely the promotion of citizenship and fundamental rights, a Europe of law and justice, a Europe that protects, access to Europe in a globalised world, a Europe of responsibility, solidarity and partnership in migration and asylum matters, the role of Europe in a globalised world.[17] These priorities set by the Stockholm program are implemented through an action plan[18] which established a roadmap with the purpose of turning these political priorities into solid results.

Likewise, as regards the cooperation in criminal matters, we note the Prüm Treaty,[19] signed in 2005 by Belgium, Germany, France, the Netherlands, Luxembourg, Austria and Spain (to which Romania joined in 2008).[20] The signatory States, without prejudice to the provisions of the Treaty on the European Union and the Treaty establishing the European Community, intended that the adoption of this legal instrument

16 Ibid.
17 Stockholm Program, 2010.
18 European Commission, COM(2010) 171 Final.
19 Treaty of Prüm, 2007.
20 Law No. 146/2008.

> to play a pioneering role in order to reach the highest possible level of its own co-operation, primarily through a more improved exchange of information, carried out particularly in combating terrorism, cross-border crime and illegal migration, as well as to allow all other Member States of the EU to participate in this cooperation.[21]

In order to achieve this goal, the aim was to accelerate the exchange of information between the authorities of the member states, especially regarding genetic profiles (DNA), dactyloscopic data, vehicle registration data and other personal data.

This so-called "historical route map of criminal law"[22] shows that the structured framework that resulted from the Maastricht Treaty and continued until the Treaty of Lisbon played a significant role in shaping the current state of the field. The doctrine explains this structure, *inter alia*, by the highly fragmented nature of the policies that were included in the second and third pillars, as well as by the desire of States to have a certain degree of institutional cooperation in these areas – namely a common foreign, security policy and, justice and internal affairs – but which were not prepared 'for the entire supranational assembly of the community pillar',[23] preferring the implicit position of intergovernmentalism, in order to keep in this way the "maximum control in their own hands".[24]

2.2. The Treaty of Lisbon, a new framework for the development of European criminal law

The Treaty of Lisbon came into force on December 1st, 2009. It brought about changes in the European institutions and their working methods, while also reinforcing the democratic legitimacy of the Union and its fundamental values. According to the European Commission,

> even though the new legal framework does not fundamentally alter the possible scope of EU criminal law, it considerably enhances the possibility to progress with the development of a coherent EU Criminal Policy which is based on considerations both of effective enforcement and a solid protection of fundamental rights.[25]

Thus, the Treaty of Lisbon amended the provisions regarding the area of freedom, security and justice, abolishing some of the obstacles that hampered the development of this concept.[26] The mechanism of the three pillars has been replaced by a bipartite classification of competences (exclusive and shared). Any competence not conferred

21 Preamble to the Treaty.
22 Harding, 2015, p. 841.
23 Craigand de Burca, 2017, p. 1090.
24 Ibid.
25 See: European Commission, COM/2011/0573 Final.
26 Griller and Ziller, 2008, p. 58.

upon the Union by the Treaties belongs to the MS. The policy of freedom, security and justice (according to Article 4 TFEU) falls within the scope of shared competences, which allows the direct action of the Union in the national criminal policy, therefore establishing a European criminal policy. The Charter of Fundamental Rights carries particular importance, on which the Treaty of Lisbon has conferred a binding legal nature.[27] This lays down some important principles of criminal justice as the principles of legality and proportionality of criminal offenses and penalties (Article 49), or the right not to be judged or punished twice in criminal proceedings for the same offense (*ne bis in idem* principle, Article 50).

As for rules with a direct impact in the criminal field, the reorganisation of the EU by abolishing the pillared structure led to the disappearance of pillar III – Police and judicial cooperation in criminal matters, the substance of the matter being currently regulated in Title 5 TFEU, entitled Area of Freedom, Security and Justice, integrated into Part Three of the Treaty – Union policies and internal actions. This title comprises of four chapters, Chapter 1 – General provisions, Chapter 2 – Policies on Border Checks, Asylum and Immigration, Chapter 3 – Judicial Cooperation in Civil Matters and Chapter 4 – Judicial Cooperation in Criminal Matters, covering the most important rules for structuring European criminal law.

According to Article 67 of the TFEU, the Union is defined as 'an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States', established as objectives to ensure the absence of 'internal border controls for persons', to frame a common policy 'on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals', to ensure

> a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws

to facilitate access to justice, 'in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters'.

Article 72 TFEU specifies that 'this Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.

These texts were written in conjunction with those of Article 4 (2) TFEU, according to which the Union 'shall respect the equality of Member States in relation to the treaties, as well as their national identity, inherent in their fundamental political and constitutional structures, including in terms of local and regional autonomy', likely to outline the functions of the States as EU limits in police and judicial

27 See European Commission, COM (2010)573.

cooperation matters".[28] Therefore, respect for fundamental rights and the diversity of legal systems and traditions are emphasised, 'thus giving the protection of rights and legal diversity a safe place and a guiding role in the whole project of the area of freedom, security and justice'.[29] This accentuation is not without importance, and subsequent developments confirm it strongly in terms of promoting the concept of constitutional identity at the centre of the debates with reference to the relationships between the national legal orders and that of the EU.[30]

Chapter 4 – Judicial Cooperation in Criminal Matters enshrines the principle of mutual recognition of judgments and judicial decisions as a cornerstone in this field (a genuine "method of EU criminal law")[31] and establishes rules of substantive and procedural law in criminal matters.

As for the criminal procedure, its base is enshrined in Article 82 TFEU which lays down in paragraph (1) that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

> lay down rules and procedures for ensuring the recognition, throughout the whole Union, of all forms of judgments and judicial decisions;
> a) prevent and settle conflicts of jurisdiction between Member States;
> b) support the training of the judiciary and judicial staff;
> c) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

Article 82(2) TFEU refers to procedural rules, enabling the European Parliament and the Council to adopt directives in order to establish minimum rules in accordance with the ordinary legislative procedure to the extent necessary of facilitating mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. These rules shall concern:

a) the mutual admissibility of evidence between Member States;
b) the rights of individuals in criminal procedure;
c) the rights of victims of crime;
d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision. For the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

28 Arnaiz and Llivina, 2013, p. 161.
29 Harding, 2015, p. 846.
30 For the "battles" around the meaning of the concept of constitutional identity, see Faraguna and Drinóczi, 2022.
31 Harding, 2015, p. 853.

Therefore, the competence of the EU in criminal procedure matters is limited by specific requirements, namely that the EU is empowered to: adopt only directives that establish minimum standards in the areas defined by the Treaty, take into account the legal traditions and systems of the Member States, allow the extension to other elements of the criminal procedure, which must be identified by the Council by decision, and adopted unanimously, following its approval by the European Parliament.

The competence of the EU to adopt rules of substantive criminal law is laid down in Article 83 TFEU. Thus, according to Article 83(1) TFEU, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are as follows: 'terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime'. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament. Likewise, Article 83(2) lays down that

> if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

Article 82 (3) and Article 83 (3) sets up a protection mechanism ("emergency brake")[32] for the MS, which can be used in the situation where they consider that the draft directives adopted according to Article 82 (2) or Article 83 would affect its criminal justice system. To the extent that the MS agree to make use of this mechanism, the ordinary legislative procedure shall be suspended, and after discussion, and in the case of a consensus, the European Council shall, within four months of the suspension, refer the draft back to the Council.

The same chapter covers rules regarding the institutional framework in criminal matters. Europol and Eurojust were reformed in order to make their activity more efficient and to be more operative in combating serious crimes affecting two or more MS or requiring a prosecution on common bases (Article 85 TFEU). In light of the investigation and prosecution components, the provisions of Article 85 (1) TFEU are significant, concerning the power of the European Parliament and the Council to adopt regulations by the ordinary legislative

32 See: Craig and de Burca, 2017, p. 1108.

procedure, to determine Eurojust's structure, operation, field of action, and tasks. Another essential institutional provision, laid down in Article 86 TFEU, provides the opportunity of establishing a European Public Prosecutor "to combat crimes affecting the financial interests of the Union". Thus, starting from Eurojust, the Council may issue regulations under a special legislative procedure to establish this new body. Likewise, Article 86 (1) sets up a special procedure, defined as an "emergency accelerator",[33] which permits, in the absence of unanimity in the Council, a group of at least nine Member States to request that the draft regulation be referred to the European Council. Article 86 (2) establishes the competence of the European Public Prosecutor's Office and Article 86(4) lays down the opportunity of the European Council to adopt

> a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

Although it may not be considered a codification of European criminal law as defined under the domestic law of the MS, the cited provisions highlight a significant aspect of supranational criminal law, both in terms of substantive and procedural matters. As for substantive criminal law, according to Article 83 TFEU, the European harmonisation of national criminal law is circumscribed to some sectors of its special part. The general part seems to be excluded from the scope of application of the criminal competence of the European Union, MS retaining their exclusive competence in this sector. However, the European harmonisation of domestic criminal law is also noticeable in its general part, a sense in which the ECJ proved to be a zealous architect in imposing the primacy of EU law. Consequently, the developments registered through and based on the Treaty of Lisbon justify the finding that European Criminal Law gradually takes place in the legal order of the EU, with a perspective of separate codification.

2.3. The way forward

2.3.1. Post-Lisbon legislative developments

The post-Lisbon period is marked by challenges, notably determined by the difficult acceptance of EU initiatives by the MS and the regulatory technique used to attain the EU's objectives in the field, namely the principle of mutual recognition, the "cornerstone" of developments in criminal matters.

33 Craig and de Burca, 2017, p. 1111.

In the 2011 European Commission Communication called 'Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies through Criminal Law',[34] the Commission presents a summary of policy areas that have been harmonised, as well as those where criminal law measures at the EU level are required. The objective is to ensure that taxpayers' money is equally protected across the Union, especially in the financial sector and in the fight against fraud affecting the financial interests of the European Union. Likewise, other harmonised policy areas were established, where the potential role of criminal law as a necessary tool to ensure effective enforcement could also be explored further, such as road transport concerning, for example, serious infringements of EU social, technical, safety and market rules for professional transports; data protection, for cases of serious breaches of existing EU rules; customs rules concerning the approximation of customs offences and penalties; environmental protection, if the existing criminal law legislation in this area requires further strengthening in the future in order to prevent and sanction environmental damage; fisheries policy; internal market policies to fight serious illegal practices such as counterfeiting and corruption or undeclared conflict of interests in the context of public procurement. The Commission specifies that 'these are areas which will require further assessment whether and in which areas minimum rules on the definition of criminal offences and sanctions may prove to be essential in order to ensure the effective implementation of EU legislation'.

As regards, in itself, to the path on which the EU legislator should follow when deciding on criminal law measures aimed at ensuring the effective implementation of EU policies which are the subject of harmonising measures, the Commission provides the necessary steps, the first being the assessment of necessity and proportionality ("ultima ratio," criminal law must always remain a measure of last resort), and the second (once demonstrate the need for criminal law) concerning which concrete actions to take, because EU legislation regarding the definition of criminal offenses and sanctions is limited to "minimum rules" under Article 83 of the Treaty. In this light, the Commission notes the conditions of "necessity and proportionality" and clear factual evidence (to establish the necessity for minimum rules on criminal law, the EU institutions need to be able to rely on clear objective evidence about the nature or effects of the crime in question and about a diverging legal situation in all Member States which could jeopardise the effective enforcement of an EU policy subject to harmonisation), tailoring the sanctions to the crime.

However, a cautious approach defining the development of European criminal law did not mean a stagnation of efforts in this field. The years that followed the entry into force of the Treaty of Lisbon brought significant legislative and institutional developments in the field of criminal law, both substantively and procedurally.

34 European Commission, 2011.

For example, in combating terrorism matters, the following were adopted: Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime; Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online.

In combatting corruption, cybercrime, fraud and money laundering, the following were adopted: Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (Directive on cybercrime); Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crimes in the European Union; Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive); Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA; Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 in the fight against fraud to the Union's financial interests by means of criminal law; Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing; Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law; Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders; Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA. As for victim protection matters, the following were adopted: Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims; Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography; Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

The transposition of some of these Directives into national law encountered difficulties and even triggered infringement procedures,[35] representing as many contexts of analysis for the legislative harmonisation in criminal matters at the EU level.

The legislative action was supported by the ECJ, which was involved in the development of European criminal law in several directions, by implementing the principles laid down in the Treaties (especially mutual recognition), the enhanced affirmation of the primacy of EU law and its effect of removing it from application of the contrary rules from the internal law of the MS, and autonomously defined certain concepts and terms of criminal law, for which the generality of terms used by European acts allow a large margin of appreciation.

Concerning the perspective of the MS in the field, it is worth mentioning Romania's initiative on the occasion of holding the Presidency of the EU Council to launch a debate on the topic entitled the

> Future of EU substantive criminal law", meant " to refresh the Council's assessment of the need to further introduce criminal provisions in new areas, in keeping with the EU competences established by the Treaties and thus providing a snapshot of needs currently perceived by MS.[36]

To prepare the debate, on 19 December 2018, the incoming Romanian Presidency presented a questionnaire with a set of nine questions addressed to the MS relating to four main areas: regulatory framework, sanctioning system, specific concepts and application of the regulatory framework (15728/18). Nineteen delegations provided written replies to the questionnaire.

The result, illustrating a prudent approach taken by the MS for the development of supranational criminal law, is summarised in the Draft report by the Presidency,[37] as follows:

1) The Union legislator should cautiously continue to exercise its competence to establish minimum rules concerning the definition of criminal offences and sanctions in line with Article 83 TFEU, giving due attention inter alia to the principles of ultima ratio, proportionality and subsidiarity.
2) At this stage, more efforts should be deployed to ensure the effectiveness and quality of the implementation of existing EU legislation. According to some Member States, this should include improving the tools for cooperation between Member States, both as regards judicial cooperation and in terms of exchange of best practices;
3) For the time being, further 'Lisbonisation' seems unnecessary. However, it might be appropriate to make an amendment to the text of point (d) of Article 2(1) of

35 European Commission , no date, Infringement decisions.
36 Council of the European Union, 2019.
37 Ibid.

Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, so as to broaden the scope of that Article.12;

4) At this point in time, there is no need to develop a common definition or understanding of certain notions, such as 'serious crime' and 'minor cases'. Several Member States indicated that they should retain flexibility concerning the application of these notions. According to those Member States, the approach followed until now, whereby serious crime could be defined, where necessary, by using different criteria for a specific legislative instrument, should continue to be applied;
5) It could be appropriate to carry out a full and thorough analysis of the necessity and advisability of establishing (further) minimum rules concerning the definition of criminal offences and sanctions in the following areas: a) environmental crimes, including maritime, soil and air pollution;13 14 b) trafficking in cultural goods;15 c) the counterfeiting, falsification and illegal export of medical products;16 d) trafficking in human organs; e) manipulation of elections; f) crimes relating to artificial intelligence, subject to further defining the issue at stake.
6) Where it is demonstrated that there are good reasons for taking legislative action in any of the areas mentioned under points 5 and 6, or any other area, the possibility of using Article 83(2) TFEU as a legal basis should be considered before extending the scope of the first subparagraph of Article 83(1) TFEU (by unanimous decision of the Council pursuant to the third subparagraph of Article 83(1) TFEU).
7) Where the Union envisages legislating in an area that is already covered by an instrument of international law, in particular a convention of the Council of Europe, more in-depth dialogue with the relevant international organisation is necessary, *inter alia* to ensure complementarity and added value and to share information regarding best practices, obstacles to ratification, etc.
8) In order to ensure a high quality of Union legislation, all the technical specificities of the legislative process should be taken into account; this should include, *inter alia*, the allowance of sufficient time during the legislative process to carry out consultations at national level.
9) Directives adopted on the basis of Article 83 TFEU should allow Member States sufficient time to implement them. The period concerned should, in principle, be no less than 24 months. The legal form of a Directive leaves Member States flexibility on how best to carry out implementation in their national legal order, including decisions on which stakeholders they want to involve in the process.

It draws attention, first of all, to the conclusion that 'further "Lisbonisation" seems unnecessary', by the mentioned concept being understood, according to the same report, 'the process of replacing Framework Decisions adopted under the Amsterdam Treaty with Directives adopted under the Lisbon Treaty, thereby updating

the content of such instruments.' It appears that MS were hesitant to move forward with harmonising criminal laws through the Directive and instead focused on improving the existing framework, legislation quality and effectiveness, which requires time to settle and consolidate. In this light, the developments in European criminal law through ECJ jurisprudence, which we will refer to separately, and some tensions between Courts at the EU level in this regard, open a perspective of debates on the role of the judiciary in complementing and fulfil the will of the states in shaping the legal order of the EU.

2.3.2. Institutional developments. Establishment of the European Public Prosecutor's Office

Perhaps the most spectacular post-Lisbon institutional evolution was the establishment and strengthening of the European Public Prosecutor's Office (EPPO). As has previously been expressed,[38] the EPPO is certainly the result of a long-term reflection over the creation of some instruments which could strengthen the fight against cross-border crime.

The idea has been developed since the mid-1990s, based on an in-depth study, *Corpus Juris*,[39] containing criminal provisions for the protection of the Union's financial interests. We find the same idea in the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor on December 11, 2001.[40] Later, in 2010, even Eurojust mentioned the institution as a potential solution for the cross-border crime issue in EU and despite the opposition shown by some MS which felt that their national sovereignty would be affected, the analysis and popularisation of this idea continued. Following the Commission's 2013 proposal to set up the EPPO, which met the resistance of 14 national parliaments of the European Union, the year 2017 was a decisive one. On February 7, 2017 the Council failed to reach a unanimous decision on a draft regulation. This led to a request from a group of 17 Member States on February 14, 2017, to send the draft regulation to the European Council. Later on April 3, 2017, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Germany, Finland, France, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, and Spain notified the European Parliament, the Council, and the Commission about their desire to establish a type of enhanced cooperation based on the draft regulation. The subject was constantly on the agenda of the Justice and Home Affairs Councils and was eventually adopted at the end of the year as the Council Regulation (EU) 2017/1939 on October 12, 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO).[41]

38 Toader and Safta, 2018, pp. 225–236.
39 Delmas-Marty and Vervaele, 2000.
40 European Commission, COM(2001) 817 final.
41 The author participated, as Minister of Justice, in Romania at that time, revealing Romania's position in favour of the establishment of the EPPO; in the statement made then we outlined that: 'It is a

Up to now, 22 Member States have joined the EPPO, and the EPPO started its activity on 1 June 2021. In the annual report for 2022, presented on 23 March 2023, before the European Parliament's Committee on Civil Liberties, Justice and Home Affairs it was showed that the EPPO received and processed 3,318 criminal complaints and opened 865 investigations and judges issued freezing orders amounting to €359.1 million in connection with EPPO investigations.

The EPPO has been set up as an independent body of the Union, with legal personality and competence established by law. The prosecutors in its structure act in the interest of the Union as a whole, and do not seek or accept instructions from any person outside the EPPO, or from any MS of the EU or institution, body, office or agency in the Union, in exercising their attributions in conformity with the Regulation. The EPPO is answerable to the European Parliament, the Council and the Commission for its general activities and shall submit annual reports on its general activities, in the official languages of the Union institutions, which are sent to the European Parliament, the national parliaments, and to the Council and the Commission.

The EPPO regulation has direct application, however, naturally it does not provide all the practical solutions for the functioning of a prosecutor's office. Likewise, it cannot solve the correlation issues of the internal regulations, from this perspective being necessary to take structured steps in more stages/directions. It is clear that the Regulation raises issues of interpretation under the lack of harmonising criminal law provisions at the European level, as well as of the different standards of protection of fundamental rights that still exist.

Suggestive in this regard is the recent request for a preliminary ruling submitted by the Oberlandesgericht Wien (Austria) on 25 April 2022 – G. K., B. O. D. GmbH, S. L. (C-281/22). The object of the case is the interpretation of Union law in particular the first subparagraph of Article 31(3) and Article 32 of Council Regulation (EU) 2017/1939 of 12 October 2017 concerning the implementation of enhanced

historic moment for the European construction. Romania agreed to participate in the enhanced cooperation for the establishment of the European Public Prosecutor's Office, intended to contribute to the protection of the Union's financial interests. Likewise, at the same time, Romania takes account of the fact that there are judges from Member States who participate, in different capacities, in the implementation of European justice. The establishment of the European Public Prosecutor's Office also has the meaning of balancing the legal mechanisms for the protection of common legitimate values and interests. We are open to contributing to the operationalisation of the European Public Prosecutor's Office, but also to the discussions that will be dedicated to expanding its powers; there are many other serious cross-border crimes that can only be prevented and fought together at European level. I personally believe that the extension of competence to acts of terrorism will represent only a step towards the extension of the competences of the European Public Prosecutor's Office to other types of crimes with a European dimension. I express the same conviction that the other Member States will also join the enhanced cooperation. We welcome all the efforts of the European Commission, the rotating EU Council Presidencies involved in the negotiation of this case and the Member States. For the future, we will focus our efforts on the operationalization of the European Public Prosecutor's Office, which will partly take over the powers from the level of the national legal space.' Juridice, 2017.

cooperation with a view to the establishment of a European Public Prosecutor's Office (EPPO).

At the time of writing this study, the opinion of the Advocate General is available,[42] according to whom these provisions must be interpreted as meaning that, in the case of cross-border investigations, the court approving a measure to be carried out in the MS, that the assisting European Delegated Prosecutor may assess only aspects related to the execution of an investigative measure. Article 31(3) and Article 32 of the EPPO Regulation must be interpreted as meaning that in the case of cross-border investigations, the court in the MS of the assisting European Delegated Prosecutor must accept the assessment by the handling European Delegated Prosecutor that the measure is justified, whether or not the latter is approved by prior judicial authorisation of the court in the MS of the handling European Delegated Prosecutor.

However, the viewpoints expressed in the case by the Austrian and German governments should not be neglected, according to which if the law of the MS of the European Delegated Assistant Prosecutor requires prior judicial authorisation for the execution of an investigative measure, such authorisation should involve a full judicial review, i.e., not only the procedural aspects (implementation of the measure), but also the substantive aspects that justify the measure in the first place. Therefore, in terms of this viewpoint, it is up to the court in the MS of the European Delegated Assistant Prosecutor to assess whether the requirement of the necessary level of suspicion regarding the commission of a crime has been met; whether the requested investigative measure would produce the necessary evidence for criminal prosecution; and whether the same evidence could not be obtained by a less intrusive measure.

As the Advocate General noted, the viewpoint of the two Governments could be understood as a concern for fundamental rights protection. MS have established coherent systems of criminal law. The protection of fundamental rights was carefully built into their legislation in the area of criminal prosecution and the sanctioning of crimes, an area in which states exercise their coercive powers affecting the private lives and liberties of individuals. However, the same does not happen at EU level, where there is no such coherence or harmonisation yet. Even in the absence of such consistency, the Advocate General nevertheless considers that the EPPO Regulation itself 'guarantees the protection of fundamental rights to a high degree.' This statement in the continuation of the argument on the component of fundamental rights also raise awareness, according to which

> it is true that in certain situations and from the perspective of some MS it may lead to a decrease of the previously protected level of individual rights. Nevertheless, those rights are protected at least at the level of the Charter and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Harmonisation, after all, inevitably leads to a weakening of the protection of fundamental rights in

42 Opinion of Advocate General delivered on 22 June 2023. Case C-281/22, G.K., B.O.D. GmbH, S.L.

> Member States with a higher prior level of protection unless the highest standard is adopted as a common rule.

However, according to the Advocate General, this is 'the price of building a future together'. It will be interesting to see the positions of the MS constitutional courts concerning this matter of protection standards on fundamental rights, which, by all means, finds a correspondence in the case law of the ECJ, notably in the Melloni Case (C-399/11) to which the Advocate General explicitly refers. However, the issue raised constitutes a new impulse, in our opinion, towards the harmonisation in criminal law matters, regardless of the answer the ECJ. Ensuring the effectiveness of cross-border investigations while protecting fundamental rights is a key objective in the convergence of MS actions to achieve a higher degree of coherence in European criminal law.

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3. Key principles of European harmonisation in criminal matters. The role of the ECJ

3.1. EU legal autonomy

The exploration of the principles that underpin an increasingly closer integration and definition of European criminal law must be placed in the overall context of the EU's evolution towards legal autonomy. The EU legal order was established and enhanced over time as an organised and structured set of legal norms – diversified and hierarchical – having specific sources, notably being incorporated into the legal order of the MS, provided with institutions and procedures empowered to issue legislative acts, to interpret them, to ascertain and sanction, if necessary, their violation.

In this light, the legal order of the EU has two seemingly opposing characteristics. On one hand, it is an independent, self-contained legal system with its own sources, legal concepts, jurisdictional regulations, and legislative acts. On the other hand, it is integrated into the legal systems of MS, affecting subjects of Union law and national authorities, including national courts that apply Union law. The doctrine refers in this regard to "multi-level constitutionalism", revealing that it provides an explanation for the substantive unity of the EU system, which is composed of the various constitutions at the national level and the EU constitutional framework. In this light,

> EU constitutional law and notably the general principles developed by the ECJ case law are inspired by the national constitutional concepts, rights, principles and traditions, and the European constitutional and legal concepts, rights and principles, find their way back into the national constitutional law through legislation, through

> judicial dialogue pursuant to Article 267 TFEU, and through a system of best practices developed and shared at all levels.[43]

Within this framework, respect for fundamental rights occupies a central place, since, as has been shown,[44] 'attaining a fair balance between the European unity and the national diversity was achieved to a large extent through the jurisdictional protection of individual rights laid down in EU law'. In this regard, an essential role has lain with the ECJ which was constantly "woven", providing form and coherence to this autonomy, characterised even by itself, in Opinion 2/13, as being 'a structured network of principles, norms and mutual legal relationships interdependent that bind, mutually, the Union itself and its Member States'.

As for the MS, this autonomy has both a supranational and a transnational dimension. In the article Exploring the Autonomy of the European Union Legal Order, the authors[45] state that in terms of a supranational perspective, 'that autonomy require EU law – and only to this type of law – to establish the way in which normative conflicts must be settled' and in terms of a transnational perspective, 'that autonomy requires the Members States, above all, to share the same degree of commitment to the values on which the EU is based, laid down in Article 2 TEU'. Furthermore, it is considered that

> in terms of a transnational perspective, autonomy was given a real form through the principle of mutual trust and through the principle of equality of Member States before the law. Once Member States are equally committed to defending the values on which the EU is founded, they are all entitled to equal justice under EU law. In the light of that mutual commitment, the old rivalries and mistrust no longer have a reason to exist and must be replaced by mutual respect and mutual trust.

The trust and mutual respect explain, support and are supported by the equality of the MS before the treaties, resulting in the enforcement of the primacy of EU law as the only way to adequately ensure the uniform interpretation and application of EU law at the level of the MS.[46] To this effect, the criminal law of the EU is perhaps the most eloquent illustration of a genuine strategy that has acted effectively in terms of aligning the legal systems of the MS based on some core principles, without directly requiring or entailing the adoption of normative acts at the supranational level. The application of the principle of mutual recognition and, developed in correlation with it, the principles of mutual trust and sincere cooperation, have consistently shaped the national norms in the matter by complying with common standards for the protection of fundamental rights, adhering to the same meaning of certain concepts that

43 Pernice, 2017.
44 Lenaerts, 2014.
45 Lenaerts, Gutiérrez-Fons and Stanislas, 2021.
46 Ibid.

have received an autonomous meaning in EU law, and the removal from the application of criminal rules from the national law contrary to EU law.

3.2. Key principles of European harmonisation in criminal matters

3.2.1. The principle of mutual recognition

The principle of mutual recognition has played a fundamental role in establishing the internal market, from where it was taken and applied by analogy to establish an area of freedom, security and justice without internal borders. Thus, in 1998, under the British presidency of the European Council, the idea of facilitating the recognition by each MS of the decisions issued by the courts of the other MS was furthered, through a minimum of procedures and formalities. In its 1999 Tampere conclusions, the European Council 'endorsed the principle of mutual recognition which (...) should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union'.[47] Following the entry into force of the Treaty of Lisbon, it found its place within the treaties, as a genuine constitutional principle, expressly laid down in Article 67, 70, 81 and 82 TFEU.

We could characterise the principle of mutual recognition as the basis of the integrative strategy specific to European criminal law. In the opinion of the president of the ECJ,[48] this principle is an appropriate tool to overcome the opposition of the MS in relation to the harmonisation of substantive aspects of their criminal legislation. The method/strategy thus chosen allowed the States to follow the same direction, of a closer and faster cooperation, without making many or immediate amendments to the national legislation. This role is more visible through the case law by which the ECJ ruled upon the relationship between the principle of mutual recognition and the protection of fundamental rights. Given the scope of the study, we will briefly mention only some key reference cases regarding the European arrest warrant, in which the application of the principle of mutual recognition radically influenced the shaping of criminal law and European constitutionalism.

The substance of the matter is the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,[49] amended by the Council Framework Decision 2009/299/JHA of 26 February 2009.[50] Article 1 paragraphs 1 and 2 of Council Framework Decision defines the European arrest warrant as 'a judicial decision issued by a Member

47 European Parliament, 1999.

48 Lenaerts, 2015.

49 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, p. 3.

50 Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, p. 24.

State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order', establishing the MS obligation to execute it 'on the basis of the principle of mutual recognition'. Paragraph 3 of the same Article states that 'This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'.

One of the reference cases for the weight given to the principle of mutual trust was *C-396/11 Radu*.[51] In this case, Mr. Radu, a person wanted on the basis of European arrest warrants issued to carry out criminal prosecution in Germany, opposed the execution invoking the fact that, on the date that Framework Decision 2002/584 was adopted, neither the fundamental rights laid down in the ECHR, nor those set out in the Charter had been specifically incorporated into the founding Treaties of the EU. Pursuant to Article 6 TEU, however, the provisions both of the Charter and of the ECHR have become provisions of primary EU law and, therefore, Framework Decision 2002/584 should henceforth be interpreted and applied in accordance with the Charter and the ECHR. Secondly, Mr Radu pointed out that that framework decision had not been implemented consistently by the MS. Lastly, Mr Radu submitted that the judicial authorities of the executing MS were obliged to ascertain whether the fundamental rights guaranteed by the Charter and the ECtHR were being observed in the issuing MS. In this context, Curtea de Apel Constanța, as the executing judicial authority, decided to refer some questions, summarised by the ECJ in the following legal issue:, namely whether Framework Decision 2002/584, in the light of Articles 47 and 48 of the Charter, as well as Article 6 of the ECHR, must be interpreted in the sense that the executing judicial authorities can refuse to execute a European Arrest Warrant issued for the purpose of criminal prosecution on the grounds that the issuing judicial authorities did not hear the wanted person before issuing this arrest warrant.

Answering the referring Court's questions thus focused, the ECJ decided that the Council Framework Decision 2002/584/JHA of 13 June 2002 must be interpreted in the sense that

> the executing judicial authorities cannot refuse the execution of a European arrest warrant issued for the purpose of carrying out criminal prosecution for the reason that the wanted person was not heard in the issuing Member State prior to the issuance of this arrest warrant.

The Court based its approach on the principle of mutual recognition, explaining that the purpose of Framework Decision 2002/584 ('the first concrete measure in the field of criminal law implementing the principle of mutual recognition')[52] is to re-

51 Case C-396/11.
52 Case C-396/11.

place the multilateral system of extradition between MS with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of conducting prosecutions, that system being based on the principle of mutual recognition ("the cornerstone" of judicial cooperation).[53] Regarding the fundamental rights invoked in the case, the Court was concise, concluding that 'the European legislature has ensured that the right to be heard will be observed in the executing MS in such a way as not to compromise the effectiveness of the European arrest warrant system.'[54]

The ECJ's approach has been criticised, arguing that it avoided the issue of the relationship between fundamental rights and the European arrest warrant[55] raised in the case, in the sense that the opportunity was missed for an in–depth analysis of the issues that the European arrest warrant raises in terms of respect for these rights and the constitutional diversity of the MS. At the same time, this kind of reasoning determined, as several authors have noted, the path to the historic judgment of the Court in Case C-399/11 Melloni,[56] a veritable turning point in European constitutionalism. From that Melloni moment, the idea of unconditional acceptance of common standards for the protection of fundamental rights at the supranational level was imposed, regardless of other various, and even higher national standards.

Case C-399/11 Melloni concerned an Italian national who had been judged and convicted in absentia. The Procura Generale della Repubblica (Italian Public Prosecutor's Office) issued a European arrest warrant for the execution of the sentence. Following his arrest by the Spanish police, Mr Melloni opposed surrender to the Italian authorities. He filed a "recurso de amparo" (petition for constitutional protection) against that order before the Tribunal Constitucional (Constitutional Court), alleging infringement of the absolute requirements deriving from the right to a fair trial proclaimed in Article 24 (2) of the Spanish Constitution. Thus, the very essence of a fair trial had been vitiated in such a way as to undermine human dignity, as a result of allowing surrender to countries which, in the event of very serious offences, validate findings of guilt made *in absentia*, without making surrender subject to the condition that the convicted party is able to challenge them in order to safeguard his rights of defence. In this context, the Tribunal Constitucional notified the ECJ to rule whether Framework Decision 2002/584 precludes the Spanish courts from making surrender of Mr Melloni conditional on the right to have the conviction in question reviewed. Answering the preliminary questions, the ECJ decided, *inter alia*, that

> Article 53 of the Charter of Fundamental Rights of the European Union must be interpreted as not allowing a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member

53 Paras. 33, 34.
54 Para. 41.
55 Raffaelli, 2019, p. 363.
56 Case C-399/11.

> State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

Thus, according to the ECJ, the interpretation according to which Article 53 of the Charter gives general authorisation to a MS to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, when necessary, to give it priority over the application of provisions of EU law, cannot be accepted, because it would undermine the principle of primacy of EU law. The interpretation was supplemented in *C617/10 of 26 February 2013, Hans* Åkerberg *Fransson*,[57] where the ECJ held, in essence, that where there are no harmonised standards for the protection of fundamental rights at EU level, the national courts can apply national standards, but they must not affect the "primacy, unity and effectiveness of EU law".

The Melloni case sparked vivid debates, affirming its major constitutional importance by the fact that the principles of recognition and mutual trust were given precedence over the standards of protection of fundamental rights enshrined in the Constitutions: 'it is a case where European criminal law becomes constitutional law'.[58] Since the ECJ ruling raised questionable effects for the protection of human rights, things did not remain stationary. The issue of protection standards in the context of the diversity of national regulations has been taken up in high-profile cases in criminal matters, such as Taricco,[59] MAS[60] and, more recently, Eurobox Promotion[61] and Lin.[62] The ECJ once again weighed the various rights and interests, pronouncing judgments that represented veritable "tests of acceptability" for CCs. In a sometimes tense climate, but which also led to constructive dialogues, the ECJ has taken new steps on the path of legal integration, grounding its reasoning by developing the principles of mutual trust and loyal cooperation.

3.2.2. The principle of mutual trust

The successful application of the principle of mutual recognition requires mutual trust and cooperation between the national judicial systems. The ECJ explains the importance of mutual trust in Opinion 2/13 of 18 December 2014, stating that

> it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other

57 Case C-617/10.
58 Mitsilegas and Mancano, 2019, p. 401.
59 Case C-105/14.
60 Case C-42/17.
61 Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19.
62 Case C-107/23 PPU.

> Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (…). (para. 191);
> Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU. (para. 192)

Opinion 2/13 identifies two main objects[63] of the principle of mutual trust: recognition of (and respect for) the shared values of the EU and compliance with EU law. It is evident that both dimensions are complex. Meeting the membership criteria, including the verification of these requirements at the moment of accession to the EU, cannot be an absolute presumption for the future. Therefore, to give substance to mutual trust, the ECJ introduced "limits", which means the obligation to verify, in specific circumstances, compliance with the values upheld by EU member states. Illustrative in this regard is the Judgment of 5 April 2016, delivered in *Joined Cases C404/15 and C659/15 PPU*,[64] having as its subject-matter the requests for a preliminary ruling made by the Higher Regional Court of Bremen, Germany, in proceedings relating to the execution of European arrest warrants issued in respect of Pál Aranyosi (C404/15) and Robert Căldăraru (C659/15 PPU). On that occasion, the ECJ ruled that

> where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing MS that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing MS, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that MS.

Through another preliminary reference, addressed by a Court from Germany, in Case *C-128/18, Dorobanțu*,[65] the ECJ was required to thoroughly present the interpretation given to Framework Decision European arrest warrant by Judgment of 5 April 2016, delivered in Joined Cases, C-404/15, Aranyosi and C-659/15 PPU, Căldăraru. In essence, in the context of the execution of a European arrest warrant

63 For a detailed approach see Boháček, 2022, pp. 103–40.
64 Joined Cases C-404/15 and C-659/15 PPU.
65 Case C-128/18.

issued by the Romanian judicial authorities, in the name of a Romanian citizen, for the purpose of criminal prosecution, the referring court wanted to find out what the minimum requirements regarding detention conditions would be, as well as the criteria for assessing those conditions, in terms of respecting the person's right not to be subject to punishment or inhuman or degrading treatment. By the delivered judgment, the ECJ ruled that the assessment of the executing judicial authority

> is not limited to the review of obvious inadequacies. For the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary and must rely, in principle, on the assurances given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention infringe Article 4 of the Charter of Fundamental Rights.

In this regard, the ECJ referred to 'the minimum requirements under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, as interpreted by the European Court of Human Rights'. These cases give expression to new developments/clarifications regarding the principle of mutual recognition. It is based on the trust between the MS, but not a "blind" trust. It requires the verification of the MS in terms of respect of the EU values. There were commentaries[66] with reference to these judgments that the ECJ approach

> constituted a paradigmatic shift on mutual recognition based on automaticity: the court stated expressly that the presumption of compliance with fundamental rights in the receiving MS is rebuttable and it placed specific duties to sending authorities to examine fundamental rights compliance.

Or, in another commentary,[67] 'the limitations of the principles of mutual recognition and mutual trust are on the menu, however only in exceptional circumstances'. The period following these decisions was focused on strengthening mutual trust. Thus, for example, in the Council Conclusions on mutual recognition in criminal matters 'Promoting mutual recognition by enhancing mutual trust' (2018/C 449/02),[68] various issues are emphasised, 'notably of a practical or policy nature – being able to impair mutual trust' and the need for 'an ongoing effort to foster and enhance this trust' was expressed. The Council states the importance of the timely and correct implementation of European instruments and continuous adaptation of the legislation of the MS to supranational requirements, on the importance of independence, the training of the judges, and the cooperation with various European bodies in the

66 Mitsilegas, Martino and Mancano, 2019, pp. 421–437.
67 Lazowski, 2019, pp. 437–455.
68 2018/C 449/02.

field. The MS are encouraged to establish (non-binding) guidelines on the application of the EU mutual recognition instruments to help practitioners understand how the national legislation implementing the EU instruments is to be interpreted and applied and invited to encourage practitioners to make full use of the possibilities of the EJN and Eurojust, following their respective mandates.

In this light, measures as the establishment of the Rule of Law Mechanism[69] can be seen as a political effort to verify and ensure mutual trust between EU states. This Mechanism provides a process for an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law. It focuses on four pillars: the judicial system, the anti-corruption framework, media pluralism, and other related institutional aspects of the system of checks and balances. The pillars cover all areas of the action and functioning of state authorities, including the legislative process, implementation of laws and policies, and judicial authority. The annual report provides valuable information and recommendations to ensure that all MS remain aligned with the fundamental values of the EU. This mechanism also acts as a driving force for coherence in EU law since in order to comply with the recommendations, the MS will have to adopt legislative measures.

3.2.3. The principle of sincere cooperation

According to the Article 4 para. (3) TUE,

> Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

This article is the basis of many of the historic judgments of the ECJ being invoked in all kinds of contexts that have shaped the European legal order, which rightly determined its qualification by some authors as an article with "Federalizing" tendencies.[70] We will explain in a separate section the way in which, in a specific conflict situation, the ECJ uses this principle to support the binding character of the Commission' Recommendations within the Mechanism of Verification and Cooperation imposed on Romania.

69 See COM(2020) 580 final.
70 Mota and van Iersel, 2021.

3.2.4. The principle of effectiveness of EU law in protecting the Union's financial interests

The principle of effectiveness of EU law in protecting the Union's financial interests, became increasingly important among the principles that coagulate the European legal order. As will be seen with reference to the recent ECJ cases that concerned rules on limitation period, the expansive force, the cross applicability of fundamental principles and rights previously analysed, and the existence, in some cases, of implicit linking points between national and EU law, is likely to impose obligations (via case law of the ECJ) on both the national legislator to respect EU law (even when it acts in exercise of purely national competence) and the national courts which have to disapply national general rules in criminal matters (including the decisions of the constitutional courts) in specific situations.

As for the European legislative framework in the matter, Article 325 TFEU should be mentioned which provides that

> The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests. […].

Likewise, the Convention on the protection of the European Communities' financial interests drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Luxembourg on 26 July 1995 (OJ 1995 C 316, p. 49; "the PFI Convention"), lays down in the Preamble that

> the contracting parties to that convention, Member States of the European Union, are convinced 'that protection of the European Communities' financial interests calls for the criminal prosecution of fraudulent conduct injuring [the] interests in question' and of 'the need to make such conduct punishable with effective, proportionate and dissuasive criminal penalties, without prejudice to the possibility of applying other penalties in appropriate cases, and of the need, at least in serious cases, to make such conduct punishable with deprivation of liberty.

Concerning the reference case law, *Taricco* judgement, Case C105/14 is well known, in which the ECJ declared the incompatibility of a part of the Italian rules on limitation period (Articles 160(3) and 161(2) of the Criminal Code) with EU law (especially, with Article 325 TFEU) emphasising that

> is liable to have an adverse effect on fulfilment of the MSs' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which it is for the national court to verify. The national court must give full effect to Article 325(1) and (2) TFEU, if need be, by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Article 325(1) and (2) TFEU.

Since, according to the Italian Constitutional Court,[71] the limitation period belongs to the general part of criminal law and has a substantive nature, the EU would not have any competence on the domestic statute of limitation period. However, according to the ECJ judgment, even rules belonging to purely domestic competences (such as, apparently, the ones on limitation period) can assume a European relevance, which require the domestic legislator to respect EU law even when it acts in an exercise of a purely national competence. The Taricco Case sent not only a strong signal upholding the principle of the effectiveness of EU law in protecting the Union's financial interests, but also concerning the power of the ECJ to "moderate" de criminal law. However, as pointed out,[72] the ECJ chose not to engage in detail with the classification of the statute of limitation periods as a matter of substantive or of procedural law, thus triggering protection under the principle of legality.

In relation to the uncertainties resulted from the ECJ settlement, the Italian Constitutional Court addressed a preliminary reference, essentially concerning the substantive legal nature of the limitation period, and the principle of legality and the protection of fundamental rights, as established by the standards of the Charter. By the judgment delivered in *Case C42/17, MAS*, the ECJ ruled that

> Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing

71 Rossi, 2017.
72 Ibid.

> conditions of criminal liability stricter than those in force at the time the infringement was committed.

Furthermore, the ECJ held that

> it is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Article *325 TFEU, in* the light of the considerations set out by the Court in paragraph *58 of* the Taricco judgment. It is that legislature's task to ensure that the national rules on limitation in criminal matters do not lead to impunity in a significant number of cases of serious VAT fraud, or are more severe for accused persons in cases of fraud affecting the financial interests of the Member State concerned than in those affecting the financial interests of the European Union. (para. 41)

These cases aroused lively debates, being generally considered that the dialogue between the ECJ and the Italian Constitutional Court could be seen as reaching a successful outcome from the perspective of both Courts in terms of identifying a "middle ground", in which the position of the Italian Court on the legality principle is not jeopardised, whilst maintaining the basic principles put forward by ECJ in Taricco I. However, the meaning and scope of the principle of legality remain to be further clarified. Also unclear is the impact of EU harmonisation on limitation periods on the conceptualisation of the principle of legality in national law.

The recent judgment delivered by the ECJ in *Case Lin C-107/23 PPU of 24 July 2023*[73] brings new developments in this regard, in a situation concerning the incidence of the limitation period in conjunction with the rules of a retroactive application of the more favourable criminal law.

In its request for a preliminary ruling, made in the context of extraordinary appeals brought by the appellants in the main proceedings seeking to have the final judgments convicting them of tax evasion and establishment of an organised criminal group and imposing prison sentences pursuant to those convictions set aside, the Court of Appeal, Brasov refers to national case-law relating to the initial version of Article 155(1) of the Criminal Code, regarding the limitation period, which may have a decisive effect on the situation of the appellants. Thus, the referring Court states firstly, that the Curtea Constituțională (CCR), by its judgment No 297/2018, upheld a plea of unconstitutionality concerning that provision in so far as it provided for the limitation period for criminal liability to be interrupted by the performance of "any procedural act". For several years, the national legislature did not take action following judgment No 297/2018 of the CCR, in order to replace the provision held to be unconstitutional, namely Article 155(1) of the Criminal Code. As a result, the CCR, by its judgment No 358/2022, upheld a further plea of unconstitutionality concerning Article 155(1) of the Criminal Code.

73 Case C-107/23 PPU.

In that judgment, emphasising the lack of action by the legislature since judgment No 297/2018, and the fact that the combined effect of the latter judgment and a lack of action had given rise to a new situation which lacked clarity and foreseeability with regards to the rules applicable to the interruption of the limitation period for criminal liability, which had resulted in inconsistent case-law, the CCR stated that between the date of publication of judgment No 297/2018 and the entry into force of a legislative measure determining the applicable rule, '[Romanian] positive law [did] not provide for any ground for interrupting the limitation period for criminal liability'. Judgment No 67/2022 of 25 October 2022, published on 28th November 2022, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) decided that, under Romanian law, the rules relating to the interruption of the limitation period for criminal liability fall within the scope of substantive criminal law and that, consequently, they are subject to the principle of non-retroactivity of criminal law, without prejudice, to the principle of the retroactive application of the more lenient criminal law (*lex mitior*), as guaranteed, *inter alia*, in Article 15(2) of the Romanian Constitution. Consequently, the High Court of Cassation and Justice held that a final conviction may, in principle, be the subject of an extraordinary appeal based on the effects of judgments No 297/2018 and No 358/2022 of the CCR. (paras. 23–34)

In this complex situation given by the national rulings of the highest national courts, the ECJ decided as follows:

> 1. Article 325(1) TFEU and Article 2(1) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, (…) must be interpreted as meaning that the courts of a Member State are not required to disapply the judgments of the constitutional court of that Member State invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, as a result of a breach of the principle that offences and penalties must be defined by law, as protected under national law, as to its requirements relating to the foreseeability and precision of criminal law, even if, as a consequence of those judgments, a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability. However, those provisions of EU law must be interpreted as meaning that the courts of that Member State are required to disapply a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (lex mitior) which makes it possible, including in the context of appeals brought against final judgments, to call into question the interruption of the limitation period for criminal liability in such cases by procedural acts which took place before such a finding of invalidity. 2 (…)

The key grounds for the settlement provided in point 1 lies mainly in para. 124 according to which the national courts cannot, in the context of judicial proceedings seeking to impose criminal penalties for serious fraud offences affecting the financial interests of the European Union, apply the national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (lex mitior), as referred to in paragraph 119 above, in order to call into question the interruption of the limitation period for criminal liability by procedural acts which took place before 25 June 2018, the date of publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court).

Paragraph 119, to which it refers, shall read as follows:

> However, it is apparent from the explanations provided by the referring court that judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice) is also based on the principle of the retroactive application of the more lenient criminal law (lex mitior) arising from judgments No 297/2018 and No 358/2022 of the Curtea Constituțională (Constitutional Court). According to the referring court's interpretation of judgment No 67/2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice), the latter court found that, in accordance with that principle, the effects of the absence of grounds for interrupting the limitation period for criminal liability under Romanian law, resulting from those two judgments of the Curtea Constituțională (Constitutional Court), could be applied retroactively to procedural acts which took place before 25 June 2018, that is to say the date of publication of judgment No 297/2018 of the Curtea Constituțională (Constitutional Court).

It should be noted that the ECJ strictly conditioned its interpretation, limiting the courts from applying the more favourable national criminal law standard in situations "as referred to in paragraph *119* above", namely in the sense that the effects of the lack of cases for interrupting the limitation period of criminal liability in Romanian law arising from the decisions of the CCR to retroactively proceed (in the sense of a more favourable criminal law) to procedural documents entered into force before 25th June 2018, namely the publication date of Decision No 297/2018 of the latter court. Therefore, the regime of limitation periods as a matter of substantive or procedural law, or its significance in the EU law was not clarified. The ECJ placed the issue under the protection of fundamental rights standards, allowing the courts of law to make their own analyses and decisions. This ruling also mentioned the recent jurisprudence of the ECJ, which allowed courts of law to disapply decisions made by the CCR. Furthermore, this also applies to decisions made by the High Court of Cassation and Justice, even if they are considered binding under domestic law.

This solution raises several issues:

– a risk of collision of the courts of law with the High Court of Cassation and Justice (in terms of the possibility to remove its decisions from application);

critical opinions were expressed in this regard in Romania[74] emphasising the role of the High Court of Cassation and Justice in the interpretation and uniform application of laws;
– an indirect collision with the CCR (in terms of the possibility to remove its decisions from application); the CCR established in its case-law that the decisions by which the unconstitutionality of an incriminating rule is found to be assimilated to the effects of a decriminalisation criminal law[75] (entailing the scope of the principle of retroactive application of more favourable criminal laws);
– a problem of interpretation, in itself, of the national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*). A correlative constitutional text that could be discussed is Art. 15 para. (2), which enshrines the future application of the law, with the exception of the more favourable criminal and contravention law, Art. 126 para. (3), and which provides for the role of the ICCJ of uniform interpretation and application of the law by all other courts, and Art. 147 para. (4) which establishes the general binding character of CCR decisions. The ECJ basically opposes all these articles of the Romanian Constitution, Article 325(1) TFEU and Article 2(1) of the Convention drawn up pursuant to Article K.3 of the Treaty on EU on the protection of the financial interests of the European Communities.

It could be argued that European criminal law is renewed, through the interpretation of the ECJ, constitutional law.

3.3. *The EU principles shaping the Romanian legislation in criminal matters*

3.3.1. Prison law in Romania

The development of post-accession criminal legislation in Romania is an extensive topic that can be the subject of a separate study. In the present framework, following the analysis aimed at the principle of mutual trust and sincere coopeartion, we will provide a few highlights regarding the legislation on detention conditions (prison law) and the Criminale Code (via Cooperation and Verification Mechanism), likely to provide a national perspective of the shaping of domestic law in the EU context.

Thus, regarding the conditions of detention in Romania, the ECJ and ECHR rulings (some of them previously mentioned in our study) have determined complex measures at a political level, for compliance with European standards in the matter (a condition for the application of the principle of mutual recognition).

For example, according to the Memorandum of 16th January 2018 with the topic 'Approval of the calendar of measures 2018-2024 for the resolution of prison

74 See for example: Les, 2023.
75 Decision No 651/2018, Official Gazette No. 1083 of 20 December 2018.

overcrowding and of detention conditions, in the execution of the pilot decision Rezmiveș and others against Romania, delivered by the ECHR on 25th April 2017'[76] five main directions of action were established: changes in legislation aimed at reducing the penitenciary population and improving the detention condition; investments in physical infrastructure of penitentiaries aimed at expanding the number of places of detention and modernising existing ones; the effective functioning of the probation system to facilitate the application of community sanctions and measures to reduce the prison population; the implementation of programs and strategies to channel people from the penitentiary system; and legislative measures to ensure an effective appeal for the harm suffered. A monitoring mechanism consisting of the organisation of a six-monthly evaluation of action plans undertaken by each institution at formal meetings of the Working Group for Monitoring and Evaluation of the Calendar of Measures, including the Ministry of Justice, the Ministry of Foreign Affairs was also established – The Government Agent for the ECHR, the Ministry of Public Finance, the National Penitentiary Administration, the National Penitentiary Directorate. The Secretariat of the Group is provided by the Ministry of Justice.

Legislatively, significant amendments of the criminal legislation on the components of the execution of punishments took place.[77] Law No 169/2017 amending and supplementing Law No 254/2013 on the execution of sentences and detention measures ordered by the judicial bodies during the criminal proceedings was adopted, initiated prior to the pronouncement of the pilot decision, and subsequently enforced.[78] Law No 169/2017 mainly established a compensatory mechanism for granting a benefit, meaning days considered to be executed for a period in custody in inadequate detention facilities. Law No 61/2018 amending and supplementing the Government Ordinance no. 26/1994 on the right to food, in peacetime, of the personnel in the national defence sector, public order and national security[79] was also adopted, as well as Order of the Minister of Justice no. 2772/C/2017 on the approval of minimum standards on the accommodation of persons deprived of their liberty,[80] and the Order of the Minister of Justice no. 2773/C/2017 for the approval of the centralised situation of buildings which are inadequate in terms of detention conditions.[81]

The development of the probation system,[82] as well as the social reintegration of convicted persons should also be noted. In this respect, by Government Ruling no. 389/2015 on the approval of the National Strategy for Social Reintegration of Persons deprived of their liberty, 2015-2019[83] a series of actions aimed at reducing

76 Juridice, 2018, Calendarul.
77 See Safta, 2020.
78 Published in the Official Gazette no. 571/18 July 2017.
79 Published in the Official Gazette no. 227 of 14 March 2018.
80 Published in the Official Gazette no. 822 of 18 October 2017.
81 Ibid.
82 Law No 252/2013 regarding the organisation and functioning of the probation system, published in the Official Gazette no. 512 of 14 August 2013.
83 Published in the Official Gazette no. 532 of 16 July 2015.

the recidivism rate were implemented and the Inter-ministerial Commission was set up and functioning to coordinate and implement the provisions of the National Social Reintegration Strategy for Persons deprived of their liberty, 2015-2019. Currently, these efforts continue, in the new framework given by the National Social Reintegration Strategy for Persons deprived of their liberty, 2020-2024.[84]

The legislative measures were accompanied by numerous administrative measures, so that currently the penitentiary system is radically changed compared to the date on which Romania's first sentencing decisions for detention conditions were pronounced.

3.3.2. The effects of the Verification and Cooperation Mechanism (CVM)

One of the most interesting aspects of EU impact on Romanian criminal law is the application of Cooperation Mechanism (CVM) set up through Decision 2006/928.[85] When Romania joined the EU, the European Commission noted some unresolved issues, particularly related to the accountability and effectiveness of the judicial system, which motivated the adoption of CVM 'to address specific benchmarks in the areas of judicial reform and the fight against corruption.' According to Article 1 of Decision 2006/928,

> Romania shall, by 31 March of each year, and for the first time by 31 March 2007, report to the Commission on the progress made in addressing each of the benchmarks provided for in the Annex."(…)
> 1) Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.
> 2) Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.
> 3) Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption.
> 4) Take further measures to prevent and fight against corruption, in particular within the local government.

In 2022, after 15 years of monitoring, the Commission concluded,[86] in essence, that Romania had made sufficient progress in terms of fulfilling the commitments it had assumed within the CVM and that all benchmarks could be satisfactorily closed. The

84 Approved by Government Ruling No 430/2020, published in the Official Gazette no. 494 of 11 June 2020.

85 Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified under document number C(2006) 6569) (2006/928/EC).

86 See: Euronews, 2022.

monitoring under this Mechanism was officially closed on 15th of September 2023,[87] and Romania's rule of law will continue within its annual cycle, similarly to all MS.

We will not go into details regarding the laborious nature of the CVM, which implied extensive annual meetings with the Commission's experts and complex reports, as well as significant amendments to the legislation in civil and criminal matters, civil procedural and criminal law, integrity, the fight against corruption, the organisation and functioning of justice, and other institutions and authorities. In this context, we will point out only a few milestones aimed at adopting and applying new Criminal and Criminal Procedure Codes. The flawed route of these regulations, the difficulty of their enactment and implementation, and the numerous issues of constitutionality they raised, urge us to reflect on the time and effort required for essential amendments in the criminal legislation of the States and the complexity of the European legislative harmonisation process.

Thus, in the first Report, in 2007, the European Commission marked[88] positively the beginning of the work of the national Commission for the elaboration of the new Code of Criminal Procedure, retaining details regarding the general approach of the new regulation. One year later, in the 2008 Report,[89] the establishment of the National Integrity Agency was positively outlined and, in the "Improvements needed" section, it was noted that there was a necessity to 'finalise a new Criminal Procedure Code (CPC) and make progress on the draft Criminal Code'. According to the Commission,

> This would provide a clearer and effective framework for prosecution and allow better cooperation with other Member States. In addition, the controversial amendments to the emergency ordinance amending the existing Criminal Code and the Code of Criminal Procedure introduced in Parliament should be dropped. They would seriously restrict meaningful investigation.

The Commission founds in the 2009 Report[90] that the adoption of the Criminal Code in June 2009[91] is 'an important expression of political commitment, and a significant step forward in terms of securing a more efficient legal system.' Moreover, it was held that

> the Codes are foreseen to enter into force only when the relevant Procedural Codes (presented at the same time by the government to the Parliament) have been debated and agreed in normal parliamentary procedure. The earliest expected date of entry into force for all four Codes is 2011. An implementing law for the application of the

87 European Commission, Press release, 2023.
88 COM/2007/0378 final.
89 COM/2008/0494 final, {SEC(2008) 2539}.
90 See: European Commission, no date, Reports on progress for Bulgaria and Romania under the Cooperation and Verification Mechanism (CVM).
91 Criminal Code of 17 July 2009 (Law No 286/2009), Official Gazette no. 510 of 24 July 2009.

> Codes will be needed. It is important to ensure that this implementing law and also the adoption procedure concerning the Procedural Codes do not lead to the reintroduction of provisions that were contested in the past or new ones which would undermine the efficiency of meaningful investigations into high level corruption and subsequent court proceedings.(…)

The 2010 Report[92] noted that

> The preparations for the entry into force of the four new codes, now scheduled for October 2011, are an important opportunity for a thorough reform of the Romanian judicial system.
> To sustain this reform process, the Commission calls upon Romania to build on the strong Parliamentary support for the procedural codes and extend this political will to other areas,

and on the same line, the 2011 Report[93] recommended 'the adoption of active measures to accompany the entry into force of the Civil Code and the adoption of a comprehensive plan for the implementation of the other three new codes'. The 2012 Report[94] registered a synthesis of the steps taken, noting that

> Since accession, Romania has pursued an ambitious legislative agenda. This has included new Civil and Criminal Codes and the accompanying procedural codes, with the explicit aim of modernising the judicial process. International experience was drawn upon in support of these efforts. The adoption of the codes in 2009 and 2010 represented a major result on the part of the Government, the Parliament and the judiciary, even if the implementation process has been lengthy. (…) the new Criminal and Criminal Procedure Codes are currently foreseen for entry into force next year. Though there have been concerns about whether the systems are in place to effectively implement the changes, and measures to prepare for implementation will need to be intensified, these Codes represent a major attempt at modernisation and if properly implemented, could bring considerable benefits for the efficiency, transparency and consistency of the judicial process.

92 European Commission, 2010, Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism {SEC(2010) 949}.

93 European Commission, 2011, Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism {SEC(2011) 968 final}.

94 European Commission, 2012, Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism {SWD(2012) 231 final}.

Furthermore, the 2012 Report is the most extensive up to that point, containing recommendations on multiple levels, including on the appointment of the Advocate of the People, the regime of emergency ordinances, and the decisions of the Constitutional Court.

The 2013 Report[95] held that 'the entry into force of the Criminal Code and the Code of Criminal Procedure is tentatively scheduled for February 2014. More clarity is needed on how to avoid these dates slipping still further', and the 2014 Report, reminding that 'successive CVM reports have followed the process of developing new legal Codes in Romania' noted that

> whilst implementation has not been easy, particularly when parallel systems have had to be maintained, there has been an increasing sense that the judicial leadership institutions have been working together with the Ministry of Justice to facilitate the transition. The preparations for the entry into force of the new Criminal Codes have sought to learn from the experience of the past. (…) The new Code of Criminal Procedure to be implemented from February is a major undertaking: all provisions are directly applicable, and the code introduces two new institutions, the "rights and freedom judge" and the "preliminary chamber" judge. It is therefore particularly important that problems are anticipated and resolved where possible. Regular monitoring of the actual effect and implementation of the new provisions will be important once the new Codes are in force.

Furthermore, the Commission noted that

> a remaining difficulty is the instability of the new Codes a few months before their entry into force. Several legal problems have been identified, which may require amendments of the codes or of the law for the application of the Criminal Procedure Code still to be adopted before the entry into force. In addition, in December the Romanian Parliament voted a series of controversial amendments to the Criminal Code, which were ruled unconstitutional by the Constitutional Court.

The 2015 Report[96] stated that

> the implementation of the new Criminal and Criminal Procedures Codes in February 2014 was a major undertaking, and a test of the ability of the judicial system to adapt. The change was successfully achieved, (…). Some innovatory measures, such as a possibility for plea bargains, seem to have already been used to good effect.

95 COM/2013/047 final.

96 European Commission, 2015, Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism {SWD(2015) 8 final}.

The 2016[97] and 2017 Reports[98] found the situation resulted from the new amendments to the Codes, necessary, in part, as a result of the constitutionality issues identified by the CCR, and the 2018 Report[99] provides a wide space to the issue, which had reached a certain impasse due to the amendments that constitute 'a profound overhaul of the Codes of 2014', as well as of finding certain provisions of the new laws as unconstitutional. The Commission noted the critical conclusions and recommendation presented in the Venice Commission Opinion on 20 October regarding the same amendments, pointing out 'the lack of quality of the legislation, and to shortcomings in its preparation as well as contradictions with the case law of ECtHR and with the international obligations of the country, especially regarding the fight against corruption'.

The 2021 Report[100] referring to the 2019 findings, subsequent regulatory concerns and the current situation, noting that

> amendments to the two codes remain necessary. In the first place, this is required to follow up on a number of far-reaching decisions of the Constitutional Court made since 2014, which have annulled provisions of both codes and had a particular impact on the fight against corruption and organised crime. In the absence of solid legislative and policy solutions, legal uncertainty hinders some individual cases and, as a result, affects the fight against corruption. (…) This opens the way to the process of revision of the criminal code and criminal procedure code to follow up on the Constitutional Court decisions, taking fully into account the need for compatibility with EU law and international anti-corruption instruments, as well as the recommendations under the CVM and the Venice Commission opinion set out in the recommendations.

This evolution of the adoption and amendments of the Criminal and Criminal Procedure Codes must be analysed in a wider context, in conjunction with reforms aimed equally at other institutions and procedures. We mention, as an example of legislative amendments, resulted from the need to comply with the requirements of a procedural nature (the duration of criminal trials indicated in the 2009 CVM Report) the changes in the procedure for settling the exceptions of unconstitutionality, in terms of eliminating the mandatory suspension in the files in which these exceptions are raised. The amendment also entails the introduction of new extraordinary

97 European Commission, 2022, Questions and answers: Cooperation and Verification Mechanism for Bulgaria and Romania.

98 European Commission, 2017, Technical report: Progress in Romania under the Co-operation and Verification Mechanism {SWD(2017) 701 final}.

99 European Commission, 2018, Technical report: Progress in Romania under the Co-operation and Verification Mechanism {SWD(2018) 551 final}.

100 European Commission, 2021, Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism {COM(2021) 370 final}.

appeals in criminal and civil matters, in case of allowing the exceptions of unconstitutionality following the settlement of the cases in which they were raised.

From this entire flawed route, it can be noted that for at least 15 years, the criminal legislation in Romania has been under the "lens" of the European Commission. Many of the current regulations have been "shaped", not only as a result of the transposition of directives or in the application of framework decisions, but also distinctly from them, to respond to the requirements of legislative harmonisation in attaining the desired goals of the shared values (among which integrity and fighting against corruption are the key points). While the pressure and haste with which the new Codes were adopted, the successive postponement of the implementation, and the fairly quick finding of the need for the new laws to be amended, led to difficulties noticed by the Commission, they were taken into account for further monitoring within the Rule of Law Mechanism:

> The annual Rule of Law Report cycle will enable the implementation phase of many of the agreed reforms to continue to be monitored in practice. Issues such as the new regime following the dismantling of the Section for the Investigation of Offences in the Judiciary, the functioning of the Judicial Inspection, human resources in the judiciary, the implementation of court decisions by public administration, the impact of the upcoming revision of criminal legislation on the effectiveness of the fight against corruption, and the evolution of the integrity framework and its application, including by Parliament, can continue to be followed-up in this way. This will be part of the monitoring of the justice system and anti-corruption as two of the core pillars of the reports.[101]

It is evident that, while the supranational level has adopted criminal rules and procedures, the States' criminal legislation has undergone a process of "Europeanisation", conforming to European supranational standards. This process has led to the emergence of new criminal law concepts, particularly in States that have recently acceded to the EU. In the case of Romania, through the CVM and the Monitoring Reports, essential changes have occurred in the criminal field, replacing a normative framework whose foundations had been laid decades ago.[102] The statement of reasons of the new Romanian Criminal Code underlines this very clearly, noting, *inter alia*, that

> Responding to the requirements of the monitoring process of the European Commission, the draft has as its starting point the need for the development of a new

101 See Report From The Commission To The European Parliament And The Council On Progress in Romania under the Cooperation and Verification Mechanism COM/2022/664 final.

102 Thus, by Article 250 of Law No 187/2012 for the implementation of Law No 286/2009 regarding the Criminal Code was repealed Law No 15/1968 regarding the Criminal Code, republished in the Official Gazette of Romania, Part I, no. 65 of 16 April 1997, with subsequent amendments and supplements.

> Criminal Code, which will take over the elements that can be maintained from the Code in force and from Law No 301/2004 and integrate them on the basis of a unitary concept alongside elements taken from other reference systems but also from the regulations adopted at the level of the European Union for the creation of the area of freedom, security and justice.

This "shaping" of the Romanian legislation was possible due to the binding force of the CVM, as well as the Recommendations issued by the European Commission in this context. Following the evolution of monitoring, we find that, over time, the Commission's Reports have become more extensive, including more and more areas deemed to be subject to the reference objectives, detailed in a number of following Recommendations, and then checked on a point-by-point basis. From this perspective, we believe that it is useful to point out the debate regarding the legal nature of the CVM and especially the Commission's Recommendations within the MCV. The disputes of the courts on this subject and the decisions of the ECJ need to be understood, as long as could be applicable *mutatis mutandis* also regarding the Rule of Law Mechanism, which this time targets all MS.[103]

Thus, in a series of preliminary referrals by the Romanian courts, the ECJ held not only the binding nature of the CVM, but also of the Reports drawn up by the Commission and the Recommendations. The ECJ invoked in this regard the principle of loyal and sincere cooperation that harmoniously complements the principles of mutual recognition and trust.

According to the ECJ,[104]

> it follows from the principle of sincere cooperation, laid down in Article 4(3) TEU, that the Member States are obliged to take all the measures necessary to guarantee the application and effectiveness of EU law and to eliminate the unlawful consequences of a breach of that law."(par.176) " In those circumstances, in order to comply with the benchmarks set out in the Annex to Decision 2006/928, Romania must take due account of the requirements and recommendations formulated in the reports drawn up by the Commission under that decision. *(*para. 177)

The ECJ concluded, in light of the foregoing considerations, that

> The benchmarks in the Annex to Decision 2006/928 are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, in the sense that Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by

103 See COM/2020/580 final.
104 Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19.

> the Commission on the basis of that decision, and in particular the recommendations made in those reports. (para. 178)

The few highlights presented demonstrate that the development of the principle of mutual trust with reference to the loyal cooperation that the MS are required to observe in order to respect the values of the rule of law established in the Treaties, gives a continuous and convergent, ascending character to the adaptation of the legislation of the MS, including the criminal component.

3.4. Some thoughts concerning the future of constitutional justice in Europe, in relation with the protection of human rights

The presentation highlights important milestones in the development of the principles of mutual recognition, mutual trust, sincere cooperation and the effective protection of the EU's financial interests. These principles have consistently influenced national legal systems by aligning them with common standards for the protection of fundamental rights, adhering to the same meaning of concepts that have an autonomous meaning in EU law, and removing criminal rules from domestic law that contradicts EU law. Although these principles have a high potential for "federalising", it is important to consider the potential of conflicts that may arise when they collide with national regulations or courts. Therefore, it is necessary to define these constitutional principles systematically to anticipate the risks and find ways to respond to them.

Commenting on the meaning of the Melloni Case, ECJ President, K Lenaerts[105] outlined that one of the main objectives of the European integration in criminal matters is to prevent criminals from exploiting freedom of movement as a means of pursuing their illegal activities with impunity. By facilitating the mutual recognition of judicial decisions in criminal matters, the SLSJ supports the effectiveness of national criminal legislation as it is legitimate for the EU legislator to establish restrictions on individual rights, as long as the MS can be reassured that those restrictions respect the EU Charter, in other words the constitutional consensus of the EU. Therefore, the harmonised standards for the protection of fundamental rights at EU level (even inferior to those in the national constitutions) emerge in the light of this revolutionary decision, based on the principle of mutual recognition, as the expression of a constitutional consensus at EU level, the meaning of which is explained by the ECJ, under the interpretation of the Charter. In this way, it seems that a constitutionalisation is attained in the absence of the amendments to the treaties and a constitution in the formal meaning of the concept: "The ECJ decided that the legislative consensus established in the framework decision complies with the constitutional consensus enshrined in the EU Charter"; 'thus, the legislative consensus of the EU prevailed over the diversity of values'.[106]

105 Lenaerts, 2014.
106 Ibid.

We agree that zero tolerance and effective measures should be taken to fight against criminality, regardless of whether it exists on a national or supranational level. However, it is not as simple as it seems. The concept of "harmony" is difficult to achieve when fundamental rights are in question. The protection of these rights should always be a main priority. The protection of the financial interests of the EU and, generally speaking, the fight against crime must be reconciled with this main priority, which is also essential for the existence of the rule of law. European criminal law in the broad sense, which includes the Convention for the Protection of Human Rights and Fundamental Freedoms, and its guardian, the ECtHR, should be considered in this regard. The "layers of protection" (constitutions, Charta, Convention) and the courts responsible for their interpretation and application make it questionable to accept lower standards of fundamental rights protection than those guaranteed by the constitutions of MS.

As noted in the Lin Case C107/23 PPU of 24 July 2023, the ECJ requires the removal of a national standard as regards the retroactive application of the more favourable criminal law. It is true that the ECJ is not referring to the *de plano* removal of this standard, but in the sense that results from the decisions issued by the Romanian supreme and constitutional courts, which put into question the way in which these courts understand national law in correlation with the EU values. This could be also an interesting separate topic, concerning not only the relationship between courts, but the profile and competence of the courts in the complex structure of the EU. However, if the *de plano* removal of the application of the more favourable criminal law had been directly discussed, it would have raised significant problems, since this principle is strongly grounded in the constitutional traditions of the MS. The quasi-unanimity of the criminal codes enshrine it in the general part, which governs the entire configuration of the criminal law (see, for example, Article 61 – Austria, Article 2 – Bulgaria, Chapter I, Section 2- Czech Republic, Article 2 – Germany, Article 2 – Greece, Article 2 – Italy, Article 112-1 – France, Section 4- Latvia, Article 2 – Luxembourg, Article 3- Lithuania, Article 27- Malta, Art.4 – Poland, Article 2 – Slovakia, Article 7 – Slovenia, Article 26 – Spain). Likewise, the ECHR applies it, even if it is not expressly enshrined in the Convention. Thus, for example, the ECHR held that

> even though Article 7 § 1 of the Convention does not expressly mention the principle of the retroactivity of the lighter penalty (unlike Article 15 § 1 in fine of the United Nations Covenant on Civil and Political Rights and Article 9 of the American Convention on Human Rights), the Court held that Article 7 § 1 guarantees not only the principle of non-retroactivity of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant (Scoppola v. Italy (no. 2) [GC], §§ 103-109.

Consequenly, a *de plano* removal could be invoked before the ECtHR by the interested parties, leading to a direct conflict of protection standards/that of the Convention as interpreted by the ECtHR and that of the Charter/as interpreted by the ECJ.

Similar conflicts could always arise in relation to other fundamental rights as long as the standards established by the Charter (in its interpretation) could not oppose other higher standards (that is, national). These higher standards could come from the Convention and are invoked based on the national Constitution, such as in Romania where the Convention takes priority over national law if it contains more favourable provisions. Protecting the EU's financial interests can be achieved without sacrificing fundamental rights. It is also important to note that standards cannot differ based on whether European law is involved, as it could lead to discrimination when applying the same concepts, especially in criminal law.

Nonetheless, it is remarkable how through the decisions of the ECJ, European criminal law emerges not only as a branch that has acquired a substantial enhancement, but also as a strong factor of the reconfiguration of the EU as a structure of States, united by a constitutional consensus. As was observed,[107] the ECJ sees itself as a 'motor of European criminal justice', as the guardian of the principles of European criminal law. It remains to be seen how national judges will learn and how the high courts will react in this context.

Coming back to the Lin Case, which contrasts the ECJ with the ÎCCJ (High Court of Cassation and Justice) and, was mediated, with the CCR, we consider that it also put into question the authority of the decisions of these Courts and their constitutional role. This type of "relativising" the decisions of the Constitutional Court and Supreme Court requires special attention and analysis, especially considering their mandatory general effect as established by the National Constitution. However, as the ECJ cannot be transformed into a court to "reform" the decisions of the national and constitutional supreme courts, even if they could be erroneous, the most reasonable attitude remains the cooperation and development of a mechanism in this regard, entailing the involvement of these latter courts in cases in which their judgments are in question. When it comes from the interpretation of the instrument of protection of human rights, "constitutional consensus" should be supported by the convergent case-law of the national constitutional courts,[108] namely the ECtHR and the ECJ. From this perspective, and in light of recent case law of the ECJ concerning the effects of the decisions of the constitutional courts, a thorough debate on the future of justice in the EU is increasingly needed.

107 Braum, 2021, pp. 14–22.
108 Case C-430/21.

4. Conclusions

In a suggestive expression, 'the EU is like a moving target which continuously redefines itself'.[109] The field of criminal law illustrates and supports this unceasing redefinition. Thus, although the EU's involvement in criminal law has led to challenges and tensions,[110] developments in this field are significant both the branch of law itself and for the evolution of the EU as an autonomous legal order.

Regarding the challenges, the statement of reasons of the Spanish Criminal Code caught our attention[111] during a perusal of the Criminal Codes of the EU MS. Arguing the 'importance of the Criminal Code in any civilised society', the Spanish legislator points out that

> the Criminal Code defines criminal and misdemeanours that constitute the cases for application of the supreme action that may be taken by the coercive power of the State, that is, criminal sentencing. Thus, the Criminal Code holds a key place in the Law as a whole, to the extent that, not without reason, it has been considered a sort of «Negative Constitution».

This excerpt explains one important challenge concerning the emerging EU criminal law: although it is not a State, and does not have a Constitution in the formal sense, the EU has a coercive power specific to States. This "power" was assigned by the MS, which introduced in the treaties the possibility for the EU to adopt not only rules of criminal procedure, but also of substantive criminal law, and must reconcile the coercive power of each of the MS in its own territory.

The establishment of criminal rules is the most suggestive proof of EU autonomy. Progressively, both at a political and regulatory level, and with the consistent involvement of ECJ, a convergence was achieved, adding new elements for the unification of criminal law in the EU. As was emphasised,[112] EU law is no longer limited to economic issues related to the establishment and functioning of the internal market. EU law has evolved following the adoption of successive treaty reforms so that it currently takes effects on the rules that have traditionally been reserved for national States. These are visible in the Directives that have succeeded or replaced framework decisions, but also through the application of mechanisms aimed at strengthening the uniform application of EU law at the level of the MS where it is difficult to attain political consensus. Mutual trust, supported by an enhanced activism of the ECJ in the promotion and protection of the values that establish the constitutional core of the EU is seen as probably the strongest engine of

109 Nuotio, 2014, p. 1117.
110 Craig and de Burca, 2017, p. 1113.
111 Organic Law 10/1995, on the Criminal Code, Official Gazette no. 281 of 24 November 1995.
112 Lenaerts, 2015.

development in recent years, also leading to extensive amendments in the criminal regulations in the MS.

The Treaties themselves, as amended in Lisbon, refer distinctly to rules of substantive, procedural and institutional criminal law. As for the general criminal law, which would seem to be the competence of the MS, it is shaping its autonomy at the European level through the case-law of the ECJ which places the harmonisation process in this field under the standards for the protection of fundamental rights and the obligations of the States based on other treaty rules with direct applicability, such as those aimed at the protection of the EU's financial interests. The aforementioned development coexists with national systems, being important (but also increasingly difficult) to distinguish between the competence of the States on the one hand and that of the EU on the other, in order to avoid conflicts and inconsistencies that would endanger the common objectives undertaken.

When it comes to criminal law tensions, the study's jurisprudential benchmarks suggest that there are conflicting forces at work. The criminal law is still under pressure, between differentiation and harmonisation, in seeking a common approach. Given that a "penal rainbow"[113] in terms of the regulations of the MS still exists, convergence in codification involves more than jurisprudential "adjustments". The varying criminalisation of specific actions in different national legal systems is a result of each state's unique development, sensitivities, history, socio-economic context, and standards of protecting fundamental rights outlined in their respective Constitutions. This has led to moments of tension that often result in visible conflicts between constitutional courts at the European level. As shown,[114] national courts tend to be reluctant to accept that the very different rules that exist in other European legal systems are as efficient, in terms of ensuring respect for fundamental rights. In the absence of a certain degree of harmonisation of rules, it is difficult to apply the presumption of mutual trust, as issues of constitutionality or even of the resulting infringement of the national constitutional identity, laid down in Article 4 TEU, may arise. The recent period has strengthened the ECJ's[115] role regarding its disputes with the national constitutional courts, where rules of substantive national criminal law have been at issue. Once more, the ECJ also imposed the primacy of EU law in this field, balancing the various rights and interests at stake, which leads to an increasingly constitutional convergence.

Regarding the European criminal law in terms of the constitutional significance, it can be concluded that a traditional State structure is not always necessary for a common criminal law to exist, even on a substantial level. The development of European criminal law has occurred through various forms and instruments and will continue to do so. Therefore, closer harmonisation in this field does not necessarily result in a classic federal state structure. It looks that a structure *sui generis*

113 Harding, 2015, p. 854.
114 Raffaelli, 2019, p. 372.
115 Lenaerts, 2013.

of states, united by the common will and values expressed in treaties, can support a common criminal law. By all means, this evolution shines a light on reconsiderations concerning the classic notion of sovereignty, since 'the sovereign is the one who punishes'.[116] The principle of mutual recognition reflects shared sovereignty,[117] which is why it is crucial to define this principle and its limits not only by the courts but also by the legislator.

In this light, it might be useful to invite the MS to a new debate on the future of substantive criminal law in the EU.

116 Braum, 2021.
117 Ibid.

Refrerences

Ambos, K. (2018) *European Criminal Law*. Cambridge: Cambridge University Press; https://doi.org/10.1017/9781316348628.

Arnaiz, A.S., Llivina, C.A. (2013) *National Constitutional Identity and European Integration*. Cambridge: Intersentia.

Boháček, L. (2022) 'Mutual trust in eu law: trust ‚in what' and ‚between whom'?', *European Journal of Legal Studies,* 14(1), pp. 103–140; https://doi.org/10.2924/EJLS.2022.007.

Braum, S. (2021) ''Rechtsstaat' and European criminal law – From the end of sovereignty', *New Journal of European Criminal Law*, *12*(1), pp. 14–22; https://doi.org/10.1177/2032284420973088.

Calderoni, F. (2010) *Organized Crime Legislation in the European Union. Harmonization and approximation of Criminal Law, National Legislations and the EU Framework Decision on the Fight Against Organized Crime*. Berlin: Springer; https://doi.org/10.1007/978-3-642-04331-4.

Craig, P., de Burca G. (2017) *European Union Law, Commentary, Jurisprudence and Doctrine*. 6th edn. Bucharest: Hamangiu Publishing House.

Delmas-Marty, M., Vervaele, J.A.E. (eds.) (2000) *The implementation of the Corpus Juris in the Member States.Volume 1*. Antwerpen: Intersentia.

Faraguna, P, Drinóczi, T. (2022) 'Constitutional Identity in and on EU Terms', Verfassungsblog, 21 February, 2022.; https://doi.org/10.17176/20220222-001059-0.

Fichera, M., Kremer, J. (2013) 'Law and Security in Europe: Reconsidering the Security Constitution' in Fichera, M., Kremer, J. (eds.) *Ius Commune Europaeum*. Cambridge: Intersentia.

Griller, S., Ziller, J. (2008) *The Lisbon Treaty: EU constitutionalism without a constitutional treaty?*. Vienna: Springer; https://doi.org/10.1007/978-3-211-09429-7.

Harding, C. (2015) 'EU criminal LAW under AFSJ', in Arnull, A., Chalmers, D. (eds.) *The Oxford Handbook of European Union Law*. Oxford: Oxford University Publishing, pp. 835–865.

Juridice.ro (2017) *Tudorel Toader și Marieta Safta au participat la JAI – 12 octombrie 2017* [Online]. Available at: https://www.juridice.ro/540753/tudorel-toader-si-marieta-safta-au-participat-la-jai-12-octombrie-2017.html (Accessed: 26 April 2024).

Lazowski, A. (2019) 'Aranyosi and Caldararu through the Eyes of National Judges' in: Mitsilegas, V., Di Martino, A., Mancano, L. (eds.) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis*. Oxford: Hart Publishing, pp. 437–454.

Lenaerts, K. (2013) 'Outside and Inside the Court: Exploring the External and Internal Legitimacy of the European Court of Justice' in Adams, M., de Waele, H., Meeusen, J., Straetmans, G. (eds.) *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*. Oxford and Portland, Oregon: Hart Publishing, pp. 13–60.

Lenaerts, K. (2014) 'Some thoughts on the State of the European Union as a Rights-Based Legal Order', *Revista Română de drept European (Romanian Review of European Law)*, 2014/4, pp. 3–18.

Lenaerts, K. (2015) 'The principle of mutual recognition in the area of freedom, security and justice', *Revista Română de drept European (Romanian Review of European Law)*, 2015/2, pp. 5–20.

Lenaerts, K., Gutiérrez-Fons, J.A., Stanislas, A. (2021) 'Exploring the Autonomy of the European Union Legal Order', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* 2021/81,, pp. 47–87. [Online]. Available at: https://www.nomos-elibrary.de/10.17104/0044-2348-2021-1-47.pdf (Accessed: 23 August 2023).

Leș, I. (2023) 'Observații sumare asupra deciziei C-107/23 din 24 iulie 2023 a Curții de Justiție a Uniunii Europene', *Juridice*, 1 of September 2023. [Online]. Available at: https://www.juridice.ro/essentials/7044/observatii-sumare-asupra-deciziei-c-107-23-din-24-iulie-2023-a-curtii-de-justitie-a-uniunii-europene (Accessed at: 23 August 2023).

Mitsilegas, V. (2019) 'Joined Cases C-404/15 and C-659/15 PPU – Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen: Resetting the Parameters of Mutual Trust: From Aranyosi to LM.' in Mitsilegas, V., di Martino, A., Mancano, L. (eds.) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis.* Oxford: Hart Publishing, pp. 421–436; http://dx.doi.org/10.5040/9781509911196.ch-015.

Mitsilegas, V., Mancano, L. (2019) 'C-399/11 – Melloni: Melloni: Primacy versus Rights?' in Mitsilegas, V., di Martino, A., Mancano, L. (eds.) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis.* Oxford: Hart Publishing, pp. 393–403; http://dx.doi.org/10.5040/9781509911196.ch-014.

Mota, C., van Iersel, D. (2021) 'Federalising tendencies of the principle of sincere cooperation in the area of common foreign and security policy', *Warwick Undergraduate Law Journal*, 2021/1, pp. 19–64.

Nuotio, K. (2014) 'European Criminal Law', in Dubber, M., Hornle, T. (eds.) *The Oxford Handbook of Criminal Law.* Oxford: Oxford University Press, pp. 1054–1076.

Pernice, I. (2017) 'European Constitutionalism and the National Constitutions of the Member States. Implications for "Brexit"', *Revista Română de drept European (Romanian Review of European Law)*, 2017/3, pp. 5–20.

Raffaelli, R. (2019) 'C-396/11 – Radu: Judgment of the Court of Justice of the European Union', 29 January 2013, in Mitsilegas, V., di Martino, A., Mancano, L. (eds.) *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis*. Oxford: Hart Publishing pp. 363–379; http://dx.doi.org/10.5040/9781509911196.ch-013.

Rossi, F. (2017) 'The European Harmonisation of the General Part of Criminal Law', *Rivista Italiana Di Diritto Pubblico Comunitario*, 2017/5, pp. 1077–1100.

Safta, M. (2020) 'Prison Law and Human Rights: Interactions and Developments'. *The Czech Yearbook of International Law*, 2020/11, pp. 123–145 [Online]. Available at: https://www.academia.edu/45120183/Marieta_Safta_Prison_Law_and_Human_Rights_Interactions_and_Developments (Accessed at: 23 August 2023).

Toader, T., Safta, M. (2018) 'From the National Public Prosecutor's Office to the European Public Prosecutor's Office', *International Conference on Law, European Studies and International Relations*, 2018/6, pp 225–236.

Wieczorek, I., Vavoula, N. (2015) 'The Constitutional Significance of EU Criminal Law', *New Journal of European Criminal Law*, *6*(1), pp. 5–7; https://doi.org/10.1177/203228441500600102.

Legal Sources

'Comisia Europeană recomandă ridicarea MCV. După 15 ani de monitorizări, raportul este pozitiv' (2022) *Euronews România*, 22 November 2022. [Online]. Available at: https://www.euronews.ro/articole/nu-publica-comisia-europeana-recomanda-ridicarea-mcv-ului-dupa-15-ani-de-monitori (Accessed: 23 August 2023).

Commission of the European Communities (2009) 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Justice, Freedom and Security in Europe since 2005: an evaluation of the Hague programme and action plan', 6 of June. [Online]. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0263:FIN:RO:PDF (Accessed 23 August 2023).

Council of the European Union (2002) *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, *Official Journal of the European Communities*, L 190, 18 July, pp. 1–20.

Council of the European Union (2009) *Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial*, *Official Journal of the European Union*, L 81, 27 March, pp. 24–36.

Council of the European Union (2018) 'Council conclusions on mutual recognition in criminal matters: 'Promoting mutual recognition by enhancing mutual trust'', *Official Journal of the European Union*, C 449/6, 2018/C 449/02.

Council of the European Union (2019) 'Future of EU substantive criminal law: Report from the Romanian Presidency' *7945/19 Annex,* 4 April. [Online]. Available at: https://db.eurocrim.org/db/en/doc/3196.pdf (Accessed: 23 August 2023).

European Commission (2001) 'Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor' *COM(2001) 817 final*, 11 December. [Online]. Available at: https://op.europa.eu/en/publication-detail/-/publication/4fd84a55-e95b-4332-8987-a2e0f62d33a7 (Accessed: 23 August 2023).

European Commission (2006) 'Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified under document number C(2006) 6569) (2006/928/EC) and Reports'.

European Commission (2007) 'Report from the Commission to the European Parliament and the Council on Romania's progress on accompanying measures following Accession' *COM/2007/0378 final*. [Online]. Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en (Accessed: 23 August 2023).

European Commission (2010) 'Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme', *COM(2010) 171 final*. [Online]. Available at: https://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2010/0171/COM_COM(2010)0171_EN.pdf (Accessed: 23 August 2023).

European Commission (2010) Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism {SEC(2010) 949}.

European Commission (2011) 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions*, COM/2011/0573, 20 September. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0573 (Accessed: 23 August 2023).

European Commission (2011) Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism {SEC(2011) 968 final}.

European Commission (2012) Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism {SWD(2012) 231 final}.

European Commission (2015) Report from the Commission to the European Parliament and the Council on progress in Romania under the Co-operation and Verification Mechanism {SWD(2015) 8 final}.

European Commission (2017) Technical report: Progress in Romania under the Co-operation and Verification Mechanism {SWD(2017) 701 final}.

European Commission (2018) Technical report: Progress in Romania under the Co-operation and Verification Mechanism {SWD(2018) 551 final}.

European Commission (2020) 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2020 Rule of Law Report' *COM(2020) 580 final*. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0580 (Accessed 23 August 2023).

European Commission (2020) 'Report From The Commission To The European Parliament And The Council On Progress In Romania Under The Co-Operation And Verification Mechanism' COM/2013/047 final. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2013:047:FIN (Accessed 23 August 2023).

European Commission (2021) Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism {COM(2021) 370 final}.

European Commission (2022) 'Report From The Commission To The European Parliament And The Council On Progress In Romania Under The Cooperation And Verification Mechanism' *COM/2022/664 final*. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2022:664:FIN (Accessed 23 August 2023).

European Commission (2022) *Questions and answers: Cooperation and Verification Mechanism for Bulgaria and Romania*. Available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_7030 [Online]. (Accessed: 26 April 2025).

European Commission (2023) *Rule of Law: Commission formally closes the Cooperation and Verification Mechanism for Bulgaria and Romania*. Press Release, 15 September. [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4456 (Accessed: 23 August 2023).

European Commission (no date) *Infringement decisions* [Online]. Available at: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?langCode=EN (Accessed: 23 August 2023).

European Commission (no date) *Reports on progress for Bulgaria and Romania under the Co-operation and Verification Mechanism (CVM)* [Online]. Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_ro (Accessed: 26 April 2024).

European Convention (2002) 'Final report of Working Group X Freedom, Security and Justice'. *CONV 426/02*. [Online]. Available at: https://dorie.ec.europa.eu/en/details/-/card/209281 (Accessed 23 August 2023).

European Parliament (1999) 'Tampere European Council 15 and 16 October 1999: Presidency Conclusions' [Online] Available at: http://www.europarl.europa.eu/summits/tam_fr.htm (Accessed: 23 August 2023).

European Parliament and Council (2006) 'Regulation (EC) No 1987/2006 of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), Official Journal of the European Union', L 381, 28 December, pp. 4–23. [Online]. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:381:0004:0023:EN:PDF (Accessed: 23 August 2023).

European Union (2010) 'Stockholm Programme' *Official Journal of the European Union, Series C, 115*, 4 of May.

European Union (2022) 'Regulation (EU) 2022/838 of the European Parliament and of the Council of 30 May 2022 amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences', PE/18/2022/REV/1, *Official Journal of the European Union*, L 148, 31 May, pp. 1–5.

European Union, 2023. *Schengen Area and Cooperation* [Online] Available at: https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=LEGISSUM:l33020&from=RO (Accessed 23 August 2023).

Government Ruling No 430/2020, published in the Official Gazette no. 494 of 11 June 2020.

Judgment of the CJEU (Grand Chamber) of 15 October 2019, Dumitru-Tudor Dorobantu-Request for a preliminary ruling from the Hanseatisches Oberlandesgericht Hamburg, Case C-128/18. ECLI:EU:C:2019:857.

Judgment of the CJEU (Grand Chamber) of 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19. ECLI:EU:C:2021:393.

Judgment of the CJEU (Grand Chamber) of 21 December 2021, Criminal proceedings against PM and others, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19. ECLI:EU:C:2021:1034.

Judgment of the CJEU (Grand Chamber) of 22 February 2022, Proceedings brought by RS, Case C-430/21. ECLI:EU:C:2022:99.

Judgment of the CJEU (Grand Chamber) of 24 July 2023, Criminal proceedings against C.I. and Others, Request for a preliminary ruling from the Curtea de Apel Braşov, Case C-107/23 PPU. ECLI:EU:C:2023:606.

Judgment of the CJEU (Grand Chamber) of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU. ECLI:EU:C:2016:198.

Judgment of the CJEU (Grand Chamber) of 5 December 2017, Criminal proceedings against M.A.S. and M.B., Judgment of 8 September 2015, Case C-42/17. ECLI:EU:C:2017:936.

Judgment of the CJEU (Grand Chamber) of 8 September 2015, Criminal proceedings against Ivo Taricco and others, Case C-105/14. ECLI:EU:C:2015:555.

Judgment of the CJEU (Grand Chamber), of 26 February 2013, Åklagaren v Hans Åkerberg Fransson, Case C-617/10. ECLI:EU:C:2013:105.

Judgment of the CJEU (Grand Chamber), of 26 February 2013, Stefano Melloni v Ministerio Fiscal, Case C-399/11. ECLI:EU:C:2013:107.

Judgment of the CJEU (Grand Chamber), of 29 January 2013, Ciprian Vasile Radu-Request for a preliminary ruling from the Curtea de Apel Constanţa, Case C-396/11. ECLI:EU:C:2013:39.

Judgment of the CJEU, Case C-107/23 PPU, 24 July 2023. ECLI:EU:C:2023:606.

Juridice.ro (2018) *Calendarul*. Available at: https://www.juridice.ro/wp-content/uploads/2018/01/Calendarul.pdf (Accessed: 26 March 2024).

Law No 146/2008. Official Gazette no. 590 of 6 August 2008.

Law No 252/2013 regarding the organization and functioning of the probation system, published in the Official Gazette no. 512 of 14 August 2013.

Official Journal of the European Union (2007) 'Treaty of Prüm: Intensification of Cross-Border Cooperation, Especially in the Field of Combating Terrorism and Cross-Border Crime' *C 125 E/120*, June 7. [Online]. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:a9f2dcc0-947f-4fca-b628-065d77004d49.0019.01/DOC_12&format=PDF. (Accessed: 26 March 2024).

Romania (2009) *Criminal Code of 17 July 2009 (Law No 286/2009)*, *Official Gazette*, No. 510, 24 July.

Chapter 11

Some Issues of Federalism and Constitutionality – Experiences of the European Union and Serbia

Bojan Tubic

Abstract

This Chapter deals with different aspects of federalism observed in the European Union and in the Republic of Serbia. The latter has changed its statehood several times in the last century and was mainly included as a part of complex states and federations after the Second World War. The experience of Serbia and states which it was a part of is similar to that of the EU. Although the method of creation was not the same, the structure, some aspects of decision-making and others factors are very similar. Some experiences from these states can be used in the study of the European Union. Also, the issue of human rights has a significant role in the constitutional system of every country. Human rights are regulated in a similar manner in the EU and the Republic of Serbia, and with future membership on the horizon there will be a stronger interaction between the two legal systems. There is a possibility that the EU joins the European Convention on Human Rights which could improve human rights protection in this international organisation. Moreover, the questions of primacy of EU law and judicial review are at the core of constitutionalism. The special, sub-national character of the European Union includes the supremacy of EU law over that of member states, like in a federation and also in the federations in which Serbia was a part of. Also, a judicial review of its acts is possible before the Court of the EU, which has substantial jurisprudence in this field regarding the direct and indirect review of the European Union's acts. With these characteristics of its legal system, the European Union is moving toward a state but it is still one *sui generis* international organisation.

Keywords: federalism, constitutionality, European Union, human rights, judicial review.

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1. Introduction

The internal structure and organisation of the European Union has been a topic in the legal doctrine since the creation of this organisation. Even in the period of the Communities, the issue of constitutionality has been discussed. This chapter will try to analyse some aspects of the constitutionality and federal structure of the European Union. The first part will be devoted to federalism alone, by comparing the experiences of Serbia and previously Yugoslavia with the EU system. The second chapter will deal with the issue of the supremacy of EU law, linked to the issue of judicial review of acts in the EU, before the Court of Justice of the EU. This chapter will also deal with the position of human rights in the "constitutional" system of the EU, as one of the most important parts of constitutionality, comparing it with human rights protection in Serbia. In the third part the judicial review in the European Union as a central element of constitutionality will be discussed.

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2. Federalism in the European Union and the Republic of Serbia

Federalism can be regarded as the framework of how a modern state can be organised. It refers to a set of institutional arrangements dividing power between a central government and regional governments. The term "federalism" has been used as a normative idea and as a certain category of political institutions.[1] Historically, the United States is mentioned as the first modern federation and in the mid-nineteenth century parliamentary federalism appeared in Switzerland and Canada. Nowadays, there are different types of federations, such as integrated federation or a pluralist federation, which they can be distinguished by their methods of decision-making, or by the powers granted to the federal government. Also, there is an important issue as to whether the federations are national or multi-national. Nevertheless, a common characteristic of all of them is that federalism is a system of government in which the same territory is controlled by two levels of government, or as a political system in which at least two territorial levels of government share a sovereign constitutional authority over their respective division and joint share of law-making powers.

Federalism in the European Union has been in the focus of debates and discussions, since Robert Schuman.[2] Since the entry into force of the Lisbon treaty, the issue of sovereignty and how it is affected by institutional changes has been shifted into focus. The experiences of states in which the Republic of Serbia was a part of in the 20th century could be significant for the further organisation of the EU.

1 Watts, 2008, p. 8.
2 Temelkovska-Anevska, 2020, p. 59.

2.1. Serbia and federalism

In the period after the First World War, Serbia became a part of The Kingdom of Serbs, Croats and Slovenes (from 1929 it changed its name and was officially called Kingdom of Yugoslavia). Since its beginning, the state had the problem of its internal organisation, due to its multinational composition.

The first constitution of this state was the Vidovdan Constitution,[3] establishing a unitary monarchy. It envisaged 33 new administrative provinces, all ruled from the centre. In 1929, king Alexander I abolished the Constitution and introduced a personal dictatorship. The name of the country was changed to the "Kingdom of Yugoslavia" and the internal division was changed to nine new districts ("*banovinas*"). The aim was to better decentralise the country. The new Constitution was brought into effect in 1931 and was called September Constitution or "Octroyed" Constitution.[4] In the period before the World War II, there were no federal elements in the internal organisation of the Yugoslav state.

During the Second World War, there was a change of political regime in Yugoslavia and communist forces, led by Tito created a new state on a federal basis. One of the goals of establishing a federal system in a state is the attempt to combine the unity of state power with the preservation of the rights of states. The reason of establishing the federative system in Yugoslavia was to solve the national question, bearing in mind it was a multinational state. Any other form of state organisation would have been a source of dissatisfaction and conflict.[5]

The first socialist state in this territory was the Federative Peoples' Republic of Yugoslavia established by the Constitution in 1946.[6] It changed its name to the Socialist Federal Republic of Yugoslavia, in the new Constitution from 1963[7] and eleven years later, in 1974, another Constitution was adopted.[8] It established a new federal organisation with six republics and two autonomous provinces in the territory of the Socialist Republic of Serbia.[9]

The Constitution lays down which rights and duties concerning the realisation of common interests shall be exercised by the Federation through federal agencies, and which by the republican and provincial assemblies through their delegations to the S. F. R.Y. Assembly and by direct decision-making.[10] The function of the Federation was, amongst other roles, to ensure the independence and territorial integrity of the Socialist Federal Republic of Yugoslavia, and protect its sovereignty in international relations, and regulate matters concerning the settlement of conflicts of law between

3 Ustav Kraljevine Srba Hrvata i Slovenaca, 1921.
4 Oktroisani ustav, 1931.
5 Nikolic, 2017, p. 186.
6 Ustav Federativne Narodne Republike Jugoslavije, 1946.
7 Ustav Socijalističke Federativne Republike Jugoslavije, 1963.
8 Constitution of the Socialist Federal Republic of Yugoslavia, 1974.
9 Ustav Socijalističke Federativne Republike Jugoslavije, 1974.
10 Ustav Socijalističke Federativne Republike Jugoslavije, Art. 244.

republican and/or provincial Autonomous Provinces (conflict rules), and jurisdictional disputes between republican and/or provincial agencies of different Republics.[11]

After the secession of some members of the Federation,[12] a new Yugoslavia was created, namely the Federal Republic of Yugoslavia, with its Constitution adopted on 27 April 1992. It was composed of the Republic of Serbia and the Republic of Montenegro.[13] These member republics were sovereign in matters which were not reserved to the jurisdiction of the Federation.[14] In Section II of the Constitution there various freedoms, rights and duties of man and the citizen were envisaged.[15]

In 2003 a new form of state was created, called Serbia and Montenegro, replacing the Federal Republic of Yugoslavia. It was established by the Constitutional Charter of the State Union of Serbia and Montenegro. It was not a federation but rather a *sui generis* form of state organisation. It was based on the equality of the two member states – the state of Serbia and the state of Montenegro. Serbia and Montenegro was a single entity in international law and member of international global and regional organisations that set the international personality as a requirement for membership. The member states could be members of international global and regional organisations which did not set an international personality as a requirement for membership.[16] Human rights were not a part of the Constitutional charter but they were prescribed in the Charter on Human and Minority Rights and Civil Freedoms which was declared to form an integral part of the Constitutional Charter.[17] The member states were obliged to regulate, ensure and protect human and minority rights and civil freedoms in their respective territories. However, Serbia and Montenegro had the competence to monitor the exercise of human and minority rights and civil freedoms, and to ensure their protection in the case when such protection had not been provided by the member states.[18]

Article 60 of the Constitutional charter required that a minimum of three years should pass after its ratification before one of the member states could declare independence. This actually happened after three years, when Montenegro voted to approve an independence referendum in 2006. In the same year a Constitution of the Republic of Serbia was adopted.[19] It has not been a federal state but it consists of two autonomous provinces – Vojvodina and Kosovo and Metohija.[20] Human rights are guaranteed in Section Two of the Constitution.[21]

11 Ustav Socijalističke Federativne Republike Jugoslavije, Art. 281.
12 See: Weller, 1992.
13 Constitution of The Federal Republic of Yugoslavia, 1992, Art. 2, para. 1.
14 Constitution of The Federal Republic of Yugoslavia, 1992, Art. 5, para. 2.
15 Constitution of The Federal Republic of Yugoslavia, 1992, Arts. 19–68.
16 Constitutional Charter of the State Union of Serbia and Montenegro, 2003, Art. 14.
17 Constitutional Charter of the State Union of Serbia and Montenegro, 2003, Art. 8.
18 Constitutional Charter of the State Union of Serbia and Montenegro, 2003, Art. 9.
19 Constitution of the Republic of Serbia, 'Official Herald of the Republic of Serbia', Nos. 98/2006 and 115/2021.
20 Constitution of the Republic of Serbia, 'Official Herald of the Republic of Serbia', 2006, Art. 182.
21 Constitution of the Republic of Serbia, 'Official Herald of the Republic of Serbia', 2006, Art. 18–81.

2.2. Federalism in the European Union

In the European Union, since its creation, there have been intense debates on the existing and future type of its organisation. Some authors define the EU 'as a system of multi-level governance, where sovereignty rights are shared and divided between supranational, national and subnational institutions'.[22] The European Communities in their founding treaties have not envisaged a federal structure. During their development and later the development of the European Union, they acquired more and more sovereign rights in certain policy areas, even in those that are traditionally connected with state's sovereignty, such as monetary politics. Some of the statesmen and founders of the idea of the European Union have shared a certain view about this organisation as a federal entity. However, at least four different European federalist doctrines could be defined, represented by one or more of the important figures in the creation of the EU, like: Jean Monnet, Robert Schuman, Konrad Adenauer, Paul-Henri Spaak, Altiero Spinelli and Alcide de Gasperi.[23] Also, there were proposals of a new type of federalism based on democratic, decentralised jurisdictions, which differs from the existing system in the EU.[24] Moreover, in the European Parliament, there is an organised group of federalists, which advocates a constitution for a federal Europe.[25]

There are some manifestations of the federalism in the European Union. Namely, the ECJ has established the supremacy of EU law and there is a "constitutional review" for the consistency of acts within Treaties, which is binding through the almost uniform acceptance of its decisions by the domestic courts. Furthermore, the powers of the European Parliament have been increasing over the years. The European Commission differs from the secretariats of other international organisations. It holds a power to propose acts in legislative procedures and strong responsibilities to implement EU regulations. Pro-European politicians and lawyers argue that the federalisation of the EU should be continued, because of the results achieved so far. However, the process was interrupted after the proposal of the Constitution for Europe was rejected by some member states, and also after Brexit. Euro-sceptics evaluate federalisation of the EU negatively and are opposed to the creation of a European state.[26] The period after Brexit was used for the consolidation of the Union itself. Moreover, COVID pandemic appeared and conflict between the Russian Federation and Ukraine has greatly influenced the EU. Although they could be considered separate issues they are strongly connected, especially in the field of the enlargement of the European Union.

The EU system could be compared with that of Germany, the USA and others, like Serbia, in the field of territorial organisation. For example in the USA the Supreme

22 Borzel, 2003, p. 1.
23 Reho, 2018.
24 Frey, 2009, p. 2.
25 Kaiser, 2024.
26 Moravcsik, 2001, p. 162.

Court contributes to the harmonisation of laws in federal units and also affects some significant social issues like human rights. Likewise, the European Court of Justice has the competences of a Supreme and Constitutional court combined and has a large influence on the legal order of the European Union, for example in the preliminary rulings procedures and also in cases brought before it by the actions for annulment. In that way, the Court affects the legal order of the European Union, in the same way as constitutional courts do in states.

The position of EU norms has become stronger with almost every change of founding treaties and with new judgments of the ECJ. Community law and now EU law obtained supremacy over national law and the ECJ also granted direct effect to these legal norms so individuals could invoke them in proceedings against states in cases of their violation.

At the beginning, there was a strong opposition to the authorities of the Communities and later of the European Union. National courts did not easily accept the supremacy of the EU law. For example, in the case *Internationale Handelsgesellschaft* (Solange I), there was a conflict between German constitutional law and EU law on agricultural exports policy. The applicants argued that EU standards on agricultural licensing system was a disproportionate violation of their right to conduct business under the German constitution. The German Constitutional Court insisted that the fundamental rights under German Basic Law reign supreme over European law. The German court made preliminary reference to the ECJ, which affirmed the primacy of EU law. It held that the validity of EU law cannot be challenged by national law and measures but it can be challenged if EU law has breached fundamental rights. In a concrete case, no fundamental rights have been engaged.[27] In the case of Solange II, the German Constitutional Court stated that the ECJ gave adequate and effective protection of fundamental rights of the individuals and it decided to follow European jurisprudence so long as such protection continued.[28]

In other European countries, the supremacy of EC law and of ECJ case law has been endorsed. For example, in France, it was confirmed in numerous cases, although there were some cases in which France refused to comply with decisions made by the ECJ. In one case, the Court stated that by continuing after 1 January 1978 to apply its restrictive national system to the import of mutton and lamb from the United Kingdom, France had failed to fulfil its obligations under Articles 12 and 30 of the EEC Treaty.[29]

Therefore, the primacy of EU law has been confirmed in the early jurisprudence of the Court but also in Declaration 17 to the TFEU,[30] notwithstanding the occasional exceptions of defiance to the rules of the EU.

27 *Internationale Handelsgesellschaft*, Case 11/70, Judgment, 17 December 1970.

28 *Re Wünsche Handelsgesellschaft* (22 October 1986) BVerfGE 73, 339, Solange II (1984) Case 345/82, [1987] 3 CMLR 225.

29 Commission v France (Mutton and Lamb), Case 232/78, Judgment, 25 September 1979, para. 11.

30 Consolidated version of the Treaty on the Functioning of the European Union, Declaration concerning primacy, Official Journal of the European Union, C 115/2008.

However, the EU lacks some important elements of federalism that would give it the means of becoming a federal state. For example, EU Member States have the exclusive power to amend or change the constitutive treaties of the EU. It should be unanimous and states would need to ratify those changes. Secondly, the EU has no real tax capacity. Also, it lacks the essential element of democratic control. Namely, the executive branch of the EU, The European Commission, is not determined by the will of the European citizens, either directly or indirectly, via the European Parliament.

3. Human rights in the European Union

Human rights protection at international level was intensified after the Second World War. In 1948, the United Nations General Assembly adopted one of the most important acts in this field, the Universal Declaration on Human Rights.[31] After that, numerous human rights conventions have been concluded, such as the International Covenant on Civil and Political Rights,[32] the International Covenant on Economic, Social and Cultural Rights,[33] the Convention on the Elimination of all Forms of Racial Discrimination,[34] and many others. There were also regional initiatives for the protection of human rights, and regional conventions were adopted. The most important of them is the European Convention on Human Rights,[35] which has the most significant influence on the European Union. The American Convention on Human Rights,[36] the African Charter on Human and Peoples' Rights[37] and others were also adopted.

The European Union has been transforming itself into a political community within a defined territory and with its own citizens, which are granted some fundamental rights and freedoms by the founding Treaties and also confirmed in the jurisdiction of the ECJ. Human rights are one of the most important part of a constitutional system.

In Europe there are two systems of regional human rights protection. One is the system established by the Council of Europe with its European Court of Human Rights, established by the European Convention on Human Rights. The other is the

31 Universal Declaration on Human Rights, General Assembly resolution 217 A.
32 International Covenant on Civil and Political Rights, 1966, p. 171.
33 International Covenant on Economic, Social and Cultural Rights, 1966, p. 3.
34 UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 1965, p. 195.
35 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 1950.
36 American Convention on Human Rights, 'Pact of San Jose', 1969, p. 123.
37 African Charter on Human and Peoples' Rights, 1981, Vol. 1520, p. 217.

system established in the European Union, by the founding treaties and jurisprudence of the Court of Justice of the EU. The new addition to human rights protection was given with the adoption of the EU Charter on Human Rights in 2000.[38] There was a concern that the active role of the EU in this field could endanger the role of the Council of Europe regarding human rights in Europe.[39] However, in 2007, a Memorandum of Understanding between the EU and the Council of Europe was adopted to resolve this relationship between the two international organisations.[40] It is stated that the Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe. This organisation and the European Union will take all necessary measures to promote their cooperation by exchanging views on their respective activities and by preparing and implementing common strategies and programmes.[41] They reaffirmed their commitment to establish close cooperation and strengthen their relations in areas such as: human rights and fundamental freedoms, rule of law, legal cooperation and addressing new challenges, democracy and good governance, democratic stability etc.[42] Moreover, both organisations agreed to respect the universality of human rights, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms, and to preserve the cohesion of the human rights protection system in Europe. The relevant Council of Europe norms will be cited as a reference in European Union documents.[43] It is especially emphasised that EU law has to be coherent with the relevant conventions of the Council of Europe. However, the former can provide more extensive protection.[44]

In the founding Treaties which established European Communities, there were no provisions on human rights. However, the Court of Justice of the European Communities invoked the principle of the supremacy of Community law, which provided some guarantees for the protection of fundamental rights. Fundamental human rights have been recognised by the ECJ as one of the elements of the general principles of Community law. The first judgment in that sense was the one in the case of *Stauder*[45] in 1969. A decade after, the ECJ referred to the constitutional traditions of the Member States, as in the case of *Internationale Handelsgesellschaft* and to the international human rights conventions, like in the *Nold case*.[46] In the former, the Court upheld that respect for fundamental rights form an integral part of the general principles of law protected by the Court of Justice.[47]

38 Charter on Human Rights and Fundamental Freedoms, 2012/C.
39 De Schutter, 2008, p. 511.
40 Memorandum of understanding between the Council of Europe and the European Union.
41 Memorandum of understanding between the Council of Europe and the European Union, para. 11.
42 Memorandum of understanding between the Council of Europe and the European Union, para. 14.
43 Memorandum of understanding between the Council of Europe and the European Union, para. 17.
44 Memorandum of understanding between the Council of Europe and the European Union, para. 19.
45 *Erich Stauder v City of Ulm – Sozialamt*, Case 29/69, Judgment, 12 November 1969.
46 *Nold KG v Commission*, Case 4/73, Judgment, 14 May 1974.
47 *Internationale Handelsgesellschaft*, Case 11/70, Judgment, 17 December 1970.

However, in the following period the ECJ also often found that there was no violation of human rights by European institutions. The present situation is that human rights are now the constant subject of cases in before both Court of Justice and the General Court. In some cases the ECJ has considered EU legislation invalid because it violates human rights. For example, in the case *Digital Rights Ireland*, the Court declared an entire directive relating to the retention data invalid.[48] Also, there are cases in which the Courts have inflicted sanctions against individuals and undertakings, like in the case of *Kadi*, which will be analysed in greater detail later in the text.[49] In this way, the Courts have applied the EU Charter on Human Rights and now 10% of all cases of the ECJ relate to fundamental rights.[50]

3.1. European Convention on Human Rights in the EU System

The European Convention on Human Rights acquired a special status in the proceeding before the ECJ which began to cite not only the text of the Convention but also judgments of the European Court of Human Rights in Strasbourg. The ECJ does not directly apply the European Convention or any other international human rights instrument, like the Universal Declaration of Human Rights. They serve as guidelines. However, in article 6, paragraph 3 of the TEU it is stated that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the EU law,[51] which are recognised as one of the elements of the primary law of the EU.

There is a terminological difference between two systems regarding human rights protection. The ECJ uses term "fundamental rights", from the Stauder case. However, the European Court of Human Rights (ECtHR) uses term "human rights". Despite this, relations between two courts are harmonious and not conflictual.

In the jurisprudence of the European Court of Human Rights, the question of its jurisdiction to control the acts of the European Union was raised. Formally speaking, this jurisdiction is not constitutional in nature. The European Court of Human Rights cannot annul an act, but it can examine whether it is in accordance with the European Convention on the Protection of Human Rights and Fundamental Freedoms. It still has no jurisdiction over the European Union, but only over its Member States.

The Court of Justice of the EC developed its jurisprudence on fundamental human rights at an early stage. In accordance with the practice of the EC Court, basic human rights are applied as a general legal principle of the legal order of the Union, and the European Convention has a special importance in this area. This principle, which arose in jurisprudence, was later incorporated into the Maastricht Treaty. Article 6,

48 *Digital Rights Ireland v Minister for Communications and Others*, Joined Cases C-293/12 and C-594/12, Judgment, 8 April 2014.

49 *Kadi v Council and Commission*, Case C-402/05 P, Judgment, 3 September 2008.

50 Allan Rosas, p. 206.

51 TEU, Art. 6, para. 3.

paragraph 2 of the EU Treaty stated in its earlier version that the European Union will respect fundamental rights, as they are guaranteed by the European Convention on Human Rights and are derived from constitutional traditions, which are common to the member states as a general principle of Union law. The European Union was not formally bound by the Convention, but in practice the result was the same. The ECJ has regularly cited and followed the jurisprudence of the European Court of Human Rights.[52] Since it was not a party to the Convention, the European Union was not subject to the jurisdiction of the European Court of Human Rights. Therefore, the legality of the acts of the European Union before this Court could only be controlled indirectly. The question of whether proceedings can be conducted collectively against the Member States of the European Community at that time was raised in the case of *Senator Lines v. the Fifteen Member States of the EU*.[53] The German company filed an application against all Member States due to the penalties imposed on it by the EC Commission and claimed that the adoption of the Commission's act violated the presumption of innocence and the right to a fair trial. The European Court of Human Rights rejected the claim on another basis and did not decide whether it could examine the legality of the Commission's act.

In cases where the acts of the European Union have been applied in a Member State individually, the acts of that state may be opened to examination before the Court of Strasbourg. The case of *Bosphorus Airways*[54] can be taken as an example. In this case, the plane, owned by the Yugoslav National Airlines, was detained at the airport in Dublin by the Irish authorities, in accordance with the United Nations resolution that imposed sanctions on the Federal Republic of Yugoslavia. This resolution was implemented in the European Union through regulation 990/93. Bosphorus Airways, the Turkish company that leased and operated the plane, challenged its detention in the Irish courts. The High Court of Ireland overturned the ministry's decision to detain the aircraft based on the regulation, but following the minister's appeal, the Supreme Court of Ireland sent a request to the EC Court for the interpretation of the given regulation of the European Community. One of the arguments of Bosphorus Airways was that the detention of the plane was a violation of the basic human rights of the applicant, especially the right to peaceful enjoyment of property and the freedom to continue with economic activities. The ECJ did not accept these arguments and replied to the Supreme Court of Ireland that the specific regulation applied in this case.[55] In this way, the Court of EC actually rejected the request of Bosphorus Airways which, among other things, was based on the European Convention and Article 1, Protocol 1 to the Convention. Following this, Bosphorus

52 *Krombach v Bamberski*, Case C-7/98, Judgment, 28 March 2000, para. 39; *Secretary of State for the Home Department v Akrich*, Case C-109/01, Judgment, 23 September 2003, para. 60.

53 *Senator Lines GmbH v the Fifteen Member States of the EU*, Press Release, 16 October 2003.

54 *Bosphorus Hava Yollari v Minister for Transport, Ireland, and the Attorney General*, Case C-84/95, Judgment, 30 July 1996.

55 *Bosphorus Hava Yollari v Minister for Transport, Ireland, and the Attorney General*, Case C-84/95, Judgment, 30 July 1996, para. 27.

Airways filed an application with the European Court of Human Rights regarding the detention of the plane by the Irish authorities. The Court made a decision that there was no violation of Article 1 of Protocol 1, i.e. violation of the right to property.[56] This case showed that the decisions and other acts of the Member States, although from the field of European Union law, can be subjected to the jurisdiction of the European Court of Human Rights.[57]

3.2. Accession of the European Union to the European Convention on Human Rights

The human rights protection system established by the European Convention on Human Rights and Fundamental Freedoms[58] is part of the European legal order. Certain authors believe that rules from this Convention have become regional customary legal rules, and some of them may also be regional *jus cogens* norms.[59] This Convention is open to signature and ratification by member states of the Council of Europe. To date, the European Union has not become a member of this international organisation and has not even signed the European Convention, so it cannot be a party to the proceedings before the European Court of Human Rights. This judicial instance could certainly improve the rule of law in the European Union, if applications by individuals against the European Union itself could be considered before it. Protocol number 14 to the European Convention on Human Rights and Freedoms enables the European Union to become a member of the European Convention on Human Rights. In addition to the adoption of the mentioned Protocol, it was necessary for the EU to have subjectivity, in order to have the right to accede to the European Convention. On March 28, 1996, the EC Court emphasised in its opinion that the founding treaties of the European Union must be amended in order for the European Communities to become members of the European Convention.[60] With the Treaty of Lisbon, the European Union is expressly granted a unique legal subjectivity,[61] although there are opinions that it had subjectivity even before its entry into force.[62] Also, the Treaty of Lisbon itself foresees the accession of the Eu-

56 *Bosphorus v Ireland*, Application No. 45036/98, ECtHR, 30 June 2005.
57 Lavranos, 2005, p. 219.
58 European Convention for the Protection of Human Rights and Fundamental Freedoms.
59 De Wet, 2006, p. 617.
60 Opinion 2/94, Opinion of the Court of 28 March 1996, para. 35.
61 Consolidated versions of the Treaty on European Union, Official Journal of the European Union, Vol. 51, 2008/C 115/01, Art. 47.
62 Etinski, 2002, pp. 133–135. Some authors considered that since the Council concludes international agreements on behalf of the EU, this implies its legal subjectivity; Dashwood, 1998, p. 214. Others, on the other hand, believed that the EU has limited legal capacity, because the special declaration adopted with the Treaty of Amsterdam emphasises that the conclusion of the agreement does not imply the transfer of competence and sovereignty from the member states to the EU. Langrish, 1998, p. 14; In practice, the international legal subjectivity of the European Community, that is, the European Union, was fully accepted.

ropean Union to the European Convention on Human Rights.[63] The issue of accession was elaborated upon in a separate Declaration, adopted with the final act of the intergovernmental conference that adopted the Treaty of Lisbon, in which it was emphasised that the accession to the Convention would be regulated in such a way as to preserve the specificity of European Union law,[64] as well as in the Protocol to the Treaty of Lisbon.[65]

Article 6 of the Treaty on European Union states in paragraph 1 that the Charter has the same legal force as the founding treaties and envisages in the paragraph 2 that the European Union shall accede to the European Convention on Human Rights and Fundamental Freedoms. This latter point has been a consequence and a response to Opinion 2/94 in which the ECJ held that the accession to the ECHR required a Treaty amendment. Going back to paragraph 2 of Article 6, it is stated that the accession to the Convention shall not affect the Union's competences as defined in the Treaties. This article is supplemented by Protocol No. 8 annexed to the Treaties, which states that there must be a separate accession agreement and specifies that this agreement shall ensure that the accession shall not affect the competences of the Union or the powers of its institutions. The Protocol also requires that the agreement shall make provisions for preserving the specific characteristics of the EU and EU law.[66]

From the procedural perspective, the accession agreement needs to be approved unanimously by the European Council and it can enter into force after it has been approved by all Member States. Moreover, the Contracting Parties of the ECHR also needs to conclude the agreement.

The ECJ was asked to provide an opinion on the conformity with the EU legal order of a draft accession agreement which had been negotiated between the European Commission and the Member States of the Council of Europe. In its Opinion 2/13, from 2014, the ECJ ruled that the draft accession agreement was incompatible with the EU legal order in many respects.[67] Besides the technical problems, there were also political obstacles.

63 Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union, Official Journal of the European Union, Vol. 51, 2008/C 115/01, Art. 6(2).

64 Declaration on Art. 6(2) of the Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union; Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union, Official Journal of the European Union, Vol. 51, 2008/C 115/01, Art. 6(2).

65 Protocol relating to Art. 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the protection of human rights and fundamental freedoms, Official Journal of the European Union, 2012/C 326/1.

66 Protocol (No 8) relating to Art. 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, Official Journal of the European Union 2012/ C 326/1.

67 Case Opinion 2/13, Opinion of the Court of 18 December 2014.

3.3. Human rights in Serbia

Human rights have been prescribed in all Constitutions of states which Serbia was a part of as a federal unit or in other forms. There were differences regarding human rights between these states, especially in the period after the Second World War, because until the Constitution of 1992 Yugoslavia in all its forms was a socialist state. This caused the different character of some human rights to be assured, especially economic and social rights, with different and unique regulation of the right of property introducing the right of self-management.

The Constitution of Serbia, which is now in force, envisages human and minority rights and freedoms in Section Two.[68] It is stated:

> The Constitution shall guarantee, and as such, directly implement human and minority rights guaranteed by the generally accepted rules of international law, ratified international treaties and laws. The law may prescribe manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right.[69]

This part of the Constitution is composed of three chapters including: fundamental principles, human rights and freedoms and rights of persons belonging to national minorities. A significant number of constitutional norms regulating human rights are placed in other sections of the Constitution, like the protection of national minorities, gender equality, the freedom of entrepreneurship and the status of foreign nationals. In total, more than one third of the constitutional text deals with human rights issues.[70]

Human rights are guaranteed in accordance with all international standards due to the fact that Serbia is a state party to all relevant international human rights conventions. The ECHR has a special significance, which is widely implemented in the Serbian legal system. However, Serbia has a significant number of cases before the ECtHR regarding alleged violations of the Convention. For example, the Court dealt with 1925 applications concerning Serbia in 2023 and with 3124 applications in 2022.[71]

The constitution of the Republic of Serbia prescribes human rights rather extensively covering all relevant groups and categories of human rights. The same applies with the EU Charter. We can conclude that human rights standards in the EU and Serbia are very similar, and are guaranteed in the same manner.

68 Constitution of the Republic of Serbia, 2006, Arts. 18–81.
69 Constitution of the Republic of Serbia, 2006, Art. 18, para. 2.
70 Simović, Avramović and Zekavica, 2013, p. 411.
71 ECtHR, Press country profile – Serbia.

4. Judicial review in the European Union as one element of constitutionalism

Acts and decisions of international organisations, especially those adopted by their plenary bodies, are not subject to the right to appeal or control, and determining their legality is a significant difficulty. Most international organisations carry out some kind of coordination of the activities of states and their decisions are generally recommendations and not legally binding, so the absence of a judicial review of their acts was not of great importance. However, with the strengthening of the importance of international organisations and the need for the effective realisation of their goals and functions, through full cooperation of all member states, there is a need to establish some kind of control procedure. Certain international organisations make binding decisions that can affect the important interests of states and even of individuals. This is the nature of Security Council resolutions adopted on the basis of Chapter VII of the UN Charter. The European Union is not a classic international organisation, because at its essence is the transfer of some sovereign powers of the member states to the European Union, which makes decisions that are binding for the member states, as well as natural and legal persons. Therefore the control of its acts is of great importance. Today, there are no great opportunities for the realisation of the rule of law within international organisations, because few of them have judicial bodies, and where they exist, they do not have the jurisdiction for judicial review of the decisions of that organisation. However, this does not mean that a control system should not be introduced in organisations that make binding decisions for states and private entities. The rules of international organisations should in some cases be implemented in the legal systems of their member states. Usually, such rules are stated in conventions, which require special ratification by member states, while in some cases they are included in the binding rules of the organisation. Obligation by an international rule in this way does not provide a sufficient guarantee for a uniform interpretation, especially if such provisions are unclear. International judicial bodies can provide the final interpretation of the organisation's rules, in order to prevent different member states from applying similar provisions in a different way. However, the harmonisation of national legal systems through the rules of international organisations is still at an early stage.

The European Union has reached such a level that it has judicial bodies that guarantee a uniform interpretation of the rules it adopts. One of the ways to achieve a uniform application of the rules of international organisations is to establish a "supreme court" within the organisation that is competent enough to abolish and modify the decisions of national supreme courts in matters that are harmonised within the given organisation. The obstacle to this is the sovereignty of states, which find it difficult to accept the existence of an international court that would be above their highest judicial instances in the hierarchy. The EU Court does not have the authority to cancel and modify the decisions of national courts. A more acceptable

solution for states would perhaps be some form of opinion, which would be binding. That has been achieved in the preliminary rulings procedures.

Due to the specificity of the European Union and in the past of existing European Communities, judicial review is more developed in them than in classic international organisations. The sources of law of the European Union have primacy in relation to the national law of its member states. In order to preserve that primacy and avoid the constitutional examination of the law of the European Union before national courts, it was necessary to establish a mechanism of constitutional legal protection at the level of the European Union, together with an independent judicial body that had a mandatory jurisdiction and that could control the powers of specific institutions and the compliance of their activities with basic rights. Also, the decisions made by such a body must have sufficient democratic legitimacy. In the context of the Treaty on the Functioning of the EU, these conditions are met to a large extent, although not completely. The Court of the EU has the jurisdiction to examine the legality of acts of the European Union, in the light of their relationship with the higher law of this organisation. If a violation of that higher right is established, the result of the procedure will be the annulment of the contested act. The courts of the European Union and former European Communities had a significant jurisprudence regarding actions for the annulment of acts of the former Communities, and now the Union, from which it can be seen that this is an important issue, constantly arising in connection with various measures adopted within the European Union. In certain areas of European Union law, which directly concerns individuals, judicial review of acts plays a very important role in achieving the rule of law. Mechanisms of legal protections that are based on the mandatory jurisdiction of the EU Court create a complete system of legal protection within the European Union. Despite its shortcomings, the action for annulment is still the most effective means of control of the acts of the European Union. This control can also be performed through requests for preliminary rulings based on Article 267 of the Treaty on the Functioning of the EU. In this way, a significant, further form of protection of individuals provided for by the Treaty is ensured, although the national courts themselves do not have the jurisdiction to declare an act that has been passed by one of the institutions of the European Union invalid.

There is a position in legal theory that the European Court of Justice must interpret the provisions of the founding treaties so that the European Union can fulfil all the tasks entrusted to it by the States Parties. Compared to national constitutional courts, the ECJ is not limited by a narrow interpretation of the provisions of the founding Treaties. This interpretation of the role of the Court, which is all correct, contributes to the comprehensive protection of individuals, because the impact of the acts adopted by the institutions of the European Union is significant and exceptional. They directly affect the legal position of individuals and it must be possible to verify their legality.[72] This interpretation of the role of the Court, which is all correct, contributes to the comprehensive protection of individuals, because the impact of the acts adopted by the

72 Everling, 2000, p. 43.

institutions of the European Union is significant and exceptional. They directly affect the legal position of individuals and it must be possible to verify their legality.

The European Union is obliged to act in accordance with the principle of the rule of law in all areas. It has been confirmed already in the jurisprudence of the Court of Justice of the European Communities. For example, in the case of *Granaria v. Hofdproduktšap* from 1978, the Court mentioned the principle of the rule of law.[73] Later, in the case of *"The Green Party" v. Parliament*, the Court emphasised that the European Community is based on the rule of law and that no member state or institution can avoid a judicial review of its acts.[74] The same was confirmed in the case of *UPA v. Council*, where the Court held that the institutions of the European Community are subject to a judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.[75] Individuals are entitled to effective judicial protection of the rights that belong to them in the legal order of the European Union, and the right to such protection is one of the general legal principles arising from the common constitutional tradition of the member states

The control of the work of institutions can be done in two ways.[76] Firstly, it is necessary to ensure that the regulations passed by the institutions are legal, that is, that the specific institution is competent to pass a certain act, that the act was passed with the prescribed procedure, and that it is in accordance with the higher law. In this way, the activity of a certain authority is controlled through an action for annulment, which is now prescribed in Article 263 of the Treaty on the Functioning of the EU.

Another form of control of the legality of the acts of the European Union bodies is through the request for a preliminary ruling, which is provided for in Article 267 of the Treaty on the Functioning of the EU. The third form of monitoring the work of institutions is the control of their inactivity, meaning that it is necessary to ensure that institutions do not fail to pass acts when they have a legal obligation to do so. This form of protection is provided in Article 265 of the Treaty on the Functioning of the EU.

4.1. Direct control of the acts of the European Union

4.1.1. Actions for annulment

One of the competences of the Court of the EU is to examine the legality of acts passed by other bodies or institutions in the European Union system, in a procedure initiated by an action for the annulment of an act. This procedure is regulated by Article 263 of the Treaty on the Functioning of the EU. This control is very important

73 *Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten*, Case 101/78, Judgment, 13 February 1979, para. 5.

74 *Parti Ecologiste "Les Verts" v European Parliament*, Case 294/83, Judgment, 23 April 1986, para. 23.

75 *UPA v Council*, Case C-50/00 P, Judgment, 25 July 2002, para. 38.

76 On the development of the judicial review of the European Communities, see Bebr, 1981.

in view of the broad legislative powers that the Treaties give to the political institutions of the European Union.

An action for annulment can be filed against the acts of the Council, the Commission and the European Central Bank, except for recommendations and opinions, as well as against acts of the European Parliament and the European Council, if they are intended to produce legal effects towards third parties. The Court of the EU is also competent enough to control the legality of the acts of the bodies, services and agencies of the European Union, which produce effects towards third parties.[77] Article 269 of the Treaty on the Functioning of the EU provides that the Court of Justice of the EU will have the jurisdiction to decide on the legality of acts adopted by the European Council and the Council, in accordance with Article 7 of the Treaty on the EU, at the request of a member state affected by these acts and only in relation to procedural issues contained in that article. Such a request must be submitted within one month from the day when the decision was made, and the EU Court should make a decision within one month from the day the request was submitted.[78]

In the case of *IBM v Commission*, the Court considered that the effect of an act is the main criterion of whether it can be covered by the then Article 230 of the EC Treaty. Any act whose legal effects are binding on the applicant and capable of affecting their interests and causing a change in their legal position is an act or decision that can be the subject of an action for annulment based on Article 230 of the EC Treaty.[79] This approach was accepted in later jurisprudence.[80]

While decrees, directives and decisions have a binding effect and are in principle eligible for review, recommendations and opinions are not binding and are not eligible for judicial review. In practice, the question arose as to whether the measures adopted by the Council or the Commission and which produce legal consequences, but were not adopted in the form of a binding act, are eligible for control. The Court considered the given issue in the case of *ERTA – Commission v. Council*,[81] where the Commission sought the annulment of certain conclusions reached by the Council regarding the negotiating position of the member states in connection with the discussions on the agreement on European transport roads. The Court held that the then Article 173 implies that the acts that are suitable for the control of the Court are all those measures adopted by the institutions, which have been given binding legal effect. Furthermore, the Court emphasised that the goal of judicial control is to ensure a respect for rights when interpreting and applying the EC Treaty. It held that

77 Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union, 2008, Art. 263.

78 Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union, 2008, Art. 269.

79 *IBM v Commission*, Case 60/81, Judgment, 11 November 1981, para. 9.

80 *Bosman v Commission*, Case C-117/91, Order, 4 October 1991, para. 13; Commission v Greencore, Case C-123/03 P, Judgment, 9 December 2004, para. 44.

81 *Case 22-70* Commission of the European Communities v Council of the European Communities, 1971.

it would not be in accordance with this goal if the conditions for the admissibility of the action for annulment were to be interpreted so restrictively that the availability of this action was limited only to the acts listed in the then Article 189. The action for annulment must be available in relation to all measures adopted by institutions that are intended to have a binding effect, regardless of their nature or the form in which they were adopted.[82] Only through the consistent application of this rule can complete protection be achieved against illegal acts enacted by the institutions of the European Union. The position of the Court, expressed in the specific case, is certainly correct, because legal entities must always be given the right to challenge acts that affect their legal position.

Based on Article 263 of the Treaty on the Functioning of the EU[83] the acts of the institutions of the European Union may be annulled for the following reasons: a lack of competence, a violation of the basic rules of procedure, a violation of the Founding Treaties or other legal rule related to their application or an abuse of authority. The Court of Justice of the EU and the Court of General Jurisdiction observe *ex officio* the first two reasons. The other two grounds for annulment can only be considered by the courts if the applicant refers to them. Judicial control can only refer to the examination of the legality of the contested measure and not to its implementation.

During the development of the legal order of the European Community, the Court of First Instance and the EC Court examined the legality of each legal act, which could produce a legal effect. They tried to ensure that the legal order of the European Community was in accordance with the Founding Treaties, and this position was not changed even when the act represented an international obligation of the Community. If the EC Court refused to examine the legality of the inclusion of an international legal act in the legal order of the European Community, then the type of acts producing such a legal effect would be exempt from control. Because of this, the Court made a decision that the fact that the act is of an international origin is not relevant to its competence to ensure the rule of law in the European Community. It is the acceptance of the principle that applies to states, and they cannot invoke their internal law to avoid an international obligation.

The European Community was an actor on the international stage with an international legal capacity and had the authority to participate in the creation of international legal rules. Therefore, the international behaviour of the European Community had to be in accordance with public international law. International legal subjectivity implies international responsibility, which means that the Community can be held responsible if its behaviour is not in accordance with international law.[84] The legal nature of the Community has been interpreted differently in the legal doctrine and the practice of the EC Court. In *Costa v ENEL*, the Court held that contrary

82 *Case 22-70* Commission of the European Communities v Council of the European Communities, 1971, paras. 40–42.

83 The Treaty on the Functioning of the EU, Art. 263.

84 *France v Commission*, Case C-327/91, Judgment, 9 August 1994, para. 21.

to ordinary international treaties, the then EEC Treaty created its own legal system, although none of the Vienna Conventions on the Law of Treaties distinguishes between ordinary and special treaties.[85]

To a certain extent, the ECJ has accepted the approach according to which the European Community is subject to international law in its international activities. In its practice, it confirmed the existence and acceptance of the European Community's international obligations imposed on it by international customary rules.[86] The Court insisted on this only occasionally, through the principle of *pacta sunt servanda*, i.e. conduct in good faith.[87] The Court most often referred to the Vienna Convention on the Law of Treaties[88] from 1969, when it examined the legality of the secondary law of the European Community in relation to the provisions of a certain international treaty.[89] In the case *France v Commission*, the Court referred to the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations from 1986.[90] In some of its judgments, the Court accepted the binding character of international law in the European Community, which existed at that time.[91] According to the Court, the European Community must respect international law in the exercising of its powers, and corresponding acts of the European Community must be interpreted in the light of the relevant rules of international law. This approach of the Court is in accordance with the general principle of international law that domestic law cannot be opposed to international law, even when domestic law is of a constitutional character.[92]

An action for annulment can be filed by the institutions of the European Union, member states and natural and legal persons in order to protect themselves from illegal binding acts of some of the institutions, provided that special conditions for the admissibility of the claim are met. The member states, the Council, the European

85 *Costa v ENEL*, Case 6/64, Judgment, 15 July 1964. Theories about the legal nature of the EU ranged from the fact that it is not a classic international organisation, but rather an informal form of international cooperation, to the fact that it represents a specific framework of cooperation between member states in the fields of external and internal policies that use the institutional and legal framework of the European Community. There were also theories that the European Union is a unique, *sui generis*, international organisation with a supranational character. Misita, 2008, pp. 289–295.

86 *Opel Austria v Council*, Case T-115/94, Judgment, 22 January 1997, para. 90.

87 *Kupferberg v Hauptzollamt Mainz*, Case C-104/81, Judgment, 26 October 1982, para. 18., Hoesch AG v Bergrohr GmbH, Case 142/88, Judgment, 19 October 1989, para. 30.

88 Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331.

89 *Opel Austria v Council*, Case T-115/94, Judgment, 22 January 1997, para. 91.

90 *France v Commission*, Case C-327/91, Judgment, 9 August 1994, para. 25.

91 Anklagemyndigheden v Poulsen and Diva Navigation, Case C-286/90, Judgment, 24 November 1992, para. 9; *Racke GmbH & Co. v Hauptzollamt Mainz*, Case C-162/96, Judgment, 16 June 1998, para. 45.

92 This principle has been established in the procedure before The Permanent Court of International Justice, PCIJ, 25 May 1926, Certain German Interest in Polish Upper Silesia, merits, *Germany v Poland*, PCIJ Rep. 1926, Ser. A, No. 7, p. 19.; PCIJ, Treatment of Polish Nationals and other persons of Polish origin or speech in the Dantzig territory, Advisory Opinion, 1932, Ser. A/B, No. 44, p. 24.

Parliament and the Commission are called "privileged applicants" and it is assumed that they have procedural legitimacy (*locus standi*), that is, a legal interest in examining the legality of all EU acts. They do not need to prove a legal interest to file an action for annulment. After the Treaty of Maastricht and the amendment of Article 230 of the EC Treaty at the time, the European Parliament and the European Central Bank were given the opportunity to initiate these procedures, in cases where their goal was to protect their competences, and after the Treaty of Amsterdam, the Court of Auditors was also given this opportunity. Article 263 paragraph 3 of the Treaty on the Functioning of the EU states that the Court will also have jurisdiction over actions filed by the Court of Auditors, the European Central Bank and the Committee of the Regions, which relate to the protection of their competences. The third group of subjects consists of natural and legal persons (individuals, companies, associations and similar entities), who have procedural legality if they can prove that they have a legal interest in filing an action, and they are called "non-privileged applicants".

If the Court determines that the action for annulment is founded, it will declare the contested act null and void. The annulment of an act implies that it disappears from the legal order of the Union, from the day it entered into force (*ab initio*), so that the parties to the proceedings return to the position they were in before its entry into force – *restitutio in integrum*.[93]

4.2. Indirect review of the European Union acts

Article 267 of the Treaty on the Functioning of the EU provides for a system of indirect examination of the legality of European Union acts, which operates independently of the procedure prescribed by Article 263, paragraph 4 of the Treaty on the Functioning of the EU. When an act of the Union requires implementation through some national measure, natural and legal persons can challenge the legality of the acts of the Union, in proceedings conducted before the courts of member states. They then prove that the act of the European Union, on which the national measure is based, is null and void. If the question of the legality of an act of the Union arises in a domestic legal dispute, the courts of the member states can, and in some cases must, refer the questions regarding the legality of the corresponding act to the ECJ, regardless of the fact that the period specified in Article 263 of the Treaty on the Functioning of the EU has expired. The consequence of this is that European Union acts can be challenged indirectly many years after their publication. In cases where such indirect examination is possible, the applicants do not have to prove the existence of a personal interest before the national court.[94]

The EC Court itself in several cases pointed to this alternative path and favoured this type of examination of the legality of acts. Its position was that

93 *Antillean Rice Mills v Commission*, Joined Cases T-480/93 and T-483/93, Judgment, 14 September 1995, para. 60.

94 Gormley, 2000, p. 169.

> with an action challenging a national measure implementing a Community decision, the applicant can challenge the legality of that decision and request the domestic court to rule on all allegations in the application, if this is necessary after addressing the EC Court for making a decision on the previous issue of validity.[95]

In the *Zuckerfabrik* case[96] it was confirmed that the system of legal protection established by the Community law at that time, includes the right of individuals to challenge the legality of Community regulations based on the then Article 177 EC Treaty (now Article 267 TFEU). This case demonstrates the Court's effort to develop effective remedies for individuals. Also, it insists on the existence of a coherent and interconnected system of legal remedies, at the national and Union level.

In the procedure under Article 267 of the Treaty on the Functioning of the EU, an allegedly illegal act of the European Union cannot be contested as such. An act passed at national level must be challenged, while the legality of an act of the European Union appears as a subsidiary issue. Even if the regulation is clearly illegal and violates the principles of the European Union, the individual must wait for its implementation and raise the question of its legality before a national court. However, there is a possibility that the contested measure of the European Union will not be implemented in the legal system of the member state, and that the individual will still suffer damage. In its practice, the ECJ held that only limited forms of judicial control will be possible in certain areas of the Union's activities. These are areas in which the Union institutions enjoy broad discretionary powers. Here, the Court limits itself to examining whether the exercise of such discretionary powers was violated by their abuse or manifest error, or whether the Commission exceeded its powers.[97] Also, the Court examines the legality of the Union act in relation to the violation of the principles of customary international law. When the rules of customary international law are complex and imprecise, judicial review must be limited to the question of whether, by adopting the contested rule, the Council committed an obvious error of judgment regarding the conditions for the application of that rule.[98]

The Lisbon Treaty does not specify the grounds for the annulment in proceedings of preliminary rulings, so in judicial practice it has been established that these grounds are the same as for the direct action for the annulment of an act.[99] In addition, acts can be annulled if they violate certain principles (proportionality, legitimate expectations, legal certainty and equality) that must be observed by EU authorities, as well as member states when applying European Union law. The annulment of the act will also occur if it violates basic human rights, or is contrary to

95 *Union Deutsche Lebensmittelwerke v Commission*, Case 97/85, Judgment, 21 May 1987, para. 12.

96 *Zuckerfabrick Süderdithmarschen v Hauptzollamt Itzehoe*, Joined Cases C-143/88 and C-92/89, Judgment, 21 December 1991.

97 *Racke v Hauptzollamt Mainz*, Case 98/78, Judgment, 25 January 1979, para. 5; *National Farmers' Union*, Case C-157/96, Judgment, 5 May 1998, para. 39.

98 *Racke GmbH & Co. v Hauptzollamt Mainz*, Case C-162/96, Judgment, 16 June 1998, para. 52.

99 Tillotson, 2000, p. 546.

the principles of public international law. In this way, the possibilities for controlling the legality of acts have been significantly expanded in relation to the text of the founding treaties themselves, which certainly contributes to the strengthening of the rule of law in the European Union.

The courts of the member states cannot judge the legality of an act of the European Union on their own, and that was also the case when it came to acts of the Community. The European Court of Justice, in the case of *Foto Frost*, ruled that a national court does not have the authority to declare a specific act illegal, but can issue a temporary measure, which postpones its implementation.[100] If the solution were to be accepted for national courts to decide on issues of legality of the acts of the European Union, it could lead to different solutions in the application of its law in member states. Such a solution would be contrary to the principles on which the European Union functions. Judges in member states have discretionary powers when referring matters to the Court of Justice of the EU. Jurisprudence in some countries indicates the difficulties that private entities have when they need to convince domestic judges to turn to the Court of the EU, contesting the legality of an act of the European Union. The discretionary powers of national judges are one of the most significant problems in achieving effective judicial protection against abuses of the institutions of the European Union. The position of applicants is better when dealing with the highest judicial instances in one of the Member States. Namely, a national court against whose decisions there is no legal remedy under national law, has the obligation to refer the question based on Article 267 of the Treaty on the Functioning of the EU, when there is a serious doubt regarding the legality of a measure.[101] Otherwise, it would be responsible for violating EU law. During the interpretation of Community law at that time, it was confirmed that a member state will be responsible for its violation, if the national judiciary fails to refer questions based on the then Article 234 of the EC Treaty.[102] This principle can also be applied when examining the legality of an act, although it remains the discretionary authority of the domestic judge to decide whether the question of legality is raised within the meaning of Article 267 of the Treaty on the Functioning of the EU. The obligation to request an opinion arises only when the domestic court takes the view that the legality arguments are well founded.[103]

National courts have reduced powers in proceedings to determine the legality of an act, because it is necessary to ensure the uniform application of Union law, which would be very difficult if the courts of member states were given discretionary powers to declare Union acts invalid. Also, the exclusive jurisdiction in the hands of

100 *Foto Frost v Hauptzollamt Lübeck-Ost*, Case 314/85, Judgment, 22 October 1987, paras. 13–20.

101 *Foto Frost v Hauptzollamt Lübeck-Ost*, Case 314/85, Judgment, 22 October 1987, para. 17.; *Gaston Schul v Minister van Landbouw*, Case C-461/03, Judgment, 6 December 2005, para. 25.

102 *Köbler v Austria*, Case C-224/01, Judgment, 30 September 2003, para. 55; Traghetti del Mediterraneo v Italy, Case C-173/03, Judgment, 13 June 2006, para. 32.

103 *International Air Transport Association and European Low Fares Airline Association v Department of Transport*, Case C-344/04, Judgment, 10 January 2006, para. 28.

the Court of Justice of the EU is necessary to guarantee a coherence in the system of legal protection in the European Union, and national courts can suspend the implementation of a national measure based on a contested EU act. The Court concluded that the differences between the courts in the member states, regarding the legality of the acts of the Union, could threaten the unity of the legal order of the Union and violate the basic requirement of legal certainty.[104] On the other hand, the Court of EC held that national courts can review the legality of a Community act and can conclude that a specific act is completely legal. In doing so, they do not call into question the existence of that act of the European Community.[105] In such cases, there remains the possibility that another national court may take a different position on an act and send the question of legality to the EC Court.

In its jurisprudence, the Court held that the decision on the illegality of an act binds not only the national court that referred the question on the basis of the former Article 234, but that it represents a sufficient basis for any other national court to consider that act invalid, in the sense of the judgment that should bring.[106]

4.2.1. Effectiveness of indirect examination of legality of European Union acts

By interpreting the former Article 234 of the EC Treaty, the EC Court favoured the rights of individuals to judicial review. It held that regulations are not the only type of Community rule that can be subject to judicial review. Directives and decisions can also be challenged on the basis of indirect control of the legality of European Union acts. In this way, private entities were given the opportunity to initiate an examination of the legality of all legal acts of the European Union that have a direct effect in domestic law. The grounds for examining legality have been expanded in relation to an action for annulment. In these procedures, the question whether the acts are in accordance with general legal principles and basic human rights can be examined. The consequence of this is that private entities have a wide range of rules to rely on when they want to establish that the Community institutions have exceeded the limits in the exercise of their powers.

Moreover, it was established in the jurisprudence that although the judgment which declares the act of the European Union null and void is referred only to the national court that brought the issue before the Court, it holds sufficient grounds for any other national court to regard that specific act as null and void.

This procedure, in addition to its positive characteristics, also has certain disadvantages. National courts are not authorised to make a decision on the legality of an act of the European Union. Rather, their role is to assess whether the request for a finding of illegality is well founded in order to refer the matter to the Court of

104 *Woodspring District Council v Bakers of Nailsea Ltd*, Case C-27/95, Judgment, 15 April 1997, para. 20.
105 *Woodspring District Council v Bakers of Nailsea Ltd, Case C-27/95*, Judgment, 15 April 1997, para. 19.
106 *International Chemical Corporation v Amministrazione delle Finanze*, Case 66/80, Judgment, 13 May 1981, para. 18.

Justice of the EU under Article 267. Also, national courts, except those against whose decisions exists is no legal remedy, do not have to refer the matter to the Court of the EU on the legality of an act. They may make an error in assessing whether a referral is necessary. Sometimes there is no domestic regulation that can be examined. The proposal to decide on the requests for preliminary ruling leads to delays and creates additional costs.

4.3. Relation between European Union Law and Public International Law

International treaties represent an important source of European Union law. The introduction of international rules into the legal order of the European Union can be viewed within the framework of two theoretical models on the relationship between two types of law – monism and dualism. Today, the prevailing view is that the relationship between European Union law and international law is exactly monistic. When consent is given to be bound by an international treaty, it enters into force in accordance with the provisions of the treaty itself and Article 12 of the Vienna Convention on the Law of Treaties between States and International Organisations and between International Organisations. The monistic theory does not deny the *sui generis* character of European Union law, as different from international law, but only considers that these two rights are part of one universal legal order.[107] The EC Treaty was reminiscent of monistic systems and the Court found in the *Haegemann* case that the provisions of an international treaty are an integral part of the EC legal order from the moment it enters into force ("Haegemann principle").[108]

The competence of the European Union in the conclusion of international agreements has been continuously expanded.[109] In its practice, the Court of EC established that an international agreement must be in accordance with the primary law of the European Community. It performed an *a posteriori* control of the legality of the conclusion of an international agreement, one of the state's parties of which was a member of the European Community. In its Opinion 1/75 of November 11, 1975, the Court indirectly pointed out that its jurisdiction was extended to be able to declare invalid the conclusion of an international agreement. It held that the question of whether the conclusion of a treaty falls within the jurisdiction of the European Community and whether it was carried out in accordance with the provisions of the Treaty is a question that can be submitted to the EC Court.[110]

107 Peters, 1997, p. 21.

108 *Haegemann v Belgium*, Case C-181/73, Judgment, 30 April 1974, para. 5. In this case it was an agreement between EEC and Greece. The same principle applies to other agreements concluded by the European Union. See: Snyder, 2003, p. 315.

109 Mignolli, 2002, p. 111.

110 Opinion 1/75 given pursuant to Art. 228(1) of the EEC Treaty.

In the case of *France v. Commission*, the question of challenging an international treaty arose.[111] France argued that the Commission concluded the agreement with the US on its own, without the involvement of the Council and argued that this was in breach of the then Article 228 of the EEC Treaty.[112] The Court of Justice considered the issue due to the fact that the institutions of the Community concluded the treaty in violation of the procedural conditions provided for in the former Article 228 of the EC Treaty.[113] The Court based its reasoning on the founding Treaty, which gave it powers to ensure that the law was respected and therefore retained jurisdiction to examine the legality of an act incorporating an international obligation into the legal system of the European Community.[114] The Commission asked whether the application should be filed against the decision authorising its vice president to sign the treaty, or against the treaty itself. Advocate General Tezauro argued in his opinion that the Court in no way excluded the possibility of directly examining the treaty.[115] He referred to Opinion 1/75 and the *Hegeman* case in support of his view that an international treaty is an act of an institution, as is the decision to conclude it. However, the Court did not listen to the suggestion of the Advocate General in this case, because the possibility of directly examining an international treaty could lead to non-compliance with international legal norms and to the international responsibility of the Community. The Court also held that in the event of non-compliance with the Treaty by the Commission, the European Community could be held internationally responsible.[116] In order to avoid these consequences, the Court made a legal distinction between concluding a treaty and an internal decision to conclude it. In accordance with this, the Court did not annul the international treaty, but only annulled the internal act by which it was decided to conclude that treaty. The Court annulled the given act because the Commission of the European Community did not have the competence to conclude the given international agreement. The court did not apply Article 46 of the 1986 Vienna Convention on the Law of Treaties,[117] which provides for strict criteria for challenging consent to be bound by a treaty. When consent to be bound by an international treaty is given in violation of a substantive or

111 *France v Commission*, Case C-327/91, Judgment, 9 August 1994.

112 It was later article 300 of the TEC.

113 *France v Commission*, Case C-327/91, Judgment, 9 August 1994, para. 28.

114 Leal-Arcas, ex: 2003, p. 222.

115 *France v Commission*, Case C-327/91, Judgment, 9 August 1994; Opinion of the Advocate General Tesauro of 16 December 1993, para. 9.

116 *France v Commission*, Case C-327/91, Judgment, 9 August 1994; Opinion of the Advocate General Tesauro of 16 December 1993, para. 25.

117 Art. 46 of the Vienna Convention on the Law of Treaties: '1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance…. 3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith'.

procedural rule of the founding Treaties, that treaty will never become an integral part of the Community's legal order. In accordance with this, the Court made a distinction between the decision to conclude the treaty and the conclusion itself, because otherwise it would have had to refuse jurisdiction to control the legality of the conclusion of the treaty.[118] The Court of the EC, creating the aforementioned distinction and performing a posteriori control of the legality of concluding international agreements, held that the exercise of competences entrusted to Community institutions in international matters cannot avoid judicial control of the legality of adopted acts.[119]

Also, if the Court of the EU were to be asked to decide on the legality of an international agreement, as in the preliminary ruling, it would have to consider whether that agreement is in accordance with the Treaty on the Functioning of the EU. Certain authors believe that, if a given treaty is found to be inconsistent with the Treaty on the Functioning of the EU, the Court would have to conclude that the Treaty has primacy in relation to it.[120] Doubts arise here, as in the case of direct claims against international treaties, regarding the jurisdiction of the Court to declare the international treaty itself invalid, which is not an act of the Union, but a joint agreement of the state's parties. A solution that is more in line with Article 267 of the EU Treaty is to allow the declaration of nullity only of the internal act concluding the agreement.

4.4. Judicial review in relation to Security Council Resolutions

The jurisprudence of the EC Court has been consistent in that the main criterion for determining whether the Court has the jurisdiction to review the legality of an act of a Community institution is to determine whether a given act produces a legal effect. The judgments of the Court of First Instance in the cases of *Yusuf*[121] and *Kadi*[122] briefly changed this established practice of the Court. They called into question the previous reasoning of the EC Court regarding its competence to control the legality of an act of one of the institutions of the Community, which transfers an international act into the legal system of the European Community. In its jurisprudence, the Court of the EC held that the European Community is based on the rule of law, so that neither the member states nor the institutions of the Community can avoid control of the question of whether their acts are in accordance with the basic constitutional act – the EC Treaty, which established a complete system of legal means and procedures, created to enable the EC Court to control the legality of all acts of institutions that produce legal effects, regardless of their nature and form.[123] In the case

118 See: *Germany v Council*, Case C-122/95, Judgment, 10 March 1998, para. 42.
119 *France v Commission*, Case C-327/91, Judgment, 9 August 1994, para. 16.
120 Heliskoski, 2000, p. 395.
121 *Yusuf and Al Barakaat v Council and Commission*, Case T-306/01, Judgment, 21 September 2005.
122 *Kadi v Council and Commission*, Case T-315/01, Judgment, 21 September 2005.
123 *Commission v Council* (ERTA case), Case 22/70, Judgment, 31 March 1971, para. 42.

of *Reynolds Tobacco and others v Commission*, the EC Court held that access to justice is one of the constitutive elements of the Community, based on the rule of law. The EC Treaty established a complete system of legal remedies and procedures designed to enable the EC Court to control the legality of acts of institutions.[124]

The European Court of Justice insisted on the issue of basic human rights within the Community due to legal disagreements with national constitutional courts, and especially with the German Constitutional Court regarding the issue of jurisdiction. In the case of *Internationale Handelsgesellschaft*, the EC Court took the view that the legality of an institution's act can be assessed only on the basis of EC law, excluding all national provisions, even those of a constitutional nature.[125] In this decision, it tried to confirm the supremacy of European Community law over national law. If the national constitutional courts would unilaterally interpret whether the law of the European Community respects human rights, it would threaten the essential constitutional principles in the Communities. In the case of *Dow Chemical Ibérica and Others v Commission of the European Communities*, the Court held that reference to violations of fundamental human rights, as they are formulated in a constitution of a member state or to national constitutional principles, may not affect the legality of an act of the Community or its effect on the territory of that country.[126]

In the case of *Bosphorus Airways*, the legality of the Council Regulation was challenged, which incorporated the Security Council resolution into the Community legal order, which violated the applicant's property rights. The Court considered that it is established practice that the basic human rights invoked by Bosphorus Airways are not absolute and that their enjoyment may be subject to restrictions justified by the general interest of the Community.[127] The goal of this specific regulation was in accordance with the general interest of the Community, so taking the applicant's property did not constitute a violation of their basic human rights. In this case, the Court of the EC would not have refused its jurisdiction if it had found that the resolution was not in accordance with the general interest of the Community, because there were no restrictions to control the legality of the given regulation.

4.4.1. Cases Yusuf and Kadi

In the *Yusuf* and *Kadi* cases, the applicants sought the annulment of several EC Regulations, among others Regulation 881/2002 of May 27, 2002, which incorporated several UN Security Council resolutions into the EC legal system. These resolutions were adopted after the attack on the World Trade Center in New York on September 11, 2001. EC regulations imposed certain restrictive measures against specific

124 R.J. Reynolds v Commission, Case C-131/03 P, Judgment, 12 September 2006, paras. 74–77.

125 *Internationale Handelsgesellschaft*, Case 11/70, Judgment, 17 December 1970, para. 3.

126 *Dow Chemical Ibérica v Commission*, Joined Cases 97/87, 98/87, and 99/87, Judgment, 17 October 1989, para. 38.

127 *Bosphorus Hava Yollari v Minister for Transport, Ireland, and the Attorney General*, Case C-84/95, Judgment, 30 July 1996, para. 21.

individuals and groups linked to Osama Bin Laden, the Al-Qaeda network and the Taliban regime. The Court of First Instance rejected all the demands of the applicants regarding the annulment of the given regulations. In these cases, the Court of First Instance made certain decisions on the relationship between the international legal order created within the UN and the legal order of the European Community. The Court considered it legitimate to mechanically subject Community law to applicable international norms, drawing a parallel with the classic rule in international law, which is provided for in Article 27 of the Vienna Convention on the Law of Treaties, according to which internal law cannot be assumed to be international, because European Community law is only domestic when compared to international law.[128] Some European lawyers disputed this qualification because, according to them, the peculiarities of the Community's supranational legal order gave this international organisation unique institutional characteristics, on the basis of which the supremacy of international law does not exist in relation to the Community's legal order.[129]

In the *Kadi* case, the Court of First Instance referred to the fact that in accordance with Article 103 of the UN Charter, the provisions of the Charter take precedence over all other treaties.[130] Decisions made by the Security Council, which are stipulated in Article 25 of the UN Charter, have primacy in relation to international agreements.[131] The Court claimed that it was obliged, based on the founding treaties, to adopt all measures necessary to enable the member states to fulfil the obligations imposed on them by their membership in the United Nations.[132] The Court was of the opinion that the European Community cannot adopt legislative acts independently of the obligations arising from the UN Charter. It held that the applicant's arguments based on the claim that the Community legal order was independent of the United Nations and governed by its own legal rules which must be rejected. The authority of the institutions, when they adopted contested EC Regulations, was limited, because they could not change the content of Security Council resolutions. Control of the legality of the adoption of EC Regulations would be equated with control of the legality of the substance of Security Council resolutions. The court clearly refused the jurisdiction to control the legality of the contested EC Regulation despite the possible violation of the basic human rights of the applicant and thus, in this way, indirectly decided that some acts of the institutions can to a certain extent avoid judicial control. It considered that it could not control the legality of the contested EC Regulation due to the limitations imposed by general international law.[133] The position was taken that it had no jurisdiction to control the legality of the resolutions, neither on the basis of international law, nor on the basis of Community law.

128 *Kadi v Council and Commission*, Case T-315/01, Judgment, 21 September 2005, para. 182.
129 Pescatore, 1961, p. 129; Simon, 2000, p. 207.
130 Art.103 of the Charter of the United Nations, 1945.
131 Art. 25 of the UN Charter: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.
132 *Kadi v Council and Commission*, Case T-315/01, Judgment, 21 September 2005, para. 204.
133 *Kadi v Council and Commission*, Case T-315/01, Judgment, 21 September 2005, para. 212.

Referring to the cases of *Raka* and *Poulsen*, it considered that if it were to engage in control, it would not be in accordance with the principle that the competences of the Community and the Court of First Instance must be used in accordance with international law. The applicant in this case relied on his inalienable basic human rights, which are an integral part of the general legal principles of the Community. The Court decided that the establishment of a violation of fundamental human rights protected by the legal order of the Community could not affect the legality of an act of the Security Council or its effects on the territory of the Community.[134] By all means, the Court of First Instance could not under any circumstances have the authority to declare the decision of the Security Council invalid. Instead, it could, in accordance with the jurisprudence of the Court of Justice, distinguish between an international act to be incorporated into the legal system of the Community and an act of an institution which had decided to undertake the implementation of Security Council resolutions and thus deprive the resolution of any of any legal effect in the Community order. The ECJ has distinguished between an international act and an act of foreign policy when there is a conflict between primary Community law and an international source. However, the Court of First Instance did not accept this distinction. In its opinion, the violation of subjective rights recognised by the law of the European Community, even those of a fundamental nature, could not justify the legal control of the EC Regulation that incorporates the resolution of the UN Security Council into the legal order of the European Community, because such acts, as a rule, fall outside the scope of the Court's control, which has no authority to question, even indirectly, their legality in the light of Community law.[135] The Court of the First Instance decided that it still had the authority to control the legality of a resolution of the Security Council, if it contradicted an imperative norm of public international law, i.e. by the *ius cogens* norm.

In the legal doctrine, the decision of the Court of First Instance was criticised.[136] The declaration of the Security Council as the supreme legislator, whose decisions are not subject to control, was particularly controversial. According to some authors, the member states agreed to the primacy of EU law because of the constitutional guarantees it provides. Such guarantees do not exist, however, when it comes to the Security Council.[137]

The EC Court, however, decided in the appeal procedure in these cases that the claims for annulment against the contested regulation were eligible for discussion and decision making.[138] The EC Court confirmed that the European Community was based on the rule of law and that member states and their institutions could not avoid a review, whether their acts were or were not in accordance with the basic

134 *Kadi v Council and Commission*, Case T-315/01, Judgment, 21 September 2005, para. 224.
135 *Kadi v Council and Commission*, Case T-315/01, Judgment, 21 September 2005, para. 225.
136 Lavranos, 2006, p. 480; Lavranos, 2007, pp. 13–15; Bulterman, 2006, p. 770.
137 Amato and Ziller, 2007, p. 283.
138 *Kadi and Yusuf v Council and Commission*, Joined Cases C-402/05 P and C-415/05 P, Judgment, 3 September 2008.

constitutional text – the EC Treaty. Also, it was confirmed that human rights are an integral part of general legal principles whose observance is ensured by the Court. Respect for human rights is a condition of the legality of Community acts, and measures that are inconsistent with the respect of human rights are not acceptable in the Community.[139] Therefore, the obligations prescribed by the international agreement could not be contrary to the constitutional principles from the EC Treaty and all acts of the Community must respect basic human rights. In the circumstances of these two cases, the control of legality was applied to the act enabling the operation of the international treaty, and not to the treaty itself.[140] The judgment of the Court, which would decide that the act of the European Community, which should enable the effect of the resolution, was contrary to the higher law in the legal order of the Community, and would not lead to a challenge of the primacy of such a resolution in international law. In this ruling, the Court referred to an earlier decision in the case of *Germany v Council*, in which it annulled the Council's decision approving an international treaty after finding that the decision violated the principle of non-discrimination, which was one of the general principles of Community law.[141]

In its earlier jurisprudence, the Court established that the activities of the European Community in the field of cooperation and development, provided for in the then Articles 177 to 181 of the EC Treaty, must be carried out in compliance with the obligations stipulated in the United Nations and other international organisations.[142] Compliance with the obligations prescribed within the framework of the United Nations is also necessary in the area of maintaining international peace and security. By adopting acts on the basis of the then Articles 60 and 301 of the EC Treaty, the European Community enabled the legal effect of Security Council resolutions adopted on the basis of Chapter VII of the UN Charter.[143] Also, the powers specified in these articles of the EC Treaty could only be exercised by adopting a common position or undertaking a joint action, based on the provisions of the EC Treaty that related to the Common Foreign and Security Policy. When implementing a specific resolution of the Security Council, the Community had to take into account the terms and objectives of the given resolution and the relevant obligations under the Charter concerning that implementation. The UN Charter does not impose a special way of implementing the resolutions adopted by the Security Council on the basis of Chapter VII of the UN Charter, since they acquire legal effect in accordance with the

139 *Kadi and Yusuf v Council and Commission*, Joined Cases C-402/05 P and C-415/05 P, Judgment, 3 September 2008, para. 284.

140 *Kadi and Yusuf v Council and Commission*, Joined Cases C-402/05 P and C-415/05 P, Judgment, 3 September 2008, para. 286.

141 *Germany v Council*, Case C-122/95, Judgment, 10 March 1998.

142 *Commission v Council*, Case C-91/05, Judgment, 20 May 2008, para. 65.

143 Article 24 of the UN Charter states that the adoption of these resolution represents primary responsibility which is conferred to this organ at the global level. This responsibility includes the power to determine what represents the threat to international peace and security and to take all necessary measures to maintain or restore it.

procedure applied in the domestic legal order of each member state of the United Nations. The UN Charter leaves member states free to choose how to incorporate these resolutions into their domestic legal order.

In the case of *Kadi*, the Court of EC pointed out that in its previous practice it had accepted that on the basis of the former Article 307 of the Treaty on the EC,[144] the derogation of even a primary right, for example provisions on common trade policy, could be allowed. The former Article 297[145] implicitly allowed the existence of obstacles in the functioning of the common market, when they were caused by measures taken by member states to implement international obligations they accepted in order to maintain international peace and security. These provisions, however, could not be interpreted in such a way as to allow the derogation of the principles of freedom, democracy and the respect for human rights and fundamental freedoms. Article 307 of the EC Treaty did not allow the derogation from the principles that were part of the very foundations of the Community's legal order. One of them is the protection of basic human rights, including the judicial control of the legality of the acts of the European Community in terms of their compliance with those basic rights.[146]

The former Article 300, paragraph 7 of the EC Treaty provided that agreements concluded under the terms of that Article are binding for Community institutions and Member States. Based on this provision, provided it was applicable to the UN Charter, it would have primacy over secondary acts in the European Community. This primacy at the level of Community law would not extend to primary law, that is, to general legal principles of which human rights are an integral part. This interpretation was also supported in the former Article 300, paragraph 6 of the EC Treaty, according to which an international agreement could not enter into force if the Court gave a negative opinion of its conformity with the EC Treaty.

In the *Kadi* case, the EC Court held that the contested regulation could not be viewed as an act directly attributable to the United Nations, nor as an act of one of its special bodies created on the basis of Chapter VII of the UN Charter.[147] In the end, the EC Court concluded that Community courts must, in accordance with the powers entrusted to them by the EC Treaty, ensure full control of the legality of all Community acts in relation to basic human rights that form part of the general principles of Community law, including the control of Community acts, which, as the contested regulation, were created to enable the effect of resolutions adopted by the Security Council based on Chapter VII of the UN Charter. The EC Court ruled that the Court of First Instance erred in the application of law, when it claimed that from the principles governing the relationship between the international legal order within the UN and the Community legal order, it follows that the contested regulation must be exempt from jurisdiction as long as it was in accordance with the norms of jus

144 TFEU, Art. 351.
145 TFEU, Art. 347.
146 *Kadi v Council and Commission*, Case C-402/05 P, Judgment, 3 September 2008, paras. 301–305.
147 *Kadi v Council and Commission*, Case C-402/05 P, Judgment, 3 September 2008, para. 314.

cogens, since it was actually enacted to give effect to a resolution adopted by the Security Council on the basis of Chapter VII of the UN Charter. Based on this, the Court of EC found that the grounds for the action were well founded and that the judgments against which the appeals were filed were annulled. Also, the Court annulled Council Regulation (EC) No. 881/2002 of May 27, 2002, insofar as it concerned the applicant. States can, during the implementation of Security Council resolutions, control their compliance with human rights. However, even if they have not done so, they must implement them in accordance with Article 25 of the UN Charter. In the case of *Kadi*, the Presidency of the EU, after the judgment of the EC Court, an explanation was received from the UN Sanctions Committee stating why Mr. Kadi and the international foundation Al Barakat were placed on the list. The EU Commission concluded that their listing was justified due to their links to Al Qaeda and adopted a new regulation leaving Kadi and the foundation on the sanctions list. Some authors believe that the EU institutions could not have acted differently, because if they had lifted the sanctions against the applicants, it would have led to the EU member states failing to fulfil their obligations under Article 25 of the UN Charter.[148]

5. Conclusion

Taking into consideration all of the analysed aspects of the constitutionality, it can be concluded that European Union has acquired some fundamental federal qualities, although it has not become a federation. The current structure of the European Union indicates that there are some federal elements in this organisation. However, there is no doubt that the EU is an international organisation which has special characteristics giving it the status of a specific supranational organisation. However, it must be emphasised that the resistance of states to the powers and competences of the EU has been present from the beginning.

The federal structure entails some of the joint functions of the central government, which are lacking in the current EU system. The examples of SFRY and especially of the State Union of Serbia and Montenegro could be of some value to the EU, in order to adjust its politics towards the new forms of integration.

Human rights as an inevitable element of every modern constitution has become a part of the system of the EU. The EU Charter on fundamental rights, was supported with the jurisprudence of the ECJ long before the Charter had been adopted, clearly indicating that human rights have a significant role in a sovereign state. This special importance is given to the relationship with the European Convention on Human Rights and the Court in Strasbourg. With the EU's accession to the Convention, the human rights protection in the EU would undoubtedly be improved.

148 Etinski, 2010, p. 88.

The issue of judicial review is of high importance for every constitutional order. Also, it is important for the European Union, in its transformation into a federal state, or at least in its attempt to become that.

The role of guardian of the Treaty has led to the fact that the EC Court has decided that there is no legal act that is exempt from judicial review. An identical position was accepted by the EU Court. If it refused to examine the legality of the inclusion of an international legal instrument in the legal order of the European Union, then some acts that produce legal effects would be exempt from control. Because of this, the Court made a decision that the fact that an act is of international origin is not relevant to its competence in ensuring the rule of law in the European Union. Also, the Court is obliged to check whether the founding treaties have been respected in the international relations of the European Union. If the then EC Court in the cases of *Yusuf and Kadi* had refused jurisdiction to control the acts of the European Community, a new distinction could have arisen between the EC Court and national courts, where the latter would unilaterally control the legality of those acts in relation to basic human rights. This could have had far-reaching consequences for the constitutional system in Europe. In the Treaty of Lisbon, the judicial control of the acts of the European Union has also been given a significant purview, and it can be said that its scope has been expanded with the facilitation of individuals to initiate proceedings for the annulment of the acts of the European Union. Current practice indicates that there is a constant effort to improve the rule of law in the European Union, through the strengthening of judicial protection mechanisms.

References

Amato, G., Ziller, J. (2007) *The European Constitution – Cases and Materials in EU and Member States' Law.* Cheltenham: Edward Elgar Publishing; https://doi.org/10.4337/9781847206787.

Bebr, G. (1981) *Development of Judicial Control of the European Communities*. The Hague: Martinus Nijhoff Publishers; https://doi.org/10.1007/978-94-011-9019-0.

Borzel, T. (2003) *What Can federalism Teach Us About the European Union? – The German Experience*, Paper prepared for the Conference "Governing together in the New Europe". Cambridge: Robinson College; https://doi.org/10.2139/ssrn.519402.

Bulterman, M. (2006) 'Fundamental Rights and the United Nations Financial Sanctions Regime: The Kadi and Yusuf Judgements of the Court of First Instance of the European Communities', *Leiden Journal of International Law*, 19(3), pp. 753–772; https://doi.org/10.1017/S0922156506003566.

Dashwood, A. (1998) 'States in The European Union', *European Law Review*, 1998/23, pp. 201–216.

De Schutter, O. (2008) 'The Two Europes of Human Rights: The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe', *Columbia Journal of European Law,* 14(3), pp. 509–562.

De Wet, E. (2006) 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', *Leiden Journal of International Law*, 19(3), pp. 611–632; https://doi.org/10.1017/S0922156506003499.

Etinski, R. (2002) 'Internal Legal Subjectivity of the European Union', *European Legislation*, 2002/2, pp. 133–135.

Etinski, R. (2010) 'Individual Sanctions of the Security Council of the United Nations and Protection of Human Rights', *Collected Papers of the Faculty of Law in Novi* Sad, 44(3), pp. 79–92.

Everling, U. (2000) 'On the Judge-made Law of the European Community's Courts', in O'Keeffe, D., Bavasso. A. (eds.) *Judicial review in European Union Law: Liber amicorum in Honour of Lord Slynn of Hadley.* The Hague: Kluwer Law International, pp. 29–44.

Frey, B.S. (2009) 'A New Concept of European Federalism', *LSE 'Europe in Question' Discussion Paper Series*, 2009/3, pp. 1–21; https://doi.org/10.2139/ssrn.1550908.

Gormley, L. (2001) 'Judicial Review in EC and EU Law – Some Architectural Malfunctions and Design Improvements', *Cambridge Yearbook of European Legal Studies,* 2001/4, pp. 167–189; https://doi.org/10.5235/152888712802761626.

Heliskoski, J. (2000) 'The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements', *Nordic Journal of International Law*, 69(4), pp. 395–412; https://doi.org/10.1163/15718100020296387.

Kaiser W. (2024) 'Federalism in the European Parliament: From Ventotene to the Spinelli Group', *European Parliament History Series, EPRS | European Parliamentary Research Service* [Online]. Available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/760354/EPRS_BRI(2024)760354_EN.pdf (Accessed: 14 April 2024).

Langrish, S. (1998) 'The Treaty of Amsterdam: Selected Highlights', *European Law Review*, 1998/23, pp. 3–19.

Lavranos, N. (2005) 'Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals', *European Energy and Environmental Law Review*, 14(8–9), pp. 213–225; https://doi.org/10.54648/EELR2005034.

Lavranos, N. (2006) 'Judicial Review of UN Sanctions by the Court of First Instance', *European Foreign Affairs Review,* 11(4), pp. 471–490; https://doi.org/10.54648/EERR2006038.

Lavranos, N. (2007) 'UN Sanctions and Judicial Review', *Nordic Journal of International Law*, 76(1), pp. 1–18; https://doi.org/10.1163/090273507X181638.
Leal-Arcas, R. (2003) 'The European Court of Justice and the EC External Trade Relations: A Legal Analysis of the Court's Problems with Regard to International Agreements', *Nordic Journal of International Law*, 72(2), pp. 215–251; https://doi.org/10.1163/157181003322560565.
Mignolli, A. (2002) 'The EU's Powers of External Relations', *The International Spectator*, 37(3), pp. 101–114; https://doi.org/10.1080/03932720208456993.
Misita, N. (2008) *The Foundations of the European Union Law*. Sarajevo: Faculty of Law of the University of Sarajevo.
Moravcsik, A. (2001) 'Federalism in the European Union: Rhetoric and Reality' in Nicolaidis K., Howse R. (eds.) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, 1st edn. Oxford: Oxford University Press, pp. 161–188; https://doi.org/10.1093/0199245002.003.0007.
Nikolić, O. (2017) 'Dissolution of Federalism in Yugoslavia', *Yearbook of the Faculty of Legal Sciences*, 7(7), pp. 185–192; https://doi.org/10.7251/GFP1707185N.
Pescatore, P. (1961) 'Les relations extérieures des Communautés européennes', *Recueil des Cours de l'Académie de Droit International*, 1961/103, pp. 1–244.
Peters, A. (1997) 'The Position of International Law within the European Community Legal Order', *German Yearbook of International Law*, 1997/40, pp. 9–77.
Reho, F.O. (2018) *Future of Europe, The Four* '*Classical Federalisms*' [Online]. Available at: https://www.martenscentre.eu/wp-content/uploads/2020/06/classical-federalism.pdf (Accessed: 9 April 2024).
Rosas, A. (2022) 'The Court of Justice of the European Union: A Human Rights Institution?', *Journal of Human Rights Practice*, 14(1), pp. 204–214; https://doi.org/10.1093/jhuman/huac020.
Simon, D. (2000) 'Les fondements de l'autonomie du droit communautaire', *Rapport général au Colloque de la SFDI, Bordeaux, 30 sept-2 oct 1999 Droit international et droit communautaire, perspectives actuelles Paris Pedone*, pp. 207–249.
Simović, D., Avramović, D., Zekavica, R. (2013) *Human rights*. Belgrade: University of Criminal Investigation and Police Studies.
Snyder, F. (2003) 'The Gatekeepers: the European Courts and WTO Law', *Common Market Law Review*, 40(2), pp. 313–367; https://doi.org/10.54648/COLA2003019.
Temelkovska-Anevska, E. (2020) 'Federalism through the theories of European Integration', *International Scentific Journal "Horizons"*, 24(13), pp. 51–62; https://doi.org/10.20544/HORIZONS.A.24.1.20.P05.
Tillotson, J. (2000) *European Union Law: Text, Cases and Materials*. London: Cavendish; https://doi.org/10.4324/9781843141259.
Watts, R.L. (2008) *Comparing Federal Systems*. Montreal: McGill-Queen's University Press.
Weller, M. (1992) 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', *The American Journal of International Law*, 86(3), pp. 569–607; https://doi.org/10.2307/2203972.

Legal Sources

African Charter on Human and Peoples' Rights, 27 June 1981, UNTS, Vol. 1520.
American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969 UNTS, Vol. 1144.
Charter of the United Nations, San Francisco, 26 June 1945.

Charter on Human Rights and Fundamental Freedoms, Official Journal of the European union 2012/C 326/02.
Consolidated version of the Treaty on the Functioning of the European Union – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – A. Declarations Concerning Provisions Of The Treaties – 17. Declaration concerning primacy, Official Journal of the European Union, C 115/2008.
Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union, Official Journal of the European Union, Volume 51, 2008/C 115/01.
Constitution of the Republic of Serbia, "Official Herald of the Republic of Serbia", Nos. 98/2006 and 115/2021.
Declaration on Article 6(2) of the Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union, Official Journal of the European Union, Vol. 51, 2008/C 115/01.
European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999.
International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS, Vol. 993.
Memorandum of understanding between the Council of Europe and the European Union, adopted at the 117th Session of the Committee of Ministers held in Strasbourg on May 10–11, 2007.
Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, Official Journal of the European union 2012/ C 326/1.
UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UNTS, Vol. 660.
Universal Declaration on Human Rights, General Assembly resolution 217 A.
Vienna Convention on the Law of Treaties, United Nations, Treaty Series, Vol. 1155.

Table of cases

Application No. 45036/98 Bosphorus v Ireland, European Court of Human Rights, Judgment of 30 June 2005.
Case 101/78, Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten, Judgment of 13 February 1979.
Case 11/70, Internationale Handelsgesellschaft, Judgment of 17 December 1970.
Case 142/88, Hoesch AG and Federal Republic of Germany v Bergrohr GmbH, Judgment of 19 October 1989.
Case 22/70, Commission of the European Communities v Council of the European Communities, Judgment of 31 March 1971.
Case 232/78, Commission of the European Communities v French Republic – Mutton and Lamb, Judgment of 25 September 1979.
Case 29/69, Erich Stauder v City of Ulm – Sozialamt, Judgment of 12 November 1969.
Case 294/83, Parti Ecologiste „Les Verts" v European Parliament, Judgment of 23 April 1986.
Case 314/85, Foto Frost v Hauptzollamt Lübeck-Ost, Judgment of 22 October 1987.
Case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, Judgment of 14 May 1974.
Case 6/64, Costa v ENEL, Judgment of 15 July 1964.
Case 60/81, IBM v Commission of the European Communities, Judgment of 11 November 1981.

Case 66/80 International Chemical Corporation v Amministrazione delle Finanze dello Stato, Judgment of 13 May 1981.
Case 97/85, Union Deutsche Lebensmittelwerke GmbH v Commission of the European Communities, Judgment of 21 May 1987.
Case 98/78, A. Racke v Hauptzollamt Mainz, Judgment of 25 January 1979.
Case C-104/81, Hauptzollamt Mainz v C.A. Kupferberg, Judgment of 26 October 1982.
Case C-109/01, Secretary of State for the Home Department v Hacene Akrich, Judgment of 23 September 2003.
Case C-117/91, Jean-Marc Bosman v Commission of the European Communities, Order of the Court of 4 October 1991.
Case C-122/95, Federal Republic of Germany v Council of the European Union, Judgment of 10 March 1998.
Case C-123/03, Commission of the European Communities v Greencore, Judgment of 9 December 2004.
Case C-131/03, R.J. Reynolds Tobacco Holdings, Inc. and Others v Commission of the European Communities, Judgment of 12 September 2006.
Case C-157/96, The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmers' Union and Others, Judgment of 5 May 1998.
Case C-162/96, A. Racke GmbH & Co. v Hauptzollamt Mainz, Judgment of 16 June 1998.
Case C-173/03, Traghetti del Mediterraneo SpA v Repubblica Italiana, Judgment of 13 June 2006.
Case C-181/73, R. & V. Haegemann v Belgium, Judgment of 30 April 1974.
Case C-224/01, Gerhard Köbler v Austria, Judgment of 30 September 2003.
Case C-27/95, Woodspring District Council v Bakers of Nailsea Ltd, Judgment of 15 April 1997.
Case C-286/90, Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp., Judgment of 24 November 1992.
Case C-327/91, France v Commission of the European Communities, Judgment of 9 August 1994.
Case C-344/04, The Queen on the Application of (1) International Air Transport Association and (2) European Low Fares Airline Association v Department of Transport, Judgment of 10 January 2006.
Case C-402/05, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, Judgment of 3 September 2008.
Case C-461/03, Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit, Judgment of 6 December 2005.
Case C-50/00, Unión de Pequeños Agricultores v Council of the European Union, Judgment of 25 July 2002.
Case C-7/98, Dieter Krombach v André Bamberski, Judgment of 28 March 2000.
Case C-84/95, Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy & Communications, Ireland and the Attorney General, Judgment of 30 July 1996.
Case C-91/05, Commission of the European Communities v Council of the European Union, Judgment of 20 May 2008.
Case Senator Lines GmbH v the Fifteen Member States of the EU, Press Release, 16 October 2003.
Case T-115/94, Opel Austria v Council of the European Union, Judgment of 22 January 1997.
Case T-306/01, Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Judgment of 21 September 2005.
Case T-315/01, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, Judgment of 21 September 2005.

Consolidated versions of the Treaty on European Union and The Treaty on the Functioning of the European Union, Official Journal of the European Union, Volume 51, 2008/C 115/01.
Joined Cases 97/87, 98/87, and 99/87 Dow Chemical Ibérica and Others v Commission of the European Communities, Judgment of 17 October 1989.
Joined Cases C-143/88 and C-92/89, Zuckerfabrick Süderdithmarschen v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn, Judgment of 21 December 1991.
Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, Judgment of 8 April 2014.
Joined Cases C-402/05 P and C-415/05, Yassin Abdullah Kadi and Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Judgment of 3 September 2008.
Joined Cases T-480/93 and T-483/93, Antillean Rice Mills and Others v Commission of the European Communities, Judgment of 14 September 1995.
Opinion 1/75, given pursuant to Article 228(1) of the EEC Treaty.
Opinion 2/13, Opinion of the Court of 18 December 2014.
Opinion 2/94, Opinion of the Court of 28 March 1996.
PCIJ, 25 May 1926, Certain German Interest in Polish Upper Silesia, Merits, Germany v Poland, PCIJ Rep. 1926, Ser. A, No. 7.
PCIJ, Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 4 February 1932, Ser. A/B, No. 44.
Re Wünsche Handelsgesellschaft, (22 October 1986) BVerfGE 73, 339, Solange II (1984) Case 345/82, [1987] 3 CMLR 225.

Internet sources

Constitution of The Federal Republic of Yugoslavia (1992) [Online]. Available at: https://www.worldstatesmen.org/Yugoslav_Const_1992.htm. (Accessed: 14 April 2024).
Constitution of the Socialist Federal Republic of Yugoslavia (1974) [Online]. Available at: https://www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf. (Accessed: 14 April 2024).
Constitutional Charter of the State Union of Serbia and Montenegro (2003) [Online]. Available at: https://www.worldstatesmen.org/SerbMont_Const_2003.pdf. (Accessed: 14 April 2024).
ECtHR, Press country profile – Serbia (no date) [Online]. Available at: https://prd-echr.coe.int/documents/d/echr/CP_Serbia_ENG (Accessed: 14 April 2024).
Oktroisani ustav (1931) [Online]. Available at: https://www.pfsa.unsa.ba/pf/wp-content/uploads/2022/10/Oktroisani-ustav-1931.pdf. (Accessed: 14 April 2024).
Ustav Federativne Narodne Republike Jugoslavije (1946) Belgrade. [Online]. Available at: https://www.arhivyu.rs/public/source/aj_10_02_10_txt_ustav1946.pdf. (Accessed: 14 April 2024).
Ustav Kraljevine Srba Hrvata i Slovenaca (1921) Belgrade. [Online]. Available at: https://www.arhivyu.rs/public/source/aj_10_02_02_txt_ustav1921.pdf. (Accessed: 14 April 2024).
Ustav Socijalističke Federativne Republike Jugoslavije (1963) [Online]. Available at: https://web.archive.org/web/20200620125946/http://mojustav.rs/wp-content/uploads/2013/04/Ustav-SFRJ-iz-1963.pdf. (Accessed: 14 April 2024).
Ustav Socijalističke Federativne Republike Jugoslavije (1974) [Online]. Available at: https://www.yuhistorija.com/serbian/doc/Ustav_SFRJ_iz_1974.pdf. (Accessed: 14 April 2024).