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.

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