Common Values and Constitutional Identities

Can Separate Gears Be Synchronised?

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Common Values and Constitutional Identities

Can Separate Gears Be Synchronised?

Edited by
András Zs. Varga – Lilla Berkes

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Chapter I

The Dilemma of the Presumptuous Watchdog: Constitutional Identity in the Jurisprudence of the German Federal Constitutional Court

Alex Graser

Abstract

This article deals with the jurisprudence of the German Federal Constitutional Court relating to European integration. It provides a condensed account of this jurisprudence, from its beginnings half a century ago, to the present; it also sets out the doctrinal standards as developed by the court, and explains their interaction with both their textual bases in the German Basic Law and the procedural law of constitutional review. The main analytical ambition of the article is to make sense of this development, and it tries to do so by reference to the court's – changing and presumably fading – role as a central actor in shaping European integration.

Keywords: German Federal Constitutional Court, European integration, democracy, rule of law, judicial governance

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1. Of courts and watchdogs

It is quite common to analogise constitutional courts with watchdogs[1] – for obvious reasons: they both guard something and fend off intrusions; they signal to potential intruders ('bark') what they consider to be the limits, and they may eventually defend these limits ('bite') when they are disregarded. Thus far, the imagery is quite straightforward. It is unclear, however, whether it can be carried any further.

When does it make sense to bark, when to bite, and how does this calculation change over time? We do not typically speculate about any such strategies, neither in dogs, because we deem it impossible, nor in courts, because we deem it improper for them to be strategic. Maybe, however, these premises are wrong, or at least obstructive when it comes to understanding the aforementioned watchdogs' predicament.

2. What to expect

In the context of the present book, the German situation is similar to that of France and Italy. Germany has been a member of the European integration project from day one, and in fact the issue of preserving the national constitutional identity against encroachments on the part of the central level, be they seeming or real, arose long before the accession to the European Union (EU) by those other, more recent Member States whose law is covered in this volume. The German Federal Constitutional Court has thus been in a position to 'accompany' the development of the law of the EU and its predecessor organisations in this regard.

In light of this sequentiality and the co-evolution of German and European law, it will come as no surprise that the German Federal Constitutional Court has developed (what has come to be known today as) its 'identity jurisprudence' with reference to the German Grundgesetz (Basic Law) rather than to any of the pertinent bases in the primary law of the EU. I shall therefore elaborate briefly, in the next section, on the textual bases for this in the Basic Law and on their development over time.

We shall also see that the German Federal Constitutional Court has, on the one hand, sought to play a formative role in the said co-evolutionary process, and that it has repeatedly sent rather assertive signals to its European interlocutors. On the other hand, it has almost persistently steered clear of any outright conflict with the

1 The imagery has been employed at uncountable instances; for a recent use in a related context, see, for example, Weiler, 2021, p. 182.

European institutions, be they its main interlocutor in Luxembourg, or the others in Brussels or Strasbourg. Remarkably, the German Federal Constitutional Court has shaped the relevant procedural law accordingly, i.e. in a way which renders it more likely that relevant cases are brought before it, but which also allows the court to avoid a ruling relatively easily.

As to its substantive position, the German Federal Constitutional Court has seemed to be concerned not so much with protecting German characteristics against pan-European homogenisation, but rather with determining the pace of European integration and, more specifically, with ensuring that, on its way, the standards of democracy and the rule of law are maintained. To be sure, there has been some oscillation in its line of cases, but the German Federal Constitutional Court has, in this regard, been astonishingly consistent over time. The aforementioned does not mean, however, that it has managed to retain its strong influence up to this day. Its messages have certainly been no less pronounced in the last decade than any time before, but its strength may be fading, and there are now more voices in the EU.

3. Core features of the German constitutional order

After the Second World War and the defeat of Nazi Germany, the Federal Republic of Germany was established as one of two German states. Its constitutional order was laid down in the Basic Law. Some 40 years later, after the fall of the Iron Curtain, the unification of the two German states was performed by way of accession of the eastern to the western part. The Basic Law was not replaced on this occasion, but rather just extended in its territorial reach and amended in only some minor respects. Indeed, this constitutional document has remained in force continuously since 1949.

The Basic Law was, at its inception, an ambitious constitution, intended to keep and guide (West-)Germany on its way towards a liberal democracy. In what has commonly been interpreted as a response to the lessons of the Nazi past, the organisational set-up was designed so as to stabilise the government in case of any future populist swing. This is reflected in both the electoral system and in how government comes into office, as well as how it can be removed from it. This design is also a reason why the Basic Law is rather difficult to change. More specifically, there is not only a procedural side to this entrenchment, in that only a qualified majority in both chambers of the legislature can enact amendments to the Basic Law,

but also a substantive one – the so-called 'eternity clause' – which declares certain core elements of the constitutional order as 'unamendable'.[2]

Moreover, there is a strong judicial guardian of the constitutional order, namely the German Federal Constitutional Court. Seated in the provincial town of Karlsruhe, the court nonetheless occupies a central position in the German system. As the final interpreter of the constitution, it has, i. a., the power to scrutinise ordinary legislation and declare it invalid. Moreover, based on the eternity clause, it can even hold that constitutional amendments are unconstitutional and void. The proceedings before the German Federal Constitutional Court can be initiated not only by various institutional actors, but also by individuals who claim that their fundamental rights have been violated. Such constitutional complaints make up, by far, the largest share of cases brought before the court. Overall, this strong design of constitutional review may, too, be viewed as a marked – and counter-majoritarian – reaction to the trauma of the Nazi period.

The Basic Law has initially been rather silent regarding the interaction between domestic and international law. Hence, it has mostly been for the German Federal Constitutional Court to create and fine-tune this interface, and it has consistently followed an approach of (increasingly) moderate(d) dualism: international law – generally – requires national implementation in Germany before it can take effect in the domestic system, and it – generally – does so on the level which the implementing legislative act occupies in the normative hierarchy. That is to say: it is inferior to constitutional norms and their interpretation by the German Federal Constitutional Court, and even the lex posterior rule will typically apply when there are conflicting provisions of the same rank.

Whilst thus far focus has been on the dualism part, it is now pertinent to discuss the exceptions to these general rules, the elements of moderation, or of the Basic Law's 'friendliness towards international law' ('Völkerrechtsfreundlichkeit'), as the German Federal Constitutional Court likes to label it:[3] firstly, as far as international law is concerned, the court operates on the assumption that all domestic public power should – and indeed does – seek to comply with the obligations that Germany has incurred under international law. For this reason, all state actions, including legislation and even

2 The official translation of Art. 79 of the Basic Law reads as follows:
'*(1) This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an inter- national treaty regarding a peace settlement, the preparation of a peace settlement or the phasing out of an occupation regime or designed to promote the defence of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification.(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundes- rat. (3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Art. 1 and 20 shall be inadmissible*'.

3 On this principle of 'friendliness towards international law', see Herdegen, 2022, Mn. 6-8. For a relatively recent and thorough treatment of this principle, its bases and limits, by the German Federal Constitutional Court itself, see BVerfGE 141, 1 – Völkerrechtsdurchbrechung.

constitutional norms, have to be interpreted in a way that maintains such compliance, and the point of reference is not just the written text of international agreements, but the interpretation they have received by the competent adjudicative body.[4]

Obviously this approach is bound to fail when it comes to instances of outright contradiction, but in most cases interpretation can do the job. It is not entirely clear, however, whether this approach is to be applied with equal strictness to all kinds of international norms. The European Convention on Human Rights has occupied a prominent position in the German Federal Constitutional Court's case law in this regard, but similar standards may apply for other commitments in the field of human rights, if possibly with lesser force.

Secondly, the German Federal Constitutional Court has always afforded special treatment to the law of the EU and its predecessor organisations. In principle, it has gone along with all the pertinent rulings of the European Court of Justice,[5] allowing for the direct effect and supremacy of European law, both primary as well as secondary, including even the European Court of Justice's partial extension of these principles to directives. In short, German law has acknowledged the peculiarity of 'supranational law', as opposed to 'international law', with regard to its interaction with domestic law, and it has done so from the beginning, in the 1960s, onwards.

In fact, with regard to European integration, it was the Basic Law that essentially followed the jurisprudence of the German Federal Constitutional Court, not vice versa. European integration had not been specifically addressed in the Basic Law – but for a brief reference in the preamble – until an amendment in the year 1992. The emerging supranational order had been dealt with under the same – sparse – provision, namely Article 24, which allows for the transfer of sovereign rights to international organisations in general.[6] Subsequently, in 1992, an extensive provision was inserted in Article 23,[7] which, most importantly, confirmed the German Federal

4 Cf. the seminal decision of the German Federal Constitutional Court, BVerfGE 111, 307 – EGMR-Entscheidungen (aka Görgülü); reconfirmed and further elaborated upon in BVerfGE 128, 326 – EGMR Sicherungsverwahrung.

5 Most prominently, of course, with the decisions in C-26/62 – *Van Gend en Loos v. Administratie der Belastingen*, and C-6/64 *Costa v. ENEL*.

6 The official translation of Art. 24 of the Basic Law reads as follows (part in italics added in 1992): '(1) The Federation may, by a law, transfer sovereign powers to international organisations. *(1a) Insofar as the Länder are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighbouring regions.* (2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world. (3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive and compulsory international arbitration'.

7 Art. 23 had initially addressed another matter and then been repealed, meaning that the number was 'free' when the provision on the EU was inserted. The following is the official translation of the current version of Art. 23 of the Basic Law. Most of it is still the Maastricht version, except for some minor changes not indicated here, and the part in italics which was added in 2009: '(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development

Constitutional Court's view that the eternity clause in the Basic Law operates as a limit also on European integration, and which additionally spelled out the guidelines for the interaction between domestic and supranational institutions in the post-Maastricht world, i.e. the newly-created EU.

4. Barking dogs seldom bite: The jurisprudence of the German Federal Constitutional Court

From the early 1970s onwards, the German Federal Constitutional Court has developed a line of jurisprudence dealing, from different angles, with the question

of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Art. 79.*(1a) The Bundestag and the Bundesrat shall have the right to bring an action before the Court of Justice of the European Union to challenge a legislative act of the European Union for infringing the principle of subsidiarity. The Bundestag is obliged to initiate such an action at the request of one fourth of its Members. By a statute requiring the consent of the Bundesrat, exceptions to the first sentence of para. (2) of Art. 42 and the first sentence of para. (3) of Art. 52 may be authorised for the exercise of the rights granted to the Bundestag and the Bundesrat under the contractual foundations of the European Union.* (2) The Bundestag and, through the Bundesrat, the Länder shall participate in matters concerning the European Union. The Federal Government shall notify the Bundestag of such matters comprehensively and as early as possible. (3) Before participating in legislative acts of the European Union, the Federal Government shall provide the Bundestag with an opportunity to state its position. The Federal Government shall take the position of the Bundestag into account during the negotiations. Details shall be regulated by a law. (4) The Bundesrat shall participate in the decision-making process of the Federation insofar as it would have been competent to do so in a comparable domestic matter or insofar as the subject falls within the domestic competence of the Länder. (5) Insofar as, in an area within the exclusive competence of the Federation, interests of the Länder are affected and in other matters, insofar as the Federation has legislative power, the Federal Government shall take the position of the Bundesrat into account. To the extent that the legislative powers of the Länder, the structure of Land authorities, or Land administrative procedures are primarily affected, the position of the Bundesrat shall receive prime consideration in the formation of the political will of the Federation; this process shall be consistent with the responsibility of the Federation for the nation as a whole. In matters that may result in increased expenditures or reduced revenues for the Federation, the consent of the Federal Government shall be required.(6) When legislative powers exclusive to the Länder concerning matters of school education, culture or broadcasting are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the European Union shall be delegated by the Federation to a representative of the Länder designated by the Bundesrat. These rights shall be exercised with the participation of, and in coordination with, the Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole. (7) Details regarding paragraphs (4) to (6) of this Art. shall be regulated by a law requiring the consent of the Bundesrat'.

of whether there are any limits, under German law, on the supremacy of an evolving law of the EU and its predecessor organisations. As we shall see in this part, the court has consistently emphasised that there were such limits and that it was itself the competent institution to enforce them. However, the German Federal Constitutional Court had never actually done this until a few years ago: there was certainly one such judgement in 2020, but perhaps also an earlier one in 2015 that could be counted as such enforcement. After the 2020 decision, which triggered intense reactions within and beyond Germany, the German Federal Constitutional Court appears most lately to have returned to its previous – and more restrained – approach.

4.1. The early years: 'The Solanges'

The first landmark case[8] in this line is commonly referred to as 'Solange 1': the name derives from the formula of the ruling which entails the German expression for 'as long as' – 'solange'. The German Federal Constitutional Court (modified, but) used that formula again in another decision at a later point, which is why the two cases have been given numbers.

In the first 'Solange' case, a national court had to apply a supranational norm in the case before it. It thought that the application of this norm of secondary European law – a regulation – would amount to a violation of a fundamental right granted in the Basic Law. Hence, it asked the German Federal Constitutional Court to assess the validity of that norm.

The Basic Law provides a special procedure for such referrals:[9] all courts can stay a proceeding before them, if they think that a rule of law upon which their decision turns is unconstitutional, and they can refer that rule for review to the German Federal Constitutional Court. The key question in 'Solange 1' was whether the German Federal Constitutional Court would consider itself competent for such a review also in this special case.

To appreciate the aforementioned situation, it is important to note that 'Solange 1' was decided in 1974, i.e. a decade after the European Court of Justice's judgement in Costa,[10] which had introduced the doctrine of supremacy. According to this doctrine, any conflict between norms of supranational and national law would have to

8 BVerfGE 37, 271 – Solange I. There had been an earlier decision on a related matter in which the German Federal Constitutional Court declared it inadmissible to challenge acts of secondary European law directly by way of constitutional complaint, but left open whether it would be willing to review such compatibility with the Basic Law in other procedural settings (cf. BVerfGE 22, 293 – EWG-Verordnungen, in para. 21).

9 The official translation of Art. 100(1) of the Basic Law reads as follows: '*If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.*'

10 Art. 24 of the Basic Law.

be resolved in favour of the former, regardless of their respective rank in the internal hierarchy of the two normative systems. Hence, from a perspective of supranational law – as framed by the European Court of Justice – there would not have been any point in the German Federal Constitutional Court assessing whether the European norm at hand was compatible with the fundamental rights guarantees of the Basic Law, because the regulation would, in any event, prevail.

However, the German Federal Constitutional Court disagreed with that view. Whilst it would not refute the principle of supremacy as such, the court emphasised that there are limits to its operation in German constitutional law. Today's specific provision on European integration (Article 23[11]) had not yet been included in the Basic Law at that time. Thus, there was only the short clause allowing for the transfer of sovereign powers to international organisations (Article 24[12]). The German Federal Constitutional Court interpreted this clause restrictively, emphasising that any such transfer of power could not amount to a change of the identity of the constitution. The court took the view that the Basic Law's section on fundamental rights formed part of this identity, meaning that limiting these guarantees could not without more be allowed.

The German Federal Constitutional Court went on to elaborate that European integration was still in flux and incomplete with regard to, i. a., the development of a codified catalogue of fundamental rights, and whilst the court acknowledged the pertinent jurisprudence of the European Court of Justice, it concluded that, as long as (sic!) there was in European Law no such catalogue that afforded a measure of protection at the level of the Basic Law, the German Federal Constitutional Court would continue to review norms of European law with regard to their compatibility with the fundamental rights guarantees of the Basic Law. It clarified that, in case it was to find an incompatibility, it would declare the European norm only inapplicable to that extent in Germany, and that such a ruling would not affect the validity of the norm as such.

Sure enough, however, the German Federal Constitutional Court did not actually find any violation of a fundamental right. Thus, 'Solange 1' was but a well-calibrated warning – an incidence of barking, if you will. In substance, there was no conflict with the European Court of Justice or the way it interpreted European law, especially with regard to its supremacy.

Twelve years later, that is in 1986, the German Federal Constitutional Court modified this jurisprudence in its 'Solange 2' decision.[13] In substance, the situation was similar to the first in that, again, a norm of secondary European law was challenged as violating a fundamental right guaranteed in the Basic Law. Procedurally, however, it was different, because this time none of the ordinary courts dealing with the case saw such a violation. Thus, there was no referral, and the case was brought

11 BVerfGE 37, 271 – Solange I.
12 Art. 23 of the Basic Law.
13 BVerfGE 73, 339 – Solange II.

to the German Federal Constitutional Court by way of a constitutional complaint[14] after all regular remedies had been exhausted.

The German Federal Constitutional Court reaffirmed its starting point that the Basic Law does not authorise any transfer of sovereign powers, not even within the process of European integration, that may cause a conflict with the identity of the German constitution. The court went on to state, however, that European integration had made sufficient progress in the time since 'Solange 1' to ensure that the protection of fundamental rights in European law had now reached a level which was essentially equal to that afforded by the Basic Law. Thus, as long as (sic!) this continued to be generally the case, any individual challenges before the German Federal Constitutional Court against norms of secondary European law would be considered inadmissible.

Again, the court did not find any violation in the case at hand. Consequently, as in 'Solange 1', the relevance of the ruling rests entirely in the signal that the court sent out for future cases, and to European institutions. Remarkably, the German Federal Constitutional Court did not quite keep up the threshold it had formulated in 'Solange 1', because the codified fundamental rights catalogue, which it had viewed necessary then, was still far out of sight in 'Solange 2'. In fact, the Charter of Fundamental Rights would only come into force more than two decades later in 2009.

Procedurally, 'Solange 2' brought about an important change. By declaring future challenges of that kind inadmissible, the German Federal Constitutional Court made it easier for itself to dispose of such cases in the future, because it would no longer have to enter into a review on the merits. At the same time, the Court kept a foot in the door, as it could always step in again if it found that the above condition ('as long as') was no longer met.

The framing of that condition was, however, quite remarkable in that it referred to the 'general' level of fundamental rights protection in Europe. As a consequence, an individual case would, strictly speaking, remain inadmissible even if there had been a human rights violation which, however, was not indicative of a decrease of the general level of protection in Europe. For a court whose mission it is to safeguard individual rights, this would be an astonishing approach. It has never been tested, however, whether the court would maintain the aforementioned view if a decision actually turned on this.

In part, this may be attributed to another remarkable feature of the reasoning in both Solange decisions – one that relates to the court's understanding of the concept of constitutional identity. This concept was not much elaborated on in either of these decisions. In particular, they made no explicit reference to the eternity clause, even

14 The relevant provision of the Basic Law is Art. 93. The official translation of the relevant part reads as follows: '*(1) The Federal Constitutional Court shall rule: (…) 4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under para (4) of Art. 20 or under Art. 33, 38, 101, 103 or 104 has been infringed by public authority.*'

though one might have expected the court to mention this clause if dealing with potentially unchangeable content of the Constitution.

However, in 'Solange 1', the German Federal Constitutional Court did not equate constitutional identity with an immutable core in the first place. It did, to be sure, refer to the fundamental rights – which are part of the Basic Law – as an indispensable essential element[15] of the constitution. However, it also stated that qualifications were possible, and it actually went on to discuss whether the conditions for such qualifications were met. Evidently, this is not the kind of immutability that an eternity clause provides.

In 'Solange 2', the German Federal Constitutional Court was still explicitly concerned with immutable elements of the Constitution, but changed a nuance in that it no longer referred to the whole fundamental rights part in this regard. Rather, it spoke of '*the legal principles that form the basis of the Basic Law's fundamental rights part*'.[16] It thus moved closer to the wording of the eternity clause, which also referred to 'principles', albeit not those underlying the entire fundamental rights part, but rather those laid down, i. a., in Article 1, i.e. the dignity clause.[17] This could be viewed as synonymous, however, based on the widely shared assumption[18] that Article 1 is an overarching general principle which has been spelled out in the specific fundamental rights provisions that ensue in the rest of the Basic Law's section on fundamental rights.

Such increased proximity notwithstanding, the German Federal Constitutional Court did not, at that time, base its concept of constitutional identity upon the eternity clause. Consequently, qualifications of German constitutional identity through European law were not viewed as forbidden per se. And indeed, in both cases the court did not find a substantive violation of national law. Constitutional identity, hence, was considered to encompass more than the immutable core that is protected in the eternity clause, and the Court did not openly contemplate whether there was anything that was more sacrosanct because it might come under the protection of the eternity clause.

This may help explain why the court, in 'Solange 2' thought it acceptable to no longer review cases on an individual basis, even if they involved an actual violation of a human right. The court was dealing with cases that were still outside any immutable core of the Basic Law. What is confusing, however, is that the court did not

15 Solange 1, para. (44): 'unaufgebbares Essentiale'.

16 Solange 2, para (104): 'Rechtsprinzipien, die dem Grundrechtsteil des Grundgesetzes zugrundeliegen'.

17 The official translation of Art. 1 of the Basic Law reads as follows: '*(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.*'

18 On this notion that there is a 'kernel of dignity' (Menschenwürdekern) contained in other fundamental rights guarantees, see Herdegen, 2020, Art. 1(1), Mn. 26 seq.

address the question of such stricter limits. As this had plainly been on the table, it is plausible to assume that the German Federal Constitutional Court deliberately avoided any such explicit warning. 'Solange 2' was an incident, thus, of judicial growling rather than of outright barking.

4.2. Forging the Union: From Maastricht to Lisbon

After the fall of the Iron Curtain, the post-Second-World-War projects of regional integration in (Western) Europe not only extended their geographical reach eastwards, but also became more intense. In 1992, the Treaty of Maastricht transformed the European Economic Communities into (one pillar of) what would henceforth be called the EU. The new paradigm went explicitly beyond economic integration, introducing European citizenship as a strong symbol for the move from market to polity. The substantive changes that this step entailed were certainly not as groundbreaking as the accompanying rhetoric suggested. However, the transformation was far-reaching enough to warrant a renewed debate regarding the finalité of European integration – and regarding its limits. The latter was at the core of another of the German Federal Constitutional Court's landmark decisions: the Maastricht judgement of 1993.[19]

The Basic Law had meanwhile been changed alongside the developments at the supranational level. Now, there was Article 23 in (mostly) its present shape, explicitly authorising, in the first sentence of its first subsection, that Germany participates

> in the development of the European Union that is committed to democratic, social and federal[20] principles, to the rule of law and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.

It does not take much to recognise the Solange legacy in this wording, except that the framers had chosen to phrase this clause not as a condition, but as a description of the EU. One might take this as a pro-integrationist gesture. The remaining sentences of subsection 1, however, and indeed all the ensuing subsections, do stipulate conditions for the participation of domestic institutions in the activities at the supranational level.

Most of these stipulations are procedural, but there is a strong substantive limitation in the third sentence of the first subsection:

19 BVerfGE 89, 155 – Maastricht.

20 It may be important to note that the original text, when speaking of federal principles, uses 'föderative' instead of 'föderale'. The translation 'federal' is correct, but it applies to both and does not catch the intended nuance. It was the explicit intention to avoid 'föderal', as this might imply a narrow understanding that equated the multilevel structure of the European Union with the specific federal structure of the Federal Republic of Germany. 'Föderativ' in this sense may hence be read as multilevel. For an extensive treatment of this issue cf. Scholz, 2022, Art. 23 Mn. 95-98.

> The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.

Thus, here is the explicit mentioning of the eternity clause which had not found its way into the Solange decisions.

This constitutional affirmation formed the background – and basis – for the German Federal Constitutional Court's continuation of its earlier jurisprudence. However, whilst its approach would remain rather stable, the topics changed. Solange-style cases hardly ever came up anymore, and unsurprisingly so in light of the procedural threshold which the German Federal Constitutional Court had introduced in 'Solange 2' (and which it would later reinforce in a decision of 2000).[21] Instead of fundamental rights, democracy became the central theme for the next two decades, beginning with the Maastricht judgement.

The proceeding was concerned with (the German contributions to concluding) the Treaty of Maastricht. The complaints argued was that this was a violation of the Basic Law which could not even be authorised by the newly-inserted Article 23. Accordingly, the argument had to be grounded on the eternity clause. The main claim was that democracy, as guaranteed by the Basic Law, stood in the way of this most recent step of further European integration. This was consistent in that democracy is indeed one '*of the principles laid down in Articles 1 and 20*', thus the wording of the eternity clause. It is in the first two subsections of Article 20[22] that we find the guarantee of, i. a., a democratic order for Germany.

A procedural problem seemed to be, however, that Article 20 is not understood as conferring in and of itself any subjective rights. To be sure, violations could nonetheless be reviewed by the German Federal Constitutional Court, but not upon a constitutional complaint. However, there were, at the time, only some constitutional complaints in that matter, and no eligible applicants who would bring a challenge along any of the other procedural lines available. The German Federal Constitutional Court would therefore have had to reject the case as inadmissible, unless it found some subjective right that could be vindicated by way of a constitutional complaint. And such a rejection would have meant that the German Federal Constitutional Court could not deal with the merits of these complaints.

Apparently, this was not the outcome that the court sought to achieve. Instead, it came up with a rather creative construction: it based its decision on Article 38[23]

21 BVerfGE 102, 147 – Bananenmarktordnung.

22 The official translation of Art. 20(1-2) of the Basic Law reads as follows: '*(1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.*'

23 The official translation of Art. 38(1-2) of the Basic Law reads as follows: '*(1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives*

of the Basic Law, which deals with the elections of the members of the Bundestag, i.e. the German Parliament. At first sight, this may seem quite self-suggesting, since, indisputably, this provision contains the right to vote, which is a subjective constitutional entitlement that can be enforced through a constitutional complaint. Creativity, however, was needed to explain how this right could potentially be violated by an international treaty that deepened European integration but did not seem to affect German voters in their constitutionally-guaranteed right to participate in national elections.

However, according to the German Federal Constitutional Court's new construction, the right to vote, in order to be meaningful, provides a safeguard against the hollowing-out of national democracy through an excessive conferral of powers to (inter- or in this case:) supranational institutions. Article 38, so the argument runs, entails not only the right on the part of the voters to elect the members of the Bundestag, but also a right – still on the part of the voters – for the Bundestag to retain a sufficiently-strong political position.

Democracy, which used to be (viewed as being) guaranteed in only an objective fashion under the Basic Law, was thus 'subjectivized'. As a consequence, every German voter would henceforth be in a position to initiate a constitutional review of any further steps of European integration. This is a remarkable move, especially for a court that has notoriously been struggling with docket control, and even more so if one recalls that the same court had just a few years earlier erected an almost insurmountable procedural threshold for Solange-style cases.

Moreover, this generosity towards future plaintiffs was not a price that the German Federal Constitutional Court paid for the chance to actually strike down any of the challenged measures, because, of course, it did not stop (Germany from participating in) any of the reforms that the Maastricht Treaty brought. Rather, the German Federal Constitutional Court needed its creative construction of Article 38 just so it could address the merits of a case that it would eventually dismiss – or, if you will: just so its barking would be heard.

What, then, were the signals that the German Federal Constitutional Court had been so eager to send? Its core mission was to attach strings to any future steps of European integration, and the eternity clause now served explicitly as its leverage to accomplish this goal: Germany, so the argument ran, could only be part of an EU that conformed to the Basic Law's unamendable core.

Hence, the court insisted that the newly-created EU, just like its predecessor organisations, continue to be limited by the principle of conferral, i.e. that it had no 'Kompetenz-Kompetenz', to use a prominent Germanicism of the time.[24] Consequently,

of the whole people, not bound by orders or instructions and responsible only to their conscience. (2) Any person who has attained the age of eighteen shall be entitled to vote; any person who has attained the age of majority may be elected.'

24 The term was used 13 times in the Maastricht decision alone, cf. paras. (37), (64), (116), and (122) subseq.

the court asserted the right also to exercise an *ultra vires* control for any legal acts by the EU. Additionally, it made explicit that it understood the Treaty on European Union (TEU) to contain neither an authority of taxation on the part of the Union, nor an authorisation yet for the creation of a currency union.

Perhaps more importantly still, the German Federal Constitutional Court presented an unusually elaborate exposition of its democratic vision as applied to the supranational setting. First, the court coined a new term – 'compound of states' (Staatenverbund) – to describe the EU as an entity sui generis: a close community of states, but short of a federation. The court went on, secondly, to stipulate that, in such a compound of states, national parliaments remained the main source of democratic legitimation, whilst the institutions and procedures of democratic participation at the European level served a supplementary function in this regard, and further European integration had to go hand in hand with an extension of such democratic structures. The court emphasised, thirdly, that there were sociological preconditions to the proper functioning of democracy, and that these were yet to develop at the European level.[25]

Constitutional identity is not a term that the decision used, although it occasionally mentioned that the Treaty of Maastricht made provision for national identity to be preserved. Implicitly, however, the whole decision rested on the eternity clause and the unamendable core it defined.

In this regard, and unlike the Solanges, the Maastricht decision was centred on the principle of democracy. However, like those decisions, the court wanted to keep its foot in the door and retain the ability to monitor the future development of European integration. Thus, whilst it did consider the present state of affairs acceptable, as in 'Solange 2', it did not install any procedural filter for future challenges, but kept the door wide open, as in 'Solange 1'. So, the Maastricht decision featured a watchdog barking at full volume – and the German Federal Constitutional Court at the height of its influence, probably.

25 The pertinent passage (para. (98) subseq.) reads as follows (references omitted, italics added, based on the translation from https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf): 'If democracy is not to remain a formal principle of accountability, it is *dependent upon the existence of specific privileged conditions*, such as ongoing free interaction of social forces, interests, and ideas, in the course of which political objectives are also clarified and modified (…), and as a result of which public opinion moulds political policy. For this to be achieved, it is essential that both the decision-making process amongst those institutions which implement sovereign power and the political objectives in each case should be clear and comprehensible to all, and also that the enfranchised citizen should be able to use its own language in communicating with the sovereign power to which it is subject. *In cases where they do not already exist, actual conditions of this kind may be developed, in the course of time, within the institutional framework of the European Union.* A development of this kind is dependent not least upon the nations concerned being kept informed of the objectives of the Community institutions and of the decisions made by those institutions. Political parties, trade associations, the press, and broadcasting stations are both a medium and a factor in this process of information, in the course of which a European public opinion should develop'.

It took quite a while for the German Federal Constitutional Court to again hand down a major decision on European integration.[26] In part, this is certainly to be ascribed to the delayed revision of the EU's bases in primary law. The Constitutional Treaty had been underway since the early 2000s, and, if it had not failed, the German Federal Constitutional Court would most likely have been called upon earlier to review such further evolution of the Union. However, it had to wait until 2008, when the Treaty of Lisbon was awaiting ratification and a number of challenges against it were brought before the court. In a nutshell, their argument was, again, very similar to the Maastricht proceeding, i.e. that this next step of deepened European integration hollowed out their right to democratic participation at the national level.

The court's judgement,[27] pronounced in mid-2009, was monumental in its length, spanning some 170 pages, and remarkable in its content, building upon the Maastricht decision and developing a differentiated yardstick to be applied in future cases. The court started by confirming its Maastricht approach, classifying the EU as a 'compound of states' whose constituent parts, the Member States, retain their sovereignty and determine the legal foundations of the EU. Their peoples remain the primary source of democratic legitimation.

The court reiterated that the EU could not assume a Kompetenz-Kompetenz, but had to respect the principle of conferral. It did not identify '*a pre-determined number of certain types of sovereign rights*' that had to '*remain in the hands of the state*',[28] but emphasised that European integration had to leave sufficient space to the '*Member States for the political formation of economic, cultural and social living conditions*'.[29] This requirement was remarkable as it went beyond the Maastricht reasoning in that it no longer had any inbuilt provisionality. In Maastricht, the limits against a conferral of excessive competencies had been set only for the time being[30] – the EU was not there yet, but might one day, at least in theory, arrive at a point when these restrictions would no longer apply. In Lisbon, by contrast, the German Federal Constitutional Court drove in some stakes that were meant to last.

The court went on to specify that the protection against excessive integration applied

> in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on

26 Leaving aside the relatively unspectacular decision in Bananamarket briefly mentioned above, and some failed constitutional complaints against the Treaty of Amsterdam with regard to the conditions under which Germany could join the currency union; BVerfGE 97, 350 – Euro.

27 BVerfGE 123, 267 – Lissabon.

28 Ibid. at para. (248). This quote and the following ones are from the official translation offered on the website of the German Federal Constitutional Court, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

29 Headnote 4 of the decision.

30 Maastricht, paras. (98)-(101).

> cultural, historical and linguistic perceptions and which develop within public discourse in the party political and parliamentary sphere of public politics'.[31]

Whilst this definition fails to provide a workable criterion for identifying any potential integrationist excess in the future, the court enumerated such areas that it considered

> (p)articularly sensitive for the ability of a constitutional state to democratically shape itself: decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, inter alia , by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5).[32]

The stunning level of detail in this enumeration is to be explained by the fact that the court had been presented, inter alia, with challenges against provisions of the Lisbon Treaty that supposedly went too far in encroaching upon these areas. Accordingly, the court listed here the ones it considered sensitive, and it took up those challenges later in its judgement when dealing with the respective treaty provisions. Additionally, despite the increased sensitivity of those matters, the court did not find any clause that could not be constructed in a way that it deemed compatible with the Basic Law's requirements. Thus, again, no biting, just barking.

The determination, however, with which the German Federal Constitutional Court stipulated unconditional limits on future integration, was astonishing, because the restriction still seemed to rest upon the court's 'thick concept' of democracy, implying sociological preconditions for true and meaningful participation to be possible:

> Democracy not only means respecting formal principles of organisation (…) and not just a cooperative involvement of interest groups. Democracy first and foremost lives on, and in, a viable public opinion that concentrates on central acts of determination of political direction and the periodic allocation of highest-ranking political offices in the competition of government and opposition. Only this public opinion shows the alternatives for elections and other votes and continually calls them to mind also in decisions relating to individual issues in order that they may remain continuously present and effective in the political opinion-formation of the people via the parties, which are open to participation for all citizens, and in the public information area.[33]

31 Lissabon, headnote 4.
32 Ibid. in para. (252). All enumerated areas are then dealt with in more detail in the subsequent passages.
33 Ibid. in para. (250) (internal reference omitted).

There is no indication as to why the optimism, which seemed to prevail in this regard in the court's Maastricht reasoning, had meanwhile faded. This is all the more enigmatic as, in its Lisbon decision, the court conceded explicitly that '*due to the great successes of European integration, a common European polity that engages in issue-related cooperation in the relevant areas of their respective states is visibly growing*'.[34] Had the court still been animated by its spirit of Maastricht, this observation would certainly have led it to adopt a more welcoming stance on future integration.

One can only speculate why it did not: it is, possibly, a reflection of the growth of the EU. Membership had, meanwhile, more than doubled. It could be the case that integrationist visions had become more remote in 2009 than they had been in the early 90s. In any event, the watchdog proved to be more territorial in Lisbon than on any of the other occasions reviewed here, although its bite inhibition was still operating at that time.

As mentioned above, the court also used the Lisbon decision to explicate its yardstick for future cases. For one, it announced that it was going to perform an *ultra vires* control, i.e. examine '*whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (…), whilst adhering to the principle of subsidiarity under Community and Union law*'.[35]

In addition, the court coined the term 'identity review' for safeguarding against potential infringements of the '*inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law*'.[36] In elaborating on this latter type of review, the court established an explicit link between its own jurisprudence rooted in the eternity clause and the respect due under EU law towards the national constitutional identities of the Member States.[37] Thus, different from the Maastricht decision, identity is the key term in Lisbon when referring to the Basic Law's inviolable core.

After the Lisbon decision, one might have thought that it was just a matter of – presumably rather little – time until the German Federal Constitutional Court would be called upon to apply the pronounced standards of review and that it would indeed find some violation sooner rather than later. However, the parameters changed when, just slightly more than a year after the Lisbon decision, the court took the opportunity to mitigate its threat significantly.

In Honeywell,[38] a relatively brief decision dismissing a constitutional complaint, the court raised the threshold for its *ultra vires* review considerably, stating that it would only be applied

34 Ibid. in para. (251).
35 Ibid., headnote 5.
36 Ibid.
37 Ibid.: '… *the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area*'.
38 BVerfGE 126, 286 – Ultra-vires-Kontrolle / Honeywell (in English texts, the case is often referred to as 'Mangold').

> if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences.[39]

In addition, the court also declared that, before it would engage in such a review,

> the Court of Justice of the European Union is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU, insofar as it has not yet clarified the questions which have arisen.[40]

The German Federal Constitutional Court had thus created a procedural loop that would allow for an exchange between itself and the European Court of Justice before any further escalation would take place. Combined with the watering down of the substantive standard, this did seem like an effective safeguard against the kind of 'judicial clashes' that many had anticipated after the Lisbon judgement. It was difficult to foresee, at the time, that the relaxation of the standard would actually backfire in the future.

4.3. Losing balance: PSPP & Co.

The tension between the national and the supranational legal order has persisted also in the post-Lisbon era. This decision did not succeed, despite its monumentality, in pacifying the aforementioned inherent conflict. Quite to the contrary, this period brought about a considerable escalation – more cases, an increasingly open conflict between the courts in Karlsruhe and Luxembourg, and even some outright conflict: eventually, the German Federal Constitutional Court would indeed go 'nuclear', as two commentators put it quite drastically.[41] But let us trace the development step by step.

The substantive focus of the proceedings before the court shifted once again in this third period. Had the Solanges been, on their face, about fundamental rights, and had the big treaty reviews focused on democracy, there would be a new theme now that was to move centre stage: budgetary sovereignty. All but one of the decisions to be covered in this section were in this field.

The one 'outlier' was a proceeding against the execution of a European arrest warrant, decided in 2015.[42] A US citizen had been sentenced in absentia by an Italian

39 Ibid., headnote 1a. this quote and the following one are from the official translation offered on the website of the German Federal Constitutional Court, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html.

40 Ibid., headnote 1b.

41 Cf. the commentary of 22 May, 2020, by Sarmiento and Utrilla, on Euronews.

42 BVerfGE 140, 317. The decision goes by different names. Most call it Europäischer Haftbefehl II, but some also refer to it as Identitätskontrolle or even Solange III.

court to 30 years of imprisonment. When arrested in Germany, he objected to his extradition and, after having exhausted all regular remedies, filed a constitutional complaint. The main argument was that the dignity clause of the Basic Law[43] entailed a prohibition against criminal convictions without having properly established the individual responsibility of the accused ('Schuldgrundsatz' – principle of guilt). A sentence in absentia would generally not meet this requirement, and the extradition by German authorities would thus violate their obligation under Article 1(1) of the Basic Law.

German law was fairly clear on that matter. The problem was that the provisions of EU law pertaining to the arrest warrant did not allow for any substantive check to be performed on the part of the extraditing Member State. Thus, there was a potential conflict between these rules and German fundamental rights guarantees. Moreover, the court had explicitly stated, in its Lisbon decision, that the principle of guilt was an element of constitutional identity as protected by the Basic Law.[44]

So, would this case trigger the identity review as framed in Lisbon? And would it lead to the eventual collision between the two judicial heavyweights that had so long been anticipated? Certainly, this was no easy call for the observers at the time, and the German Federal Constitutional Court indeed managed to surprise everyone.

A potential way out for the court might have been to resort to the procedural filter it had installed in 'Solange 2'. If it could have viewed the problem at hand as an individual rather than a general one, then the complaint might have passed as inadmissible. But would this make sense – explicitly stating that a violation touches upon the immutable core of the Basic Law and at the same time considering the problem 'not general enough' for review? The paradox of the 'Solange 2' filter had to become obvious now that Lisbon had brought conceptual clarity to the identity jurisprudence. The court did not really resolve the issue; it emphasised, rather cryptically,[45] that there were some heightened admissibility standards for constitutional complaints seeking an identity review, but decided that the complaint before it was admissible.

Next, one could have expected the court to follow its Honeywell ruling and, before deciding itself, refer the case to the European Court of Justice for a preliminary ruling on the exact meaning of the relevant provisions of EU law. There had been doubts whether this Honeywell loop was to be applied not just in *ultra vires* cases, or also before an identity review could take place.[46] However, although the German Federal Constitutional Court confirmed that the Honeywell principles applied equally to both situations,[47] it did not choose this avenue. To understand this contortion, one needs to know that the earlier case law of the European Court of Justice[48] in that matter made

43 Art. 1 of the Basic Law.
44 BVerfGE 123, 267 – Lissabon, at para. (346).
45 For a detailed analysis of this aspect, see Burchardt, 2016, pp. 533-535.
46 Ibid., on p. 535.
47 BVerfGE 126, 286 – Ultra-vires-Kontrolle / Honeywell, at para. (46).
48 Cf. C-399/11 – *Melloni*.

it unlikely that this court would be able to solve the conflict by softening the rigidity of the rules on the European arrest warrant.

Thus, the German Federal Constitutional Court added a qualification to its decision in Honeywell, stating that a referral was only to be made 'if necessary',[49] and it then came to the conclusion that it was not necessary here because EU law was clear on the matter. Interestingly, however, this 'clarity' was not derived from the jurisprudence of the European Court of Justice, but, quite to the contrary, based on the German Federal Constitutional Court's own – and diverging – view of how EU law should be understood: pointing to the dignity clause in the Charter of Fundamental Rights, the German court stated that European law had to be interpreted in a manner so that it did not prescribe obedience to an arrest warrant in such a case.

So, as a result, the German Federal Constitutional Court had, for the first time, pinpointed a norm of EU law that failed the German identity review, but it steered clear of an outright collision with the European Court of Justice by taking the liberty to align European law with German law in that matter – quite a bold move, and possibly not to the amusement of the court in Luxembourg. This could hardly be called barking anymore, but rather amounted to a mock bite.

Thus far, the thematic outlier has been examined, and focus can now switch to the line of decisions on budgetary sovereignty.[50] The starting point is the respective passage from the Lisbon decision where the German Federal Constitutional Court began to stipulate the conditions under which budgetary restrictions could amount to a violation of the principle of democracy and – as a reflex – of the corresponding individual right as framed in Maastricht. This would, in the court's own words, be the case '*if the determination of the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent*', and the same applied '*correspondingly to essential state expenditure*'. The court went on to concede that '*(n)ot every European or international obligation that has an effect on the budget endangers the viability of the Bundestag as the legislature responsible for approving the budget*'. However, it insisted that it was '*decisive (…) that the overall responsibility, with sufficient political discretion regarding revenue and expenditure, can still rest with the German Bundestag*'.[51]

These criteria are not particularly specific. However, quite in line with the overall spirit of the Lisbon decision, they sound rather assertive of national sovereignty, in this case with regard to fiscal autonomy. It should be noted, though, that the court

49 BVerfGE 126, 286 – Ultra-vires-Kontrolle / Honeywell, at para. (46).

50 BVerfGE 129,124 – EFS; BVerfGE 132,195 – Europäischer Stabilitätsmechanismus; BVerfGE 134, 366 – OMT-Beschluss; BVerfGE 135, 137- ESM-Vertrag; BVerfGE 142,123 – OMT-Programm; BVerfGE 146, 216 – PSPP-Vorlagebeschluss; BVerfGE 151, 202 – Europäische Bankenunion; BVerfGE 154,17 – PSPP-Programm; the most recent decision of 6 December, 2022 – 2 BvR 547/21, has not yet been published in the official collection. It is referred to as 'Eigenmittelbeschluss' or 'Next Generation Europe', and can be retrieved from http://www.bverfg.de/e/rs20221206_2bvr054721.html.

51 BVerfGE 123, 267 – Lissabon, at para. (256).

wrote this on the eve of the Greek debt crisis. With hindsight, it would perhaps have framed these lines somewhat more cautiously.

In any event, with the lively times that were to come in European fiscal policy, the court would be faced with an unexpectedly high number of such cases in the post-Lisbon era. Germany was involved, obviously, in a number of stability mechanisms at the EU level, and this involvement was regularly challenged and labelled as too far-reaching a compromise on budgetary sovereignty. Without going into detail on each of these decisions, it can be stated that the court's responses initially exhibited a familiar pattern: it would reaffirm its jurisdiction and the applicable doctrines, send out signals as to where the limits of its tolerance might be, and at times require some qualifications of the measures under review, but essentially let them pass.

Moreover, the court would elaborate further in this jurisprudence on the core doctrines of the *ultra vires* and the identity review as well as on how they relate to each other. In particular, its 2016 decision on the Outright Monetary Transactions (OMT) Program offers an extensive treatment of these matters. As for the identity review, the court specified that this was about examining "whether the principles declared by Article 79 sec. 3 (of the Basic Law) to be inviolable are affected by transfers by the German legislature of sovereign powers or by acts of institutions, bodies, offices, and agencies of the European Union', and that it concerned 'the safeguarding of the core of human dignity in fundamental rights (…) as well as the fundamental principles upon which the principles of democracy, the rule of law, of the social state, and of the federal state of Article 20 (of the Basic Law) are based'.[52] Under the ultra vires review, by contrast, the court 'examines whether acts of institutions, bodies, offices, and agencies of the European Union exceed the European integration agenda in a sufficiently qualified way and therefore lack democratic legitimation in Germany'."[53]

Regarding the relationship between the two, the court explained that both types of review were independent of one another. However, '(s)ince the exceeding of competences in a sufficiently qualified manner also affects the constitutional identity (…), the *ultra vires* review constitutes a particular case (…) of the application of the general protection of the constitutional identity by the Federal Constitutional Court.[54]

Further, as such cases would, in part, typically turn on the interpretation of supranational norms, the German Federal Constitutional Court emphasised that it was primarily for the European Court of Justice to determine the meaning of EU law.

52 BVerfGE 126, 286 – Ultra-vires-Kontrolle / Honeywell, at para. (138). The decision on the OMT Program may, in the present context, be remarkable also for its comparative compilation of similar case law across the EU (in para. (142)). Here, and in the rest of the present para, the verbatim quotes are again taken from the official translation on the court's official website, retrievable from https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html.

53 In para. (143).

54 In para. (153).

Even if the Court of Justice were to adopt '*a view against which weighty arguments could be made*', the German Federal Constitutional Court would go along with this. However, the court added that this was to be the case only '*as long as the Court of Justice applies recognised methodological principles (… and did not …) act in a way that is objectively arbitrary*'.[55]

This last part of the German court's exposition of its review standards could, on its face, be read as a delineation of the spheres of competence of the two courts – perhaps even as an affirmation of respect for the European Court of Justice. But was it? Why did the German Federal Constitutional Court even deem it necessary to be explicit about this minimum threshold? Was it warranted to tell its colleagues not to decide arbitrarily? Again, there is some likelihood that this message was received in Luxembourg with mixed feelings, to say the least, especially as this was just one year after the 'mock bite' in the arrest warrant case.

Admittedly, this is pure speculation, and, worse even, relates to a matter that might be flatly irrelevant, for what is the point in trying to sense the emotional vibes in judicial prose? This is rather uncommon, for sure. On the other hand, however, the ensuing course of events after the OMT decision may otherwise be difficult to explain, and quite a few commentators have eventually resorted to subtextual explanations.

The next proceeding to arise was the notorious PSPP case, with the abbreviation referring to the European Central Bank's Public Sector (Asset) Purchase Program. The challenges against (German participation in) this programme (and related measures) were brought before the German Federal Constitutional Court by way of multiple constitutional complaints. The key contention was that the underlying decisions of the European Central Bank were *ultra vires*, as they were in breach of the prohibition of monetary financing and the principle of conferral in EU law. Additionally, the claim was that the resulting limitations on the budgetary autonomy of the German Bundestag amounted to a violation of the constitutional identity as protected in the Basic Law. In a thoroughly reasoned decision, the German Federal Constitutional asked the European Court of Justice for a preliminary ruling on how the pertinent provisions of EU law were to be understood, especially with regard to the relevant decisions of the European Central Bank. This was in 2017.[56]

The European Court of Justice responded to these questions a year later in a decision referred to as "Weiss".[57] It found no violation of EU law by the European

55 In para. (161).

56 Cf. BVerfGE 146, 216 – PSPP-Vorlagebeschluss. An English translation is available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/07/rs20170718_2bvr085915en.html.

57 C-493/17. At times the non-German literature uses the same shorthand also for the related decisions of the German Federal Constitutional Court. An extensive excerpt of the decision in Weiss has been incorporated into the reasons of the subsequent decision by the German Federal Constitutional Court on the PSPP Program.

Central Bank. Thus, the case arrived back in Karlsruhe and was decided in May 2020, that is, another one and a half years later.[58]

Based on the interpretation by its colleagues from Luxembourg, the German Federal Constitutional Court was satisfied that the challenged programmes posed no threat to German budgetary autonomy which was large enough so as to fail the identity review.[59] The result of the *ultra vires* review, however, was different. The court found, indeed, that the European Central Bank had exceeded its competence in taking the challenged decisions, as had the European Court of Justice in not reviewing them adequately.[60]

The underlying legal issue was whether these decisions would come under the EU's – and, more specifically, the European Central Bank's – exclusive competence for monetary policy. Alternatively, they would have to be classified as measures of economic policy for which there is only a supporting competence, meaning that they would probably not be covered. This question, in turn, depended on whether, and to what extent, the economic effects, which these measures could undisputedly have, were to be taken into account. Leaving them aside and focusing exclusively on the monetary purposes of those decisions would lead to a result whereby they were within the mandate of the bank.

The view of the German Federal Constitutional Court was that, first, these economic effects were relevant – and indeed weighty –, that, second, a justification would have been required as to why taking measures at the European level constituted no undue encroachment upon the realm of Member State competence, and that, third, any grounds for such a justification would have had to pass a proportionality test. The court found, however, that the European Central Bank had '*neither assessed nor substantiated that the measures provided for in (its) decisions satisfy the principle of proportionality*'.[61]

However, the German Federal Constitutional Court was dissatisfied not only with the decisions of the bank – to this it dedicated but a few lines – but also – and mainly – with their review by the European Court of Justice. It thus went on to explain, meticulously,[62] why it thought that the European court had failed to scrutinise the proportionality of those measures of the bank with the required degree of precision. More specifically, the German Federal Constitutional Court stated that this review of proportionality was rendered 'meaningless' because, in the assessment by the European Court of Justice, the economic policy effects of the PSPP were 'disregarded

58 Cf. BVerfGE 154,17 – PSPP-Programm. In the following, the verbatim quotes are again taken from the official translation on the court's official website, retrievable from https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html.

59 Ibid. in para. (116).

60 Ibid.

61 Ibid.

62 Ibid. in paras. (116)-(153).

completely', so that 'no balancing of conflicting interests' could take place – which, however, was supposed to be the 'key element' of such a review.[63]

The European Court of Justice had thus, in the eyes of its German counterpart, '*manifestly exceeded (its) judicial mandate*', which, in turn, resulted '*in a structurally significant shift in the order of competences to the detriment of the Member States*'.[64] Therefore, the judgement of the European Court of Justice was labelled, in this regard, as '*simply not comprehensible so that, to this extent, (it) was rendered ultra vires*'.[65]

So, there it was, eventually – the bite: announced with long notice, applied with professional skill, dosed with thorough deliberation – and yet, unanticipated by most. The reactions showed widespread irritation. The repercussions in academia were enormous[66] and mostly negative, ranging from flat rejection[67] to apologetic reconstructions of how the escalation had evolved.[68] There were quite a few, to be sure, who did not deem such biting illegitimate per se, but even amongst them the view prevailed that the specific occasion had not warranted this reaction.[69] Additionally, the harshness of the language was picked up in many comments.[70] 'Simply not comprehensible' is a tough verdict. However, given the lenience of the standard as it had been framed before, the court could not have chosen any relevantly milder tone to justify this result. If the court had anticipated that it was ever going to bite, it probably would have been more cautious about the formulation of the threshold.

Politics had to respond, too, of course, and there were at least two distinct epilogues that deserve mentioning. First, the German Federal Constitutional Court had required the Central Bank of the Federal Republic of Germany (aka German Bundesbank) to stop participating in the PSPP after a transitional period of three months, unless the criteria of its PSPP judgment be met by that time.[71] So, this required immediate action, but it also proved manageable without major perturbation.

63 All quotes ibid. in para. (138).
64 Both quotes ibid. in para. (154).
65 Ibid. in para. (116).
66 By way of illustration, different pertinent fora hosted extensive discussion of that decision: for the German Law Journal's 'Special Collection on European Constitutional Pluralism and the PSPP Judgment' of August 31, 2020, cf. https://germanlawjournal.com/german-law-journal-special-collection-on-european-constitutional-pluralism-and-the-pspp-judgment/; for the special issue of the International Journal of Constitutional Law, published on 12 May, 2021, documenting the Symposium: The PSPP Judgment of the Bundesverfassungsgericht, cf. https://academic.oup.com/icon/search-results?f_TocHeadingTitle=Symposium%3a+The+PSPP+Judgment+of+the+Bundesverfassungsgericht; for the debate on Verfassungsblog (in the week of the decision) cf. the editorial overview 'Wir Super-Europäer', of 8 May, 2020, by Maximilian Steinbeis, at https://verfassungsblog.de/wir-super-europaeer/.
67 An illustrative example is the commentary co-authored or endorsed by 25 scholars, cf. Basedow et al., 2021, pp. 188-207.
68 Cf. for a prominent example Grimm, 2020, pp. 944-949.
69 Cf. for a particularly pointed example see Weiler, 2021, p. 182
70 Cf. for example Marzal, 2020.
71 Cf. BVerfGE 154,17 – PSPP-Programm, in para (235).

After all, the court had only objected to the absence of sufficient considerations pertaining to the proportionality of the decisions of the European Central Bank. The bank was free, thus, to just provide additional reasons, and it did. Within less than two months, the Bundesbank had requested, and the European Central Bank had delivered, both new considerations on that matter and documentation of earlier ones which had not been disclosed before. This material was then shared with the German Ministry of Finance, which in turn disclosed it to the Bundestag, and it was concluded that the requirements that the German Federal Constitutional Court had framed in PSPP were now met.[72]

So far, so easy. All institutional actors involved were determined, as it seems, to dispose of the matter as smoothly as possible. This was not true, to be sure, for the complainants of the initial PSPP proceeding. Since not all of the relevant documents had been made public, they requested such disclosure in the German Federal Constitutional Court. This was framed as an application for an order of execution of the PSPP decision. However, the court dismissed the application approximately a year after its PSPP judgement, on formal grounds, holding that it went beyond what can be pursued in this procedure in that it related to measures taken after that judgement.[73]

The second epilogue unfolded, soon after the first had ended, between the European Commission and the German Government. Slightly more than a year after the PSPP judgement, the Commission initiated infringement proceedings against Germany. As the first steps of such proceedings are not public, there is only summary information available regarding the content of the respective communications. Apparently, the Commission's argument was that the decision of the German Federal Constitutional Court had denied legal effect to the preliminary ruling of the European Court of Justice in Weiss, and that it had thus violated the principle of supremacy.[74] The German Government is reported to have responded[75] that it acknowledged, i. a., the supremacy of EU law, that it in its view, the legality of acts of institutions of the EU did not depend on their assessment by the German judiciary within proceedings of constitutional complaints, and that it was committed to using all means at its disposal in order to avoid any *ultra vires* decisions in the future. Upon this declaration, the Commission decided not to pursue the infringement proceeding

72 A thorough exposition of this course of events can be found in the subsequent decision of the German Federal Constitutional Court.

73 Cf. BVerfG, Order of the Second Senate of 29 April 2021 – 2 BvR 1651/15 -, paras. (1)-(111). The decision has not been published in the official collection. The English translation (and a link to the German original) can be found at http://www.bverfg.de/e/rs20210429_2bvr165115en.html.

74 Cf. the brief report which at the time was published on the webpages of Christian Calliess, Europarecht Aktuell: EU Kommission leitet Vertragsverletzungsverfahren gegen Deutschland ein; News of 10 June, 2021, https://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/calliessc/Aktuelles/20210610_Vertragsverletzung.html.

75 Cf. Ruffert, 2021 on Verfassungsblog, which, i. a., contains a summary of the statement by the German Government.

any further.[76] This was in late 2021. It was the last of the formal repercussions of the PSPP decision, and perhaps also the end of what might eventually emerge as an era characterised by that decision and its run-up. In any event, there has been yet another decision since.

4.4. Beginning of a new era: The judgement on the 'Own Resources Decision'

In December 2022, the German Federal Constitutional Court pronounced its judgement[77] regarding (the German ratification of) the 'Own Resources Decision' taken by the Council of the European Union in December 2020. This decision was based on a programme of the EU entitled 'Next Generation EU', which, in turn, is intended to mitigate the economic and social consequences of the pandemic. The 'Own Resources Decision' authorised the European Commission to borrow up to 750 billion euro until the year 2026.

This sum is outside the regular budget, but almost of the same size.[78] There had long been debates related to increasing the EU budget by way of borrowing, but the predominant view has been that this would require a new mandate in the primary law of the EU. The challenges were, first, that the 'Own Resources Decision' went beyond the competencies of the EU and, second, that (taken together with the previous occasions) the (aggregated) potential liabilities that Germany had incurred amounted to an undue limitation of the budgetary autonomy of the German Bundestag. Whilst the latter argument had to be tested under the identity review, the former would primarily come under the *ultra vires* test, but a violation could, according to the logic set out in the decision, also affect the constitutional identity.

The German Federal Constitutional Court found no violation on either count. From a political perspective, this result was, perhaps, expectable. After all, the proceeding was about the COVID-19 crisis and its economic repercussions – difficult to imagine, hence, that the German Federal Constitutional Court would put the brakes on the European recovery measures. This was all the more true as the court had already denied injunctive relief in that matter approximately one and a half years earlier.[79]

From a legal perspective, however, the decision was quite remarkable. Doctrinally, the court would reaffirm its approach in yet another thorough exposition of

76 Cf. the respective news release on the website of the European Commission on 2 December, 2021. https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201.

77 Cf. BVerfG, Judgment of the Second Senate of 6 December 2022 – 2 BvR 547/21 ('Eigenmittelbeschluss'). The decision has not been published in the official collection yet. The English translation, which does not cover the entire judgement, though, and a link to the German original can be found at http://www.bverfg.de/e/rs20221206_2bvr054721en.html.

78 For an overview of the long-term EU budget see https://www.consilium.europa.eu/en/policies/the-eu-budget/long-term-eu-budget-2021-2027/.

79 BVerfG, Order of the Second Senate of 15 April 2021 – 2 BvR 547/21; the decision has not been published in the official collection. The English translation (and a link to the German original) can be found at http://www.bverfg.de/e/rs20210415_2bvr054721en.html.

the standard of review as it had evolved since its Lisbon decision. So, no surprises here. But wasn't the case at hand much more sensitive with regard to a potential erosion of Member State competencies than the one in PSPP?

It is not so much the budgetary autonomy issue. The court had been wise enough in its earlier decisions not to quantify a red line in this regard.[80] Thus, it has retained the flexibility to extend the limits of its tolerance as the situation requires (albeit maybe not to reduce them again). And certainly, this pandemic-driven 'Own Resources Decision' was not an ideal moment to invoke these limits.

What was more remarkable, however, was the German Federal Constitutional Court's self-restraint with regard to the competence matter, as the case bore the potential to push open the gate for a permanent expansion of the EU's budget, and the issue was squarely on the table. Indeed, the reasons even include a verbatim quote by Olaf Scholz, German Minister of Finance at the time, stating, in the German Bundestag, that this was '*the path toward the fiscal union*', and that this was '*a good path for the future of Europe*'.[81] The court's ruling did address this matter, to be sure, seeking to contain this inherent tendency by underscoring the exceptional nature of the case at hand. More specifically, it emphasised that the

> 2020 EU Own Resources Decision only authorises borrowing on the part of the European Union itself; ensures that the borrowed funds be used exclusively for tasks for which the European Union has competence in accordance with the principle of conferral; subjects the borrowing to limits as to both the duration and the amount of the commitments assumed; and requires that the amount of 'other revenue' not exceed the total amount of own resources.[82]

However, all these conditions notwithstanding, it was clear that, still, a rather generous construction of the relevant provisions of primary law had to be adopted for that 'Own Resources Decision' to pass. Again, the German Federal Constitutional Court was frank about this. Indeed, it would discuss all objections at length, but only to conclude for each relevant provision that it was not entirely impossible to interpret them broadly enough to cover that decision. It is this very move, and the language used to perform it,[83] that are the most remarkable features of the decision. Whilst the criteria remained ostensibly unchanged, their application has been loosened

80 In the present decision, it went even further in explicitly leaving open '*whether such a justiciable strict outer limit exists*'; cf. BVerfG 'Eigenmittelbeschluss', in para. (219).

81 Cf. BVerfG 'Eigenmittelbeschluss', in para. (14), (117) (neither passage is available in the English translation).

82 Ibid. headnote 2.

83 Ibid. in para. (162) (interpretation 'not manifestly untenable' for Art. 122 of the TFEU, and 'not clearly ruled out' for Art. 311 of the TFEU); para. (171) (cannot be said to 'manifestly exceed the competence' for Art. 122 of the TFEU, and not a 'manifest violation' of Art. 311 of the TFEU); para. (186) (again does not 'manifestly exceed the competence' for Art. 122 of the TFEU); para. (193) ('possible exceeding of competences is not manifestly apparent' for Art. 311 of the TFEU); para. (203) ('circumvention (… is not …) manifestly evident' for Art. 125 of the TFEU).

considerably[84] – to an extent, arguably, that amounts almost to a complete abdication on the part of the court.[85]

Moreover, the German Federal Constitutional Court would not even request a preliminary ruling from the European Court of Justice, because it deemed this unnecessary. This was plausible in so far as the German court reached an affirmative ruling anyway. However, it is noteworthy nonetheless, because there had been a relevant ruling by the European Court of Justice only on one of the relevant provisions.[86] For the other two, there were many open questions, which the court had itself laid open and discussed at length. But still, the German Federal Constitutional Court saw '*no reason to assume that the Court of Justice of the European Union would interpret the competences (…) more narrowly than*' it had done itself.[87]

Mind, though, that the German court had voiced multiple objections to that broad interpretation, and that it had concluded just that this broad interpretation was not 'manifestly untenable'. Was the German Federal Constitutional Court thus insinuating that the European Court of Justice would in any case have gone to the outer limits of interpretation so as to support the legality of the Council's 'Own Resources Decision'? And if so, would this be a statement about an inevasive practical necessity in the case at hand, or about an alleged tendency of the European Court of Justice in general?

Once again, it is not easy to decipher the subtextual messaging that may be going on here between Karlsruhe and Luxembourg. Such speculation appears to be of declining importance, though, as there is ample reason to assume that this most recent decision of the German Federal Constitutional Court marks the beginning of a new era in which it will follow a much more restrained approach and perhaps also play a less pronounced role. The watchdog may not have fully resigned, but it has certainly retracted.

5. Reading the law from the court's lips

There has been a strong focus, in most of this contribution, on the jurisprudence of the German Federal Constitutional Court. But does this make sense? Is there anything in this which helps us understand the past and maybe even predict the future?

84 For a similar diagnosis ('a downright tangible relaxation of the standard of review'), see, for example, Ruffert, *2022*.

85 On this issue, see, for example, the very outspoken assessment by the dissenting Judge Müller, for whom the court's decision 'signals a retreat from the substance of *ultra vires* review'; cf. the Dissenting Opinion published at the end of the decision, cf. BVerfG, Eigenmittelbeschluss, para. (1).

86 I. e. Art. 125 of the TFEU, for the interpretation of which the German Federal Constitutional Court had relied upon the European Court of Justice's decision in C-370/12 – *Pringle*.

87 Ibid. in para. (236).

Adopting this perspective seemed plausible at least insofar as it is certainly this jurisprudence, rather than the sheer text of the Basic Law, that displays what the law is in the matter at hand. This statement is more, in this context, than just a confession to the Holmesian creed.[88] As we have seen, the Basic Law used to be almost entirely silent on the relevant questions for decades – that is: the formative years for the interaction of national and supranational law. And even when the Basic Law was given an extensive clause on this issue later, this was largely to confirm the path that the German Federal Constitutional Court had already defined at that point, and which the court then pursued further thereafter.

Today, we have a long and nuanced line of decisions. We have doctrines telling us both how to understand the substantive provisions of the Basic Law in this matter and what kinds of challenges the German Federal Constitutional Court is likely to face when reviewing a case. Additionally, we have criteria that the court will apply to these cases. So, the court has set the scene for the resolution of pertinent conflicts in the future, and it has done so quite thoroughly.

This does not mean, however, that the law as it has emerged from this jurisprudence allowed us, neither now nor in the past, to predict the outcome of future cases with any relevant degree of certainty. And indeed, it would not seem particularly functional if it did. European integration has always been a dynamic process. It might not be moving all that fast, and it has halted more than once, but in contrast with other polities, nation states in particular, the potential for dynamism has been inscribed in the institutional set-up of the EU and its predecessor organisations from the outset. Stand-still has always equalled crisis in European integration. It would seem most appropriate, hence, for its Member States not to overemphasise stability in the legal regimes governing the interface with their supranational interlocutor.

6. Understanding the watchdog and its predicament

But if it is not primarily the law that helps us understand what has been going on, what else can we draw from the above exposition of the German Federal Constitutional Court's jurisprudence? At this point, we may shift our focus again to where the present contribution started, that is, to the role of the German Federal Constitutional Court. Perhaps it is by looking at the court as an institutional actor that we can best make sense of this.

88 Cf. the famous quote by Oliver Wendell Holmes, Jr.: '*The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law*'; Holmes, 1897, pp. 460–461.

6.1. Starting point: Self-interested integrationism?

In order to do this, we may need first to have a look at the general set-up within which the German Federal Constitutional Court has operated. Taking part in European integration can be assumed to pay off, on balance, for all current Member States. At least, the fact that they have joined and remained on board may be taken as a strong indication of this. However, Member States are not monolithic, and EU membership has been faced with opposition in all of them, albeit to varying degrees across time. Additionally, the balance sheet is different for each individual Member State.

As for Germany, pro-integrationist positions have always been predominant by far. Germany's peculiar history has most likely played a decisive role in this, especially in the post-war era, but similarly around 1990 when German unification became possible. Moreover, the fact that Germany is the largest economy and amongst the most influential Member States may explain its consistently pro-European stance. And obviously, there is no need here to further ponder upon whether it is geopolitics, or the economy, that has determined the course of history.

In any event, it is not all that surprising, against this backdrop, that the German Federal Constitutional Court has not so much been concerned with protecting any features of German national identity against potential encroachments of the central power. This, one may assume, could be achieved by political actors representing national interests in Brussels or Strasbourg. Moreover, it is quite intuitive that the largest Member State's constitutional court would then use its leverage instead so as to impact on the trajectory of European integration and its institutional development.

6.2. Presumptuousness I: Benevolent hegemonialism?

To be sure, one may view this attitude as hegemonial – the illegitimate presumption of a role that a single national court cannot have any mandate to play in the development of a supranational polity. There would be much to be said about this claim, for and against it. Indeed, a sizeable part of the echo that the German Federal Constitutional Court's jurisprudence has received, both nationally and internationally, speaks to this question.[89] But even if one found the court guilty of the charge of presumptuousness in this regard, one should maybe not judge it on this sole ground, since, at least, it does not seem to have been particularistic interests that the German Federal Constitutional Court has pursued. Rather, as we have seen, the concerns it has voiced pertain to democracy and the rule of law, commonly shared values, that is, and to specific aspects of these principles, moreover, which seemed so basic that such insistence would hardly be considered divisive amongst the Member States.

89 For a widely cited review cf. Weiler, 1995.

The assessment would hence turn on whether the substantive desirability of the pursued goals could offset the formal objections against the actor's competence in pursuing them. It is difficult to pass judgement on this matter, but it may be recalled that this question has come up more than once in the history of European integration. The European Court of Justice's decision in Van Gend[90] may feature as the original sin in this regard. It was an incidence of institutional overstretch, for sure. But would there have been, without it, any plausible trajectory for a supranational community to emerge, starting from a Westphalian order governed by the principle of sovereign equality?

This is neither to express any firm position on the legitimacy of the role that the German Federal Constitutional Court assumed, nor to suggest that this assessment had necessarily to be parallel to that of the European Court of Justice. But it may, at least, illustrate that forging a viable supranational polity might be attainable realistically only at the expense of sacrifices in terms of procedural legitimacy. So, it may all depend – and, more specifically, the assessments of the German Federal Constitutional Court's presumptuousness may depend – on whether one considers the output to be legitimate, and the output legitimacy to be weighty enough to justify those sacrifices.

6.3. Presumptuousness II: Escalating overstatement?

The German Federal Constitutional Court may, however, have been presumptuous in yet another sense – not only in that it might have exceeded its proper mandate, but in that it may have overestimated its own force.

There is some indication, to be sure, that the German Federal Constitutional Court was indeed an influential player, especially in the earlier stages of European integration. The echo of its pertinent decisions reached far beyond the confines of its home country and German(-speaking) scholarship, and it still does.[91] There seemed to be a widespread perception that the German Federal Constitutional Court's rulings had to be taken seriously, and determinative of some outer limits that had to be observed when moving further on the integration path.

But how much does that tell us about the court's actual force at the time? Assessing this force is particularly difficult as the court has rarely applied it, but mostly just threatened to do so. What would have happened if the watchdog had remained silent? As with all preventive measures, their effectiveness is difficult to gauge, and we have no counter-factuals here to refer to. Thus, there is no hard proof. We can only speculate.

90 C-26/62 – *Van Gend en Loos v. Administratie der Belastingen*.

91 Especially the PSPP decision triggered many – and predominantly critical – reactions. The International Journal of Constitutional Law dedicated an entire symposium to this judgement, published in Volume 19, Issue 1, 2021, p. 179 subseq. Of the many other reactions to PSPP, see, for a particularly outspoken critique, Cassese, 2020; for a somewhat more moderately framed, but equally critical account see Eleftheriadis, *2020*; for a mixed assessment see Bobic and Dawson, 2020, pp. 1953-1998.

This applies, all the more, to the other alternative: we cannot know what the course of events would have been had the court bitten earlier[92] and maybe also more often then. Nor could the court itself predict this, of course, in any instance when it decided just to bark rather than to bite. This approach, however, may still have been a wise strategy. Uncertainty can increase the threat. As long as one only barks, weakness does not show, but it might once one bites.

This may indeed be what happened in the court's decision in PSPP and its aftermath. It did cause a scandal, for sure. But when the turmoil settled, it seemed as if the court and its position had not gained any significant force. And indeed, the next decision showed a very cautious, perhaps even resignant, court. We shall see what the future brings, but at this point, it seems unlikely that the German Federal Constitutional Court will ever return to its old level of assertiveness again.[93]

This is not to say that it was unwise for it to bite. Threats may wear down over time. At some point, one may have to act upon them, if one wants to retain credibility. When the German Federal Constitutional Court had to decide in PSPP, it seemed indeed to have reached a point at which it had become hard for it to bark effectfully.[94] Perhaps the court could have steered clear of that situation in its earlier decisions, or it could have waited for a more plausible opportunity[95] to bite. In either case, it might still be in a stronger position today – perhaps.

However, it is conceivable also that its (perceived) strength had already begun to fade long before and, indeed, independently of, its own decisions. The EU has grown. The German Federal Constitutional Court may still be the largest Member State's most important court, but there are many Member States now, and some courts with a voice that is audible too. In such a changing environment, the German Federal Constitutional Court's strategies, if any, may not have made too much of a difference.

92 And few commentators contemplate this – admittedly hypothetical – course of events. Weiler, is an exception in this regard. In his view, the Lisbon judgement would have been an appropriate opportunity, but the court '*shied away from going the full length by saying Nein to Lisbon in the name of democracy (…) Had they done a 'PSPP' in the Lisbon case, it would have provoked the much-needed serious soul searching which is so overdue in our Union*'. Weiler, 2021, p. 182.

93 In the eyes of Weiler, ibid., there was a '*toppling, through self-immolation no less, of the FCC from its pedestal as the primus inter pares of Member State constitutional courts*' (p. 180), and, as a consequence '*the prestige of the FCC suffered a serious blow*' (p. 182).

94 For an elaborate analysis of the court's situation when deciding in PSPP, see Grimm; very pointedly, he describes the situation of the 'German Federal Constitutional Court' as being '*caught in a trap that it set itself with the best, pro-European intentions*' Grimm, 2020, p. 948.

95 Thus, the main thrust of Weiler's Art., entitled 'Why Weiss?', cf. in particular, p. 186 seq.

7. Stronger as a pack?

Here is yet another dilemma, and a more general one. European integration is in need of effective checks, maybe more than ever. Not that it had moved forward all too speedily in recent years – not across the board at least, but in some respects maybe. Much depends on perspective here, but this is at the heart of the problem: there will always be cases in which some Member State feels that insufficient regard has been paid to one of its vital interests, be it in matters of constitutional identity, or be it a more generic concern about the EU's conformity to essential requirements related to the rule of law, democracy, or Member State autonomy.

But who is to carry out such checks? The European Court of Justice does not seem to be an optimal candidate for this task. For too many, this institution's past will be too strongly associated with the decisive contributions it has made to European integration. These contributions may be praiseworthy to this day, and groundbreaking in retrospect, but they were integrationist, and regardless of how its future jurisprudence developed, it is hard to imagine that the European Court of Justice could, anytime soon, shake off the suspicion of being driven – deep inside – by some integrationist bias. The problem would not (necessarily) be the content of the decisions, but the legitimacy of the institution.

So, who else could perform that task? It no longer seems realistic that institutions at the top of the Member States' judiciary could play that role. Being particularistic agents by definition, their legitimacy in that realm has always been shaky, and their decreased relative weight within the EU is unlikely much longer to sustain any such performance, even if they were to manage it more cautiously than the German Federal Constitutional Court. And who says that caution and benevolence in the above sense would prevail in all future times? In fact, the prospect of a bunch of weakened, but unleashed watchdogs going wild is amongst the more plausible trajectories of a refragmentation of Europe.

The time may thus have come for a new institution: a European court that could be invoked when Member States see a violation of interests of the kind described above; a court that would be composed of Member State judges delegated to that institution only on the occasion of such disputes, and of some judges, in addition, of the European Court of Justice; an institution, hence, which would not just avoid any suspicion of an integrationist bias, but also be able to transcend the particularistic national views.

This short sketch of the idea may suffice – the suggestion is neither new nor mine, and it has been elaborated upon elsewhere.[96] Such a new court, to be sure, would neither be the solution to all problems, nor even the end to all disputes. One should not expect it to become the procedural capstone, providing Kelsian closure to

96 The suggestion would make this new adjudicative body a part of the European Court of Justice; for the initial suggestion, see Weiler and Sarmiento, 2020a; the same authors have also published a reply to (some early) critique of their proposal, Weiler and Sarmiento, 2020b.

the cupola of EU law. This is not how supranationalism has worked so far, and it is doubtful whether it should, or even could, be transformed this way.

Instead, such a court would likely be too weak to take the reins, and would thus be compelled to remain cautious with any formal finality of its decisions. It would, ideally, be reconciliatory in its attitude and Solange-style in its rulings. It could play a role similar, maybe, to that of the German Federal Constitutional Court in its better days, or of other Member State courts, for that matter. It would be a response to the decrease of these institutions' relative weight, and in some cases also to the erosion of their authority.

The dilemma, in a nutshell, may hence be this: with national watchdogs losing stature, there is a growing need to recalibrate the power balance for a formative judicial dialogue on the future trajectory of European supranationalism. And the solution may rest on the hope that a pack of watchdogs might be able to achieve what a single watchdog is no longer able to.

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Chapter II

National Constitutional Identity Confronted With the Constraints of European Union Law

Bertrand Mathieu

Abstract

This chapter considers some of the developments on national identity presented in a previous publication but focuses specifically on the analysis of the construction of a 'European identity' and the points of friction between these two types of identity.
Constitutional identity corresponds to the essential elements of national identity a person has decided to include in its constitution, thus giving them legal scope. National identity enables the identification of a political community. This state community, formed by a people and endowed with the attribute of sovereignty, is defined by its history, values, and many elements that characterise its raison d'être and its specificity. Meanwhile, it is an element of separation from what is not it, an element of dialogue with other communities founded on other identity principles, and an element of sharing with other states that share some of the values in common.
Considering the relationship between this national identity and the values of European identity, European identity, originally conceived as the common denominator of the values of national identities, developed in an almost autonomous manner through the affirmation of values forged by the Union's bodies and, first, the Court of Justice of the European Union. Based on the common values enshrined in the Treaty, the Court will develop an extensive interpretation and definition of these values, in particular of the concept of the rule of law, which will allow it to extend its competences and enter into a federal logic that is not desired by the states. This identity, intended to be common and often imposed on the states, tends to achieve a European imperium that is not without ideological connotations.

Bertrand Mathieu (2023) 'National Constitutional Identity Confronted With the Constraints of European Union Law'. In: András Zs. Varga – Lilla Berkes (ed.) *Common Values and Constitutional Identities—Can Separate Gears Be Synchronised?,* pp. 51–77. Miskolc–Budapest, Central European Academic Publishing.

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The resistance of several national jurisdictions to this imperium makes it necessary to seek mechanisms that allow for the promotion of common values and the protection of identity-based values. These mechanisms must restore the place of political power, which, in a democracy, has the greatest legitimacy to settle possible conflicts. The determination of new mechanisms of regulation between the requirements of the defence of national identities and those linked to the values and principles that sovereign states have decided to put in common, probably conditions for the survival of European legal orders.

Keywords: constitutional identity, European identity, nation, values, European Union, political community

1. Introduction

The notion of constitutional identity refers to several concepts, primarily those of the Constitution. The Constitution is understood as the text and the manifestation of an act of sovereignty that determines how people intend to govern themselves (or to be governed) and the principles and values specific to these people. Thus, the Constitution focuses on a political organisation and an ideological system specific to a nation. Therefore, constitutional identity refers to the elements of identity a nation recognises as fundamental. It inscribes legal text elements relating to aspects such as history, culture, and religion, which constitute the identity heritage of the nation. Constitutional identity is, thus, the legal manifestation of national identity; that is, a set of norms that allows national identity to assert itself and oppose the interference of principles or values that would be contrary to it but also to dialogue with other identities. This notion implies a distinction between what is proper and what is not. National identity conditions the existence of a state. Indeed, it is the fundamental reason a human group settled in a territory, constituted a nation, and founded a state, even though these factors may have come into play at different times.

If national identity refers to what is specific, it does not exclude the fact that certain principles or values appropriate to this identity are shared with other states or other groups of states; they can then constitute elements of the common identity of an international or supranational organisation, which implies distinguishing the proper from the common. It is, therefore, necessary to define this concept, which is largely undefined, before analysing its relationship with the requirements of other legal orders, particularly the European Union (EU). Therefore, the developments that follow will establish equivalence between constitutional and national identity, considering that the former is a legal expression of the latter.

Specificities of national constitutions are closely linked to historical and constitutional developments. Various questions have been raised by history and answered by constitutions. The role of religion in the state, its relationship with national minorities, and the definition of some fundamental societal values are conditioned by history.

The return of the concept of national identity in ideological and geopolitical debates[1] and in the legal field reflects resistance to the globalisation movement, which is reflected in the prevalence of the supranational over the national and is not only economic and commercial but also cultural. However, this movement, aimed at denying or considering as secondary the existence of a national identity, is far from universal. Indeed, many states assert themselves as powers by claiming their own national identities. This notion is true for China, Turkey, India, and Russia. The national identity crisis is essentially a European phenomenon. Indeed, two supranational systems, the Council of Europe and the EU, have adopted a converging logic aimed at substituting a common identity for state identities, whereas these systems originally aimed only at identifying and defending common identity elements. For some of these states, such as Germany, the trauma of the Second World War led to the easy acceptance of the assimilation of nationalism and national identity, with the rejection of the former leading to the abdication of the latter. For other states, such as France, with a long national and state tradition, some have considered this identity powerful enough to allow a European identity to prevail. However, this question is becoming increasingly important and is leading to a political gap that tends to replace the traditional gap between the right and left. Finally, in states such as Hungary, which has experienced successive imperial integrations with Ottoman, Austrian, German, and Soviet countries, the question of national identity is vital, and Europe, first conceived as a tool for emancipation, is today perceived by some as running the risk of losing an identity that has barely been recovered.

Indeed, in Western Europe, the concept of the nation is being questioned; the virtues of the state are being challenged; there is only room for individuals and supranational structures; the general interest is being diluted in the realisation of the desires and rights of individuals; the identities that are recognised and valued are sexual, religious, or even ethnic; and the place of national identities is being increasingly reduced. However, the return of the concept of national or constitutional identity must lead one to question its place in the construction of a political community and the conditions of dialogue with common identities forged, notably in the European melting pot. In particular, it is a matter of observing the mechanisms of cooperation and subordination that are at work through the relationship between national and European identities.

1 Del Valle and Soppelsa, 2021.

2. National identity as a basis for a political state system[2]

If democracy, in its different forms today, constitutes a political model of reference, notably, this mode of government, as a mode of legitimisation and exercise of power, is not the only one possible. Democracy has a long history. It was preceded by other political regimes: feudal, imperial, and theocratic. Therefore, there are many grounds on which it cannot develop. If one disregards ancient cities, or, more broadly, reduced political communities, democracy has found a framework for its development in the nation-state.

2.1. Identifying a political community

By definition, democracy assumes the existence of people. These people cannot be universal, which implies, besides the purely utopian character of such a conception, that they can govern themselves, obey common laws, and share identical values. In any case, these people, confused by the universality of human beings, cannot constitute a political society. However, the question of the exercise of power and its legitimisation is necessary to arise in a political society.

A political community can be considered as several individuals grouped in a territory and endowed with a system of government. There are three primary conditions for the existence of such a political community: people, territories, and political organisations.

In the geographical sense, a territory is a '*space appropriated and occupied by a human group that identifies with it and bases part of its identity on it in parallel with the establishment of a legitimate power*'.[3] Therefore, the territory has a political dimension. It also included social dimensions.[4] To use a more contemporary terminology, a so-called 'civil' society, detached from a territorial framework, cannot constitute a political society.

2.1.1. Political community and state structure

This political organisation does not necessarily take a state form. The state structure, a modern form of political organisation, has developed in some countries through the transformation of the feudal system into a monarchical system. In a more recent period, the phenomenon occurred either through the break-up of empires (Austro-Hungarian, Soviet), through the establishment of a federal organisation bringing together relatively weak state or pre-state structures (United States, Germany), or through artificial divisions carried out in the context of decolonisation.

2 On this question, see Mathieu, 2017, Translated into Hungarian, Szazadveg Editions, 2018, into Spanish, Electoral Court Editions, Mexico City, 2021, into Russian, Hopma Editions, Moscow, 2021.
3 Théry, 2007, p. 365.
4 Foucher, 2007, p. 167–168.

The affirmation of the nation-state in the XIXth century strengthened the link between the people and territory. Another substantial characteristic of a state is its sovereignty. Sovereignty is exercised within the framework of territory. Thus, the Middle Ages saw a shift from the idea of territory—the possession of a man—the royal domain belonging to the king—to the idea that power no longer implied that the sovereign was in a relationship of possession. Thus, one leaves private law to enter the logic of public law.

Sovereignty implies the existence of initial and unconditional power. This power must be embodied in the reason of the strongest, the reason of the most competent, dynastic reason, religious reason, and the people. If sovereignty does not imply democracy, democracy can exist only in a system based on sovereignty.

The idea of a frontier separating the two-state sovereignties emerged at the end of the 18th century. In the XIXth and XXth centuries, the nation-state built a political mystique around the border as an instrument of delimitation of the territory. A border is an instrument of political and symbolic separation. A border is an invention associated with the birth of an international order based on the sovereignty of states, which goes around a homogeneous territory and raises a line of protection against external interference.[5]

As Chantal Delsol points out, the notion of separation

> relates to the constitution of beings. Creation is established only by separations: to constitute beings, it is necessary to draw their contours—in other words, their limits. Nothing exists but by its limits. A river without banks ceases to be a river to become a swamp. I exist because I can say I am human and not an animal, a woman and not a man, etc. In this respect, the borders mean, first of all, the existence of a society that is inside… Any human whole has reality only by its differences. […] The differences are concretized only by separations: definitions, borders, and an undifferentiated world would be a magma without definition and, therefore, without existence. One realizes that there is no meeting, solidarity, or link between entities previously defined and thus, delimited.[6]

The territory and, therefore, the borders, constitute the framework of a representation made of places and histories. Each national community has its ink mental map.[7] Today, the migration crisis and the reactions of certain states that comprise building walls, as Hungary has done, for example, reflect the link that naturally exists between the border and identity; the closure of the former reflects the fear of losing the latter. It is probably the vain temptation to abolish borders that brings walls back to life. As Pascal Bruckner notes, 'There is *no history without geography*'.[8]

5 See Dullin, Forestier-Peyrat, 2016.
6 *Le Figaro*, Oct. 8, 2015.
7 Foucher, 2012, p. 23.
8 Baudet, 2015.

Considering recent history, since 1980, more than 28,000 km of new international borders have been established, and another 24,000 have been the subject of delimitation and demarcation agreements.[9] The crises in Cyprus, the creation of Kosovo, and the annexation of Crimea by Russia—to mention only the European situation—demonstrate the importance of territories and borders.

The nation refers to the idea of a people, not a sum of individuals. It refers to a people carried, to use an expression by Renan, by a collective will to live or a 'community of dreams', to use a more poetic expression by Malraux. The nation forges as many people as it expresses itself. This notion of peoplehood is not defined by ethnic considerations but by voluntary adhesion to history, values, and a common project. As Jean-Marc Sauvé notes, '*In France, the State is the foundation on which the nation was built, it constitutes its matrix*'[10].

These states have provided themselves with constitutions. The original definition of the term in the field of interest can be found in Aristotle, according to whom the constitution is the government of a political community. This aspect has been retained in this study. It is within this framework and context that modern forms of democracy have developed.

2.1.2. Political community and democracy

While globalisation seemed to mark the slow death of the state structure and the individual seemed to have finally found mastery of his destiny and freedom of his attachments, its defensive function revitalised it. In the context of the multi-form instability the world is experiencing today, the necessity of the state is imposed in the face of the rise of terrorism, conflict, and economic and financial crises. The relegation of the State to the background or even the plea for its end in favour of the 'self-managing' society of individuals, is the result of a certain vision of the progress of societies. Given the defects for which it was faulty or of which it was made faulty, the concept of the state was denounced. However, with the resurgence of transnational threats and crises of all kinds, especially health crises, the state is once again being called upon to ensure the protection of freedoms, economic development, and defence against democracy. Indeed, globalisation is not the result of political will, but of the action of financial and economic forces that are not, in principle, democratic. Democracy, as a principle of the legitimisation of the exercise of power, operates within a geographical framework that necessarily implies borders. Imagining a global political system would only lead to the establishment of a mechanism for the settlement of conflicts, whether military or economic. From this perspective, economic globalisation corresponds in a 'trompe-l'oeil' to the construction of a society without borders. This 'above ground' society exists only in the hands of private economic and especially financial entities. It can also be a prerogative of the elite, which evolves within this framework without

9 Foucher, 2012, p. 7.
10 Council of State, 2015, p. 12.

constituting a political society. These transnational economic and financial structures undermine state structures, thereby weakening democracy[11] and the link between the state, nation, and democracy. By nature, political space cannot be that of the world.[12] Analyses aimed at supporting the development of a 'right without the State'[13] lead in fact to the question of whether such a right would not be, by nature, incompatible with democracy. Democracy and national identity are interdependent.

Democracy is the framework and mode of policy exercises. It supposes, therefore, '*the belonging to a city which is not planetary but implies a history, a language and culture, the delimitation of territories marked by borders the existence of a State which embodies the community and ensures the security*'.[14]

As Alexandre Del Valle notes, Aristotle, Plato, and even Rousseau explained that democracy is impossible within an imperial political unit.[15] Montesquieu demonstrated how Rome perished by granting everyone the right to citizenship.

> For then, Rome was no longer this city whose people had had only one spirit… The people of Italy have become its citizens, each city brought its geniuses, its particular interests… The torn city did not become any more whole, and, as one was a citizen only by a kind of fiction, one did not have any more… the same gods, the same temples, the same burials; one did not see Rome any more with the same eyes; one did not have any more of the same love for the Fatherland; and the Roman feelings were no longer there.[16]

All things being equal, a parallel can be drawn with the EU's claim to building European people. The idea according to which the people would be produced by the law and not the law of the people, supported, in particular, by Jurgen Habermas, constitutes the negation of the democratic principle by placing the legists above the people. Democracy implies, as Slobodan Milacic notes,[17] that politics precede law, the Constitution proceeds from elections, and the people found the law. To say that 'the norm overrides the vote' calls into question the democratic principle itself. The failure of the EU to build a genuine, democratic political space as an extension of the economic space shows that the deconstruction of the people-state-constitution relationship has led to a democratic impasse.[18] Moreover, European law, similar to the European Convention on Human Rights (ECHR), can be applied only through the implementation of state legal instruments.

11 See Zarka, 2016, p. 102.
12 Against the view of Rousseau, 2015, p. 105.
13 See Cohen-Tanugi, 2016.
14 Le Goff, 2016, p. 242.
15 Del Valle, 2014, p. 109.
16 Montesquieu, 1734 p. 72; see the analyses of Manent, 2012, p. 204 et seq.
17 Aix-en-Provence Colloquium, Nov. 2016, 25 years of democratic elections in the East: what gains, what challenges, proceedings forthcoming.
18 Contrary to the thesis supported by Rousseau, 2016, p. 93. et seq.

Thus, democracy, as a principle of the legitimisation of power based on the will of the people, implies the existence of a political society inscribed within borders and formed by people comprising citizens (non-citizens being, by definition, excluded from this political society) linked by a community of destiny and the sharing of common values. As Raymond Aron notes, individuals cannot become citizens of the same state unless they feel that they share a common destiny.[19] Democracy presupposes its existence.[20] From this perspective, democracy is necessarily inclusive; that is, it brings together individuals who share the same values. In this sense, immigration can only be accepted and proven to be a source of enrichment if it is accompanied by the integration of those who join the national community within the framework of democracy.[21] Thus, people are defined as political entities rather than ethnic entities. In contrast, the deconstruction of the link between people and the state leads to the privileging of communities defined by ethnicity, religion, or language. From this perspective, unless ethnic communities are transformed into political communities, the communitarian conception of society will be radically incompatible with democratic principles. This refers to the existence of a tribal society. National identity is above particular identities; not only can it not be considered discriminatory but also it constitutes a melting pot in which, at the political level, ethnic differences must be ignored. Although this is not always the case in practice, national identity excludes an ethnicised conception of society.

From this perspective, the citizen is part of this political community. Aristotle established a clear link between the citizen, capable of participating in the exercise of deliberative functions, and the city.[22] This citizen cannot be embodied in an atomised individual who would see the political structure only as a debtor of rights and material benefits and who would make other community memberships prevail over membership in the political community; that is, the national community. Thus, it is appropriate to question the possibility of dual nationalities. The acceptance of dual nationality is justified from the perspective of the individual who, having come from elsewhere and integrated into a new society, wishes to establish a link between his community of origin and his community of destiny. It is more challenging to accept if one considers the same individual as a citizen and looks at the interest of the community to which he or she belongs from now on or if one considers not only one's rights but also one's duties. If rights accumulate, there can also be a conflict of duty.[23] Dual nationality, which is debatable in principle, is even more debatable regarding the representative of the nation responsible for expressing its will and ensuring protection.

19 Baudet, 2015, p. 332.
20 See Baudet, 2015, p. 13, p. 16.
21 See Bheres, 2016; Simone, 2016.
22 Aristote, Politique, Livre III-1, p. 443.
23 Cf. Baudet, 2015, p. 342.

2.2. Sharing common values by this political community

In extending the analyses that condition democracy through the existence of a political community, it is appropriate to consider that this political community can only exist insofar as its members share a certain number of values. This 'ethnic' conception is corrected by the analysis according to which this defect of ethnic homogeneity is overcome when '*a community of aspirations*' is formed.[24] Tocqueville develops this link between political community and common values. He considers that

> It is easy to see that no society can prosper without similar beliefs […] because, without common ideas, there is no common action, and without common action, there are still men but no social body. For there to be a society, it is, therefore, necessary that all the minds of citizens should always be brought together and held together by a few principal ideas.[25]

He also introduces a link between these values and democracy by affirming that '*the democracy of the moderns supposes morals, manners, opinions also a certain passion for the citizens to perceive each other*'.[26] The purpose of a constitution is not only to provide for the organisation of power within the state (the institutional aspect) but also to set out the values of the political community it governs.

Contrary to what a simplistic and commonly shared analysis may lead to, fundamental rights are not the only values set forth by the Constitution. Thus, the statement in Article 1 of the Declaration of 1789 that '*men are born and remain free and equal in rights*' is a postulate, which cannot be denied and which does not create a specific right, even if it is the basis for the rights that have subsequently been defined. The secular, democratic, and social character of the republic affirmed in Article 1 of the French Constitution of 1958 was not a statement of rights.

The existence of duties towards the community does not exactly refer to values, if not to the virtues that characterise a good citizen to protect the community's interests. This situation is the case with requirements such as defending one's country, paying taxes, fulfilling one's civic duties, and respecting the environment; other duties are marked by a moral connotation. They do not limit themselves to playing the role of regulators of social life; they refer to a certain conception of society or humans. Thus, Article 4 of the Declaration of 1795 proclaims that '*no one is a good citizen unless he is a good son, a good father, a good brother, a good friend, a good spouse*'. The ideas of fraternity and solidarity (e.g. Article 2 of the Spanish Constitution) or that which primarily places on the family the burden of assistance to the needy (French Constitution of 1848) are part of this logic. The principle of dignity marks a remarkable innovation from this perspective. If this principle can be expressed as

24 Aristotle, p. 445, p. 522.
25 Du principe de la souveraineté du peuple en Amérique, DA II, 15, quoted by Jaume, 2008, p. 105.
26 Jaume, 2008, p. 30.

a subjective right—the right to protect against attacks on one's dignity—it is essentially a philosophical affirmation referring, in Christian tradition, to an ontological conception of man. It implies a duty not to harm the dignity of others, even if they consent to it. This notion justifies the limitations of individual liberty.

More broadly, the ECHR recognises the restrictions prescribed by law as necessary in a democratic society and appropriate for safeguarding the interests of society and the rights and freedoms of others. The French Declaration of 1789 makes extensive reference to these common interests; thus, the common good can justify social distinctions (Article 1); the law has the task of defending actions harmful to society (Article 5); manifestations of freedom of opinion, including religious opinion, must not disturb public order (Article 10); and public necessity can justify dispossession (Article 17). Of course, these collective interests do not refer to values but to the need to base society on the duty to respect common values.

Interestingly, the draft European Constitution, which had the hitherto unfulfilled ambition of creating a political society, made a recurrent reference to the notion of value. This is particularly true of the Preamble, which refers to 'the *cultural, religious and humanist heritage of Europe, from which universal values have developed*…', and of Article I-2, entitled '*the values of the Union*'. If one disregards the fact that the text refers alternately to the universal character of the values of the Union and then to their own character, its purpose is, notably, to construct a new legal order to create, *ex nihilo*, a political community. The authors rely on the existence of common values as the first condition for the existence of such an order and community. In the same sense, the opening sentence of the Charter of Fundamental Rights of the European Union reads as follows: '*The peoples of Europe, by establishing an ever closer Union among themselves, have decided to share a peaceful future based on common values*.

Therefore, it is appropriate to consider that the existence of common values conditions the existence of a political community and, therefore, a democratic regime. Unquestionably, a political community can be founded on common values without resting on democratic legitimacy, as clearly demonstrated by the existence of theocratic regimes. However, democracy requires a community built around common values.

The values that structure national identity cannot be identified with fundamental rights alone. Their claim to universalism has weakened the concept of national identity. Indeed, these fundamental rights are largely defined or interpreted, though the situation amounts to almost the same thing by supranational structures of a jurisdictional nature or even by non-governmental organisations. In this sense, the constitutional courts, guardians of the national values expressed by the constitutions, implicitly or explicitly submit to the interpretations determined by supranational bodies (the study will return to this notion). If one accepts that one is defined by one's identity and that human rights are considered to have a universalist scope, this identity cannot be dissolved in these rights, even though the rights may be part of this identity. The link between values and identity is that

the national community is neither a coincidence nor a temporary aggregate. It has its roots in the past. '*It constitutes the only organ of conservation for the spiritual treasures amassed by the dead, the only organ of transmission through which the dead can speak to the living*'.[27] This sense recalls the view of Raymond Aron, according to whom individuals cannot become citizens of the same state unless they share a common destiny.[28]

The existence of a political community, the first condition of democracy, implies the recognition of its identity and, thus, otherness regarding what is not. First, it is necessary to determine what constitutes a nation's identity. It is challenging to include this identity in the definition or enumeration of legal criteria. However, there is an echo of it in a constitution: this is the case of language, defined by Jacques Julliard as '*a rallying sign, a culture, a spirit, a form of relationship to the world*'.[29] This is, of course, territory and geography. It is a form of culture, literature, and architecture. Spirituality is religious. To deny the Christian tradition of France or even Europe is to commit to the denial of reality as much as an act of rupture.

National identity is perhaps essentially the history to which books, monuments, and narratives bear witness. Ernest Renan states that a nation is a historical heritage site and a contract for the future. History is primarily the story of '*shared ideals and beliefs, shared trials and sufferings*'.[30] History is the fact that an imaginary world that shapes national identity is built. This conception of history is no longer incompatible with a scientific conception of history than with the artistic perception of a monument with a strict architectural study. However, the approach that claims to be scientific in history often constitutes the perfect negative of the 'national novel'. In reality, it aims to destroy the esteem that a person has in the past by developing repentance that destroys national cohesion and social ties. How can we integrate the new generations and foreigners we welcome into a community that denigrates itself and rewrites history in the glory of those who fight it? From the exaltation of (national) heroes, we moved on to the exaltation of victims (of whom we would be executioners). The pride of our history has been replaced by a desire for revenge on the part of those who consider themselves victims of our behaviour. History includes part of the novel; it is also a science; it cannot be under the cover of scientificity to bend to an ideological vision that is anachronistic.

On a personal level, as on a collective level, only an affirmation of one's identity allows one to know where one comes from, where one is going, who one is, and with whom one is exchanging. It is the loss of the feeling of identity and the impression of dispossession that leads to the rejection of the other, and not, contrary to what we would like to believe, an identity clearly assumed and open to dialogue with other identities.

27 Weil, 1949; 2016, p. 16.
28 Baudet, 2015, p. 332.
29 *Le Figaro*, June 5, 2015.
30 Goff, 2016.

3. The national identity principle of cooperation and resistance in the framework of supranational structures

The phenomenon of globalisation or internationalisation goes far beyond the economic and financial framework and also affects the values of nations by gradually building a system with a universal vocation that is not universal but aspires to become so. This is the case, for example, of an essentially individualistic conception of fundamental rights and the rewriting of history in light of contemporary and anachronistic conceptions. Similarly, in a more indirect but deeper way, GAFA tends to standardise ways of thinking while creating and developing communities that organise themselves around their own value systems.

By refocusing on the legal field, international or regional law, which is largely constructed by supranational judges and relayed by national judges, will lead to a forced march towards uniformity. Such phenomena contribute to questioning and devitalising national identities. However, this attempt at standardisation has led people and certain states to withdraw from the defence of their national identity.

The challenge facing jurists, in particular, is to articulate the requirements resulting from this movement of internationalisation, to which states have adhered using treaty provisions, and the protection of national identity which justifies the very existence of the state. This study retains the following guidelines: It is necessary to ensure that states are not imposed constraints to which they have not freely adhered and that they retain their free will concerning what falls within the scope of their national identity; moreover, states must be subject to respect for the commitments they have made. More concretely, at the European level, it implies maintaining the mechanisms of respect for the treaties, in particular the jurisdiction of the European Court of Human Rights and the Court of Justice of the European Union, but also delimiting as clearly as possible what comes under national identities (e.g. questions relating to the conception of the family or religion and access to one's own territory) and what comes under common values (e.g. an independent justice system, respect for the rights of defence, human dignity, and respect for free elections).

It is up to the constituent to set the values of identity and the national judge to ensure that they are respected; it is up to the treaty to set the common values and to the European judges to ensure that they are respected. The question, then, is how to articulate the protection of these two identities. However, the relationship between international law and national constitutional law does not lend itself to a single hierarchy of norms that leads to the creation of a federal constitutional system. Notably, the European Court of Human Rights has followed this logic by defining itself as a constitutional court.

In reality, the current situation is reflected in the existence of several legal orders—international, European, and national—whose relations are essentially regulated by judges, which leads them to intervene largely in the competences of political bodies.

Although this study is essentially devoted to the relationship between the states and the EU, it is necessary to consider the institutions of the Council of Europe and the case law of the European Court of Human Rights because the processes have certain points in common, and the judges of the EU often rely on the case law of the European Court of Human Rights to define the concepts to which they refer.

3.1. The temptation of uniformity through the construction of a European identity that replaces national identities

This phenomenon can be observed in the law produced within the framework of the Council of Europe and in the law produced by the EU. In both cases, it is essentially the courts that are in charge, and the tools of this standardisation or substitution are concepts, *a priori* consensual, but whose substance is largely undetermined.

3.1.1. The Council of Europe and the design of a European identity

The central body of the Council of Europe is the Committee of Ministers, comprising the ministers of foreign affairs of the State parties. However, the Court of Human Rights plays a major role regarding fundamental rights. The Council of Europe has created a multitude of bodies whose role is essentially consultative and who participate in its mission in their specialised fields. This is the case with the European Commission for Democracy and Law, known as the 'Venice Commission'.

Thus, European States are truly framed by a multitude of bodies competent to ensure respect for European values. The combined actions of these bodies create an effective network to protect and promote fundamental rights and European values. In this scheme, the European Court of Human Rights considers itself to be a European neo-constitutional judge.

This case law must be considered in the relations between the states and the EU because if the principle of participation of the Union in the Council of Europe, written in the Treaty, is not (yet) effective, the case law of the Court of Justice of the European Union considers the case law of the Court of Human Rights to interpret the provisions of the Charter of Fundamental Rights of the European Union.

In this sense, the European Court of Human Rights recognises its right to ensure the identification of European values and the dividing line between these European values and the margin of manoeuvre left to the States. It is up to the Court to adapt the rights recognised by the Convention to what it considers to be the evolution of European society, which may lead it, if necessary, to recognise rights not included in the Convention. Further, the Court posits that it must consider any relevant rules of international law applicable to the relations between the contracting parties in interpreting the rights and freedoms recognised by the Convention, which is no longer the sole frame of reference. Finally, the Court freely interprets the principle of subsidiarity in light, in particular, of legislative developments in Member States (i.e.

majority of them or almost all of them), modifying the spirit of the Convention, the substance of which is modified by considering the evolution of national laws.

Intergovernmental bodies have political legitimacy. European judges' legal legitimacy differs in nature. The legitimacy of expert committees such as the Venice Commission, which plays a key role in affirming and defining common values, should also be questioned. The European Court of Human Rights limits states' room for manoeuvring by referring to general concepts that are subject to ideological interpretation. Thus, it regards the restrictions on certain rights recognised by the Convention to respect a necessary goal in a democratic society, which refers, in particular, to pluralism, tolerance, and the spirit of opening up (7 December 1976 n° 5493/72). From this perspective, the Court confuses democracy and the rule of law.[31]

For example, the court's jurisprudence is undoubtedly sensitive to the demands of the LGTB movement and is favourable to theories such as gender. The 'moralizing' role of the Council of Europe is reflected in 'warnings' such as '*sexist stereotypes by the authorities constitute a serious obstacle to the achievement of genuine equality between the sexes, one of the main objectives of the member states of the Council of Europe*'.[32] Relying, in particular, on this case law, the Venice Commission considered that *measures aimed at removing from the public domain the promotion of sexual identities other than heterosexual affect the fundamental principles of a democratic society, characterized by pluralism, tolerance and open-mindedness, and the fair and appropriate treatment of minorities.*[33] However, not all minorities are equal. Thus, the European Court of Human Rights has considered that it is in the general interest of society to avoid the emergence of parallel societies based on distinct philosophical convictions and that it is important to integrate minorities into society.[34]

3.1.2. The European Union and the imperium of consensual but largely indeterminate values

The notion of values is common in the EU Treaty. Thus, it is a system that is complementary and competitive with national values, which tend to supplement or subordinate the latter. From this perspective, the fate reserved for the concept of 'rule of law' is particularly emblematic.

3.1.2.1. The European Union: a value-creating structure

The European texts refer extensively to the values of the Union. Thus, the Preamble refers to 'the cultural, religious and humanist heritage of Europe, from which have developed the universal values of the inviolable and inalienable rights of the

31 On this distinction Mathieu, 2017.
32 *Juridicic v. Croatia*, February 4, 2021.
33 CLD AD (2013) 022 and notice CDL-AD(2021)050.
34 *Konrad v. Germany,* September 11, 2006.

human person, as well as libertý, democracy, equality and the rule of law'. Article 2 of the Lisbon Treaty refers to the values of the Union, expressed in a general way, which will contribute to extending the competencies of the Union and its intervention in areas related to the sovereignty of the states. Among these values are respect for human dignitý, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidaritý and equality between women and men'.

However, the formulations are ambiguous. These values belong to a common European heritage, which necessarily refers to European States. This notion tends to consider European values as the common denominator of national values and that these European values only exist insofar as they are shared by all EU states. Furthermore, the respect for constitutional identity was affirmed. The result should be a dual system: what comes under a common European identity and what comes under national identities—that is, values specific to a state and not necessarily shared by others (e.g. family and secularism). However, the system does not work that way. The Charter of Fundamental Rights of the European Union defines, in broad terms, common values, and the text of the EU Treaty refers to the ECHR. Consequently, the EU is not only determined by the existence of common values but is also a producer of common values.

The conception of national identity, based on its own values, tends to be replaced by a society without a past but built by the particular affinities of contemporaries, a society built around sexual, linguistic, religious, or other communities. However, this new system of values, disconnected from the national melting pot, is arbitrarily and authoritatively manufactured by European authorities, particularly by judges who are devoid of any national anchorage or democratic legitimacy and who place themselves above national law.

The most important thing in this respect is the broad power of interpretation that judges recognise regarding very general principles such as the rule of law or the principle of non-discrimination. Although there is broad consensus on these values, it is clear that they can refer to very different content.

This is particularly true of the reference to the 'rule of law' (to which this study will return) and the principle of non-discrimination. This principle cannot be absolute, and its application considers the differences in situations that are allowed to be considered (e.g. gender and nationality) and the weight of requirements linked to the general interest. Case law of the European Court of Human Rights established a list of common values defined by substance. Thus, in its decision on 16 February 2022 regarding sanctions against Poland, the Court argued as follows:

> *Once an applicant country becomes a Member State, it joins a legal construct which rests on the fundamental premise that each Member State shares with all the other* Member States, and recognizes that they share with it, a set of common values on which the Union is founded, as set out in Article 2 [TEU]. This premise implies and justifies the existence of mutual trust between the Member States in the recognition of these

> values and, therefore, in the respect of the Union law that implements them ([Opinion 2/13 (Accession of the Union to the ECHR), of 18 December 2014, EU:C:2014:2454, paragraph 168]). Member States' rights and practices should continue to respect the common values on which the Union is founded.

It adds that

> This premise is part of the specific and essential characteristics of Union law, arising from its very nature, which result from the autonomy enjoyed by that law in relation to the rights of the Member States as well as to international law.

It concludes:

> It follows that respect by a Member State for the values contained in Article 2 TEU constitutes a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State and that the values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the Union as a common legal order. Thus, the Union must be able, within the limits of its powers under the Treaties, to defend those values.

The Court affirms the principle of uniformity in the interpretation of these principles by stating the following:

> Article 2 TEU is not a mere statement of political guidelines or intentions, but contains values which are part of the very identity of the Union as a common legal order, values which are embodied in principles involving legally binding obligations on the Member States. Even if, as is clear from Article 4(2) TEU, the Union respects the national identities of the Member States, which are inherent in their fundamental political and constitutional structures, so that these States have a certain margin of appreciation in ensuring the implementation of the principles of the rule of law, it does not follow that this obligation to produce results may vary from one Member State to another. Thus, for example, even if the Court were called upon to interpret, in the context of an action for annulment brought against a decision adopted under the contested regulation, the concepts of 'pluralism', 'non-discrimination', 'tolerance', 'justice' or 'solidarity', which are contained in Article 2 TEU, in so doing, contrary to what is claimed by the Republic of Poland, supported by Hungary, it would be exercising only the powers conferred on it by the Treaties, in particular by Article 263 TFEU.

The result is that once they have joined the EU, the states are supposed to have accepted all the values set out in the texts (which is perfectly justified) and accept *a priori* the evolving interpretation that the Court of Justice of the European Union is likely to give to the statement of these values. It means that the state is transferring

jurisdiction to the European court, whose interpretation it cannot contest, and the values enshrined in European texts must be considered as matrix principles generating other rules and principles not enshrined in the treaties.

The above decision follows the infringement procedure initiated by the Commission against Poland, which considered that the case law of its constitutional court

> violated the principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as the binding rulings of the Court of Justice of the Union' and that the Polish Constitutional Court 'no longer meets the requirements of an independent and impartial court established by law'. The European Parliament's resolution notes the 'attacks on the freedom of the media and journalists, migrants, women's rights, the rights of LGBT people and freedom of association and assembly.

This situation is a far cry from defending the 'financial interests of the Union' (which is the normal object of the 'conditionalities' attached to European aid).[35]

3.1.2.2. The rule of law, the 'Trojan horse' of the EU imperium

Our system is a mixed democratic and liberal system; democracy refers essentially to the mechanisms of legitimisation of power, and liberalism refers to the modes of exercise of power, that is, essentially to the control and limitation of power. The principle of respect for the rule of law satisfies the second requirement. The rule of law essentially refers to the idea that the State must respect the rules it sets and that citizens must assert before a judge that these rules have been respected. This is an essential guarantee of arbitrariness. However, the rule of law can refer to respect for substantial provisions at the foundation of the legal system, such as human dignity or the principle of individual freedom. For the rest, it is up to the constituents and legislators to define the rights and freedoms that the judges must guarantee. However, hiding behind this consensual concept, the judge tends to deviate from this function of the guarantor to substantially define the rule of law and impose on political leaders a series of rules and principles that correspond to his idea of the desirable evolution of society. The real question is not whether the scope of the rule of law should be limited but who defines the substance of this rule of law, who decides on the balance between fundamental rights, between the requirements of the general interest and those relating to the protection of individual rights, and who decides on the balance to be respected between respect for private life and freedom of expression. From this perspective, the judge must be a guarantor and not a decision-maker. However, this is no longer the case.

35 Schoettl, 2022.

The rule of law[36] is a formidable instrument for assimilation and standardisation. Respect for the rule of law represents a real constraint on Member States. To make this constraint effective, Regulation 2020/2092 on 16 December 2020 aims to exert financial pressure on Member States that would not respect the concept of the rule of law, as defined by the EU. Based on the idea that violations of the rule of law are likely to affect the sound financial management of European resources, the Commission can extend its power considerably. While corruption may indeed be considered a threat to the proper use of European funds and the principle of protecting citizens against arbitrary action is undoubtedly a common principle of the rule of law, its reach extends beyond this.

Thus, questions on the organisation of powers (whereas, for example, the separation of powers can be conceived as implying the independence of judges or the autonomy of the judiciary, which is not the same thing), the protection of national borders external to the Union, immigration, the treatment of foreign NGOs, or the organisation of higher education are covered under the 'umbrella' of the rule of law, which potentially broadens the competences of the Union. The same can be said of issues such as the place to be assigned to sexual, religious, or other identities. This notion is especially true because the interpretation of the rule of law is unclear. Thus, while Article 2 of the EU Treaty seems to give it its own meaning, distinct from that of other principles (e.g. human dignity, freedom, democracy, equality, and human rights), the European Parliament makes it a matrix principle that includes all the 'values' referred to in Article 2. Thus, the European Parliament resolution of 10 March 2022[37] on the rule of law states that

> In accordance with the regulation on conditionality linked to the rule of law, the rule of law must be understood in the light of the values and principles enshrined in Article 2 of the EU Treaty, in particular fundamental rights and non-discrimination; that the Commission should use all the instruments at its disposal, including the rule of law conditionality regulation, to combat persistent violations of democracy and fundamental rights throughout the Union, including attacks on media freedom and journalists, migrants, women's rights, LGBTIQ people's rights, and freedoms of association and assembly…

and that

> a clear risk of a serious breach by a Member State of the values enshrined in Article 2 of the EU Treaty does not only concern the Member State in which the risk materialises, but has an impact on the other Member States, on their mutual trust, on the very nature of the Union and on the fundamental rights of its citizens under Union law.

36 See Mathieu, 2017.
37 2022/2535(RSP).

It is understandable that the mission entrusted to the Commission, under the control of the European judge, may create friction with values specific to certain States. In reality, the conflicts between certain States and the European structures, notably the courts, do not generally concern the recognition of the values enshrined in the treaty but rather the meaning that should be given to them. In the abovementioned decision on 16 February 2022, the Court of Justice of the European Union established the scope of the concept of the rule of law and the methodology that led to the interpretation adopted. Regarding the reference standards, the Court, per its case law, adopts a broad interpretation of the reference standards. It states:

> The rule of law requires that all public authorities act within the limits set by law, in accordance with the values of democracy and respect for fundamental rights, as enshrined in the Charter of Fundamental Rights of the European Union *and other applicable instruments, and under the supervision of independent and impartial courts* (emphasis added).

It also considers the interpretations adopted by many organisations of various types. It states that

> The detection of violations of the principles of the rule of law requires the Commission to make a thorough qualitative assessment. This assessment should be objective, impartial and fair and take into account relevant information from available sources and recognised institutions, including judgments of the Court of Justice of the European Union, reports of the Court of Auditors, the Commission's annual report on the rule of law and the scoreboard on justice in the [Union], reports of [OLAF] and the European Public Prosecutor's Office, where appropriate, as well as the conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies, such as the Council of Europe's Group of States against Corruption (GRECO) and the [European Commission for Democracy through Law (Venice Commission)], in particular its list of rule of law criteria, the European Network of Presidents of Supreme Judicial Courts and the European Network of Councils for the Judiciary The Commission could, if necessary, consult the European Union Agency for Fundamental Rights and the Venice Commission in order to prepare an in-depth qualitative assessment.

Such a methodology involves a large number of interpreters, before whom the States can hardly defend their perspective and leaves the Court with a very wide margin of manoeuvre. Poland, supported by Hungary, argued as follows:

> The provisions of the contested regulation do not comply with the requirements of clarity and precision which follow from the principle of legal certainty, since that regulation does not clearly specify the requirements which must be met by the Member States in order to be able to retain the funding granted to them from the

> Union budget and that it confers on the Commission and the Council an excessively broad discretion and that the concept of 'rule of law', as defined in Article 2(a) of the contested regulation, is problematic in this respect. This concept could not, as a matter of principle, be the subject of a universal definition, since it would include a non-exhaustive number of principles whose meaning may differ from one State to another, depending on its constitutional characteristics or its own legal traditions. Moreover, this definition would unduly broaden the scope of the said concept as a value of the Union, which would be only one of the values contained in Article 2 TEU, to the other values contained in this provision.

The Court held that

> Although it is true that Article 2(a) of the contested regulation does not specify the principles of the rule of law which it mentions, the fact remains that recital 3 of that regulation recalls that the principles of legality, legal certainty, prohibition of arbitrary action by the executive, effective judicial protection and separation of powers, referred to in that provision, have been the subject of abundant case law of the Court.

Based on this self-reference, the Court first holds that the rule of law is a pre-eminent principle, considering that

> While there is no hierarchy between the values of the Union, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law, and vice versa.

The rule of law becomes an all-inclusive principle with a perimeter that is not predefined.

Thus, while the European Treaty does not grant any competence to the authorities of the EU in matters of judicial organisation of the States, these authorities attribute to themselves, through the principles enshrined in Article 2 of the Treaty, encompassed in the concept of the rule of law, a form of exercising 'the competence of the competence' that is the prerogative of sovereign States[38]. Hence, under the cover of this concept, and more broadly of fundamental rights, a form of insidious federalism is developing that escapes the will of the states. The creature escapes from the creator.

38 Schoettl, 2022.

3.2.3. Diversity of national resistances to the imperium of European Union law

The crises affecting the relationship between national laws and the law of the ECHR, as interpreted by the European Court of Human Rights, and the law of the EU are of the same logic in that they confront ever-greater European integration regarding national sovereignty and constitutional identities. The profound differences between these two supranational orders do not allow for the exact transposition of diagnoses and therapies. Nevertheless, these two systems are marked by the role played by supranational judges in their development, and the norms of reference tend to overlap and homogenise, reinforcing the strength of the whole.

Regarding how the 'friction' between European and national law is legally identified, the most 'brutal' is that which comprises establishing, in a general way, the supremacy of constitutional law over conventional law, including that resulting from supranational jurisdictions. Thus, Russia, relying on its constitutional provisions and the absence of relevant provisions in the Convention refused to apply the decision of the European Court of Human Rights, condemning it for the absence of official recognition of homosexual couples (*Fedotova v. Russia,* July 13, 2021, no. 40792/10).

The resistance of national jurisdictions to the law of the EU has taken several legal forms; we will take only a few recent examples whose diversity and multiplication reflect the importance of the problem. The Polish question is, from this perspective, emblematic. While the European Court of Human Rights (July 22, 2021, case 43447/19) ruled that the Polish court responsible for applying European law was not a court established by law within the meaning of the European Convention (Article 6 right to a fair trial) and following the case law of the CJEU aimed at protecting the independence of national courts (e.g. 7 February 2019, C-49/18), the Polish Constitutional Court in a decision on 7 October 2021 ruled that certain provisions of the EU Treaty are incompatible with the Polish Constitution, in particular the provisions of articles 1 (1) and 2 in connection with Article 4 insofar as they oblige a national authority or allow it not to apply a provision of the Constitution. The Court of First Instance contests that integration has been achieved, inter alia, through the interpretation of Union law by the CJEU. The German Constitutional Court has declared itself competent to decide that a European institution has acted beyond its competences under EU law (BverfG 29 April 2021, 2 BvR 1651/15, 2BvR 2006/15).

On 10 December 2021, the Hungarian Constitutional Court ruled that if the exercise of joint competences with the EU is incomplete, Hungary has the right (and, in some cases, the obligation), as per the presumption of reserved sovereignty, to exercise the relevant non-exclusive area of competence of the EU until the institutions of the EU take the necessary measures to ensure the effectiveness of the joint exercise of competences. Second, it declared that when the incomplete effectiveness of the joint exercise of competences resulted in consequences that raised the question of the violation of the right to identity of persons living in Hungary, the Hungarian state was obliged to ensure the protection of this right within the framework of

its obligation of institutional protection. Finally, the Constitutional Court stated that the protection of Hungary's inalienable right to determine its territorial unity, population, form of government, and state structure was part of its constitutional identity.

If we examine the situation in France, first, the Conseil d'Etat and the Cour de Cassation recognised the superiority of the Constitution over international law in the domestic legal order. In its assembly decision, *Sarran and Levacher* of 30 October 1998, the Conseil d'État ruled that international commitments do not have a higher authority in the domestic legal order than the Constitution: '*The supremacy conferred by Article 55 of the Constitution on international commitments does not apply, in the domestic order, to provisions of a constitutional nature*'. Similarly, in its *Fraisse* decision of 2 June 2000, the plenary assembly of the Court of Cassation, having to rule on the respective legal values of national law and treaties (in this case, the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms), considered that the supremacy conferred on international commitments over laws by Article 55 of the Constitution does not apply in the internal legal order to provisions of a constitutional nature. From a second perspective, the French Constitutional Council, like other constitutional jurisdictions, notably Italy and Spain, in somewhat different forms, has reserved the application of secondary European legislation when the principles inherent to constitutional identity were at stake. Article 88-1 of the Constitution states the following:

> The Republic participates in the European Union, which is made up of States that have freely chosen to exercise certain of their competences in common by virtue of the Treaty on the European Union and the Treaty on the Functioning of the European Union.

In June 2004, it deduced that '*the transposition into domestic law of a Community directive is a constitutional requirement*' (June 10, 2004, No. 2004-496 DC). However, it reserves the hypothesis that European law would be contrary to a rule or a principle 'inherent to the constitutional identity of France' (27 July 2006, No. 2006-540 DC). This jurisprudence was reaffirmed by the Constitutional Council's decision No. 2021-940 QPC on 15 October 2021 (Sté Air France), which, with regard to the obligation imposed by European law on air carriers to re-route foreigners whose entry into a member country is refused, identified, for the first time, a principle inherent in the constitutional identity of France and, as such, opposable to European law (i.e. the public monopoly of legal force).

However, in the absence of a constitutional determination for these principles, the French Constitutional Court applied them modestly. Notably, the recognition of the existence of such a principle is in the hands of the constitutional court, as the Constitution does not explicitly refer to such principles. Thus, this jurisprudence constitutes a weapon of dissuasion rather than an efficient tool for dividing competences between what comes under national law and what comes under Union law. Notably,

a principle may be recognised in national and European legal orders without being given the same scope. This is the case with the principle of equality, which, in French law and in principle, does not imply that a difference in situation must necessarily correspond to a difference in treatment. The same can be said of the principle of dignity, which can be conceived of as an objective and a subjective right with different consequences. From another perspective, the Conseil d'Etat has refrained, as a matter of principle, from imposing a veto on the CJEU similar to that imposed by the Karlsruhe Court in monetary matters. Thus, its French Data Network decision on 21 April 2021 is as follows:

> Contrary to what the Prime Minister maintains, it is not up to the administrative judge to ensure that secondary European Union law or the Court of Justice itself respects the division of powers between the European Union and member states. It cannot review the conformity of decisions of the Court of Justice with Union law and, in particular, deprive such decisions of the binding force with which they are vested on the grounds that the Court of Justice has exceeded its jurisdiction by conferring on a principle or an act of Union law a scope exceeding the field of application provided for by the treaties.

These jurisprudences, which occurred within a relatively short period, show, beyond the legal logic mobilised, the challenges that affect the relationship between the mechanisms of European integration and the affirmation of national constitutional identities.

3.3. The search for mechanisms of conciliation between the respect of the national constitutional identity and that of the common European identity

The following lines only aim to outline, synthetically and approximately, the avenues that could be explored to regulate systemic relations and ensure conciliation between the promotion of European identity and the protection of national identities. Otherwise, it leads towards de facto federalism, which is not assumed and will eventually lead to revolts by citizens who are no longer mere spectators, or a break-up of European structures because of the refusal of certain nations to submit and abdicate their sovereignty.

3.3.1. Redefining the articulation of national and European competences

This definition must be the work of politicians. Indeed, it is a question of clearly determining what competences should be entrusted to European structures and what competences and powers should remain in the hands of states. To do so, a distinction must be made between what comes under the heading of European identity, which justifies the association of several states, and what comes under the heading of national identity.

Reflections were performed in two directions. Defining national and European competencies more precisely. In fact, it is a matter of reflecting on what the states intend to share. Thus, respect for human dignity, the right to a fair trial, and protection against arbitrariness are unquestionably common values. The same cannot be said about the concept of the family, the definition of marriage, or the place of religion. It should then be admitted that the affirmation of a principle of identity constitutes a reservation for the absolute prevalence of European orders over the national order, a prevalence that is fixed by treaties and is only valid because it is accepted by the national constitutions.

3.3.2. Enforce the principle of subsidiarity

Once this distribution of competences has been established based on work that is essentially political, it will be easier for the European Court of Human Rights to enforce the principle of subsidiarity. This principle implies that only if constitutional protection proves insufficient should the matter be addressed at the European level. Indeed, as Jean Paul Costa, former President of the Court, notes, this principle implies that the task of ensuring respect for the rights enshrined in the European Convention falls primarily on the authorities of the contracting states and not on the Court; the latter intervenes only if the national authorities fail to do so. Thus, in the case of rights or freedoms that belong to the constitutional and conventional corpora, it is appropriate to consider that this protection is first ensured in the constitutional order as far as the review of the law is concerned.

Today, the Court seems to be moving in favour of recognising a principle of subsidiarity on certain so-called 'societal' issues,[39] leaving them to the discretion of the national legislator. However, appreciation of the scope of this principle remains in its hands. Similarly, the Protocol of No. 15 on the principle of subsidiarity assumes, according to the Brighton Declaration, that 'States may choose the manner in which they wish to fulfil their obligations under the Convention'. However, assessment of the scope of this principle remains in the hands of the Strasbourg Court. Similarly, following the same protocol, respect for the margin of appreciation of States was included in one of the recitals of the Preamble to the Convention. This can be a tool in the hands of a national judge or government to assert the ultra vires of the Court.

3.3.3. Moving from an obligation of submission to an obligation of constructive dialogue

A conflict of the type that pitted the German Constitutional Court against the Court of Justice of the European Union or to remain within the framework of the Council of Europe, the resistance of Great Britain to the case law of the European

39 For example, in matters of filiation, ECHR March 22, 2012, No. 45071/09 *Ahrens v. Germany* and No. 23338/09 *Kautzor v. Germany.*

Court of Human Rights concerning the voting rights of prisoners, testifies to the impasse constituted by the requirement of a single vertical relationship between the European courts and the national courts and to the need to find a way to resolve conflicts. Thus, it is conceivable that, regarding relations between courts, national courts could reinterrogate European courts when a conflict arises or is likely to arise. One can also imagine the creation of a conciliating body with flexible functions. For example, in the case of a conflict between the European Court of Human Rights and a constitutional court or a national Supreme Court, an ad hoc panel could be convened. A more permanent panel could be convened to address recurrent or systemic issues. In the event of non-resolution of conflicts, or in the event that the solution of the conflict would, according to the state concerned, run against a fundamental principle recognised by the constitutional order, it would be advisable to give political authorities the power of the last word on the matter.

3.3.4. Conclusion

It should not be forgotten that although the protection of fundamental rights and freedoms has blossomed in the European melting pot, states remain the natural framework for expressing the sovereignty of the people. However, the whole of this organisation—State, People, Sovereignty—only makes sense in that it has been built from national identities inscribed in constitutions. Supranational systems respond to post-national logic aimed at building a new identity with a universal vocation but are disembodied. It makes large abstractions when it does not try to make a clean sweep of the traditions, customs, histories, and mentalities of people dispossessed, leading individuals to form an entity joined together around history and common projects. If certain forms of supranationality contributed to the maintenance of peace between the peoples, the destruction of the national identities for the profit of a rather artificial common European identity can involve only the bursting of society. Meanwhile, the individualist and community source of conflicts in the sharing of common values will no longer allow for regulation. Europe is rich in diverse national identities and the strengthening of a common identity while respecting these national identities.

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Chapter III

Italy and the European Union: A Legal Analysis

Giacinto della Cananea

Abstract

The tasks of this chapter are two-fold: descriptive and interpretative. The first is to describe essential facts concerning the relationship between the Italian legal order and that of the European Economic Community, now the European Union (EU). In this respect, it is important not to lose sight of the evolving nature of European construction and the increasingly strong foundations of integration in Italian constitutional settlement. This section seeks to lay the groundwork for a later discussion of these interpretations. There are contending theories and the literature is rapidly evolving. The chapter suggests that while the acquis is hardly susceptible to being re-discussed, the emergence of political movements and parties characterised by sceptical views about European integration may impinge on the role of Italy within the EU.

Keywords: integration, sovereignty, primacy of EU law, choice for Europe, counter-limits, Italian Constitution, dualism

1. Introduction

The tasks described in this chapter are two-fold: descriptive and interpretative. The first is to describe essential facts concerning the relationship between the Italian legal order and that of the European Economic Community (EEC), now the European Union (EU). The latter has passed 70 years and witnessed development, change,

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and evolution that will be briefly charted in subsequent paragraphs. This section seeks to lay the groundwork for further discussion. For the sake of clarity, there are contending theories, and the literature is still rapidly evolving. The objective of this section is to render accessibility to wider public scholarship. The divergence between scholars reveals differences as to how a traditional concept of public law, sovereignty, must be intended and the role that political and judicial institutions can play. This chapter also explains why different scenarios may emerge in subsequent years.

2. Essential legal facts

It is helpful to begin with two quick caveats. First, for the descriptive purposes of this study, it is necessary to consider some essential facts that are relevant and significant from a public law perspective. In brief, empirical implies historical. In this respect, many accounts of the relationship between the Italian legal order and that of the EEC/EU are based on the analysis of some 'significant' judicial decisions. There is nothing wrong with this approach, as judicial politics are becoming increasingly relevant.[1] However, the broader institutional, political, and social context should not be neglected, especially when there is a 'rigid' constitution, and political forces make fundamental decisions, as occurred in Italy in 1948 and 1957. Moreover, judicial decisions regard only a part of our civil, economic, and social life. Judicial decisions occasionally affect other areas. This is the case with the Economic and Monetary Union (EMU), which has salient constitutional implications.

The second caveat concerns the significance of the following description. Constitutions have distinct cycles; however, there are rare moments when the trajectories of various national constitutions converge. A convergence of this type occurred in the late 1940s when the constitutions of Italy, Germany, and other European nations were transformed. Another event occurred after 1989 when other nations regained full independence. Thus, neighbouring countries often face similar problems. However, their solutions may and often do differ largely because of significant differences in history, institutions, and political preferences.

2.1. Constitutional openness

Retrospectively, two main choices shaped Italy after 1945: the balance between legal continuity and transformative change and the openness towards other legal systems.

The continuity of the Italian State was ensured, notwithstanding the radical discontinuity of the fascist regime (1922–1943). Political parties could have certainly

1 See Shapiro, 1981 and Stone Sweet, 2000.

chosen to amend the existing Constitution, the *Statuto Albertino*, which had a century of history. However, all relevant political actors thought it was necessary to formalise the foundations of the new liberal and democratic order in a new constitution. Thus, they chose to break with the earlier regime by replacing the old constitution with a new constitutional settlement.[2] The Republican Constitution was adopted and enacted in 1948. The parliamentary regime was reintroduced. The Constitution laid a rich bill of rights. Moreover, it broke with the institutional tradition because 20 regions were created, five of which had special legal status. This situation implied the repudiation of traditional centralisation, although real change was not easy to achieve.

There was also a discontinuity, as far as the external dimension of the State was concerned, which is clearly demonstrated by an analysis of three constitutional provisions. First, the primacy of international law was established. In this respect, Article 10 provided that the Italian legal system 'shall conform to the generally recognized principles of international law' (i.e. international custom) while treaties would have to be ratified by Parliament. Second, a new clause concerning limitations of sovereignty was established. According to Article 11

> Italy shall agree, on conditions of equality with other States, to such limitations of sovereignty as may be necessary to ensure peace and justice among Nations. Italy shall promote and encourage international organizations pursuing such goals.

This constitutional provision is of fundamental importance for two related but distinct reasons. First, it implies a rejection of the traditional notion of the indivisible nature of sovereignty, as conceived by Bodin and Hobbes;[3] that is, sovereignty is no longer regarded as a whole or totality but rather as a bundle of sovereign powers or functions. Consequently, under Article 11, the exercise of individual sovereign functions or powers can be transferred to international organisations. Second, although this clause was defined with a view towards international bodies, it provided a legal basis for European integration.

The third constitutional provision confirms and specifies the previous one in the field of labour. Coherently with the emphasis that Article 1 puts on labour (upon which 'the Republic is founded'), Article 35 affirms that labour must be protected 'in all its forms and practices'. Such protection is not limited to the state but transcends it. Indeed, Article 35 (3) states that Italy must 'promote and encourage international agreements and organisations that aim to establish and regulate labour rights'. The following paragraph, while recognising the 'freedom to emigrate', requires public authorities to protect Italian workers abroad.

When these constitutional provisions are considered as a whole, it becomes clear that the two central pillars of the fascist regime are broken: the authoritarian

2 For further analysis, see Cartabia, 2022.
3 See Hobbes, 1651.

government and the autarchy. This similarity to post-war Germany is evident. The Italian Constitution and German Basic Law (*Grundgesetz*) adopted international law as part of the national legal system.[4] The ramifications of these innovative choices become more evident when the path to European integration is discussed.

2.2. The choice for Europe

Recent and accurate historical studies have shown that the famous speech delivered by the French Minister of Foreign Affairs, Robert Schuman, on 9 May 1950 was not at all 'out of the blue'. On the contrary, it was preceded by an accurate elaboration by a group of high civil servants led by Jean Monnet, and its essential content was shared with other European leaders, such as Konrad Adenauer.[5] Whether or not Alcide De Gasperi, Italy's president of the Council of Ministers, had been previously informed about the speech, there is no doubt that he and his government were consistent supporters of the project. A broad pro-European consensus emerged between the Catholic and liberal forces. The Italian Minister of Foreign Affairs, Gaetano Martino, played a fundamental role in relaunching the project after the fiasco of the European defence community (1954).[6] A solid parliamentary majority supported the ratification of the treaties of Paris (1952) and Rome (1957), establishing the European Community of Coal and Steel and the EEC, respectively. However, parliamentary debates were quite harsh, and socialists and communist parties eventually voted against both treaties.

While the emphasis is generally on the fact that, as a consequence of these political decisions, Italy has been a founding member of both European organisations, other two aspects must be highlighted. First, these political decisions, together with those to join the military alliance based on the North Atlantic Treaty (1949), were Italy's fundamental choice after 1945. Second, in contrast to the widespread but wrong opinion according to which the European construction had an economic dimension, its political character manifested during parliamentary debates. During his speech at the Senate in 1952, De Gasperi unequivocally affirmed that 'in Europe, we build a coalition of democracies founded on the principle of liberty'. These were not just the words of official speech. Indeed, when Spain first applied for membership in the EEC, it was rejected precisely because it did not meet the standards of liberal democracies.

Over the following two decades, Europe's choice, initially promoted by the *élite*, received growing popular support. The left-wing parties' initial hostility towards

4 La Pergola and Del Duca, 1985, p. 598.

5 See Monnet, 1976. For a different interpretation, Milward, 1991 (for whom the European construction was instrumentally used to rescue the nation-State).

6 See Serra, 1989. On the role played by De Gasperi, see La Pergola, 1994, p. 260 (arguing, however, that De Gasperi had an instrumental approach, because he viewed Italy's participation in European institutions as a kind of insurance against the danger of domestic instability).

the communities faded.[7] The public has consistently endorsed Italy's active role in constructing an integrated Europe. Opinion surveys showed that the project of integration—the 'ever closer union between European peoples'—found more support in Italy than in the other Member States. It also obtained support from the Constitutional Court after its initial reluctance.

2.3. Judicial doctrines: separation

For a better understanding of the changing judicial policies, it can be helpful to pause a little to shed light on the conflicting views about the status of EEC law.

Since *Van Gend*, the case in which the European Court of Justice affirmed the principle of the direct effect of the Treaty of Rome,[8] the court's judicial policy has been characterised by a sophisticated conception of monism.[9] In other words, the legal systems of the Member States and the European Community (EC) were not regarded as being separate, in contrast with traditional 'dualist' theories of international law.[10] In 1964, the Italian Constitutional Court (ICC) recognised that Article 11 of the Italian Constitution authorised the state to limit its sovereignty. However, this opinion diverged from that of the European Court of Justice (ECJ) in *Costa v. ENEL*.[11] It refused to consider EC law as 'higher' than national law. This was manifested in its argument based on the traditional *lex posterior* criterion, according to which subsequent national legislation prevailed over previous EEC norms (the Treaty of the Roma). The assumption on which this argument was based was that there was no primacy in EEC law.

Ten years later, in 1973 in *Frontini*, the ICC refused the logic of monism embraced by the European Court. This supported the traditional criterion according to which *lex posterior derogat priori*. Consequently, ordinary courts (civil, administrative, and criminal) could enforce EC law against subsequent and conflicting national legislation only after the ICC itself had authorised them to do so on a case-by-case basis.[12]

2.4. Judicial doctrines: integration

A discontinuity occurred more than 10 years later in *Granital* when the ICC accepted that the EC law could be directly applicable without its prior judgement. However, the ICC did not implicitly ground this shift in monism in the ECJ approach. It maintained a dualist perspective, affirming that the EC and national legal orders,

7 La Pergola, 1994, p. 264.
8 ECJ, Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963).
9 Cannizzaro, 2012, p. 58.
10 For further analysis, Gaja, 1992, p. 123.
11 ICC, judgement n. 14/1964, [1964] CMLR, p. 425. On the European side, see ECJ, judgement of 15 July 1964, case 6/64, *Costa v. ENEL*.
12 ICC, judgement n. 183/1973, *Frontini* [1974] CMLR, p. 372.

although still distinct, were coordinated.[13] Extrajudicially, the former President of the ICC observed the following:

> The Constitutional Court progressed beyond its intermediate stance by accepting a view of supremacy that an American constitutional lawyer might find similar to that embodied in the supremacy clause of Article VI of the United States Constitution…. The 1984 decision takes the autonomy language of the 1975 decision and carries it to its logical conclusion. Italy's adherence to the European Communities through Article 11 of the Italian Constitution makes Community law applicable in Italy as the law of an autonomous legal order. This Article 11 acceptance of Community law therefore requires that ordinary courts determine whether Community law covers the subject matter dealt with by subsequent internal law. If it does, the Community law takes precedence over the internal law without regard to whether the internal law was adopted before or after the Community law.[14]

In brief, with *Granital*, the ICC accepted the primacy of EEC law over national law and examined it from the perspective of the decentralised system of constitutionality established in Italy. However, there is an important exception. The Court has reserved the power to assess the conformity of community norms with the fundamental principles of the constitutional order and the inalienable rights of human beings.

In 1984, the ICC accepted the concept of supremacy. However, as previously argued, the ICC did not repudiate its dualist approach. Consequently, the Court left the Italian Constitution without any protection against the excessive ambitions of EC institutions. Indeed, such protection was re-affirmed only for a sort of '*noyeau dur*', including fundamental human rights and the 'supreme' principles of our constitutional order, the so-called 'counter-limits'. Although no list of the latter exists, if there was a shift in the case law of the ICC choice, it was not from denial of supremacy to its full and unlimited acceptance. The ICC chooses supremacy under certain conditions and limits.[15]

This judicial policy was confirmed a few years later by another judgement (No. 389/1989), rendered by the ICC. Initially, the Court reiterated what it had affirmed in 1984. It then made a further step, holding that the Community legal order and the national one were 'reciprocally autonomous, but co-ordinated and communicating'. Consequently, self-executing EC norms had direct effects on the national legal order, and both judges and public administrations were required to disapply national rules contrasting with them.[16]

13 ICC, judgement n. 170/1984, *Granital* [1984] CMLR, p. 331. For further analysis, see Cartabia, 1990, p. 173.

14 See La Pergola and Del Duca, 1985, p. 613–614.

15 See Cartabia and Weiler, 2000, p. 128.

16 ICC, judgement n. 389/1989, § 4. For further remarks, see Cartabia, 1990, p. 191 (noting, however, the tension between the Court's doctrine and the results it achieved).

In summary, the 'European' jurisprudence of the ICC has had a gradual and incremental character. It began with the rejection of the supremacy of EC law on the grounds that the two legal orders were separated. Subsequently, it shifted to recognising that these legal orders were coordinated. Eventually, the doctrine emphasises that the relationship between them must be stressed. A clear development is inevitable because the legal order of the EC/EU itself has constantly evolved.

2.5. Constitutionalising of the choice for Europe

Thus far, we have seen that political leaders made the fundamental, and at that time controversial, decision to join the European Communities based on Article 11 of the Constitution, although it did not refer directly to Europe, and that the ICC backed this choice of constitutional basis and gradually accepted both the doctrines of direct effect and the supremacy of EC law, though not without conditions and limits. However, the adequacy of this constitutional basis was increasingly controversial because the scope of application of EC law steadily increased and it had a greater impact on national law in areas such as agriculture, industrial policy, and public procurement. It was contested, *a fortiori*, that the competencies of the EC were further expanded by the Treaty of Maastricht. This brought to the fore the extent to which 'Europe' was regarded as a domestic policy issue and raised the issue of whether State sovereignty could favour European integration.

In other countries such as France, Portugal, and Spain, for the first time after many years, political and social forces engaged in a national discussion on the benefits of European integration. Ratification processes, necessary for the new treaty to enter into force, allowed institutions to consider and resolve several issues concerning two central concepts of public law, sovereignty. and citizenship, in light of the norms establishing the European Monetary Union (EMU) and citizenship of the EU. The French case is particularly significant in this respect because the President of the Republic referred the Maastricht Treaty to the Constitutional Council which, for the first time, affirmed that the Constitution was an obstacle to the ratification of an international agreement. The obstacle was the provision of the preamble to the 1946 Constitution (incorporated by the 1958 preamble), according to which *'France may consent to limitations of sovereignty necessary for the organization and defense of the peace'.* Therefore, the French provisions are very similar to Article 11 of the Italian Constitution. Political institutions deemed that the decision taken by the Constitutional Council could be implemented by way of a minimal revision of the Constitution and, thus, added a new provision authorising the *'transfers of competence necessary for the establishment of the EMU'* and another concerning citizens. However, after the Danish referendum, the decision was made to hold a referendum in France.[17]

17 Stone, 1993, p. 70.

Things went differently in Italy; notwithstanding the requests for a referendum allowing people to express their views about European integration, the usual ratification procedure was used based on parliamentary approval. However, the Maastricht Treaty, with the complex structure of the EU and technical content concerning monetary policy and government budgets, did not receive much attention from most leading politicians, let alone the electorate. While the latter was generally, if not generically, for 'Europe', a new party, the Northern League, was very skeptical, an aspect to which we will return in the final part of this study.

Meanwhile, it must be said that a constitutional theory that seeks to accommodate the principles of national sovereignty with the realities of European integration and its new structures and processes remains to be constructed. This task was fulfilled, in part, during the following century in two stages. The first was the 2001 constitutional reform. The second stage was the constitutional reform that took place in 2012 after the economic and financial crisis that hit Europe.

The 2001 constitutional reform concerned the relationship between the central government and regional and local authorities. When such a relationship was transformed, with an unprecedented reinforcement of the regions' legislative powers, it was thought that it was necessary to clarify that not only national legislation but also regional legislation had to respect EU law. Article 117 of the Constitution was amended by a provision according to which any piece of legislation adopted by the state and regions must respect the Constitution, the legal order of the community, and international agreements. There has been much discussion in academic circles as to whether such a provision simply confirmed the limits stemming from these three types of legal sources or intended to establish a hierarchy between them. Although the debate has not ended, at least two aspects are clear. First, it supplements Article 117 to ensure an adequate constitutional foundation for European integration. Second, it is clear that according to the ICC, only EU law has direct effects and supremacy on national law, with the consequence that administrative and ordinary judges do not apply national provisions, while their contrast with the ECHR must be judged by the ICC itself. Some years after the reform, not only has the ICC confirmed that Article 11 still ensures a *'secure foundation'* to the law of the EU but also it has affirmed that the new text of Article 117 deals with only one of the several aspects raised by the relationship between the EU and the national legal order,[18] thus emphasising continuity.

For a better understanding of other constitutional reforms, some words should be said about the EMU and the crisis that emerged in 2009. When the Treaty of Maastricht was negotiated, its supporters emphasised the benefits of a single currency (e.g. it would serve to dilute the influence of the German central bank) and enhance monetary stability. As these issues are highly technical in nature, they have received scant attention from the public. Article 11 of the Constitution, seen in conjunction with another clause protecting 'saving in all its forms' (Article 47), was regarded as

18 ICC, judgement n. 220/2010, § 7 (all the Court's judgements are now available on the website: www.cortecostitutionale.it; in some cases, an English translation is also provided).

an adequate basis for the transfer of monetary policy to the EU. Things were very different 20 years later when the European debt crisis burst out. Although Italy was not one of the countries that could not refine their government debt and needed external support, the reiteration of financial orthodoxy by EU institutions and the conditions imposed on Greece, which were perceived as socially harsh and unjust, induced a split between the traditional parties and the parties and movements that openly criticised the EU, this time backed by some economists, lawyers, and political scientists.[19] The parliamentary majority supported all measures taken at the European level, including the creation of the European Stability Mechanism and the stipulation of the Fiscal Compact. It also supported constitutional reform. However, political opposition to the EMU grew to an unprecedented level, explaining the partial shift in the country's strategy, which will be discussed in the next section.

Meanwhile, it is appropriate to illustrate new constitutional reforms. This notion concerns various aspects of public budgeting. Article 81 of the Constitution concerning the state budget was amended in two ways: a controversial balanced budget provision was introduced, and recourse to borrowing was limited, coherent with the prohibition of excessive government deficits.[20] Article 97 was also amended by a new provision establishing that public administrations must ensure that their budgets are balanced and that public debt is sustainable *'in accordance with European Union law'*. Finally, under Article 119 (1), the obligation to have balanced budgets was imposed on regional and local authorities, with a view to *'ensuring compliance with the economic and financial constraints imposed under European Union legislation'*. Moreover, under Article 119 (7), such public authorities may have recourse to borrow only as a means of funding investments, excluding current expenditures. The first two provisions are not without challenges because the notion of the budget cycle used by Article 81 is unclear, and the notion of debt sustainability laid down by Article 97 is somewhat enigmatic. Therefore, it is challenging to understand whether and how those provisions can be enforced. However, considered as a whole, the new constitutional provisions had two goals: repeating, for emphasis or clarity, Italy's adhesion to the principles upon which the EMU is based and obtaining acceptance of public debt by the financial markets.

Retrospectively, both goals have been achieved, but not without costs. The tighter limits imposed on government budgets and public debt are, to say the least, *'not welcome in the political arena'* because they limit the political options for those who govern.[21] Moreover, they are viewed by the discontents as a sort of Trojan horse for further limitations of sovereignty, which would imply huge economic and social costs.

19 An interesting example is Giandomenico Majone, a political scientist who had previously analysed the regulatory strategy of the EU: see his book *Rethinking the Union of Europe Post-Crisis. Has Integration Gone Too Far?*, Cambridge, Cambridge University Press, 2014.

20 For further analysis, see Giarda, 2018, p. 335.

21 Giarda, 2018, p. 346.

2.6. Judicial cooperation

A final essential fact that is legally relevant concerns judicial attitudes towards European integration. Notably, the Italian judicial system is not monist. By contrast, it is pluralistic for three reasons. First, there is no established rule for precedents. Consequently, lower courts are not formally bound by the rulings adopted by higher courts, even though they generally respect them. Second, Italy has a dualist system of judicial review with ordinary judges (at the top of which is the Court of Cassation) and specialist administrative courts, including the Council of State and the Court of Auditors. Third, the Court has become a key institutional actor. Within this pluralistic judicial system, divergent interpretations are not infrequent, and conflicts are not rare, especially between the Council of State and the Court of Cassation. All these judges, moreover, cooperate with the ECJ through the mechanism that has been called the *'jewel of the Crown';* that is, the preliminary reference mechanism.[22]

This procedural device was strategic in several ways. Under Article 267 of the Treaty on the Functioning of the European Union (TFEU), the lower courts can send preliminary references to the ECJ, whereas the highest jurisdictions are required to do so. This situation furnishes the ECJ with nearly two-thirds of all legal questions it must address. It allows the ECJ to involve national courts in the enforcement of EU law to ensure that such laws are applied uniformly. Consequently, it uses the legitimacy and competence of national courts. Regardless of the constitutional status of international or supranational rulings, national governments and parliaments feel incomparably more bound by the rulings of their courts.[23] Moreover, a preliminary ruling may give a lower court a better chance to promote adjustments in legal interpretation, which is impeded by a higher court.

As regards Italian courts, since the 1980s, the judicial dialogue between the ECJ and administrative and ordinary courts has gradually intensified. The quantitative and qualitative aspects deserve mention. Quantitatively, during the 1953–2015 period, French judges sent 931 preliminary references to the ECJ, of which 118 came from the *Cour de Cassation,* and 99 from the *Conseil d'Etat*. Italian judges sent 1,326 preliminary references, of which 132 came from the Court of Cassation, and 126 from the Council of State.[24] In sum, there was a greater propensity for Italian judges to use this mechanism and, comparatively, Italian administrative judges were more inclined to do so than ordinary judges given the latter's wider area of competence. Qualitatively, there is virtually no salient legal question, from public procurement to criminal law, in which national judges refrain from using preliminary reference procedures, thus making the ECJ an alternative source of authority to the ICC.

22 Craig, 2007, p. 285.

23 See Stone Sweet, 2004, p. 15.

24 ECJ, *Judicial statistics 1953-2015* (2015), 97-102. For further remarks, see della Cananea, 2016, p. 101.

This last remark may explain another shift in the ICC's judicial policies. It involved using the preliminary reference mechanism. The ICC has never considered itself as a 'court' in the meaning of Article 267 TFEU for several reasons: structurally, only one-third of its members are professional judges, while two-thirds are appointed by political institutions, the President of the Republic and Parliament; functionally, its main power is not to adjudicate disputes between individuals or between individuals and public authorities but to check the constitutionality of legislation. Moreover, as with other national constitutional courts, the ICC was reluctant to send preliminary references to the ECJ. Affirming that a constitutional court does not seek a preliminary ruling raises the question of whether this is a matter of law or policy. From a legal perspective, there is no insuperable obstacle to admitting that a constitutional court may be regarded as a court of last resort. This was confirmed when the ICC first sought a preliminary rule from the ECJ.[25] It suggests that sending references is a matter of policy.

When the ICC decided to seek a preliminary ruling, it specified that this could be done because there was a dispute between two public authorities; that is, the State and Region enjoying a special status, Sardinia. Therefore, according to the ICC, the necessity to seek preliminary rulings arises only regarding inter-institutional disputes (*giudizi in via di azione*); that is, those that arise either between the state and the regions or between the latter.[26] The second case concerned the complex interaction between the norms aimed at protecting the finances of the EU and domestic rules concerning the duration of criminal proceedings. Notwithstanding the strong perplexity raised by the Court of Cassation, backed by some prominent constitutional lawyers, about the risk that a national tradition would be infringed, the ICC chose to continue its 'dialogue' with the ECJ, and its choice furnished an adequate solution.[27] In other words, it chose dialogue instead of standing up as the last defence against national identity.

The third step involves the right to be silent within administrative procedures managed by the financial markets' regulatory authority: CONSOB. This required a slight digression. In US public law, the leading case is *Miranda*, decided by the Supreme Court almost 60 years ago. This case addressed several questions involving custodial interrogations without the presence of an attorney. In the Italian Constitution, the provision concerning due process in criminal trials (Article 111) can be, and has been, interpreted in two opposite ways. For some, this is the norm in

25 ICC, order n. 104/2008. For further details, see della Cananea, 2008, p. 523. See also Fontanelli and Martinico, 2010, p. 346 (arguing that 'this decision represents a veritable shift from the procedural impermeability between constitutional procedural law and EC law').

26 See Cartabia, 2009, p. 5.

27 On the issues involved with the *Taricco II* saga, there is a burgeoning literature, which is not always perspicuous. The final word has been said by the ECJ in its ruling on Case C-42/17, *MAS*, where it disagreed with the opinion issued by AG Bot, and by the ICC in its ruling n. 115/2018. For an analysis of the behaviour of some constitutional courts that affirm their role of ultimate defenders of national identities, see Guastaferro, 2012, p. 263.

criminal trials. For others, this norm was a manifestation of a broader principle of procedural fairness. The ICC has raised doubts about whether the former interpretation is compatible with Article 6 of the ECHR as interpreted by the European Court of Human Rights in *Chambaz*.[28] In a well-written preliminary reference (Order no. 117 of 2019), it urged the ECJ to resolve this doubt in the case of an insider dealing offence. AG Pikamae has consistently argued that a solution must be found in light of the distinction between natural and legal persons in that the former may invoke the right to remain silent.[29] The Court has followed the AGs' opinion. It examined the provisions of the EU legislation in light of Articles 47 and 48 of the Charter of Fundamental Rights of the EU. It has also referred to Article 6 of the ECHR on the assumption that even though the Convention has not been formally incorporated into the EU legal order, the fundamental rights it recognises and protects constitute the general principles of EU law.[30] Once the Court has held that Articles 47 and 48 included the right to silence of the natural persons who are charged, it follows that punitive penalties could not be legally imposed. As the Court has clarified, natural persons cannot be penalised if they exercise the right to remain silent.[31]

2.7. European law v. international law

Thus far, our legal and empirical analysis has shown that:

i) The choice of Europe was, together with NATO membership, a fundamental political decision after 1945.

ii) After the initial reluctance of the ICC to recognise the principles of direct effect and supremacy, there has been a significant development in its jurisprudence.

iii) Political institutions strengthened their ties with the EU in 2001 and 2012. Therefore, even though there is no clause like the *Europa-artikel* of the German Basic Law, there is increasing integration between the national legal order and that of the EU. The importance of this development can be better understood by examining the different states of things which concern international law after the controversial judgement issued by the ICC in the German liability case.

Before examining this case, it may be helpful to briefly consider the foundations of the present law and the options at our disposal when considering judicial remedies against States. All legal systems must make fundamental choices about justiciability in actions involving the state and its officers. Within the national system of public law, an option that is used diminishingly is to have a general cloak of immunity. The

28 ECtHR, judgement of 5 April 2012, *Chambaz v. Switzerland* (application n. 116603/04).
29 Opinion of AG Pikamae, delivered on 27 October 2020, Case C-481/19, *DB v Consob*.
30 ECJ, judgement of 2 February 2021, Case C-481/19, *DB v Consob*, § 36.
31 ECJ, judgement of 2 February 2021, Case C-481/19, *DB v Consob*, § 58.

opposite option is the acceptance of a general principle of justiciability, though the courts act as gatekeepers and, thus, allow remedies for state action affecting certain interests but not for others. However, from the viewpoint of international law, States enjoy immunity from suits before domestic courts.[32]

This privilege was at the heart of the complex dispute that arose at the beginning of the twenty-first century. In short, some individuals brought claims against Germany before ordinary Italian courts, seeking reparations for injuries caused by violations of international humanitarian law committed by German occupying forces during the Second World War, including those against Italian nationals. Germany instituted proceedings against Italy, requesting that the ICJ declare that it had failed to respect the jurisdictional immunity it enjoyed. Greece requested permission to intervene. The ICJ has endorsed this claim. However, the Court eventually found that Italy had violated Germany's immunity by declaring the civil judgements rendered by the courts enforceable,[33] although three judges dissented from the majority: Cançado Trindade, Yusuf, and Gaja (ad hoc judges sitting in this case).

Two years later, domestic courts reconsidered this immunity in light of the constitutional guarantee of access to a court.[34] The starting point was that such guarantees were absolute and could not be derogated. While the ICJ focused on jurisdictional liability, the ICC focused on another issue: the conflict between the norm of international custom, as interpreted by the ICJ, and the norms and principles of the Italian Constitution; more precisely the 'essential principles of the state order', including the principles of protection of fundamental human rights. The threshold thus set out is high because the ICC has reiterated its general doctrine of '*controlimiti*' (counter-limits) to the limitations of national sovereignty stemming not only from generally recognised norms of international law but also from EU law and the treaties agreed with the Holy Seat. The conclusion that follows from this doctrine is that if a fundamental right is infringed, its role is to ensure protection regardless of the consequences.[35] In practical terms, the national constitution trumps international law.[36] While the judges of the ICJ could, and did, express their dissent, this could not be done by the members of the ICC because the domestic constitutional framework does not provide dissenting opinions. However, the ICC was divided. A former member of the Court has subsequently said that he was even ready to resign from the Court to avoid being associated with a 'terrible decision', a form of 'legal protectionism'.[37] It is questionable whether the ICC has failed to give weight not only to international customary norms but also to the role of the ICJ in ensuring

32 Peters, Lagrange, Oeter and Tomuschat, 2015.

33 ICJ, judgement of 3 February 2012, *Jurisdictional immunities of the State* (*Germany v. Italy*; Greece intervening), § 100.

34 Art. 24 of the Italian Constitution.

35 ICC, judgement n. 238 of 2013. available in English on the Court's website: https://www.cortecostituzionale.it/ documenti/download/doc/recent_judgments/S238_2013_en.pdf.

36 Tomuschat, 2014, p. 189.

37 Stone Sweet and della Cananea, 2022, p. 1538.

that disputes among nations are resolved peacefully. This is even more questionable because it takes for granted that when Article 24 of the Italian Constitution refers to access to courts for the protection of individual rights, it only refers to domestic courts as distinct from international courts. The issue that arises is whether the ICC has deemed that the status of international law can be considered distinct from the status of EU law in light of its increasing political and legal importance, which is confirmed by the two recent reforms of the Constitution. This issue will be discussed in the following section.

3. Interpretations

While the previous section illustrated the main facts that are relevant and significant from a public law perspective, this section discusses their interpretations. The structure of this argument is as follows. It begins with the distinction between facts and interpretations. This is followed by an analysis of three interpretations that are not only distinct but also mutually exclusive in that each excludes or precludes the other. The first is the most authoritative interpretation, according to which, after seven decades of European integration, the Italian State is no longer what it was initially. The opposite interpretation emphasises the traditional concept of sovereignty. Another interpretation is based on the distinction between the *acquis communautaire* and new policies.

3.1. Facts and interpretations

This section is based on two premises that must be fully delineated for clarity. The first is a general distinction between facts and interpretations. The second premise relates to the development of the former from a public law perspective.

Generally, the first distinction is relatively easy to understand. Put simply, facts concern what happened and can be proven to be effective or real. Whether a certain constitutional provision exists is a matter of fact, not opinion. Thus, for example, when Victorian constitutionalist Albert Venn Dicey criticised the French *droit administrative* on the grounds that a certain constitutional provision excluded the liability of the servants of the state, he referred to a provision that no longer existed. Generally, an interpretation or opinion that is not based on facts or even prescinds from them is less likely to be considered by the participants in a discussion. That said, a statement about a fact is not only examined to ascertain whether it refers to something that is true.[38] Its importance and relevance should be considered in future

38 For an excellent analysis of this issue of method, see Loughlin, 1994, p. 50 (suggesting that, as knowledge is relational, truth or falsity may not be determined outside the social context).

studies. In other words, facts do not exist simply because we must ascribe meaning to them. Therefore, the importance of context must not be neglected.[39]

From the perspective of public law, a further caveat is apposite. The relevance and significance of all elements of fact are partly determined by essentially contested concepts;[40] that is, concepts involving widespread agreements, such as democracy and fairness. The EU Treaties provide an example. According to Article 4 of the TEU, the Union is founded on the values of democracy, liberty, respect for the rule of law, and fundamental rights. Arguably, a positive norm is insufficient to determine the content of concepts such as democracy and the rule of law and their meaning is functionally related to the practice in which these values are sustained. Not surprisingly, there are various opinions on what these values mean, and those of the new members of the EU may differ from the opinions of the founders.[41] However, this argument is valid for multiple reasons. First, even before the Maastricht Treaty, there was a shared understanding among the founders of the Community in that only liberal democracies could become part of it. Second, because Article 4 existed before the more recent enlargement, the agreement that then existed about certain ramifications of those values, such as judicial independence, cannot be neglected. Third, Article 4 does not simply note that these values are shared by the Member States but also requires the latter to respect them.[42] This notion is confirmed by Article 7 TEU. In this sense, the soundness of an interpretative proposition concerning the values upon which a union is founded must necessarily consider facts and uses.

3.2. A new type of State

As observed initially, the first interpretation argues that, if we consider not only the potentiality created by the Constitution of 1948, in particular the acceptance of 'limitations to sovereignty' established by Article 11, but also the facts that followed, a new type of State has emerged, which can be called the 'communitarized' State because it is involved in a process of integration. To better understand this school of thought, which is widely shared among public lawyers, a slight digression is necessary regarding the concepts of sovereignty and integration.

The concept of sovereignty embodied in the Italian Constitution, so the argument goes, is no longer that elaborated upon by Bodin and Hobbes at the birth of the modern state, taken for granted by the realist school of international relations. Indeed, in Bodin, there are two distinct conceptions of sovereignty: one is analytical because it distinguishes the various sovereign powers (including making laws, declaring war, and appointing the highest magistrates), and the other is synthetic because it views

39 Loughlin, 1994, p. 50.

40 Gallie, 1955, p. 167.

41 For further discussion, see von Bogdandy, 2021, p. 73. For a different approach, which views the enforcement of values as a political task, rather than legal, and, thus, calls for dialogue, see Mader, 2019, p. 133.

42 See Mangiameli, 2017, p. 198 (discussing the 'homogeneity clause').

sovereignty as a totality.[43] However, in Hobbes, the latter conception predominates. In line with this conception, many realists have argued that, from the perspective of international law, what matters is whether internationally agreed norms are enforceable through sanctions or military threats. In contrast to this established school of thought, Chayes and others have argued that in the modern world, sanctions and military threats are extraordinary measures. Most of the time, states comply with the norms they have agreed to simply because, in a complex and interdependent world, the normal way to exercise power is to be members of regional or global legal regimes and influence their decisions. Within such regimes, compliance is assured by other means, including incentives, pressure, and judicial or quasi-judicial mechanisms.[44] This managerial and pragmatic approach explains much of the world in which we live. Article 11 of the Italian Constitution fits this conceptual framework perfectly. As observed earlier, at its roots, there is the idea that 'a shared sovereignty is not only conceivable and admissible but also necessary in light of the goals—peace and justice among the peoples of the world—that the State, no State alone, could achieve'. Membership in international organisations is, thus, the only legitimate way to pursue constitutional purposes.

This general argument is further specified regarding Europe through the concept of integration used by judicial decisions and academic writing. The core of the ECJ's argument in *Van Gend en Loos* has two limbs. The first is that 'the Community constitutes a new legal order of international law, for the benefit of which the states have limited their sovereign rights, albeit within limited fields', which confirms that sovereignty can, and has been, limited. The second limb of the argument is that community institutions are 'endowed with sovereign rights' that affect both Member States and individuals. The underlying idea is, thus, that sovereign powers are no longer exercised by each State individually but are 'transferred' to the Union and, thus, exercised jointly.

There is a rich literature that explores the rationale for EU integration and contending theories, including neofunctionalism, intergovernmentalism, and multi-level governance. In the Italian context, both the first and last theories gained consensus. The central tenet of neofunctionalism, the concept of spillover, that is, the idea that integration in one area creates pressures for integration in other areas, has been appealing to political leaders seeking to explain why communities would secure peace and prosperity, both of paramount importance for a country that adopted a constitution that refused war as an instrument to solve disputes (Article 11) and that literally had to be reconstructed after 1945. Moreover, it has appealed to both policymakers and scholars seeking to explain why the single market is supplemented by common policies, including a single currency. Multi-level governance, with its emphasis on the existence of multiple levels—subnational, national and supranational—of government, where authority and policymaking are shared, and, thus, on interconnection rather than hierarchy, is also appealing to policymakers seeking

43 Bodin, 1576.
44 Chayes and Chayes, 1995, p. 1.

to achieve goals that would be precluded without joint action (e.g. the protection of the environment or trade agreements with the most powerful States) or to alleviate the costs of unpopular decisions[45] in the logic *'Europe requires us to do so'*. It has an undeniable appeal for constitutional lawyers who wish to shed light on the role that subnational institutions can play and on judicial dialogue.[46]

Considered together, shared sovereignty and European integration support the theory of state, which emphasises the dimension of change. Simultaneously, the Republican Constitution is regarded as a key element of discontinuity regarding the previous political regime and as the source of a new order, where might and power are limited by democracy and law. The emphasis put on the limitations of sovereignty explains the diffusion of the idea of 'external bounds'. These three examples can be instructive. State aid to enterprises, a traditional instrument of administrative action is not prohibited by the treaties but is legitimate only if it does not jeopardise competition, and it is preferable that monitoring and surveillance are discharged by a supranational institution, the Commission. Similarly, the prohibition of excessive government deficits is viewed as an instrument aimed at preventing government failure, distinct from market failures, which are cured by public regulation. The fact that the national constitution now requires public authorities not to run excessive deficits and ensure debt sustainability confirms that these limits must not be viewed as external impositions but rather as requisites of sound governance. Discretion is not excluded but is limited by technical considerations and subject to impartial controls, particularly by judges.

In contrast to the popular understanding of democracy and input legitimacy, this school of thought emphasises output legitimacy and the rule of law. It advocates political deference to bureaucratic expertise, judicial wisdom, and external bounds derived from the membership of regional organisations as features of the modern state. It argues that a new type of state has emerged, one that is involved in evolving integration; that is, a state that has renounced full and indivisible sovereignty.[47]

3.3. Defence of national identity and democracy

What has just been said about the first school of thought can help understand the other, although this cannot be viewed as the opposite view. Its main concerns are the preservation of national identity and the defence of democracy in the only area where it has flourished historically: the state. At the outset, however, these concerns are not simply distinct but are also emphasised in the context of different visions of public law and the state. Therefore, they require autonomous treatments.

45 Craig, 2011, p. 16. See also Weiler, 2011, for a discussion of the legal culture of European integration.

46 See, for example, Tega, 2021. For a critique of 'multilevel constitutionalism', see della Cananea, 2010, p. 284.

47 Cassese, 2012, p. 81; Manzella, 2003, now in *Quaderno europeo. Dall'euro all'eurocrisi*, Venice, Marsilio, 2005

After the Treaty of Maastricht, several national politicians and scholars highlighted the Union's duty to respect Member States' *'national identities, inherent in their fundamental structures, political and constitutional'* (Article 4 (1) TEU).[48] However, in Italy, few studies have referred to national identity in connection with the organicist vision of the social body. Instead, several constitutional lawyers have expressed concerns about the threats to individual rights and equality. The core of the argument rests on the uniqueness of the Italian Constitution's framework for civil and social rights, including those related to health and social security. There is no particular role in this list for elements such as individual freedom, adherence to the rule of law and government transparency. These considerations, central to the liberal view of the state, are viewed formalistically. Hence, there is a radical critique of the limitations that stem from membership in the EMU, such as the prohibition of excessive government deficits and the primary concern for monetary stability. The negative consequences that follow from these 'neo-liberal' policy choices are said to affect workers and the protection of health. Some commentators criticised the asymmetry between the economic and social as follows:

> Past experience has taught us that muddling through under the existing treaties works only at the expense of the democratic and social constitution. Past and present experience also shows the necessity of using macroeconomic instruments that are part of the social democratic tradition, and which EU rules constrain or foreclose. If those are now required, there are only two ways to harness them: either by aligning EMU to democratic and social ends or by unravelling it in a coordinated fashion to restore democratic and social constitutionalism at the national level.[49]

Concerns for democracy, another pillar of these theories, are expressed in several ways. While the founders of the EC saw it as a club of liberal democracies that was the best way to secure peace and prosperity and legitimacy was thus conceived in terms of outcomes, these commentators assert that the notion of democracy was attenuated or limited. Democracy is directed towards a deficit that exists within the EU. While other scholars identify the democratic deficit in the 'disjunction between power and electoral accountability' and express concern as to 'executive dominance',[50] these commentators explicitly address the tension between the technocratic nature of the EU and its legitimacy. Their main thrust is a mixture of bureaucratic overreach and lack of transparency and accountability, which shifts the union away from the perspective of democratic constitutionalism.[51] The differences between the first and second schools of thought are profound and can have diverse consequences.

48 See von Bogdandy and Schill, 2011, p. 1. (suggesting that the identity clause reshapes the relationship between the Union and its States).

49 Dani, et al., 2021, p. 309.

50 See, however, Moravcsik's defence of the EU from the charge of democratic deficit: Moravcsik, 2002, p. 603.

51 For further analysis, see Chiti and Teixeira, 2013, p. 683.

A detailed analysis requires an extended chapter. What follows is an outline of some issues, some of which are more abstract, while others are very concrete.

First, consider what is crucial from the perspective of constitutional law and legal theory; that is, the conception of sovereignty. The phrase 'limitations of sovereignty', employed by Article 11 of the Constitution, can be interpreted in the sense that it allows for the transfer of functions and powers to the EU. However, this notion can be interpreted in a radically different manner in that EU institutions can only be allowed to exercise functions and powers that still belong to the state. The underlying assumption of the latter interpretation is that sovereignty is inalienable, similar to the argument used in France in the referendum on the Treaty of Maastricht. The consequence is that sovereignty, traditionally intended, has not withered away but is still at the heart of the constitutional settlement. Thus, supporters of this theory concede that the powers related to monetary policy are exercised by the ECB *de jure*, not *de facto*; therefore, the acts of the ECB constitute binding determinations of matters that come within their remit. However, they argue that these powers can legally be returned to the state to which they belong. This interpretation can be appealing theoretically but is not immune to practical challenges. There is nothing to indicate that these powers can be returned to the state if they wish to remain in the EMU. Therefore, the only possible option is to withdraw from the EU. Legally, this is not a threat but an inevitable consequence.[52]

Now, consider the ratification of the EC/EU treaties. For almost three-quarters of the century, the legitimacy of the EC/EU was based on the mechanisms of representative democracy. Thus, governmental negotiations must be followed by the parliamentary ratification of treaties. The Parliament always ratified treaties and, thus, sanctioned the transfer of functions and powers to Europe. However, the discontents argue that this method is acceptable only from the viewpoint of 'formal' legality. What is lacking, for them, is a 'substantive' legitimacy, because the people should be allowed to express their voice through a referendum, as happened in France and the UK. This theory is even more problematic than the previous one because Article 75 of the Italian Constitution explicitly prohibits a referendum concerning international treaties, such as those upon which the EU is founded.[53] This discontent replies that nothing prohibits a consultative referendum. In this case, there was a precedent: the consultative referendum held in 1989 on a project to give a constituent mandate to the European Parliament. However, there is nothing to suggest that a mechanism not provided for by the Constitution can be converted into something that the Constitution explicitly prohibits. Nor is it easy to see how Article 75 could be amended because the very first clause of the Constitution provides that *'sovereignty belongs to the people, which exercises with the forms and limits established by the Constitution'*. In other words, the choice of representative democracy cannot be ignored.

52 See Chiti and Teixeira, 2013, p. 707. (criticising the 'politics of fear').
53 For further discussion, see Martinelli, 2022, p. 1555.

This may explain why some constitutional lawyers recently posed a provocative challenge to the ICC's established jurisprudence. As observed earlier, this jurisprudence has recognised the increasing integration between the national legal order and that of the EU. Critics contend that the Court should not hesitate to acknowledge the existence of a conflict between EU policies and the rights protected by the Constitution, which are said to be part of the national identity in the sense of Article 4 (1) TFEU. In light of the settled case law of the ICC, it is perfectly legitimate for constitutional lawyers to pose search questions concerning the legitimacy of obligations that stem from EU membership. Moreover, it should not be forgotten that a similar line of reasoning was used by the ICC in the German liability case, with the consequence that the national constitution, as interpreted by the ICC, trumped international law. It is by the same token perfectly fitting to subject this analysis to close critical scrutiny, for example, by raising the issue concerning liability, because within the EU, there is a centralised system of enforcement, which is based on the Commission and the ECJ, as opposed to the international system. This is especially so given that most of the cases in which the discontents complain about limitations imposed on social rights derive from national constitutional provisions, such as those concerning financial balance and debt sustainability. This also applies to a variant of the previous argument; that is, some decisions taken by the EU institutions, such as the Stability and Growth Pact (SGP), have gone beyond the treaties and, consequently, unduly limit the exercise of power by national institutions.[54] There are excellent arguments criticising the choice made with the SGP on the grounds of policy. However, in light of Article 126 of the TFEU, which entrusts EU institutions with the power to modify the standards for national budgetary policies, it is challenging to see how the SGP can be regarded as extralegal. A distinct issue is whether Italy had to agree with the limitations of its budgetary or financial sovereignty. This issue will be discussed in the next section.

3.4. Acquis *v. further integration*

Thus far, we have discussed two groups of theories that concern European construction as it developed in the last seven decades or so; that is, the *acquis*. Thus, it is time to consider the perspective of further integration. For analytical purposes, two opposing visions of Europe were delineated. For our purposes, it suffices to characterise each of them briefly. There is, first, the vision that is centred on the idea, or perhaps the ideal, of an *'ever closer union among the peoples of Europe',* to borrow the famous words used by the Treaty of Rome's preamble. The other vision of Europe postulates a greatly enlarged union with less intense ties, a sort of 'club' where the members agree only on a few fundamental objectives and principles and do not necessarily wish to change the current state of things. The intent here is not to discuss these visions in their entirety, as such views have already been expressed

54 Guarino, 2013, p. 211. (went even further, asserting that a sort of 'golpe' took place).

elsewhere.[55] Rather, the intent is to show that the differences between these visions of Europe are so profound that their practical consequences differ depending on the framework within which they are considered.

This applies particularly to the financial mechanisms existing within and outside the EMU. In this respect, the first school of thought tends to assume that the criteria governing the conduct of monetary policy are based on the *'nature of the things'*. For others, bureaucratic experts and unrepresentative bodies, such as central banks, make decisions but are unaccountable. They criticise, *a fortiori*, the European Stability Mechanism (ESM), which is a body created by a separate international treaty that lies outside the institutional framework of the EU and exacerbates the problems of complexity and opacity. Diverse opinions characterise the debate concerning the ratification of the new treaty, which modifies ESM. Since Italy is the only Member State that has not yet ratified the treaty, it is important for the entire EMU. The remainder of this paper is organised as follows. First, economic arguments in favour of and against the new treaty are illustrated. Next, the study considers specific legal issues. Finally, it discusses the political ramifications of this debate.

Two main arguments support the ratification of the new treaty on the ESM. First, there is a general argument regarding banking unions. The heart of the argument is that the *'banking union remains incomplete, without its cross-border deposit insurance pillar supported by a credible fiscal backstop'*.[56] Thus, the EMU remains exposed to financial shocks that may threaten its systemic stability, with the further consequence of making bailouts necessary, in contrast to existing rules. It is readily apparent that the theory of integration that underlies this argument is neofunctionalism, with its strong emphasis on spillover; that is, the idea that integration in one area creates pressure for further integration in the same area or other areas and that this would secure prosperity in the guise of stability. It is even more evident when considering that the next step should be to support ESM through a public guarantee against sovereign default; that is, a Eurobond. This general argument is supplemented by another argument concerning Italy: its public debt is huge,[57] and the exposure of some national banks is non-negligible. Hence, preventing banking crises that may negatively affect sovereign debt is necessary. Overall, if ESM reform fits well with EMU members' needs, it does more so with Italy's needs.

The opposing theory contests both arguments. It contests the advantages that would derive from the reform of the treaty establishing the ESM because this would transform the ESM from a *'manager of sovereign debt into an institution for the prevention, control, and management of such crises'*.[58] More concretely, the ESM would be entrusted with the power to decide whether a country that takes part in the EMU and must seek external financial support should restructure its government debt.

55 See della Cananea, 2019, p. 45.
56 Micossi and Pierce, 2020, p. 1.
57 It is 'colossal', for Micossi and Pierce, 2020, p. 1.
58 Messori, 2019.

This risk is particularly serious for Italy, precisely in light of its high public debt, which would be exposed to heavy instability. In brief, *'the EMU Member State that has the most to lose is Italy'*.[59]

Economic science contributes to a better understanding of the advantages and disadvantages of a government when faced with difficult strategic decisions. In legal analysis, it is extremely difficult, if not impossible, to weigh the advantages and disadvantages of such decisions. However, in some respects, legal analysis may clarify the grounds for possible misunderstanding. This is the case of the proposition according to which, if the new treaty is ratified and the ESM is entrusted with new powers, thus making an agreement with an EMU country where certain conditions are included, those conditions may be unilaterally and retroactively modified by the ESM board against the will of the state concerned. In my view, this proposition is not legally or politically tenable. This is not legally tenable because unilateral and retroactive modifications of bilateral agreements are excluded. This is politically untenable because there is no reason why a board should have privileged status against a country that is a signatory to a treaty.

However, the political spectrum is more divided than ever before. The majority that supported the government led by Mario Draghi were so divided that they decided not to conclude a new ESM Treaty. The new government, based on a Eurosceptic majority, initially affirmed that it was necessary to wait until Germany's Constitutional Court adopted its ruling on the action brought against the ratification of the new treaty. This rule was adopted by the end of 2022. Giorgia Meloni's decision was two-fold. First, they must come to grips with the question concerning the entire EMU, that is, whether the new treaty must be ratified after which every country may decide whether to use the instruments that it provides. However, they must clarify whether they intend to avail loans under the new treaty conditions. Logically and legally, the two issues are clearly distinct, and the stakes concerning the former are higher than those regarding the latter because Italy might obstruct further integration for the first time. However, politically, the distinction tends to blur in the opinion of the political leaders according to whom approving the ESM changes would *'end our national sovereignty'*. Moreover, the government might be tempted to threaten not to initiate a ratification process to negotiate other dossiers, such as the SGP reform. This would be, in itself, a change because it would show the government's intent to operate to maximise its (perceived) individual interest regardless of the perspective of an ever-closer union between the peoples of Europe[60] and might run counter to the maintenance of Italy's political position in the core of the EU. As in Borges's 'garden of forking paths', cyclical repetition is not disjointed from differently spreading trajectories.[61]

59 Messori, 2019, p. 12.

60 For a discussion that catches well the assumptions upon which this vision of the EU is based, see Harlow, 1992, p. 331.

61 Borges, 1948.

4. Conclusion

There is no attempt to summarise the preceding arguments. Rather, it is helpful to highlight some analogies and differences between Italy, Germany, and France, the three founders of the EU. Similarly to France and Germany, Italy is a founding member of the EC and is now part of the Union. Like Germany and France, its membership has been based on the mechanisms of representative democracy, and its constitutional identity has been gradually shaped in close connection with the European construction. Unlike Germany, however, there is, for the first time, a parliamentary majority that is reluctant, if not openly hostile, to further integrate, at least in some areas. The role of legal scholarship is to raise adequate awareness of past choices, especially those enshrined in the Constitution, which can be changed only through prescribed forms and within certain limits and to be equally aware that there are always sunsets and new dawns.

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Chapter IV

On Croatian Constitutional Identity and European Integration

Petar Bačić

Abstract

This study addresses the topic of Croatian constitutional identity, which is firmly embedded in the original text of the Croatian Constitution adopted in 1990 and is closely connected to the European integration process from the inception of the existence of the Republic of Croatia as an independent and sovereign state. It analyses all relevant constitutional provisions that regulate the relationship between national and international law, including the constitutional amendments of 2010 adopted during Croatia's European Union (EU) membership negotiations that refer to the modalities of accession, functioning of the Republic of Croatia in the EU, and adaptation of the Croatian legal system to new requirements stemming from the final stage of the European integration process. The position of the Croatian Constitutional Court regarding international and EU law and the question of transnational constitutional and judicial dialogue, in general, are also analysed. Entering the European Convention on Human Rights prompted the Constitutional Court to engage more actively in judicial dialogue with other courts. The Constitutional Court accepts and applies the legal standards developed by the European Court of Human Rights (ECtHR). Moreover, in its decisions, it often explicitly refers to the ECtHR case law and the case law of some European constitutional courts, following the pattern characteristic of judicial dialogue in Europe. The author notes that taking a position in such a transnational dialogue must be realised based on mutual partnership and respect. Finally, the elaboration of the fundamental values of constitutional order and the idea of European integration, with the parallel process of adaptation of the national constitutional-political system to the complex of European law, prompted

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the Constitutional Court of the Republic of Croatia to start developing the concept of constitutional identity.

Keywords: constitution, identity, Republic of Croatia, national constitutional identity, Croatian Constitutional Court, constitutional dialogue

1. Introduction

The search for Croatian constitutional identity started at the end of the 1980s and the beginning of the 1990s, a period in which major political changes occurred peaceably in most communist and socialist countries of Central and Eastern Europe. Through the transition from a single-party system to a constitutional democracy, the Republic of Croatia confronted and experienced challenges similar to those in other new European democracies. All such countries had to take a decisive step towards the establishment of democratic institutions founded on the rule of law, and that process was primarily seen through radical constitutional changes.[1] Nevertheless, Croatia did not have the good fortune to experience the so-called velvet revolution (i.e. peaceful transition to constitutional democracy).[2] It is, therefore, also necessary to consider war circumstances when analysing the period of democratic transition in Croatia, including its impact on the constitution-making process. The first democratic Constitution adopted in December 1990 established the Republic of Croatia as a sovereign 'national state of the Croatian people and a state of members of other nations and minorities who are its citizens' based on the respect for the rule of law in which *'the equality of citizens and human freedoms and rights are guaranteed and ensured'*, as stated in its Preamble.[3]

Of course, the question of national identity has multiple aspects and, in a narrower sense, is undoubtedly older and more comprehensive than the complex relations created by the adoption of the Constitution, the declaration of independence, and the realisation of a sovereign constitutional democratic state in 1991.[4] Different elements of the Croatian national identity and status can be traced to centuries and various compound entities. To illustrate the latter, it suffices to consider only the 20th century. Until 1918, Croatia was a part of the

1 According to J. Elster, the crucial question for new democracies was: 'Will the new political systems be permeated by the 'spirit of constitutionalism' in which basic political institutions are seen as a stable framework for policy rather than manipulable tools?' Elster, 1992, p. 17.

2 The term 'velvet revolution' primarily refers to Czechoslovakia. B. Smerdel notes that all repressive communist regimes in Central and Eastern Europe (except for a minor armed conflict in Romania) had 'collapsed on their own'; Smerdel and Sokol, 2006, pp. 78–79.

3 Constitution of the Republic of Croatia, Official Gazette *Narodne novine* No. 56/1990.

4 Bačić, 2005, p. 89.

Austro-Hungarian monarchy. After 1918, together with Slovenia and Serbia, it was part of the Kingdom of Serbs, Croats, and Slovenes—that is, the Kingdom of Yugoslavia—until 1941. After 1945, until 1991, Croatia became an integral federal unit of the Socialist Federative Republic of Yugoslavia. The period after international recognition and the adoption of the Declaration on the Proclamation of the Sovereign and Independent Republic of Croatia in 1991,[5] including after the end of the Homeland War in 1995, was also a period of expression of Croatian identity on all possible levels, including the 1997 constitutional amendment aimed at *'strengthening the constitutional guarantees of state independence'*, which will be elaborated further in the text.[6]

An integral part of this process of affirmation and strengthening of Croatia's identity constitutes the objective of fulfilling the strategic goals of joining Euro-Atlantic organisations based on common values of peace, security, and the rule of law. These objectives were proclaimed in the constitutional Preamble in as early as 1990, and they were again accentuated in the important 1991 Decision of the Croatian Parliament:

> As a sovereign and independent state that guarantees and ensures the fundamental human and minority rights expressly guaranteed by the Universal Declaration of the United Nations, the Final Act of the Helsinki Conference, documents of the Organization for Security and Co-operation in Europe (OSCE) and the Paris Charter, the Republic of Croatia is willing to enter, in the context of European integration, into interstate and inter-regional associations with other democratic states.[7]

Therefore, the idea of Croatian constitutional identity is firmly embedded in the original constitutional text and is closely connected with the European integration process from the very beginning of the existence of the Republic of Croatia as an independent and sovereign state. Furthermore, a new impetus regarding its conceptualisation came with Croatia's full membership in the European Union (EU), including the identity elements identified by the Constitutional Court of the Republic of Croatia in its case law.

5 Declaration on the Proclamation of the Sovereign and Independent Republic of Croatia, passed by the Croatian Parliament on 25 June 1991, Official Gazette *Narodne novine* No. 31/1991. On 15 January 1992 the Republic of Croatia gained international recognition.

6 Smerdel, 2014, p. 195. This text is also available online, see: https://www.pravo.unizg.hr/_download/repository/Constitutional_law_of_the_28_EU_Member_States_-_Croatia.pdf.

7 Decision on the termination of all legal and state ties with other republics and provinces of Yugoslav federation, p. 5, passed by the Croatian Parliament on 8 October 1991.

2. Constitution and identity

The Constitution of the Republic of Croatia was adopted on 21 December 1990 and has been amended on five occasions: 1997, 2000, 2001, 2010, and 2013. Each of these constitutional revisions had different objectives, such as strengthening and clarifying the constitutional guarantees of human rights and fundamental freedoms in 1997 when Croatia also ratified the European Convention on Human Rights (ECHR),[8] adjusting the constitutional division of powers and altering the semi-presidential system of government with a parliamentary one in 2000, and completing the previous constitutional revision by instituting a unicameral instead of bicameral parliament in 2001. The primary objective of the fourth constitutional revision in 2010 was to create a constitutional basis for membership in the EU. However, with the constitutional change in 2013, only the definition of marriage (as a union between a woman and a man) was included in the constitutional text.

According to procedures for its amendment, the Constitution can be amended following two distinct procedures—it can be done either by the Parliament or by the people's vote in the referendum. Both procedures have been employed since the first four constitutional revisions were made by the Croatian Parliament, while the last revision was a result of the first national referendum on constitutional changes.

When amending the Constitution, the Croatian Parliament follows a special procedure laid down in Part IX, Article 147–150 of the Constitution: Amendments may be proposed by a minimum of one-fifth of the members of the Croatian Parliament, the President of the Republic, and the Government; the Parliament decides whether to initiate the procedure by a majority of all deputies; the same majority is required for determining draft amendments to the Constitution; and the final decision to amend the Constitution is taken by a two-thirds majority of all deputies. The Croatian Parliament promulgated the adopted constitutional amendments.

The procedure for amending the Constitution in a referendum is outlined in Article 87, according to which a referendum may be called for by the Croatian Parliament (Article 87 paragraph 1) and by the President of the Republic (though only at the proposal of the government and with the counter-signature of the Prime Minister, Article 87 paragraph 2). Consequently, a referendum on proposals for the amendment of the Constitution (i.e. a referendum on constitutional changes, complete or partial) may be called by the Parliament or the President of the Republic. Nevertheless, constitutional (and legislative) referenda may also be initiated through the Institute of Citizens' Initiative. As per Article 87 (3) of the Constitution, the Parliament shall call a referendum on all issues that may be put to a referendum by the Parliament or the President of the Republic *'when so demanded by ten percent of all voters in the Republic of Croatia'*. The citizen's initiative in Croatia was not part of the original 1990 text of the Constitution but was later introduced with constitutional

8 The Republic of Croatia joined the Council of Europe and signed the ECHR on 6 November 1996. The Convention was ratified and entered into force on 5 November 1997.

changes in 2000. The constitutional referendum in 2013 was not only a result of successful popular initiatives but also the consequence of changes in the referendum framework realised as part of the 2010 constitutional revision to ensure Croatia's entry into the EU.[9]

Finally, no provision in the Constitution would prevent changes to any of its parts. The Constitution does not explicitly impose any limits in this regard. That is, there is no constitutional 'eternity clause'. The constitutional text, however, undoubtedly contains certain provisions that are of special importance for the Constitution as *'an ultimate expression of the will of the people',* for constitutional-legal order, and for the very identity of the Croatian state.

First, Article 3 of the Constitution (Part II—Fundamental provisions) establishes *'the highest values of the constitutional order'*. The new democratic constitution was founded on a set of fundamental principles that differed completely from those exercised in the old regime. Following the example of other countries, Croatian constitution-makers believed that the aim of the constitution-making process was not just a constitution as a mere document but the desire to democratically constitute the people as the source of government. The Croatian constitution-makers' new approach was reflected in the interpretation of the Constitution as a fundamental state norm, whose supremacy is indicated by the constitutional values expressed in Article 3, which enumerates the following:

> Freedom, equal rights, national and gender equality, peacemaking, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the basis for the interpretation of the Constitution.

This provision represents a generally accepted ethical concept and framework of values accepted by society and law. The Constitution does not explicitly mention fundamental principles, but the highest values of the constitutional order *de facto* function exactly. They are defined as the basis for the interpretation of the entire constitutional text and its provisions, Thus, they have a regulative role *sui generis*, as B. Smerdel rightfully notes, as they *'serve as a guideline both for the legislative body when elaborating specific human rights and fundamental freedoms, as well as for judges when deciding in concrete cases'*.[10] Therefore, they represent the fundamental constitutional principles prioritised over all other constitutional norms.

Furthermore, per the constitutional framers' intention to establish the Republic of Croatia as a modern constitutional state based on the rule of law in which all its citizens are equal and have equal rights, Article 1 (Part II) of the Constitution Croatia is defined as a *'unitary and indivisible democratic welfare state'* in which the

9 Bačić and Ivkošić, 2022, pp. 97–98.
10 Smerdel, 2014, pp. 203–204.

power 'derives from the people and rests with the people as a community of free and equal citizens'.

In the Preamble of the Constitution (i.e. part I) with the title 'Historical Foundations' that has special importance for the interpretation of the Constitution, two more definitions of state are embedded, as we already mentioned. These definitions, as noted by M. Arlović and M. Jelušić, illustrate that constitutional framers decided to constitutionalise the state based on a combination of national and civic identity.[11] Namely, paragraph 2 of the Preamble establishes Croatia as the *'national state of the Croatian people and a state of members of other nations and minorities who are its citizens'*.[12] Although this definition emphasises national identity, it constitutes an open understanding of that concept, combining its 'ethnos' element with civic identity (i.e. with the concept of 'demos' that equally includes all citizens of the Republic of Croatia as citizens of the modern democratic constitutional state that respects common values and principles). Further, as stated in paragraph 3 of the Preamble, Croatia is such a *'state in which equality, freedom and human and civil rights are guaranteed and secured, and economic and cultural advancement and social welfare are promoted'*. The definition in Article 1 also emphasises civic identity (i.e. the concept of 'demos'). Moreover, as a more comprehensive concept, the content is determined by the fact that it embraces all citizens of the Republic of Croatia, regardless of their national or other characteristics. In other words, 'We, the people' refers to all Croatian citizens.[13] Croatia is, therefore, primarily defined as a modern constitutional state in which all citizens are equal and have equal rights.

Finally, the fundamental values enumerated in Article 3 are more extensively elaborated in the individual constitutional provisions guaranteeing specific human rights and fundamental freedoms, which are placed in Part III. of the Constitution (under the title 'Protection of human rights and fundamental freedoms'). Among the general provisions that, inter alia, regulate the prohibition of discrimination and rights of national minorities, Article 17 provides that during a state of war, an immediate threat to the independence and unity of the Republic, or in the event of major natural disasters, individual constitutionally guaranteed human rights and freedoms may be restricted. Although the respective constitutional norms do not stipulate

11 Arlović and Jelušić, 2019, p. 55. et seq; online version available at: https://www.ccr.ro/wp-content/uploads/2022/01/Volum-Regional-Conf-The-national-constitutional-identity-in-the-context-of-European-law-2019.pdf.

12 The Preamble has repeatedly been amended and supplemented, especially regarding this particular provision. After the last amendment of 2010, para 2 in relevant part states as follows: '… the Republic of Croatia is hereby established as the nation state of the Croatian nation and the state of the members of its national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Rusyns, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs, Albanians and others who are its citizens and who are guaranteed equality with citizens of Croatian nationality and the exercise of their national rights in compliance with the democratic norms of the United Nations and the countries of the free world'.

13 Smerdel, 2014, p. 202.

which rights are subject to restrictions, Article 17 (3) suggests that it could apply to all rights and freedoms except those for which the Constitution provides special protection, namely the right to life; prohibition of torture, cruel, or degrading treatment or punishment; legal definitions of criminal offences and punishment; and freedom of thought, conscience, and religion. Restrictions on enumerated rights cannot be imposed even in cases of clear and present danger to the state. Thus, these rights are absolute.[14]

As part of the Croatian legal theory, there is an understanding that this norm, which is a non-derogation human rights clause, can be seen as the inviolable essence of the Constitution, or its material core, the norm by which certain principles and their protection are put before the security and existence of the state itself, undoubtedly constituting its constitutional identity. Of course, most European states enshrine such clauses in their constitutions, which are also very similar in content to the Croatian Constitution. Furthermore, Article 15(2) of the ECHR provides a comprehensive list of absolute rights that mostly encompasses rights protected from derogation by the Croatian Constitution.[15]

Nevertheless, the first reference to constitutional identity in the Constitutional Court's case law concerns the constitutional preamble and can be found in the Decision of July 2011 concerning amendments to the Constitutional Act on Rights of National Minorities[16] and the enactment of new electoral legislation that introduced so-called positive discrimination measures concerning the election of parliamentary representatives of national minorities.[17] The Constitutional Court annulled new electoral legislation, insisting on its previously established standpoint on the unity of the Constitution, which cannot be interpreted to extract a single provision from the totality or relations established by it; the Constitution has 'internal unity'; thus, the meaning of any of its parts is bound to all other provisions, especially regarding the

14 Bačić and Ivkošić, 2022, p. 106. When deciding upon restrictions on human rights, the Parliament and the President of the Republic must adhere to important criteria set out in the Constitution. The first criteria relates to the principle of proportionality – the Constitution explicitly demands that the extent of such restrictions must be appropriate to the nature of the threat. The second criteria relates to the non-discrimination principle—such restrictions must not result in the inequality of citizens with respect to race, colour, gender, language, religion, or national or social origin.

15 The only exception is freedom of thought, conscience and religion. ECHR Art. 15 para 2 protects certain rights from derogation: The right to life, except in respect of deaths resulting from lawful acts of war (Art. 2); The prohibition of torture and other forms of ill-treatment (Art. 3); The prohibition of slavery or servitude (Art. 4 para 1); No punishment without law (Art. 7). Three of the additional protocols to the Convention also contain clauses that prohibit derogation from certain rights contained in them. These are Protocol No. 6 (the abolition of the death penalty in time of peace and limiting the death penalty in time of war), Protocol No. 7 (the ne bis in idem principle only, as contained in Art. 4 of that protocol) and Protocol No. 13 (the complete abolition of the death penalty); https://www.echr.coe.int.

16 Decision U-I-3597/2010…U-I-994/2011 of 29 July 2011.

17 The Croatian Government proposed new model of election of minority representative that basically resulted in dividing national minorities in two groups: minorities that exceeded 1.5 % of population and those that constituted less than 1.5 of all population given dual voting rights.

highest values of the constitutional order (paragraph 28). The Court referred exactly to paragraph 2 of the constitutional Preamble, stating that *'it defines the constitutional identity of the Republic of Croatia'* (paragraph 30.1). Referring further (paragraph 30.2) to Article 1, the Court concluded that 'the Constitution accepted the civil concept of a state in which all its citizens—which include members of the Croatian nation and members of all national minorities —constitute the 'people' (German: Staatsvolk)'.[18]

A new step forward concerning the conceptualisation of national constitutional identity came with Croatia's full membership in the EU. Although the Constitutional Court did not elaborate on the 'national identity clause' located in Article 4(2) of the Treaty on EU or the question of subsidiarity of the EU law, as might have been expected, it located new identity elements in several cases that resulted from popular initiatives launched after 2010 constitutional amendments, which were adopted as necessary preparation for the upcoming EU accession. In an effort to ensure the realisation of its constitutional choice, within which one of the essential aspirations was the integration of the state into the international community, the Republic of Croatia had to solve the issue of adapting its internal legal order to international law. Therefore, in the following chapter, we consider the incorporation of international law and EU legal acts into national law.

3. The relationship between national and international law

On 1 July 2013, Croatia became the 28th member of the EU. Croatia's path towards the EU started in 2000 with opening negotiations for the Stabilisation and Association Agreement (SAA), following the May 1999 proposal of the European Commission on the creation of the Stabilisation and Association Process (SAP) for Albania, Bosnia and Herzegovina, Croatia, Macedonia, and the Federal Republic of Yugoslavia (a new state founded in 1992, transformed in 2003 into the State Union of Montenegro and Serbia; since 2006, Montenegro and Serbia have been independent states). The entire process was launched with the primary aim of stabilising the region and enabling association with the EU as its long-term goal.[19]

18 *'The 'people' defined in this way—that is, the 'community of free and equal citizens'—exercises power by electing its representatives to the Croatian Parliament, the representative body of citizens, on the basis of universal and equal suffrage. Therefore the Constitutional Court determined that the Constitution does not allow the law to guarantee and determine in advance the number of guaranteed seats for any minority on any basis (national, ethnic, linguistic, sexual, age, educational, professional, property, etc.) within the framework of the general electoral system. That system is established in order to provide that the 'people' exercise its power as provided under the Art. 1 para. 2 and 3 and as such it represents direct expression of the equal rights, national equality and democratic multiparty system, which are highest values of the constitutional order of the Republic of Croatia (Art 3.)'*. Ibid.

19 In July 1999, the Stability Pact for South-Eastern Europe was also launched as a political instrument with the strategic aim of establishing and reinforcing peace and security in South-Eastern Europe

Stabilisation and Association Agreements, offered to Western Balkan countries (i.e. Albania[20] and five out of six republics that made up the Yugoslav federation; Slovenia was at that time already included in negotiations to become a full member of the EU)[21] were a sort of new generation of European agreement treaties which were previously offered to Central and East European (CEE) 'new democracies'. Constituting frameworks of relations between the EU and candidate countries, these agreements ensured the formal mechanisms and agreed levels of reference, which opened up the possibility of approaching EU standards, covering areas such as political dialogue, regional cooperation, four freedoms with the creation of a transitional free trade area for industrial products and agricultural produce, approximation of national legislation to the *acquis communitaire*, and wide-ranging cooperation in all areas of EU policy, including justice and home affairs.

Negotiations were launched in November 2000, following the Zagreb Summit.[22] The SAA between Croatia and the EU was signed in October 2001,[23] and the Interim Agreement came into force on 1 May 2002. Accession negotiations between Croatia and the EU were officially opened in 2005 when the SAA was enacted after

through bringing the countries of the region to the Euro-Atlantic structures and strenghtening of mutual cooperation. It was based on the support from the main international organisations and integrations. According to its Preamble '*the countries of South Eastern Europe recognise their responsibility for working together within the international community and developing a strategy for the stability and growth of the region and for cooperating, together with the major donors, so that the strategy should be achieved'*. These *aims 'will be achieved via a comprehensive approach to the region involving the EU, OSCE, Council of Europe, UN, ATO, OECD, WEU, IFIs and the regional initiatives. Particular attention was given to the fact that the Pact would be helped by the USA and that it would obtain priority in dialogues between the USA and Russia'*. See more in Vukadinović, 1999, p. 179 et seq.

20 The SAA for Albania was signed in 2006, it entered into force in 2009 and the country was awarded candidate status in 2014. For short summary of Albania's path through negotiations for the SAA and towards the EU see for example Starova A., Albania on its way to the European Union, CIRR, 2004, pp. 132–137.; Accession negotiations were launched in 2022.

21 Slovenia (2004) and Croatia (2013) are now Member States. In 2008 Western Balkans countries were joined by Kosovo which in socialist Yugoslavia enjoyed the status of autonomous province. Macedonia (now North Macedonia) is a candidate country since 2005, Montenegro since 2010, and Serbia since 2012; Bosnia and Herzegovina applied for EU Membership in February 2016; in April of the same year, the SAA with Kosovo entered into force. Bosnia and Herzegovina and Kosovo are currently in potential candidate status. Montenegro started with accession negotiations in 2012 and Serbia in 2013, while accession negotiations for North Macedonia were finally launched in 2022.

22 In the Annex (Stabilization and association process on an individualised basis) of the Final Declaration adopted on 24 November 2000 at Zagreb Summit, the following was remarked: *'Croatia: the Union commends the scale of the efforts and the success of the reforms embarked upon since the start of this year by this country's authorities. They have now enabled negotiations to be started for a stabilisation and association agreement: we hope they will progress rapidly'*. https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ er/declang4.doc.html.

23 See Stabilisation and Association Agreement between the European Communities and their Member States, on the one hand, and the Republic of Croatia, on the other; Official Journal of the European Union, L 26/3 of 28 Vol. 48 of 28 January 2005. Interestingly, Croatia was the second country to sign the Stabilisation and Association Agreement with the EU on 29 October 2001. The first country among six ex-Yugoslav republics involved in the SAP launched in 1999 that signed the SAA was the Republic of Macedonia (SAA signed on 9 April 2001).

being ratified by the national Parliaments of the EU Member States, the European Parliament, and the Croatian Parliament.[24] The negotiation process was terminated in 2011.[25] Following the European Parliament's consent to Croatia's membership, Croatia signed the Treaty of Accession to the European Union on 9 December 2011.[26]

During the period between its entry into force and Croatia's accession to the EU, the SAA constituted a legal basis for the regulation of relations between the EU and Croatia while marking a shift from the voluntary phase to the phase of mandatory harmonisation of national legislation with the *acquis communitaire*. According to the provision of Article 69 of the Croatian SAA, 'Croatia will endeavor to ensure gradual harmonization of existing laws and future legislation with the *acquis*'.[27] Regarding the requirement of 'legal harmonisation' of domestic legislation with the EU law, for all SEE countries and especially for their courts during the EU pre-accession process, a major challenge was the question of whether ongoing 'legislative harmonisation' should go hand in hand with 'judicial harmonisation' as a process in which 'national courts should apply the interpretation of the European Court of Justice and consider EU legislation when applying provisions of domestic laws or the provisions of the SA Agreements'.[28] In most CEE constitutional systems during the pre-accession period, the European Agreements' provisions could generally be applied directly, as

24 Between the Zagreb summit (2000) and the enactment of the SAA (2005), the Thessaloniki summit was held (June 2003). The European Partnership was proposed at the Summit as a new step that should intensify the SAP and further strentghten the common EU and Western Balkans commitment for European integration. Regarding the progress of countries, the following conclusion was adopted: 'Progress of each country towards the EU will depend on its own merits in meeting the Copenhagen criteria and the conditions set for the SAP and confirmed in the final declaration of the November 2000 Zagreb summit'. See para 4 of the Declaration, EU-Western Balkans Summit Thessaloniki, 21 June 2003, available at: e:///C:/Users/user/Downloads/Eu-Western_Balkans_Summit__Thessaloniki__21_June_2003.pdf; See also Meurs, van W., The next Europe: South-eastern Europe after Thessaloniki, SEER, Vol. 6, No. 3, December 2003, pp. 9.-16.

25 Croatia applied for EU membership on 21 February 2003, in April 2004, European Commission issued positive opinion on Croatia's membership application. In June of the same year, European Council confirmed Croatia as a candidate country. The SAA entered into force on 1 February 2005, and accession negotiations were launched in October same year. The EU finally closed accession negotiations with Croatia on 30 June 2011. See: https://www.sabor.hr/en/european-affairs/croatias-path-eu/chronology/chronology-important-dates-eu-accession-process.

26 See: Commission Opinion of 12 October 2011 on the application for accession to the European Union by the Republic of Croatia; European Parliament Legislative resolution of 1 December 2011 on the accession to the European Union of the Republic of Croatia; Decision of the Council of the European Union of 5 December 2011 on the admission of the Republic of Croatia to the European Union; Treaty between Member States of the EU and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union, Official Journal of the European Union, L 112 Volume 55 of 24 April 2012, https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:12012J/TXT. See also: https://www.europarl.europa.eu/news/en/press-room/20111201IPR32926/croatia-s-eu-accession-green-light-from-parliament.

27 Act on the ratification of the Stabilization and Association Agreement, Official Gazette 'Narodne novine' – International Treaties, no. 14/2001.

28 Albi, 2005, p. 52; See: Georgievski, 2014, p. 13 et seq.

many accepted a monist approach to international treaties.[29] However, in general, there were few cases of direct application of the European Agreements' provisions, though the so-called EU-friendly approach towards application and interpretation of domestic law before courts was widely adopted.[30]

In the Republic of Croatia, the SAA is widely considered an international agreement *sui generis*. Thus, it was a framework for relations with the EU throughout the pre-accession period, and it has been directly applicable by national courts and other authorities, according to Article 141 of the Constitution of the Republic of Croatia, which addresses the application of international law.

> International treaties which have been concluded and ratified in accordance with the Constitution, which have been published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be altered or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law.[31]

Determining the relationship between international and national law, Article 141 of the Constitution of the Republic of Croatia gives primacy to international treaties over Croatian laws regarding legal effects. This general incorporation clause applies to all relevant treaties regardless of their subject matter. It does not apply to other sources of international law. The supralegal force of international treaties referred to in the aforementioned constitutional provision derives from their special procedure of adoption in the Croatian Parliament and from the acceptance of the obligations that the state has under international law as a full member of the international community and its legal order. The provisions of these international treaties may be changed or repealed only under conditions and in the way specified by them or in accordance with the general rules of international law.

The aforementioned constitutional provision was amended in 1997 by adding that it expressly referred to agreements in force. International agreements have been concluded and published, but for various reasons, they have not entered into force. Therefore, to avoid confusion and strengthen legal certainty, the constitution-maker stressed that priority in application over Croatian laws is given only to those

29 According to S. Georgievski's analysis, that was the case in Lithuania, Bulgaria, Poland, Estonia, Slovenia, Czech Republic, Slovakia, and Romania following constitutional amendments. Georgievski, op. cit., p. 14. Generally, political transition of CEE countries in 1990s' was often accompanied with the transition from monism to dualism.

30 Ibid. Regarding the judicial application of EU law, the term 'Euro-friendly' (or similar terms 'EU friendly' and 'EU harmonious') might be perceived in that the EU law is used as *'argumentative tool to interpret domestic law'* (Kuhn) or as *'pro-European interpretation of laws'* approach that enables adaptation of national law to EU standards (Lazowski). See also Kuhn, 2019.

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

international treaties that have been concluded and confirmed in accordance with the Constitution, published, and entered into force. Consequently, national courts are obliged to apply international treaties over national law in cases of non-conformity. Regarding the direct application of international treaties, beyond Article 141, such an obligation is also derived from Article 118(3), which stipulates that *'courts administer justice according to the Constitution and laws, as well as to international treaties and other sources of law'* (two latter 'external' sources were added with constitutional amendments in 2010).[32] Apart from *ex officio* application of international treaty provisions in cases of their non-conformity with national laws that regulate the same matter, the courts may decide to directly apply international law upon the request of parties in proceedings, though such a request is not binding.

Regarding the Constitutional Court of the Republic of Croatia and its competencies, the Court has no clear authority to examine the constitutionality of international treaties; that is, to review the substantive content of a treaty. However, it can examine the statute on the ratification of international treaties by which it is implemented in the domestic legal order (as regulated by Article 129 of the Constitution).[33] In other words, the respective Constitutional Courts' competence is limited to a review of the formal constitutionality of the law on ratification adopted by the Croatian Parliament, which is well established and repeated in its case law:

> According to the competences of the Constitutional Court stipulated in Article 125 (Article 129, op. PB)[34] of the Constitution and the conditions under which interna-

32 Prior to the 2010 constitutional amendments, it was stipulated that *'courts shall administer justice according to the Constitution and laws'*. See Constitution of the Republic of Croatia, Official Gazette *Narodne novine* No. 41/2001 (consolidated text).

33 Constitution of the Republic of Croatia, Official Gazette *Narodne novine* No. 85/2010 (consolidated text).
Art. 129: *'The Constitutional Court of the Republic of Croatia: – shall decide upon the compliance of laws with the Constitution, – shall decide upon the compliance of other regulations with the Constitution and laws, – may decide on the constitutionality of laws and the constitutionality and legality of other regulations which are no longer valid, provided that less than one year has elapsed from the moment of such cessation until the filing of a request or a proposal to institute proceedings, – shall decide on constitutional petitions against individual decisions taken by governmental agencies, bodies of local and regional self-government and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia, – shall monitor compliance with the Constitution and laws and shall report to the Croatian Parliament on detected violations thereof, – shall decide upon jurisdictional disputes between the legislative, executive and judicial branches, – shall decide, in conformity with the Constitution, on the impeachment of the President of the Republic, – shall supervise compliance of the platforms and activities of political parties with the Constitution and may, in* compliance with *the Constitution, ban non-compliant parties, – shall monitor whether elections and referenda are conducted in compliance with the Constitution and laws and shall resolve electoral disputes falling outside the jurisdiction of the courts, – shall perform other duties specified by the Constitution'.*

34 The Constitutional Court uses numbering of the Constitution (see the version published on: www.usud.hr) which is different from the one in the official text of the Constitution of the Republic of Croatia published in the Official Gazette 'Narodne novine' no. 85/2010 (consolidated text). We

> tional treaties can be altered or repealed, contained in the second sentence of Article 134 (Article 141, op. PB) of the Constitution, it follows that in the process of reviewing the constitutionality of laws the Constitutional Court is competent to review the formal constitutionality of acts on the ratification of international treaties. However, the Constitutional Court is not competent to review the substantive content of the international treaty itself as a component part of the Act. The Constitutional Courts' case-law so far shows that – due to the lack of cassational powers – when interpreting the second sentence of Article 134 (141) of the Constitution, the Constitutional Court did not consider itself competent to review the compatibility of the provisions of international treaties with the Constitution, which, in accordance with the first sentence of Article 134 (141) of the Constitution, became an integral component of the legal order of the Republic of Croatia.[35]

Therefore, the Constitutional Court held that its jurisdiction over the constitutionality of national laws that ratify international treaties was strictly limited by the procedural aspect. In other words, the review of constitutionality is limited to questions on whether the law was adopted by the competent authority and whether it followed the procedure mandated by the Constitution. Finally, it seems Article 141 of the Constitution of the Republic of Croatia in the traditional debate between dualists and monists favoured the latter, as it declared international treaties to be part of the internal legal order, assuring them primacy over national laws.[36]

Therefore, in the pre-accession period, Article 141 of the Croatian Constitution was the only constitutional provision that enabled the direct application of EU law sources under the framework of the SAA and its provisions on harmonisation. It may also be concluded that there was no *'clear constitutional authority for the application of EU law'*.[37] Although such possibility existed within the aforementioned limits, in the same period, no such cases would result in a direct application of the SAA provisions instead of conflicting Croatian legislation or *'any established doctrine on the*

use the latter, but, to avoid confusion, when citing the Constitutional Courts' case-law (and only if needed), we provide both numberings (the numbering provided in the Official Gazette is inserted in parentheses i.e. round brackets).

35 U-I-2234/2017 of 6 June 2017, para 4. The Constitutional Court already established the same standpoint in ruling: U-I-825/2001 of 14. January 2004. ('Narodne novine' no. 16/04.), para. 4: *'…the Constitutional Court of the Republic of Croatia is not competent to review the direct compliance of international treaties with the Constitution'*, and later confirmed it in rulings: U-I-1583/2000 and U-I-559/2001 of 24. March 2010. ('Narodne novine' no. 46/10.), and U-I-6738/2010 of 11. June 2013. (www.usud.hr). Art. 129.

36 However, we should not ignore the arguments of those who rightly emphasise that such a solution does not refute the dualist understanding because the constitutional provision does not give priority to international law as a whole but only to that part of it which the state expressly accepts. Moreover, Croatian constitution-maker is free to change such solution at any time, and such a change in the Constitution would not mean a violation of international law. See more in Bačić, 2021, pp. 441–433.

37 Goldner Lang and Mataija, 2014, p. 93. et seq.

interpretation of the mirror provisions of the SAA, even though ECJ case law has at times been relied upon (mostly in the area of competition law)'.[38]

4. Association, dissociation: transfer of sovereign powers and accession to the EU

During Croatia's EU membership negotiations, the Croatian Parliament (Hrvatski Sabor) adopted amendments to the Constitution of the Republic of Croatia on 16 June 2010. The 2010 constitutional amendments created a constitutional and legal basis for Croatia's membership in the EU and ensured new constitutional grounds for the application of EU law. However, new constitutional provisions concerning 'European affairs', which will further be elaborated in the next chapter, entered into force on the day when Croatia became a full member of the Union (in accordance with Article 152 of the Constitution).[39] Before this situation, the EU accession referendum was held on 22 January 2012.

The Croatian Constitution regulates the process of association and dissociation in Article 142, which constitutes Part 2 of Chapter VII, and creates a constitutional basis for previous accessions to international organisations.[40] Article 2(4) of the Constitution foresees that the decision 'on association into alliances with other states' is to be made by the Croatian Parliament or the people directly. The Croatian Parliament decides on the ratification of international treaties, which transfer sovereign powers to international organisations or alliances by a two-thirds majority of all deputies (Article 140). Any decision concerning the Association of the Republic of Croatia was made directly by the people in a referendum (Article 142). In the original 1990 constitutional text, Chapter VII, which regulated international relations, was divided

38 Ibid. Though the Constitutional Court of the Republic of Croatia accepted the 'EU friendly approach' in the area of competition law, as for example in 2011 Decision U-III/4082/2010 of 17 February 2011 in which it speciffically stated that Croatian institutions correctly applied EU law (para. 7.1. – *'The Administrative Court and the Croatian Competition Agency correctly applied the rules on market competition of the European Union and the rules arising from the interpretation instruments adopted by the EU institutions'*), the overview of the case law that might be relevant in terms of the existence of general obligation on harmonisation of Croatian legislation with the *acquis* shows inconsistency in this respect.

39 Art. 152: *'The Amendments to the Constitution shall enter into force on the day of their promulgation, the 16th day of June 2010, with the exception of Art. 9, para. (2) pertaining to execution of a decision on extradition or surrender in compliance with the acquis communautaire of the European Union, and Art. 133, para. (4) and Art. 144, 145 and 146 of the Constitution of the Republic of Croatia, which shall enter into force on the date of accession of the Republic of Croatia to the European Union'.*

40 Although of somewhat different content, as these provisions were partially amended over the years, they will be elaborated in text. For the original text see: Constitution of the Republic of Croatia, Official Gazette 'Narodne novine' no. 56/1990. Croatia acceeded to the United Nations in 1992 and to the Council of Europe in 1996.

into two parts, with the second section (Association and Secession) comprising one provision that regulated the procedure for the association of Croatia in alliances with other states and the secession from such an alliance.[41] Decisions concerning the Republic's association were made based on a referendum by a majority vote of the total number of electors. This provision was incorporated into the constitutional text to provide (together with other relevant norms) a constitutional basis for holding the independence referendum—that is, the establishment of an independent and sovereign Republic of Croatia.[42]

The aforementioned provision was changed in a 1997 constitutional revision, as it regards the procedure of dissociation, and was supplemented by adding a specific ban on Croatia's association with other states if such association would basically result in a renewal of the Yugoslav state association of any kind:

> Any procedure for the association of the Republic of Croatia into alliances with other states, if such association leads, or may lead, to a renewal of a South Slavic state union or to any form of consolidated Balkan state is hereby prohibited.[43]

Constitutional provisions on association and dissociation were again amended in 2010 to create a constitutional basis that would enable Croatia to achieve its long-awaited accession to the EU. In this sense, for the first time since 1990, the constitution-maker intervened in the provision related to the referendum decision-making, providing that any question regarding association shall first be decided *'by the Croatian Parliament by a two-thirds majority of all deputies',* while the final decision *'shall be made in a referendum by a majority of voters voting in the referendum'* (Article 142).[44]

41 Constitution of the Republic of Croatia (1990), Art. 135
'Procedure for the association of the Republic of Croatia in alliances with other states may be instituted by at least one third of the representatives in the Croatian Parliament, by the President of the Republic, or by the Government of the Republic of Croatia.
Such association of the Republic shall first be decided upon by the Croatian Parliament by a two-thirds majority vote of all representatives.
The decision concerning the Republic's association must be made on the basis of a referendum by a majority vote of the total number of electors in the Republic.
Such referendum shall be held within 30 days from the date the decision was rendered by the Parliament.
The provisions of this Constitution concerning association shall also relate to conditions and procedure for secession of the Republic of Croatia, except when owing to extraordinary circumstances the Croatian Parliament may, at the proposal of a third of the representatives, or of the President of the Republic, or the Government of the Republic of Croatia, for the purposes of protection of the Republic of Croatia, decide on secession by a two-thirds majority vote of all representatives present'.

42 The referendum of the independence of Croatia was held on 19 May 1991. The turnout was 83.6%. On the first question, for Croatia to become a sovereign and independent state, 94% voted 'for'.

43 Constitution of the Republic of Croatia (1997), Official Gazette 'Narodne novine' no. 8/1998 (consolidated text), Art. 135. par. 2. Today it is Art. 142 par. 2, while the wording remained unchanged. See Sokol and Smerdel, 2006, p. 432.; see also Rodin, 2008.

44 See Proposal of constitutional amendments of 15 June 2010., Art. 27, Explanatory text, p. 19–20; https://sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080052/PRIJEDLOG_PROMJENE_USTAVA_RH.pdf.

The decision on the referendum is, thus, made by a simple majority of the votes cast; that is, most voters who have voted. However, until the constitutional revision of 2010, the conditions for reaching decisions in the referendum were significantly stricter. Namely, before 2010, the constitutional requirement was that a decision be made by a majority of all voters (the acceptance quorum), provided that the majority took part in the referendum (the participation quorum). In this sense, by intervening for the first time since 1990 in the provision related to the referendum decision, the constitution maker replaced the difficult-to-achieve condition of obtaining the majority of votes of all voters via a solution that requires only 'the majority of votes of the voters who participated' for the state referendum to succeed. Considering that it also meant that not participating in the referendum (i.e. the abstain vote) no longer has the same effect as a vote 'against', this change made it possible for the real will of the voters to be expressed in the referendum.[45] The aforementioned change, thus, preceded not only the 2012 referendum on the EU accession of the Republic of Croatia but also a citizen's initiative that led to a successful referendum on constitutional change in 2013, thereby significantly alleviating the conditions for decision-making in the referendum.[46]

As a mandatory referendum according to Article 142 of the Constitution (Chapter VII, Part 2, Association and Dissociation), the Croatian Parliament called for a referendum on joining the EU in December 2011, just after signing the Accession Treaty. Held on 22 January 2012, the accession referendum delivered an overwhelming 'yes' vote. The referendum question was straight and simple: *'Are You in favour of the membership of the Republic of Croatia in the EU?'*. Almost two million Croatian citizens voted in the referendum, meaning that the voter turnout was 43.5%. The EU accession referendum passed with 66.2% of the votes cast in support, while 33.1% voted against joining the EU.

5. Constitutional amendments of 2010 and application of European Union law

All changes to the constitution that are closely related to the European integration process can be classified into different groups.[47] Beyond the aforementioned constitutional change regarding the referendum that practically enabled Croatia's accession

45 As noted by R. Podolnjak: *'It was obvious to the vast majority of Croatian politicians and constitutional scholars that the approval quorum required for referendums on state alliances is too high a barrier and that it could be the greatest obstacle in the process of Croatia's accession to the EU'.* Podolnjak, 2015, p. 134.

46 See Smerdel, 2014, pp. 199–200.

47 For example, Smerdel clasiffies them in a following manner: 1) Amendments required by the accession negotiations with the EU, 2) Amendments required for adaptation of the legal system to membership in the EU, 3) Amendments declaring intention to correct injustices, 4) Amendments to the political decision-making system. See Smerdel, ibid.

to the EU, different amendments were adopted at the request of European negotiators to facilitate accession. These constitutional issues arose from individual chapters of negotiations with the EU, such as the constitutional status and independence of the Croatian National Bank (Article 53) and the State Audit Office (Article 54), the abandonment of the principle of non-extradition of its citizens to foreign states, and the effective implementation of the European Arrest Warrant (Article 9).[48]

Constitutional provisions that refer to the modalities of accession, functioning of the Republic of Croatia in the EU and adaptation of the Croatian legal system to new requirements stemming from the final stage of the European integration process are inserted in a separate, new Chapter VIII of the Constitution named 'The European Union' (Arts. 143-146 Constitution). The first of these four provisions, each of which has a separate title, provides the legal basis for membership and the transfer of constitutional powers to the union's institutions (Article 143).[49] Three other provisions encompass the participation of citizens and government bodies in decision-making within EU institutions (Article 144),[50] the application of EU law and its supremacy over Croatian law (Article 145), and the rights of EU citizens within the Republic of Croatia (Article 146).[51] These constitutional provisions (along with Article 9 para-

48 It's interesting to mention that the application of the European Arrest Warrant was delayed until Croatia became a full member of the European Union, although the negotiators demanded its direct application even before reaching full membership.

49 Art. 143 – Legal Grounds for Membership and Transfer of Constitutional Powers
'Pursuant to Art. 142 of the Constitution, the Republic of Croatia shall, as a Member State of the European Union, participate in the creation of European unity in order to ensure, together with other European states, lasting peace, liberty, security and prosperity, and to attain other common objectives in keeping with the founding principles and values of the European Union.
Pursuant to Art. 140 and 141 of the Constitution, the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership'.

50 Art. 144 – Participation in the European Union:
The citizens of the Republic of Croatia shall be directly represented in the European Parliament where they shall, through their elected representatives, decide upon matters falling within their purview.
The Croatian Parliament shall participate in the European legislative process as regulated in the founding treaties of the European Union.
The Government of the Republic of Croatia shall report to the Croatian Parliament on the draft regulations and decisions in the adoption of which it participates in the institutions of the European Union. In respect of such draft regulations and decisions, the Croatian Parliament may adopt conclusions which shall provide the basis on for the Government's actions in European Union institutions.
Parliamentary oversight by the Croatian Parliament of the actions of the Government of the Republic of Croatia in European Union institutions shall be regulated by law.
The Republic of Croatia shall be represented in the Council and the European Council by the Government and the President of the Republic of Croatia in accordance with their respective constitutional powers.

51 Art. 146 – Rights of the Citizens of the European Union:
Citizens of the Republic of Croatia shall be European Union citizens and shall enjoy the rights guaranteed by the European Union acquis communautaire, and in particular:
– freedom of movement and residence in the territory of all Member States,
– active and passive voting rights in European parliamentary elections and in local elections in another Member State, in accordance with that Member State's law,

graph 2 regarding the execution of a decision on extradition or surrender in compliance with the acquis communautaire of EU and Article 133 paragraph 4 regarding the right to local and regional self-government for EU nationals in compliance with the law and EU acquis communautaire) did not enter into force on the day of its promulgation but on the day when Croatia became the newest EU Member State (though given the 2020 withdrawal of the United Kingdom from the EU, it is no longer the 28th EU Member State as it was at the time of accession).

Regarding the application of EU law in the national legal order, the crucial constitutional provision is Article 145 ('European Union Law'), as it opens the constitutional order for the application of EU law before domestic courts and public bodies:

> The exercise of rights ensuing from the European Union acquis communautaire shall be made equal to the exercise of rights under the Croatian law.
> All legal acts and decisions accepted by the Republic of Croatia in European Union institutions should be applied in the Republic of Croatia in accordance with the European Union acquis communautaire.
> Croatian courts shall protect subjective rights based on the European Union acquis communautaire.
> Governmental agencies, bodies of local and regional self-government, and legal persons vested with public authority shall apply European Union law directly.[52]

Article 145 regulates the protection of citizens' subjective rights before Croatian courts based on the principle of equivalent legal protection. It is also about the direct and indirect effects of EU Law as its fundamental characteristics and the principle of supremacy of EU Law (although without explicitly addressing it). All the entities were encompassed by paragraphs 1 and 2. That is, all state authorities, including national courts, must apply EU law in a way that does not constitute the exercise of subjective rights arising from excessively challenging or almost impossible EU law. The principle of the direct effect of EU Law is laid down in paragraph 3, whereas paragraph 4 expresses the principle of the direct administrative effect. Furthermore, Article 5 paragraph 2 stipulates the obligation for all persons to *'abide by the Constitution and law and respect the legal order of the Republic of Croatia'*. This paragraph was also

– the right to the diplomatic and consular protection of any Member State which is equal to the protection provided to own citizens when present in a third country where the Republic of Croatia has no diplomatic-consular representation,
– the right to submit petitions to the European Parliament, complaints to the European Ombudsman and the right to apply to European Union institutions and advisory bodies in the Croatian language, as well as in all the other official languages of the European Union, and to receive a reply in the same language.
All rights shall be exercised in compliance with the conditions and limitations laid down in the founding treaties of the European Union and the measures undertaken pursuant to such treaties.
In the Republic of Croatia, all rights guaranteed by the European Union acquis communautaire shall be enjoyed by all citizens of the European Union.

52 Constitution of the Republic of Croatia (consolidated text), Official Gazette Narodne Novine no. 85/2010

changed in 2010 such that the word 'law' was inserted (instead of the previously used term 'legislation', which was limited to national laws), implying adherence to the entire legal order, now including not only the relevant international law (especially the most important European Convention on the Protection of Human Rights and Fundamental Freedoms) but also the *acquis communautaire* (Article 145) (i.e. the entire EU legal system).[53]

Regarding the transfer of power to the EU, in addition to Article 141 of the Constitution, which basically promotes monism as the main model of regulation of the relationship between international and domestic law, Articles 139 and 140 have also been considered, which regulate treaty-making power. Article 139 of the Constitution stipulates that 'pursuant to the Constitution, law and rules of international law' international treaty making power is vested upon *'Croatian Parliament, President of the Republic and Government of the Republic of Croatia'*, depending on the *'nature and content' of the respective treaty'*.[54] Further, Article 140 differentiates between four types of international treaties that must all be ratified by the Croatian Parliament but do not follow the same procedure: 1) treaties that require the adoption of amendments to laws, 2) treaties of a military and political nature, and 3) treaties that give rise to financial commitments for the Republic of Croatia (all in paragraph 1) are to be ratified by a simple majority, while (4) treaties that grant an international organisation or alliance powers derived from the Constitution of the Republic of Croatia are to be ratified by a two-thirds majority of all deputies (paragraph 2).[55] Finally, Article 143 paragraph 2 provides *that 'Pursuant to Articles 140 and 141 of the Constitution, the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership'*.

As highlighted in the explanatory text of the 2010 constitutional amendments adopted by the Croatian Parliament, membership in the EU requires the transfer of certain constitutional powers to joint institutions, as per Article 140 of the Constitution. However, according to Article 143, Croatia is determined to accede to and participate in the union of European states that promotes peace, liberty, security,

53 See Smerdel, 2014, p. 206.

54 Art. 139. of the Constitution: *'Pursuant to the Constitution, law and rules of international law, international treaties may be concluded, depending on the nature and content of an international treaty, by the Croatian Parliament, the President of the Republic or the Government of the Republic of Croatia'.*

55 Art. 140. of the Constitution*: (1) The Croatian Parliament shall ratify all international treaties which require the adoption of amendment to laws, international treaties of military and political nature, and international treaties which give rise to financial commitments for the Republic of Croatia. (2) International treaties which grant an international organization or alliance powers derived from the Constitution of the Republic of Croatia shall be ratified by the Croatian Parliament by a two-thirds majority of all deputies. (3) The President of the Republic shall sign the documents of ratification, accession, approval or acceptance of international treaties ratified by the Croatian Parliament in conformity with paragraphs (1) and (2) of this Art.. (4) International treaties which are not subject to ratification by the Croatian Parliament are concluded by the President of the Republic, at the proposal of the Government, or by the Government of the Republic of Croatia.*

and prosperity, as its common founding values. Further, the EU is an organisation with limited powers in that it has only those powers previously transferred to it by Member States with the Founding Agreements and their amendments. Regarding any future amendments to the EU contractual framework, they do not require the activation of procedures in Article 142 (association and dissociation) beyond the procedure stipulated by Article 140 regarding the conclusion and ratification of international treaties.[56]

Therefore, each new transfer of power to EU institutions is limited in that it requires a decision by two-thirds of the majority of all deputies of the Croatian Parliament (Article 140 paragraph 2 of the Constitution). In addition to the clear and strict constitutional requirements in the case of the transfer of new powers, there are no specific limitations: any other future amendment of the treaties that do not include the transfer of new powers requires only a parliamentary decision taken by a simple majority. Furthermore, the referendum stipulated by Article 142 is obligatory only in the case of 'association and dissociation' but not when additional powers are transferred relative to those conferred at the time of accession (though there is always a possibility that a referendum may be called according to Article 87).[57] Finally, as already stated, the Constitutional Court has no direct express authority over the constitutional review of international treaties, either ex-ante or ex-post.[58] Though it is competent to review the constitutionality of a law on the ratification of an international treaty, the competence of the Constitutional Court is limited in

56 See Proposal of constitutional amendments, 15 June 2010, p. 20. proposed by the Committee on the Constitution, Standing Orders and Political System, Draft proposal adopted on June 18 2010, available at: https://sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080052/PRIJEDLOG_PROMJENE_USTAVA_RH.pdf.

57 Art. 87 of the Constitution:
'The Croatian Parliament may call a referendum on proposals to amend the Constitution, a bill or any such other issue as may fall within its purview.
The President of the Republic may, at the proposal of the Government and with the countersignature of the Prime Minister, call a referendum on a proposal to amend the Constitution or any such other issue as he/she may deem to be of importance to the independence, integrity and existence of the Republic of Croatia.
The Croatian Parliament shall call referenda on the issues specified in paragraphs (1) and (2) of this Art. in accordance with law, when so requested by ten percent of the total electorate of the Republic of Croatia.
At such referenda, decisions shall be made by a majority of voters taking part therein.
Decisions made at referenda shall be binding.
A law shall be adopted on any such referendum. Such law may also stipulate the conditions for holding a consultative referendum'.

58 The following legal acts are relevant for the functioning and the internal organisation of the Constitutional Court of the Republic of Croatia: The Constitution of the Republic of Croatia, Official Gazette 'Narodne novine' no. 85/2010 (consolidated text), The Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette 'Narodne novine' No. 49/02 (consolidated text), The Rules of Procedure of the Constitutional Court of the Republic of Croatia, Official Gazette 'Narodne novine' 181/03, 2/15 (consolidated text available at: https://www.usud.hr/en/legal-basis).

that regard, as it does not include a review of the constitutionality of the substantive content of an international treaty. Therefore, the Court could perform only an indirect review of their compliance with the Constitution.

6. Constitutional Court of the Republic of Croatia in constitutional dialogue

As the practice of the Constitutional Court regarding international and EU law and the question of transnational constitutional and judicial dialogue, in general, is concerned, the entering into force of the ECHR prompted the Constitutional Court to engage more actively in judicial dialogue with other courts, referring to case-law of the ECtHR in the first place and considering the jurisprudence of other national, primarily European constitutional courts. In this sense, the Court follows the pattern of judicial dialogue in Europe.

Comparative research in the context of constitutional conversations outside Europe, most notably concerning the Canadian example, shows that the concept of dialogue reflects the participation of courts and legislatures in a dialogue regarding the determination of a proper balance between constitutional principles and public policies necessary for the democratic legitimacy of judicial review. Therefore, this ongoing dialogue is used as a middle point between judicial and legislative supremacy. However, in the European context, the emphasis is on dialogue between courts.[59] In European states, among members of the Council of Europe (COE) and the EU, the term transnational judicial dialogue is primarily connected with two modalities: first, it refers to direct interaction between judges that can occur in different settings, such as international conferences or working visits from one court to another; second, it refers to the citation of foreign opinions by national judges, either when such references are mandatory, as in the case of a conflict between national and international law, or when judges decide to do so simply because they are allowed to consult foreign law and they find it helpful in resolving the actual case before them.[60] European courts often use both modalities. In this way, it is possible to argue that Europe developed and accepted the idea of transnational judicial communities, thanks to decades of existence and progress of the COE and the EU; that is, the adoption and application of the ECHR and EU constitutional documents and common legal *acquis*.[61]

In this context, the Constitutional Court accepts and applies the legal standards developed by the ECtHR, and, in its decisions, it often explicitly refers to ECtHR

59 Claes and De Viseer, 2012.
60 Frishman, 2013.
61 Claes and De Viseer, ibid.

case law. For example, the legal stand of the ECtHR on the principle of proportionality is of special importance for the Constitutional Court, which completely adopted the test of proportionality implemented by the ECtHR. Through the Constitutional Court's case law, the ECHR gained special status in the Croatian legal order. The Court repealed certain statutory provisions of the Expropriation Act, reviewing the conformity of domestic law directly with the ECHR.[62]

However, the situation with EU law is different, although the Constitutional Court already accepted the Euro-friendly approach[63] in the pre-accession period and was informed about the legal stands of the Court of Justice of the European Union (CJEU) and, on rare occasions, referred to it in its decisions, for example, regarding the legal opinion about the importance and content of the principle of the legitimate expectations of parties.[64] Surprisingly, the Constitutional Court also referred to the EU Charter of Fundamental Rights in 2012 but without any detailed explanation or connection to the merits.[65] Furthermore, in 2013, the Court concluded that the EU Charter could not be examined in terms of its merits because the period relevant to deciding on the Charter was not yet in force in Croatia.[66]

After Croatia acceded to the EU, the highest national courts started to use EU law, including cross-references to the case law of the CJEU, though not extensively and not by applying it directly but rather limiting it as an interpretative tool. In the 2014 decision regarding the case of an abstract control of the constitutionality of the Inheritance Act, the Court cited the CJEU's case law, underlying its repeated standpoint that procedural legislation is generally applied from the day of its entry into force to all pending procedures at that moment (*Elliniko Dimosio Case*,

62 By 2016, the Constitutional Court has referred to the case law of the ECtHR in more than 1,800 of its decisions. See Omejec, 2016, p. 15. Omejec argues that *'although formally has sub-constitutional status (Art. 141 of the Constitution), the ECHR is so far the only European law in Croatia which actually has a quasi-constitutional status'*.

63 In the 2008 case regarding the regulation of the market competition and the issues of the application of the *'criteria, standards, and instruments of interpretation of the European Communities'*, to which the SSP and the Interim Agreement refer, the Constitutional Court found that they are not applied as the primary source of law but only as an auxiliary instrument of interpretation in the context of obligation of harmonising legislation with the *acquis communitaire*. See U-III-1410/2007 of 13 February 2008.

64 See European Commission for Democracy through Law (Venetian Commission), Questionnaire – Conference of European Constitutional Courts – CDL-JU (2004)035, Strasbourg, 5 March 2004.

65 U-I-448/2009 of 19 July 2012, para. 44.4. *'The Constitutional Court reminds of the fact that human dignity is absolutely protected, non-derogable and non-comparable. Art. 1. of the Charter of Fundamental Rights of the European Union* (Official Journal of the European Union, C 83/389, 30. 3. 2010.) stipulates: *'Human dignity is inviolable. It must be respected and protected. Human dignity represents fundamental indivisible and universal value in the European Union'*.

66 U-I-5600/2012 of 23 April 2013. Recently, the Constitutional Court started to apply the Charter directly, as in an asylum case U-III-424/2019 of 17 December 2019 (see p. 121). This approach is however limited to cases concerning migration and asylum that fall under the scope of application of EU law. The other approach where the Charter is regarded as an interpretative tool only is still dominant. For detailed case analysis and interpretation of the Constitutional Courts' approach see Majić, 2021.

C-121/91 & C-122/91).[67] In another 2014 case, only this time deciding on a constitutional complaint connected with the execution of the European arrest warrant, the Constitutional Court extensively cited the CJEU's judgements in *Radu Case* C-396/11 (including the opinion of the Advocate General delivered in that case) and *Pupino Case* C-105/03, again not using CJEU's case-law directly but through cross-references as an explanation of the legal background.[68] It is interesting to note that the aforementioned *constitutional complaint was lodged due to the alleged violations of human rights and fundamental freedoms guaranteed by the Constitution, inflicted upon the applicant by the rulings of the County Court and the Supreme Court which, as an appellate court, referred to the CJEU's Pupino Case.* The Supreme Court stated the following:

> With a view to achieving the goals and respecting the principles expressed in EU law, national courts are obliged to apply national law in the light of the letter and spirit of EU legislation. This means that national law must be interpreted in its application as far as possible in light of the wording and purpose(…) and to be in line

with EU law. The Supreme Court in its 2015 judgement further clarified that since Croatia became a full member of the EU, *'EU law is a component of the Croatian legal order and must be applied; moreover, it has primacy over national law'*. Such an obligation *'relates to all legal relations established after Croatia's accession that fall into the scope of application of the EU law'*. Furthermore, the Supreme Court noted that though the EU law is not directly applied as it regards those legal relations established in the pre-accession period and corresponding litigations, in such cases, Croatian courts are obliged to interpret national law in the *'spirit of the EU law and acquis communitaire (including the CJEU's case law)'* as such an obligation arises from the SAA that entered into force in 2005.[69]

Communication between the national courts of Member States and the CJEU largely depends on preliminary rulings procedure, which indeed can be seen as a *'nexus between national and European law'*.[70] References for preliminary rulings constitute a specific type of dialogue between judges *'since the question is directed by a national judge to a European one'*.[71] As the first request for a preliminary ruling under Article 267 of the Treaty on the Functioning of the EU was submitted in

67 See, for example U-I-2403/2009 of 25 February 2014, par. 5 (reference to cases *Elliniko Dimosio v. Nikolaos Tsapalos & Konstantinos Diamantakis,* C-121/91 i C-122/91).

68 U-III-351/2014 of 24 January 2014, par. 9.1, 10, 13.1.

69 Supreme Court Judgement and Decision Revt 249/14-2 of 9 April 2015, p. 22–23.

70 Jacobs et al., 2019, p. 1215.

71 Medal Rodriguez clarifies that there are 'two types of references for a preliminary ruling: when the national judge raises a question about how to interpret a European law in order to correctly apply it, or in the event that a national judge asks for the review of the validity of a European law. In either case, the characteristic feature is that it is a dialogue between judges since the question is directed by a national judge to a European one'. Medal Rodriguez, 2015, p. 109.

2014 by the Municipal Court, more than 30 preliminary questions have been referred to the CJEU by Croatian courts, including the Supreme Court.[72] The Constitutional Court, however, though engaged in constitutional dialogue with national constitutional courts (often referring, for example, to the jurisprudence of German Bundesversassungsgericht in the first place) and international courts in Europe (the dominant influence of the ECtHR), still has not used the possibility of submitting a reference for a preliminary ruling regarding the application of EU law to the CJEU. Nevertheless, in its June 2020 Decision, the Constitutional Court declared that, regarding the criteria established by the CJEU in the *Vaassen-Göbbels Case* (C-61/65, 1966), it considers itself as the national court, which has jurisdiction within the limits of the competences conferred upon it by Article 125 of the Constitution and referring to Article 267. The TFEU launched the procedure for a preliminary ruling before the CJEU.[73]

Nevertheless, the constitutional amendments of 2010 that, preparing for the EU accession referendum, changed the constitutional framework concerning referendum decision-making in practice induced a series of citizen initiatives that also provoked the Constitutional Court to engage more actively in defining Croatian constitutional identity. Second, this reference was made in 2013, concerning the national referendum of the citizens' initiative to amend the Constitution, whereby the definition of marriage as a living union between men and women was introduced.[74] After successfully collecting signatures, the Croatian Parliament called for a national referendum without triggering the Constitutional Court's competence to decide on the constitutionality of the referendum question. Though the Court could act only if so requested by the Parliament, which is the only body competent to institute constitutional review in this case, it reacted before the referendum was held by issuing a

72 Compare data on questions referred for a preliminary ruling, available at Info Curia case-law: https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C&for=&jge=&dates=&language=hr&pro=&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&oqp=HR%252C&td=%3BALL&avg=&lgrec=hr&lg=&page=1&cid=438923.

73 U-III-970/2019 of 24 June 2020, par. 14 et seq. In that sense, the recent development in Constitutional Courts' application of the EU Charter of Fundamental Rights, especially in cases concerning migration and asylum, might lead the Court to activate the preliminary reference procedure in years to come. However, the overall approach of the Constitutional Court is still incostitent and the number of cases in which the Charter was applied is limited. See more in: Majić, ibid.

74 In 2013 Citizen's Initiative called 'In the Name of the Family', reacting to the then Government's initiative to legalise same-sex marriage, managed to collect sufficient number of signatures. The referendum was held on 1 December 2013 and the question that was put to the voters was: *'Are You in favour of the Constitution of the Republic of Croatia being amended with a provision stating that marriage is a life union between a woman and a man?'*. The turnout was 37.9% of voters, out of which 65.8 voted 'yes' and 33.7 voted against. Thus, the Constitutional Charter of Rights and Freedoms was amended by incorporating the definition of marriage into Art. 62 of the Constitution: 'Marriage is a life union between a man and a woman' (Part III, Art. 62, par. 2).

special statement called 'Communication' and extended its review powers.[75] It stated that although Parliament did not react by sending the request, the Court did not lose its general controlling powers over the constitutionality of the referendum. However, the Court further declared that out of respect for the constitutional role of the Croatian Parliament as the highest legislative and representative body in the state, it is only permissible for the Court to make use of its

> general controlling powers as an exception when it establishes the formal and/or substantial unconstitutionality of a referendum question or a procedural mistake of such severity that it threatens to infringe the structural characteristics of the Croatian constitutional state, that is its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (as specified in Article 1 and Article 3).[76]

The Constitutional Court's next references to constitutional identity can also be found in cases connected with popular initiatives. In each of these three cases, the Constitutional Court asked referendum questions contrary to the Constitution. The first Decision[77] dates back to 2014 and concerns the referendum to amend the Constitutional Act on the Rights of National Minorities, specifically the part that regulates minority language rights. Deciding on the constitutionality of the referendum question upon the request of the Parliament, the Court stated that the rights of national minorities, more specifically using language and script, were guaranteed by Article 12 (2) of the Constitution, which represents *'universal and permanent values that define the identity of the Croatian constitutional state'*.[78]

Two other relevant decisions date back to 2015, both on the citizens' initiative and with the same result regarding the constitutionality of the referendum question. In the Decision on so-called outsourcing (paragraph 33.4), the Court repeated its statement in a case that dealt with the constitutional referendum on marriage.[79] In the second decision on motorway monetisation (paragraph 43.1), the court declared that Article 49(1)—that is, guarantees of entrepreneurial and market freedoms—must

75 Communication Sus 1/2013 of the Constitutional Court, of 14 November 2013, on the Citizen's constitutional referendum on the definition of marriage.

76 SuS-1/2013 of 14 November 2013., par. 5. *The Court concluded that the primary protection of values expressed in Art. 1 and 3 of the Constitution does not exclude the authority of the framer of the Constitution to expressly exclude some other question from the circle of permitted referendum questions.*

77 Decision No. U-VIIR-4640/2014 of 12 August 2014, par. 13.1 The collection of signatures for intended referendum was basically organised to prevent the Government's intention to fully implement the Act on national Minorities and to place bilingual plaques (in Cyrillic script) on public institution buildings in the city of Vukovar.

78 Art. 12 of the Constitution: *(1) The Croatian language and the Latin script shall be in official use in the Republic of Croatia. (2) In individual local units, another language and Cyrillic or some other script may be introduced in official use together with the Croatian language and Latin script under conditions specified by law.*

79 Decision No. U-VIIR-1159/2015 of 8 April 2015, par. 33.4, NN 43/2015.

always be interpreted together with Article 3 of the Constitution (fundamental values) and have special significance for the conception of constitutionally guaranteed rights that constitute the identity of the Croatian constitutional state.[80]

Finally, in the latter Decision, the Constitutional Court first established the unconstitutionality of the referendum question (i.e. proposed Act amendments) and concluded that it is *'not necessary to further review the conformity of referendum question with EU law in substance because the Constitution, by its own legal force, has supremacy over EU law'*.[81] This statement by which the Court explicitly declared the supremacy of the Constitution over EU law was quite surprising, as it was not necessary to reach the decision in the case. The Court did not further elaborate on its position on the relationship between national law and EU law nor did it connect the concept of Croatian constitutional identity with the relevant provisions of the EU Treaties, in particular with Article 4 TEU.[82]

7. Concluding remarks

Different possibilities of transnational dialogue for the institutions of the Republic of Croatia emerged with its international recognition in 1992 and, later, with its gradual integration into various international organisations of a supranational character (UN, COE, WTO, and EU). The gradual implementation of the ECHR law and of the ECtHR judgements in national law was especially evident in the case law of the Constitutional Court and the obligation to take a new course towards the realisation and implementation of EU law after the constitutional amendments of 2010 and the insertion of separate Chapter VII. The 'European Union' in the Constitution of the Republic of Croatia has brought the constitutional judiciary and regular courts into a possible position of taking an active (and not just a passive) dialogic approach towards European institutions. The elaboration of the fundamental values of constitutional order and the idea of European integration, with the parallel process of

80 Decision No. U-VIIR-1158/2015 of 21 April 2015 (par. 43.1), NN 46/2015. Constitution of the Republic of Croatia, Art. 49 para. 1: *Free enterprise and free markets shall form the foundation of the economic system of the Republic of Croatia.*

81 Ibid., par. 60.

82 Deciding recently, again in the case connected with review constitutionality the referendum question (U-I-VIIR-2181/2022 of 16 May 2022), this time regarding revisions to legislation governing the protection of the population from contagious diseases, the Court reiterated the necessity of 'holistic interpretation of the Constitution' (U-I-3780/2003) and its obligation *'not to allow the holding of any referendum when it finds such formal and/or substantive unconstitutionality of the referendum question or such a grave procedural error which threatens to undermine the structural characteristics of the constitutional state, that is, its constitutional identity, including the highest values of the constitutional order (Art. 1 and 3 of the Constitution)'*, as stated in Communication SuS-1/2013 of 14 November 2013., par. 5.

adaptation of the national constitutional-political system to the complex of European law, prompted the Constitutional Court of the Republic of Croatia to start developing the concept of constitutional identity. Exactly taking the position in such transnational dialogue that must be realised based on mutual partnership and respect, including a *'correct understanding of the established limits, both to the national constitution and to the regulatory authority of the European Union'*,[83] would enable national institutions and Constitutional Court to engage more actively in conceptualisation and the protection of national identity that is inherent to fundamental structures of constitutional democracy in Croatia.

83 Smerdel, 2014, pp. 516–517.

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Chapter V

Constitutional Identity of the Czech Republic

Michal Petr

Abstract

This section focuses on the relationship between national and European Union (EU) laws from the Czech Republic's perspective. Its aim is not to provide a comparative analysis of these issues but rather to present a specific Czech perspective, with particular emphasis on the concept of Czech constitutional identity. Thus, this chapter is based on the jurisprudence of the Czech Constitutional Court and the corresponding academic discourse. It begins with a discussion of the incorporation of EU Law into the Czech constitutional order, its direct effect, and the limits on the primacy of EU Law. It concludes that while there are no provisions on the effects of EU Law on the Czech constitutional order, the Constitutional Court uses the principles established by EU Law itself. Notably, even though the Constitutional Court is known to be a strong protector of Czech constitutional identity, the primacy of EU Law has never been called into question. The chapter further examines in-depth the concept of transfer of national sovereign powers to the EU and its constitutional consequences, its legal basis and the procedure for it, and, in particular, its limits, including the ultima ratio supervision of the Czech Constitutional Court. Accordingly, the first ever ultra vires ruling, passed by the Czech Constitutional Court, is explained, including its consequences for further practice. Finally, the Chapter focuses on European values, as enshrined in Article 2 of the Treaty on the European Union, and national identity, protected by Article 4 thereof. The Constitutional Court finds these fundamental values compatible in principle, even though in practice, it did not have to resolve any specific problem concerning this issue.

Keywords: constitutional identity, primacy, sovereign rights, ultra vires, Treaty of Lisbon

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1. Introduction

This chapter addresses the relationship between the European Union (EU) and national law from the perspective of the Czech Republic, focusing not only on the core issues of the incorporation of the EU law into Czech legal order but also considering the principles of EU law, in particular its fundamental values, as expressed in Article 2 of the Treaty on the European Union (TEU), and the EU's obligation to respect the Member States' national identity, as prescribed by Article 4 (2) TEU. We also discuss several related issues, including the academic discourse on these issues in the Czech Republic and the constitutional dialogue between key institutions. This chapter is founded on the jurisprudence of the Czech Constitutional Court (CCC) and the academic writings of predominantly Czech scholars. Its aim is not a cross-border comparison of the topics discussed or a generalised analysis of these issues; rather, it strives to provide a specific Czech perspective, which may be used for future comparative work.

For the same reason, it tries to work as much as possible with sources in English; fortunately, the CCC has published a translation of its most important judgements on its English website. If possible, we provide citations from academic papers in English, although we do not overlook Czech papers.

2. Incorporation of European Union legal acts into Czech law

This chapter discusses the specific provisions of Czech constitutional law, enabling EU law to take effect in the Czech legal order, including the relevant academic discussion and the doctrine of conditional transfer of powers, as developed by Czech jurisprudence and reflected in academic discourse.

2.1. The constitutional foundations of the EU Law

The Constitution of the Czech Republic (hereinafter the 'Constitution')[1] was amended in 2001 to enable the accession of the Czech Republic to the EU (this amendment is known as the 'Euro-amendment' of the Constitution).[2] The crucial provision thereof, which enabled the EU membership and is, therefore, known as

1 English language version of the Constitution is online available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Ustava_EN_ve_zneni_zak_c._98-2013.pdf (Accessed: 14 February 2023).

2 This amendment is incorporated in the English language of the Constitution, mentioned in the previous footnote.

the '*integration clause*', is contained in Article 10a of the Constitution, which reads as follows: '*Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution*'.

First, it does not contain any specific provisions regarding the incorporation of the EU legal order into the Czech Republic. This sparked intensive debate among scholars discussing what should be understood as the legal basis for the legal effects of EU law in the Czech Republic. Two approaches have emerged from this debate. First, if the integration clause of the Constitution does not prescribe the effects of EU law in the Czech legal order, other provisions of the Constitution must be identified and employed to that effect. According to others, the effects of EU law in the Czech legal order flow directly from EU law, and the Constitution does not need to add anything to this regard.

The first approach was summarised in a series of articles by professor Jiří Malenovský,[3] then a judge of the CCC and since 2004 a judge of the Court of Justice of the European Union (CJEU). According to him, the Constitution must not only enable part of the state sovereignty to be conferred on the EU (the 'integration clause', contained in Article 10a of the Constitution) but also define the effects of EU law in Czech legal order (known as the '*incorporation clause*').[4] Thus, primary EU law requires specific incorporation clauses in its Constitution. Conversely, because secondary law is the product of EU institutions and primary law, not Member States, its legal effects should be governed by EU law; however, this is possible only if the effects of primary law are defined by the Constitution.[5]

According to prof. Malenovský, Article 10a of the Constitution contains only an 'integration clause', not an 'incorporation clause';[6] therefore, another provision of the Constitution defining the effects of EU law in Czech legal order must be identified. He proposes that it must be the general reception clause on international law contained in Article 10 of the Constitution, according to which

> Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.

3 Malenovský, 2003; Malenovský, 2004; Malenovský, J. 2005b.

4 Malenovsky, 2003, p. 845: '*The effects which the primary Community law connects with the impact of different forms of secondary Community law […] cannot be put into effect and enforced without an intermediation of constitutional norms of the states concerned. If the Community law is to be applied directly vis-à-vis persons under the jurisdiction of individual […] states, the respective sovereign needs to issue an original instruction in this regard. First, by vacating the space hitherto reserved only to his organs to exercise sovereign powers (by conferring these powers on the organs of EC/EU), and second, by authoritatively informing its organs and subordinates about the binding character and characteristics of the Community law in the space he has vacated for their application*'.

5 Ibid., p. 846.

6 Malenovský, 2004, p. 228.

According to the 'general reception clause' (Article 10 of the Constitution), international law enjoys applicational primacy over the 'normal' Czech law, not the Constitution. To secure the primacy of EU law over the constitutional law, prof. Malenovský argues that unlike 'normal' international treaties, international treaties adopted according to Article 10a of the Constitution (the 'integration clause') (i.e. the EU primary law) must be endorsed by a qualified majority in the Parliament (the same as the constitutional law, see Chapter 3.1); by analogy, it should, therefore, enjoy application priority even over the constitutional law. The term 'statute' in the 'reception clause' (Article 10 of the Constitution), therefore, must be interpreted as a 'constitutional statute'; thus, the Constitution itself would provide that the EU law has primacy even over the Czech constitutional law.

The opposing interpretation, proposed by Dr Jan Kysela, currently a professor at Charles University, and Dr. Zdeněk Kühn, also currently a professor at Charles University and a judge at the Supreme Administrative Court, relies solely on the wording of Article 10a of the Constitution.[7] According to them, national law cannot define the effects of the EU law: '*The effects of the Community law stem from it itself, without the constitutions of Member States having anything to add; if they do, it often only clouds the matter*'.[8] Article 10a of the Constitution, therefore, serves a double purpose: it is an 'integration clause' and an 'implicit incorporation clause'; EU law has a priority over the Czech one not because Article 10 of the Constitution must be interpreted in this way, but because Article 10a of the Constitution had vacated the legal space for the EU law, together with its effects.[9] The effects of EU law in space thus vacated must be governed by EU law itself, as Czech law is no longer applicable.

Very intensive debate crystalised around these two interpretations in a few years after the 'Eura-amendment' had been adopted[10] without leading to any conclusion or consensus. It was finally settled only by the CCC in its judgement '*Sugar Quotas III*' in 2006,[11] its first judgement concerning the EU law.

This case concerns the regulation of the sugar market. Before the Czech Republic acceded to the EU, the CCC annulled two government regulations setting quotas for sugar production.[12] In the third case (*Sugar Quotas III*), the CCC was asked to annul another governmental regulation adopted after the EU accession. The CCC annulled the regulation again, though this time, not because of its unconstitutional content (as before) but because the government acted *ultra vires* while adopting it.

The CCC fully endorsed the interpretation of the Constitution suggested by Dr Kühn and Dr Kysela, according to which Article 10a of the Constitution serves both

7 Kühn, 2004; Kysela, 2002; Kühn and Kysela, 2002; Kühn and Kysela, 2004.
8 Kühn and Kysela, 2004, p. 23.
9 Ibid., p. 24.
10 Among others Bartoň, 2002; Král, 2004; Syllová, 2002.
11 CCC Pl. ÚS 50/04, 8 March 2006. The judgement is available in English at: https://www.usoud.cz/en/decisions/2006-03-08-pl-us-50-04-sugar-quotas-iii (Accessed: 14 February 2023).
12 CCC Pl. ÚS 45/20, 14 February 2002; CCC Pl. ÚS 39/01, 10 October 2002.

as an 'integration clause' and 'incorporation clause', and the effects of EU law within Czech legal order are governed by the EU law itself:

> Article 10a of the Constitution of the Czech Republic […] operates in both directions: it forms the normative basis for the transfer of powers and is simultaneously that provision of the Czech Constitution which opens up the national legal order to the operation of Community law, including rules relating to its effects within the legal order of the Czech Republic […]';[13] thus, '[i]n contrast to international law, Community law itself determines and specifies the effects it has in the national law of the Member States.[14]

This crucial interpretation has been maintained without question in further jurisprudence of the CCC and gradually accepted by the commentators, though not without question.[15] Overall, Article 10a of the Constitution is the sole legal basis for the effects of EU law on the Czech Republic. Specific EU legal acts need not be incorporated into the Czech legal order; the mere fact that the Czech Republic had transferred some of its competences to the EU means that EU law is applicable in the Czech Republic, with legal effects prescribed by the EU law.

2.2. Conditional transfer of powers

Beyond clarifying the constitutional basis of EU law in the Czech Republic, the CCC in the *Sugar Quotas III* judgement and its subsequent case-law also explained other points concerning the effects of EU Law in the Czech legal order, in particular, the doctrine of limited transfer of powers and the limits to the primacy of EU Law.[16]

First, Article 10a of the Constitution enables the transfer of certain powers from the Czech Republic to the EU; the transfer must be limited such that it must not '*violate the very essence of the republic as a sovereign and democratic state*' (see Chapter 5.2.1).[17] The transfer of power means that the Czech organs lose their corresponding powers and competences.[18] Thus, any exercise of powers by Czech organs in the area

13 CCC Pl. ÚS 50/04, 8 March 2006. To support this reasoning, the CCC added that: '*The Constitutional Court is of the view that […] [a] different approach would, after all, not correspond with the fact that the very doctrine of the effects that Community acts call forth in national law has gone through and is still undergoing a dynamic development. This conception also best ensures […] the conditionality of the transfer of certain powers'.*

14 CCC Pl. ÚS 50/04, 8 March 2006.

15 Král, 2006; Maršálková, 2006; Malenovský, 2006; Zemánek, 2006.

16 For a comprehensive summary in English, see e.g. Zemánek, 2007.

17 CCC Pl. ÚS 19/08, 26 November 2008.

18 CCC Pl. ÚS 50/04, 8 March 2006: *'Art. 10a […] constitutes a provision that makes possible the transfer of certain powers of Czech state organs to […] the European Community and its organs. In the moment when the Treaty establishing the European Community […] became binding on the Czech Republic, a transfer was affected of those powers of national state organs which, according to EC primary law, are exercised by organs of the EC, upon those organs. In other words, at the moment of the Czech republic's*

where the competences had been transferred to the EU was *ultra vires*; this was the reason the CCC annulled governmental regulation in the *Sugar Quotas III* case.[19] Second, power transfer is conditional. Similar to the constitutional courts of other Member States, the CCC declared in *Sugar Quotas III* that:

> the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state.[20]

Thus, the transfer of powers is conditional on two levels:[21] the formal level, requiring the transfer of only limited powers, thus preserving the foundations of the state sovereignty of the Czech Republic (as defined in Article 1 (1) of the Constitution),[22] and the material level, requiring that the transferred powers be exercised in a way that does not jeopardise the foundations of a material law-based state (as prescribed in Article 9 (2) of the Constitution).[23] The CCC should remain the ultimate guardian of conditional power transfer.[24]

Third, concerning the power of the CCC, it confirmed that it had no power to assess the validity of EU law; the CCC could only assess the compatibility of Czech law with the Czech constitutional order. Meanwhile, the CCC must interpret the Czech constitutional order per EU Law.[25] The *European Arrest Warrant* Judgement clarifies

accession to the European Community, the transfer of these powers was accomplished such that the Czech Republic conferred these powers upon EC organs. Thus, the powers of all relevant national organs are restricted to the extent of the powers that are being exercised by EC organs, regardless of whether they are powers of norm creation or powers of individual decision-making'.

19 CCC Pl. ÚS 50/04, 8 March 2006: '*In adopting [the Governmental regulation], the Government exceeded its authority; that is, it asserted its powers of norm-creation in a field which, on the basis of Art 10a of the Constitution of the Czech Republic, had already been transferred to EC organs*'.

20 Ibid.

21 CCC Pl. ÚS 19/08, 26 November 2008.

22 Art. 1 (1) of the Constitution reads as follows: '*The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens*'.

23 Art. 9 (2) of the Constitution reads as follows: '*Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible*'.

24 CCC Pl. ÚS 50/04, 8 March 2006: '*Should […] these delegated powers be carried out by the EC organs in a manner that is regressive in relation to the existing conception of the essential attributes of a democratic law-based state, then such exercise of powers would be in conflict with the Czech republic's constitutional order, which would require that these powers once again be assumed by the Czech Republic's national organs*'.

25 CCC Pl. ÚS 50/04, 8 March 2006: '*Although the Constitutional Court's referential framework has remained, even after 1 May 2004, the norms of the Czech Republic's constitutional order, the Constitutional Court cannot entirely overlook the impact of Community law on the formation, application, and interpretation of national law […]. In other words, in this field the Constitutional Court interprets constitutional law taking into account the principles arising from Community law*'.

the extent of this obligation.[26] As will be discussed in detail below in Chapter 5.3, in this case, the CCC assessed the compatibility of the European Arrest Warrant with the Czech constitution order and in particular the Charter of the Fundamental Rights and Freedoms (hereinafter 'Czech Charter'),[27] which guarantees that '*No citizen may be forced to leave her homeland*'.[28] The CCC concluded that if the constitution is interpreted per the principles of EU integration, such an interpretation must be adopted.[29] The CCC then found that the European Arrest Warrant was not contrary to the Czech Constitutional Order.

Finally, in the *European Arrest Warrant* Judgement, the CCC further clarified the extent of its competence. Given the supremacy of EU law, it generally has no competence to assess the EU legislation and the Czech law implementing it but for the cases where EU law leaves Member States with some discretion in implementation,[30] provided, as the CCC outlined already in the *Sugar Quotas III* judgement, that the EU organs exercise the power transferred to them in a manner that is compatible with the preservation of the foundations of Czech state sovereignty and in a manner that does not threaten the very essence of the substantive law-based state. Thus, '*unless such an exceptional and highly unlikely eventuality comes to pass, the Constitutional Court […] will not review individual norms of Community law for their consistency with the Czech constitutional order*'.[31]

If indeed the CCC were to review a specific act of EU law, it would, thus, make sure that it is not beyond the powers granted to the EU – *ultra vires* – as the CCC found in the *Slovak Pensions* judgement, discussed in Chapter 6, and that it is not in conflict with the 'material core' of the Constitution, discussed in Chapter 5.1. Even though not without critique,[32] the doctrine on the effects of EU law in Czech legal order, the limits to the principle of primacy of EU law and the role of the CCC

26 CCC Pl. ÚS 66/04, 3 May 2006. The judgement is available in English at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%2066-04.pdf (Accessed: 14 February 2023).

27 English language version of the Czech Charter is available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Charter_of_Fundamental_Rights_and_Freedoms.pdf (Accessed: 14 February 2023).

28 Art. 14 (4) of the Czech Charter.

29 CCC Pl. ÚS 66/04, 3 May 2006, para. 61: '*A constitutional principle may be derived from Art. 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC treaty, according to which domestic legal enactments, including constitution, should be interpreted in conformity with the principles of European integration and the cooperation between the Community and Member State organs. If the Constitution […] can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected [which] supports the carrying out of that obligation, and not an interpretation which precludes it*'.

30 *Ibid*, para. 54: According to the CCC: '*[W]here the delegation of authority leaves the member states no room for discretion as to the choice of means, that is, where the Czech enactment reflects a mandatory norm of EC law, the doctrine of primacy of Community law in principle does not permit the Constitutional Court to review such Czech norm in terms of its conformity with the constitutional order of the Czech Republic […]*'.

31 CCC Pl. ÚS 66/04, 3 May 2006, para. 53.

32 Bříza, 2009; Hamuľák, 2016, p. 67–72; Komárek, 2008.

vis-à-vis the EU law, thus, crystallised relatively early around several seminal judgements of the CCC.[33]

3. Transfer of additional powers to the European Union

As discussed in the previous section, the constitutional basis for the effects of EU law in the Czech legal order is Article 10a of the Constitution, which enables certain powers of Czech institutions to be transferred to the EU, and the fact that transferring the powers itself enables those powers to be exercised by EU institutions in the Czech Republic. Thus, in general, the Constitution does not require any amendments to enable any possible future transfer of power to the EU. Nevertheless, Czech law prescribes specific domestic procedures concerning the adoption of acts, transferring powers according to Article 10a of the Constitution, as discussed below via the ordinary and simplified revision procedures of EU primary law.

3.1. Ordinary revision procedure of primary law

Concerning the ordinary revision procedure of primary law – that is, if the transfer of additional powers is executed based on an international treaty according to Article 10a of the Constitution (as was the case with the Lisbon Treaty, the review of which will be discussed in Chapters 4.1 and 5.2) – the Czech Parliament must give consent to the ratification of the treaty unless a specific constitutional act adopted for this purpose would require a referendum.[34] The referendum was required only for the Czech accession to the EU (and contemplated regarding the Constitutional Treaty, see Chapter 4),[35] not for the Lisbon Treaty.

Consent must be obtained from the majority (three-fifths) of members of the Chamber of Deputies and three-fifths of members of the Senate.[36] This is a significantly higher majority than in the case of 'normal' international treaties for the ratification of which only a simple majority is required[37] and comparable to the adoption of a constitutional act, which also requires a three-fifths majority.[38]

33 Hamuľák, 2014; Šlosarčík, 2015.
34 Art. 10a (2) of the Constitution.
35 Constitutional act No. 515/2002 Coll. concerning the Referendum on the Czech Republic's Accession to the European Union and Amendments to Constitutional Act No. 1/1993 Sb., the Constitution of the Czech Republic, as amended by subsequent constitutional acts. English language version of the constitutional act is available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/515_2002_EN.pdf (Accessed: 14 February 2023).
36 Art. 39 (4) of the Constitution.
37 Art. 39 (1) of the Constitution.
38 Art. 39 (4) of the Constitution.

Before such a treaty is ratified, the CCC may be asked to assess its conformity with the constitutional order;[39] the Constitutional Court Act prescribes the details of the proceedings before the CCC.[40] The petition for review may be submitted by members of Parliament or the President.[41] If petitions were filed, the treaty may not have been ratified before the judgement of the CCC.[42]

If the CCC concludes that the international treaty conflicts with the constitutional order, it declares such a nonconformity in its judgement and lists the provisions of the constitutional order with which the treaty conflicts.[43] Such a judgement of the CCC is a hindrance to the treaty's ratification until the nonconformity is cured;[44] to do that, an amendment to the Constitution would be necessary. Such an amendment, however, cannot touch the 'material core' of the Constitution (see Chapter 5.1).[45] Conversely, if the CCC concludes that the international treaty does not conflict with the constitutional order, it shall declare this in its judgement,[46] enabling its ratification.

Concerning specifically the Lisbon Treaty, the CCC was asked twice to review its compatibility with Czech constitutional orders, once by the Senate as a whole and once by a group of Senators; this process and the CCC judgements, *Lisbon I*[47] and *Lisbon II*,[48] will be discussed below in Chapters 4 and 5.2.

3.2. Simplified revision procedure of the primary law

Second, in the simplified revision procedure of primary law, no additional powers may be conferred on the EU on this basis, as is clear from the treaty of

39 Art. 87 (2) of the Constitution.

40 English language version of the Constitutional Court Act is available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/ConstitutionalCourtAct_1.pdf. (Accessed: 14 February 2023).

41 According to Section 79a (1) of the act Constitutional Court Act, the petition may be filed by either (i) one of the chambers of Parliament, as of the moment when the treaty is submitted to it for its consent to ratification, until the moment when the treaty receives that consent; (ii) a group of at least 41 Deputies or a group of at least 17 Senators, from the moment when the Parliament has given its consent to the ratification of the treaty, until the moment when the President of the Republic ratifies the treaty; (iii) a group of at least 41 Deputies or a group of at least 17 Senators, from the declaration of the results of a referendum in which consent to the ratification of a treaty is given, until the moment when the President of the Republic ratifies the treaty; or (iv) the President of the Republic, from the moment when the treaty was submitted to him for ratification.

42 Art. 87 (2) of the Constitution.

43 Section 79e (1) of the Constitutional Court Act.

44 Section 79e (3) of the Constitutional Court Act.

45 Art. 9 (2) of the Constitution.

46 Section 79e (2) of the Constitutional Court Act.

47 CCC Pl. ÚS 19/08, 26 November 2008. The judgement is available in English at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%2019-08.pdf (Accessed: 14 February 2023).

48 CCC Pl. ÚS 29/09, 3 November 2009. The judgement is available in English at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%2029-09.pdf (Accessed: 14 February 2023).

the EU.[49] Therefore, no further discussion of this procedure is necessary for this study. For completeness, it ought to be mentioned that the Constitution does not address the simplified procedure; prior consent from the Chamber of Deputies is required.[50]

When reviewing the Lisbon Treaty, the CCC also concluded that no additional competencies may be granted to the EU through Articles 48 (6) and (7) TEU.[51] However, the CCC proclaimed in 2008 its *Lisbon I* judgement that '*it is necessary to ensure review of a decision adopted on the basis of Article 48 paragraph 6, subparagraph two, by the Constitutional Court of the Czech Republic for the decision's consistency with the constitutional order*'.[52] Such a review procedure is not in place and, surprisingly, has not yet been adopted.

4. Constitutional review of the Constitutional Treaty and the Lisbon Treaty

The Constitutional Treaty of the Czech Republic has not been formally examined. Similar to accession to the EU, a referendum was considered a form of political representation, even though it was challenging to reach an agreement on it.[53] The Constitutional Treaty was abandoned before an agreement on the form of ratification was reached. Conversely, the review of the Lisbon Treaty was extensive, as discussed below.

4.1. Review of the Lisbon Treaty by the Czech Constitutional Court

Concerning the Lisbon Treaty, the CCC issued two judgements, *Lisbon I* and *Lisbon II*, discussed in-depth in section 5.2. The most vocal political opponent of the Lisbon Treaty was then president Václav Klaus, who was the last head of state in the EU to sign it. Surprisingly, he did not challenge the Lisbon Treaty before the CCC, even

49 Art. 48 (6) and (7) TEU.

50 Section 109i and 109l of the Act No. 90/1995 Coll., on the Rules of Procedure of the Chamber of Deputies, as amended. The act on the rules of procedure of the Chamber of Deputies is available in English at: https://pspen.psp.cz/chamber-members/legal-framework/ (Accessed: 14 February 2023).

51 CCC Pl. ÚS 19/08, 26 November 2008, paragraphgraph 160: '*Paragraphgraph six, third subparagraphgraph of the contested Article rules out changes under this regime that would affect the competences of the Union; this expressly eliminates any doubt in relation to Article 10a of the Constitution of the Czech Republic*'. Paragraphgraph 161: '*As regards this article [i.e. Article 48 (7) TEU], conceptually we cannot even think about changes expanding union competences, because it concerns – as is obvious – only voting*'.

52 CCC Pl. ÚS 19/08, 26 November 2008, para. 167.

53 Malenovský, 2005a.

though he was empowered to do so, as described in section 3.1. The CCC was first requested to review the Lisbon Treaty by the Senate, the upper chamber of Parliament. It decided in November 2008 that certain specific provisions of the Treaty, identified in the Senate's petition, were not inconsistent with the Czech constitutional order (*Lisbon I* judgement).[54] The CCC famously concluded that:

> The Treaty of Lisbon changes nothing on the fundamental conception of existing European integration […]. In terms of our constitutional law, the Constitution […] remains [the] fundamental law of the state […]. The Constitutional Court remains the supreme protector of Czech constitutionality, including against possible excesses by Union bodies or European law, which also clearly answers the contested issue of the sovereignty of [the] Czech Republic; if the Constitutional Court is the supreme interpreter of the constitutional regulations of the Czech Republic […], it is obvious that Article 1 par. 1 of the Constitution cannot be violated.[55]

The CCC also stressed, and underlined it as its most important finding, that the values upon which the EU is founded are fully compatible with the core values of the Constitution: '*the most important finding for the Constitutional Court's review was that the Union continues to be founded on the values of respect for human dignity, freedom, democracy, a materially understood law-based state, and the observance of human rights*'.[56]

Thereafter, both Chambers of Parliament consented to the ratification of the Lisbon Treaty. However, the president did not ratify it, and almost a year after the Lisbon Treaty had been cleared by the CCC, a group of Senators (i.e. not the Senate as a whole) brought another petition to the CCC, asking it to review the Lisbon Treaty 'as a whole'. As the process of ratification had become highly politicised, the senators stated in their petition that:

> The petitioners cannot rid themselves of the impression that the Constitutional Court, in reviewing the conformity of the Treaty of Lisbon with the constitutional order, was always heretofore, in case of any doubts, more on the side of the Treaty of Lisbon than on the side of the constitutional order. The Constitutional Court has a considerable degree of discretion in interpretation, and, unfortunately, the Constitutional Court's efforts to proceed intentionally so that the Treaty of Lisbon could be declared not to contravene the constitutional order cannot be denied.[57]

The CCC, however, dismissed this petition as well in November 2009, summarising that '*this judgement refutes doubts about the conformity of the Treaty of Lisbon*

54 This judgement is discussed in detail e.g. in Bříza, 2009a or Zemánek, 2009.
55 CCC Pl. ÚS 19/08, 26 November 2008, para. 216.
56 CCC Pl. ÚS 19/08, 26 November 2008, para. 217.
57 CCC Pl. ÚS 29/09, 3 November 2009, para. 32.

with the Czech constitutional order and removes formal obstacles to its ratification'.[58] On the same day, the president finally ratified the treaty. The specific issues that the CCC analysed in the Lisbon Treaty and the conclusions the CCC arrived at are discussed in Section 5.2.

4.2. Principles of review of the 'Article 10a Treaties'

The CCC judgement *Lisbon I* was the first case in which the CCC reviewed the compatibility of an international treaty, transferring the powers of the Czech Republic to international organisations per Article 10a of the Constitution, with the Czech constitutional order. Therefore, it is necessary to answer several general questions regarding this procedure.

First, the CCC declared in the *Lisbon I* judgement that it would review only the specific provisions of the Lisbon Treaty identified in the petition. Specifically, the CCC decided that it was not authorised to review the Lisbon Treaty 'as a whole'.[59] Interestingly, a year later, when the CCC returned to the review of the Lisbon Treaty in its *Lisbon II* judgement, it changed its initial position expressed in the *Lisbon I* judgement and decided it may review the Lisbon Treaty 'as a whole'.[60]

Second, in connection with the specific provisions under review, the CCC stated that it may review the provisions that were part of the 'previous' treaties, as the 'new' ones are 'normatively new provisions';[61] in this connection, it added that '*[t]he absence of a prior review of the Accession Treaty by the Constitutional Court cannot, in and of itself, establish a presumption that it is constitutional*'.[62]

Third, the CCC determined its point of reference when reviewing the Lisbon Treaty. As discussed in Chapter 2, given the transfer of power from the Czech Republic to the EU, the CCC generally accepts the primacy of EU Law, even though only conditionally.[63] Thus, the CCC's review of the EU law is generally limited to the 'material core' of the Constitution (see Chapter 5.1). The CCC, however, decided that, regarding the preliminary review of treaties according to Article 10a of the

58 CCC Pl. ÚS 29/09, 3 November 2009, para. 179.

59 CCC Pl. ÚS 19/08, 26 November 2008, para. 74: '*Here, the Constitutional Court inclined towards the conclusion (arising by analogy from its settled case law in the area of reviewing legal regulations) that focuses only on the provisions of the international treaty that were formally contested and grounds therefore provided in the petition*'.

60 CCC Pl. ÚS 29/09, 3 November 2009, para. 109.

61 CCC Pl. ÚS 19/08, 26 November 2008, para. 87: '*The Constitutional Court included in its review all the provisions of the Treaty of Lisbon whose consistency with the Constitution the petitioner contests in a reasoned manner, because […] it considers them to be normatively new provisions, even though we can concede that they may, although only in some aspects, only replicate existing norms of European law*'.

62 CCC Pl. ÚS 19/08, 26 November 2008, para. 90.

63 As the CCC repeated in Pl. ÚS 19/08, 26 November 2008, para. 113: '*This loan of partial powers is a conditional one; it can continue as long as these powers are exercised by EC bodies in a manner compatible with the preservation of the foundations of the Czech Republic s state sovereignty, and in a manner that does not jeopardise the foundation of a material law-based state*'.

Constitution, such a limited review would not be sufficient.[64] For the review of the Lisbon Treaty, the CCC therefore '*took into consideration the entire system of the Czech constitutional order, although primarily its untouchable material core, specifically those articles and parts that can apply to the provisions of the Treaty of Lisbon*'.[65]

5. Issues on which the Constitutional Court refused to intervene to protect Czech constitutional order

It is appropriate to distinguish between two situations in which the CCC can intervene to protect national law and its competence against EU law. The first situation concerns the *ex-ante* review of international treaties according to Article 10a of the Constitution, discussed in Chapter 4; in this case, the review is more extensive, having as its reference criterion the entire Czech constitutional order. This review was conducted regarding the Lisbon Treaty, as discussed in-depth in Section 5.2.

The second situation concerns the *ex-post* review of specific activities of EU organs, in particular the EU legislation; in this case, the review is limited to the reference criterion of the 'material core' of the Constitution and the intervention is generally '*exceptional and highly unlikely*';[66] an example of such a review will be discussed below in Chapter 5.3.

In this chapter, we will, however, discuss first the concept of the 'material core' of the Constitution, and, thereafter, the specific cases of review the CCC has performed.

5.1. 'Material core' of the Constitution

The CCC addressed the issue of the 'material core' of the Constitution in its first judgement, reviewing the compatibility of a legal act with the Czech constitutional order in 1993 and stressing that the Constitution '*is not established on neutrality of*

64 CCC Pl. ÚS 19/08, 26 November 2008, para. 90: '*If we accepted the opinion that consent with the ratification of an international treaty under Art. 10a […] reduces the present review only to the area of the 'material core' of the Constitution, and otherwise rules it out, it would mean that the institution of the preliminary review of the constitutionality would to a large extent become meaningless*'.

65 CCC Pl. ÚS 19/08, 26 November 2008, para. 93.

66 CCC Pl. ÚS 66/04, 3 May 2006, para. 53: the Constitution '*joined the modern concept of a law-based state, which is understood not as a formal, legal state, but as a material legal state. The guiding principle is undoubtedly the principle of inherent, inalienable, non-prescriptible, and non-repealable fundamental rights and freedoms of individuals, equal in dignity and rights; a system based on the principles of democracy, the sovereignty of the people, and separagraphtion of powers, respecting the cited material concept of a law-based state, is built to protect them. These principles cannot be touched even by an amendment to the Constitution implemented formally in harmony with law, because many of them are obviously of natural law origin, and thus the state does not provide them, but may and must – as a constitutional state – only guarantee and protect them*'.

values, it is not merely a definition of institutions and processes, but incorporates in its text certain regulatory ideas, expressing the basic untouchable values of a democratic society'.[67] These principles stem from Article 1 (1) of the Constitution, according to which the Czech Republic is '*a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizen*', and the 'eternity clause' contained in Article 9 (2) of the Constitution, according to which '*any changes in the essential requirements for a democratic state governed by the rule of law are impermissible*'. This notion was summarised again in the *Lisbon I* judgement section.[68]

The 'material core' of the Constitution has been extensively discussed in academia[69] but beyond the focus of this study. From the perspective of the relationship with EU law, these fundamental values are viewed as the Czech 'constitutional identity' by scholars,[70] even though this term is not frequently used and the term 'material core' of the Constitution is more common in Czech discourse (on the relationship with Article 4 (2) TEU, see Chapter 8). Crucially, these values are fundamentally the same as those evoked by the Article 2 TEU,[71] and any conflict between 'Czech' and 'EU' values is, thus, regarded as very improbable by the academia,[72] given the overall pro-European approach of the CCC.

5.2. Ex-ante review of the Lisbon Treaty

As indicated, the CCC performed an in-depth review of the Lisbon Treaty and ultimately found it to accord with the Czech constitutional order. This chapter discusses four fundamental issues that the CCC needed to resolve before consenting to the ratification of the Lisbon Treaty.

5.2.1. Sovereignty of the Czech Republic

The fundamental objection to the Treaty was that after its ratification, the Czech Republic would no longer continue to be a sovereign state. This issue was analysed in-depth in the *Lisbon I* judgement. The CCC began with the premise that the

67 CCC Pl. ÚS 19/93, 21 December 1993. The CCC went on to declare that: '*In the concept of a constitutional state on which the Czech Constitution is based, law and justice are not subject to the discretion of the legislature, and thus of laws, because the legislature is bound by certain fundamental values that the Constitution declares to be untouchable. For example, the Czech Constitution provides in Art. 9 para. 2 that 'any change in the essential requirements for a democratic state governed by the rule of law is impermissible'. This places the constitutive principles of a democratic society, within this constitution, above legislative competence, and thus 'ultra vires' of Parliament. A constitutional state stands and falls with these principles. Removal of one of these principles, by anyone, even by a majority or unanimous decision of Parliament, could not be interpreted otherwise than as removal of this constitutional state as such*'.

68 CCC Pl. ÚS 19/08, 26 November 2008, paragraphgraph 93.

69 E.g. Holländer, 2005; Molek, 2014.

70 E.g. Kosař and Vyhnálek, 2018, p. 861.

71 CCC Pl. ÚS 19/08, 26 November 2008, paragraphgraph 217.

72 Kosař and Vyhnálek, 2018, p. 866.

traditional doctrine of state sovereignty[73] was no longer adequate for describing the current state of international affairs.[74] The CCC, therefore, endorsed the doctrine of non-binary 'shared' or 'pooled' sovereignty:[75]

> The European Union has advanced by far the furthest in the concept of pooled sovereignty, and today is creating an entity sui generis, which is difficult to classify in classical political science categories. It is more a linguistic question whether to describe the integration process as a 'loss' of part of sovereignty, or competences, or, somewhat more fittingly, as, e.g., 'lending, ceding' of part of the competence of a sovereign. It may seem paradoxical that the key expression of state sovereignty is the ability to dispose of one's sovereignty (or part of it), or to temporarily or even permanently cede certain competences.[76]

Given this nature of modern sovereignty and the consequences of its sharing, the CCC could conclude that a limited transfer of state powers to the EU is not to be understood as a weakening of Czech sovereignty but may, on the contrary, lead to its strengthening.[77] However, going into details of the transfer of powers, the CCC stressed that it must be limited and cannot influence the existence of the Czech Republic as a sovereign state, as defined in Article 1 (1) of the Constitution; these limits should ultimately be guaranteed by the CCC.[78] Even so, the transfer may

73 According to the CCC in Pl. ÚS 19/08, 26 November 2008, para. 98: '*State sovereignty is traditionally understood as the highest and exclusive power on a state's territory, and as the state's independence in international relations. Thus, no international law norm can arise without the will of the states themselves, acting on the principle of equal sovereignty*'.

74 According to the CCC Pl. ÚS 19/08, 26 November 2008, para. 105: '*The global scene can no longer be seen only as a world of isolated states. It is generally accepted that the state and its sovereignty are undergoing change, and that no state is such a unitary, separagraphte organization as classical theories assumed in the past*'. Therefore, according to para. 209: '*In a modern, democratic, law-based state, state sovereignty is not an aim in and of itself, in isolation, but is a means to fulfilling the abovementioned fundamental values, on which the construction of a constitutional, law-based sate stand*'.

75 In more detail, see e.g. Belling, 2016 or Hamuľák, 2015.

76 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 104.

77 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 108: '*We can conclude from these deliberations that the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign's participation in a manner that is agreed on in advance and that is reviewable, is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole. The EU's integration process is not taking place in a radical manner that would generally mean the 'loss' of national sovereignty; rather, it is an evolutionary process and, among other things, a reaction to the increasing globalization in the world*'.

78 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 109: '*Art. 10a clearly cannot be used for an unlimited transfer of sovereignty; in other words, based on Art. 10a on cannot transfer – as already stated – powers, the transfer of which would affect Art. 1 par. 1 of the Constitution to the effect that it would no longer be possible to speak of the Czech Republic as a sovereign state. Thus, the concept of sovereignty, interpreted in the context of Art. 1 par. 1 of the Constitution and Art. 10a of the Constitution, clearly shows that there are certain limits to the transfer of sovereignty, and failure to observe them would affect both Art. 1 par. 1 and Art. 10a of the Constitution. These limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide*

include '*entire comprehensive areas of legal regulation*'.[79] Similarly, the CCC did not address any issues with the existence and definition of the exclusive[80] and shared[81] competencies of the EU. Summarising the transfer of powers, the CCC stressed the importance of the fact that the EU does not have the '*legislative competence – competence, i.e. the authorization to amend fundamental regulations, [which] remains with the member states*'.[82]

Similarly, the CCC refused the claims against the existence of the 'flexibility clause' (Article 308 TFEU) which, according to the petitioners, works as a 'blanket norm', enabling the EU to adopt measures beyond its competences (i.e. beyond the powers transferred to the EU under Article 10a of the Constitution). The CCC repeated that '*even after the Treaty of Lisbon enters into force, the EU will not acquire the power to create its own new competences, the member states will still be 'masters of the treaties*'.[83] For the same reasons, the CCC also dismissed claims against the simplified revision procedure of the primary law (Articles 48 (6) and (7) of the TEU).[84] The same applies to the ability of the EU to conclude international treaties and bind Member States (Article 216 TFEU).[85]

Beyond these general considerations of sovereignty, the CCC ruled out the possibility that sovereignty would be weakened by the common European defence[86] or provisions on border control, immigration, and asylum policies;[87] the same applies to provisions on judicial cooperation in criminal affairs.[88] Czech sovereignty can also not be infringed upon by EU provisions on enhanced cooperation.[89]

The CCC also refused to accept that the principle of sovereignty might be infringed by the possibility of suspending member-state rights according to Article 7 of the TEU. The CCC stated in *Lisbon I* that the violation of values that Article 7 TEU is meant to protect '*would simultaneously mean violation of the values on which the materially understood constitutionality of the Czech Republic rests*'.[90] The CCC, thus, concluded that '*Article 7 [TEU] must be understood as a supplement to the mechanism of the protection of principles on which the constitutionality of the Czech Republic stands,*

discretion; interference by the Constitutional Court should come into consideration as ultima ratio, i.e., in a situation where the scope of discretion was clearly exceeded, and Art. 1 par. 1 of the Constitution was affected, because there was a transfer of powers beyond the scope of Art. 10a of the Constitution'.

79 CCC Pl. ÚS 19/08, 26 November 2008, para. 130.
80 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 133.
81 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 134.
82 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 132.
83 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 146.
84 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 164.
85 According to the CCC Pl. ÚS 19/08, 26 November 2008, para. 183: '*Art. 216 cannot be interpreted as a competence norm that would extent the competences of the Union*' and thus, according to para. 184: '*the European union can exercise conferred competences both internally and externally*'.
86 CCC Pl. ÚS 29/09, 3 November 2009, para. 152.
87 CCC Pl. ÚS 29/09, 3 November 2009, para. 154.
88 CCC Pl. ÚS 29/09, 3 November 2009, para. 155.
89 CCC Pl. ÚS 29/09, 3 November 2009, para. 166.
90 CCC Pl. ÚS 19/08, 26 November 2008, para. 209.

and not as a means for violating them'.[91] The CCC, hence, concluded that the Lisbon Treaty, 'as a whole' and its individual provisions, did not infringe on the existence of the Czech Republic as a sovereign state.

5.2.2. 'Political neutrality'

The claimants in *Lisbon II* proposed that the Lisbon Treaty infringes on the principle of 'political neutrality', on which the Czech Republic is founded. However, the CCC replied that the Constitution is not founded on neutrality but is based on values (see Chapter 5.1) and that it '*does not see any conflict between the value orientation of the constitutional order and the values that are expressed as the objectives of the EU*'.[92] For the same reason, the CCC did not challenge the requirement of 'European commitment' on the part of the Commission members (Article 17 (3) TEU).[93]

5.2.3. The 'democratic deficit' of the European Union

The petitioners in *Lisbon II* also proposed that because of the 'democratic deficit' in the EU decision-making process, the Czech Republic would lose its position as a democratic state, as defined by Article 1 (1) of the Constitution. The CCC, however, retorted that the transfer of some decision-making power to a supranational entity is the essence of EU membership[94] and that '*the democratic process on the Union and domestic levels mutually supplement and are dependent on each other*'.[95]

The CCC added in the *Lisbon II* judgement that the Lisbon Treaty '*transfers powers to bodies that have their own regularly reviewed legitimacy, arising from general elections in the individual member states*' and that it '*permits several ways of involving domestic parliaments*',[96] referring to Article 12 TFEU.

5.2.4. The Charter of Fundamental Rights of the European Union

Finally, the petitioners also challenged the Charter of Fundamental Rights of the European Union (hereinafter the 'Charter'), both its existence and its effects on the protection of human rights in the Czech Republic. The CCC conceded that the protection of fundamental rights belongs to the 'material core' of the Constitution; it, however, did not find any conflict:

91 CCC Pl. ÚS 29/09, 3 November 2009, para. 159.
92 CCC Pl. ÚS 29/09, 3 November 2009, para. 143.
93 CCC Pl. ÚS 29/09, 3 November 2009, para. 163.
94 According to the CCC Pl. ÚS 29/09, 3 November 2009, para. 136: '*it is precisely the essence of transfer of powers of the authorities of the Czech Republic that, rather than Parliament (or other authorities of the Czech Republic), it is the international organisation to which these powers were transferred that exercises them*'.
95 CCC Pl. ÚS 29/09, 3 November 2009, para. 139.
96 CCC Pl. ÚS 19/08, 26 November 2008, para. 173.

> The content of the catalogue of human rights expressed in the EU Charter is fully comparable with the content protected in the Czech Republic on the basis of the Czech Charter of Fundamental Rights and Freedoms, as well as the Convention for the Protection of Human Rights and Fundamental Freedoms. In that regard, we can say that the EU Charter is in harmony not only with the material core of the Constitution but also with all provisions of the constitutional order.[97]

5.2.5. Partial conclusions

Thus, even though the Lisbon Treaty was reviewed twice and in much detail, the CCC concluded that it did not need to intervene to stop its ratification or require additional changes to the Constitution.

5.3. Ex-post review of EU legislation

As noted, when reviewing the EU legislation and the Czech law implementing it, the CCC generally accepts the primacy of EU law and limits itself to assessing whether the legislation does not exceed the powers transferred to the EU and is in line with the 'material core' of the Czech constitutional order (see Chapter 5.1).[98] Thus, the number of CCC decisions concerning the review of EU law is small relative to the overall workload of the CCC. Meanwhile, the CCC is inclined to decide in favour of EU law and interpret Czech constitutional law in line with EU law.[99]

This is evident from the early *European Arrest Warrant* case,[100] where the CCC reviewed several provisions of the Czech Criminal Code and Criminal Procedure Code implementing the European Arrest Warrant, allowing for the extradition of Czech nationals, which seemingly contradicted the Constitution and the Czech Charter and guarantees that '*No citizen may be forced to leave her homeland*'.[101] Indeed, the Czech

97 CCC Pl. ÚS 19/08, 26 November 2008, para. 197. The CCC added in para. 198: '*Contemporary democratic Europe […] reached an exceptional level of protection of human rights; the EU Charter in no way adds problems to this system, but on the contrary – in the area of its competence – suitably expands it, and the individual, for whose benefit the entire structure was built, can only profit from it*'.

98 CCC Pl. ÚS 66/04, 3 May 2006, para. 53: '*the delegation of a part of the powers of national organs upon organs of the EU may persist only so long as these powers are exercised by organs of the EU in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner that does not threaten the very essence of the substantive law-based state. Understandably […], unless such an exceptional and highly unlikely eventuality comes to pass, the Constitutional Court […] will not review individual norms of Community law for their consistency with the Czech constitutional order*'; emphasis added. The same, according to para. 54, applies to Czech law implementing the EU one, '*where the delegation of authority leaves the member states no room for discretion as to the choice of means, that is, where the Czech enactment reflects a mandatory norm f EU law*'.

99 Kosař and Vyhnálek, 2018, p. 866.

100 This case is discussed in detail e.g. in Komárek, 2007.

101 Art. 14 (4) of the Czech Charter.

Government intended to amend the constitutional order and refrained from doing so after failing in parliament.[102]

The CCC took the view that the cited provision of the charter was not in itself.

> Unambiguously resolve whether and to what extent it precludes the surrender of a citizen, for a limited time, to an EU Member State for a criminal proceeding being conducted there if, following the conclusion of such proceedings, he has the right to return to his homeland.

Instead, the CCC took the position that Czech law, including constitutional law, must be interpreted in line with EU law.[103] In this case, the CCC, therefore, declared that it must reflect '*the contemporary reality of the EU*',[104] characterised by '*an extraordinarily high mobility of people, ever-increasing international cooperation and growing confidence among the democratic states of the EU*'[105] and the fact that '*[i]f Czech citizens enjoy certain advantages, connected with the status of EU citizenship, then it is natural in this context that a certain degree of responsibility must be accepted along with these advantages*'.[106] The CCC also added that '*it is necessary to take into account not only the protection of rights of the persons suspected of committing a criminal act but also the interests of the victims*'.[107] Based on these presumptions, the CCC determined that the European Arrest Warrant was in line with the Czech constitutional order.

6. Issues on which the Constitutional Court intervened to protect the Czech constitutional order

The CCC is believed to be one of the most activistic in protecting the 'material core' of the Constitution.[108] Even so, there was only one exceptional case in which the CCC refused to accept the primacy of EU law, known as the *Slovak Pensions* case. Although essential, the facts of the case are very complicated. Thus, this study

102 CCC Pl. ÚS 66/04, 3 May 2006, para. 63.
103 CCC Pl. ÚS 66/04, 3 May 2006, para. 61: '*A constitutional principle can be derived from Art. 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the Constitution, should be interpreted in conformity with the principles of European integration and cooperation between Community and Member State organs*'.
104 CCC Pl. ÚS 66/04, 3 May 2006, para. 72.
105 CCC Pl. ÚS 66/04, 3 May 2006, para. 70.
106 CCC Pl. ÚS 66/04, 3 May 2006, para. 71.
107 CCC Pl. ÚS 66/04, 3 May 2006, para. 96.
108 Kosař and Vyhnálek, 2018, p. 861.

will only briefly outline them for this chapter; a more detailed description is also available in English.[109]

On 31 December 1992, the former Czechoslovakia was dissolved, and, on 1 January 1993, two new countries entered into existence: the Czech Republic and the Slovak Republic. Among the many arrangements between the two new states, a specific agreement was concluded on social security and pensions,[110] according to which participants of the hitherto Czechoslovak pension scheme were assigned to either the Czech or Slovak scheme based on the registered seat of their employer on 31 December 1992. Thus, many Czech citizens became members of the Slovak scheme, even though they had been living and working only in the Czech Republic.

Because of the differences in economic performance and different parameters of these pension schemes, the pensions of some Czech citizens, calculated within the 'Slovak' scheme, were in some cases lower than they would hypothetically have been if calculated within the 'Czech' one. Some Czech citizens perceived this as a form of discrimination and unequal treatment, as the current Czechs and Slovaks were then contributing to the same pension scheme. Moreover, as the right to 'adequate' pensions is guaranteed by the Constitution to Czech citizens,[111] they ultimately addressed the CCC in numerous individual but similar cases.

In 2003, the CCC issued its first judgement, declaring this practice, having an effect on smaller 'Slovak' pensions, unconstitutional.[112] Thus, Czech social security organs began to add a 'special increment' to the pensions of Czech citizens affected, compensating them up to the 'Czech' level of pensions. After the Czech Republic became a member of the EU, some institutions, including, in particular, the Supreme Administrative Court (SAC), adopted the position that the matter will be governed by EU law and the hitherto practice by granting the 'special increment' only to Czech citizens resident in the Czech Republic is contrary to the EU principle of non-discrimination. The SAC addressed the CJEU with a request for a preliminary ruling concerning this issue; the CJEU replied in the *Landtová* case[113] that the EU law is indeed applicable in this matter and that the practice of granting 'special increment' only to Czech citizens residing in the territory of Czech Republic is contrary to the EU law. According to the CJEU: '*The documents before the Court show incontrovertibly that the [CCC] judgement discriminates, on the ground of nationality, between Czech nationals and the nationals of other Member States*'.[114]

109 Anagnostaras, 2013; Komárek, 2012; Zbíral, 2012.

110 Agreement on Social Security of 29 October 1992 between the Czech Republic and the Slovak Republic.

111 Art. 30 (1) of the Czech Charter: '*Citizens have the right to adequate material security in old age and during periods of work incapacity, as well as in the case of the loss of their provider*'.

112 CCC II. ÚS 405/02, 3 June 2003. The judgement is available in English at: https://www.usoud.cz/en/decisions/2003-06-03-ii-us-405-02-pension-insurance (Accessed: 14 February 2023).

113 CJEU, C-399/09, 22 June 2011.

114 CJEU, C-399/09, 22 June 2011, para. 43.

The Czech social security organs and ordinary courts followed this practice until another claim for a 'special increment' reached the CCC. In its judgement, *Slovak Pensions XVII*,[115] the CCC, however, retained the view that EU law is not at all applicable to this matter: '*a period of employment with an employer with its registered office in the present-day Slovak Republic during the existence of the Czechoslovak state cannot be retroactively considered to be a period of employment abroad*'. Consequently, as EU law was not applicable, the CCC concluded that the CJEU's judgement was *ultra vires*:

> European law […] cannot be applied to entitlements of citizens of the Czech Republic arising from social security until 31 December 1992; […] we cannot do otherwise than state, in connection with the effects of ECJ judgement […] C-399/09 on analogous cases, that in that case *there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union* under Article 10a of the Constitution; this *exceeded the scope of the transferred powers, and was ultra vires* (emphasis added).[116]

In this conflict of opinions, the CCC, thus, did not invoke the protection of the 'material core' of the Constitution or the Czech 'constitutional identity'[117] but relied on its role of the ultimate guardian of the Constitution, claiming that the EU organs exercised powers not granted to them by the Czech Republic and that the CCC, not the CJEU, is empowered to finally decide on this question of competence. The clash of competences between the CCC and the CJEU has since not been resolved;[118] its urgency, however, evaporated in practice, as the economic situation in Czechia and Slovakia levelled and the demand for 'special increments' disappeared on its own. As will be discussed in Chapters 9 and 10, this judgement remains one of the most criticised CCC findings.

7. Interpretation of Article 2 TEU in the practice of national courts

The Czech courts rarely refer to the EU values contained in Article 2 of the TEU. As has already been discussed in Section 4.1, the CCC concluded in the *Lisbon I* judgement that these values were fundamentally identical to those upon which the

115 CCC Pl. ÚS 5/12, 31 January 2012. The judgement is available in English at: https://www.usoud.cz/en/decisions/2012-01-31-pl-us-5-12-slovak-pensions (Accessed: 14 February 2023).
116 CCC Pl. ÚS 5/12, 31 January 2012; emphasis added.
117 Zbíral, 2014.
118 Stehlík and Sehnálek and Hamuľák, 2020.

Czech constitutional order was founded. Conversely, referrals to the rule of law are relatively common in Czech jurisprudence; however, courts mainly refer to Czech constitutional law rather than EU law.

8. Interpretation of Article 4 TEU in the practice of national courts

The concept of national (constitutional) identity has not developed much in case law. As has already been discussed above, it is generally understood as corresponding with the term 'material core' or 'material focus' of the Constitution,[119] a concept developed by the CCC (see Chapter 5.1). The same applies to the interpretation of Article 4 (2) of the TFEU in Czech academia.[120] If there is an academic debate on the national or constitutional identity of Member States, it mostly focuses on CJEU case law and[121] not specifically on the Czech Republic.

In the case-law of the CCC, the term 'constitutional identity' has only been used in a couple of cases without drawing any specific consequences out of it. For example, in the *Slovak Pensions* case, the CCC merely remarked that the CCC should have '*familiarize[d] itself with the arguments that respected the case law of the Constitutional Court and the constitutional identity of the Czech Republic*'.[122] References to Article 4 (2) of TFEU are even rarer. For example, in the *Lex Babiš* judgement, the CCC merely stated that the EU is bound to respect the national identity of its Member States.[123]

9. Academic position on the impact of EU law in the Czech Republic

Though matters of Czech constitutional law and its relationship with EU law are not intensively discussed outside of the Czech Republic, and academic literature is predominantly published in the Czech Republic by Czech authors, the discussion is relatively intense. Still, over the nearly 20 years of Czech EU membership, there have been no significant developments; the 'mainstream' position has remained the same.

119 Kosař and Vyhnálek, 2018, p. 861.

120 Tomášek et al., 2022, p. 1214: '*In the case of Czech Republic, the core of its 'constitutional identity' is connected in particular with the 'eternity clause' and material focus of the Constitution, derived especially from Art. 1 and Art. 9 (2) of the Constitution*'.

121 Burda, 2021; Hamuľák and Kopal and Kerikmäe, 2017; Zbíral, 2014.

122 CCC Pl. ÚS 5/12, 31 January 2012.

123 CCC Pl. ÚS 4/17, 11 February 2020.

Intense disputes over specific topics were common. The most famous was the dispute concerning the constitutional legal basis of the effects of EU Law in the Czech legal order, outlined in Chapter 2.1. Another important dispute followed the *Slovak Pensions* judgement of the CCC, arguably the most famous international judgement of the CCC. While most opinions criticised the CCC,[124] often rather harshly,[125] some publications supported it.[126]

It may be observed with some exaggeration that the position taken by the authors follows somewhat along 'generational' lines, with the younger authors being more in favour of undistorted application of the EU, while the older ones retain more reserved positions towards it. However, there has been no significant change in academic position regarding the assessment of EU law in Czech legal order.

10. Constitutional dialogue in the Czech Republic

In Czech legal theory, the term 'constitutional dialogue' is not much used and has not been addressed in academic writings regarding the application of EU law. Several observations may, however, be made in understanding the 'dialogue' in the broadest possible sense.

First, the Czech courts do not reflect much in their rulings on Czech academic writing. Even though they occasionally cite some of the papers, it is mainly to support the findings of the court and elaborate on the ideas therein, lest they be discussed with them. Thus, as already observed in Chapter 2.1, when resolving the biggest-ever

124 E.g. Bobek, 2014; Král, 2012; Král, 2013; Kühn, 2016.

125 Anagnostaras, 2013, p. 973: '*Historic as it may be, the Slovak Pensions ruling of the Czech Constitutional Court seems to amount to a legally contestable and politically inappropriate application of the ultra vires doctrine. […] Struggling over the protection of its prerogatives, the constitutional court may consider it then necessary to attack the source of this peril although its primary target is ultimately the rival national court*'; Komárek, J. (2012), p. 323: '*The Court of Justice's authority (and the authority of EU law as a whole) was just collateral damage in judicial war that had been raging between the Czech Constitutional Court and the Czech Supreme Administrative Court for several years. […] The Constitutional Court's decision appears to be an unmeasured response to the continuing undermining of the authority of national highest judicial body*'; Zbíral, R. (2012), p. 1488: '*All in all, it is firmly hoped that the Constitutional Court's decision will be taken for what it really was: a poorly written judgement whose objective was to cement the Constitutional Court's position in the domestic judicial hierarchy rather than to declare all-out war on the EU. It belongs in the footnotes of EU law textbooks, as a reminder of the axiom 'being the first is not always the best*'.

126 In particular, Pítrová, 2013, p. 93, states that '*The conclusion of the Constitutional Court that the European regulation governing the coordination of pension systems between Member States cannot be applied to the very unique situation of the dissolution of the Czechoslovak Federation and its consequences is completely justified*' and '*As for the question which body has the competence of making the final decision in such a 'conflict of courts', it is absolutely necessary to answer that when applying the principle of derived legitimacy of the EU bodies and the character of member States as the masters of the Treaties, it is the Constitutional Court*'.

dispute among Czech scholars concerning the legal basis of the effects of EU law in the Czech legal order, the CCC in the *Suga Quotas* judgement simply cited one of the articles without even referring to the other possible interpretation. In this regard, there is no 'dialogue' on the side of the courts. The major judgements of Czech courts are, conversely, subject to detailed scrutiny by academia.

Second, concerning the relationships between ordinary courts, they are governed by the principle of court hierarchy and no 'dialogue' is taking place. However, on several occasions, the lower courts, not agreeing with the higher courts, referred the case to the CJEU for a preliminary ruling, thus avoiding the interpretation of the higher court with which it was not in agreement. A famous case concerned the Regional Court in Brno, which found that the proceedings before the Czech Competition Authority infringed on the *ne bis in idem* principle, as prescribed in Czech and EU law. After being overruled by the SAC,[127] the Regional Court addressed the CJEU, seeking support for its interpretation. Only when the CJEU found that the Regional Court's interpretation was contrary to EU[128] law did the Regional Court change its approach and decide per the previous ruling of the SAC.[129]

The situation was somewhat similar to the *Slovak Pensions* case discussed in Chapter 6. When the SAC did not want to respect the interpretation of the CCC, it asked the CJEU to support it. However, this case was later criticised for the lack of constructive dialogue on all fronts. The main dispute was between the SAC and the CCC; in dozens of individual cases concerning the 'Slovak Pensions', the position of the courts shifted from any attempt to argue persuasively to contempt (SAC suggesting that CCC does not understand the basics of social security law) and force (CCC suggesting that the SAC judges should face disciplinary proceedings).[130]The Czech government, which represented the Czech Republic before the CJEU, fully sided with the SAC and refused to provide it with any opportunity to support its views.[131] When the CCC wanted to inform the CJEU of its interpretation, its letter was returned.[132] Ultimately, after receiving the CJEU judgement, the CCC disregarded it as *ultra vires*. Any attempt at dialogue occurred only after the *Slovak Pensions XVII* judgement was delivered. In another similar case, the SAC addressed the CJEU again with a request for a preliminary ruling, somewhat taking the position of the CCC; in fact, the SAC was reasoning for and in the place of the CCC.[133] However, this case was settled before the Czech institutions, and the CJEU was not allowed to resolve these issues.[134]

127 SAC 2 Afs 93/2008, 10 April 2009.
128 CJEU C-17-10, 14 February 2012.
129 For more details on this interesting case, see e.g. Hamuľák et al., 2014, pp. 236-241.
130 Bobek, 2014, p. 59.
131 CCC Pl. ÚS 5/12, 31 January 2012; according to the CCC: '*the Czech government, as a party to the proceeding on the preliminary question, unprecedentedly stated in its statement that the case law of the Constitutional Court violates European Union law*'.
132 CCC Pl. ÚS 5/12, 31 January 2012.
133 Bobek, 2014, p. 64.
134 Ibid.

Third, the CCC is not inclined to enter any dialogue with the CJEU, as it is not willing to submit requests for preliminary rulings. The CCC does not explicitly rule this out,[135] as it has not yet been done.

11. Conclusion

This chapter aims to introduce the relationship between national and EU law from the perspective of the Czech Republic, with an emphasis on the concept of Czech constitutional identity, considering, in particular, the jurisprudence of the CCC and the corresponding academic literature. Three issues were analysed in detail: (i) what is the constitutional basis for the effects of EU law in the Czech legal order, what are these effects and the limits the Czech constitutional law puts on them; (ii) the process of adoption and revision of EU law, with a particular emphasis on the Treaty of Lisbon; and (iii) Czech constitutional identity and fundamental values of the EU, as set for by the TEU?

Concerning the incorporation of EU law into the Czech constitutional order, there are no provisions on the effects of EU law in the Czech legal order; the Constitution only provides for the possibility of transferring certain sovereign powers to the EU. The CCC concluded that this setting is sufficient and that the principles established by EU law may be used to determine its effects. Similar to other European constitutional courts, the CCC, in principle, adopted the principle of primacy of EU Law as long as it does not infringe on the material core of the Constitution. In practice, the CCC has always adopted a pro-European interpretation of the Czech constitutional order, and the principle of primacy has never been questioned.

Meanwhile, the CCC imposed on itself the role of *ultima ratio* supervisor regarding whether the EU does not exercise competences that had not been transferred on it. In this regard, the CCC was the first constitutional court in the EU to declare that the EU has trespassed on its competences. To a great extent, this specific ruling, connected with a single historical event predating EU membership, has been heavily criticised by academia and does not seem to have influenced subsequent Czech jurisprudence in any significant way.

Second, the adoption of EU law, a referendum, was necessary for the Czech Republic to join the EU. Interestingly, the content of the EU law in force had not been scrutinised by the CCC. Conversely, all subsequent revisions of primary EU law are

135 In CCC Pl. ÚS 50/04, 8 March 2006, the CCC did not rule out the possibility that in the future, it might address the CJEU with a request for a preliminary ruling (the CCC '*reserves to itself in the future the possibility of adopting an unequivocal answer, in other words, to refer a matter for the adjudication to the ECJ in individual types of proceedings*'). In a more recent judgement CCC II. ÚS 3432/17, 11 September 2018, the CCC, however, ruled that it will not itself address the CJEU in case of individual constitutional complaints.

subject to ratification by the Parliament by a majority corresponding to the majority needed to adopt any international treaty. Before ratification, a treaty may be subject to CCC review. The Lisbon Treaty was reviewed twice, and the CCC found it to accord fundamentally with the Czech constitutional order.

Finally, concerning European values, as enshrined in Article 2 of the TEU and national identity, protected by Article 4, the CCC equates Czech constitutional identity with the material core of the Constitution and finds these fundamental values in principle compatible. In practice, there is no need to resolve the specific problems concerning this issue.

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Chapter VI

Constitutional Identity and Relations Between the European Union Law and the Hungarian Law

András Zs. Varga – Lilla Berkes

Abstract

In its Decision 22/2016. (XII. 5.), the Constitutional Court set several limits on the implementation of European Union (EU) acts that go beyond the scope of conferred or jointly exercised powers. The Constitutional Court has stated that, based on a motion to that effect, it could examine whether the joint exercise of powers infringes on human dignity and other fundamental rights or Hungary's sovereignty and identity based on its historical constitution. The decision introduced a new, previously unknown limit to the exercise of shared competence in constitutional dialogue by formulating the term constitutional identity.

The legal nature of Hungary's constitutional identity is the specificity of the communities that make up the state and nation, which does not apply to other nations in the same way or at all. In Hungary, national identity is inseparable from constitutional identity. The fundamental values that constitute identity have been established through the historical development of the Constitution, and the nation has always adhered to them. The values that constitute a country's identity are legal facts that cannot be renounced by either an international treaty or an amendment to Fundamental Law. The latest addition to the constitutional dialogue is Decision 32/2021 (XII. 20.). Its significance lies in the fact that the Constitutional Court was not reluctant to use the Ultravires argument against EU acts adopted in the absence of the unions' competence. In connection with this, this study provides an overview of the relationship between the EU and Hungarian law through the practice of the Constitutional Court. The chapters cover the constitutional issues of the incorporation of

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EU Law, its emergence in the practice of the Constitutional Court, and the various approaches, from staying away to developing control and emphasising constitutional dialogue as a means of avoiding conflict.

Keywords: constitutional identity, Constitutional Court of Hungary, sovereignty, EU law, ultra vires

1. Introduction

Throughout its history, the Hungarian State has been governed by its constitutional laws, later understood as the rule of law, which have been harmed only under the country's foreign occupations and during dictatorial regimes imposed on Hungary by foreign powers. For our country, the regime changes (transition) of the 1990s not only meant a return to our national and constitutional traditions but also the adoption of new approaches and a novel vocabulary from the West.

Standing at a crossroads, the Constitutional Court has opted for such a conception of the rule of law, which is usually characterised by an overemphasis on legal certainty, the synonymous use of legal certainty and the rule of law, and a focus on the formal rule of law. The Constitutional Court ruled that the transition was based on legality. When interpreting and applying the rule of law, law enforcement bodies acting under Fundamental Law must consider several circumstances. One is that Hungary is a member state of the European Union (EU); thus, it should apply where EU law is binding. In the absence of uniformly applicable legislation, Hungarian courts cannot disregard the national legal provisions in force. Neither EU law nor Fundamental Law empowers national courts to do so.

In contrast, according to Article R(4) of the Fundamental Law, all bodies of the state, including the courts, must protect Hungary's constitutional identity. Therefore, constitutional dialogue with the Court of Justice of the European Union (CJEU) is not based on the absolute and unconditional primacy of EU Law. In the absence of EU legal implications, the application of existing Hungarian legislation cannot be ignored. However, the Constitutional Court may examine, and has already examined, whether EU institutions have exceeded the limits on the exercise of their powers laid down in the relevant provisions of the Treaty on the European Union (Articles 1, 4, and 5) and in Article E(2) of the Fundamental Law.

In its Decision 22/2016. (XII. 5.), the Constitutional Court has set several limits on the implementation of EU acts that go beyond the scope of conferred or jointly exercised powers. The Constitutional Court has stated that, based on a motion to that effect, it could examine whether the joint exercise of powers infringes on human dignity and other fundamental rights or Hungary's sovereignty and identity based on its historical constitution.

The decision introduced a new, previously unknown limit to the exercise of shared competence in constitutional dialogue by formulating the term constitutional identity. Similarly, it has already been mentioned in parallel reasoning that the legal nature of Hungary's constitutional identity is the specificity of the communities that make up the state and the nation, which does not apply to other nations in the same way or at all. In Hungary, national identity is inseparable from constitutional identity. The fundamental values that constitute identity have been established through the historical development of the Constitution, and the nation has always adhered to them. The values that constitute a country's identity are legal facts that cannot be renounced by an international treaty or an amendment to Fundamental Law. The only way to deprive Hungary of these values is to deprive it of its sovereignty and status as an independent state. That is why Hungary's accession to the EU did not result in it renouncing its sovereignty or declaring its cessation. The founding treaties only allowed for the joint exercise of certain competencies, and any further joint exercise of competences must be presumed to respect the maintenance of Hungary's sovereignty.

In the absence of a specific competency, the EU does not have the power to adopt legal acts that have a binding force on Member States. Such *ultra vires* acts would disregard the principles governing the exercise of shared competencies, as laid down in Articles 4 and 5 of the Treaty on the European Union and in Article E(2) of the Fundamental Law, including the principles of proportionality and subsidiarity, bypassing the limits of competencies conferred by the Treaty on Member States (*Kompetenz-Kompetenz*). The implementation of *ultra vires* acts in national law violates Article B(1) of the Fundamental Law, according to which Hungary is an independent democratic state governed by the rule of law. Therefore, all state bodies are obliged to act against *ultra vires* following the requirement of the protection of sovereignty and constitutional self-identity.

The latest addition to the constitutional dialogue is Constitutional Court Decision 32/2021 (XII. 20.). Its significance lies in the fact that the Constitutional Court was not reluctant to use the *ultra vires* argument against EU acts adopted in the absence of the unions' competence. The conclusions of the dissenting opinion attached to the 2016 decision have been included in the new decision, which states that the exercise of power under Article E(2) of Fundamental Law must accord with fundamental rights and freedom. Furthermore, the new decision clearly considered constitutional identity as a limit to the joint exercise of powers. The firm stance of the Constitutional Court was not without precedent. The decision refers to several constitutional court decisions delivered in France, Poland, Germany, the Czech Republic, and Spain, whereby national constitutional courts examine whether the exercise of EU powers conforms to the constitutional rules of Member States. In line with the parallel reasoning attached to the 2016 decision, the Constitutional Court confirmed that the elements of the population, language, history, and cultural traditions—the achievements of our historical constitution—listed in documents defining the struggle to consolidate sovereignty are part of the country's constitutional self-identity. In this

context, the Constitutional Court referred to the Seventh Amendment to the Fundamental Law, according to which the joint exercise of powers may not restrict Hungary's inalienable right to dispose of its territorial unity, population, form of government, or state organisation. Moreover, the Seventh Amendment to the Fundamental Law explicitly builds on Article 4(2) of the Treaty on the European Union, which states that the Union shall respect the national identities of the Member States, including their political and constitutional organisation.

As such, the right of disposition is part of Hungary's constitutional identity as a historical constitutional achievement, and it is the task of the Constitutional Court to set limits on the exercise of shared powers and ensure the exercise of Hungary's right of disposition. However, this may be done only exceptionally if the exercise of shared competences is incomplete (*i.e.* if the institutions of the EU do not exercise the powers manifestly conferred on them or if the exercise of shared competences is only superficial such that it does not ensure the effective implementation of EU law).

In connection with this, this study provides an overview of the relationship between the EU and Hungarian law through the practice of the Constitutional Court. The chapters cover the constitutional issues of the incorporation of EU Law, its emergence in the practice of the Constitutional Court, and the various approaches, from staying away to developing control and emphasising constitutional dialogue as a means of avoiding conflict.

2. The relationship between European Union law and Hungarian law: How are European Union legal acts incorporated into national law?

As a starting point for the examination of the relationship between the law of the EU and the law of Member States, it is worth noting the existing reality that Hungary's legal system, in the most general sense, comprises three legal systems: domestic (internal, Hungarian) law, international law, and the legal system of the EU. Within the law of the EU, the primary sources of law are international, as they are created or at least recognised (see the general principles of law) by sovereign Member States. Hungarian law follows a dualistic approach as to how law not created by the Hungarian legislature becomes part of Hungarian law; therefore, given its international character, primary sources of law become part of Hungarian law as Hungarian sources of law through transformation and internal promulgation. However, secondary sources of law form independent legal orders that are not completely mixed with the internal law. The test of the full independence of the two legal systems is the constitution, which is at the apex of internal law, and which, although it 'supersedes' the EU legal system in certain respects, retains its independence in respect of its essential provisions (see the concept of an integration-resistant constitutional

core, familiar from German law). However, beyond this approach, the need to ensure that legal entities know which legal system they must follow must be emphasised. This is a crucial necessity arising from the requirement of legal certainty, which is a fundamental requirement of a uniform legal system into which various legal systems must be integrated.[1]

Hungary applied for EU membership on 1 April 1994, and accession negotiations began at the end of March 1998. On 12 April 2003, a national referendum was held on accession to Hungary, which occurred on 1 May 2004. The accession process and preparation for accession were based on the adoption and harmonisation of the EU's legal system. In this process, the integration of EU Law into the national legal system and, in a broad sense, harmonisation, including the transmission and enforcement of EU Law to its addressees, had to be (and is) ensured.[2]

2.1. The question of a constitutional amendment on accession

One of the most important milestones of accession to the EU was the definition of the constitutional basis, during which a constitutional mandate established the division of competences between the EU and Hungary, which also served as the basis for the incorporation of EU law into the Hungarian legal system. Hungarian public law scholars have been relatively slow to address legal issues related to European integration, with sovereignty being the most prominent issue.[3] These debates intensified as accession approached.

Until recently, there was no tradition in Hungary of questioning the Constitution as the main source of law or of treating it as mere law, as the Constitution defined the framework for the exercise of power and, thus, for law-making as the basis of sovereignty and legal order. From a functional perspective, the EU has substantial public powers governed by law, independent of the Member States that constitute it. There are also shortcomings in the EU's system of checks and balances in classical minimum standards, such as the separation of legislative, executive, and judicial powers.[4] European integration is, indeed, changing traditional concepts of the state and law, and the development of the EU has obvious implications for the place and role of constitutions that do not recognise other sovereigns over themselves and has raised and continues to raise questions such as the relationship between EU institutions and national constitutions and the conflict and cooperation between the CJEU and the constitutional courts of the Member States[5]. These issues touch on fundamental questions of sovereignty,[6] warranting the need for a constitutional amendment in Hungary.

1 Schanda and Varga, 2020, pp. 64–66.
2 Losoncz, 2004, pp. 24–29.
3 Kecskés, 2006.
4 Walker, 2004, pp. 123., 125.
5 Trócsányi, 2019, pp. 38–39.
6 Paczolay, 2004b, p. 7.

Even so, the question of whether an accession would require a constitutional amendment was a contentious issue.[7] The Constitutional Court answered this question in Decision 30/1998 (VI. 25.)[8], which addresses the applicability of EU law in detail. As it reflected a pre-accession situation, it did not raise several questions (e.g. the constitutional assessment of EU law after accession), but it clarified that an international treaty that imposes an obligation on Hungarian authorities to apply the public law rules of another system of public power (which will arise in the future and have not been promulgated in Hungarian law) cannot be concluded without a specific constitutional mandate.[9] The source of the exercise of public power subject to democratic legitimacy must be public power under the Constitution or one of its institutions. In the case of a public law relationship involving sovereignty, subjection to foreign law requires a constitutional mandate. According to the decision, this is not the case because Hungary was not a member of the EU, and Community law criteria cannot be incorporated into the rules governing the application of international treaties.[10]

The Constitutional Court contacted the Minister of Justice and Minister of Foreign Affairs to obtain their views on the case. Both ministers thought there was no constitutional problem, the legislator had the constitutional authority to conclude international treaties with sovereignty limitations, and there was no sovereignty problem because, first, the application of foreign law in Hungary concerned a very narrow subject matter and a specifically defined area of regulation (competition law) (opinion of the Minister of Justice), and, second, the traditional interpretation of national sovereignty was no longer applicable in today's circumstances (opinion of the Minister of Foreign Affairs). The government, therefore, did not perceive the importance of sovereignty limitation in the specific context of this issue and probably did not consider it necessary to amend the constitution for accession.[11]

However, Decision 30/1998 (VI. 25.), by placing the Accession Clause in the context of sovereignty,[12] became an important reference for the amendment of the Constitution, which was finally adopted in 2002.[13] The amendment came into force on the day of its promulgation (23 December 2002). From that date, the Accession Clause (Article 2/A) became a part of the Constitution, according to which

> The Republic of Hungary may, in order to participate in the European Union as a Member State, exercise certain powers deriving from the Constitution jointly with the other Member States, on the basis of an international treaty, to the extent necessary

7 Gombos and Sziebig, 2016, p. 162.
8 The decision examined the rules implementing the competition provisions of the association agreement.
9 Csuhány and Sonnevend, 2009, pp. 240–242.
10 Tóth, 2021, pp. 443–444.
11 Balogh-Békesi, 2015, pp. 43–44.
12 Vincze, 2009, p. 374.
13 Act LXI of 2002 amending Act XX of 1949 on the Constitution of the Republic of Hungary.

> for the exercise of the rights and the fulfilment of the obligations arising from the Treaties establishing the European Union and the European Communities (hereinafter referred to as the European Union); this exercise of powers may be carried out independently, also through the institutions of the European Union.[14]

According to the explanatory memorandum, the law amending the Constitution[15] was intended to align the Accession Treaty with the Constitution. The starting point was that the constitution created the possibility for the Accession Treaty to apply to Hungary. The founding treaties of the EU will ultimately be binding based on the Constitution's mandate; therefore, the Constitution will remain the basic rule of law in Hungary. Regarding the exercise of sovereignty, after accession, some public affairs will be conducted jointly with the other member states of the EU or through the institutions of the EU in accordance with the provisions of an international treaty ratified and proclaimed based on the Constitution. This concept was essentially taken over by the Fundamental Law, which came into force in 2012.

2.2. The question of the representation of European Union law at the constitutional level

The Accession Clause does not address the relationship between EU law and national law or the question of EU law becoming national law. Several ideas have been proposed to address this issue during the preparation of the constitutional amendment. These included the introduction of a provision in the Constitution, linked to the Accession Clause, stating that participation in the EU (in an international organisation) as a member (Member State) affects community law in accordance with the founding treaties and the principles derived from them. Another idea was that there should be no reference at the constitutional level to the principles governing the application of community law. It has also been suggested that, in the presence of an accession clause, the law proclaiming the Accession Treaty reflects the primacy of community law and the obligation of the legislator to interpret internal law in conformity with community law. It has also been argued that the Constitution should contain a reference to the primacy of community law without limiting the Constitutional Court's powers in a way that is compatible with community law.[16]

Until the adoption of the Lisbon Treaty, the principle of the primacy of EU law was not enshrined in primary (treaty) law but 'only' had a basis in the case-law of the European Court of Justice. Thus, there were hardly any countries that explicitly recognised the primacy of EU law over national law and, in particular, over national constitutions in their constitutions. Member States have not wished to enshrine the

14 Art. 2/A (1) of the Act XX of 1949 on the Constitution of the Republic of Hungary.
15 Act LXI of 2002 amending the Act XX of 1949 on the Constitution of the Republic of Hungary.
16 Paczolay, 2004a pp. 173–174.

principle of the primacy of EU law in the Treaties either.[17] Although several countries have provided for the primacy of European Law in their constitutions, they do not explicitly recognise the primacy of EU Law over national constitutions.[18] In Hungary, when the constitutional amendment was being prepared, the amendment proposal would have originally included a reference to community law and other acquis of the EU[19], but regulating the relationship between community law and Hungarian law by reference to community law would have meant an explicit recognition of the autonomy of community law and its primacy of application over the Constitution; therefore, this provision was not included in the submitted proposal.[20] The deletion of this element of the proposal was essentially the result of political discussions and a compromise.[21]

Accession was not followed by the Act on Legislation; only the amendment introduced in 1994, when the Access Treaty was proclaimed, affected the issue, according to which the Government, when proposing a bill that affects the subject matter of the Access Treaty, is obliged to inform the Parliament whether the proposed legislation approximates the legislation of the European Communities or whether the legislation to be introduced will be compatible with the legislation of the European Community. The lack of an amendment also meant that the legislative act did not provide a clear answer to the positioning of EU Law in the legal system.

In its decision dated 30/1998 (VI. 25.), adopted before accession, the Constitutional Court considered EU law as foreign law and, therefore, included expectations related to international law. It interpreted the pre-accession situation; therefore, its findings are not relevant to the post-accession situation. However, the failure to clarify its relationship with EU law when the Constitution was amended resulted in an open situation. With accession, regulations, directives, various decisions, customary law, general principles of law, and *soft law* entered Hungarian law, the source of which—especially the regulation—had to be incorporated into the legal system through the Accession Clause and the transformation of the Accession Treaty[22] because the Hungarian legal order was silent in the place of Community Law and did not clarify how and for how long its primacy would prevail.[23] From the law enforcement perspective, there is also some tension, as the application of the law is conducted within a national framework, essentially via the institutional system of the Member States, the regulating principle of which is the adherence to the constitution and compliance with constitutional requirements. Meanwhile, law enforcement

17 Trócsányi, 2017, p. 100.
18 Kovács, 2011, p. 4.; Trócsányi, 2014, pp. 476–477.
19 *'Art. 2/A (2) Community law and the other acquis of the European Union shall be applied in the Republic of Hungary in accordance with the founding Treaties of the European Union and the principles of law deriving therefrom'.*
20 Csuhány and Sonnevend, 2009 pp. 243–244.
21 Paczolay 2004a, pp. 174.
22 Kende, 2004, pp. 130–131., Gombos and Sziebig, 2016, p. 162.
23 Nagy, 2004, p. 109.

authorities must interpret the law in an EU-compliant manner and courts must set aside national legislation (or judicial decisions that violate it), which is contrary to EU law.[24] However, it has also been suggested that this omission could significantly weaken the position of Hungarian legislation vis-à-vis EU legislation in the future exercise of parallel legislative powers by the EU and Member States.[25] At the same time, the absence of explicit provisions on community law in the Constitution did not raise its primacy at the constitutional level. Had this been the case, the conflict between national and community laws would have resulted in unconstitutionality, but this has not been the case, and the Constitutional Court has consistently avoided answering this question.[26]

A rather paradoxical situation has, thus, arisen, during which time the Constitutional Court in its first years consistently avoided answering the question and only examined the constitutionality of the law implementing EU Law, ignoring the interpretation and subject of the examination of EU Law[27] while avoiding the use of the word sovereignty[28]. In these proceedings, the Constitutional Court concluded that the question is not the validity of the rules of the EU or the interpretation of those rules, but the constitutionality of the Hungarian legislation implementing the regulation of the Union; that is, the norm in question is not EU law but Hungarian law, and the Constitutional Court is entitled to determine its validity, scope, and the constitutional conditions of its applicability. During this period, the body mostly found that it lacked competence regarding aspects of EU law or that the conflict of norms raised in relation to community law was not a question of constitutionality. Overall, the characteristics of EU Law regarding international and national laws have not been clarified.[29] The Constitutional Court could have determined the constitutional conditions for the primacy and applicability of EU Law in the proceedings before it in connection with the ratification of the European Constitutional Treaty (see below). However, here as well, it failed to examine the question. Thus, overall, from this period, it distinguished between European law and Hungarian legislation based on it, reserving the power to examine the latter's conformity with the Hungarian Constitution, irrespective of its EU legal origin.[30]

As previously mentioned, the transposition and incorporation of EU law into Hungarian law have not been given special provisions in the Legislative Act; therefore, they were adopted under the general legislative procedure. In 2010, the Parliament adopted a new legislative act, which now provides that, when drafting legislation, it must ensure it complies with the obligations arising from EU law and that the explanatory memorandum of the draft legislation must contain information on the

24 Dezső, 2006, pp. 70., 79., Dezső and Vincze, 2006, p. 14.
25 Kecskés, 2006.
26 Csink, 2009, pp. 380–381.
27 Dezső, 2006, p. 77.
28 Vincze, 2009, p. 374.
29 Chronowski, 2019, [8].
30 Dezső and Vincze, 2006, p. 189.

compatibility of the proposed legislation with the obligations arising from EU law and on the obligation to consult EU institutions and Member States; the latter is also dealt with in a separate title. A separate Government Decree[31] fulfils the preparatory tasks necessary to comply with EU law. This Regulation also stipulates that the Minister responsible for Justice is responsible for checking the conformity of draft legislation with EU law to fulfil harmonisation obligations.

2.3. Changes with the entry into force of the Fundamental Law (2012)

With the Fundamental Law entering into force in 2012, the Accession Clause[32] underwent a slight shift in emphasis. In the 2010–2011 constitutional process, (still) no substantive debate emerged on the EU law provisions of the Fundamental Law. Thus, Article E(1) of the Fundamental Law was identical in substance to the provisions of the previous Constitution, but there was a minor difference in paragraph 2. The Constitution provided that Hungary could exercise certain powers arising from the Constitution jointly with other Member States and that the exercise of powers could be carried out independently through the institutions of the EU. Article E(2) of the Fundamental Law provides that power may be exercised jointly with other Member States through EU institutions. From this, the constituent power intended to narrow down the possibilities for the exercise of powers through the institutions of the EU, excluding the possibility of the EU institutions exercising their powers

31 Government Decree 302/2010 (XII. 23.) on the performance of the preparatory legislative tasks necessary to comply with European Union law.

32 Original text:
'Art. E (1) Hungary (1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.
(2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union.
(3) The law of the European Union may, within the framework set out in para. (2), lay down generally binding rules of conduct. (4) For the authorisation to express consent to be bound by an international treaty referred to in para. (2), the votes of two thirds of the Members of the National Assembly shall be required'.
The text currently in force following the Seventh Amendment of the Hungarian Constitution (2018):
'Art. E) (1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.
(2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this para. shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure. (3) The law of the European Union may, within the framework set out in para. (2), lay down generally binding rules of conduct.
(4) For the authorisation to express consent to be bound by an international treaty referred to in para. (2), the votes of two thirds of the Members of the National Assembly shall be required'.

independently of the Member States and independent of Hungary's participation. However, there is no consensus in the literature on this topic. Paragraph 3 provides a new provision that the law of the EU may establish a generally binding rule of conduct within the framework of paragraph 2, which may also be interpreted as meaning that the Constitutional Court may take action against the application in Hungary of EU legal acts that are contrary to Fundamental Law or *ultra vires*.[33] The Constitution, thus, recognised the legal source nature of EU Law but did not provide for the primacy of the application of EU Law or its place in the hierarchy of legal sources. It only contains a procedural rule for primary law (founding treaties): the authorisation to recognise the binding force of such an international treaty requires two-thirds of the votes of the Members of Parliament.[34]

Thus, the entry into force of Fundamental Law did not induce an immediate change in the constitutionality of EU Law, and the Constitutional Court maintained its previous practice. The following sections explain in-depth how this situation has changed since 2016. Here, we will only briefly refer to the fact that in the last seven years, the Constitutional Court has interpreted the Accession Clause [Article E] of the Fundamental Law in several cases, which was amended by the Parliament following the Constitutional Court's decision on 5 December 2016 (Decision 22/2016). In these decisions, the Constitutional Court has clarified the scope of the authorisation granted in Article E and created powers to examine the exercise of shared competence based on Article E(2), for which it has developed three elements of control—*control of fundamental rights, control of sovereignty, and identity control*—which introduced the presumption of maintained sovereignty, the possibility of examining *ultra vires* and ineffective exercise of powers, and the concept of constitutional dialogue and prevented an overly broad interpretation of the scope of the Court of Justice's rulings. It has also highlighted the recognition of the primacy of EU Law, the possibility of initiating a preliminary ruling procedure, and, in places, has incorporated the provisions of the Treaties and the rulings of the CJEU into its argumentation. It also stressed the exceptional nature of its intervention and repeatedly referred to the margin of manoeuvring of the Parliament and the Government.

Although these decisions do not provide a clear answer to the relationship between EU law and Hungarian law, they certainly show that the Constitutional Court can set limits on the enforcement of EU law in Hungary through its interpretation of Fundamental Law.[35]

33 Szabó and Gyeney, 2020, pp. 168–170.
34 Chronowski, 2019, [13].
35 Chronowski, 2019, [28].

3. Distribution of powers between the European Union and the Member States: transferring additional powers relative to those conferred at the time of accession

Article E of the Fundamental Law sets out a framework for exercising powers between the EU and Hungary. Paragraph 2 states that

> Hungary may, in order to participate in the European Union as a Member State, exercise certain of its competences under the Fundamental Law, in common with the other Member States, through the institutions of the European Union, on the basis of an international treaty, to the extent necessary for the exercise of the rights and the fulfilment of the obligations arising from the founding Treaties. The exercise of powers under this paragraph shall be in accordance with the fundamental rights and freedoms enshrined in the Fundamental Law and shall not restrict Hungary's inalienable right to dispose of its territorial unit, its population, its form of the government, and its organisation of the State.

In paragraph 4, *'The authorisation to recognise the binding force of an international treaty under para. (2) shall require a vote of two-thirds of the Members of Parliament'*. Formally, the answer to the post-accession transfer of power is that an international treaty must settle the issue, requiring a qualified majority vote. The Court confirmed Decision 22/2012 (V. 11.) that

> Any treaty leading to the further transfer of Hungary's competences as defined in the Fundamental Law through the joint exercise of competences through the institutions of the European Union requires the authorisation of two-thirds of the members of Parliament. That is to say, Article E(2) and (4) apply not only to the Accession Treaty and the founding treaties or any amendment thereto, but also to any treaty in the drafting of which Hungary is already participating as a Member State in the reform of the European Union (…) The question of which treaty is to be regarded as such can be determined on a case-by-case basis on the basis of the subjects and subject matter of the treaty and the rights and obligations arising from it.[36]

Article E of the Fundamental Law, however, approaches the question of the exercise of powers mainly from a procedural perspective, formally providing its guarantee rules, but does not explicitly state how the 'stealthy' extension of powers, which has appeared in recent criticisms, is manifested and how the Constitution can constitute a barrier to it. The conditions for a formal delegation of powers are, therefore, set out, while the Constitutional Court has attempted to provide a constitutional answer to the question of exercising powers without delegation.

36 Reasoning [50]-[51].

The question of *ultra vires* jurisdiction has not been raised for a long time in Hungarian legal literature or in the practice of the Constitutional Court. As there was no reference to EU Law in the Constitution, the Constitutional Court could avoid assessing the constitutional implications of a possible conflict between EU and Hungarian Law. This was particularly true for questions of jurisdiction. However, after the Lisbon Treaty came into force, certain jurisdictional disputes appeared, both at the political level and in the practice of some member states' constitutional courts, which later impacted the Hungarian Constitutional Court. For the control of EU law from a constitutional perspective, three types of standards have emerged in the European integration process, based primarily on and influenced by German constitutional court practice: the fundamental rights standard (EU law must ensure the same level of protection of fundamental rights as the national constitution), the sovereignty protection standard (which aimed at controlling the exercise of delegated powers and identifying the *ultra vires* exercise of powers by the EU), and the protection of the constitutional identity of the Member States.[37] The Hungarian Constitutional Court has incorporated these criteria into its practice.

The *ultra vires* test arises essentially in the context of the protection of sovereignty in the practice of the Constitutional Court because although participation in the integration process is not a transfer of sovereignty but a joint exercise of powers, the manner and limits of such participation may affect the exercise of state sovereignty. The Constitutional Court rarely examines the possible limits to sovereignty, and of the three controls mentioned, it has focused mainly on the protection of identity (as discussed in detail in the following chapters).

Several questions can be raised about the exercise of powers in the integration process (and in relation to international organisations), including who should be the guardian of powers, whether and who has the ultimate right of control over the exercise of delegated powers, whether there is an internal legal remedy for any perceived or actual overstepping of powers, whether the delegating act can be revoked in general, what are the substantive conditions for the delegation of powers, are there minimum requirements in relation to the recipient international organisation or institution, and whether certain powers have essential content, the autonomous delegation of which is not voluntarily possible for a given state. The consideration and answering of these questions typically presupposes the competence of a (constitutional) court; however, the topos of sovereignty alone are not suitable answers.[38] Although these are important questions for the constitutional development of the state and the exercise of its sovereignty as a whole, the Hungarian Constitutional Court has only dealt with a fraction of these issues in a rather abstract manner.

In two decisions [Decision 22/2016 (XII. 5.), Decision 32/2021 (XII. 20.)], the Constitutional Court explicitly addressed the *ultra vires* exercise of power in the context of EU integration. In the case of Decision 22/2016 (XII. 5.) (Quota Decision),

37 Chronowski, 2019, [26].
38 Chronowski and Petrétei, 2020, [73].

the petitioner expressly made the *ultra vires* act as the subject of the proceedings.[39] In the decision, the Constitutional Court reserved the *ultra vires* examination for itself, apart from the possibilities of action being open to Parliament and the Government.[40] In this context, it formulated two limits based on the National Avowal Article E(2) and Article 4.2 of the Treaty on European Union (TEU): the joint exercise of powers must not infringe on the sovereignty of Hungary (*sovereignty control*), and it must not result in a violation of constitutional self-identity (*identity control*). Respect for and protection of Hungary's sovereignty and constitutional identity are binding to all (including the Parliament and the Government directly involved in the decision-making mechanism of the EU), and the Constitutional Court is the main guardian of

39 Citing the motion from the Quota Decision:
'[17] In the opinion of the petitioner, 'on the basis of Art. E) (2) of the Fundamental Law, the Hungarian constitutional institutions and bodies are only bound to implement the legal acts of the European Union if those acts are based on the authorisation of the Founding Treaties of the European Union. Accordingly, the Hungarian institutions and bodies are not constitutionally obliged to obey the so-called ultra vires regulations, directives and decisions, i.e. the ones that go beyond their scope of competences, as they transgress the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties'. The commissioner for fundamental rights holds that as it is unconstitutional when the European Union exercises a competence by going beyond the 'necessary extent' of the competences vested in the Union, it is indispensable to explore the substance of necessary extent. In the petitioner's opinion, the formulation of the ultra vires barrier in Art. E) (2) 5 makes it a question of constitutionality to establish whether the decisions or measures of the Union such as the EUC Decision go beyond the competences vested on the Union in the Founding Treaties. [18] In this context, the petitioner made a reference to the German and the Czech constitutional courts as well as to the Maastrich-judgement of the Supreme Court of Denmark, and to the fact that in 2014 the German Constitutional Court asked for a preliminary ruling by the Court of Justice of the European Union about the ultra vires nature of the decision by the Governing Council of the European Central Bank. [19] In the context of all the above, the commissioner for fundamental rights concluded that 'also the Hungarian constitutional institutions, first and foremost […] the Constitutional Court' are bound to safeguard the compliance with the ultra vires prohibition, as a question of constitutional law. The petitioner holds that in the course of exercising its competences the Constitutional Court may establish the inapplicability of legal acts of the Union, as they have been adopted in the absence of a relevant competence of the EU, using as an example the EUC Decision indicated in the first question. [20] As stated by the petitioner, the 'necessary extent' of the delegation of powers contained in Art. E) (2) is subject to debate, thus 'several potential and constitutionally acceptable forms of actions by the bodies of the State can be deducted from it, with regard to the joint exercise of competences embodied in a norm of the Union similar to Council decision 1601/2015'.'

40 Reasoning *'[50] 7. With regard to the petitioner's motion related to transgressing the scope of competences, the Constitutional Court notes that when the ultra vires nature of an act under EU law occurs, – on the basis of Art. 6 of the Protocol that forms an integral part of the Founding Treaties – the National Assembly and – in accordance with Art. 16 (2) of TEU – the Government, representing Hungary in the Council empowered to adopt legislation in the Union, may take the steps available and deemed necessary in the given situation.*
[51] Furthermore, according to the Act XXXVI of 2012 on the National Assembly and the National Assembly's Resolution 10/2014. (II. 24.) OGY on certain standing orders, upon the initiative of the Committee of European affairs, the National Assembly of Hungary or the Government of Hungary may file a claim with the Court of Justice of the European Union alleging the violation of the principle of subsidiarity by the legislative act of the European Union'.

this protection. However, the latter raises the question of the actual outcome of the examination, especially if the Court does not use a preliminary ruling procedure.[41]

In Decision 32/2021 (X II. 20.) the Constitutional Court did not define further conditions for the exercise of *ultra vires* powers but confirmed its previous findings. It referred to the fact that, in the Quota Decision, it had examined several Member States' practices concerning *ultra vires* acts and the reservation of fundamental rights and that there had been further cases since the decision was taken.

Both decisions, through *ultra vires* control, have unpacked the essence of sovereignty control, which can serve as a reference point for defining the scope of the Constitutional Court's intervention. The essence of this is that the source of public power is the people whose sovereignty cannot be discharged by the EU clause, Hungary's sovereignty must be presumed to be maintained in relation to the rights and obligations laid down in the founding treaties of the EU when the joint exercise of additional powers is being considered and that the joint exercise of powers cannot result in people losing their ultimate control over the exercise of public power.

4. The impact of the Constitutional Treaty and the Lisbon Treaty on national law: constitutionality tests

4.1. The Constitutional Treaty before the Constitutional Court

Hungary was one of the countries where the Constitutional Treaty was not put to a referendum but was ratified by the Parliament, second after Lithuania. Hungary was actively involved in the work of the Convention preparing the European Constitutional Treaty, and at the time was perceived to be closer to the 'federalist' than the 'sovereign' camp but consistently stressed the importance of the principle of equality of Member States. The general impression was that the Convention was a success for Hungary, where, for the first time, old and new Member States were on an equal footing, and small and medium-sized Member States could cooperate effectively.[42] Perhaps this is also connected to the fact that Hungarian politicians consistently praised the Constitutional Treaty, and there was no particular dialogue on the method of ratification, which was essentially limited to a parliamentary debate on a parliamentary resolution authorising the government to sign the treaty but did not attract much attention. Ratification by referendum was raised as a proposal by one opposition politician, but the speakers in the parliamentary debate all argued in favour of ratification by the parliament and against a referendum. After less than three hours of general debate and approximately three-quarters of an hour of detailed

41 Drinóczi, 2017a, pp. 12–13.
42 Grúber, 2005, pp. 155., 157–159.

debate, the debate was closed, and the decision authorising the Government to sign the Constitutional Treaty was adopted by 276 votes in favour, 19 against and 16 abstentions.[43] Hence, the problems that had arisen in some Western European countries (see, for example, the symbol of the 'Polish plumber' who takes jobs away from the French people or the concept of the European Constitution, its possible implications, and the question of the EU becoming a federation) and had become or could have become part of the referendum campaign did not directly arise.[44]

This case was brought before the Constitutional Court in 2003 to validate the referendum question. On 29 September 2003, an NGO that regularly organised protests against Hungary's accession to the EU submitted a signature collection form to the National Electoral Committee, claiming that it wished to initiate a national referendum on the matter. The question was, 'Do you want the Republic of Hungary not to recognise the binding force of the international treaty establishing the Constitution of the EU on the Republic of Hungary?' In decision 122/2003 (X. 27), the National Election Committee refused to certify the signature collection form on the grounds that, according to Article 28/C of the Constitution[45], a referendum cannot be held on the obligation arising from an international treaty in force, as the question put to the referendum conflicts with the commitment contained in the Act concerning the conditions of accession of the Republic of Hungary and the adjustments to the Treaties on which the EU is founded. The proposers of the referendum question subsequently (now in 2004) appealed to the Constitutional Court, which, on 13 December 2004,[46] annulled the National Election Committee's decision and ordered it to conduct a new procedure.

The Constitutional Court began its reasoning by stating that the legal environment had changed fundamentally since the referendum initiative, and the objection to the rejection of the National Election Committee decision was submitted. At the end of November 2003, it still seemed realistic that the Constitutional Treaty would be adopted and signed before the accession of the new Member States. On 29 October 2004, the Prime Minister and Minister of Foreign Affairs of the Republic of Hungary, based on the authorisation granted by Parliament in Resolution 105/2004 (X. 20.), signed the Constitutional Treaty, the ratification of which falls within the competence of Parliament. Referring to the Vienna Convention on the Law of Treaties, the Constitutional Court has ruled in several decisions that the Republic of Hungary must refrain from any action that would thwart the objective and purpose of an already signed international treaty. However, this obligation does not affect

43 Parliament Decision 105/2004 (X. 20.) on the signing of the Treaty establishing a Constitution for Europe
Rózsa, 2004.

44 Arató and Lux, 2012, pp. 195–197., Angyal 2007, pp. 180–182.

45 '*§ 28/C (5) National referendum may not be held on the following subjects:*
b) obligations set forth in valid international treaties and on the contents of laws prescribing such obligations',

46 Decision 58/2004. (XII. 14.).

the right of the parliament to decide freely whether to ratify an international treaty. The prohibition contained in Article 18(a) of the Vienna Convention means that a referendum on a specific international treaty already signed but not yet ratified by the Parliament cannot be held based on citizen initiative. Article 28/C(5)(b) of the Constitution, however, prohibits referendums on international treaties that have already been ratified, promulgated, and entered into force, and not on international treaties that have been signed but not yet ratified. Therefore, the Constitutional Court has taken the view that a referendum is not *a priori* excluded regarding international treaties already signed but not yet ratified by Parliament. The signing of a treaty makes it likely that the state wishes to be a party to the treaty in question but does not imply an obligation to be a party to it. Thus, Parliament has a real choice as to whether to ratify the treaty. Hence, the question of whether Parliament should ratify an international treaty is itself a referendum that can be initiated and held.

In repeated procedures, the National Electoral Committee, having confirmed the validity of the signature form, refused to validate it. The Constitutional Court upheld the National Electoral Committee's decision in Decision 1/2006 (I. 30.).

According to the explanatory memorandum, by ratifying the Constitutional Treaty and depositing the accession instrument, the Republic of Hungary expressed its acceptance of the Constitutional Treaty as an international treaty and the obligations arising from it. The existence of this international commitment is not affected by whether the international treaty has already entered into force. Ratification is a single legal act, and once the instrument of ratification has been deposited, there is no possibility of withdrawing from it in accordance with the practice generally accepted in international law, but only in certain cases, subject to certain conditions, of withdrawing from the treaty, or, in a limited number of cases, of invoking its invalidity. However, a successful referendum held based on the referendum initiative, which would have resulted in a majority in favour of the question, would force the Parliament to take a decision of such a nature—to change the decision recognising the binding force of the treaty on the Republic of Hungary and, consequently, withdraw the instrument of ratification already deposited, which it cannot take, as the international treaty in force on the conclusion of international treaties does not recognise this type of international legal instrument. Thus, at the time of examination of the objection, the condition laid down in Article 28/B(1) of the Constitution that the subject of the referendum may be a matter falling within the competence of parliament is no longer fulfilled. Once the binding force of an international treaty has been recognised, a referendum on the recognition or non-recognition of its binding force cannot be held under Hungarian legislation. The process of drafting the Constitutional Treaty coincided with Hungary's accession to the EU, but did not, in principle, give rise to any major public law controversy. The question could have been raised as to the extent to which a new role concept towards federalism regarding the EU would be compatible with the Accession Clause, especially regarding the issue of granting or transferring powers. However, as we have seen, the debate has not started in this direction. The Constitutional Court itself examined

the binding force of international law and the competence of the National Assembly regarding referendums in both procedures, the nature of which – the certification of a referendum question – did not allow for the condition of more far-reaching questions.

4.2. The ex-post control procedure for the Lisbon Treaty

Contrary to the above, constitutional court proceedings in the 2010 Lisbon Treaty can be seen as a paradigm shift. The Hungarian pattern was similar to the procedure for the Constitutional Treaty: the Treaty of Lisbon was promulgated by the Parliament on the fourth day after its signature, the President of the Republic did not veto its constitutionality, and neither the Parliament nor the Government, which is also entitled to review the preliminary provisions, initiated the procedure of the Constitutional Court. Thus, unlike in other Member States, no constitutionality review was carried out. Hungary was the first country to ratify the Lisbon Treaty, and as with the Constitutional Treaty, there was no particular public law debate. Similarly, in 2007, an attempt was made to put the issue into a referendum. The question was, *'Do you want the Republic of Hungary not to recognise the binding force of the EU Treaty on the Republic of Hungary, as agreed by the Heads of State and Governments of the Member States of the European Union at their meeting in June 2007?'* The National Electoral Committee saw a deficiency primarily in the clarity of the question and refused to certify it. They concluded that a national referendum on the recognition of the binding force of a treaty could not be held in the future. In its decision, the Constitutional Court[47] considered the fact that the Lisbon Treaty had been recognised as binding in the meantime such that the Parliament could not decide on this issue again, that it no longer had the power to ratify it, and that a referendum could not be held on this issue. Therefore, the Constitutional Court upheld the National Election Committee's decision.

This was followed by a petition to the Constitutional Court for an ex-post review of the law proclaiming the Lisbon Treaty, which raised the issue of the infringement of the country's sovereignty. The Constitutional Court decided on the issue two years later in Decision 43/2010 (VII. 14.). As the Constitutional Court, from the perspective of its exercise of jurisdiction, excluded EU law from the rule of the Constitution on international law [Article 7(1)] by treating it as part of national law,[48] and, thus, the possible conflict between Hungarian law and EU law did not become a constitutional issue, the question of why the Constitutional Court could still examine the constitutionality of the Lisbon Treaty required separate justification in 2010.[49] The petitioner claimed that the sovereignty of the country had been violated; however, he noted that the Lisbon Treaty would also require a reinterpretation of the Accession Clause.

47 Decision 61/2008 (IV. 29.).
48 Decision 1053/E/2005, Decision 72/2006 (XII.15.).
49 Chronowski, 2019, [18] – [20], [24].

In his view, accession to the EU was authorised by the referendum before accession and in knowledge and within the framework of the conditions then in force. Even so, the Lisbon Treaty was incompatible with this. The Court dismissed the petition in Decision 143/2010 (VII. 14.).

The Constitutional Court addressed this jurisdictional problem by formally incorporating the Lisbon Treaty into Hungarian law. It was found that this could be examined on the basis that the legislature had not amended the Accession Treaty but had promulgated it by a separate law (Article 2 of the law promulgating the Lisbon Treaty), including the Charter of Fundamental Rights and its commentary. Consequently, from a formal perspective, the Act proclaiming the Lisbon Treaty was a law in force, a 'law with substantive content in the national legal system', which could be examined by the Constitutional Court.[50] Before reaching this conclusion, the Constitutional Court briefly indicated that it was aware several member states' constitutional courts had conducted or were conducting proceedings and also noted that, in Hungary, however, none of the parties entitled to initiate a preliminary review had made use of this possibility.

Although the Constitutional Court established its jurisdiction in this case, it also stated at the beginning of its reasoning that, if it were to declare the law promulgating the treaty amending the founding and amending treaties of the EU unconstitutional, its decision would not have any effect on the commitments of the Republic of Hungary's membership in the EU. According to the judgement, this contradiction can be resolved by requiring the legislature to create a situation in which the Republic of Hungary can fully comply with its obligations under the EU without prejudice to the Constitution. Moreover, it stressed that the authentic interpretation of the founding and amending treaties of the EU and the so-called secondary or derived law, regulations, directives, and other European law rules adopted based on these treaties fell within the jurisdiction of the CJEU. However, there is no obstacle to the Constitutional Court referring to the specific rules of the founding and amending treaties of the EU without giving or requiring an independent interpretation. However, the decision did not address whether the Constitutional Court could request an interpretation of EU law in the context of a preliminary ruling procedure. Moreover, regarding the content of EU law, the decision only refers to 'fundamental facts' that are 'generally known' or 'do not require independent interpretation' and does not even answer the question of whether it can refer to EU law with a content that is not entirely clear in its decisions.[51]

In this framework, decisions address sovereign issues in detail. In interpreting the Accession Clause, it was stated that if, in the course of the development of the

50 This finding was criticised in two parallel opinions and one dissenting opinion. If the Constitutional Court had consistently adhered to its previous practice, it would have had to hold that the Treaty of Lisbon, which had already entered into force at the time of the judgement of the petition, was in fact and without doubt part of EU law and, therefore, had no jurisdiction to rule on the petition. Szabó, 2021, p. 187.

51 Kiss, 2022, p. 164.

EU, it should appear necessary to exercise additional powers derived from the Constitution, either jointly or through the institutions of the EU, the transfer of such powers to the extent necessary and based on a new international treaty is constitutionally possible. Therefore, the decision rests with the legislature, as the exerciser of state sovereignty, to decide whether it can accept complex institutional reforms on behalf of the Republic of Hungary.[52] However, the Constitutional Court has reserved the right to exercise control over any further transfer of powers that it will do alone, independent of any other national or EU body. It concluded that the Treaty of Lisbon had transferred sovereignty to the extent necessary, did not create a European superstate, did not fundamentally change the EU, and ensured the exercise of control by national parliaments by applying the principles of subsidiarity and proportionality to a greater extent than before, Moreover, the National Assembly could play an active and proactive role. However, the decision did not provide a substantive answer to the question of whether the constitution of Member States could limit the exercise of powers and, if so, by what standard this could be decided.[53] This did not cause much excitement in the literature, and the reactions were critical. Among these, it is worth highlighting that although Decision 143/2010 (VII.14.) was an indirect check on sovereignty, little can be deduced from the Accession Clause, as it is a procedural enabling rule and is not a suitable standard for constitutionality on merits.[54] Indeed, the significance of the decision lies in the fact that it clarified that the Accession Clause could not supersede the sovereignty clause of the Constitution.[55]

4.3. Have these procedures provided an answer to the relationship between EU law and national law?

Overall, the Hungarian Parliament played a learning-by-doing role regarding the Constitutional Treaty and the Lisbon Treaty, ratifying them without any major public debate, while a small number of critics tried to achieve what they could not achieve in the Parliament via referendums and ex-post control of norms: to conduct a constitutional-sovereignty debate on the documents that shaped the future of the EU and within its Member States.

The Constitutional Court, however, has consistently avoided raising EU Law issues to the level of constitutionality, and the procedures related to the validation of referendum questions have not provided an opportunity for this because they are subject to a petition. In fact, the decision on the Lisbon Treaty did not provide an answer to the relationship between the Hungarian Constitution and EU Law nor did it examine in-depth the impact of the Lisbon Treaty on the competences of the Member States. Although the decision paved the way for the incorporation of sovereignty

52 Trócsányi, 2023, p. 258.
53 Balogh-Békesi, 2021, p. 808.; Balogh-Békesi, 2015, p. 131.
54 Blutman, 2017, p. 4.
55 Kukorelli, 2013, p. 5.

control into the Constitutional Court argument, the Constitutional Court did not take this path until a few years later, in 2016. The possibilities, at least in Hungary, were, therefore, limited if we considered the impact of the documents on the internal legal order and the exercise of powers, including the Accession Clause of the Constitution, the practice of the Constitutional Court, and the passivity of Parliament. This change came first with the Constitutional Court's decision of 22/2016 (XII. 5.) (the so-called Quota Decision), and with the reaction of the Constitutional Court, which amended the Accession Clause of the Constitution, incorporating the sovereignty and identity control elaborated in the Quota Decision, thus allowing for a deeper substantive examination than before for the future.

5. The limits of intervention by the Constitutional Court: avoiding intervention

As already mentioned, the Constitutional Court has been ambivalent about EU Law. Before the Fundamental Law came into force, it only examined the constitutionality of legislation implementing EU law, treating it as national law. Thus, the Constitutional Court had conducted an examination of the constitutionality of the challenged legislation but had only compared it to the Constitution and had not addressed the impact of EU law on Hungarian law.

In its Decision 17/2004 (V. 25), the Constitutional Court concluded that the question at issue in the contested provisions was not the validity or interpretation of the rules of the EU but the constitutionality of the Hungarian legislation implementing EU regulation.[56] The decision avoided an examination of the interpretation and validity of EU Law; its findings were limited to the most necessary ones, which are routine of the Constitutional Court's practice; that is, the reasoning does not contain anything new regarding the relationship between the rules of the EU and the Constitution. One year later, the constitutionality of the transposition of the directives was examined. Decision 744/B/2004 examined whether the Court had jurisdiction to examine the constitutionality of the law transposing the Directive. However, it concluded that it could examine the constitutionality of Hungarian legislation based on the Directive without examining the validity of the Directive or the adequacy of its implementation. The decision did not consider the fact that the transposition of the directive into national law is based on an obligation, did not contain any principles on how the body views the constitutionality of secondary community acts, and did not indicate what should be done in that case; if it finds that the law transposing the directive is unconstitutional, what the limits are on

56 The case was a prior checking procedure in the context of the Law on measures relating to commercial surplus stocks of agricultural products. The law was aimed at implementing Community law.

the exercise of jurisdiction, whether and how this procedure differs from the ex-post review procedure, and no reference to the relationship of the Constitutional Court with the CJEU. Decision 1053/E/2005 raised the question of how to rule when national law (a statute in this case) was contrary to the Treaty of Rome, as promulgated by the Act Promulgating the Accession Treaty. The petitioner invoked a breach of the Accession Clause but sought a declaration of unconstitutionality in the form of a failure to act under the Treaty of Rome. However, the decision held that the Accession Clause provisions did not impose any specific legislative obligations. Therefore, the substantive assessment was again based on the Constitution and not on the Treaty of Rome. Decision 72/2006 (XII. 15.) examined the rules governing on-call doctors' fees. The regulation was found to be in breach of an EU directive, and there was a related case law from the CJEU, which ruled that the rules of the directive were directly applicable, but the Constitutional Court almost ignored EU aspects. It did not see any substantive unconstitutionality in its conflict with the Directive and did not examine the merits of the issue. Decision 32/2008 (III. 12.) was issued on the subject of the European Arrest Warrant—an issue which, in the case of a possible transfer of criminal jurisdiction, was of far-reaching relevance to the question of sovereignty. In this decision, however, the Constitutional Court separated the constitutional problem raised from the constitutional issues of sovereignty: Articles 2/A and 7(1) of the Constitution. The Decision 142/2010 (VII. 14.) examines the unconstitutionality of the law in a single agricultural support scheme. According to the decision, the challenged legislative provision was enacted by the parliament in its competence, not in the implementation of a community legal obligation, thus avoiding the examination of the question of the infringement of community law. However, the Constitutional Court, although in its previous decisions, had left the interpretation of EU Law entirely to the CJEU, in this decision, it interpreted the relevant Council Regulation, albeit in a reserved manner. Moreover, there have also been cases[57] where secondary law or the case law of the CJEU has been invoked as an additional argument in favour of the constitutionality argument.[58]

For the 2004–2010 period, it is not necessarily possible to identify the reasons the Constitutional Court avoided answering the questions raised in the petitions, including the question of the infringement of EU Law or the limits on the exercise of EU powers. It is self-evident that in the absence of an explicit constitutional provision, it was not a situation of necessity regarding the assessment and application of EU Law nor was it a court or tribunal regarding which the obligation to initiate a preliminary ruling procedure would have arisen. However, it can only be assumed that it wished to avoid the question of who had the final say in cases involving the EU. For all such reasons, the grounds on which the national constitutional court refused to intervene to protect national law and competence cannot be answered, if only because it could settle issues within the framework of its national law.

57 e.g. Decision 74/2006 (XII.15.), Decision 766/B/2009, Decision 23/2010 (III. 4.).
58 Balogh-Békesi, 2015, pp. 75, 77, 84–85, 89, 93–94, 114, 117–118, 120, 122.

The practice changed with the Lisbon Decision, which has been described above. Since then, but especially since the 2016 Quota Decision, the Constitutional Court has been more active in cases involving the EU. Consequently, the avoidance of this issue was most typical for the period before 2016. The period shows a varied picture. In cases related to student contracts[59] and slot machines,[60] the Constitutional Court considered EU law and referred to the decisions of the CJEU; Decision 3255/2012 (IX. 28.) on criminal cooperation with the Member States of the EU was not mentioned. The proceedings were initiated based on the Ombudsman's petition, which did not address EU law. Decision No.3144/2013 (VII. 16.) on a similar subject was adopted, which, although it did not deal with jurisdictional issues, referred to the relevant EU law (framework decision) and the case law of the CJEU in the context of the examination of the infringement of the Fundamental Law; that is, it remained formally on the grounds of the internal legal examination but filled the content of the Fundamental Law with EU law. However, during this period, several proceedings were pending before the Constitutional Court, in which parallel infringement proceedings were also pending against Hungary, but the Constitutional Court did not consider this fact and did not necessarily await or consider their outcomes. These include the retirement of judges[61] and quota decisions on the distribution of refugees[62].

Third, considering the cases where petitioners invoked EU law, most decided to refuse admission. Two solutions can be found in relevant rulings. As a general rule, the argument that the grounds of the petition did not allow for a substantive constitutional examination—for example, that the petition did not raise a question of fundamental constitutional importance or a question that would have a substantial impact on judicial decisions—could be considered. Accordingly, the Panel did not need to consider the consequences of involvement in EU law.[63] Another solution was to state that a constitutional complaint cannot be directly based on Article E of the Fundamental Law per se without further elaboration or showing a connection with the right guaranteed by the Fundamental Law.[64] The reference to Article E is not widespread in itself; petitioners refer to EU law or the case law of the CJEU in the context of a violation of specific fundamental rights.

Looking at the practice presented in the other chapters, the Constitutional Court has typically followed three different approaches to the questions of national law and EU law, Fundamental Law and EU law, and the exercise of EU powers: it has not examined the questions; it has made substantive findings, typically in connection with abstract questions; and it has used EU law on the government's motion, or it

59 Decision 32/2012 (VII. 4.).
60 Decision 26/2013 (X. 4.).
61 Decision 33/2012 (VII. 17.).
62 Várnay, 2019, p. 67.
63 e.g., Ruling 3009/2013 (I. 21.), Ruling 3031/2013 (II. 12.) (here the petitioner's statement does not mention that the principle of direct effect was violated), Ruling 3126/2013 (VI. 24.).
64 Ruling 3140/2013 (VII. 2.), Reasoning [17] – [18], Ruling 3041/2014 (III. 13.), Reasoning [25], Decision 3003/2022 (I. 13.), Reasoning [17].

has used EU law to strengthen its constitutional argument. Therefore, the latter is the more common of the two types of intervention, which can be attributed partly to the constitutional tradition of avoiding the issue and partly to the question of jurisdictional limits. It should also be pointed out, however, that even in the case of intervention, the Constitutional Court has placed itself within strong limits; its proceedings are not directly concerned with the EU Act or its interpretation; it does not rule on its validity, invalidity, or its primacy in the application; and it consistently refers to the need to resolve the conflict within the framework of constitutional dialogue.

6. The limits of Constitutional Court intervention: intervention in defence of national law and powers

Regarding the Accession Clause and the relationship between EU law and national law, the case law of the ordinary courts has held that Hungary undertook an obligation to apply the rules of Community Law in accordance with the interpretation of the European Court of Justice and that the provisions of Community Law form an integral part of the Hungarian legal order, which the national court is obliged to take into account.[65] The Constitutional Court, as we have pointed out previously, did not touch upon this issue, and from 2016 onwards, it incorporated the narrative of sovereignty and constitutional self-identity into its own practice to protect national law and competences. For this decision to be worthwhile, in addition to the change in the external political environment (which presented the Constitutional Court with certain problems), it was necessary for the Constitutional Court to change its previous position, which was essentially based on the avoidance of EU-law issues, aided by the identity-forming role of Fundamental Law.

6.1. The importance of the identity-building role of the Fundamental Law

With the adoption and enforcement of Fundamental Law, Hungary has a different constitution that emphasises identity creation. The identity-creating instruments of the Fundamental Law, the National Avowal (i.e. the preamble to the Constitution), and the achievements of our historical Constitution as a framework of interpretation laid the foundations for the Constitutional Court to adopt the reference to constitutional identity years later.[66] With these two solutions, the Constitution departed significantly from the previous one. The preamble to the Constitution, called the National Avowal, is voluminous, its style is neither sentimental

65 Gombos and Sziebig, 2016 pp. 167–168.
66 Trócsányi, 2019, pp. 34–35.

nor poetic, and it is politically committed to identity building. In this way, it fits with the trend of post-1989 constitutional preambles in Central Europe and the Baltic States, whose main function is identity building. These constitutional preambles typically sought to provide a substantive answer to the question of why the new socio-political order was 'better' than the previous one based on socialist foundations. Typically, they place the change of regime in the context of the struggle for national independence, highlighting the most important historical events in the life of the country, especially its 'glorious' periods. In other words, these introductions seek to establish the most basic narratives of a qualitatively new political community, emphasising the values of democracy and the rule of law and embedding them in a self-reliance and independence-centred reading of national history.[67]

Another new means of identity creation refers to the achievements of historical constitution. Fundamental Law states that its provisions must be interpreted in accordance with their purposes, the National Avowal, and the achievements of the historic Constitution.[68] Inextricably linked to this is the statement in the preamble that affirms that the protection of our identity, rooted in our historic constitution, is the fundamental duty of the state.

This has led the Constitutional Court to emphasise national specificities in its practice and to identify and protect legal institutions that have developed organically over history and are part of our constitutional culture.[69] Thus, the Constitution laid the foundation for a paradigm shift in thinking. However, it is slow to take root. Although Article R(3) of the Fundamental Law, through the interpretation of the Constitution, gives normative character to the National Avowal and the achievements of our historical Constitution; in reality, neither has become a normative obligation.

In fact, National Avowal is a decorative element of the practice of the Constitutional Court. One reason for this is that every legally relevant element is clearly elaborated in the constitutional text in a legal nature; therefore, it has not become the basis for judgements of legal development and activist nature. Additionally, its treatment as a normative introduction is inherently alien to the Hungarian constitutional judiciary and Hungarian legal culture. In contrast, reference to the achievements of the historical constitution appears sporadically, albeit not as a stand-alone argument, but as a strengthening argument.[70] It is not possible to determine *a priori* what is included in the achievements of the historical constitution.[71] There is no established methodology for its application, nor is there a clear pattern of when the Constitutional Court feels the need to use it to reinforce its arguments. What has

67 Berkes and Fekete, 2017, pp. 15–16.

68 *'Art. R (3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution'.*

69 Trócsányi, 2014, p. 481.; Trócsányi, 2019, pp. 35–37.

70 Berkes and Fekete, 2017, p. 16.

71 Varga, 2016, p. 89.

served as a starting point is that Fundamental Law does not call for the application of the historical Constitution but provides for its acquisition as a framework for interpretation. The acquis—at least this appears to be the case from the practice of the Constitutional Court[72]—carry the essential content of fundamental rights that cannot be limited by law and which, in principle, cannot be limited by the Constitution itself.[73] In fact, the reference to the acquisition of the National Avowal and the historic Constitution serves to identify Hungary through them. The emphasis should not be on specific legislative provisions, but on the spirit that permeates our historical constitution[74], through which the application of the law can return to constitutional tradition[75].

The values named by the Constitutional Court as achievements of our historic constitution are essentially universal and not exclusively Hungarian. It is also noticeable that the decisions in which references were made to the achievements of our historical Constitution or the National Avowal were not made on the subject of state sovereignty, the powers of the Member States, or the conflict between international law, EU law, and national law. However, it is significant that the Constitutional Court has highlighted this acquis; by doing so, it has reviewed and made it aware of the legal and state-historical traditions. This logical process is at stake in the call for constitutional self-identity. However, by the end of 2021, the two systems of reference were linked in a constitutional interpretation decision concerning the implementation of an ECJ judgement. In this decision, the Constitutional Court held that the values constituting Hungary's constitutional identity were created over the course of historical constitutional development. In the context of the manifestation of Hungary's national identity, the protection of its linguistic, historical, and cultural traditions is a constitutional achievement of history. As such, they are legal facts that cannot be waived not only by an international treaty but also by an amendment to Fundamental Law, as legal facts cannot be changed by legislation.[76] This decision sharply contrasts with Decision 143/2010 (VII. 14.), which, in its ex-post examination of the Lisbon Treaty, stated that there are constitutional limits to deeper integration, the most important aspect of which is sovereignty, though it did not develop a sovereignty test.

72 The historical constitutional achievements include the independence of the judiciary, the achievements of religious freedom, the obligation to protect state and private forests, the creation of a Court of Accounts independent of the government, the establishment of a parliament, the national role and the definition of its functioning by the Constitution, and the freedom of the press. The National Avowal's themes of helping the destitute and the poor, responsibility for our descendants, and the fulfilment of the good life as the common goal of citizen and state are reflected in the decision on parental care. The former also appeared in the decision on foreign currency loans. In other cases, the reference to the achievements of our historic constitution or to a theme of the National Avowal appears only in passing, without elaborating on the content.

73 Varga, 2016, p. 88–89.

74 Kurunczi and Varga, 2013, p. 133.

75 Csink and Fröhlich, 2012, p. 12.

76 Decision 32/2021 (XII. 20.).

6.2. The Constitutional Court's Quota Decision: fundamental rights control, sovereignty control, and identity control

The protection of national law and national competencies was the forerunner of Decision 143/2010. (VII. 14.) (Lisbon Decision), in which the Constitutional Court opened the way for sovereignty control to be incorporated into its reasoning. The decision itself, however, remained on the path laid down by the Constitutional Court, did not provide an actual answer to the relationship between the Hungarian Constitution and EU law, did not examine the impact of the Lisbon Treaty on the competences of Member States in-depth, and did not even discuss the standard by which this could be done. In the years that followed the decision, the Constitutional Court avoided the issue of *sovereignty control* until 2016. Despite several cases pending before the Constitutional Court in this period in which infringement proceedings were pending against Hungary, the Constitutional Court did not address these issues and examined only the question of the infringement of the Fundamental Law. Therefore, the question of the relevance of EU Law has not yet become a part of constitutional discourse. This raises the question of whether the encounter between the EU legal order, which is considered a *sui generis* or part of national law, and the Hungarian legal order is not a constitutional issue, and in which sphere can it be classified? In addition to examining questions of constitutionality, the practice of the Constitutional Court rejects questions of pure legality and, by implication, the examination of governmental and political decisions. Questions of EU law could, therefore, fall somewhere within these spheres.

However, 2016 was a strong turning point in the practice of the Constitutional Court, as it was the year when *sovereignty control,* which was not included in 2010, was developed, and *identity control* was introduced as a new aspect of the examination. Following the Quota Decision, the Constitutional Court was more courageous in identifying possible points of friction between the two legal orders and in defining the limits of the delegation of powers and the specificity of the Member State to be protected. The period is characterised by the Constitutional Court's search for a way forward: defining its position regarding transnational courts and exploring the possibility of acting against any potential threat to the Constitution and national traditions to be protected. Thus, whereas the previous 20 years had been characterised by a reticence to engage with EU law and institutions, the Constitutional Court entered a space from which it had previously shied away by defending sovereignty and identity. However, the search for a way forward was not a one-way process as the foundations for constitutional dialogue (described in detail below) were also laid.

The tasks of the Constitutional Court and, where appropriate, of ordinary courts regarding the protection of sovereignty and identity can also be understood as the result of the historical development in which the protection of the rule of law and the emphasis on legality became increasingly the task of the courts and was embodied in their judgements and decisions. The concepts of common European tradition and national identity, thus, appeared for the first time in judicial decisions (see

the Internationale Handelsgesellschaft case, in which the CJEU had already referred to the 'constitutional tradition common to the Member States', or the Solange decisions). The defence of common traditions as international and supranational values and hence the emphasis on the primacy of EU law over national constitutions and the notion that a common European tradition cannot be set against national constitutional identities, and vice versa, are corollaries of the Lisbon Treaty. Therefore, the two sets of values must be balanced. This also implies that the constitutional identity of each nation cannot be dissolved through artificially created common imperial approaches. Common values include what is common and national values include what is not. However, non-common values are also European values at that point; therefore, they must also be protected by the courts. This protection can be provided for by the constitutional courts of Member States.[77] It was, therefore, inevitable that the Hungarian Constitutional Court, like many national constitutional courts, would take on the task of participating in the EU law-national law-national constitution dynamic that has changed since the Lisbon Treaty.

The procedure underlying Decision 22/2016 (XII. 5.) (the so-called Quota Decision) was initiated in the Ombudsman's motion and concerned the distribution of refugees within the EU, which Hungary did not support.[78] According to the decision, the Constitutional Court may, in exceptional cases and as a matter of *ultima ratio* (i.e. in compliance with the constitutional dialogue between the Member States) examine whether the exercise of powers based on Article E(2) of Fundamental Law[79] infringes on human dignity, the essential content of other fundamental rights, Hungary's sovereignty (including the scope of the powers conferred on it) or constitutional identity.[80]

The Constitutional Court identified the main question to be answered as the assessment of the *reservation of fundamental rights* (i.e. whether an EU Act may violate fundamental rights) and the *ultra vires* of EU acts as specific constitutional problems, 'which must be examined by the Constitutional Court, directly at the level of the Fundamental Law, which is the basis of the Hungarian legal system'. This categorical

77 Varga, 2018, pp. 22., 26–27.

78 The Ombudsman asked for an interpretation of the Fundamental Law, partly regarding the ban on collective expulsions and partly regarding the possible unconstitutional involvement of Hungarian state bodies in the implementation of EU decisions. With regard to the latter, he also asked which legal institution is entitled to declare this, whether the exercise of powers relating to the founding treaties can restrict the implementation of an act that is not based on powers conferred on the EU, and whether the provisions of the Fundamental Law can be interpreted as authorising or restricting the transfer by Hungarian bodies and institutions, as part of cooperation within the legal framework of the EU, of a significant group of foreign nationals legally resident in an EU Member State, following an institutional procedure and without objectively prescribed criteria.

79 *'Art. E (2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union'.*

80 Decision 22/2016 (XII. 5.), Reasoning [33], [43]–[46].

statement clearly indicates a radical change in the constitutional court's conception of its role and foreshadows its irreversibility.

The decision does not refer to the Lisbon Decision, and the issue of sovereignty or identity is primarily addressed through foreign constitutional court decisions. The decision refers to the practices of the Estonian, French, Irish, Latvian, Polish, and Spanish constitutional courts and Supreme Courts, with the strongest echo being the Solange decisions of the German Constitutional Court. It highlights arguments in favour of the protection of sovereignty and identity. This approach is methodologically criticisable, as it presents only a small slice of the practice of the cited courts and does not place it in a comparative context. In terms of its function, this section mainly intends to show that the Hungarian Constitutional Court's decision is not unprecedented, as these questions have been raised throughout Europe and answered in similar ways by judicial fora. However, it is not accompanied by any further independent reasoning on the part of the Constitutional Court but merely refers to the fact that it has reviewed this practice, followed immediately by the conclusion that the power of investigation exists, subject to conditions.

Accordingly, an investigation into the exercise of power may be conducted based on Article E(2) of the Fundamental Law:

- on a motion to that effect,
- in exceptional cases,
- *ultima ratio*,
- while respecting the constitutional dialogue between Member States.

The content of this assessment may be whether there is a breach:

- *the essential content of human dignity*, other *fundamental rights,* or
- Hungary's *sovereignty* (including the extent of the power it transferred) and
- *constitutional identity.*

This is followed by an interpretation of the content of each of the elements mentioned here: *fundamental rights control, sovereignty control, and identity control.*

Regarding the *reservation of fundamental rights,* the Constitutional Court held that any exercise of public power in Hungary (whether it is a joint exercise of powers with other Member States) is subject to fundamental rights. It was also the case at the time of accession to the EU, and the level of constitutional protection of fundamental rights already achieved was not affected by accession. As the protection of fundamental rights is a primary obligation of the State, it cannot be exempted from this responsibility even when it is implementing EU law. The framework for examining whether the maintenance of fundamental rights is affected is the duty to cooperate and to ensure that European law is enforced as far as possible, while the *ultima ratio* protection of human dignity and the essential content of fundamental rights is also a matter of concern.[81]

81 Reasoning [46]–[67].

In the context of the *ultra vires* nature of the EU Act, the decision first referred to the possibilities granted to the Parliament and the Government, and only then expanded the interpretation of Article E(2) of the Fundamental Law. In such cases, the intervention and initiation of proceedings by public authorities (e.g. in the European Council or before the CJEU on the grounds of subsidiarity) is considered necessary and justified rather than intervention by the Constitutional Court.

Based on this Decision, Article E(2) ensures the validity of EU law for Hungary and constitutes a limit on the powers conferred or exercised jointly. These limits—based on the National Avowal (the preamble) of the Fundamental Law and through Article E(2) and Article 4(2) of the Treaty on the European Union—posit that the joint exercise of powers must not infringe on the sovereignty of Hungary (sovereignty control) and must not result in a violation of constitutional identity (identity control). The main guardian of respect and the protection of sovereignty and constitutional identity is the Constitutional Court. The far-reaching nature of this statement was, however, immediately clarified by the Constitutional Court, first by pointing out that the subject of the sovereignty or identity test is not directly the EU Act or its interpretation and that it does not, therefore, rule on its validity, invalidity, or primacy in the application. Later in the decision, the possibility of interference is further qualified by referring to constitutional dialogue.

Regarding *sovereignty control*, the following observations are recorded:

- As long as Fundamental Law enshrines the principle of independent, sovereign statehood and identifies people as the source of public power, the EU clause cannot supersede them.
- By joining the EU, Hungary did not renounce its sovereignty but only made possible the joint exercise of certain competences; therefore, Hungary's sovereignty must be presumed to be maintained when assessing the joint exercise of additional competences to the rights and obligations laid down in the founding treaties of the EU (*presumption of sovereignty maintained*).
- Sovereignty is enshrined in the Constitution as the ultimate source of power and not as competence. Therefore, the joint exercise of power should not result in people losing their ultimate control over the exercise of public power (whether joint or individual in the form of Member States).

According to the concept of *constitutional identity*, the decision of the Constitutional Court referred to Hungary's constitutional identity, the content of which was determined on a case-by-case basis. Defining the content of constitutional identity considers the whole of Fundamental Law and its individual provisions, its purpose, the National Avowal, and the achievements of our historical constitution as a basis. The resolution also contains an open list of constitutional values that fall within this scope: freedoms, separation of powers, the republican form of government, respect for public autonomy, freedom of religion, the legitimate exercise of power, parliamentarianism, equality of rights, recognition of the judiciary, and the protection of nationalities living with us. These fundamental values are not created by

Fundamental Law; they are only recognised by Fundamental Law. Therefore, they cannot be renounced by an international treaty, and only the permanent loss of sovereignty of independent statehood can deprive Hungary of them. As sovereignty and constitutional self-identity are intertwined at several points, the two checks must, in some cases, be carried out regarding each other.[82] With this decision, the Constitutional Court has effectively created conditions for examining whether EU acts are in breach of Fundamental Law.[83]

The high degree of abstraction in the explanatory memorandum has made it difficult to determine how the Constitutional Court will solve more concrete constitutional problems in the future using the test set out in the Quota Decision.[84] The survival of the Quota Decision also indicates that the tests were applied to mixed cases.

6.3. Establishment of the Unified Patent Court as a jurisdictional issue

The first decision in which the findings of the Quota Decision were substantially invoked concerned the establishment of the Unified Patent Court. The proceedings were initiated by the government, which sought to interpret Articles E(2) and (4), Q(3), and 25 of the Fundamental Law.[85]

In its Decision 9/2018 (VII. 9.), the Constitutional Court held that an international treaty concluded in the framework of enhanced cooperation, which transfers jurisdiction to rule on a group of private law disputes within the meaning of Article

82 Reasoning [64]–[65], [67].

83 In its subsequent decisions, the Constitutional Court has also stated that this examination provides for three types of control: in exceptional cases and as a *last resort* (i.e. in compliance with the constitutional dialogue between Member States), it can carry out *fundamental rights check* (whether the exercise of joint competences infringes the essential content of a fundamental right), a *sovereignty* or *ultra vires check* (whether Hungary's sovereignty, including the scope of the competences it has transferred, is infringed), and an identity check (whether Hungary's constitutional identity is infringed). e.g. Decision 32/2021 (XII. 20.), Reasoning [24].

84 Kelemen, 2017, 6.

85 The essence of the initiative for the interpretation of the Fundamental Law was whether the proclamation of an international treaty on the basis of Art. E(2) and (4) of the Fundamental Law, which
(a) is not one of the founding treaties of the European Union or is not a legal act of the Union but to which only the Member States of the European Union may be parties,
(b) is a condition for the effective implementation of enhanced cooperation established under Union law; and
(c) establishes an international judicial organisation which
(ca) has exclusive competence in a specific group of matters, partly defined by EU law and partly by other international agreements through which it is established,
(cb) in its proceedings, it shall also be entitled to interpret and apply Union law, other international agreements concluded by or with non-party Member States and national law; and
(cc) appeals against its decisions shall be available only within the organisation of the court to be set up.
If the international treaty cannot be proclaimed under Art. E(2) and (4) of the Fundamental Law, what are the conditions for its proclamation under the second sentence of Art. Q(3) of the Fundamental Law, in particular Art. 25 of the Fundamental Law on the judicial power.

25(2)(a) of the Fundamental Law, to an international institution not included in the founding treaties of the EU. Thus, the ruling on these disputes and the judicial decisions made in them are contrary to Article 24(2)(c) and (d) of the Fundamental Law and cannot be declared under the provisions of the Fundamental Law in force.

Regarding the *control of sovereignty,* the explanatory memorandum states that the presumption of sovereignty requires a restrictive interpretation: as long as an international treaty concluded by the Member States does not become part of the acquis communautaire[86], it is necessary to examine whether Articles Q or E of the Fundamental Law provides a constitutional legal basis for the international agreement that Hungary intends to conclude. The norms, principles, and fundamental values of *ius cogens* constitute a benchmark that all subsequent constitutional amendments and constitutions must meet; however, beyond that, the sovereignty-limiting effect of international law is not achieved by a supranational legal order but by the self-limitation of the state. *Identity control* was not interpreted further nor was it fundamentally involved in this case.

6.4. Nuances of control

In 2019, a Constitutional Court decision was handed down to examine the relationship between EU and Hungarian laws. In its Decision 2/2019 (III. 5.), the Constitutional Court ruled that the Constitutional Court is the authentic interpreter of Fundamental Law and that this interpretation cannot be distorted by any interpretation given by another body that must be respected by all. In its interpretation of the Fundamental Law, the Constitutional Court has considered the obligations membership in the EU entails and the obligations incumbent on Hungary under international treaties.

The Constitutional Court's proceedings concerning the interpretation of the Fundamental Law were initiated by the government. The petition raised questions such as whether the Fundamental Law was the source of legitimacy for all sources of law, including the rights of the EU under Article E of the Fundamental Law and whether it follows from it that the interpretation of the Fundamental Law by the Constitutional Court cannot be undermined by the interpretation of another body. The background to the application was that the European Commission had sent a formal notice stating that, according to its interpretation, Article XIV of the Fundamental Law on Asylum, as amended, infringed certain Arts of Directive 2011/95/EU of the European Parliament and of the Council on 13 December 2011 on standards for the qualification and status of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons granted subsidiary protection, and for the content of the protection granted. This was the first case in

86 According to the decision, enhanced cooperation has a specific public law meaning and can be part of EU law and international law. The decision did not in fact decide the legal nature of the Unified Patent Court Agreement but left room for the Government and Parliament to treat it as international law. Gombos and Orbán, 2021, p. 833.

which the Constitutional Court had to address the possible consequences of a conflict between Fundamental Law and a directive.

The decision harks back to the Lisbon Decision, which is based on the premise that Article E(1) of the Constitution enshrines participation in the building of European unity as a state objective, but participation is not an end in itself but must serve to extend human rights, prosperity, and security.

Regarding *identity control*, the resolution does not contain any further elements, nor does it detail or mention national specificities to be protected. However, it emphasises our European identity (alongside the call for national avoidance). Accordingly, the Hungarian nation first expressed its European identity when it became a state, and this identity matured into a firm national conviction given situations that arose in the course of history. It was a direct consequence of this European identity that after the change in regime, Hungary continuously sought to participate in European integration, which was approved by a nationwide case-by-case referendum. This part of the decision is a pro-EU counterpoint to justification elements concerning the conflict between EU law and the Constitution. However, it does not answer the question of how European identity, which is part of national identity, relates to other elements of identity that are also treated as part of our constitutional identity.

EU law was first established by the Decision as being directly applicable in the territory of Member States and as creating rights and obligations directly for legal entities. However, this specificity and binding nature are based on a constitutional command in the Fundamental Law (Article E) that the Constitutional Court has no power to annul. There is also a brief reference to the fact that EU law takes precedence over national law, as made by domestic legislators. No further statement is made regarding the primacy of EU Law and no general conclusion can be drawn from this, although the Constitutional Court has already clarified its position on this point in its later decision, 32/2021 (XII. 21.). The decision also laid down the obligation for the cooperative interpretation of the law. Overall, the decision does not treat EU law as supranational law, but uses the terminology of 'the coexistence of the EU and the domestic system of norms'.

These open justifications for EU law are followed by the section on the exercise of *sovereignty control*, which stipulates that the exercise of powers through the institutions of the European Union may not exceed what is necessary under an international treaty and 'may not be directed to more powers than those which Hungary otherwise has under the Fundamental Law'. It may also emphasise the principle of maintained sovereignty. In line with its previous decisions, it also stresses that the joint exercise of powers must not restrict Hungary's inalienable right to dispose of its territorial unit, population, form of government, and organisation of the state and that the joint exercise of powers may be limited to the extent necessary. Reference is also made here to the responsibility of the Parliament and the Government, subsidiarity and proportionality tests, and the possibility of initiating annulment proceedings. The decision concluded by stating that the coexistence of the EU and national systems of rules does not, in most cases, give rise to a constitutional dilemma,

as the two systems of rules are based on a common set of values. However, different standards may lead the Constitutional Court and the CJEU to different conclusions regarding the adequacy of national standards, but this contradiction can be resolved by respecting constitutional dialogue. This is also in line with a brief reference at the end of the decision to consider the commitment to the completion of European unity *(Europafreundlichkeit)* arising from Article E(1) of the Fundamental Law.

6.5. Human dignity at the centre

Most recently, the Constitutional Court recalled its decisions on identity and sovereignty control in Decision 32/2021 (X II. 20.). Here as well, the procedure was aimed at the interpretation of the Fundamental Law and was initiated by the government.[87]

These two aspects of the decision were different and novel from those previously established. It expanded the content of fundamental rights control: fundamental rights control has been associated with sovereignty and identity control from the outset, but it had not been the focus of previous decisions. However, for the first time, the Constitutional Court has conducted its analysis along these lines, which also means that it has approached the issue from a fundamental rights perspective (how uncontrolled immigration affects culture and can be protected through human dignity). Further, it is a novelty in that it links constitutional identity in this decision to the requirement to respect the achievements of the historic constitution.

In its *review of fundamental rights,* it concluded that the failure to exercise joint powers, as provided for in Article E(2) of the Fundamental Law, could result in the permanent and mass residence of foreign populations in Hungary without democratic authorisation, which could violate the Hungarian people's right to self-identity and self-determination, stemming from their human dignity. Given the lack of exercise of power, the traditional social environment of persons living in the territory of the State of Hungary may change without democratic authority or any influence on the persons concerned and without any control mechanisms on the part of the state. This may lead

87 The Government requests the Constitutional Court to interpret Art. E(2) and XIV(4) of the Fundamental Law. In its application, it referred to the judgement of the CJEU in Case C-808/18, according to which a foreign national illegally staying in Hungary cannot be escorted across the border but must instead be subject to asylum or expulsion proceedings. Given that the effectiveness of the EU rules on expulsion is not guaranteed, the implementation of the CJEU judgement may lead to a situation where a non-Hungarian national illegally staying in Hungary, whose identity is sometimes unknown, remains in Hungary for an indefinite period of time, thus becoming de facto part of the Hungarian population. In the view of the Minister of Justice, until such time as effective readmission is achieved by the EU, compliance with the obligation under the judgement will lead to a change in the population, which will directly affect Hungary's sovereignty, as enshrined in the Fundamental Law, its identity based on its historical constitution, and its inalienable right to dispose of its population. In the context of the constitutional problem presented, it is, therefore, essential to interpret Art. E(2) and XIV(4) of the Fundamental Law: can the said provisions of the Fundamental Law be interpreted in such a way that Hungary may enforce an EU obligation which, in the absence of effective enforcement of European legislation, may lead to the situation that a foreigner illegally residing in Hungary becomes de facto part of the country's population.

to a process which is beyond the control of the state, leading to a forced change in the traditional social environment of the person concerned. It should be stressed that the decision emphasised the existence or otherwise of State control rather than the relationship between settlement and identity, in which it emphasised that the obligation on the State should not, even exceptionally, result in any distinction between the human dignity of individuals, nor should it affect the State's obligation to ensure full protection of the human dignity of all persons present in its territory, including asylum seekers.

Regarding the *control of sovereignty,* the decision clarified the previous decision by referring to the Treaty on the Functioning of the European Union (TFEU). The presumption of sovereignty applies without doubt to all powers not considered by the TFEU to be exclusive EU powers, as, in these cases, not only the Fundamental Law but also the TFEU itself provides that Member States are entitled to exercise a certain scope of powers even after the entry into force of the TFEU. This focus on the Fundamental Law has been combined with the degree of consideration of the TFEU. It also invokes *the principle of effet utile* and the primacy of EU Law while noting that it is not unprecedented in the practice of national constitutional courts to question the applicability of a CJEU decision.

The novelty of the decision in this context is that, based on the presumption of maintained sovereignty, it also stated that the EU and its institutions exercise not only the powers conferred on them for their joint exercise in accordance with the objective of the founding and amending treaties of the EU if they create secondary sources of law but also that the exercise of powers is conditional on ensuring the effective implementation of the secondary sources of law created. It cannot be assumed that Hungary has definitively ceded the right to exercise a given power to the institutions of the EU if such institutions manifestly disregard their obligation to exercise that power or if that joint exercise of power is only ostensibly carried out in such a way that it does not ensure the effective application of EU law. In this case, therefore, there is no proper exercise of power by the EU; it is essentially acting outside the scope of the powers conferred on it (*ultra vires*), and, consequently, Hungary is allowed to act unilaterally if

- A lack of competence must affect fundamental rights or limit the discharge of public duties.
- The European Union places the necessary safeguards to ensure that EU rules are effectively enforced.
- Unilateral action is only possible in accordance with the founding treaties and in the furtherance of their objectives.
- Hungary must call on the EU to exercise its powers jointly.[88]

However, it has also stressed that this application of the presumption of sovereignty may be made exceptional and only in cases where the lack of exercise of the common powers concerned or their incomplete exercise in a manner that manifestly

88 Blutman, 2022, p. 10.

does not ensure the effective application of EU law could lead to a breach of fundamental rights or a limitation of the fulfilment of the obligations of the state.

Regarding *identity control*, the decision stated that constitutional identity and sovereignty are not complementary but are interrelated concepts in several respects:

- Hungary's preservation of its constitutional identity, as a member state of the EU, is essentially made possible by its sovereignty (the preservation of its sovereignty),
- constitutional identity is manifested primarily through a sovereign act – constitution-making,
- Considering Hungary's historical struggles, the aspiration to preserve the country's sovereign decision-making powers is part of the country's national identity and, through its recognition in the Constitution, its constitutional identity,
- The main features of state sovereignty recognised in international law are closely linked to Hungary's constitutional identity because of the country's historical characteristics.

The decision reviews the achievements of the historical constitution the Constitutional Court has made part of the constitutional interpretation, which includes the protection of the values that constitute the constitutional identity of the country (including linguistic, historical, and cultural traditions and certain steps in the struggle for the sovereignty and freedom of the country).[89] The identity has been created in the course of the historical development of the Constitution and comprises legal facts that cannot be renounced by an international treaty and by an amendment to the Fundamental Law, as legal facts cannot be changed by legislation. This part of the reasoning was first presented in the Quota Decision, but only in parallel reasoning later in Decision 2/2019. (III. 5.).[90] While this argument has moved from parallel reasoning to the main text, the reasoning elements of the Quota Decision also appear in the operative part, which shows the Constitutional Court's determination to treat constitutional identity as an important cornerstone of the future.

The Constitutional Court has previously recognised the primacy of EU Law, and this decision does not depart from it, although the content of the decision does not suggest that it has confirmed it. However, strengthening the control of fundamental rights also means that the state has a constitutional obligation to act, albeit in exceptional cases and under specific conditions, to protect human dignity, including against EU acts that threaten it, thus ultimately extending the constitutional mandate under which the state may disregard the implementation of EU law. In places, it sticks to more abstract reasoning (e.g. it does not clarify certain aspects of the lack of exercise of competence) and the criteria set out in the decision are rather loose.[91]

89 Reasoning [102]–[107].

90 Both parallel reasoning were written by judge András Zs. Varga {Decision 22/2016 (XII. 5.), Reasoning [112], Decision 2/2019 (III. 5.), Reasoning [70]–[72]}.

91 Blutman, 2022, p. 10.

6.6. Extension of the jurisdiction in judicial practice and the Constitutional Court's response

The Constitutional Court typically examined the Accession Clause and the relationship between EU and Hungarian laws in the context of abstract issues on the motion of the Government or the Ombudsman, while the proceedings underlying Decision 11/2020 (VI. 3.) were initiated by a judicial initiative; that is, they were based on concrete cases. During the procedure, the Constitutional Court found a constitutional requirement,[92] as it found that the legal provision challenged in the petition (relating to the land-use rights of legal persons) was inextricably linked to the Administrative Decisions of Principle by the Kúria (5/2019 and 11/2019). It stated that as a consequence of the principle of the primacy of European Union law, a statutory provision contrary to EU law must be set aside and may not be applied, thus extending the application of the statutory provision to situations not even covered by EU law. The Decisions of the Principle by Kúria are binding on all courts. The Constitutional Court referred to the judgement of the CJEU in the SEGRO case, which led to the amendment of the legal provisions under review. It stressed that the judgement was delivered in a case in which the free movement of capital between Member States was an essential element and that a foreign company was involved in the case. The issue of the right of use at stake in the case pending before the Constitutional Court was not the subject of the SEGRO case, but was extended to other types of disputes by the Administrative Decision of Principle 11/2019, which was issued after the judgement and referenced.[93] The principal decided on a dispute that did not involve EU elements. The Constitutional Court, however, considered it inescapable that the applicability of a valid and effective Hungarian law with effect for all could only be terminated by a decision of the Constitutional Court annulling it per the Fundamental Law. To give effect to an act of the EU against a Hungarian act in conflict with it, the court is entitled, in the specific case before it, which is of relevance to EU law, to apply the act of the EU, setting aside the application of the Hungarian act, with legal effect only for the parties concerned based on Article E(1)–(3) of the Fundamental Law. In the absence of a specific legal act uniformly applicable to the member states of the EU, the court may not disregard the law in force through an expansive interpretation of a judgement of the CJEU. Neither the law of the EU nor the Fundamental Law empowers it to do so.

92 *'The Constitutional Court, acting on its own motion, finds that Act CCXII of 2013 No 108. § In applying paras (1), (4) and (5) of Art. 108(1), (4) and (5) of the Act on the Protection of the Rights of Persons under State Law on the Protection of the Rights of the Child, it is a constitutional requirement of Art. B, Art. E(2) and (3) and Art. R(1), (2) and (4) of the Fundamental Law that the court may not disapply Hungarian law in the absence of involvement of European Union law'.*

93 *'In the case of the applicant, reverse discrimination can only be avoided if – as in the case of legal entities subject to EU law – the Kúria follows the judgement of the CJEU in this case and waives the application of Section 108 (1) of the Fétv. and Section 94 of the Inytv. on the automatic cancellation of the beneficial ownership'.*

The decision was not taken up by the legal literature; however, the following year, a decision was handed down, annulling court judgements along the lines set out in the decision. In Decision 16/2021 (V. 13.), the Constitutional Court derived these requirements in detail. As a starting point, it stated, with reference to the Simmenthal judgement, that the requirement of the effective enforcement of EU law requires that where a directly applicable EU legal rule conflicts with the provision of the law of a Member State (in this case, Hungarian law), the court of the Member State must act by setting aside the rule of national law and applying the provisions of EU law. It then sets the limits of the obligation to be set aside, including the presumption of maintaining sovereignty. According to this provision, first, in the event that it cannot be established that a matter is not affected by EU law, it is not conceptually possible to set aside a rule of Hungarian law and apply EU law to the case in question, as that would be contrary to the principle of restrictive interpretation and the principle of maintained sovereignty and would also go beyond the powers conferred by Article E of the Fundamental Law. Even so, even if it is possible to establish the involvement of EU law in an individual case, the rule of Hungarian law may be set aside only if (regarding the principle of indirect effect under EU law and the obligation to interpret Article 28 of the Fundamental Law) the rule of Hungarian law in question cannot be interpreted in a manner consistent with the Fundamental Law and the provisions of EU law. Article E(2) and (3) of the Fundamental Law do not even provide an exceptional constitutional possibility to extend the scope of EU Law to cases that are not affected by EU Law (so-called purely national situations).

6.7. Reflections on the paradigm shift of the Constitutional Court

In the legal literature, it has been criticised in connection with the decisions that the Constitutional Court does not make clear exactly what powers it has interpreted for itself, what it means by the joint or incomplete exercise of powers, how its powers extend, what the constitutional roots of the concept of constitutional identity are, and what constitutional identity—detached from its German roots—has been presented as an explanatory principle of national self-serving.[94] A rather ambivalent relationship also emerges regarding the practice of the CJEU: although the Constitutional Court is not entitled to interpret EU law according to its practice, it quoted the CJEU's decision at length in its decision on the Unified Patent Court (one dissenting opinion even noted that these arguments were indifferent); it did not draw any conclusions from it.[95] Meanwhile, Decision 11/2020. (VI. 3.) sought to avoid a broad interpretation of CJEU practice. There is also some criticism of the growing use of the concept of constitutional identity, which is of questionable utility but has the

94 Chronowski, Vincze and Szentgáli-Tóth 2021, pp. 654–664.
95 Chronowski and Vincze, 2018, pp. 480–481.

disadvantage of being indefinite, generating conflicts with the EU or even confusing the internal logic of constitutional law, thus leading to abuse.[96]

At the same time, beyond the emphasis on sovereignty and identity, there is also openness to dialogue (see below) and a desire to ensure the widest possible application of EU law. This is reflected in the emphasis on the requirement of cooperative interpretation of the law, the importance of the state objective of European cooperation, the common values of the EU and the domestic legal system from 2019,[97] and the reference to the derivability of the preliminary ruling procedure from the Fundamental Law from 2020. Moreover, although only tangentially, since 2010 there has also been an emphasis on the possibility for the Parliament and the Government to take action against acts that restrict the interests of the country, its sovereignty, or constitutional identity through various procedures and instruments, from which, and, in practice, from the fact that the new tests are confined within a multi-layered framework, it can be concluded that the Constitutional Court is still not open to the possibility of greater intervention beyond the abstract definition of principles and limits.

The extent to which this was a defence against national law is open to question. Case law has formulated abstract answers in the context of constitutional interpretation, oscillating between Fundamental Law and the obligations arising from EU membership, and these abstract requirements are of little use as a guide for the interpretation of specific legal provisions. Consequently, they can be understood more as defences related to the exercise of competence, but this is not the level at which issues are decided. This seems to have been considered by the Constitutional Court, and it is no coincidence that references to the functions of various public bodies are made. The protection of national law is most evident in the noted constitutional complaint procedures, but it is questionable to what extent this approach will become common practice and whether the problems that are evident in these procedures will arise in the future.

7. The Treaty on European Union in the practice of the Constitutional Court: references to Article 2 (in particular the rule of law) and Article 4 (in particular respect for national identity)

The concerns regarding Articles 2 and 4 of the TEU first arose in the context of examining the constitutionality of the law on cooperative credit institutions. In that case, the petitioners argued that several provisions of the contested law were discriminatory and, therefore, contrary to Articles 2–3 TEU and far removed from

96 Szente, 2022, p. 17.
97 Chronowski, 2019, [23].

community law, and, therefore, also in breach of the loyalty clause in Article 4(3) TEU. This was a breach of Article E(3) of the Fundamental Law. However, per its previously stated practices, the Constitutional Court ruled that Article E(3) cannot be considered a right guaranteed by Fundamental Law, and no concrete violation of fundamental rights can be established based on this provision.[98]

The Quota Decision refers to Article 4 TEU in two ways: first, in the cited parts of foreign Polish and, indirectly, Spanish Constitutional Court decisions, and, second, as a basis for the control of the exercise of shared competences. The Constitutional Court did not make a specific observation regarding the former. In the case of the latter, the TEU and Article 4(2) have been referred to as one of the international treaties in Article E(2) of the Constitution.[99] The decision later added that the protection of the constitutional identity under Article 4(2) TEU *'should be ensured in the framework of a form of cooperation with the CJEU based on the principles of equality and collegiality, in mutual respect, similar to the practice currently followed by the Constitutional Courts of many other Member States and by the supreme judicial fora of the other Member States with a similar function'.*[100] The decision did not define the content and invocability of constitutional identity from an EU perspective but from a national perspective. Thus, the TEU does not play any role in the decision beyond what is quoted.

However, the parallel explanatory memoranda for the decision were more verbose. One of the parallel explanations highlighted the limitations of the Constitutional Court's procedure: once an EU law has been adopted, any related legal dispute, including the legal interpretation of its scope as exceeding the EU's competence, ultimately falls exclusively within the competence of the CJEU; thus, the role of the constitutional courts or supreme courts of the Member States is limited to preventing the scope from being exceeded in a preliminary ruling procedure or when they attempt to resolve their *ultra vires* problems, also in advance, in the informal framework of the European constitutional dialogue by invoking, among other things, the recognition of national identities in the treaty.[101] Another pointed out that although the resolution 'would also infer from Article 4(2) TEU' that respect for and protection of Hungary's sovereignty and constitutional identity is binding on all (including the Parliament and the Government directly involved in the decision-making mechanism of the EU), Article 4(2) TEU does not impose an obligation on all nor on Hungarian state bodies but protects Member States from interference by

98 Decision 20/2014 (VII. 3.), Reasoning [17], [53].

99 *'By interpreting the Fundamental Law's National Avowal and its Art. E) (2), with due account to Art. 4 (2) of one of the international treaties referred to in Art. E) (2), the TEU, the Constitutional Court establishes two main limitations upon the joint exercising of competences. On the one hand the joint exercising of a competence shall not violate Hungary's sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control)'.* Decision 22/2016. (XII. 5.), Reasoning [54].

100 Reasoning [62]–[63].

101 Reasoning [76].

the Union. In contrast, the above obligation (and the entire Fundamental Law) is binding to the Parliament and the Government, but the fact remains that it is binding regardless of any provision of the TEU.[102] Regarding the latter statement, because of the specific methodology of the decision, the call of the TEU is so sporadic that it cannot be stated with great certainty that the obligation of respect for constitutional self-identity for individual public bodies is explicitly based on Article 4(2) of the TEU and not directly on the Fundamental Law.

In a tax case,[103] the petitioners invoked the principle of cooperation enshrined in Article 4(3) of the TEU, which, in their view, implies that it is the responsibility of the courts of the Member States to ensure that legal persons have judicial protection of rights derived from EU law. However, the Constitutional Court found that it did not have jurisdiction to assess the compatibility of Hungarian law with EU law; therefore, there was no room to examine the merits of this part of the petition. It also emphasised that, in the case of a legal interpretation by a legal practitioner, it can only define the constitutional framework of the scope of interpretation and that the interpretation of the legislation in technical law is not a matter within the competence of the Constitutional Court[104]; that is, it effectively implied that the conformity of the legislation with EU law and its proper interpretation is a technical legal issue that cannot be subject to constitutional review.

Finally, Decision 32/2021 (XII. 20.) referred to Article 4 of the TEU in more detail. The function here was similar to that of the Quota Decision, showing that its reasoning was based on EU law. The decision states that the obligation to protect the fundamental right to institutional protection must be assessed in the context of Hungary's constitutional identity, and it must be considered a fundamental state function affecting Hungary's public order, which, *inter alia*, Article 4(2) of the TEU states that the EU must respect. It also incorporates the principle of subsidiarity under Article 5(3) TEU, from which it is concluded that, in certain areas, the EU (and its institutions) is entitled to act only if and to the extent that the exercise of competence is more effective at the EU level than at the Member State level.

One of the conclusions of the decision in this context is that the 'institutions and bodies of the Hungarian State have a duty under Article E(2) of the Fundamental Law to ensure that, when drawing up national legislation on asylum applications and asylum seekers, these provisions are formed in accordance with the principles of solidarity and sincerity laid down in Article 4 (3) TFEU, considering the provisions under Article 4 (2) TFEU on the essential functions of the State, the territorial integrity of the State, and the maintenance of public order, including the provisions on the protection of national security and the rules of the 1951 Convention relating to the status of refugees and its additional protocol, as reflected in the legal provisions of the Union. The *effet utile* of the EU law should be presumed when designing

102 Reasoning [105].
103 Decision 3334/2019 (XII. 6.).
104 Reasoning [38], [86], [97].

these rules. The decision to grant or refuse asylum was Hungary's sovereign national act. The second conclusion of the decision, which is related to TEU, is based on the finding that Article 4 of the TEU does not apply to the right of asylum. Article 4(2) TEU, by stipulating that the Union respects the national identities and fundamental functions of the Member States, protects Member States from interference by the Union in certain matters, imposes limits on the exercise of Union competences, and, with these norms, on the side of Hungary, the obligation of the State to protect its 'constitutional identity' (identity) [National Avowal, Article R(4)] and the inalienability of Hungary's 'inalienable right of disposal' (sovereignty) in certain matters (in the exercise of its powers through the institutions of the EU) can be compared, in the sense of the Fundamental Law. The right to dispose of the essential attributes of statehood —a permanent population, defined territory, government, and the capacity to interact with other states—and the ability to exercise that right effectively and efficiently are among the functions of the State, which the Union respects in accordance with Article 4(2) of the TEU.[105]

In Hungary, for the reasons described in the previous chapters, the Constitutional Court avoids direct reference to and interpretation of EU Law. Similar to the relatively short history of raising questions about jurisdiction, it cannot be clearly stated that Article 2 and 4 TEU are explicitly recalled in practice, nor can they be treated as practice, especially given that the former did not even appear in the reasoning of the Constitutional Court decisions. Regarding the latter, only Decision 32/2021 (XII. 20.) contains the findings on its merits. A similar conclusion can be drawn from the practice of ordinary courts. Though the parties to the dispute referred to Articles 2 and 4 of the TEU in their arguments, the courts do not provide any separate justification for the principle of the rule of law or the protection of national identity.[106]

8. Constitutional dialogue as a bridge

In Hungary, Drinóczi dealt with the topic of constitutional dialogue most comprehensively in the form of an MTA doctoral thesis and monograph. In her monograph, she presents the conceptions of constitutional dialogue in detail, ranging

105 Reasoning [43], [71], [87], [97]–[98], [100].

106 Regarding Art. 2 TEU: in social security cases, the ruling of the Kúria (Kfv. 37.882/2020/3.) and the judgement of the Kúria (Mfv. 10.185/2019/7.); in a labour law case the judgement of the Metropolitan Court of Appeal (Mf. 31.265/2021/8.) and in the cases of general contract terms (Gf. 40.140/2015/5., Gf. 40.607/2014/4.); the judgement of the Metropolitan Court of Appeal in the case of general contract terms, Gf. 40.140/2015/5 and Gf. 40.607/2014/4, and in the case of personal rights, the judgement of the Metropolitan Court in the case of personal rights (P. 21.215/2020/7.). Regarding Art. 4 TEU, the reference to the principle of loyal cooperation under para. 3 is common when the courts interpret the related case-law of the CJEU in the context of a specific case.

from the theory of institutional dialogue through the theory of multi-stakeholder dialogue to extended dialogue constructs focusing on the legislator to the theory of federal dialogue. In his view, constitutional dialogue is a flexible system in which the communication underlying the dialogue means that the opinion of the sender of the message—the form in which it is presented as irrelevant—is considered by the receiver of the message, and this consideration is reflected in the response that influences the sender's decision. This consideration can range from mere acknowledgement to genuine consideration and is manifested in legislative or judicial activities. In a constitutional democracy, dialogue is 'constitutional' if it takes place between constitutional or non-constitutional actors in a constitutional procedure (i.e. a procedure that is constitutional in one of its elements). The procedure is 'constitutional' if its elements are regulated at the level of the constitution. This process aims to identify constitutional content as precisely as possible.[107] The author follows a flexible conception of constitutional dialogue and includes legislative reactions to constitutional court decisions and legislative proposals by ombudsmen.

This study follows a narrower interpretation based on the concept of dialogue that can be drawn from the practice of the Constitutional Court. In this context, this study first reviews the practice of the Constitutional Court, focusing on decisions that explicitly mention this legal instrument and its function in the decision. This research intends to examine which cases and for what reasons the Constitutional Court makes constitutional dialogue part of its reasoning. Finally, it concludes by examining the impact of these references on the Constitutional Court. There are two main forms of constitutional dialogue in the Constitutional Court's practice of the Constitutional Court: *the inter-judicial dialogue* and *European constitutional dialogue*.

8.1. Dialogue between courts

This dialogue, in the sense that the Constitutional Court is actively involved, was explicitly introduced in the practice of the Constitutional Court in 2011 as 'dialogue between courts'.[108] In this decision, the Constitutional Court stated that the judge was obliged to bring his constitutional concerns regarding the applicable law to the attention of the Constitutional Court, which was obliged to rule on the merits of the constitutional issue brought before it. It considered this as a manifestation of mutual obligation and responsibility, called a dialogue between courts, and established it as a constitutional requirement; that is, imposed as an obligation on the courts. According to the decision, the only way to ensure this 'dialogue' is to bring a judicial

107 Drinóczi, 2017b, p. 32.

108 The decision basically examined the procedural rules of judicial initiatives and the procedural consequences of the prohibition of application of the prohibition ruled in previous decisions. In this context, it dealt with the question of what a judge should do if he finds that he should base his decision on an unconstitutional law. The procedure was initiated under the old Constitutional and Constitutional Court Act (these issues are settled in the current legal environment) and was based on hundreds of judicial initiatives.

initiative before the courts. At one point, the decision refers to the decision of the European Court of Justice in Case C-210/06, based on a Hungarian initiative, by drawing a parallel between the procedural rules of the preliminary ruling procedure and the initiative procedure and by contrasting the two in the matter of the remedy against the suspensory order.

For this study, however, it is worth highlighting the recital in the explanatory memorandum of the European Court of Justice's ruling on the dialogue between courts, according to which the legal instrument of the preliminary ruling procedure is based on 'dialogue between courts' to ensure a uniform interpretation of Community law and is available to all national judges.[109] In the reasoning of the Constitutional Court, this element is only present in passing; it is not a source of inspiration; it has no role in the decision beyond that of a source of inspiration. Therefore, it does not go to the heart of the dialogue. Regarding its consequences and functions, it justified the judge's referral to the Constitutional Court. It is also worth noting that, in 2011, although the decision clearly indicated that the preliminary ruling procedure constituted the dialogue between courts at the EU level,[110] in the 12 years since then, despite numerous references to the importance of constitutional dialogue, the Court has never taken advantage of this possibility.

The idea of inter-judicial dialogue has not been explicitly mentioned in any other Constitutional Court decision following this decision, and although the 2011 decision referred to it as an obligation, this understanding of the decision has not been followed in practice based on the new Constitutional Court Act.[111] Although this should, in principle, mean that the dialogue between the courts and the Constitutional Court has been weakened, the Constitutional Court Act and the procedural codes that entered into force in 2012 provided for more detailed regulation of the institution of judicial initiative than before and even regulated it at the level of the Fundamental Law,[112] which has led to a significant increase in the number of judicial initiatives. However, the position of the Constitutional Court has also changed. It also positioned itself much more prominently than before regarding the courts by becoming a specialised body for dealing with constitutional complaints.[113]

109 Decision 35/2011 (V. 6.), Reasoning IV.3.2.–3.3.

110 Trócsányi, 2022, p. 17.

111 Berkes, 2022a, p. 253.

112 *'Art. 24 (2) The Constitutional Court:*
(…)
b) shall, at the initiative of a judge, review the conformity with the Fundamental Law of any law applicable in a particular case as a priority but within no more than ninety days;'

113 Under the new regulatory framework, a judge may refer to the Constitutional Court not only as a violation of a right guaranteed by the Fundamental Law but also a violation of other provisions of the Fundamental Law against the person who indirectly lodged a constitutional complaint against the legislation. The judge's initiative, therefore, has a double effect: the Constitutional Court exercises a control of the norm, as it examines the constitutionality of the applicable law, thereby also protecting the Fundamental Law, and the result of the procedure, by imposing a prohibition of application, has an impact on the underlying individual case. In this context, the submission of such

Therefore, the precursor of dialogue exists at the regulatory level and in practice, although it is sometimes surrounded by mistrust.[114] From the perspective of the Constitutional Court, however, this dialogue works through judicial initiatives and constitutional complaints. In the view of the President of the Constitutional Court, these links have been strengthened by the institution of 'genuine' constitutional complaints against judicial decisions, as, in these cases, the Constitutional Court's fundamental rights messages are essentially indirect, filtering through the case-law of the courts in the context of a structured and interactive fundamental rights adjudication.[115] However, this also shows the specific nature of the dialogue between the Constitutional

petitions has become much more widespread (i.e. judges have actively sought and requested the opinion of the Constitutional Court). This is also linked to the fact that the Fundamental Law has substantially redefined the role of the courts and the Constitutional Court and, thus, the examination of individual or normative acts. Whereas under the Constitution, the Constitutional Court examined only normative provisions, and the courts decided all individual cases; the Constitutional has changed this division of labour. According to the Constitution, all questions of constitutionality are the responsibility of the Constitutional Court: in addition to examining the constitutionality of legal rules (normative provisions), the Constitutional Court may also examine the conformity of judicial decisions with the Constitution on the basis of a constitutional complaint. Meanwhile, the Fundamental Law gives the supreme judicial body the possibility of reviewing the law: the Kúria can examine the legality of municipal decrees and, in the event of a breach of the law, annul them. However, Art. 28 of the Fundamental Law imposes a constitutional requirement on judges to recognise the fundamental rights implications of the case before them and to interpret the applicable legislation in a manner that is in conformity with the Fundamental Law. Berkes, 2022a, pp. 254–255, Balogh, 2011, p. 134.

114 This form of a dialogue between the courts is, therefore, guaranteed, but the question is that while the Constitutional Court basically expects judges to initiate proceedings, if they cannot resolve the violation of the constitution by interpreting the law, how much willingness is there for this among judges themselves. Extensive research has been carried out on this issue, in which the judges interviewed gave two main reasons for not having recourse to the Constitutional Court. One group of these reasons had a technical basis: the party had applied to the court for a judicial initiative as part of a tactic to draw the case, the Constitutional Court had already examined the issue and there was in fact a question of interpretation of the law, not of constitutional law, the initiative was irrelevant to the resolution of the dispute, or the possibility of rejection was given. In these cases, there is in fact no need for dialogue between the courts. There were also arguments that weakened the credibility of the dialogue: the failure to refer the case to the Constitutional Court was also justified by the lack of clarity of the infringement, the preference for the higher court to decide, and the lack of confidence in the correct decision of the Constitutional Court. Beznicza et al., 2019, pp. 326., 335–336. The decision taken is binding on the judge, but in many cases, it does not lead to the desired result. The Constitutional Court does not, for example, take it upon itself to interpret vague or uncertain rules: as long as they are not completely uninterpretable, it is up to the judge hearing the case to determine the content of the law. Berkes, 2022a, 261.

115 Sulyok and Deli, 2019, pp. 57–59. The decisions of the Constitutional Court may have had several effects: they may have had a liberating effect on judges ('extensional effect'), they may have provoked resistance from judges ('confrontational effect'), they may have overruled restrictive judgements ('restrictive effect'), and they may have led to the adaptation of judges ('adaptive effect'). In the vast majority of cases, judges have followed the criteria set out by the Constitutional Court and have sooner or later incorporated them into their judgements in individual cases. Hörcherné Marosi, 2022, pp. 81–82.

Court and the courts: the parties are not equal, as the Constitutional Court's power to annul court decisions ultimately puts it in a position of strength vis-à-vis the courts. Perhaps this is also why this kind of dialogue has not become part of the standard vocabulary of decisions.

8.2. Emergence of the European constitutional dialogue in the practice of the Constitutional Court

A constitutional dialogue on specific EU issues has been initiated. Not only did the Constitutional Court have to position itself relative to domestic courts, but the growing importance of cases in the EU context also made it necessary for it to interpret its own place and role in this context. Constitutional courts were typically seen as institutions that were the ultimate guardians of the Constitution and constitutionalism in their respective countries—the bodies that had the final say on these matters (the same was true of the Supreme Court). However, there have been an increasing number of global and regional developments that have impacted the activities of these supreme bodies, resulting in a discernible change in the way in which the supreme forum has become less 'supreme'.[116] This change includes the emergence of supranational and international adjudication and the intensification of their activities. Thus, the supreme judicial and constitutional courts must pay increasing attention to issues that were previously within their sovereign discretion in interpreting legal (constitutional) norms, paying attention to the relevant case law of supranational courts in addition to their own case law.[117] The Hungarian Constitutional Court has been slow and incremental in opening up in this direction and has consistently sought to maintain its supreme position.

When the Constitutional Court interprets its own place and role in the EU, the starting point is that the requirement for a conforming interpretation of EU Law is part of the Fundamental Law and the practice of the Constitutional Court. Based on a combined interpretation of Articles R(3)[118] and E(1)[119], when interpreting the provisions of the Fundamental Law, the Constitutional Court must bear in mind that its aim is to create European unity, from which the obligation to interpret them in conformity with EU Law can also be derived. Consequently, the essence of the Constitutional Court's position is that it seeks to establish consistency between the Hungarian and EU legal orders while preserving the domestic constitutional tradition.[120] As it has recognised or been confronted with the fact that certain conflicts cannot be

116 Trócsányi and Sulyok, 2020, pp. 229–230.; Trócsányi, 2023, p. 260

117 Uzelac, 2019, p. 127.

118 'Art. R) (3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution'.

119 'Art. E) (1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity'.

120 Sulyok, Csillik and Deli 2022, pp. 119–120.

resolved by interpretation of the law, it has invoked the instrument of constitutional dialogue as a subsidiary principle in several cases.

8.3. Constitutional dialogue in the Quota Decision

The first decision in which the Constitutional Court called for a constitutional dialogue was adopted in 2016. The decision can be seen as the beginning of a period in which the Constitutional Court, in contrast to the cautious silence of previous years,[121] began to identify conflicts between the powers, laws, and decisions of the EU and the Fundamental Law and the way it operates. This period is characterised by an emphasis on the defence of the Fundamental Law, but there is also a counterbalance in each of the decisions concerned, with the body forming a bridge between the two by recognising the law of the EU and calling for a constitutional dialogue. Thus, decisions are characterised by the fact that, ultimately, everyone finds a set of arguments that they can support: the Constitutional Court can take or leave, give, or take. By calling for constitutional dialogue, it effectively postponed a final conclusion. Perhaps, this is why, unlike the Polish example, there has been essentially no reaction at the EU level to Hungarian decisions. However, these decisions do not change the balance of power, they do not have a direct impact, they are mainly intended to draw attention to them, and there is no need to respond to them because they were not adopted as part of the formal procedure of the CJEU.

As mentioned above, the procedure underlying the Quota Decision was initiated in the Ombudsman's motion and concerned the distribution of refugees within the EU, which Hungary did not support. The decision considered constitutional dialogue within the EU to be an institution of utmost importance and examined the practice of the constitutional courts and supreme courts of Member States regarding *ultra vires* acts and the maintenance of fundamental rights. It also stressed that within the framework of constitutional dialogue, the CJEU respects the competences of Member States and considers their constitutional needs.[122] However, in the decision, the Constitutional Court also immediately stressed that the subject matter of the sovereignty or identity test is not directly the EU Act or its interpretation and, therefore, does not rule on its validity, invalidity, or primacy in the application. However, it also noted that any dispute over an EU Act, once it has been adopted, including any

121 Prior to the entry into force of the Fundamental Law, the Constitutional Court had jurisdiction to interpret decisions, but only in relation to the ex-post control of Hungarian legislation transposing a law or a directive and, generally, not in relation to the exercise of joint powers nor to EU regulations, decisions, directives, or CJEU decisions. In most cases, the panel has rather examined the constitutionality of the Hungarian legislation and, as regards aspects of European Community law, has mostly found a lack of competence or held that the conflict of norms raised in relation to Community law is not a question of constitutionality. Chronowski, Vincze and Szentgáli-Tóth, 2021, pp. 645–646.

122 Cases C-376/98, *Germany v Parliament and Council (Tobacco advertisement judgement)* and C-36/02, *OMEGA Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* and C-404/15 *Aranyosi and Căldăraru*.

legal interpretation claiming that it exceeds EU competence, ultimately falls exclusively within the competence of the CJEU and that the constitutional courts or Supreme courts of the Member States no longer have any legal means to influence the dispute in the event of legal proceedings pending before the CJEU. In this context, he reiterated that they could, at most, try to resolve their *ultra vires* problems in the preliminary ruling procedure of the CJEU (Article 267 TFEU), or ex-ante, in the informal framework of the European constitutional dialogue, *inter alia*, by invoking the recognition of national identities in the treaty (Article 4(2) TEU).[123]

The decision does not define the concept of constitutional dialogue in detail and acknowledges the limited role of national constitutional courts, leaving open the question of whether constitutional dialogue can be an effective instrument for the protection of national constitutions and constitutional traditions.[124] There have been several criticisms of the decision in the literature, but we will highlight the one concerning constitutional dialogue, which criticises the vague content of the concept and points out methodological flaws. Regarding the former, the question has been raised as to whether the Constitutional Court meant by this term that it should also examine the constitutional practice of the other Member States or whether it meant, in the words of the Constitutional Court decision, 'cooperation with the CJEU based on the principles of equality and collegiality and mutual respect'.[125] According to this criticism, the latter can, at most, mean a preliminary ruling procedure which, contrary to what is stated in the Constitutional Court decision, is not based on the principles of equality and collegiality. Additionally, the Constitutional Court never used a preliminary ruling procedure. As for the methodology, criticism that the Constitutional Court has merely assembled decisions that fit its own system of reasoning and did not carry out a real comparative analysis of the law has been levelled.[126] Another criticism was that the Constitutional Court misunderstands the concept of constitutional dialogue, as it defines it as an obligation that does not exist. It ignores the fact that European judicial constitutional dialogue is linked to the globalisation of constitutional law and the specific nature of the functioning of the European judicial area and is mainly an inspiration and an application of the comparative law method.[127]

123 Decision 22/2016 (XII. 5.), Reasoning [56], [76].

124 However, the possibility of using informal dialogue was also raised, but in light of the *Czech Landtová* case, the panel does not see any possibility for this, although the Hungarian Constitutional Court is trying to change this in a positive direction through its extensive international activities. Sulyok, Csillik and Deli, 2022, p. 112.

125 Ernő Várnay described the former as horizontal dialogue and the latter as vertical dialogue. Within the vertical dialogue, the most superficial form of dialogue is when the Constitutional Court refers to the case law of the European Court of Justice (this was done in the Quota Decision) and the next level is when it explicitly considers it (the suspension orders to be referred to later may be an example of this), while the strongest dialogue is within the framework of the preliminary ruling procedure (this has not yet been done in the practice of the Constitutional Court). Várnay, 2022, pp. 97–100.

126 Chronowski, Vincze, Szentgáli-Tóth, 2021, pp. 664–666.

127 Drinóczi, 2017a, pp. 10–11.

8.4. Suspension of proceedings as a practical expression of constitutional dialogue?

Following the Quota Decision, orders suspending the procedure in which the Constitutional Court took the preliminary ruling procedure of the CJEU as a preliminary question and decided to await the decision to be taken there can be understood as a practical expression of constitutional dialogue. In the context of proceedings pending before the institution of the EU, the Constitutional Court has stressed in several decisions that it considers the case law of the CJEU in its decision-making and attaches particular importance to constitutional dialogue within the EU. The Constitutional Court considers that the EU, through its institutional reforms, the Charter of Fundamental Rights, and the CJEU, can guarantee a level of protection of fundamental rights that is generally equivalent to that provided by national constitutions or at least sufficient and that the possibility of review reserved for the Constitutional Court must, therefore, be applied in light of the duty of cooperation and to ensure that European law is applied as far as possible. Consequently, when the Constitutional Court becomes aware that a preliminary ruling procedure or infringement proceedings are pending before the CJEU regarding the legislation it is examining, it will suspend its proceedings.[128]

There had already been an example of suspension before the Quota Decision, but the Constitutional Court did not mention constitutional dialogue. It merely referred to the binding nature of the CJEU's decision to interpret EU law.[129] However, during this period, there were also several cases pending before the Constitutional Court, in which infringement proceedings were pending against Hungary (e.g. the law on the status and remuneration of judges, where the Constitutional Court did not await the decision of the European Court of Justice and did not refer to possible EU legal relations in its decision[130]and the Quota Decision itself, where Hungary initiated proceedings before the European Court of Justice, but there was no reference to it in the decision). Therefore, 2016 was a strong caesura in the practice of the Constitutional Court, and the suspension orders issued in 2018 can be seen as the first time the Constitutional Court established a real and substantive link between the proceedings

128 Ruling 3198/2018 (VI. 21.), Reasoning [3]-[9]; Ruling 3199/2018 (VI. 21.), Reasoning [2]–[7]; Ruling 3200/2018 (VI. 21.), Reasoning [2]–[5]; Ruling 3220/2018. (VII. 2.), Reasoning [2]–[3]. The Constitutional Court also considers the case law of the European Court of Human Rights (ECtHR), following a similar logic. It is rare for proceedings before the ECtHR to be pending in parallel with those before the Constitutional Court, and because of the case of Szalontay v. Hungary, which qualified the constitutional complaint as an effective remedy that must be exhausted in advance, the likelihood of this has further decreased. However, from the decisions taken so far, the Constitutional Court may suspend its proceedings in the case of an infringement of an international treaty pending the decision of the ECtHR {Ruling 3215/2016. (X. 26.), Reasoning [7]; Ruling 3228/2016 (XI. 14.), Reasoning [2]; Ruling 3044/2017 (III. 7.), Reasoning [2]}. In these cases, however, there is no reference to the importance of dialogue. Berkes, 2022b, pp. 654–657., 656.

129 Decision 3216/2013 (XII. 2.), Reasoning [9]–[11].

130 Decision 33/2012 (VII. 17.).

before it and those before the CJEU. While in the Quota Decision, the Court referred only in abstract terms to the constitutional dialogue within the EU and cooperation with the CJEU; these orders can now be seen as a concrete implementation of all this.[131]

However, these cases can also be seen as a redefinition of the Constitutional Court's position, as it can express its position as the last word after these decisions, thus defending its position as the main decision-maker on the issue of constitutionality. Even so, it is not yet possible to conclude on the outcomes of this dialogue. In the cases referred to, following the judgement of the CJEU, the legislator amended the contested legislation, which was repealed in its entirety, preventing the Constitutional Court from proceeding and leading to the termination of the proceedings.[132] Only one case was decided on the merits[133], in which the Constitutional Court used the substantive decisions of the CJEU but examined the underlying problem only in the context of the infringement of the Fundamental Law, thus seeking to preserve the primacy of the Fundamental Law and ensure consistency with EU law.

8.5. Further emphasis on constitutional dialogue

The next step in the call for European constitutional dialogue for the Constitutional Court was Decision 2/2019 (III. 5.), which also refers to the coexistence (i.e. not hierarchy) of the EU and the domestic system of norms, the common values on which the two systems of norms are based, and the role of respect for constitutional dialogue in resolving possible conflicts. The novelty of the decision, however, is the emphasis on the fact that the Constitutional Court is the authentic interpreter of the Fundamental Law, based on which it is the task of the Constitutional Court to determine the interpretation of the constitutional order of Hungary, thus the authentic interpretation of the fundamental constitutional order. Meanwhile, the interpretation of other bodies cannot deviate from the authentic interpretative practice of the Constitutional Court.[134]

However, the Constitutional Court also emphasises in its decision that EU law and the national legal system based on Fundamental Law are, presumably, intended to achieve the objectives set out in Article E(1). Thus, the 'creation of European unity and integration' is not only an objective for political bodies but also for the courts and the Constitutional Court, from which 'European unity' follows the harmony and coherence of legal systems as a constitutional objective. Hence, to achieve these objectives, legislation and the Fundamental Law must be interpreted, where possible, such that the content of the rules also accords with EU law. There is also a reference

131 Várnay, 2019 p. 67.
132 Ruling 3410/2022 (X. 21.), Reasoning [9]–[11], Ruling 3319/2021 (VII. 23.), Reasoning [28]–[30], Ruling 3318/2021 (VII. 23.), Reasoning [33], [36].
133 Decision 3040/2021 (II. 19.).
134 Reasoning [35].

to a commitment to the completion of European unity *(Europafreundlichkeit)*, which is derived from Article E(1) of the Constitution.

Here as well, the need to bring the Constitution and EU Law closer together and harmonise them through legal interpretation is evident. The Constitutional Court expressly stated that it interpreted the second sentence in Article XIV(4)[135] of the Fundamental Law to ensure that its result is consistent with the spirit of the Fundamental Law as a whole and that, in the interests of constitutional dialogue and of contributing to the achievement of European unity in the interests of freedom, prosperity, and security of the peoples of Europe, it also considers the Directive's consistency with the relevant provisions of the Charter of Fundamental Rights.

However, this decision does not promote dialogue in any meaningful way: one of its most significant criticisms is that it is more of a 'monologue within the limits of cooperation'. For constitutional dialogue to be effective, it must be conducted in a common language, using general legal principles recognised at the European level, established or commonly agreed concepts, precise reasoning, duly explained criteria, and meaningful involvement of previous European constitutional practice. Without the use of this common language (and method), the arguments of the Constitutional Court will not only be useless between courts but also in the cooperation between the State and the EU institutions.[136]

8.6. Emergence of the preliminary ruling procedure as a dialogue

In its Decision 26/2020 (XII. 2.), the Constitutional Court continued along this path and emphasised the balancing role of constitutional dialogue between the core of national constitutional law, which is untouchable by integration, and European law developed by the CJEU, which has priority of application. This balance can be ensured through dialogue between courts that are reciprocal and open to each other's arguments, without which neither the *sui generis* nature of national constitutional law nor European law can be guaranteed.

The argument also shows that the Constitutional Court has increasingly emphasised its equal position and associated it with the equality of constitutional law and European law. Moreover, by referencing the integrationist constitutional core part of the dialogue, the Constitutional Court increases the weight of constitutional law, which is reinforced by the fact that the decision states that the Constitutional Court cannot take a neutral position on institutionalised cooperation. Meanwhile, it is a major step towards the European Court of Justice and effective dialogue, which has

135 *'Art. XIV (4) Hungary shall, upon request, grant asylum to non-Hungarian nationals who are persecuted in their country or in the country of their habitual residence for reasons of race, nationality, the membership of a particular social group, religious or political beliefs, or have a well-founded reason to fear direct persecution if they do not receive protection from their country of origin, nor from any other country. A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution'.*

136 Blutman, 2022, p. 12.

also raised the possibility that the Constitutional Court's right to initiate preliminary rulings may be derived from Fundamental Law, especially if the case before it involves a threat to compliance with fundamental rights and freedoms under Article E(2) of the Fundamental Law or to the restriction of Hungary's inalienable right to dispose of its territorial unity, population, form of government, and state organisation. However, this leaves the question unanswered.

In 2021, the Constitutional Court interpreted the Fundamental Law[137] regarding the government's motion. In this case, the Constitutional Court did not rule on an individual case but rather carried out an abstract interpretation of the Fundamental Law.[138] The novelty of this case is that the Seventh Amendment to the Fundamental Law, which came into force after the Quota Decision, added the control of fundamental rights, sovereignty, and constitutional identity to Article E of the Fundamental Law.[139] Regarding dialogue, the decision does not contain anything new, its function being, as in previous decisions, to counterbalance the stronger content of constitutional protection and leave the conclusion of the decision open. However, beyond constitutional protection, the decision also underlined that the Constitutional Court accepts, as per the requirement of constitutional dialogue, that the interpretation of EU Law is a matter for the Court of Justice (and not the Constitutional Court). The next step towards the use of the preliminary ruling procedure is also the brief reference to the fact that the European Court of Justice has ruled that it is not necessary to request a preliminary ruling when 'the correct application of Community law is so obvious as to exclude all reasonable doubt', which was also considered by the Constitutional Court in its decision.[140]

8.7. Is the preliminary ruling procedure a possible way forward?

The initiation of the preliminary ruling procedure has been raised in principle, which already shows that the Constitutional Court has considered it, but the procedural part—either statutory or at least case-law level—is missing (e.g. in which procedures it may be used, within which procedural framework, whether and when such an obligation exists, and whether and to what extent the Constitutional Court is bound by the decision of the European Court of Justice). Consequently, the literature is divided as to whether the Hungarian Constitutional Court can request

137 Decision 32/2021 (XII. 20.).

138 The request for interpretation of the Fundamental Law was made in the context of the implementation of the European Court of Justice's decision in Case C-808/18 *Commission v Hungary*.

139 *'Art. E) (2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this para. shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure'.*

140 32/2021 (XII. 20.), Reasoning [64].

a preliminary ruling.[141] In 2010, two constitutional judges argued in a separate opinion that the Constitutional Court's decision also took a position on an EU law issue, implicitly accepting the 'national court' status and, also implicitly, by applying the doctrine of *acte clair,* did not exercise its right to initiate a preliminary ruling procedure.[142]

Since then, these arguments have not been substantiated. The Constitutional Court has been very terse in its treatment of the issue, and the abovementioned decisions contain only a single sentence. In the absence of legislation, the Constitutional Court rejected such requests[143] and preferred to suspend the proceedings and await the European Court of Justice's decision, as the referred injunctions show.

9. Summary

One of the most important milestones of accession to the EU was the definition of constitutional foundations, in connection with which we have already pointed out that Hungarian public lawyers were relatively late addressing legal issues regarding European integration. While many scholars of civil law, commercial law, and private international law have been analysing the issues of EU law for decades and have applied the results of their research on this topic to the development of Hungarian law, public law literature has been slow to prepare for the consequences of the development of EU law in Hungary.[144] For a long time, the literature has also avoided taking a clear position on the question of which of the two has primacy in the event of a conflict between the Constitution and EU Law, and how this affects the perception of the country's sovereignty. However, given the Lisbon Treaty, the notion of the 'creeping extension of powers', the objection to the disregard of subsidiarity, and the voices that the rigid, hierarchical structure between legal systems based on the notion of the primacy of EU Law is far from clear and that the doctrine of absolute primacy cannot be applied without limitation in the relationship between European law and the law of Member States has emerged, partly as a result of foreign and partly political influence. With the growing prevalence of EU Law, the (apparent?) protection of national and constitutional identities has been countered. Without clarifying the issues of national and European identity, it is not possible to take a position on the future shape of European integration or key regional and global economic and geopolitical issues.[145] A successful European integration policy can

141 Sulyok, Csillik, Deli, 2022, p. 120.
142 Decision 142/2010 (VII.14.).
143 Ruling 3165/2014. (V. 23.), Reasoning [16], Ruling 3004/2015 (I. 12.), Reasoning [19], Ruling 3050/2015 (III. 2.), Reasoning [17]
144 Kecskés, 2006.
145 Trócsányi, 2023, p. 261.

only be based on a balanced relationship between national and European identities and due consideration of the requirements of these two identities. Consequently, any further extension of the competences in favour of the EU should be considered within a constitutional framework and in specific areas.[146] The Court finally tried to provide constitutional, sovereign, and pro-European answers to these questions. The reception of decisions was mixed because of the highly politicised nature of the issue. Critical voices predominate in the literature, emphasising the perceived shortcomings of decisions and their limited applicability as a practical guide, while the political world has found support to which it can appeal. This simplifies the debate into a pro- or anti-EU argument and thereby distracts attention from the longer-term question of the direction in which Europe and the freedom and prosperity of the peoples of Europe are heading and the vision of the future that unity in diversity should presuppose.

146 Martonyi, 2018, pp. 30, 42., 52.

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Chapter VII

Polish Constitutional Identity and the EU Challenges: European Law as a Tool for the Redrafting of the Polish Constitution

Aleksander Stępkowski

Abstract

The paper aims at describing, in a synthetic but still systematic way, the impact that EU has for Polish legal system in general and constitutional order in particular. Considering category of the constitutional identity as determined in the jurisprudence of the Polish Constitutional Court, an attempt is made to demonstrate the way in which Polish constitutional order is altered beyond the procedures provided to this end by the Constitution and without proper involvement of the Polish Parliament. It is described, how delegation of certain powers to EU pursuant to specific provisions of the Polish Constitution has profoundly affected domestic balance of power between three branches in at least two different dimensions. However, regardless which dimension is concerned, it always results in the limitation of the powers of national legislature. This process demonstrates also decline of the modern politics and its displacement by its postmodern successor, where real political power is no-longer located on national level, but above, upon supra-national level.

Keywords: constitutional identity, Constitutional Court, delegation of powers, limitation of powers, Polish legal order

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1. Introduction

This paper aims to describe, in a synthetic but still systematic way, the impact that the EU has on the Polish legal system in general, and constitutional order in particular. Considering the category of the constitutional identity as determined in the jurisprudence of the Polish Constitutional Court, an attempt is made to show the way in which Polish constitutional order is altered beyond the procedures as provided to this end by the Constitution and without proper involvement of the Polish Parliament.

2. Incorporation of the EU law into the Polish legal system

When discussing the incorporation of EU law into the Polish legal system we must consider the two perspectives of this process. The first is the European perspective, whilst the second is the national, Polish perspective.

According to Article 291(1) of the TFEU, Member States shall adopt all measures of national law necessary to implement legally-binding EU acts. This provision is of special importance for directives, as they are binding only as to the result to be achieved, upon each Member State to which they are addressed, leaving to the national authorities the choice of form and methods to be adopted for this end. Therefore, the crucial element when it comes to the incorporation of European law into the Polish system is the constitutional framework determining the national system of the sources of law.

2.1. Constitutional framework

The Polish Constitution of 1997 was drafted ahead of time, in anticipation of gaining membership within the EU, and it provides a constitutional framework for the incorporation of EU law into the Polish legal system. This constitutional framework consists of several provisions relating to the constitutional hierarchy of law, determining the catalogue of legislative instruments that may contain generally binding rules of law, and the place of international law within this hierarchy.

Regardless of existing doctrinal controversies as to the nature of the EU as an organisation and doubts surrounding whether it is correct to consider it merely an international organisation, the Polish Constitution takes into account the Union itself and its law under the headings of international organisation[1] and international law respectively. Therefore, the first constitutional provision which is of importance in

1 Judgment of 11 May 2005 K.18/04, OTK ZU nr 5A/2005, item 49, section 8.5; and judgment of 31 May 2004, K 15/04, OTK ZU nr 5/A/2004, item 47.

this respect is Article 9, declaring that the Republic of Poland respects international law that is binding upon it. Article 87(1) determines sources of universally-binding law in Poland, listing Constitution, statutes, ratified international agreements, and acts of subordinate legislation issued by the executive upon the authorisation of the statutory delegation (*rozporządzenia*). The order of appearance, as portrayed in Article 87 paragraph (1) is, however, not fully instructive for proper determination of the place of international law within the Polish legal system. The said order is better and more precisely described in Article 91, providing that, after promulgation of a ratified international agreement in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), it constitutes part of the domestic legal order and is directly applicable, unless it is subject to some additional statutory enactment.

The actual power of such a ratified international treaty ultimately depends, however, on the way it was ratified.[2] If it was ratified by the President of the Republic upon prior specific statutory authorisation, as required by Article 89 of the Constitution, its provisions take precedence over statutes if they are not to be reconciliated with the domestic statutory provisions. This kind of ratification is required for the most important international treaties which concern broadly-understood security issues (peace, international alliances, political or military treaties) as well as issues requiring mandatory statutory regulation, including constitutional freedoms, rights or obligations of citizens, and membership in an international organisation, in addition to the treaties providing for a State's considerable financial obligations.

2.2. Law of the international organisation

The actual hierarchical position of international law in the Polish legal system much depends on the specific way in which a particular international treaty was ratified. Therefore, despite the already-outlined complex constitutional regulations determining the position of international law within the Polish legal system, matters pertaining to membership of the EU are addressed in a yet specific way, described in Article 90 of the Constitution. The difference between procedures from Articles 89 and 90 is that, whilst the first article relates to international treaties imposing certain international obligations on a State Party and thus limiting its sovereignty, the second article authorizes delegation of certain sovereign powers to an international entity establishing legal framework for integrative cooperation between Member States. Therefore, the international organisation or institution, within the meaning of Article 90, has an integrative character. As was explained by the Polish Constitutional Court, the characteristic feature of such an integrative treaty is that the exact content of the obligations accepted by a state in such a treaty might evolve in the course of the state's functioning. Consequently, after some time, the scope of the binding obligation of a Member State may differ in comparison to its content as

2 See Mistygacz, 2012, p. 139.

accepted at accession.[3] Otherwise speaking, the true effect of the delegation of a state's powers to an integrative organisation or institution is not known at the accession.[4]

The Article 90 of the Polish Constitution does not speak directly about the EU but authorises, in certain matters, delegation of the powers belonging to state's authorities to an international organisation or international institution. In theory it authorises delegation of powers to any other organisation designated to perform certain competencies of its Member States,[5] rather than only to the EU; in practice, however, this provision was included in the Constitution because of anticipated accession to the EU.[6] Indeed, Article 90 was only adopted twice as a procedure for ratification of the international treaty: the first time for the Accession Treaty and the second time for ratification of the Lisbon Treaty. However, each new attribution of power to the EU must (in theory) take place pursuant to Article 90.

Such a delegation, as described above in section 1 of Article 90, is possible only by virtue of international agreement which is to be ratified in a specific way upon a statute dedicated to this end and granting specific authorisation to the President of the Republic of Poland to ratify such an international agreement (authorizing statute). The said specificity first consists of qualified majorities as required for adoption of the authorising statute.[7] A statute authorising ratification of an international agreement providing for delegation of the powers of Polish state on the EU is to be adopted by a two-thirds majority vote in the presence of at least half of the statutory number of deputies in the lower chamber of the Polish Parliament (Sejm), and subsequently with an analogues majority in the Senate. This parliamentary procedure might be supplemented with an optional national referendum as performed according to specific rules provided for in Article 125 of the Constitution. Broadly speaking, it might be summarised that ratification of such an international treaty requires majorities like those which are required in case of the constitutional amendment, as specified in Article 235(4) of the Constitution.[8]

3 '… *The system of the European Union is dynamic in nature. It provides for the possibility of changes in the content of the law compared to the state at the time of accession. It also provides for the possibility that the principles and scope of the Union may evolve. At the time of accession, therefore, there is not absolute certainty about all elements of further development. At the same time, however, the competences delegated by the Member States ensure their influence on the actions and decisions of the whole system. This is an important guarantee of its correctness and acceptability*' (K.18/04, section 5.1).

4 Dobrowolski, 2013, section 3.3.

5 It had also been considered whether Art. 90 was appropriate for ratification of the statute of the Rome Statute of the ICC. See: Opinie w sprawie ratyfikacji przez Polskę Rzymskiego Statutu Międzynarodowego Trybunału Karnego, *Przegląd Sejmowy* nr 4/2001, pp. 129–172. Another case, when it was contemplated to be applied for the treaty with the USA concerning military installations on the Polish territory. See: Piotrowski, 2009; Kranz, Wyrozumska, 2009, pp. 20–49.

6 This was acknowledged by Winczorek, 2000, p. 115; Mik, 1999, p. 145.

7 See, in this respect, considerations by the Constitutional Tribunal undertaken whilst reviewing the constitutionality of Polish accession to the EU in judgement K 18/04, sections 3.2 and 4.3.

8 This majority is even higher in case of the voting in the Senate: Art. 235(4): A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of

2.3. Priority of EU law over statutory law (Acts of Parliament)

This much more complex and demanding procedure of ratification has one important effect. According to Article 91(3), the procedure states that, for the future, legal rules created in accordance with the international treaty so ratified are to be applied directly in the Polish legal system and have priority in application before domestic statutory provisions providing for different legal effects than the law enacted by the international organisation. It might be said that the ratification of a treaty delegating certain powers of a Member State to an international organisation or institution, according to the procedure specified in Article 90(1), provided by means of the procedure described in Article 90(2)-(4), has the same effect as if each piece of legislation adopted by such an organisation was subsequently ratified by the Polish president upon the virtue of a specific statutory authorisation.

The constitutional scheme, as provided by Article 90, is concluded with Article 91(3) stating that, in case of '*agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws*'. In this way, the priority of EU law over the domestic statutory law has its expressed authorisation in the Polish Constitution.[9]

Hence, the procedure specified in Article 90 provides: 1) a legal base for the Polish membership within the EU authorising access to the Treaties which constitute EU primary law; 2) a procedure enabling a kind of blanquette authorisation for the EU secondary law pursuant to Article 91(3) of the Constitution. The latter provision considers EU secondary law as '*legal adopted by the international organization*' granted with the competencies pursuant to Article 90, providing they are directly applicable *and* adopted within the scope of the powers so delegated by the Republic of Poland.

In practice, Article 91(3) is applicable to regulations and decisions within the meaning of TFEU Article 291 and *prima facie* not to indirectly-applicable directives requiring formal transposition to the national legal system. However, the 'prima facie' reservation is important, as Article 91(3) might appear to be of crucial importance after the expiring of the term for implementation of a directive, when the

at least half of the statutory number of deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of senators.
This argument was emphasised by the Constitutional Tribunal whilst reviewing the Accession Treaty upon which Poland joined the EU. See: judgement 18/04, sections 3.2, 4.6, and, in particular, 14.2, where the Court declared as follows: '*The will of the People as Sovereign was manifested in the sphere relevant here during the referendum authorizing ratification of the Treaty of Accession and the Act concerning its Conditions. Moreover – both in the representative and direct form (national referendum) – it finds expression in deciding on the fate of the basic regulations of the Treaty and in influencing the content of Community law – in the process of giving their opinion by the competent committees of the Sejm and the Senate and in shaping, within the parliamentary scheme, the position of the Government, which is constitutionally accountable to the Sejm*'.

9 It is worth mentioning that other international treaties, which were concluded otherwise than provided for in Art. 90, are incorporated into the Polish legal system upon Art. 91(1)–(2).

implemented law is applicable by the courts and administrative authorities. In such a situation, Article 91(3) might also authorise departure from the domestic legislation in case it would prevent the EU law as enacted in a particular directive, from taking its full effect.

It is, however, to be mentioned here that the Polish Constitutional Court has declared, upon the Polish accession, that Poland and other

> Member States retain the right to assess whether the Community (EU) legislative authorities, in adopting a particular act (law), acted within the framework of the delegated powers and whether they exercised their powers in accordance with the principles of subsidiarity and proportionality. If this framework is exceeded, acts (legislation) adopted outside of it are not covered by the principle of primacy of Community law.[10]

2.4. Implementation of directives

2.4.1. General remarks

When discussing the implementation process, it is often understood as consisting of three stages. The first is elaboration of the draft legislation, whilst the second consists of submission of the project to the Parliament and its legislative transposition to the binding domestic legislation. The third is notification of the transposition to the European Commission and the giving of the practical effects of the directives in the domestic legal system. At each stage of the process, the government is involved. The first and the third stages are fully dominated by the government, which is relatively less engaged at the second stage, although initiation of the transposition and participation of the government during the Parliamentary legislative process is still of substantial character.

It has been proposed, in Polish academic writings, that there be a discerning between two terms which are often used synonymously, namely differentiation between 'implementation' and 'transposition' of the EU law into the Polish legal system. The first is considered a very complex and general process of providing the effectiveness of the EU law within the Polish legal system, whereas transposition is to be understood in a more technical way as the enactment of domestic law transposing the EU law into national regulations intending implementation of the European law into the Polish legal system. Therefore, implementation, i.e. adoption of all measures of national law necessary to implement legally-binding acts of the EU as required by Article 291(1) of the TFEU, is of much broader meaning, including transposition, whereas the latter is but the second (out of three) stage of the earlier. The transposition must be proceeded by a drafting of the law to be enacted and then it must be notified to the Commission and put into full effect in the course of its execution. Looking at the situation from this perspective, implementation is a manifestation

10 Judgement K 18/04, section 10.2.

of a Member State's participation within the EU, whereas transposition is a specific domestic legislative process being determined by the need for implementation.[11]

The general institutional framework for implementation of EU law in the legal system of the Republic of Poland is regulated in the Act of 8 October 2010 on co-operation of the Council of Ministers with the Sejm and the Senate on matters related to the membership of the Republic of Poland in the EU[12] (Cooperation Act). The statute concerns a broad range of cooperation between executive and legislative powers in the field of European policy, including legal issues and the establishment of the obligation of the government to cooperate with both chambers of Parliament in matters related to Polish membership of the EU (Article 2), including the obligation of the government to inform the Parliament on issues pertaining to the functioning of the Republic of Poland within the EU (Article 3) and cooperation in the process of drafting European law (Articles 4-16). Chapter 4 of the statute (consisting of a single article, namely Article 18) is dedicated to cooperation in the legislative process enacting Polish law and implementing the law of the EU. It consists of four sections which determine the deadline for the Council of Ministers (the government) when it comes to submitting a draft law implementing European law, being at least 3 months before the expiry of the deadline for implementation and providing for some exemptions from this general rule.[13]

It also means that the government is the authority which has the stronger priority – when it comes to presenting legislative projects concerning the implementation of legislation – in comparison to other entities that, formally speaking, are generally granted legislative initiative pursuant to Article 118 of the Constitution (group of the deputies to Sejm, the Senate in its entirety, and the President of the Republic). Considering the text of the Constitution, the government has not been attributed there with the exclusive power to present legislative bills implementing EU law, *per analogiam* with its exclusive power in respect of the legislative bill of the budget and other related issues, as provided for in Article 221 of the Constitution or the legislative bill for the statutory authorisation for ratification of the international treaty, as it is strongly believed (though not stated in the text of the Constitution) amongst academic writers.[14] It seems, however, that for practical reasons it is very unlikely that other entities would attempt to compete with the government in this area, considering that it was the government which was involved in the European legislative process and, again, from the domestic perspective, it is in the best position for drafting legislation in this area. Therefore, the government is described as the most active (and not the only authorised) entity proposing legislative bills

11 Trubalski, 2016, pp. 70–73.

12 Dz. U. z 2010 Nr 213, item 1395; in force since 13 February 2011.

13 It is worth mentioning here also that Art. 18(4) of the Cooperation Act provides also for the government's obligation to submit to both chambers of the Parliament information on legislative bills whose deadline for implementation has expired or will expire within 3 months from the date of submission of the information. Such information must be provided at least once each 6 months.

14 See Mistygacz, 2012, p. 140 and the authors referred thereto, as well as Kruk, 1998, p. 23.

implementing the EU law.[15] The Rules of the Sejm still provide, in Article 95a, that beside governmental initiative as the one aiming to implement European law (section 2), it remains the case that the *Marszałek Sejmu* (the Speaker of the Sejm) can also declare a legislative bill submitted by other authorised entities as dedicated to the implementation of EU law (Article 95a(3) of the Rules of Sejm).

2.4.2. The Government

Implementation is conditioned with the preparation of the draft of statutory enactment transposing EU law into the national system and submitting this to the Parliament (the Speaker of the Sejm). Pursuant to the Act on the divisions of the central administration[16] (Act on Divisions), the Polish central administration is divided into 37 divisions of central administration (*działy administracji rządowej*)[17] and each minister (member of the Council of Ministers) is responsible for several divisions which might be attributed to them in a different way by the prime minister. The 8th division consists of the issues related to the membership of the EU. By virtue of Article 13(3) subsections 1-3, the minister in charge of this division coordinates the process of drafting statutes implementing EU directives, whilst also supervising the conformity of all governmental legislation to the EU law and providing opinions on the conformity, to the European law, of all the legislation being proceeded in the Parliament. The drafting of a particular piece of legislation for the sake of transposition is, however, the duty of ministers in charge of a specific division, the scope of which belongs to the subject of European regulation. The legislative draft so prepared is adopted by the Council of Ministers and then submitted to the Parliament.

2.4.3. The Parliament

Parliamentary procedure aimed at the transposition of EU law into the Polish legal system is essentially the same as for any statutory regulation being generally determined by the Constitution (Articles 118-124) and, in a more detailed way, by the Rules of the Sejm (*Regulamin Sejmu*) and the Rules of Senat (*Regulamin Senatu*).

2.4.3.1. The Sejm – the Lower Chamber

Despite the Rules of Sejm being adopted in 1992, the regulation was amended upon Poland's accession to the EU in February 2004,[18] introducing certain specific modifications of the standard legislative procedure. The special Chapter 5a was

15 Patyra, 2012, p. 158.

16 Ustawa z dnia 4 września 1997 o działach administracji rządowej (Dz.U. 1997 nr 141 item 943) hereafter Act on Divisions of the Central Administration (1997).

17 Art. 5 of the Act on Divisions of the Central Administration (1997).

18 Uchwała Sejmu Rzeczypospolitej Polskiej of 20 lutego 2004 o zmianie Regulaminu Sejmu Rzeczypospolitej Polskiej (M. P. Nr 12, item 182). In force since 31 March 2004.

introduced which is dedicated to specific rules applicable to the bills implementing EU law (so-called 'European bills'). The chapter consists of six articles (95a-95f) modifying general legislative procedure, as determined in Title II Chapters 1-3 and 14 of the Rules of Sejm (Article 95a(1)). It aims, first of all, to provide the fastest possible track for adoption of the implementing legislation.

The legislative procedure aimed at transposition of EU law into the Polish legal system starts with the ascribing of the 'European' character to the bill. In the case of a governmental bill, the character is determined by virtue of the formal declaration of the Government (Article 95a(2) of the Rules of Sejm), and in the case of other bills submitted to the Marszałek Sejmu (the Speaker of the Sejm), it is the Speaker who determines whether a legislative bill has the status of an implementation bill; indeed, this determination must be made before the Speaker will submit the bill for the first reading (Article 95a(3)).

By virtue of Article 119(1) of the Constitution, legislative procedure within the Polish Parliament is divided into three general stages, termed 'readings' (*czytania*). A special provision of the Rules of Sejm requires the Speaker to adopt a schedule for proceeding that would allow adoption of the statute within the time limits as required for implementation of a directive (Article 95b). The Speaker of the Sejm, whilst directing the draft law implementing the law of the EU, at the same time sets the schedule of work in the Sejm on the draft law, considering the deadlines for the implementation, as set for particular directives. This parliamentary schedule is to be observed when proceeded in the parliamentary committee (Article 95c). The proceeding of the implementing bill in the committee is modified in a way that hinders the proposing of amendments to, or a rejection of, the bill (Article 95d). The proceeding then provides, in Article 95e, for the second reading of the bill together with the committee's report on the bill, at the nearest plenary session of the Sejm. Similar abbreviated solutions are provided in Article 95f for the committee proceedings and subsequent plenary session in case the *Senat* (upper chamber of the Polish Parliament) was to adopt amendments to the legislation.

2.4.3.2. The Senate – the Upper Chamber

The Senate, in its Rules (*Regulamin Senatu*), also provides for quick proceeding with the implementing statutes as adopted by the Sejm. The Rules contain only two special provisions. One provides, in Article 68(1a), for non-mandatory, additional opinion regarding implementing statutes from the Commission of Foreign Affairs and the EU, whereas in subsection 2 it provides for flexible arrangements allowing quick proceeding as in the case of urgent legislation. Other incidental regulations from the Rules of the Senate provide only for ensuring that the Senate will never propose a piece of legislation which would be inconsistent with the EU law (Article 54(4a); Article 78a). The remainder of the legislative procedure transposing EU law into the Polish legal system is exactly the same as in every other statute, ending with the promulgation by the President of the Republic and subsequent publication of the

statute being transposed from European law, which is then notified to the European Commission.

When attempting to draw a general conclusion about the parliamentary stage of the implementation process, as determined in the Cooperation Act as well as the Parliamentary Rules of Procedure, it appears that Parliamentary powers were reduced to giving opinions on the drafts of EU legislation as submitted to both chambers by the Government within the time limits specified by the law, as well as giving an opinion on the positions that the Government intends to adopt with regard to the legislative process at the EU level.[19]

2.4.4. Notification and ongoing implementation process

The process of implementation does not end with the notification regarding transposition that has been completed, as the goal of the implementation is to give the full practical effect to European law. This is, however, the area where a state's authorities operate with the courts in the first place. It is also important to realise that, once the term for transposition expires, directives are supposed to be binding in the domestic legal order, as to the result to be achieved (Article 288(3) of the TFEU), as if they were directly effective.[20] Therefore, courts applying domestic law, as enacted in the fulfilment of the transposition duties, are bound to consider if the domestic law enables directives to take their full effect. As such, courts become the key actors in the implementation process after the date for transposition has expired. Particularly important here is the procedure of referral for preliminary ruling by the domestic court to the Court of Justice of the EU, as provided for in Article 267 of the TFEU. As was already demonstrated in Polish practice, such a referral for preliminary ruling might be of crucial importance when it comes to the scope of the powers of the EU, being an engine of a far-reaching extension of the EU competencies, disregarding domestic procedures in this respect. Therefore, judicial case law must also be considered whilst discussing the implementation of EU law in the domestic law.

3. European integration and its limits

Poland joined the EU on 1 May 2004, seven years after the adoption of the Polish Constitution of 2 April 1997. This is an important issue, because Article 90 of the Constitution expressly provided a formal base for Polish accession. For this very reason, European integration, since the very beginning, was a matter of applying constitutional provisions providing for a specific procedure applicable in such

19 Patyra, 2012, p. 155.
20 See Domańska, 2014, p. 25.

a situation. Article 90 of the Constitution, in its first section, provides as follows: '*The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in certain matters*'.

What is important here is qualification of the state competencies subject to delegation with the words '*in certain matters*'. As the transferable matters only '*certain*', they are not all the matters in which Polish authorities have competences. The question thus arises: if there are competencies, which are unalienable upon this constitutional provision when read *a contrario*? In such a way, a constitutional concept has emerged, according to which there are a certain number of state competencies that must not be transferred pursuant to Article 90, and as such are not transferrable at all. This number of non-transferrable state competencies was described in 2005 as the '*core of powers enabling sovereign and democratic determination of the destiny of the Republic*' in the judgement reviewing constitutionality of the Accession Treaty.[21] Following this, it was described as Polish 'constitutional identity' in the Judgement reviewing conformity to the Constitution of the Lisbon Treaty in 2010,[22] which will be presented in Section 3.

Article 90 of the Constitution, authorising transfer of a certain state's competencies to the EU, must also be observed in the case of any further delegation of state powers to EU institutions. As was emphasised in the judgement of the Constitutional Court on conformity to the Polish Constitution of the EU Accession Treaty,

> The Polish fundamental law giver, being aware of the importance of international treaties on the transfer of competences belonging to public authorities 'in certain matters' to an international organisation or an international institution (…), introduces significant safeguards against too easy or insufficiently legitimate transfer of competences outside the system of state authorities of the Republic of Poland. These safeguards apply to all cases of transfer of competences to the bodies of the Communities and the European Union.[23]

This thought was then developed by the Court in its judgement reviewing conformity to the Constitution of the Lisbon Treaty (K 32/09) given on 24 November in 2010.[24] According to this statement, Article 90 of the Constitution cannot be understood in such a way that it exhausts its meaning after a single application upon accession to the EU. The Constitutional Court has dismissed, as inadmissible, interpretation according to which, initial transfer of competencies to the EU, as it took

21 Judgement K 18/04, section 8.4. '*Of fundamental importance, from the point of view of sovereignty and the protection of other constitutional values, is the limitation of the possibility to delegate competences only to «certain matters» (and thus without infringing the 'core' of powers, enabling – in accordance with the preamble – the sovereign and democratic determination of the destiny of the Republic)*'.

22 Judgement of 24 November 2010, Sygn. akt K 32/09, OTK ZU nr 9/A/2010, item 108, section 2.2.

23 Judgement K 18/04, section 3.2.

24 Judgement K 32/09, section 2 (2.1–2.2).

place in 2004, has given an open way for further transfers, no longer obeying procedural requirements set out in Article 90. As the Constitutional Court emphasised, those requirements still apply to future changes in the Treaty on the EU if those changes result in the subsequent transfer of competencies to the EU. This means, in particular, that an international treaty aimed at delegating additional competencies to the EU or to some of its institutions, must not be ratified by means of procedure set forth in Article 89 of the Constitution for all international treaties interfering with the matters reserved for statutory regulation, but not involving transfer of states' sovereign competencies. (See paragraph 2.1. at p 227).

Therefore, as follows: the transfer of any new competencies of the state authorities to the EU requires the same full procedure as described in Article 90 of the Constitution and adopted for entering the EU. It is, however, disputable whether this constitutional position taken by the Constitutional Court is obeyed in practice. A spectacular manifestation of the ambiguity is the case of ratification of the Fiscal Treaty which will be discussed later.

4. The Accession Treaty and the Lisbon Treaty under constitutional review

4.1. General remarks

The Constitutional Court has reviewed the constitutionality of certain provisions of the Lisbon Treaty in judgement K 32/09, of 24 November 2010,[25] in which general theory on European integration, as regulated in the Polish Constitution, was developed – theory that has been in force since that time. However, five years earlier the impact of the European law on the Polish legal system had already been analysed in a detailed way in the judgement of 11 May 2005 (K 18/04) reviewing the conformity of the Accession Treaty to the Polish Constitution. The latter provided a complex account of the relationship between Polish law and EU law, taking into consideration the specific character of the EU as an organisation which is constantly expanding its competencies. The account also included issue of constitutional interpretation favourable to EU law, as well as the case of possible conflict between the Constitution and the EU law. The former has developed the concept of constitutional identity and declared the principle of protection of national sovereignty within the European integration process.

25 Judgement K 32/09, sections 2.1-2.2.

4.2. Judgement of 11 May 2005 (K 18/04) on the Accession Treaty

The Constitutional Court reviewed the conformity of the Accession Treaty of 16 April 2003 (including the Act on the determining conditions for the EU accession and its Final Act) to the Polish Constitution in the judgement of 11 May 2005 (K 18/04). The Accession Treaty was challenged by the three parallel motions submitted by three distinct groups of the members of Parliament. Under review was submitted the Accession Act in its entirety, as well as its particular provisions construed in conjunction with several TEU provisions.[26] Those provisions were examined against the preamble and 27 specific provisions[27] of the Polish Constitution.

The Constitutional Court has summarised[28] this complex and complicated motion for review as being based on two assumptions. The first is very general, i.e. that the Polish Constitution (Article 8 in particular) prevents accessing of the legal system of the EU, assuming supremacy of European law over the domestic law. The second is based on an assumption regarding conflict between a specific axiology of the Polish Constitution (including, in particular, protection of property, family, family agricultural farms) and norms stemming from primary and secondary European law. The Court has certainly affirmed the conformity of the Accession Treaty to the Constitution, giving some more general accounts about the relation between Polish and EU legal systems.

Discussing the supremacy of the Polish Constitution, as declared in its Article 8, the Constitutional Court pointed out that this Constitutional provision should be read in conjunction with Article 9 declaring that Poland is obeying ratified international law.[29] Therefore, it must be accepted that the Polish Constitution understands the Polish legal system as consisting of different kinds of legal rules. On the one hand, there are Polish legal provisions originating from legislative activity of the Polish Parliament and other domestic bodies, whilst on the other hand there is also ratified international law.[30] In this context, of particular importance are the '*international treaties on the transfer of competences belonging to public authorities «in certain matters» to an international organization or an international institution*'. Regarding the far-reaching consequences of such international treaties, the Constitution contains the following:

> significant safeguards against too easy or insufficiently legitimate transfer of competences outside the system of state authorities of the Republic of Poland. These

26 TEU's Art. 8, Art. 13, Art. 19(1), Art. 33, Art. 105, Art. 190, Art. 191, Art. 202 and Art. 203.

27 The specific constitutional provisions of the Polish Constitution are as follows: Art. 1, Art. 2, Art. 4, Art. 5, Art. 6, Art. 8(1), Art. 10, Art. 13, Art. 18, Art. 21(1), Art. 23, Art. 25(4), Art. 31, Art. 38, Art. 62(1), Art. 79(1), Art. 83, Art. 87, Art. 90(1), Art. 91(3) Art. 95, Art. 101(1), Art. 178(1), Art. 188 point 1, Art. 193, Art. 227(1), and Art. 235.

28 Judgement K 32/09, section 1.6.

29 Judgement K 32/09, section 2.1.

30 Judgement K 32/09, section 2.2.

> safeguards apply to all cases of transfer of competences to the bodies of the Communities and the European Union.[31]

Constitutional authorisation for delegation of competencies '*in certain matters*' requires a precise description of the fields and the scope of the competencies covered by the delegation. At the same time, it must be understood as a prohibition to delegate: i) the entirety of the competence of a given body, ii) competencies in the entirety of the matters in a given field, iii) essential competencies that determine the identity of a given state authority. It is hence not permitted – as the Court has emphasized – to preserve some less important competencies which would simulate that a given constitutional authority is still operating as it should operate according to the Constitution.[32] The Court stressed that '*actions by which the transfer of powers would undermine the sense of existence or functioning of any of the organs of the Republic would be in clear conflict with Article 8(1) of the Constitution*'.[33]

Continuing, the Court emphasised that the constitutional provision providing for the precedence in application of international agreements over domestic laws, resulting from Article 91(2) of the Constitution,

> does not directly (and in any respect) lead to the recognition of the analogous precedence of such agreements over the provisions of the Constitution. Thus, the Constitution remains – by virtue of its special power – «the supreme law of the Republic of Poland» over all international agreements binding the Republic of Poland. This also applies to ratified international agreements on the transfer of competence «in certain matters».

Moreover, the Court emphasised that '*By virtue of the supremacy of the Constitution resulting from Article 8 (1) of the Constitution, it enjoys, on the territory of the Republic of Poland, the priority of validity and application*'[34]. Therefore, the Court declared that

> Neither Article 90(1) nor Article 91(3) can provide a basis for delegating to an international organization (or an institution thereof) the authority to enact laws or make decisions that would be contrary to the Constitution of the Republic of Poland. In particular, the norms indicated here cannot serve to delegate powers to an extent that would make the Republic of Poland incapable of functioning as a sovereign and democratic state.

31 Judgement K 32/09, section 3.3.

32 '*There is no basis for the assumption that, in order to comply with this requirement, it would be sufficient to preserve in a few matters, if only for the sake of appearances, competencies within the competence of constitutional bodies*'. Judgement K 18/04, section 4.1.

33 Judgement K 18/04, section 4.1.

34 Judgement K 18/04, section 4.2.

In this respect, the Court mentioned that it is adopting a position akin to that taken by the German Federal Constitutional Court in the Maastricht case of 12 October 1993 (2BvR 2134, 2159/92) and in the Danish case of Carlsen v. Denmark of 6 April 1998 (I 361/1997).[35] Additionally, the Court stressed that the decision regarding delegation is also legitimised with qualified majorities that are required for the adoption of the authorising statute.[36]

It is worth mentioning here that the Court pointed out the integrative specificity of the Accession Treaty providing membership within the EU. It acknowledged that

> the Accession Treaty, compared to classical international agreements, shows certain peculiarities. While those agreements assumed predictability of elements of future functioning already at the time of the conclusion of the agreement, the European Union system is dynamic in nature. It provides for the possibility of changes in the content of the law compared to the state at the time of accession. It also provides for the possibility of evolution of the principles and scope of the Union's functioning. At the time of accession, therefore, there is no absolute certainty about all elements of further development. At the same time, however, the powers delegated by the member states ensure the influence of those states on the actions and decisions of the entire system. This is an important guarantee of its correctness and acceptability. After all, the decision for the Union to enter a new area of action, in order to achieve one of the objectives of the community, requires unanimity of the member states on the matter to be decided (Article 308 TEC). This ensures that changes in the area under consideration cannot take place despite the opposition of any state[37].

The Constitutional Court made some more general comments about the relationship between Polish and European law, pointing out that

> the very concept and model of European law has created a new situation in which autonomous legal orders exist side by side. Their interaction cannot be fully described by the traditional concepts of monism and dualism in the system: domestic law – international law.

Those legal orders, though autonomous, are in constant interaction, and collisions between them might occur, including conflict between Community law and the provisions of the Constitution. Such a possible conflict might be managed by the constitutional interpretation. However, at some point, a contradiction might appear between '*a norm of the Constitution and a norm of Community law, a contradiction that cannot be eliminated by the application of an interpretation that respects the relative autonomy of European law and national law*'. As the Constitutional

35 Judgement K 18/04, section 4.5.
36 Judgement K 18/04, sections 4.3 and 4.6.
37 Judgement K 18/04, section 5.1.

Court declared, due to the commonality of assumptions and values, such a situation arises exceptionally but still cannot be excluded.[38] The Court emphasised, in this context, that '*a «European law-friendly» interpretation has its limits. Under no circumstances can it lead to results that are contradictory to the clear wording of constitutional norms and impossible to reconcile with the minimum threshold of constitutional protection*'.[39]

If such a contradiction were to arise, according to the Polish Constitutional Court, it could not be solved

> in Polish legal system by acknowledging the superiority of the Community norm in relation to the constitutional norm. Nor could it lead to the loss of validity of the constitutional norm and its replacement by a Community norm, or to the limitation of the scope of application of that norm to an area not covered by the regulation of Community law.

This initial declaration of the Court sounds very much as if it declared the supremacy of the national constitutional order. However, the Court has developed its position in a quite different way, pointing up to the necessity of taking political action that would solve the problem of such a contradiction. The Court declared that, in the case of this kind of unreconcilable contradiction,

> it would be up to the Polish legislator to decide either on an amendment of the Constitution, or to bring about a change in Community regulations, or – ultimately – a decision to leave the European Union. This decision would have to be taken by the sovereign, i.e., the Polish Nation, or by the state authority which, in compliance with the Constitution, may represent the Nation.[40]

Thus, the Court has declared that unreconcilable contradiction between constitutional legal provisions and European law provisions exceeds the legal means of solving such a conflict of laws and requires political action resulting in the changing of one of the contradicting rules or the abandonment of the EU by the country. The Court explained that European legislation can never amount to an alternative way of changing the Polish Constitution.[41] This needs direct political action, as provided for in the procedure of constitutional amendments. One of the reasons for the aforementioned is that the '*Constitution in the area of individual rights and freedoms set a minimum and impassable threshold that cannot be lowered or questioned as a result of*

38 Judgement K 18/04, section 6.3; See also section 8.3 of the judgement: '*The Polish Constitution and Community law are based on the same set of common values*'.

39 Judgement K 18/04, section 6.4.

40 Judgement K 18/04, section 6.4.

41 Judgement K 18/04, section 6.4: '*Thus, the Constitutional Court does not recognise the possibility of questioning the validity of a constitutional norm by the mere fact of the introduction into the system of European law of a Community regulation contrary to it*'.

the introduction of Community regulations'. In this respect, the Constitution has the function of an ultimate warranty protecting the rights and freedoms expressly set out in the constitution.[42]

The Court has also redefined the true meaning of the supremacy of the Constitution in the Polish legal system, as declared in its Article 8, taking into account the new context as provided by the membership of the EU and more broadly by the ongoing process of European integration.

In the first place, priority of the Constitution means that the process of European integration is determined by the Constitution, which provides for its legal base,[43] within Article 90 in particular. The second dimension where the primacy of the Polish Constitution manifests itself is the constitutional review of the Treaty as provided by the Constitutional Court, and as also provided for in the Constitution in relation to ratified international treaties.[44] Finally, the third dimension in which the primacy of the Constitution manifests itself is the immunity of constitutional provisions from any possible direct modification of them by the European law. EU law has no power to modify the Polish Constitution in case of irremovable contradiction between European law provisions and the Constitutional provisions. In case of such a contradiction, it is for the sovereign Polish constitutional legislator to decide on the way it is to be solved.[45] It is clear in the judgement that the Constitutional Court was under no illusion that the process of European integration, if it is also to affect Poland, will entail changes to the Polish Constitution. In this way, the Polish Constitutional Court also had no illusions as to the primacy of European law being indispensable if the common European law is to become reality. It stipulated, however, that this inevitable process must take place in the way provided for by the Polish Constitution, upon the sovereign decision regarding self-limitation of the sovereign

42 Judgement K 18/04, section 6.4.

43 Judgement K 18/04, section 7: '*(…) the process of European integration related to the transfer of competences in certain matters to EU bodies is supported by the Constitution of the Republic of Poland itself. The mechanism of the Republic of Poland's accession to the European Union finds a clear legal basis in constitutional regulations. Its validity and effectiveness depend on the fulfilment of the constitutional elements of the integration procedure, including – the procedure of transfer of competences*'.

44 Judgement K 18/04, section 7: '*…the supremacy of the Constitution is confirmed by the constitutionally determined mechanism of constitutional review of the Accession Treaty and the acts constituting its integral components. This mechanism is based on the same principles on which the Constitutional Court may adjudicate on the compliance of ratified international agreements with the Constitution. In such a situation, the subject of control also becomes, albeit indirectly, other acts of primary law of the Communities and the European Union as annexed to the Accession Treaty*'.

45 Ibid., section 7: '*… the provisions (norms) of the Constitution, as a superior act and an expression of the Sovereign will of the Nation, may not lose their binding force or be altered by the mere fact of the emergence of an irremovable contradiction between certain provisions (community acts and the Constitution). In such a situation, the sovereign Polish constitutional legislator retains the right to decide autonomously the manner in which the contradiction is to be resolved, including possible amendment of the Constitution itself*'.

powers.[46] With this said, the Court also emphasised that still it is only possible to delegate competencies 'in certain matters' without infringement of the 'core matters' enabling self-determination of Poland.[47] This issue was subsequently developed in the judgement reviewing the constitutionality of the Treaty of Lisbon.

4.3. Judgement K 32/09 and protection of constitutional identity

The Polish Constitutional Court reviewed the constitutionality of certain provisions of the Lisbon Treaty in judgement K 32/09 held on 24 November in 2010.[48] Formally speaking, the constitutional review addressed Article 1 point 56 and Article 2 of the Lisbon Treaty, although its substance related, in fact, to the new content of Article 48 of the TEU in conjunction with Article 2(2) and Article 3(2), as well as Article 7 and Article 352 of the TFEU. Not surprisingly, the judgement found that the Lisbon Treaty conformed to the Polish Constitution. However, the deepening of the European integration as manifesting in the Treaty also inspired the Constitutional Court to develop the concept of constitutional identity as an element of the solemnly-declared constitutional principle protecting national sovereignty in the course of the European integration process.

4.3.1. Early appearance of the 'constitutional identity' concept

The original meaning of the 'constitutional identity' concept referred to the content of domestic law, and, more specifically, to the content of domestic judicial procedures, which – as the jurisprudence of the Constitutional Court began to emphasize – should be determined with respect for the *constitutional identity* of the judiciary. The concept first appeared in relation to preliminary proceedings in the course of which the Supreme Court decided whether to accept the cassation complaint for examination, following which the said concept was subsequently invoked whilst assessing the Supreme Court's legitimacy to refer legal questions to the Constitutional Court.[49] The concept of the constitutional identity of a court so understood, apart from the obvious requirement of impartiality and independence, was

46 Ibid., section 7: '*The principle of the primacy of Community law over national law is strongly emphasised by the case-law of the Court of Justice of the European Communities. This state of affairs is justified by the objectives of European integration and the needs of creating a common European legal area. This principle is undoubtedly an expression of the desire to guarantee uniform application and enforcement of European law. However, it does not – on an exclusive basis – determine the final decisions taken by sovereign member states in conditions of a hypothetical collision between the Community legal order and constitutional regulation. In the Polish legal system, decisions of this type should always be taken taking into account the content of Art. 8(1) of the Constitution. In accordance with Art. 8(1) of the Constitution, the Constitution remains the supreme law of the Republic of Poland*'.

47 Judgement K 18/04, section 8.4.

48 Judgement K 32/09, section 2 (2.1-2.2).

49 Decision of 16 March 2010 P 3/07, OTK ZU 3/A/2010, item 30.

described as prohibiting arbitrariness in the operation of the court and ensuring participation of interested parties in the proceedings, which is subject to the requirement of openness whereas the decision ought to contain reliable and verifiable reasons.[50] These requirements were closely associated with the necessity of respecting principles of procedural justice in the judicial procedure.[51] The constitutional identity of a court so understood has sometimes been described succinctly as aimed at preventing the transformation of a court into a bureaucratic institution,[52] incapable of satisfying the substantial right to a fair trial (the essence of that right) perceived in the context of the overall principle of a democratic state based on the rule of law implementing the principles of social justice.[53] However, the advancement of the European integration led the Constitutional Court to start using the expression as a means of protection of the national sovereignty in the course of the European integration process.

4.3.2. The 'constitutional identity' in its proper meaning

When considering the conformity of the Lisbon Treaty to the Polish Constitution, the Constitutional Court declared that, whereas joining of the EU must result in certain limitations of a state's sovereignty, by no means does it amount to its abolishment. Limitation of the national sovereignty resulting from European integration is compensated by the power of co-deciding within the EU. Moreover, according to the Constitutional Court, joining of the EU, as it took place according to the Constitution, must be understood as a manifestation and thus affirmation of the national sovereignty and hence reaffirms the primacy of the Polish Nation in deciding its own fate. This basic principle is manifesting itself in the preamble to the Constitution, as well as in several constitutional provisions in Articles 2, 4, 5, 8, 90, 104(2), and

50 Judgements of: 26 November 2019, P 9/18, OTK ZU A 2019, item 70, section 33; 4 April 2017 P 56/14, OTK ZU A/2017, item 25; 22 March 2017 SK 13/14, OTK ZU 19/A/2017, section 3.2; 27 October 2015 K 5/14, OTK ZU 9/A/2015, item 150, section 3.3; 22 October 2013 SK 14/13, 100/7/A/2013, section 3.2.1; 31 March 2009 SK 19/08, OTK ZU nr 3/A/2009, item 29, section 2; 26 February 2008, SK 89/06, OTK ZU nr 1/A/2008, item 7; 20 May 2008 P 18/07, OTK ZU nr 4/A/2008, item 61; 1 July 2008 SK 40/07, OTK ZU nr 6/A/2008, item 101; 19 September 2007 SK 4/06, OTK ZU 8/A/2007, item 98, section 5; 16 January 2006 SK 30/05, OTK ZU nr 1/A/2006, item 2; 31 March 2005 SK 26/02, OTK ZU 3/A/2005, item 29, section 4.4; 16 January 2006 SK 30/05, OTK ZU 1/A/2006, item 2; Decision of 16 March 2010 P 3/07, OTK ZU 3/A/2010, item 30.

51 Judgement of 26 February 2008 SK 89/06, OTZ ZU 1/A/2008, item 7, section 1.2.4.

52 See: judgements of: 1 July 2008 SK 40/07 OTK ZU 6/A/2008, item 101; 20 May *2008* P 18/07, 4/A/2008, item 61, section 5; 29 April 2008 SK 11/07, 47/3/A/2008; 2 October 2006 SK 34/06, OTK ZU 9/A/2006, item 118; 16 January 2006 SK 30/05, OTK ZU 9/A/2007, item 116; See also decisions by the Constitutional Court of: 29 March 2000 P 13/99, OTK ZU nr 2/2000, item 68; 12 April 2000 P 14/99, OTK ZU nr 3/2000, item 90; 10 October 2000 P. 10/00, OTK ZU nr 6/2000, item 195; 27 April 2004 P 16/03, OTK ZU nr 4/A/2004, item 36; 17 October 2007 P 29/07; See also dissenting opinion by judge Zdziennicki in case SK 26/02, OTK ZU 3/A/2005, item 29.

53 Judgement of 28 April 2009 P 22/07, OTK ZU 4/A/2009 item 55, section 4.

Article 126(1).[54] In those provisions, sovereignty is manifesting itself as a bundle of several inalienable states' competencies envisaging values upon which the Polish constitution has been founded and determining the constitutional identity of the Polish State.[55]

Therefore, according to the Constitutional Court, the concept of constitutional identity consists of a range of states' powers, which are non-transferrable pursuant to Article 90 of the Constitution and thus are not transferrable at all.

The matters covered by the absolute prohibition of transfer include, in particular:

- protection of human dignity and constitutional rights,
- the principle of statehood,
- the principle of democracy,
- the principle of the rule of law,
- the principle of social justice,
- the principle of subsidiarity, as well as
- prohibition of the transfer of constitutional authority and
- prohibition of the transfer of competencies to create competencies.[56]

In such a way, Article 90 of the Constitution, authorising *prima faciae* the transfer of certain competencies to the EU, also appears to be the guarantee for the

54 Art. 2: principle of the democratic state based on the rule of law; Art. 4: the sovereignty of the Nation; Art. 5: duty to protect independence and integrity; Art. 8: supremacy of the Constitution; Art. 104(1): the Sejm as representation of the Nation; Art. 126(2): the President as the guardian of the Constitution, sovereignty, security and territorial integrity; and Art. 130 of the Constitution: presidential oath listing basic values to be protected by the Head of the State.

55 '… *sovereignty of the Republic and its independence, understood as the distinctiveness of Polish state's existence within its present borders, in the conditions of membership in the European Union on the principles laid down in the Constitution, signify an affirmation of the primacy of the Polish Nation to determine its own destiny. The Constitution is a legal expression of this principle. In particular provisions of the Preamble, Art. 2, Art. 4, Art. 5, Art. 8, Art. 90, Art. 104(2) and Art. 126(1), in the light of which the sovereignty of the Republic consists of the non-transferable competences of the state authorities which constitute constitutional identity of the state. The principle of sovereignty is reflected in the Constitution not only in the provisions of the Preamble. The expression of this principle is the very existence of the Basic Law, as well as the existence of the Republic understood as a democratic state based on the rule of law (Art. 2 of the Constitution). Art. 4 of the Constitution stipulates that the supreme power 'belongs to the Nation', which excludes its delegation to another superior. According to Art. 5 of the Constitution, the Republic shall safeguard the independence and inviolability of its territory and ensure the rights and freedoms of man and citizen. The provisions of Art. 4 and Art. 5 of the Constitution, in conjunction with the Preamble, delineate the fundamental relationship between sovereignty and the guarantee of the constitutional status of the individual, while at the same time excluding the renunciation of sovereignty, the recovery of which the Preamble to the Constitution affirms as a premise for the Nation to stand for itself*'. Judgement K 32/09, section 2.1.

56 '*the matters covered by the absolute prohibition on transfer include provisions defining the supreme principles of the Constitution and the provisions concerning the rights of the individual which determine identity of the state, including in particular: the requirement to ensure the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the principle of the rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement to ensure better realisation of constitutional values and the prohibition on the transfer of constitutional authority and powers to create competences*'. Judgement K 32/09, section 2.1.

preservation of the constitutional identity of the Republic, as it sets the limits on the transfer of competencies laid out therein.

What was emphasised by the Court is that Article 90 of the Constitution cannot be understood in such a way that it exhausts its meaning after a single application. It is inadmissible to have the opinion that the initial transfer of competencies to the EU, as it took place pursuant to the Lisbon Treaty, gives an open way for further transfers, already disregarding requirements set out in Article 90. Those requirements still apply to future changes in the Treaty on the EU, if those changes result in the subsequent transfer of competencies to the EU.[57]

The concept of the protection of constitutional identity is rooted in the protection of the national sovereignty, which is considered a fundamental constitutional value. The preamble to the Constitution understands sovereignty as the power to determine the fate of Poland and the Polish nation determining the manner in which provisions of the Constitution concerning independence and sovereignty of the Polish State are to be interpreted. Conversely, however, the preamble also determines the construction of the provisions dealing with European integration (Articles 9, 90 and 91 of the Constitution). Therefore, Article 90 of the Constitution was construed not only as authorising the transfer of competencies from a state to the EU, but also as setting limits on that transfer. As such, Article 90 (determining the procedure for passing the law transferring competencies) was considered one of the special 'normative anchors' for the protection of sovereignty along with Article 8(1), providing for supremacy of the Constitution, as well as Article 91, providing for primacy of European law before statutory law, but not before the Constitution.[58]

All of those considerations led the Court to a solemn declaration of the constitutional principle of protection of sovereignty in the course of the European integration process. The principle requires the respecting of constitutional constraints for transferring competencies within the process of the European integration. Those constraints restrict such a transfer only to 'certain issues' requiring provision of proper balance between powers transferred and those which are non-transferrable and continuously belong to the state as the 'essence of sovereignty'.

Amongst the powers essential to Polish sovereignty, the Constitutional Court listed, alongside others,

- power to enact constitutional provisions and to review complicity with them,
- power to determine judicial system,

57 '*The Art. 90 of the Constitution remains guarantee for the preservation of the constitutional identity of the Republic and sets the limits to the delegation of powers it authorises. Art. 90 of the Constitution cannot be understood in such a way that it exhausts its meaning after a single application opening the way for further transfers, already disregarding requirements set out in Art. 90. Such an understanding of Art. 90 would deprive this Constitutional provision of its legal power. The Art. 90 must be applied to any subsequent changes to the provisions of the Treaties on which the European Union is founded which occur otherwise than by means of an international agreement, if those changes result in a transfer of competence to the European Union*'. Judgement K 32/09, section 2.1.

58 Judgement K 32/09, section 2.2.

- authority over the state's territory,
- control over the army and the public order & security authorities.

The principle of the protection of sovereignty in the process of European integration:

- requires so that allowed transfer of powers can only be done by means of a special legislative procedure as specified in Article 90 of the Constitution,
- forbids transfer of competencies in universal/general terms,
- forbids transfer of the entirety of the most important competencies,
- denies any kind of implied authorisation, of the organisation granted with states' powers pursuant to Article 90, to extend the number of powers so granted.

Extension of attributed competencies is only allowed by means of an international treaty properly ratified and authorised by means of the procedure provided for in Article 90 of the Constitution, including possible popular authorisation in the referendum.

Whilst declaring the principle of the protection of sovereignty within the process of European integration, the Constitutional Court also emphasised that the principle protecting national sovereignty in the European integration process must be reconciled with the principles of favouring the process of European integration, as well as the principle of cooperation between states (K 11/03). However, favourable construction of European law must not lead to results that would contradict express content of constitutional provisions or would be impossible to reconcile with minimal warranties as provided for by the Constitution (K 18/04).[59]

The Polish Constitutional Court also stressed that the concept of *constitutional identity* corresponds to the notion of *national identity* which, according to the first sentence of Article 4(2) of the TEU, is protected. This allowed the Court to qualify the EU as a structure that affirms national identity of Member States. Therefore, the Polish Court emphasised that Article 5(1)-(2) of the TEU has declared objectives, for the achievement of which the Union was established, as additional limits to the competencies conferred upon the EU and not as a factor allowing for gradual extension of the competencies originally attributed to the EU.

According to the Constitutional Court, the concept of the EU, as expressed in the Treaty of Lisbon, aims to respect both the principle of the preservation of sovereignty in the integration process, and the principle of favouring the process of European integration and cooperation between states.

The Constitutional Court expressed its conviction that fundamental principles of the Union, as enacted in the Treaty of Lisbon, forbid such an interpretation of the Treaty provisions, which would aim to overrule the national sovereignty of states or to jeopardise national identity in order to take over directly non-transferred national

59 Judgement K 32/09, section 2.2.

competencies. The Treaty, so understood, explicitly confirms the importance of the principle of preserving sovereignty in the process of European integration, which is fully in line with the culture of European integration as included in the Polish Constitution. Therefore, the challenged Lisbon Treaty provisions were held to be conformant to the Polish Constitution.

The Constitutional Court was very vocal on the protection of national sovereignty and constitutional identity in judgement K 32/09. It is, however, important to remember that the judgement was affirmative of the Lisbon Treaty, and this might be the reason why it caused no political controversies. The same constitutional principles, when applied in a different political context and declaring nonconformity of EU law to the Constitution in judgement K 3/21, caused serious political controversies between the EU and Poland, which will be described later.

5. The sovereign powers abandoned by the Constitutional Court

5.1. Untransferable? So what?

On 20 February 2012, a statute authorising ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Treaty) of 2 March 2012, was enacted pursuant to the procedure described in Article 89 of the Polish Constitution. This is not the procedure from Article 90 containing the delegation clause, but the general procedure applicable for ratification of international treaties not delegating powers to an international organisation or institution.[60] The Fiscal Treaty was concluded beyond the legal framework of the EU and is not published in its Official Journal. However, it is clearly declared, in its preamble, that the ultimate objective of the contracting parties is '*to incorporate the provisions of this Treaty as soon as possible into the Treaties on which the European Union is founded*'. The aforementioned statement acknowledges that the Fiscal Treaty intends to modify EU Treaties, but it was not adopted within the procedure formally set for revision of the Treaties in Article 48 of the TEU. However, the Fiscal Treaty is linked to EU law in an unprecedented way and its provisions could operate only within the context of European law using its terminology and mechanisms.[61] In fact, the Fiscal Treaty grants

60 The issue is analysed in a very careful and detailed way by Dobrowolski, 2013, pp. 41–57. Below I am following this analysis in this respect.

61 See Mik, 2012, pp. 82–83, 93–94.

additional competencies to the EU Commission,[62] hence international institutions within the meaning of Article 90 of the Constitution. Moreover, those competencies compete with the powers which the Polish Constitution has attributed exclusively to specific Polish authorities competent in the area of public finances.

According to the Polish Constitutional Court, Articles 216(5) and 220 of the Polish Constitution, which impose financial restrictions in case of excessive budgetary deficit, demonstrate that the Constitution protects not only balance within the public finances, but also '*political sovereignty of the legislature and, respectively, of the Government in determining budgetary expenditures. The ability to make political decisions as to the hierarchy and amount of these expenditures is an inalienable* (emphasis added – A.S.) *attribute of these authorities*'.[63] Thus, the Fiscal Treaty in Articles 3, 5 and 7 changes the constitutionally-defined scope of competencies of the Government and the Parliament, as the Constitution grants the exclusive power to fight excessive deficit in public finances to the Government (determining amount of the budgetary deficit) and the Parliament (in making decisions on the introduction of corrective programmes). Moreover, no substantial change is provided by Article 3(2) declaring that '*correction mechanism shall fully respect the prerogatives of national Parliaments*' whereas in fact it amounts to nothing more than a formal competence of the national Parliament to enact corrective measures in accordance with the principles set out by the relevant EU bodies. Therefore, by virtue of the Fiscal Treaty, exclusive competencies of the legislature to shape the structure of the budget and budgetary procedures were delegated to the EU, as well as the competence of the Government to independently determine, each year, the amount of budgetary deficit. There has thus been a transfer of sovereign powers ('*transfer of competences*') from these state authorities to EU authorities. This required procedure set out by Article 90 of the Constitution, but in fact statutory authorisation for the ratification of the Financial Treaty was provided according to easier procedure provided for (non-integrative) international treaties, as determined in Article 89 of the Constitution. Moreover, the Constitutional Court refused, in 2013, to consider a motion for constitutional review of the Fiscal Treaty on formal grounds,[64] that was subject to two dissenting opinions. Moreover, after two years' delay, it refused to consider[65] a motion for constitutional review of the statute authorising ratification of the Treaty on 13 January

62 It concerns the issues of the procedure of the so-called 'reversed majority' from Art. 7 of the Fiscal Treaty, affecting contracting states' powers to oppose decisions taken by the Commission, b) setting legal grounds for the so-called 'correction mechanism' as provided in Art. 3(1)(e), which grants new power to the Commission, c) duty to implement budgetary and economic partnership programme (Art. 5 of the Fiscal Treaty).

63 Judgement of 26 November 2001, K. 2/00. OTK ZU nr 8/2001, item 254.

64 Judgement of 21 May 2013 K 11/13, OTK ZU 2013, nr 4A, item 53.

65 Again, it took place on formal grounds – death of one of the senators supporting the motion for review, resulting in its frustration, as the motion for review submitted was no longer supported by a sufficient number of the Members of Parliament. Decision was explained in a detailed way, although the overall account of the proceeding strikingly suggests rather unwillingness to take a clear position in this respect – nevertheless this conclusion is arguable.

2015.[66] The Constitutional Court has manifested in this way its unwillingness to take a position on the aforementioned controversial issue. Most probably, if the Court were to review this issue on merits, it would have to rule on the unconstitutionality of the ratification procedure and perhaps the unconstitutionality of controversial provisions of the Fiscal Treaty. As such, it preferred to use subsequent opportunities refusing the review, which allowed it to take no official position, neither on conformity to the Constitution of the Fiscal Treaty nor on the statutory authorisation for its ratification.

5.2. Inalienability unprotected

This problem was, however, revisited in the next judgement of 26 June 2013 (K 33/12). The judgement provided a review of the conformity of the Act on the ratification of European Council Decision No 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the EU with regard to a stability mechanism for Member States whose currency is the Euro.[67] The amendment strictly related to the Fiscal Treaty integrating it, at least to some extent, into the TFEU. A constitutional review of the ratification statute was requested by a group of MPs in July 2012. They considered it incompatible with Article 90, which requires a qualified majority for the adoption of such a law,[68] whereas the ratification law was adopted by a simple majority.[69] The applicants argued that the Council Decision subject to ratification, as modifying primary EU law, created grounds for transferring – to an international organisation such as the European Stability Mechanism (ESM) – the competencies of state authorities. The applicants claimed that the Council Decision created legal conditions for conferring on that organisation the authority to decide on the terms of Poland's participation in the monetary union, as well as extending, with respect to Poland, the jurisdiction of the Court of Justice of the European Union and the Court of Auditors. This created a legal basis for narrowing the powers of the Parliament to determine budgetary policy and the powers of the Council of Ministers to conduct economic policy of the state, empowering the European Commission

66 Decision of 13 January 2015 K11/13, OTK ZU 1A/2015, item 3.

67 Ustawa z dnia 11 maja 2012 o ratyfikacji decyzji Rady Europejskiej 2011/199/UE z dnia 25 marca 2011 w sprawie zmiany Art. 136 Traktatu o funkcjonowaniu Unii Europejskiej w odniesieniu do mechanizmu stabilności dla państw członkowskich, których walutą jest euro (Journal of Law for 2011, item 748).

68 During legislative work, a draft resolution calling for ratification in accordance with Art. 90 of the Constitution was tabled (druk sejmowy No. 114/VII kadencja) but was rejected by the government majority.

69 The ratification process is described in: *Biuletyn Komisji do Spraw Unii Europejskiej i Komisji Spraw Zagranicznych nr 125/VII kadencja*; and *Sprawozdanie Stenograficzne z 14. posiedzenia Sejmu 10 maja 2012,* pp. 168-181. Controversies concerning chosen procedure for ratification: *Opinie w sprawie Decyzji Rady Europejskiej of 16-17 December2010 dotyczącej zmiany Art. 136 Traktatu o funkcjonowaniu Unii Europejskiej, w szczególności procedury jej stanowienia w UE oraz procedury jej ratyfikacji*, 'Przegląd Sejmowy' nr 2/2012, s. 147–176; oraz 'Przegląd Sejmow' nr 3/2012, pp. 177–215.

to determine the rules of the correction mechanism for the state's financial management. According to the applicants, the ratification Act was incompatible with Article 48(6) of the TEU, but this thread is less relevant for current deliberations, as it concerns the assessment of the legality of the TFEU amendment via Decision No 2011/199/EU.

When considering the application, the Court asked whether the transfer of competencies that will appear by virtue of an international agreement after future fulfilment of some additional conditions (here: necessary future acceptance of the Euro currency) should be considered in the same way, regarding constitutional conditions, as the transfer of competencies which takes place solely by virtue of the international agreement upon its mere ratification without any other conditions.[70] The Court also analysed the notion of 'competences of an organ of state authority' within the meaning of Article 90 of the Constitution.

The court then concluded that, in light of the content of the Council Decision, there are no grounds to conclude that the Act authorising ratification of the Council Decision on the amendment of Article 136(3) of the TFEU leads to a transfer of such competencies within the meaning of Article 90 of the Constitution. The Court emphasised that this provision does not mention either the competencies of an organ of state authority or their transfer to an international organisation. Indeed, taken literally, this provision merely confirms the competence of Member States whose currency is the Euro to conclude international agreements amongst themselves. The Court was unwilling to see the functional link between this provision and the 2012 Fiscal Treaty, which was integrated into the institutional system of the EU through the aforementioned provision. Instead, the Court emphasised that Poland (at that moment) has not been a member of the Eurozone and thus is not an addressee of this provision and will not participate in the creation of the ESM.[71] The Court therefore suggested that the amended Article 136 of the TFEU has no impact on the international status of Poland.

In addition, the Court took the view that the new provision of Article 136 of the TFEU does not identify the area in which competence is to be transferred under it, nor of the extent to which this transfer is to take place. There is also no indication of the authorities that would acquire new sovereign competencies vis-à-vis the Member States.

The Court found, then, a substantial difference between an international agreement immediately delegating powers and an agreement whereby those powers

70 Judgement of 26 June 2013, K 33/12, OTK ZU 5/A/2013, item 63, section 1.2.2: '*Against the background of the present case, an important issue arose as to whether the procedure for the enactment of a law giving consent to ratification, as envisaged in Art. 90 of the Constitution, is also required when the 'delegation of competences of state organs' in connection with the ratification of an international agreement may occur potentially, in the unspecified future. Indeed, the applicant alleged that the law 'creates' the grounds for the transfer of competences, and not that the transfer of competences occurred upon ratification of the Council decision*'.

71 Judgement K 33/12, section 7.3.2.

will be transferred automatically upon some additional condition in the foreseeable future. The Court therefore chose to refer to the literal wording of the new TFEU provision and completely disregarded its legal context, giving it an obvious functional meaning extending far beyond its literal wording. This is a completely different attitude from that which the Court usually adopts when reviewing constitutionality. One might even ask a question: if the Council Decision is so irrelevant for Polish authorities, confirming only their power to conclude international agreements, then what was the need for its ratification?

It is therefore not surprising that the judgment aroused a number of controversies and was far from being unanimous, with five dissenting opinions and far-reaching criticism. In addition to the substantive issues, demonstrating the applicability of Article 90, dissenting opinions also stressed the procedural issue, arguing that, where a specific procedure is appropriate for the ratification of an international agreement (and the TFEU was ratified by virtue of the procedure set in Article 90 of the Constitution), then the same procedure must be applied for ratification of amendments to the substance of that treaty.[72] The Court addressed the aforementioned allegation, holding that this principle cannot be considered as applicable to all legal acts and certainly does not apply to the interpretation of Article 90 of the Constitution,[73] supporting its position in this respect with reference to the principle of favouring the process of European integration and cooperation between states.[74]

6. Standing for the Constitution

It seems that, when speaking about protection of national law and constitutional identity of the Member State by the Polish Constitutional Court, we are thinking about constitutional judgements opposed to EU actions which contradict the national Constitution. First of all, such constitutional judgements demonstrate not only declaratory determination to protect national identity, including its constitutional dimension, but first of all those judgments which ruled on the non-conformity of the EU law to the national Constitution. It is very easy to be vocal on the protection of constitutional identity if non-conformity need not be declared. However, the Polish Constitutional Court had already declared such non-conformity three times.

72 See, in particular, dissenting opinion by judges Teresa Liszcz, Mirosław Granat and Marek Zubik (supported by Marek Kotlinowski and Zbigniew Cieślak).

73 Judgement K 33/12, section 6.6.2.

74 Judgement K 33/12, section 6.6.3.

6.1. Alleged biting

The first case when the Polish Constitutional Court declared that EU law is unconstitutional was in case P 1/05, as decided on 27 April 2005. The Constitutional Court examined the conformity to the Constitution of Article 607t § 1 of the Code of Criminal Procedure implementing the Council Framework Decision (2002/584) on the European Arrest Warrant (EAW) and surrender procedures between Member States. The introduction of the EAW raised doubts as to its compliance with the provision of Article 55(1) of the Constitution prohibiting the extradition of a Polish citizen. The Constitutional Court rejected both the possibility of a dynamic interpretation of the prohibition covered by the provision of Article 55(1) of the Constitution and attempts to treat extradition and the EAW differently in substance. Recognising that both institutions are in essence the same, the Constitutional Court declared the provision of Article 607t § 1 of the Code of Criminal Procedure as non-conformant to Article 55 paragraph (1) of the Constitution prohibiting the extradition of a Polish citizen abroad.[75] However, at the same time, the Constitutional Court perceived the necessity of fulfilling international obligations, including those resulting from Polish membership of the EU. Taking this into account, the Constitutional Court, pursuant to Article 190 paragraph (3) of the Constitution, postponed the expiring of the unconstitutional law provision for the maximum allowed time of 18 months, calling upon the Parliament to provide solutions allowing reconciliation between the constitutional prohibition of the extradition of a Polish citizen and the international obligation of the Polish state to provide for a legal mechanism allowing operation of the EAW. The Constitutional Court suggested, quite clearly, an amendment of the Polish Constitution in this respect,[76] emphasising at the same time that '*[t]he amendment of the Constitution has for years been used as a necessary measure to ensure the effectiveness of EU law in the national legal orders of Member States*'.[77] This position

75 Judgement of 27 April 2005 P 1/05, OTK ZU 4A/2005, item 42, section 4.4: '… *Art. 607t § 1 of the Code of Criminal Procedure, in so far as it permits the surrender of a Polish citizen to a Member State of the European Union on the basis of a European arrest warrant, is incompatible with Art. 55(1) of the Constitution*'.

76 '*The decision of the Constitutional Court declaring Art. 607t § 1 of the Code of Criminal Procedure unconstitutional causes this provision to lose its binding force. 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 Art. 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 Art. 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 legislature to reinstate the provisions on the EAW that will be eliminated from the legal order as a result of the TK ruling*'. Judgment P 1/05, section 5 and 5.2 in particular.

77 Judgement P 1/05, section 5.7.

adopted by the Constitutional Court referred quite directly to the conclusions drawn from the judgement assessing the constitutionality of the Accession Treaty, where it was declared that, in case of unreconcilable contradictions between the Constitution and the EU law, Polish Legislative Power must made a decision, choosing one of three available options: changing the Constitution, initiating the procedure for changing EU law, or leaving the EU.[78] In effect, Article 55 of the Polish Constitution was amended in a way which removed contradiction with the Council Decision on the EAW, and no political turbulence occurred.

6.2. A new chapter in relations with the EU

Quite a different situation appeared, however, in 2021, when the Constitutional Court had to twice declare EU law irreconcilable with the Polish Constitution. In both cases, it was rather concerning construction of the Treaties as provided by the CJEU than the Treaty regulations themselves. Both judgements of the Constitutional Court were the result of political conflict between the Polish Government and the EU, and also provoked an infringement procedure initiated by the Commission.

This new situation started with the political change in Poland that took place in 2015 when the new coalition initiated ambitious reforms, including profound changes in the judicial system, starting with the Constitutional Court and then aiming at the Supreme Court and the common courts. Those political changes resulted in a regular political war between judges representing the old judicial system and its political reformers. Needless to say that the political constellation dominating European institutions was by no means enthusiastic about the political change in Poland.

It would be difficult to provide some concise outline of this political conflict between the judiciary and Parliamentary majority, having its specific propaganda and political narratives. Suffice to say it resulted in a series of preliminary referrals to the CJEU (as well as mass applications to the ECtHR), which were used by militant judges as a way to frustrate political reforms. Subsequent series of the judgments of the Luxemburg Court, at least to a certain degree, met the judicial expectations and provided those judges with an efficient tool for disregarding several statutory provisions. Those preliminary judgements were, however, directly touching the organisation and structure of the judicial system, hence why the competencies were never attributed to the Union. Moreover, they held that Polish courts are authorised to disregard judgements of the Constitutional Court as well as constitutional provisions by the common courts.

78 '*… if an irremovable contradiction were to arise between the provisions of the Constitution and those of Community law, a contradiction which cannot be resolved by an interpretation respecting the relative autonomy of European law and national law … [in] such a situation it would be up to the Polish Legislature to decide either to amend the Constitution, to bring about changes in Community regulations or – ultimately – to decide to withdraw from the European Union. This decision should be taken by the Sovereign, which is the Polish Nation, or by the body of state authority which, in accordance with the Constitution, can represent the Nation*'. Judgement K 18/04, sections 6.3–6.4.

This development resulted, however, in the reaction of the Constitutional Court, which responded in two judgements. One was initiated by the preliminary referral from the Supreme Court, whilst the other resulted from an application submitted by the Polish prime minister to the Constitutional Court. The first concerned the CJEU's decision on interim measures suspending operation of statutory regulations constituting a legal base for the functioning of the newly-established (and today already abolished) Disciplinary Chamber in the Polish Supreme Court. The second concerned the CJEU's preliminary judgement authorising Polish courts to disobey constitutional regulation and the normative effect of the judgements of the Constitutional Court.

6.3. Challenging CJEU interim measures (P 7/20)

In the judgement given on 14 July 2021 (P 7/20),[79] the Constitutional Court decided upon the preliminary referral that was made by the Supreme Court adjudicating in the (late) Disciplinary Chamber. The Supreme Court asked about the conformity of the second sentence of TEU Article 4 paragraph (3), read in conjunction with Article 279 of the TFEU, to the extent that it results in the obligation of an EU Member State to implement interim measures affecting the operation of the national judicial system, with Article 2 (the principle of the state based upon the rule of law and implementing principles of social justice), Article 7 (principle of legality), Article 8 paragraph (1) (supremacy of the Polish Constitution) and Article 90 paragraph (1) (restricting the scope of transferrable competencies only to some matters) in conjunction with Article 4 paragraph (1) (principle of the sovereignty of the Nation) of the Constitution. Briefly speaking, the Constitutional Court examined if it was conformant to the Constitution, imposing by the CJEU, the interim measures suspending the operation of legal provisions being the legal basis for operation of the Disciplinary Chamber in the Supreme Court, which took place in the CJEU decision of 8 April 2020 (C-791/19 R). The Constitutional Court (by majority) held that the CJEU, when imposing interim measures paralysing the activity of the Disciplinary Chamber, exceeded the scope of attributed powers acting *ultra vires* and infringing on Polish Constitutional provisions, as indicated in the referral for preliminary ruling. Formally speaking, the judgement was about the constitutionality of the EU Treaty law, but again it was in fact about the way the treaty provisions are interpreted and applied by the CJEU[80] ruling that the acts adopted by the CJEU *ultra vires* are not covered by the principles of primacy and direct application set out in Article 91 paras. (1)-(3) of the Constitution.

79 Judgement of 14 July 2021 P 7/20, OTK ZU A/2021, item 49.

80 Formally, the Constitutional Court held that the second sentence of Art. 4 para. (3) of the TEU, read in conjunction with Art. 279 of the TFEU, is non-conformant to Art. 2, Art. 7, Art. 8 para. (1) and Art. 90 para. (1) in conjunction with Art. 4 para. (1) of the Constitution of the Republic of Poland, and to that extent is not covered by the principles of primacy and direct application set out in Art. 91 paras. (1)-(3) of the Constitution, to the extent that the CJEU imposes *ultra vires* obligations on Poland, as the EU Member State, by issuing interim measures relating to the system and jurisdiction of Polish courts and Polish judicial procedure.

The Court has, in general, reaffirmed the conformity to the Polish Constitution of Article 4 paragraph (3) in conjunction with Article 279 of the TFEU. Thus, it confirmed the obligation of Poland, as an EU Member State, to implement interim measures as imposed by the CJEU. However, it emphasised that this legitimate power to impose interim measures is limited by the principle of attributed powers, the scope of which is determined by the principle requiring respect for constitutional identity of the Member State, as well as the principles of subsidiarity and proportionality. It follows, from the reasoning of the Court, that the Court of Justice of the EU is also bound by the principle of conferral. As a consequence, the CJEU may also exceed its competence. From the fact that the EU has only such competencies as were transferred to it by the Member States (Article 4 paragraph (1), Article 5 paragraph (1) of the TEU), and the Member States remain sovereign parties to the treaties, it follows that the final word on the limits of the delegated powers should rest with the Member State. Thus, according to the Constitutional Court, the CJEU was not granted the power to decide unanimously on the limits of competencies attributed to the EU. An opposite conclusion in this respect might even result in unauthorised and arbitrary exercising of powers that the Republic of Poland has never transferred to the Union.[81]

As a consequence, the Constitutional Court decided on the unconstitutionality of those Treaty provisions that may be considered as authorising the CJEU to impose obligations relating to the judicial system, jurisdiction, and the judicial procedure, being the scope of competencies belonging to the constitutional identity of the Republic of Poland and thus reserved for Constitutional regulation and never delegated to the EU.[82]

The Constitutional Court also emphasised that the interim measure resulting in suspension of national law constitutes, in principle, an automatic modification of a national legal system of a Member State. Therefore, it may happen that an interim measure, as adopted by the CJEU, will constitute a more far-reaching interference than a final judgment issued pursuant to Article 258 of the TFEU, which declares discrepancies between national law and EU law without direct interference in the national legal system.

81 '*It follows from the fact that the EU has only such competences as have been delegated to it by the Member States (Art. 4(1), 5(1) first sentence of the TEU), and from the fact that the Member States remain sovereign parties to the Treaties, that the final word on the limits of delegated competences should lie with the Member State. To hold that it is for the CJEU, in case of doubt, to determine the limits of delegated competences and the framework of constitutional identity on its own would go beyond the treaty jurisdiction of the CJEU and, in the extreme, could consequently lead to the arbitrary exercise of competences that the Republic has not delegated*'. Judgement P 7/20, section 6.5.

82 '*From Art. 8(1) of the Constitution, stating that it is the supreme law of the Republic of Poland, derives 'the supremacy and consequently the precedence of the Constitution over the law of the European Union, especially in exceptional situations connected with the need to protect the sovereignty of the state (U 2/20). The incompatibility with Art. 90(1) in conjunction with Art. 4(1) of the Constitution arises from the CJEU adjudicating in the area of the system and jurisdiction of judicial authorities, i.e. in areas which the Republic of Poland has not and cannot delegate to the EU*". Judgement P 7/20, section 6.10 (229–230).

6.4. Response to European authorisation of judicial disobedience to Constitution (K 3/21)

The second judgement K 3/21 of the Constitutional Court, as adopted in response to CJEU recent case law, was delivered on 7 October 2021 and provoked much controversy – both in Poland and abroad. Formally speaking, this application has challenged several provisions of the Treaty on EU.[83] In substance, however, the Court has acknowledged that it is by no means the very Treaty provisions which are at stake, but some specific way of their construction as provided by the CJEU in the recent judgements. The Court declared the inconsistency of the challenged Treaty provisions (or a specific way of their interpretation) with the Polish Constitution. In fact, it is not Treaty provisions which are important here, but the effect of some very intensive interpretation of what has been clearly envisaged already in the operative part of the judgement. This refers directly to the effects of the process of creating an '*ever-closer union between European nations*' in the course of which European integration reaches a '*new stage*' manifesting in the adoption of legal solutions outside the scope of attributed powers and the undermining of the constitutional identity of the Member State. The constitutional Court referred here to Article 1 of the TEU, declaring it in conjunction with Article 4(3) of the TEU as consistent with the Polish Constitution as long as the EU bodies act within the framework of delegated competencies and as long as this new, ever-closer stage of cooperation does not result in the Polish Constitution being deprived of its supremacy, i.e. priority in force and application over all other norms in the legal space on the territory of the Republic of Poland, and as long as Poland retains the functions of a sovereign and democratic state. If, however, by way of interpretation of the Treaties, the CJEU shapes such a stage of ever-closer cooperation in which the provisions of the EU law, created by way of interpretation of the Treaties by the CJEU beyond the limits of delegated competence, are placed above the Constitution, thereby causing a loss of sovereignty of the State and the Nation, then, to that extent, the '*ever closer union between the peoples of Europe*' will be inconsistent with the Constitution.[84]

The judgement, in its operative part, has three points. In the first point it was held that inconsistent with the Polish Constitution is EU law (precisely the EU law as construed by the Luxemburg Court) which:

- authorises European institutions to act beyond the scope of competencies attributed to them upon the Treaties,
- similarly, contrary to the Polish Constitution is EU law, which undermines the position of the Polish Constitution as a supreme law of superior force and priority in application,
- then, contrary to the Polish Constitution is EU law, which prevents Poland from operating as a sovereign and democratic state – what should be read as

83 Art. 1(1)-(2) in conjunction with Art. 4(3) of the TEU as interpreted by the CJEU, as well as Art. 19 in conjunction with Art. 2 of the TEU.

84 Judgement K 3/21, section 4.6.

prevents Polish Parliament from legislating in the area which was not transmitted to the EU.

The second point of the judgement refers to Article 19(1) of the TEU, which was held to be unconstitutional in so far as it:
- grants national courts the power to disregard provisions of the Constitution in the adjudication process,
- and grants national courts the power to apply statutory provisions that are no longer in force being repealed either by the Parliament or by the Constitutional Court when declared unconstitutional.

In the third point, the Constitutional Court held, as unconstitutional, EU law conferring *ultra vires* on national courts:
- power to review the legality of the procedure for the appointment of a judge, be it the legality of the resolution of the National Council of Judiciary (NCJ), or the very act of appointment of a judge by the president of the Republic of Poland taken directly upon the Constitution,
- power to decide that, due to the defects within the process of judicial nomination, refusing to recognise such a judge as being appointed to judicial office.

A brief comment on the third point is necessary. Polish law provides for judicial review of the legality of resolutions of the NCJ. In this point, the judgement challenges not the very legal possibility for a reviewing of the resolution by the NCJ, but the granting of this by the EU law. Polish law forbids, however, any challenging of the very decision on judicial appointment as taken by the president of the Republic directly upon the Constitution, as this would breach the principle of judicial irremovability.

Judgement K 3/21 of 7 October 2021 provoked much controversy. However, it is a quite simple application of the *principle of protection of constitutional identity in the process of European integration* as declared in judgement K 32/09, which caused no controversies at all. The arguments presented in judgement K 3/21 will be presented whilst discussing the constitutional construction of Articles 2 and 4 of the TEU.

7. Article 2 of the TEU in the Polish constitutional case law

The very nature of Article 2 of the TEU, which contains a listing of several 'values' fundamental to the EU, determines its function. This concerns, in particular, the 'rule of law' principle which expresses a general idea of a just, well-governed state, and changes its exact meaning depending on social, political, and legal circumstances. In actual fact, it means a particular constitutional concept that is believed to be operating, to a certain degree, in the current situation, but still much is to be done

in order to fulfil this political ideal. The idea of the rule of law determines, therefore, what is believed to be the proper course of the constitutional process.

According to the Polish Constitutional Court, all values listed in Article 2 of the TEU are also included in the Polish Constitution, in particular in Articles 7 (principle of legality), 30 (protection of human dignity), 31 (protection of individual freedom), 32 (principle of equality), 33 (equality between women and man) and 38 (protection of human life).[85] The Constitutional Court reiterated, following the European academic writings,[86] that the values enumerated in Article 2 of the TEU constitute interpretative guidelines when interpreting EU law, addressed primarily to EU bodies and institutions, but also to Member States.[87] At the same time, the Constitutional Court emphasised that the principle of the democratic state based on the rule of law, as expressed in Article 2 of the Polish Constitution, is identical in content[88] to the principles of democracy and the rule of law as established in Article 2 of the TEU. The Constitutional Court thus declared, in the U 2/20 judgment, that the content of Article 2 of the TEU, by referring to the content of the national constitutions, draws, to a significant extent, also on the content and interpretation of Article 2 of the Constitution of the Republic of Poland.[89]

The Constitutional Court, referring to academic writings,[90] emphasised that it is manifestly wrong to consider that the values of Article 2 of the TEU have a precise and single meaning. Quite the opposite, they are open to various sources of inspiration, including the Polish Constitution clearly referring to the idea of '*culture rooted in the Nation's Christian heritage and universal values*', as stated in its preamble.[91] The axiology, as expressed in Article 2 of the TEU (read in conjunction with its preamble), expresses values which are characteristic of the cultures of the Member States, by no means being created in the course of the TEU negotiations. Thus, the specificity in the way they are understood in the various European democracies must be respected. The recognition of these values as 'common' must not imply an agreement to give them a specific Community-meaning through a law-making construction applied by the EU bodies. '*The values constituting national identity cannot be imposed on any nation at all as a result of the interpretation of treaty law by the CJEU*'.[92]

The Constitutional Court also drew attention to the distinctiveness in understanding of the rule of law. If one applies this principle to the law-making activity of judges, then one can see that, whilst it is compatible with the British understanding of the *rule of law*, it is not compatible with the judges' continental understanding, for

85 Judgement K 3/21, section 8.1.
86 Schwarze, 2018; Blanke and Mangiamelli, 2013; Geiger, Khan and Kotzur, 2015.
87 Judgement K 3/21, section 5.2.
88 Art. 2: *The Republic of Poland shall be a democratic state based on the rule of law and implementing principles of social justice*.
89 Judgement K 3/21, section 8.1.
90 Banaszak, 2014, p. 9–22
91 Judgement K 3/21, section 8.1.
92 Judgement K 3/21, section 8.1.

which the separation of legislative and judicial power is of fundamental importance. It is clear that one of the foundations of the rule of law is judicial independence and impartiality. However, the manner in which judges are appointed, their relationship with the sovereign, and the guarantees of independence as provided to judges by the state, including immunities, disciplinary procedures, working conditions and organisation of judicial activity, are contingent upon national constitutional systems of the Member States and could not be subjected to any form of uniform assessment or criteria.[93]

The efficiency of judicial protection and the independence and impartiality of judges and the courts are fundamental components of the principle of a democratic state based on the rule of law, as declared in Article 2 of the Polish Constitution, as well as the principle of democracy and the rule of law listed by Article 2 of the TEU amongst the values on which the EU is based. The principles constitute, therefore, a common good of Polish *constitutional identity* and European legal culture. Resulting from the *rule of law*, the principle of legality is also the cornerstone of the European legal culture. Its interpretation by no means provokes controversies. Any public authority is obliged to refrain from activity for which there is no clear legal base and cannot presume its competence. These principles are an immanent part of the Polish *constitutional identity*.[94] Whereas the second paragraph of Article 19(1) of the TEU and Article 2 of the TEU obviously conforms to the Polish Constitution, it does not follow that every specific rule as derived from those provisions by the CJEU in the area of organisation of Polish courts and the appointment of Polish judges could also be considered as conformant to the Polish Constitution.[95] The rules on the appointment of judges in EU Member States are the exclusive competence of each sovereign state and not international courts. In particular, Article 2 of the TEU can in itself constitute neither authoritative nor sufficient grounds for establishing criteria for the appointment of judges or assessment of the correctness of this process.[96] Organisation of the judiciary, including the establishment of appropriate safeguards for the independence of judges and the impartiality of the courts, is the exclusive competence of Member States. Whereas Polish judges also apply EU law, they do it on the basis of the Polish Constitution and not on the basis of rules contrary to it.[97]

93 Judgement K 3/21, section 8.1.

94 Judgement K 3/21, section 4.2.

95 CJEU Judgement of 2 March 2021 C-824/18 (ECLI:EU:C:2021:153, section 148, 167), in which the CJEU: 1) authorised the Supreme Administrative Court (SAC) to conduct proceedings on the basis of a provision previously repealed by the Constitutional Court; 2) gave the SAC authority to conduct proceedings to examine the independence and autonomy of the NCJ, without any basis in the law; 3) obliged the SAC to make an arbitrary assessment of the independence and autonomy of a constitutional state body such as the NCJ.

96 Judgement K 3/21, section 8.1.

97 Judgement K 3/21, section 8.1.

8. Article 4 of the TEU in the Polish Constitutional case law

The appearance of Article 4 of the TEU is strictly linked to Article 2 and it is extremely difficult to separate the issues, especially if speaking about the limits of EU powers towards the Member States. In attempting to draw some demarcation line for the purpose of the structure of this report, it is worth mentioning that Article 4 of the TEU is more often invoked by the courts in order to explain loyal cooperation of the Member States and the need to give effect to the interpretation of EU law as provided by the CJEU. In a number of rulings, the Constitutional Court referred to Article 4(3) of the TEU in explaining the need for an 'EU law friendly' interpretation of national law including the Constitution,[98] and a similar approach has been taken in the Supreme Court.[99] As a parallel national base for this friendly rule of interpretation, the Constitutional Court indicated Articles 9 and 91(3) of the Polish Constitution. However, in the context of internal Polish dispute around the judicial reform, which has been experienced since 2018, Article 4 has found its important function in the dispute conducted by means of judicial decisions. The EU took this opportunity to intervene and broaden its political power, extending its pressure to the field of the organisation of the judicial system, based on Article 19 of the TEU but also using Article 4 to speak about sincere cooperation with respect of the CJEU decisions extending competencies of the EU (relevance of the EU law) to the fields of the judicial system.

The Constitutional Court, in its judgment of 7 October 2021 (K 31/21), indicated that the obligation to provide a European law-friendly interpretation of national law is closely related to the need for respect of the relative autonomy of European law and national law stemming from the explicit requirement of reciprocity, as had been included in Article 4(3) of the TEU under the Lisbon Treaty. From this requirement flows the obligation of the Constitutional Court and the CJEU to respect each other's spheres of jurisdiction and apply a mutually-friendly interpretation of EU law and the national Constitution.[100]

In the opinion of the Polish Constitutional Court, the full acceptance of the principles of primacy and direct effect of EU law by no means imply resignation from the supremacy of the Constitution.[101] The limits for creative interpretation by the CJEU

98 Judgment P 1/05; as well as Judgement of 16 March 2010 K 24/08, OTK ZU nr 3/A/2010, item. 22; 14 October 2009 Kp 4/09, OTK ZU nr 9/A/2009, item 134; 11 May 2005 K 18/04; 24 November 2010 K 32/09; 16 November 2011 SK 45/09; 20 April 2020 U 2/20; 14 July 2021 P 7/20; Decision of the Constitutional Court of: 19 December 2006, P 37/05, OTK ZU nr 11/A/2006, item. 177; 21 April 2020 Kpt 1/20.

99 Resolution of the bench of 7 Supreme Court Judges of 8 January 2020, I NOZP 3/19; Judgements of the Supreme Court of: 10 September 2020, III UK 124/19; of 26 May 2021, I NSKP 1/ 21; Decision of the Supreme Court of 26 March 2019, I NSZP 1/18.

100 Judgement K 3/21, section 1.5.

101 '*The priority of the application of EU law before Polish law, unspoken in the Treaties, conforms with the Constitution, as it can be derived from Art. 91 of the Constitution, but only on condition that it is applied within the scope of competences conferred upon the EU (Art. 4(1) TEU) and within the limits of the*

come, on the one hand, from the TEU itself declaring the principle of conferral. This fundamental principle restricts the creativity of the CJEU's interpretation exclusively to areas covered by EU law. On the second hand, the Treaty restricts the competence of the CJEU also with the principles of subsidiarity and proportionality as included in the second sentence of the TEU's Article 5(1). As for the scope of the competencies conferred upon the Union and its bodies, the principle of respect for constitutional identity and the fundamental functions of the state, as declared in judgment K 32/09, plays a fundamental role in its determination.[102]

If an unavoidable conflict between Polish law and EU law occurs, then the body applying the law must decide on the correct application of law provisions. If it is a Polish court, then its duty is to apply the Constitution as the supreme law of the Republic of Poland. Judges are bound by the Constitution and, on taking office, take an oath of allegiance to the Constitution. In contrast, EU bodies, including CJEU judges, are not bound by the Polish Constitution, but are still bound by the principle of respect for Member States' constitutional identity, as expressed in TEU Article 4(2).

As was stated by the Constitutional Court in an earlier judgment of 14 July 2021 P 7/20, reconciliation of the principle of primacy and direct application of EU law on the one hand, and the principle of supremacy and direct application of the Constitution on the other, is possible on condition of strict and honest compliance, in accordance with the principle of sincere cooperation, as well as with the principle of conferral established in Article 4(1) of the TEU. This also requires EU bodies to refrain from exceeding the boundaries of the powers conferred as laid down in Articles 4(1)-(2) and 5(1) of the TEU.[103] Thus, Article 1(2) of the TEU, which speaks of reaching a new stage in the process of creating an ever-closer union amongst the peoples of Europe, and Article 4(3) of the TEU, which formulates the principle of sincere mutual cooperation, are fully compatible with the Constitution, both taken separately and jointly. However, the Luxemburg case law pretending to interpret those provisions, but exceeding competencies conferred by the Republic of Poland are inconsistent with them and undermine the supremacy, primacy and bounding

principles of proportionality and subsidiarity (Art. 5(1) TEU), with respect for the Polish constitutional identity and fundamental functions of the state (Art. 4(2) TEU). Acceptance of the principles of primacy and direct effect of EU law by no means implies abandonment of the supremacy of the Constitution and the role of the Constitutional Tribunal as determined by the Constitution'. Judgement K 3/21, section 2.4.

102 '*European treaties, while not indicating how EU law is to be interpreted through a positive description, indeed do so by setting very clear limits on the interpretation and application of European law. The boundaries of interpretation therefore derive from the treaty itself. They are determined by the rule of conferral in Art. 4(1) TEU, limiting the CJEU's adjudicatory activity only to areas covered by EU law, and as determined by the principles of subsidiarity and proportionality (Art. 5(1), second sentence, TEU). The CJEU's adjudicatory discretion is also limited by the principle of respect for constitutional identity and the essential functions of the State enshrined in Art. 4(2) TEU*'. Judgement K 3/21, section 4.1.

103 '*… the removal of the conflict between the principle of primacy and direct applicability of EU law (on the one hand) and the principle of supremacy and direct applicability of the Constitution (on the other hand) is possible subject to strict and honest compliance, according to principle of sincere cooperation, with the principle of conferral laid down in Art. 4(1) TEU, which also implies that EU bodies refrain from acting outside the limits laid down in Art. 4(2) and 5(1) TEU*'. Judgement K 3/21, section 4.4.

character of the Constitution, and consequently jeopardising the functioning of Poland as a sovereign and democratic state. The Court emphasised that the norms created by the interpretation of the Treaties by the CJEU cannot be placed above the Constitution. A similar approach was also taken by the Supreme Court in a decision referring certain constitutional issues to the Constitutional Court.[104]

In case P 7/20, the court assessed, in light of the Constitution, the Treaty regulations on the basis of which an interim measure was issued by the CJEU in Case C-791/19. Article 4 of the TEU was also relevant to the decision. The Constitutional Court emphasised that it follows from the principles of sincere cooperation and effectiveness, as well as from the *pacta sunt servanda* principle, that a Member State of the EU is obliged to implement provisional measures ordered by the CJEU. However, in accordance with the principle of conferral (Article 4(1) of the TEU and the first sentence of Article 5(1) of the TEU), a provisional measure ordered by the CJEU must also remain within the limits of the competence conferred by the Member State of the EU respecting the constitutional identity of the Member State (first sentence of Article 4(2) of the TEU) and its essential functions (second sentence of Article 4(2) of the TEU); additionally, the CJEU must also comply with the principles of subsidiarity and proportionality (second sentence of Article 5(1) of the TEU).

The court also emphasised that, in the previous practice of the CJEU, amongst the numerous rulings establishing interim measures, there are none which concern the organisation of the system of judicial power of the Member States and the exercise of the judicial office, or the system or properties of other constitutional organs of the Member States.[105] Therefore, the Constitutional Court held that the interim measures ordered against the Republic of Poland on 8 April 2020 in Case C-791/19 violated the first sentence of Article 4(2) of the TEU by clearly and substantially encroaching on the area of constitutional regulation, thus violating the Polish constitutional identity embracing exclusive competence to organise the system of the national judiciary. In light of this, no authority may, according to the Constitutional Court, exempt Polish citizens, and in particular Polish judges, from the obligation to apply the Polish Constitution.[106] The Constitutional Court pointed to the CJEU's violation of the principle

104 Decision of the Supreme Court of 21 November 2019, II CO 108/19.

105 Judgement P 7/20, section 4.

106 '*The interim measures ordered against the Republic of Poland on 8 April 2020, contrary to the first sentence of Art. 4(2) of the TEU, clearly and substantially encroach upon the area of constitutional regulation, thus violating the Polish constitutional identity, of which the Polish judiciary is an immanent part. No authority can exempt Polish citizens, and in particular Polish judges, from the obligation to apply the Polish Constitution*'. Judgement P 7/20, section 6.8. '*Regarding clear excess beyond the limits of the principle of conferral (the first sentence of Art. 5(1) TEU) and the substantial infringement of the principles of subsidiarity and proportionality (the second sentence of Art. 5(1) TEU) with regard to the system and jurisdiction of Polish courts and the procedure before Polish courts, deriving from Art. 4(3), second sentence, of the TEU in conjunction with Art. 279 TFEU of the obligation to implement provisional measures such as those ordered by the CJEU's order of 8 April 2020 is incompatible with Art. 7 of the Constitution, which requires a public authority to act on the basis and within the limits of the law*'. Ibid, section 6.10.

of proportionality when ordering interim measures by indicating that, if the purpose of the interim measure ordered on 8 April 2020 in Case C-791/19 is to ensure that Polish courts are free to make preliminary references, then in order to guarantee this purpose, neither suspension of the Disciplinary Chamber of the Supreme Court, nor the suspension of specific judges, is necessary, proportionate, or legitimate. This can be clearly seen against the background of the case underlying the court's decision on interim measures. The issue there was to hold a judge criminally liable for public traffic safety offences and thus there is no reason to suspend operation of the disciplinary court in such a case, as the issue does not pertain to EU law. Moreover, according to Article 4(2) (third sentence), the issue pertains to the state duty of maintaining law and order as well as safeguarding national security and, as such, is excluded from EU regulation. This assessment is by no means different because of the fact that the person to be charged in this case is a judge. The immunity enjoyed by Polish judges has its source in Article 181 of the Constitution and not in EU law. The majority of EU Member States do not provide for formal immunity for judges, hence there are no grounds for assuming that the protection of the immunity of a Polish judge suspected of committing a traffic offence is an EU matter requiring the CJEU's judicial intervention.[107]

In summary, it could be said that, essentially, Article 4 of the TEU had been originally invoked in order to justify an EU-friendly approach in interpreting domestic law. However, as the tension between the EU and Poland appeared regarding changes in the judicial system, the Polish Constitutional Court emphasised the interrelation between the principle of sincere cooperation, pointing out its reciprocal effect requiring the EU to obey the limits of the conferred competencies. Observance of those limitations stemming from the principle of conferral, as declared in Article 5(1) and referred to in Article 4(1) of the TEU, must be additionally considered as obeying the request to respect national identities, inherent in Polish fundamental structures, political and constitutional, as declared in Article 4(2) of the TEU, despite

107 '*If the purpose of the interim measure ordered by the order of 8 April 2020 is to ensure that Polish courts are free to ask preliminary questions, it is neither necessary nor proportionate nor legitimate to suspend the Disciplinary Chamber of the Supreme Court or to suspend specific judges to ensure that purpose. This is evident from the case in which the preliminary question was referred. It concerns criminally liability for offences committed against safety in public roads traffic. There is no reason to suspend the Disciplinary Chamber of the Supreme Court in such a case and to stop referring similar cases to this Chamber. There is no EU element at all in such cases. Cases of traffic safety offences undoubtedly belong to the field of maintaining law and order, which is expressis verbis excluded from EU regulation (third sentence of Art. 4(2) TEU). This assessment could not be different by the mere fact that the person to be charged is a judge. Judicial immunity in Polish law is rooted in Art. 181 of the Constitution and not in EU law. Most EU member states do not provide for formal immunity for judges. This is the case in Belgium, Cyprus, Denmark, France, Germany, Greece, Ireland, Italy, Spain and Sweden (see G. Canivet, J. Joly-Hurard, La responsabilité des juges, ici et ailleurs, Revue internationale de droit comparé, no. 4/2006, pp. 1049-1093). Hence, there are no grounds for assuming that the protection of the immunity of a Polish judge suspected of committing an offence in communications is an EU matter and requires judicial intervention of the CJEU*'. Judgement P 7/20, section 6.9.

the criticism that was expressed in the academic writings, qualifying such an approach with the adjective ethnocultural, simplified, or exclusionary.[108]

The above-referenced content has described the position of the Polish Constitutional Court in relation to Articles 2 and 4 of the TEU, taken in reaction to judicial decisions made by the CJEU within the recent context of controversies surrounding Polish reforms of the judicial system. The reforms resulted in regular confrontations of concise but very influential elites of the Polish judiciary against the political majority. The struggle for reintroducing the former system of professional career that gave informal and hence uncontrolled power over the judicial nominations to this concise elite has been going on under the narrative of protecting judicial independence and the rule of law. Apart from those CJEU decisions regarding the Polish judiciary, which were taken in reaction to Commission infringement procedure, others were taken following application for preliminary ruling pursuant to Article 267 of the TFEU, by means of which the opposing judges have been seeking, from the Luxemburg Court, authorisation for their actions which were manifestly contrary to Polish law, including the Polish Constitution. Some of those referrals for preliminary judgement were successful and some of them were found manifestly inadmissible. Within the latter group there are decisions of the Supreme Court sitting in the Chamber of Labour and Social Security Law[109] which were asking for interpretation of Article 2 read in conjunction with Article 4 of the TEU. Despite the questions being left unanswered,[110] they presented a peculiar way of understanding the concept of *constitutional identity* as a fundamental constitutional structure inherent in the national identity of a given Member State. The Supreme Court has proposed there, to the CJEU, to accept that the meaning of the 'constitutional identity of a Member State', with regard to the right to court, may only be determined by means of dialogue between national courts and the CJEU within the procedure of preliminary question. The proposal was left unanswered, but it demonstrates the determination of the national (here Polish) judiciary to seek legitimacy of their actions beyond the national political structures, in direct cooperation with international courts, regardless of the legal boundaries set for the international courts in the international treaty law.

108 Ziółkowski, 2021, pp. 21–23 and the works there quoted.

109 The decisions were taken mainly on 15 July 2020 just after publication of the effect of presidential elections 2020, where the opposition candidate lost competition with the President Andrzej Duda who applied for his 2nd term. These are the decisions in cases seeking abolishment of the judicial nominations within the civil procedure, number: II PO 3/19, II PO 4/19, II PO 9/20; II PO 10/20; II PO 11/20; II PO 14/20; II PO 15/20; II PO 16/20 and II PO 18/20.

110 On 22 December 2022, the CJEU decided the questions registered as C-491/20, C-492/20, C-493/20, C-494/20, C-495/20, C-496/20, C-506/20, C-509/20 and C-511/20 were inadmissible For a summary of the decision see: http://www.sn.pl/en/actualities/SitePages/Actualities.aspx?ItemSID=117-0d89abd2-8bba-4029-999a-feb44dcfa88b&ListName=current_events.

9. Academic assessment of the EU law's impact on the Member States

Polish academic writings have never been under any illusion as to the enormous influence that European law has on Polish law. It was quite quickly pointed out that the content of approximately 80% of statutory regulations operating in Poland is determined by European law.[111] Similarly, the issue of the primacy of European law was not a subject of controversy, due to the clear disposition of Article 91(3) of the Constitution, as already discussed. The constitutional provision expressly provides for primacy of EU law over Polish statutory enactments in case of collision between national and European law. This regulation is all the more important due to the fact that the attempt to codify principles of application of EU law failed and was not included in the Treaty of Lisbon.[112]

Due to the content of Article 91(3) of the Constitution, the structural significance of the principle of primacy has not been questioned as far as statutory law is concerned, whilst significant doubts have been raised as to the primacy of European law over the Constitution. Piotr Winczorek, in the year of Polish accession to the EU, explicitly wrote that Article 91(3), assuming the precedence of law established by an international organisation over acts of Parliament, excludes the Constitution being an act of a higher rank than statutory enactment.[113] It is also stressed, in the doctrine, that the position excluding constitutional norms from the principle of primacy is not peculiar against the background of other Member States where (with the exception of Estonia and the Netherlands) constitutional courts do not accept the primacy of EU law over the Constitution.[114]

It has also been emphasised, from the outset in the doctrine, that the actions of Community institutions which do not fall within the limits of the attributed powers are not authorised in the Treaties and thus are inadmissible. The principle of primacy must not apply, therefore, to acts of Community law which exceed those limits, whilst the constitutional courts of the Member States have the right to review whether the institutions of the Union have exceeded the limit of the powers conferred.[115] Conversely, however, some authors spoke, very early on, of the possible acceptance of the primacy of Union law over the Constitution, provided that such

111 Sokolewicz, 2005, p. 68; Szymanek, 2005, pp. 347–351.

112 Safjan and Bosek, 2016, Legalis/el. The only reference to the principle of the primacy of application of Union law over national law in primary EU law was included in the merely political Declaration No 17 appended to the TFEU, which refers, in this respect, to the body of case law of the CJEU (Miąsik, 2022) and does not constitute any normative novelty, merely emphasising the importance of this case law (Safjan and Bosek, 2016).

113 Winczorek, 2004, p. 11.

114 Całka, 2016, pp. 51–52; Safjan and Bosek, 2016.

115 Działocha, 2004, p. 29. This position was still affirmed after adoption of the Lisbon Treaty. See: Biernat, 2011, pp. 59–60.

acts remained within the scope of the attributed powers and had sufficient democratic legitimacy,[116] though these were entirely isolated voices. Over time, however, it began to be emphasised that, in the operative dimension, within the scope of the powers conferred, the system *de facto* operates as if European law also enjoyed precedence over the Constitution, which 'significantly reduces the scope for conflict with national constitutional courts'.[117] This position is further supported by the already-described jurisprudence of the Constitutional Court (P 1/05; K 18/04), and by the doctrinal pronouncements of its then president.[118] This position also remains actual to the present day.[119]

10. Instead of conclusion

The delegation of certain powers to the EU pursuant to Article 90 of the Constitution has profoundly affected the domestic balance of power between three branches. This process has at least two different dimensions, although one common denominator – the decline of political power as possessed by the national legislature.

The first dimension reveals *de facto* priority of the Government (Council of Ministers) in determining much of the legislative process. As was stated in the literature, within the framework of the EU legislative procedures a changing of the constitutional roles characteristic for parliament and for the Government has been taking the place. An authorised representative of the Government is taking part in the creation of the European law which is to be implemented then by the national Parliament,[120] which is deprived of any substantial impact regarding the content of the law.[121] Gradual growth of the EU law resulted in national Parliaments being placed in the position of formal executor of the decisions taken within the European political process, party to which is the Government. Subsequently, it is the Government which submits draft law transposing EU Directives into the Polish Law. As the draft legislation is heavily determined by the directives subject to transposition, the Parliament appears to have considerably limited power to intervene in the merits of the law proposed.[122] Therefore, contrary to the classical relationships between Parliament and the Government, gradually the first appears to acquire more executive function, whereas the latter is much more focused on programming and taking (or at least influencing) political choices, which used to be the domain of the Parliament. The

116 Łętowska, 2005, p. 1141.
117 Miąsik, 2022.
118 Safjan, 2006, pp. 3–17.
119 Miąsik, 2022, and writtings there quoted.
120 Patyra, 2012, p. 156.
121 Kruk, 2006, p. 157.
122 Bałaban, 2007, p. 132 et seq.; Patyra, 2012, p. 156.

function of national legislature is becoming gradually reduced to the dimension of designating the Government, and after this the said legislature has only the task of implementing political decisions taken outside the national Parliament. The constitutional legitimacy for this process of *de facto* change in the constitutionally-determined relationships between Parliament and the Government appears to lie, first of all, in Article 90 of the Constitution authorising transfer of the powers of sovereign states' authorities to the EU. This transfer appears to be mainly at the expense of national legislative power, whereas the national Government acquires additional powers stemming from participation in the decision-making process at the EU level and then extended to the dominating position within the process of implementation of the European law in the national legal system. This reduction of the powers of the Parliament in the real operation dimension is hardly supplemented with extended obligation of the Government to provide Parliament with detailed information about the initiatives and the decision-making process within the EU.

The second dimension of this process relates to the position of the national judiciary, which considers itself to be less and less bound by the statutory law as provided by the Parliament. The system of judicial referrals under Article 267 of the TFEU for preliminary ruling started to be developed in a way which considerably limited the legislative power. First of all, courts have an instrument with which to correct the transposition process, i.e. by referring for preliminary judgements in the area covered by the EU law. However, EU axiology, as described in Article 2 of the TEU, appears to be a very useful means of broadening the scope of the power conferred formally on EU institutions, especially the Court of Justice of the EU. Political confrontation between the judiciary and political majority that has been experienced since 2015 in Poland demonstrated that close cooperation between national courts and the CJEU may result in practical deprivation of the legislative power of its inherent competencies, that were never conferred upon the EU.

The described decline of the importance of legislative power also demonstrates the decline of the modern politics and its displacement by its postmodern successor, where real political power is no longer located at the national level, but above, at the supranational level.

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Chapter VIII

Constitutional Identity and Relations Between EU Law and Romanian Law

Tudorel Toader – Marieta Safta

Abstract

This study addresses the issue of constitutional identity with reference to theoretical and practical developments in Romania, especially from the perspective of jurisprudence and the dialogue, sometimes with more tense moments, between the Romanian Constitutional Court and the Court of Justice of the European Union. In order to paint the most complete, 'photographic' image of the issues involved, this study presents the constitutional basis of the incorporation of EU acts into national law, the concrete method used for the incorporation, and the evolution of the jurisprudence of the Constitutional Court of Romania both in defence of national law and EU law; also presented are the development of the concept of the rule of law and the concept of constitutional identity in the Romanian doctrine and jurisprudence, highlighting the opinions expressed and the existing trends. Since the central theme of the research is dialogue as a form of shaping the concept of constitutional identity, the study ends with the fundamental milestones of this dialogue in various forms by way of preliminary references (vertically, between national courts, including constitutional ones and the CJEU); within international structures, namely associations of constitutional courts, the Venice Commission and the collaborating networks established at the level of the ECHR and the CJEU; within the various forms of bilateral cooperation. It is concluded that these forms of constitutional dialogue are well developed in Romania. However, the issue of authority relations remains latent, as shown by the recent turbulence emphasized in the study. The main conclusion is that judicial dialogue, in all its forms, represents, for now, the most appropriate solution for a balanced institutional approach to constitutional identity.

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1. Incorporation of EU legal acts into Romanian law: Constitutional framework

Romania became a Member State of the European Union (hereinafter EU) on 1 January 2007, thus completing a process[1] initiated shortly after Romania's transition to a new political regime as a result of the 1989 Revolution.

An essential stage in this process was the revision of the Romanian Constitution,[2] in 2003.[3] In the section dedicated to the Constitution of Romania on the website of the Chamber of Deputies,[4] the central values of the revision are written down as follows: the creation of the appropriate constitutional framework, as well as the legal basis for the Euro-Atlantic integration of the country; the alignment of the framework's provisions with the regulations of the European Union; regulating the right of Romanian citizens to vote and to be elected to the European Parliament: '*by voting for the revision law, the Romanian citizens expressed their support for joining NATO and integration into the European Union*'.

The law for the revision of the Constitution established the way in which EU legal acts were incorporated into national law.[5] Thus, a new Title – *Euro-Atlantic integration* – was introduced into the Constitution, and comprised two articles: *Integration into the European Union* (Article 148) and *Accession to the North-Atlantic Treaty* (Article 149). Likewise, there was an amending of the provisions laid down in Article 11 – *International Law and National Law* – as well as those in Article 20 – *International Treaties on Human Rights*, establishing the relationships between international and national legal orders.

1 On 1 February 1993, Romania signed the European Agreement, establishing an association between Romania, on the one hand, and the European Communities and their Member States, on the other, and submitted its application for EU membership in June 1995, see online https://romania.representation.ec.europa.eu/despre-noi/scurt-istoric-al-relatiilor-dintre-romania-si-uniunea-europeana_ro.

2 In its initial wording, the Constitution was adopted at the meeting of the Constituent Assembly on 21 November 1991 and entered into force following its approval by the national referendum on 8 December 1991.

3 Law for the revision of the Romanian Constitution No. 429/2003, approved by the national referendum of 18-19 October 2003 and entered into force on 29 October 2003, the date of publication in the Official Gazette of Romania of the Ruling of the Constitutional Court No. 3/2003 for the confirmation of the result of the national referendum of 18-19 October 2003 regarding the Law for the revision of the Romanian Constitution.

4 Available at: http://www.cdep.ro/pls/dic/site.page?id=333 (Accessed 1 February 2023).

5 [s] See Safta, 2021a, pp. 244–248; see also Toader and Safta, 2015, pp. 206–255.

Therefore, to answer the question regarding the incorporation of EU acts into national law, there is the need for a systematic interpretation of the aforementioned constitutional provisions, namely those in Article 11, Article 20, and Article 148 of the revised Constitution, with Article 148 representing the 'accession/integration clause'.

The above-mentioned constitutional texts have the following wording:

> Article 11
> International law and national law
> (1) The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to.
> (2) Treaties ratified by Parliament, according to the law, are part of national law.
> (3) If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.
> Article 20
> International treaties on human rights
> (1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.
> (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.
> Article 148
> Integration into the European Union
> (1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.
> (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence ('au prioritate'[6]) over the opposite provisions of the national laws, in compliance with the provisions of the accession act.
> (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union.
> (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.
> (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.

6 Romanian language.

Analysing Article 148 of the Constitution, as concerns the incorporation of EU acts into national law, we distinguish between the primary regulatory acts (*the constituent treaties of the European Union* and the *acts revising the constituent treaties of the European Union*) – which require ratification (sense in which we return to the basic rules laid down in Article 11 of the Constitution) – and the secondary laws (the Constitution expressly specifies *mandatory community regulations*, other than the treaties), the latter of which are applied in the national legal order according to the rules applicable in EU law to each category of the acts.

The rule on the ratification of international treaties (regardless of the sphere/field) is established in Article 11 paragraph (2) of the Constitution, according to which '*Treaties ratified by Parliament, according to the law, are part of national law*'. The ratification procedure is provided by Law No 590/2003 on treaties,[7] which distinguishes between treaties at the State level, at the governmental level, and at the departmental level, concluded and endorsed by different acts, in line with their level (Article 2 of Law No 590/2003, Section – *Categories of treaties*). Article 11 paragraph (2) of the Constitution refers to treaties at the State level, as they are ratified by the Parliament. The constituent treaties of the European Union and the acts revising the constituent treaties of the European Union fall into the category of the treaties ratified by the Parliament, except they have a distinctive legal regime in terms of the procedure for adopting the ratification law and the effects/relationships with national law.

From a procedural point of view, the specificity is given by the provisions of Article 148 paragraphs (1) and (3) of the Constitution, which establish, as regards the laws on the ratification of the founding treaties of the EU, that they '*are adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators'* and, specifically, that '*the provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the founding treaties of the European Union*'. It turns out that, although from a material point of view they do not fall into the category of constitutional laws (namely the revision of the Constitution), the ratification laws of EU Treaties shall be adopted by a qualified majority of votes, laid down in the Romanian Constitution only for constitutional laws, and not for organic laws (whose field is established in the Constitution and which are adopted by a simple majority of votes)[8] or ordinary laws (the other laws, which can cover any field and are adopted by a simple majority of votes).[9] These peculiarities have determined debates regarding the qualification of those laws. It was argued, for example, that

> if we also add the material criterion of the importance of regulated social relationships to the formal one, it is abundantly clear that the transfer of certain powers

7 Published in the Official Gazette, No. 23 of 12 January 2004.

8 Arts. 73 and 76 of the Romanian Constitution, available at https://www.presidency.ro/en/the-constitution-of-romania (Accessed: 1 February 2023).

9 Art. 76 of the Romanian Constitution, https://www.presidency.ro/en/the-constitution-of-romania (Accessed: 1 February 2023).

> specific to the State sovereignty or the joint exercise with other States of their own jurisdiction of the State power shall prevail over the regulatory field of organic or ordinary laws and may have constitutional relevance.[10]

As will be seen in the next chapters, the Law on the Ratification of the Treaty of Lisbon was qualified, by both the Legislative Council and the Parliament, as an organic law.

In terms of the effects of incorporation/relationships with national law, the specificity is given by the provisions of Article 148 paragraphs (2) and (3) of the Constitution, which establish their prevalence/priority ('prioritatea'[11]) over the contrary provisions of the national laws.

As regards the secondary laws of the EU, they are applied in the national legal order according to the rules established in EU law, in which sense the Constitutional Court of Romania[12] (hereinafter CCR) held, for example, by Decision No 887/2015,[13] that

> The regulations, as secondary regulatory acts adopted at the level of the European Union, shall directly be applicable in the legal order of the Member State. Therefore, the Member State is not expressly liable to transpose the regulation, a valid requirement in view of other secondary acts, as is the case, for example, of the directive. Therefore, the Member State is bound to fulfil those established by the regulations, a requirement that is characterized either by taking the necessary administrative measures, or by drafting normative acts able to create the necessary framework for public administration authorities to bring to fulfilment the requirement which lies with the State. Even if the regulation is directly applicable, it provides a set of rules with general applicability at the level of the European Union, the European legislator, in line with the object of the regulation, being able to provide the Member States a certain room for manoeuvre to a lesser or greater extent in order to achieve the goal outlined by its provisions.

Again referring to the effects of incorporation/relationships with national law, the same specificity of priority over the contrary provisions of national laws, laid down in Article 148 paragraph (2) of the Constitution, is also applicable for the '*other binding community regulations*', meaning, according to the CCR, that

> the regulations (a legislative act that must be applied in its entirety, in all Member States), the directives (a legislative act that set an objective that all Member States

10 Tănăsescu, 2022, p. 1328.

11 Romanian language.

12 The Romanian Constitution enshrines the European model of constitutional review, see arts. 142–146 of the Constitution, available at https://www.presidency.ro/en/the-constitution-of-romania (Accessed: 1 February 2023)

13 Published in the Official Gazette No. 191 of 15 March 2016.

> must achieve, each of them having the freedom to decide upon the ways regarding the achievement of the established objective) and the decisions (a legislative act directly applicable and binding for all those to whom it is addressed; its beneficiaries can be Member States or even companies).[14]

The drafting of Article 148 paragraph (2) of the Romanian Constitution, which enshrines the priority of the *constituent treaties of the European*, *acts revising the constituent treaties of the European Union* and *other binding community regulations* over *national laws* ('legile interne') contrary to them, raised the issue of interpreting the concept of '*national laws*' ('legi interne'[15]). The interpretation is particularly relevant, as it establishes the place of EU law in relation to the Romanian constitutional order.

In this regard, there is the case law of the CCR, consisting of the decision on the initiative for the revision of the Constitution (2003) and the subsequent decisions, by which the Court held '*an intermediate position between the Constitution and the other laws when it comes to the binding European normative acts*'. It therefore follows that, in the CCR's opinion, the concept of '*internal laws*' refers to the other normative acts in the legal system, and not to the Constitution itself, the latter of which is the supreme law in Romania.

Thus, by Decision No 148/2003[16] on the initiative for the revision of the Constitution, the Court ruled as follows:

> The accession to the European Union, once achieved, entails a series of consequences that could not occur without an appropriate regulation, of constitutional rank. The first of these consequences requires the integration of the community acquis into national law, as well as the determination of the relationship between the community normative acts and the national law. The solution proposed by the authors of the initiative for revision aims to implement community law in the national space and establish the rule of priority application of community law over the contrary provisions of national laws, in compliance with the provisions of the act of accession. The consequence of the accession is based on the fact that the Member States of the European Union understood to place the acquis Communautaire – the founding treaties of the European Union and the regulations derived from them – on an intermediate position between the Constitution and the other laws, when it comes to binding European normative acts. The Constitutional Court finds that this provision, laid down in Article 145,[1] does not violate the constitutional provisions regarding the limits of the revision nor other provisions of the Fundamental Law, being a particular enforcement of the provisions of the current Article 11 (2) of the Constitution, according to which 'Treaties ratified by Parliament, according to the law, are part of

14 Decision No. 390/2021, published in the Official Gazette No. 612 of 22 June 2021.
15 Romanian language.
16 Published in the Official Gazette No. 317 of 12 May 2003.

> national law.' Furthermore, the Court notes that, in order to integrate this European concept into the Romanian Constitution, it deems necessary to supplement the provisions of Article 11 with a new paragraph, for which purpose it is expressly provided in the legislative proposal for revision that, 'If a treaty Romania is to become a party comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.' In order to ensure this constitutional provision an operational character, the introduction of another provision is proposed, contained in Article 144 a1), according to which the Constitutional Court 'shall decide upon the constitutionality of treaties or other international covenants, upon referral to one of the presidents of the two Chambers, of a number of at least 50 deputies or at least 25 senators'.

Subsequently, consistent with those was ruled even from the year 2003, the CCR reasserted the principle of supremacy of the Constitution over the entire national legal order, at the time when it ruled upon another initiative for revision of the Basic Law (Decision No 80/2014).[17] The Court held that the establishment, through the proposal for the revision of the Constitution, of the rule according to which EU law is applied without any circumstances within the national legal order, therefore without distinguishing between the Constitution and the other national laws, is tantamount to positioning the Basic Law in a background to the EU legal order. As a result, the Court found the unconstitutionality of the proposed amendment in relation to the provisions of Article 152 paragraph (2) of the Constitution, regarding the limits of the revision of the Constitution.

Likewise, in Decision No 104/2018,[18] the CCR noted that:

> The Constitution provides that the provisions of the founding treaties of the European Union and other binding Community rules shall take precedence over provisions to the contrary in national laws, in compliance with the provisions of the Act of Accession. However, in connection with the concept of 'national law', by Decision No 148 of 16 April 2003 on the constitutionality of the legislative proposal to revise the Romanian Constitution, the Court distinguished between the Constitution and the other laws (see Decision No 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014, paragraph 452). Likewise, the same distinction is made at the level of the Basic Law in Article 20 (2) final sentence, which provides for international rules to be applied as a matter of priority, unless the Constitution or national laws contain more favourable provisions and Article 11 (3) states that if a treaty to which Romania is to become a party contains provisions contrary to the Constitution, ratification can take place only after revision of the Constitution (paragraph 91).

17 Published in the Official Gazette No. 246 of 7 April 2014.
18 Published in the Official Gazette No. 446 of 29 May 2018.

This assertion of the Court has remained constant over time, reiterated in a more recent decision, which placed the CCR in the middle of the debates raising the issue of a dispute with the Court of Justice of the European Union (hereinafter CJEU) on the legal interpretation of the relationship between national and European legal order. Thus, by Decision No 390/2021,[19] the CCR reasserted the principle of the supremacy of the Constitution, with reference also to the case law cited above and noted, *inter alia*, that

> the Basic Law of the State — the Constitution is the expression of the will of the people, which means that it cannot lose its binding force merely by the existence of a discrepancy between its provisions and those of European laws, the membership to the European Union not being able to affect the supremacy ('supremația') of the national Constitution on the entire judicial order (paragraph 29).

In the same context, the Court also found that

> the relationship between national and international law is established in the Romanian Constitution in Articles 11 and 20. The corroborated interpretation of the two constitutional norms emphasizes the following principles: (i) the commitment of the Romanian state to fulfil exactly and in good faith its obligations under the treaties to which it is a party; (ii) through the ratification of international acts or treaties by the Romanian Parliament, they become national norms; (iii) the supremacy of the Romanian Constitution in relation to international law: Romania may not ratify an international treaty containing provisions contrary to the Constitution until after the prior revision of the National Fundamental Law; (iv) the interpretation and application of the constitutional provisions on the rights and freedoms of citizens shall be carried out in accordance with the Universal Declaration of Human Rights, the Covenants and the other treaties to which Romania is a party; (v) in the field of human rights, the dispute between an international treaty to which Romania is a party and national law shall be settled in favour of the international treaty only if it contains more favourable rules. (…) The Court finds that, through the notions of 'domestic legal acts' and 'domestic law', the Constitution has exclusively envisaged infraconstitutional legislation, the Basic Law preserving its hierarchically superior position by virtue of Article 11 paragraph (3) of the Basic Law. (…) The Romanian legal system comprises all the legal norms adopted by the Romania and which must be in line with the principle of the supremacy of the Constitution and the principle of legality, which are the essence of the requirements of the rule of law, principles enshrined in Article 1 (5) of the Constitution (paras. (79)-(83).[20]

19 Published in the Official Gazette No. 612 of 22 June 2021.

20 With the dissenting opinion of the Judges L.D. Stanciu, E.S. Tănăsescu, published in the Official Gazette No. 612 of 22 June 2021.

This being, the systematic interpretation of Articles 11, 20 and 148 of the Romanian Constitution leads to the following conclusions:

- the treaties ratified by Parliament are part of national law; as a rule, they acquire in national law the legal force and the position in the hierarchy of normative acts given by the act of ratification, with the appropriate consequences;
- the treaties on human rights to which Romania is a party belong to a specific category: they are part of the 'constitutionality block', having constitutional interpretative value (in the sense that the constitutional provisions must be interpreted and enforced in accordance with the provisions of the international treaties to which Romania is a party) and priority of application in case of inconsistency with national laws, except when the Constitution or national laws comprise more favourable provisions; it has been rightly noted that this doctrine of constitutionality block responds to the need to accommodate a new source of international law – human rights treaties – distinct from prior arrangements, which demands priority over lower national standards of human rights protection, including constitutional ones: '*the constitutionality block doctrine is a fascinating legal construct which allows a harmonious and soft 'co-habitation' between the supremacy of the national Constitution and the priority of higher international human rights standards of protection (de facto primacy)*'[21];
- the *constituent treaties of the European Union, acts revising the constituent treaties of the European Union* and *other binding community regulations* also provide a category of international acts with a specific legal regime, in the sense that they have priority over the contrary provisions of national laws; according to the CCR, they have a supra-legislative but infraconstitutional position as noted,[22]

> the accession clause is also seen by the CCR as the basis for the reception of the Charter of Fundamental Rights of the EU into the national legal order. The Court analyzes the Charter as EU primary law, rather than as an international human rights treaty.

As a specific dimension of incorporation, we should mention the use of EU law within the constitutional review by the CCR, and the application of EU law by the courts of law. Thus, according to established case law of the CCR,

> the use of a norm of European law within the framework of constitutional review as a norm interposed to that of reference [A/N the Constitution] implies, based on Article 148 (2) and (4) of the Romanian Constitution, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unequivocal by

21 Viță, 2019, pp. 1623–1662.
22 Ibid.

> itself or its meaning must have been established clearly, precisely and unequivocally by the Court of Justice of the European Union and, on the other hand, the norm must be limited to a certain level of constitutional relevance, so that its normative content supports the possible violation of the Constitution by the national law – the only direct norm of reference within the constitutional review. In such a hypothesis, the approach of the Constitutional Court is different from the simple enforcement and interpretation of the law, a power that lies with the courts and administrative authorities, or from the possible issues related to the legislative policy promoted by Parliament or the Government, as the case may be. In view of the stated cumulative conditionality, it falls within the discretion of the Constitutional Court to apply within the constitutional review the decisions of the Court of Justice of the European Union or to formulate preliminary rulings by itself in order to establish the content of the European norm. Such an attitude is related to the cooperation between the national and the European constitutional court, as well as to the judicial dialogue between them, without bringing into discussion issues related to the establishment of hierarchies between these courts.[23]

Regarding the Charter of Fundamental Rights of the European Union, the CCR expressly ruled that it is, in principle, applicable within the constitutional review

> to the extent that it ensures, guarantees and develops the constitutional provisions in the matter of fundamental rights, in other words, to the extent that their level of protection is at least at the level of the constitutional norms in the matter of human rights.[24]

As for the case law of the CJEU and its effects, the CCR held, for example, that

> The Court of Justice of the European Union does not have the jurisdiction to issue a judgment aimed at establishing the validity or invalidity of the national law. The consequence of a certain interpretation given to the Treaty may be that a provision of a national law is not in line with European law. The effects of this preliminary ruling are those stated in the established case-law of the Court of Justice of the European Union, namely that 'the interpretation given by the Court of Justice, in carrying out the power conferred by Article 177 (became Article 267 of the Treaty on the functioning of the European Union), to a rule of community law, clarifies and defines, when necessary, the meaning and scope of this rule, as it must or should be understood and enforced from the moment of its entry into force.[25]

23 Decision No. 668/2011, published in the Official Gazette No. 487 of 8 July 2011, see also Decision No. 414/2019, published in the Official Gazette No. 922 of 15 November 2019; see also Safta, 2017.
24 For example, Decision No. 1.237/2010, published in the Official Gazette No. 785 of 24 November 2010, or Decision No. 339/ 2013, published in the Oficial Gazette No. 704 of 18 November 2013.
25 Decision No. 921/2011, published in the Official Gazette No. 673 of 21 September 2011.

2. The transfer of additional powers compared to those conferred at the time of accession to the EU: Constitutional and legal framework

In the first chapter, we explained the method used to incorporate international acts in general, and EU acts in particular, into the national legal order. The connecting 'keys' of the different legal orders are Article 11, Article 20 and Article 148 of the Constitution, amongst which Article 11 provides the general framework regulating the ratification of international treaties, whilst Articles 20 and 148 contain special norms, applicable to international treaties on human rights (Article 20) and EU acts (Article 148).

With reference to the aforementioned constitutional framework, as long as the granting of new powers to the EU would mean the amendment of the constituent treaties of the EU, it follows that the amendment ('*acts revising the constituent treaties of the European Union*') requires the adoption of a national law for the ratification. This conclusion also arises from the case law of the CCR, where it was held, for example, that the Member States maintain powers that are inherent in order to preserve their constitutional identity, and '*the transfer of powers, as well as rethinking, emphasizing or establishing new guidelines within the powers already transferred belongs to the constitutional margin of appreciation of the Member States*'.[26]

It should be noted that the international treaties which are contrary to the Constitution are prohibited from entering the internal legal order, as long as, according to Article 147 paragraph (3) – the final sentence of the Constitution – '*the treaty or international agreement found to be unconstitutional shall not be ratified*'. The constitutional review of the treaty before ratification can be carried out by the Constitutional Court, upon referral, pursuant to Article 146b of the Constitution, according to which the CCR '*shall adjudicate on the constitutionality of treaties or other international agreements, upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 senators*'. To the extent that, within the framework of the *a priori* constitutional review, the CCR would find that such a Treaty violates the Constitution, its ratification could only be undertaken after the revision of the Constitution, as long as, according to Article 11 paragraph (3), '*if a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution*'.

The revision procedure[27] is enshrined in a separate chapter (Title VII) of the Romanian Constitution. Thus, according to Article 150 of the Constitution, the initiative of revision may be started by: the president of Romania on the proposal of the government; by at least one quarter of the number of deputies or senators, as well as by at least 500,000 citizens with the right to vote (who must belong to at least half the

26 Decision No. 683/2012, published in the Official Gazette No. 479 of 12 July 2012.
27 See Safta, 2021a, pp. 244–248.

number of the counties in the country), and in each of those counties or in the Municipality of Bucharest, at least 20,000 signatures must be recorded in support of this initiative. According to Article 151, the draft or proposal of the revision must be adopted by the Chamber of Deputies and the Senate, in separate sittings, by a majority of at least two thirds of the members of each Chamber. If the two Chambers adopt different wordings, then the mediation procedure is carried out. If no agreement can be reached by a mediation procedure, the Chamber of Deputies and the Senate shall decide thereupon, in joint sitting, by the vote of at least three quarters of the number of deputies and senators. The revision is considered to be final if it is approved by a referendum held at least 30 days from the date of adoption of the revision law in the Parliament. Consequently, the last word in the revision procedure falls with the people – the holders of national sovereignty – under the conditions of Article 2 of the Constitution. To this effect, the Constitution of Romania provides three situations in which a national referendum can be held, two in which the referendum is binding on decision-making (for the revision of the Constitution and, respectively, for the dismissal of the President), and one in which the referendum is optional and advisory (the referendum on issues of national interest, upon the initiative of the president of Romania). The Constitution revision law enters into force on the date of the publication, in the Official Gazette of Romania, of the CCR decision confirming the results of the referendum.

The limits of the revision are provided by Article 152 of the Constitution of Romania in three paragraphs, which are classified by Professor D.C. Dănișor[28] as follows: material limits (paragraph 1), meaning those values considered intangible by the constituent power ('*the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language*' shall not be subject to revision), teleological limits (paragraph 2), in the sense of '*result of the procedure that is not desirable*' (no revision shall be made if it results in '*the suppression of the citizens' fundamental rights and freedoms or of the safeguards thereof*'), and limits regarding exceptional situations ('*The Constitution shall not be revised during a state of siege or emergency or in wartime*').

Within the revision procedure, an essential role belongs to the CCR, which carries out the constitutional review on the initiatives for the revision of the Constitution and the revision laws of the Constitution adopted by the Parliament. The review undertaken by the CCR aims to comply with the revision procedure and the revision limits. Likewise, the CCR ensures compliance with the procedure for organizing and holding the referendum and confirms the latter's ballot returns. It is worth noting that these are the only powers for the accomplishment of which the CCR acts *ex officio*. The *ex officio* referral means that, in carrying out the constitutional review, the Court is not bound by the limits of any referral. The only limits are those provided by the Constitution. Within these limits, the Court practically carries out a systematic

28 Dănișor, 2018, pp. 11–31.

constitutional review of the initiative for the revision of the Constitution and of the law on the revision of the Constitution adopted by the Parliament.

Once ratified by the Parliament, the treaty enjoys the presumption of complying with the Romanian Constitution. However, this is not an absolute presumption, as it results from the *per a contrario* interpretation of the provisions laid out in the first sentence of Article 147 paragraph (3) of the Constitution, according to which '*if the constitutionality of a treaty or international agreement has been found according to Article 146 b), it cannot be the subject of an exception of unconstitutionality*'. Likewise, once ratified, the treaty binds the Romanian State. According to Article 11 paragraph (1) of the Constitution, '*it shall pledge to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to*'.

3. The ratification of the Lisbon Treaty: Procedural stages and authorities involved

The procedural stages of the adoption of Law No. 13/2008 for the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007[29] (hereinafter the Law for the ratification of the Treaty of Lisbon) will be presented further, with reference also to the acts of the authorities involved, as it results from the ratification law report, published on the website of the Chamber of Deputies[30] and the transcripts of the debates and adoption of the law.[31]

On 19 December 2007, the Government of Romania submitted, to the president of Romania, the bill for the ratification of the Treaty of Lisbon, for adoption[32] '*according to the emergency procedure provided for by Article 76 paragraph (3) of the Constitution*'.[33]

The bill, containing a sole article, was accompanied by an Explanatory Memorandum[34] in which, in the *Socio-economic Impact Section of the draft normative act*, under the headings *Macro-economic Impact*, *Impact on the business environment*, *Social impact*, *and Impact on the environment*, the following is stated: '*not applicable*'. The section dedicated to the socio-economic impact includes only a mention under the

29 Published in the Official Gazette, No. 107 of 12 February 2008.

30 Available at http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=9041&cam=2 (Accessed: 1 February, 2023).

31 Available at http://www.cdep.ro/pls/steno/steno.stenograma?ids=6430&idm=3&idl=1 (Accessed: 1 February, 2023).

32 Available at http://www.cdep.ro/proiecte/2008/000/00/1/gv1.pdf (Accessed: 1 February, 2023).

33 According to Art. 76 para. (3) of the Constitution, '*At the request of the Government or on its own initiative, Parliament may pass bills or legislative proposals under an emergency procedure, established in accordance with the Standing Order of each Chamber*'.

34 Available at http://www.cdep.ro/proiecte/2008/000/00/1/em1.pdf (Accessed: 1 February, 2023).

Other information column, as follows: '*The Reform Treaty represents progress in the reform process of the European institutional framework, the decision-making mechanism at the European Union and community policies level, whose positive effects at the EU level will indirectly have a positive impact on the internal level*'. In the section entitled *Consultations carried out in order to develop the draft normative act*, there is mentioned the involvement of the European Institute of Romania, '*which has expertise in the translation of the acquis Communautaire*', making the mention '*not applicable*' in the other headings referring to the consultations organized with the local public administration authorities or inter-ministerial committees. Under the heading *Information regarding approval*, contained in the same section, it is stated that the project '*was favorably approved by the Legislative Council*',[35] and that *'no approval from the Supreme Council of National Defense, the Economic and Social Council, the Competition Council, the Court of Accounts is required*'. The Opinion[36] of the Legislative Council was requested by the Government on 18 December 2007 and given on 19 December 2007; it is quite laconic, comprising the following content:

> It approves the bill favorably. Due to the content of the Treaty proposed for ratification, the bill belongs to the category of organic laws. In the enforcement of Article148 para. (1) and (3) of the Constitution of Romania, republished, the bill shall be submitted for adoption in the joint sitting of the Chamber of Deputies and the Senate, to be voted on by a majority of two-thirds of the number of deputies and senators. The text of the Treaty shall bear the mention that it is a certified copy, as provided by the rules of legislative technique for drafting the normative acts.

As regards the content of the *Explanatory Memorandum*, under the section *Expected changes* it was mentioned that

> just like the founding treaties of the European Community and the amending treaties (Amsterdam and Nice), the Reform Treaty will constitute a primary European law. Thus, in accordance with Article 148 (2) and (3) of the Constitution of Romania, the Reform Treaty shall have priority over the contrary provisions of the internal laws.

The section also showed that

> the reform treaty resumes in a significant proportion the innovations brought by the Treaty establishing a Constitution for Europe, signed in Rome by the Heads of State and the Government on 29 October 2004.

35 According to Art. 79 para. (1) of the Constitution, '*The Legislative Council shall be an advisory expert body of Parliament, that advises draft normative acts for the purpose of a systematic unification and co-ordination of the whole body of laws*'.

36 Available at http://www.cdep.ro/proiecte/2008/000/00/1/cl1.pdf (Accessed: 1 February, 2023).

The president of Romania signed the Decree for submitting the Treaty of Lisbon to Parliament, so that it could be ratified on 8 January 2008,[37] and communicated it to the two Chambers of the Romanian Parliament on the same date.[38] On 10 January 2008, the Bill was sent to the Committee for Legal Matters, Disciplinary and Immunities for a report. On 31 January 2008, a favourable Report was received, and the Bill was entered into the agenda of the joint sittings of the two Chambers of Parliament.

Examining the Joint Report on the Bill for the Ratification of the Treaty of Lisbon[39] drawn up by the Committee for Legal Matters, Discipline and Immunities of the Chamber of Deputies and the Committee for Legal Matters Appointments, Discipline, Immunities and Validations, we note its summary nature. Thus, after mentioning the applicable constitutional norms, the favourable opinion of the Legislative Council, and the title of the Project, the following are noted:

The Treaty of Lisbon of 13 December 2007 does not replace the current treaties; it only amends them. Thus, it includes two provisions amending both the Treaty on the European Union and the Treaty establishing the European Community, which will be renamed 'The Treaty on the Functioning of the European Union';

The two treaties, as amended, will have equal legal value;

Among the most important amendments made by the Treaty of Lisbon are:

- the express enshrinement of the legal personality of the European Union;
- giving mandatory legal value to the Charter of Fundamental Rights;
- establishing a clear division of powers between the Union and the Member States;
- a series of institutional changes;
- strengthening the role of national parliaments;
- the extension of qualified majority voting to several fields;
- the introduction of the double majority system for adopting decisions within the Council starting in 2014;
- the solidarity provision in the energy field and in case of terrorist attacks.

Following the debates and the opinions expressed by the members of the two committees, it was decided, with an unanimous vote of those present, to submit the Bill for the ratification of the Treaty to the plenary of the assembled Chambers, for debate and adoption.

According to the content of the Treaty, the bill belongs to the category of organic laws.

On 4 February 2008, the debate regarding, and approval of, the Bill for the ratification of the Treaty of Lisbon took place in the joint sitting of the Chamber of

37 Available at http://www.cdep.ro/proiecte/2008/000/00/1/decret1.pdf (Accessed 1 February 2023).
38 Available at http://www.cdep.ro/proiecte/2008/000/00/1/ap1.pdf (Accessed 1 February 2023).
39 Available at http://www.cdep.ro/comisii/juridica/pdf/2008/rp001.pdf (Accessed 1 February 2023).

Deputies and Senate. With 387 votes for, one vote against and one abstention, the Parliament of Romania adopted the Law.[40]

Analysing the transcript of the parliamentary debates, it is found that they started with the presentation of the project by the prime minister, who began by emphasising the historic nature of the vote and the fact that it is '*the first treaty signed by Romania, as a Member State of the European Union*'; he also further exposed the instruments and mechanisms created by the Treaty, concluding with elements on '*the pride of participating in this exercise*', '*the consistency of the role assumed in the Union*', '*the qualities to be an influential and dynamic actor in the Union*', and the proposal to ratify the Treaty, which '*will allow us to enter a stage of progress which will lead to the benefit of both Romanians and other European citizens*'. The report of the Committees was presented and other interventions followed from deputies and senators, who in turn emphasised the historic moment and the fact that Romania is among the first States to ratify the Treaty. However, it was also underlined, in more or less virulent tones (also determined by the position in Parliament of the political parties whose representatives spoke), that: one year after accession, '*Romania's profile as a new member of Europe is still not sufficiently structured*'[41]; Romania is under the monitoring of the Cooperation and Verification Mechanism[42]; '*a reform of the Constitution of Romania*'[43] is required; the present and future responsibilities were invoked.[44] Likewise, an attitude was expressed, according to which, '*although we have certain objections to the Treaty of Lisbon (…) we will vote in good conscience*'.[45] Additionally, it was emphasised that the case law of the CJEU is codified, which '*means the primacy of Community law over internal law*',[46] whilst a further opinion was also expressed, i.e. that '*what we are discussing today is the transition to a confederation project and even if we do not say these things very directly, we will have to think about all the consequences*'.[47]

As for the concept of identity, it can be found in the intervention of the representative of the Party România Mare. Speaking of the interests of Romanians in this context, he mentions '*their identity as a people*', with the emphasis on the fact that '*Romania is in Europe*' and the discussions are only about the entry into the European structures. Moreover, the concept of identity appeared in one of the speeches, but in a generic reference to '*the new identity of the European Union*'.[48]

40 Available at: http://www.cdep.ro/pls/steno/steno.stenograma?ids=6430&idm=3&idl=1 (Accessed 1 February 2023).

41 The Parliamentary Groups of the Social Democratic Party, available at http://www.cdep.ro/pls/steno/steno.stenograma?ids=6430&idm=3&idl=1 (Accessed 1 February 2023).

42 The Parliamentary Groups of the Liberal Democratic Party.

43 The Parliamentary Groups of the Social Democratic Party, available at http://www.cdep.ro/pls/steno/steno.stenograma?ids=6430&idm=3&idl=1 (Accessed 1 February 2023).

44 All spechees.

45 The Parliamentary Groups of the Greater Romania Party.

46 The Parliamentary Groups of the Hungarian Democratic Union from Romania.

47 The Parliamentary Groups of the Social Democratic Party.

48 The Parliamentary Groups of the Liberal Democratic Party.

The law was enacted by the Decree of the President of Romania No 250/2008 and was published under the number 13 in the Official Gazette of Romania no. 107 of 12 February 2008.

To sum up, the ratification of the Treaty of Lisbon was carried out in an emergency parliamentary procedure; no constitutionality issues were raised, and no limits related to national or constitutional identity were opposed. The Constitutional Court was not asked to rule upon the constitutionality of the Treaty of Lisbon.

4. Competencies of the CCR and the courts of law in the new legal framework determined by the accession to the EU: The *constitutional relevance* of EU law and the contribution of the CCR in the *Europeanisation* of the national regulatory system

We will further develop the distinction between the competence of the CCR and that of the courts of law based on the interpretation and application of paragraphs (2) and (4) of Article 148 of the Romanian Constitution, following the evolution of the CCR jurisprudence in the matter. Indeed, within these paragraphs it is possible to identify several stages corresponding to the adaptation to the new legal reality determined by the accession to the EU, also influenced by the judicial borrowing (the case law of other Constitutional Courts).

Thus, soon after the accession to the EU, there was a period in which the CCR seemed to assume control of the conformity of national rules to those of the EU.[49] In one of the few cases dealing with EU law, the Court stated the following:

> Given that, as of January 1, 2007, Romania joined the European Union, the Court has to examine the domestic legislation in the field of state aid and its compatibility with the European Union legislation in the field, because, under Article 148 paragraph (2) of the Constitution, 'As a result of the accession, the provisions of the constitutive treaties of the European Union, as well as the other binding community regulations, have priority over the contrary provisions of the internal laws, respecting the provisions of the act of accession.

Shortly after, starting in 2009, the CCR interpreted Article 148 of the Constitution in the sense that it does not fall under its competence to pronounce on the

49 Decision No 59/2007, published in the Official Gazette No. 98 of 8 February 2007; Decision No 558/2007 published in the Official Gazette No. 464 of 10 July 2007; Decision No 1031/2007, published in the Official Gazette of Romania no 10 of 7 January 2008.

aspects related to the application of EU law. In this regard, there can be found in the legal literature a detailed description of relevant case law on the topic of the pollution tax.[50] Thus, when asked to review the constitutionality of the legal provisions by reference to the constitutional accession clause (Article 148), the CCR used the so-called 'lack of competence' argument.[51] The CCR noted[52] that it does not have the power to examine whether a provision of national law complies with the text of the Treaty establishing the European Community (A/N now the Treaty on the Functioning of the European Union) in terms of Article 148 of the Constitution. According to the CCR,

> Such power, namely to establish whether there is a contrariety between national law and the EC Treaty, belongs to the court of law, which, in order to reach a fair and lawful conclusion, ex officio or upon request of the party, may submit a preliminary question in the meaning of Article 234[53] of the Treaty establishing the European Community before the Court of Justice of the European Communities. If the Constitutional Court would be deemed competent to adjudicate on the conformity of national legislation with the European legislation, we would face a possible legal dispute between the two courts, which, at this level, is unacceptable.

The CCR went further, stating that it is also the obligation of the national Parliament to give 'priority' to EU law, pursuant to the Article 148 accession clause. Similarly, the Court also held[54] that the power of priority application of the binding Community (A/N now EU) rules in relation to the provisions of the national legislation belongs to the court of law, because '*it is a matter of the enforcement of law, not of constitutionality*', and '*within the relations between the Community and the national law (except the Constitution), we can only refer to priority application of the former in*

50 For the case law of the CJEU on this topic, please see Joined Cases C-29/11 and C-30/11, *Aurora Elena Sfichi v. Directia Generala a Finantelor Publice Suceava and Others*, 2011 E.C.R. 1-00059; Case C-573/10, *Sergiu Alexandru Mica v. Administratia Finantelor Publice Lugo*, 2011 E.C.R. 1-00101; Case C-441/10, *loan Anghel v. Directia Generala a Finantelor Publice Bachu*, 2010 E.C.R. 1-00164; Case C-440/10, *SC SEMTEX SRL v. Directia Generala a Finantelor Publice Bachu*, 2010 E.C.R. 1-00163; Case C-439/10, *SC DRA SPEED SRL v. Directia Generala a Finantelor Publice Bachu*, 2010 E.C.R. I00162; Case C-438/10, *Directia Generala a Finantelor Publice Bachu and Administratia Finantelor Publice Bachu v. Lilia Drutu*, 2011 E.C.R. 1-00100; Case C-335/10, *Administratia Finantelor Publice a Municipiului Thrgu-Jiu gi Administratia Fondului pentru Mediu v. Claudia Norica Vijulan*, 2011 E.C.R. 1-00099; Case C-336/10, *Administratia Finantelor Publice a Municipiului Thrgu-Jiu gi Administratia Fondului pentru Mediu impotriva Victor Vinel Ijac*, 2011 E.C.R. 1-00058; Joined Cases C-136/10 and C-178/10, *Daniel lonel Obreja v. Ministerul Economiei*, 2011 E.C.R. 1-00057; Case C-402/2009, *loan Tatu v. Statul Roman prin Ministerul Finantelor gi Economiei and Others*, 2011 E.C.R. 1-02711; Case C-263/10, *lulian Nisipeanu v. Directia Generala a Finantelor Publice Gorj*, 2011 E.C.R. I00097.

51 Decision No. 1596/2009, published in the Official Gazette No. 37 of 18 January 2010.

52 Decision No 1596/2009 cited or Decision no 1289/2011, published in the Official Gazette No. 830 of 23 November 2011.

53 Art. 267 TFUE.

54 Decision No 137/2010, published in the Official Gazette No. 182 of 22 March 2010.

relation to the latter and such a matter falls within the competence of the courts'. As noted in the doctrine, the CCR suggests a separation of tasks,

> meaning that the application and enforcement of EU law is to be undertaken by the judiciary, executive, and legislature; whereas the CCR is to observe the fulfilment of this obligation pursuant to the Constitution. In any case, the Court denied its own competence on the matter.[55]

In the next stage, starting from 2011, a new jurisprudential orientation was outlined. Gradually, the CCR built the so-called '*doctrine of interposed norms*'[56] (for this concept see Prof. S. Deaconu[57]), which allowed the use of the EU law in the constitutional review. Thus, the CCR held, in one particular case, that

> considering the place that community regulations, according to Article 148 para (2) of the Constitution, in relation to internal laws, the Court is called to invoke in its jurisprudence the mandatory acts of the European Union every time they are relevant to the case, as long as their content is not equivocal and an own interpretation is not requested.[58]

Moreover, it was further stated that '*it is neither positive legislature nor a court with jurisdiction to interpret and apply EU law in disputes involving rights of citizens'*. Simply put, the CCR allows the use of a rule of European law within the constitutional review as a rule interposed to that of reference (Constitution), subject to certain conditions:

> this rule must be sufficiently clear, precise and unambiguous in itself or its meaning must have been clearly, precisely and unequivocally established by the European Court of Justice (..), the rule must be circumscribed to a certain level of constitutional relevance, so that its legal content might support the possible infringement by the national law of the Constitution – the only direct reference standard in its constitutional review. In such a case the approach of the Constitutional Court is distinct from the simple application and interpretation of law, jurisdiction belonging to courts and administrative authorities, or from any issues of legislative policy promoted by Parliament or the Government, as appropriate.

The Court explicitly stated that

> in the light of cumulative set of conditionality, it is up to the Constitutional Court to apply or not in its constitutional review the judgments of the European Court of

55 Viță, 2019, pp. 1623–1662.
56 Deaconu, 2022, p. 243.
57 Ibid.
58 Decision No. 383/2011, published in the Official Gazette No. 281 of 21 April 2011.

> Justice or to formulate itself of preliminary questions to establish the content of the European rule.[59]

The distinction, in terms of competence, between the CCR and courts of law is given by the '*constitutional relevance of EU law norms'*, as clearly results from Decision No 64/2015,[60] where the Court found the unconstitutionality of Article 86 paragraph (6) of Law no 85/2006 on the insolvency procedure, with reference, *inter alia*, to Article 148 paragraph (2) of the Constitution. Recalling its jurisprudence, in which it held that the use of a rule of European law in the framework of the constitutionality control *'as a rule interposed to the reference one implies, pursuant to Article 148 para.(2) and (4) of the Romanian Constitution, a cumulative conditionality (…)*', the CCR further held that

> Related to the present case, (…) the first conditionality is fulfilled, Article 153 para. (1) letter e) of the Treaty on the Functioning of the European Union, Article 27 of the Charter of Fundamental Rights of the European Union and Article 2 and 3 of the directive having a sufficiently clear, precise and unequivocal content, especially in light of the interpretation given by the Court of Justice of the European Union through the previously mentioned decision. Regarding the second conditionality, the Court finds that, through their normative content, the acts of the European Union protect the right to 'information and consultation of workers', supporting and complementing the action of the member states, therefore, directly targeting the fundamental right to the social protection of work provided by Article 41 paragraph (2) of the Constitution as interpreted by this decision, a constitutional text that ensures a standard of protection equal to that resulting from the acts of the European Union. It follows, therefore, that the previously mentioned acts of the European Union obviously have a constitutional relevance, which means, on the one hand, that they circumscribe and subsume Article 41 paragraph (2) of the Constitution, by fulfilling the double conditionality previously mentioned, without violating the national constitutional identity (Decision no. 683 of June 27, 2012, published in the Official Gazette of Romania, Part I, no. 479 of July 12, 2012), and, on the other hand, that it is within the competence of the Court's constitutional finding of the existence of this normative inconsistency between the previously mentioned European Union acts and the national ones, respectively Article86 para.(6) first sentence of Law no. 85/2006. With regard to the latter aspect, the Court notes that the normative inconsistency cannot be resolved only by resorting to the constitutional principle of the priority of application of the acts of the European Union, but by finding the violation of Article148 paragraph (2)

59 Decision No. 668/2011, published in the Official Gazette No. 487 of 8 July 2011; see also Decision No. 1088/2011, published in the Official Gazette No. 668 of 20 September 2011; Decision No. 921/2011, published in the Official Gazette no. 673 of 21 September 2011; Decision No. 903/2011, published in the Official Gazette No. 673 of 21 September 2011.

60 Published in the Official Gazette No. 286 of 28 April 2015.

> of the Constitution, text that includes, by default, a clause for compliance of internal laws with European Union acts (with the distinctions mentioned in Decision no. 80 of February 16, 2014, published in the Official Gazette of Romania, Part I, no. 246 of April 7, 2014, paragraph 455), and its violation, in the case of European Union acts with constitutional relevance, must be sanctioned as such by the Constitutional Court. Of course, regarding European Union acts that do not have constitutional relevance, the competence to remedy the normative inconsistency belongs to the legislator or the courts, as the case may be (see Decision no. 668 of May 18, 2011, previously cited).

Perhaps the most representative case where the CCR found the *constitutional relevance* of EU law and applied it in a constitutional review was that settled by Decision No 534/2018.[61] The CCR held that the case relates to the recognition of the effects of a marriage legally concluded abroad between a citizen of the EU and his same-sex spouse – a national of a third country – in relation to the right to family life and to the right to freedom of movement, from the perspective of the prohibition of discrimination on the basis of sexual orientation. The 'interposed' norm (with *constitutional relevance*) was Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE and 93/96/CEE(2). The CCR held that there was uncertainty regarding the interpretation of some concepts used by this Directive, in conjunction with the Charter of Fundamental Rights of the EU and with the recent case law of the CJEU and the ECHR, concerning the right to family life; it thus decided to refer the case to the CJEU. Consequently, within the constitutional review of the provisions of Article 277 paras. (2) and (4) of the Civil Code, the CCR applied (as interposed to the Romanian Constitution) the provisions of European law, as interpreted by the CJEU (Grand Chamber) in the Judgment of 5 June 2018, pronounced in Case C-673/16.[62] Invoking its jurisprudence regarding the doctrine of interposed norms, the CCR held the following[63]:

> The rules of European law contained in Article 21 paragraph (1) TFEU and in Article 7 paragraph (2) of Directive 2004/38, interposed within the constitutionality control of the reference established by Article 148 paragraph (4) of the Constitution, have both a precise and unequivocal meaning, clearly established by the Court of Justice of the European Union, as well as constitutional relevance, as they concern

61 Published in the Official Gazette No. 842 of 3 October 2018.

62 C-673/16 – *Coman and Others*, https://curia.europa.eu/juris/liste.jsf?num=C-673/16, the only case in which the CCR has referred preliminary questions to the CJEU so far, available at https://curia.europa.eu/juris/document/document.jsf;jsessionid=228B64B67CC671C4AEFDFFDAF7A01202?text=&docid=202542&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=86360 (Accessed: 1 February 2023).

63 Paras. (40) and (41).

> a fundamental right, namely the right to intimate, family and private life. In this light, applying the provisions of the European court in the interpretation of European norms, the Constitutional Court found that the relationship of a same-sex couple falls within the scope of the notion of 'private life', as well as the notion of 'family life', like the relationship established in a heterosexual couple, a fact that determines the incidence of the protection of the fundamental right to private and family life, guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union, by Article 8 of the European Convention on the defense of human rights and fundamental freedoms and Article 26 of the Romanian Constitution.

The CCR upheld the exception of unconstitutionality and found that the provisions of Article 277 paragraph (2) and (4) of the Civil Code are constitutional in so far as they permit the granting of the right of residence on the territory of the Romanian State, under the conditions laid down in European law, to the spouses – citizens of the Member States of the European Union and/or citizens of non-member countries – of marriages between persons of the same sex concluded or contracted in a Member State of the EU.[64]

In other cases, applying the same test of constitutional relevance, the CCR decided not to use EU law as a norm interposed to the reference one. Some of the most debated cases in the Romanian legal literature in this regard concern Decision 2006/928/CE – Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (M.C.V.)[65] and the M.C.V. Reports. Thus, for example, in the case settled by Decision No 137/2019,[66] the Court ruled that

> Decision 2006/928/EC, an act of European law with a binding nature for Romania, is also devoid of constitutional relevance. The Court concluded that, even if these acts (Decision 2006/928/CE and the M.C.V. reports) would comply with the conditions of clarity, precision and unequivocalness, their meaning being established by the CJEU, those acts do not constitute norms that fall within the scope of the necessary level of constitutional relevance carrying out the constitutional review by reference to them. Not having met the cumulative conditionality laid down in the established case-law of the constitutional court, the Court held that they cannot form the basis for a possible violation of the Constitution by the national law, as the only direct norm of reference within the constitutional review.

Another recent example concerns the referral to unconstitutionality of the provisions of Article 1 paras. (4), (6), and (7) and Article 19 of the law on the protection

64 Decision No. 534/2018, published in the Official Gazette No. 842 of 3 October 2018.
65 Available at https://eur-lex.europa.eu/eli/dec/2006/928/oj (Accessed: 1 February 2023).
66 Published in the Official Gazette No. 295 of 17 April 2019.

of whistle-blowers in the public interest, as well as of the law as a whole.[67] Indeed, the CCR claimed that

> It does not fall within its role and competence to interpret Article 346 of the TFEU and to extract from its content the requirements resulting from the interpretative way of the case-law of the Court of Justice of the European Union to be written into the analyzed law. Any issues in the interpretation of the analyzed text determined by the reference to Article 346 of the TFEU can be settled by the competent national courts of law, even by formulating a preliminary question according to Article 267 of the TFEU.

The Court also held that

> The issues raised by the authors of the objection of unconstitutionality have no constitutional relevance, being confined to the sphere of compliance of national law with a directive, without anticipating any substantial violations of the constitutional norm. Moreover, even a possible incorrect transposition of a directive does not result ab initio in the unconstitutionality of the law on such grounds [see also Decision No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015, paragraph 32].

However, the lack of a definition of the concept 'constitutional relevance', which at this moment is at the discretion of the CCR, raised questions and criticism, showing that clear criteria should be established by the Court.[68]

Here could also be mentioned the cases in which, applying paragraphs (2) and (4) of Article 148, providing the obligations of national authorities in the context of EU accession, the CCR found the unconstitutionality of national legislation contrary to these obligations. Thus, for example, considering that the Parliament had repealed the domestic provisions allowing for an extraordinary appeal against an irrevocable decision breaching EU law, the CCR held the unconstitutionality of this provision. The aforementioned move referred to Law No 299/2011 for the repeal of Article 21 paragraph (2) of the Administrative Litigation Law No 554/2004, as a whole, and the provisions of Article 21 paragraph (2)'s first sentence of Law No 554/2004, insofar as they are interpreted to the effect that they cannot be subject to review of final and irrevocable decisions pronounced by courts of appeal, in breach of the priority principle of EU law, when it does not reveal the merits of the case. The CCR invoked the EU accession clause, which requires all national authorities to ensure the priority of EU law. Moreover, the Court found that '*by granting no remedy for the breach of EU law, the principle of loyal cooperation enshrined in Article4(3) TEU would be disregarded, and the constitutional obligations of Article 148 accession's clause would*

67 Decision No. 390/2022, published in the Official Gazette No. 746 of 25 July 2022.
68 See Deaconu, 2022, p. 245, also with reference to Zanfir-Fortuna, 2011.

be rendered merely illusory'. At the same time, the CCR found that the very essence of the principle of 'priority' would be hampered. In support of its reasoning, the CCR referred to the benchmark cases of the CJEU: *Van Gend en Loos and Costa v. ENEL*.[69] The Court also ruled that

> by accessing to the legal order of the European Union, Romania accepted that, in the fields where the exclusive jurisdiction belongs to the European Union, regardless of the international treaties it signed, the implementation of the requirements resulting from them should be subject to the rules of the European Union. If not, it would lead to the undesirable situation that, through the international obligations undertaken bilaterally or multilaterally, the Member State would seriously affect the jurisdiction of the Union and, practically, substitute it in the mentioned fields. (…). Therefore, in the application of Article 11 paragraph (1) and Article 148 paragraph (2) and (4) of the Constitution, Romania fulfils in good faith the obligations resulting from the act of accession, not interfering with the exclusive jurisdiction of the European Union and, as established in its case-law, by virtue of the compliance clause contained by Article148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations it undertook as a Member State.[70]

There can be noted, in this regard, the contribution of the CCR to the *Europeanisation* of the national regulatory system, highlighting the responsibilities of the public authorities arising from the act of accession (the courts of law and the legislator) and sanctioning their violation.

5. The role of the CCR in defending of national law and competence

It could be argued that the very way in which the CCR interprets and applies Article 148 of the Constitution (the so-called accession/integration/compliance clauses) serves to protect the national legal order based on the supremacy of the Constitution, which is the fundamental law of the country. Starting with Decision No 148/2003, pronounced on the initiative for the revision of the Constitution and, until now, in various tones, more or less cautious and more or less explicit,[71] the Court has promoted the same hierarchy of the legal system: the intermediate position of the

69 Decision No. 1039/2012, published in the Official Gazette No. 61 of 29 January 2013.

70 See Decision No. 683/2012, published in the Official Gazette No. 479 of 12 July 2012, Decision No. 64/2015, published in the Official Gazette No. 286 of 28 April 2015, Decision No. 887/2015, published in the Official Gazette No. 191 of 15 March 2016.

71 For an analysis of the CCR case law up to the time of the first and only preliminary reference to the CJEU, see Viță, 2019, pp. 1623–1662.

founding treaties of the EU and the mandatory regulations derived from them, between the Constitution and the other internal laws.

As we have already mentioned, pronouncing on the initiative to review the Constitution, in 2003, the Court held that the consequence of the accession is that the Member States of the European Union '*have understood to place the acquis communautaire – the treaties establishing the European Union and the regulations derived from them – on an interim position between the Constitution and the other laws, when it comes to binding European regulatory acts*'.[72]

The supremacy of the Basic Law was strongly reaffirmed after more than a decade, in 2014, when the CCR found the unconstitutionality of an initiative for the revision of the Constitution that aimed to change the relationship between the Constitution and EU law.[73] At that moment, by the Sole Article points 121 and 122 of the initiative for a revision of that Constitution, there was proposed the amendment of the marginal name of Title VI, becoming *'Romania's membership to the European Union and the North Atlantic Treaty Organisation'*; also put forth was an amendment of the normative content of Article 148 paragraphs (1) and (2), as follows:

> (1) The ratification of the treaties amending or supplementing the European Union's founding Treaties, as well as treaties amending or supplementing the North Atlantic Treaty is made through a law adopted in the joint session of the Senate and the Chamber of Deputies, with the vote of two-thirds of the number of Senators and Deputies.(2) Romania shall ensure observance, within its national legal order, of the European Union law, according to the obligations undertaken through the accession document and the other treaties signed within the Union.

Examining the proposed amendment, the Court found the unconstitutionality of Article 148 paragraph (2) in the new wording.[74] The ground invoked by the Court was Article 152 paragraph (2) of the Constitution, which enshrines the limits of revision. Thus, the Court noted that the current wording of the Constitution establishes that the provisions of the founding treaties of the EU, as well as the other binding community regulations, have priority over the contrary provisions of the national laws, complying with the provisions of the act of accession. With reference to the concept of 'national laws', the Court referred to its Decision No 148/2003, where it made a distinction between the Constitution and the other laws, noting that the same distinction is made at the level of the Fundamental Law '*by Art. 20 para. (2) final sentence which stipulates the priority application of international regulations, unless the Constitution or national laws comprise more favourable provisions*'; the court likewise referred to its Decision No 668/2011, where it ruled that the binding acts of the EU are norms interposed within the constitutional review. Therefore, according

72 Decision No. 148/2003, published in the Official Gazette No. 317 of 12 May 2003.
73 Decision No. 80/2014, published in the Official Gazette No. 246 of 7 April 2014.
74 Ibid.

to the CCR, establishing, through the proposed new wording, the thesis that EU law shall be applied without any circumstances within the national legal order, not distinguishing between the Constitution and the other national laws, '*is tantamount to placing the Fundamental Law in the background compared to the legal order of the European Union'.* In this light, the Court held that

> The Fundamental Law of the State – the Constitution – is the expression of the will of the people, which means that it cannot lose its binding force just by the existence of an inconsistency between its provisions and the European ones. Likewise, accession to the European Union cannot affect the supremacy of the Constitution over the entire legal order (see in the same sense the Judgment of 11 May 2005, K 18/04, pronounced by the Constitutional Court of the Republic of Poland).

Furthermore, the Court found that the constitutional courts have full jurisdiction regarding the powers established by the legislator, and '*the CCR shall obey only the Constitution and its organic Law of organization and functioning No 47/1992, its powers being established by Ar. 146 of the Fundamental Law and Law No 47/1992*'.[75]

Therefore,

> Accepting the new wording proposed in Article 148 (2) would be tantamount to creating the premises necessary to limit the powers of the Constitutional Court, meaning that only normative acts that are adopted in fields that are not subject to the transfer of jurisdiction to the EU could still be subject to constitutional review, while normative acts that regulate in shared fields, from a material point of view, would be subject exclusively to the legal order of the EU, the constitutional review over them being excluded. Or, irrespective of the field in which the normative acts regulate, they must observe the supremacy of the Romanian Constitution, according to Article1 para.(5). Such an amendment would constitute a limitation of the right of citizens to refer to constitutional justice in order to protect certain constitutional values, rules and principles, meaning the suppression of a guarantee of these values, rules and principles, which also comprise the sphere of fundamental rights and freedoms.

Likewise, the Court protected the guarantees enshrined in the Constitution when the initiatives of the revision of the Constitution called into question (even indirectly) the compatibility of such guarantees with the EU law, and also emphasised the perfect compatibility of such guarantees with the EU law. This is the case, for example, with the presumption of lawful acquirement of property, enshrined in Article 44 paragraph (8) of the Constitution[76] ('*Legally acquired assets shall not be confiscated. Legality of acquirement shall be presumed*'). Over time, there have been several attempts (1996, 2003, 2011) to eliminate (through initiatives of revision of the Constitution) this

75 See in this regard Decision No. 302/2012, published in the Official Gazette, No. 361 of 29 May 2012.
76 See Toader and Safta, 2015.

presumption – the last one motivated by, and making reference to, the European normative framework. The CCR remained consistent in its role as guardian of the limits of the revision of the Constitution, offering, at the same time, the 'key' (in terms of legal reasoning) of the compatibility of constitutional norms with European ones. We will further point out the 'saga' of the presumption of lawful acquirement of property.

Thus, by Decision No. 85/1996,[77] the CCR held that '*the presumption of lawful acquirement of property is one of the constitutional guarantees of the right to property*' and '*this presumption is also based on the general principle that any legal act or deed is lawful until proven otherwise, requiring, as concerns the wealth of a person, that unlawful acquirement be proven*'. Referring to the debates that accompanied the adoption of the 1991 Constitution theses, the Court also held that

> the legal certainty of the right to property on the assets that make up one's wealth is [...] inextricably linked to the presumption of lawful acquirement of property. Therefore removal of this presumption is tantamount to a suppression of a constitutional guarantee of the right to property.

By Decision No. 148/2003,[78] adjudicating on the proposed text to be introduced in the Constitution which stated that the presumption does not apply in the case of '*property obtained from criminal conduct*', the Court held that this wording implies that it is meant to reverse the burden of proof on lawful acquirement, being provided the unlawfulness of wealth acquired from criminal conduct. The Court found unconstitutional the proposal for revision that was aimed, in essence, at the same objective, namely removal of the presumption of lawful acquirement of wealth, because it is tantamount to a suppression of a constitutional guarantee of the right to property.

By Decision No. 799/2011,[79] the CCR resumed the grounds set forth in the aforementioned decisions, also declaring that

> in the absence of such presumption, the owner of property would be subject to continuing uncertainty because, whenever someone would invoke the unlawful acquirement of the property, the burden of proof lays not with the one who makes the allegation, but with the owner of the property.

In addition to the above, the Court held that

> the regulation of this presumption does not prevent the delegated or primary legislature to adopt, pursuant to Article 148 of the Constitution – Integration into the European Union, regulations to enable full compliance with EU legislation in the fight against crime. Moreover, this objective was also considered by the initiator of the

77 Published in the Official Gazette, Part I, no. 211 of 6 September 1996.
78 Published in the Official Gazette Part I, no. 317 of 16 April 2003.
79 Published in the Official Gazette, No. 440 of 23 June 2022.

> proposed revision, especially with regard to Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, published in the Official Journal of the European Union no. L 68 of 15 March, which requires taking all measures necessary to comply with its provisions, particularly mitigating the reduction of the burden of proof regarding the source of goods held by a person convicted of a crime related to organized crime.

As we have mentioned, in relation to a study on this topic,[80] the novelty amongst the initiatives to revise the Constitution concerning the presumption of lawful acquirement of property was the adoption of the Council Framework Decision 2005/212/JHA on confiscation of Crime-Related Proceeds, Instrumentalities and Property.[81] The aim of the framework-decision is to ensure that all Member States have effective rules on confiscation of crime-related proceeds, *inter alia*, in terms of burden of proof regarding the source of assets held by a person convicted of an offence relating to organised crime;

> each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.

As a consequence, keeping the reasons which characterise the presumption provided for in Article 44 paragraph (8) of the Constitution as a guarantee of the right to property, in Decision No. 799/2011 the CCR also offers an answer to the Romanian legislature's concern, determined by the adoption of the above-mentioned framework-decision and the obligations undertaken by Romania as a Member State of the EU. One year after the CCR delivered the said decision, a safety measure on extended confiscation was introduced into Romanian law by Law no. 63/2012 amending and supplementing the Criminal Code of Romania, and by Law no. 286/2009 on the Criminal Code,[82] being a law transposing the Council Framework Decision No 2005/212/JHA of the European Union.

Over time, the CCR has developed, attached to the value of supremacy of the Constitution, the concept of constitutional identity. The CCR identifies it as being enshrined in Article 11 paragraph (3), in conjunction with Article 152 of the Fundamental Law (the limits of revision of the Constitution), as a guarantee of *a core identity* of the Romanian Constitution, which '*should not be relativized in the process of European integration*' (paragraph (81) of Decision No 390/2021[83]). However, from

80 Toader and Safta, 2015.

81 Published in the Official Journal of the European Union L 68 of 15 March 2005, pp. 49–51.

82 Published in the Official Gazette, Part I, no. 258 of 19 April 2012.

83 Available at https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_390_2021_EN.pdf (Accessed: 1 February 2023).

the analysis of the CCR case law, it can be noted that Article 152 of the Constitution, which enshrines the limits of the revision, represents only a '*core identity*'. There are also other aspects that the CCR deemed, following assessment, to belong to the constitutional identity: the status of parliamentarians'[84]; the regulation of incompatibilities[85]; the retirement of magistrates[86]; and the judicial organization.[87] The CCR noted that '*the way of organizing the national justice system is part of the constitutional identity of the Romanian State*'.[88] We will detail this topic in Chapter 7.

It might be also qualified as an act in defence of the values enshrined in the Romanian Constitution the Decision by which the CCR found the unconstitutionality of a national law transposing an EU Directive (Law no. 298/2008 on the retention of data generated or processed by the providers of publicly available electronic communications services or public communications networks and amending Law no. 506/2004 on the processing of personal data and privacy protection in the electronic communications sector).[89] In essence, the CCR held that

> the restriction on the exercise of the right to private life, secrecy of correspondence and freedom of expression, (…) must occur in a clear, predictable and unequivocal manner as to remove, if possible, the occurrence of arbitrariness or abuse of authorities in this area.

In the reasoning part of the Court's decision, the shortcomings of the drafting of the impugned normative act are thoroughly specified, including in relation to the standards required by the European Court of Human Rights in its case law.[90] With regard to this decision, it was noted, more or less critically,[91] that it was delivered without addressing any preliminary questions to the CJEU.

However, the assertion of the supremacy of the Constitution and the constitutional identity does not mean, and is not intended to lead de *plano* to, the idea of a conflict of jurisdiction. Over time, the CCR has affirmed a pluralistic conception and mutual respect between the courts belonging to legal orders, which are parties in a proceeding of interference. According to the Court, such an attitude is related to cooperation between the Domestic Constitutional Court and the European Court, as well as to the judicial dialogue between them without raising issues related to establishing hierarchies. Even when the CCR found the unconstitutionality of a national law transposing an EU Directive[92] (mentioned above), the decision of the CCR did

84 Decision No. 964/2012, published in the Official Gazette No. 23 of 11 January 2013.
85 Decision No. 682/2018, published in the Official Gazette No. 1050 of 11 December 2018.
86 Decision No. 533/2018, published in the Official Gazette No. 673 of 2 August 2018.
87 For developments, see Chapter 7.
88 Decision No. 88/2022, published in the Official Gazette No. 243 of 11 March 2022.
89 Decision No 1258/2009, published in the Official Gazette No. 798 of 23 November 2009.
90 Sunday Times v. the United Kingdom, 1979; Rotaru v. Romania, 2000.
91 Efrim and Zanfir and Moraru, 2013.
92 Decision No. 1258/2009, published in the Official Gazette No. 798 of 23 November 2009.

not raise a conflict of jurisdictions in itself. The Court held that there had been a violation of the fundamental constitutional principles, as well as fundamental rights, due to the lack of clarity and precision of the national rules transposing the European Directive, resulting in the ascertainment of the unconstitutionality of the transposing law, without proceeding to the approach of any issues likely to produce collisions with the CJEU/conflicts of jurisdiction.

In this context, a more recent decision of the CCR (No 390/2021)[93] seemed quite atypical by its antagonistic positioning with the CJEU, and led to a wave of criticism and vivid debates. Even if the reasoning invoking the precedents related to the supremacy of the Constitution and the national constitutional identity can be viewed as ways in which the CCR defended the same values, in line with its case law, other reasoning of the decision (that led to criticism and the response of the CJEU in defence of the independence of national judges – case C-430/21 – RS[94]) expresses an approach which can be described as having a unique character in the landscape of CCR jurisprudence. We will refer to this decision in the next chapters.

6. The interpretation of Article 2 of the TEU (in particular with regard to the rule of law) in the practice of the Romanian courts of law: Tensions in constitutional justice

According to Article 1 paragraph (3) of the Romanian Constitution, '*Romania is governed by the rule of law*'. As a guarantor for the supremacy of the Constitution, the CCR has defined and applied this principle in its case law, and also in conjunction with the international treaties to which Romania is a party, through the appropriate enforcement of Articles 11, 20 and 148 of the Constitution[95] as well as the case law of the European Court of Human Rights (ECHR) and the CJEU. Likewise, the CCR invoked documents of the Venice Commission, in respect of which it pointed out, for example, in a case on electoral matters where it envisaged the Code of Good Practices in Electoral Matters,

> that indeed this act is not binding, but its recommendations establish the coordinates of a democratic election, in relation to which the States – which are characterized as belonging to this type of regime (A/N democratic) – can express their free choice in electoral matters, complying with the fundamental human rights, in general, and with the right to be elected and to elect, in particular.[96]

93 Published in the Official Gazette No. 612 of 22 June 2021.
94 Available at https://curia.europa.eu/juris/liste.jsf?num=C-430/21 (Accessed: 1 February 2023).
95 For the rules established by these Art., see Chapter 1.
96 Decision No. 51/2012, published in the Official Gazette No. 90 of 3 February 2012.

As for the implementation of Article 2 of the TEU within the constitutional review (as well as the CJEU's interpretation of this article), it is carried out by virtue of, and in accordance with, the rules laid down by Article 148 of the Constitution.[97]

As regards the reflection of Article 2 of the TEU in the practice of national courts, we consider noteworthy the so-called 'waves' of preliminary rulings of the Romanian courts,[98] starting with 2019, concerning provisions adopted by Romania in light of the effectiveness of the fight against corruption and the guarantee of the independence of the judiciary, especially the 'saga' determined by the regulation on the Section for the Investigation of Offences Committed within the Judiciary (SIOJ),[99] which led to referrals both to the CCR and the CJEU by the Romanian courts of law.

For a better understanding of the context, it must be mentioned that, in Romania, the theme of justice in general, the independence of the judiciary in particular as a dimension of the rule of law, and, in this context, the place and role of the Cooperation and Verification Mechanism (CVM) established on the occasion of accession to the EU, have been very present in the public space. Some 'hot spots' of debates, referrals, and challenges were the establishment of the aforementioned SIOJ and the value of the opinions and recommendations of various European forums on the national regulations, including on this structure. These issues have given rise to numerous referrals to the CCR, the request for opinions from the Venice Commission,[100] and the expression of recommendations by the European Commission under the Cooperation and Verification Mechanism,[101] by GRECO[102] within its jurisdiction. Likewise, courts of law notified the CJEU, which issued judgments highly debated in Romania, assigning diametrically-opposed meanings depending on the interest of proving one point of view or another.

This is one of the 'themes' of the recent judgments/decisions of the CJEU and the CCR that have led to legal debates and preliminary references of the national courts

97 Explained in Chapter 1.

98 Bercea, 2022, pp. 50–89.

99 Specialized section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors.

100 See CDL-AD(2021)019-e. Romania – Opinion on the draft Law for dismantling the Section for the Investigation of Offences Committed within the Judiciary, adopted by the Venice Commission at its 127th Plenary Session (Venice and online, 2-3 July 2021), available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)019-e. (Accessed 1 February 20230), CDL-AD(2019)014-e. Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 amending the Laws of Justice, adopted by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019), CDL-AD(2018)017-e. Romania – Opinion on draft amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organisation, and Law No. 317/2004 on the Superior Council for Magistracy, adopted by the Commission at its 116th Plenary Session (Venice, 19-20 October 2018), available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)017-e. (Accessed: 1 February 2023).

101 Available at https://ec.europa.eu/info/files/progress-report-romania-com-2021-370-final_ro (Accessed: 1 February 2023).

102 Available at https://rm.coe.int/decision-87th-greco-plenary-meeting-strasbourg-kudo-online-22-25-march/1680a1ea78 (Accessed: 1 February 2023).

facing the dilemma of the concurrent enforcement of national and EU regulations. In this context, and in light of Article 2 of the TEU in conjunction with other provisions of the Treaties, the application of the CCR decisions and the disciplinary liability of judges for non-compliance with the CCR decisions were discussed, resulting from which was the obligation to remove this liability from the national legislation.

Thus, in the 'first wave' of cases (joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 – *Asociaţia 'Forumul Judecătorilor din România (AFJR Case*), the disputes in the main proceedings follow on

> a wide-ranging reform in the field of justice and the fight against corruption in Romania, a reform which has been monitored at EU level since 2007 under the cooperation and verification mechanism established by Decision 2006/928 on the occasion of Romania's accession to the European Union ('the CVM')'; 'between 2017 and 2019 the Romanian legislature amended Laws No 303/2004, 304/2004 and 317/2004[103] on several occasions. The applicants in the main proceedings dispute the compatibility with EU law of some of those amendments, in particular the amendments concerning the organisation of the Judicial Inspectorate (Case C-83/19), the establishment of the SIIJ within the Public Prosecutor's Office (Cases C-127/19, C-195/19, C-291/19 and C-355/19) and the rules governing the personal liability of judges (Case C-397/19).[104]

In support of their actions, the applicants in the main proceedings refer to the reports from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, of 25 January 2017 (COM(2017) 44 final; 'the CVM Report of January 2017'), of 15 November 2017 (COM(2017) 751 final) and of 13 November 2018 (COM(2018) 851 final; 'the CVM Report of November 2018'); opinion No 924/2018 of the European Commission for Democracy through Law (Venice Commission) of 20 October 2018 on draft amendments to Law No 303/2004 on the statute of judges and prosecutors, Law No 304/2004 on judicial organisation and Law No 317/2004 on the Superior Council for Magistracy (CDL-AD(2018)017); the Group of States against Corruption (GRECO) report on Romania, adopted on 23 March 2018 (Greco-AdHocRep(2018)2); the opinion of the Consultative Council of European Judges (CCJE) of 25 April 2019 (CCJE-BU(2019)4); and the opinion of the Consultative Council of European Prosecutors of 16 May 2019 (CCPE-BU(2019)3). According to the applicants, those reports and opinions contain criticism of the provisions adopted by Romania in the years spanning 2017 to 2019 in light of the effectiveness of the fight against corruption and the guarantee of the independence of the judiciary, whilst the said reports and opinions also set out recommendations for amending, suspending or withdrawing the above-mentioned provisions.

103 So-called 'Justice laws'.

104 Para. (47), Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, available at https://curia.europa.eu/juris/liste.jsf?num=C-83/19&language=ro (Accessed: 1 February 2023).

The requests for a preliminary ruling under Article 267 of the TFEU of the Romanian courts raised, in essence, the interpretation of Article 2, Article 4(3), Article 9 and the second subparagraph of Article 19(1) of the TEU, Article 67(1) and Article 267 of the TFEU, Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), and Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56). As recorded by the CJEU in its ruling,

> the referring courts were uncertain, in that regard, as to the legal nature and effects of the CVM and the scope of the reports drawn up by the Commission under it. (…) According to those courts, the content, legal nature and duration of that mechanism should be regarded as falling within the scope of the Treaty of Accession, with the result that the requirements set out in those reports should be binding on Romania. In that context, the referring courts mention several judgments of the Curtea Constituțională (Constitutional Court, Romania) that have addressed those issues, including judgment No 104 of 6 March 2018. According to that judgment, EU law would not take precedence over the Romanian constitutional order, and Decision 2006/928 could not constitute a reference provision in the context of a review of constitutionality under Article 148 of the Constitution, since that decision was adopted before Romania's accession to the European Union and has not been interpreted by the Court in terms of whether its content, legal nature and duration fall within the scope of the Treaty of Accession.[105]

By the Judgment of 18 May 2021,[106] the CJEU (Grand Chamber) ruled as follows:

> 1. Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, and the reports drawn up by the Commission on the basis of that decision, constitute acts of an EU institution, which are amenable to interpretation by the Court under Article 267 TFEU.
> 2. Articles 2, 37 and 38 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, read in conjunction with Articles 2 and 49 TEU, must be interpreted as meaning that as regards its legal nature, content and temporal effects, Decision 2006/928 falls within the scope of the Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union. That

105 Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3696 (Accessed: 1 February, 2023).
106 Ibid.

decision is binding in its entirety on Romania, as long as it has not been repealed. The benchmarks in the Annex to Decision 2006/928 are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, in the sense that Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports.

3. The legislation governing the organisation of justice in Romania, such as that relating to the interim appointment to the management positions of the Judicial Inspectorate and that relating to the establishment of a section of the Public Prosecutor's Office for the investigation of offences committed within the judicial system, falls within the scope of Decision 2006/928, with the result that it must comply with the requirements arising from EU law and, in particular, from the value of the rule of law, set out in Article 2 TEU.

4. Article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 must be interpreted as precluding national legislation adopted by the government of a Member State, which allows that government to make interim appointments to the management positions of the judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, without following the ordinary appointment procedure laid down by national law, where that legislation is such as to give rise to reasonable doubts that the powers and functions of that body may be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors.

5. Article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 must be interpreted as precluding national legislation providing for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors, where the creation of such a section

– is not justified by objective and verifiable requirements relating to the sound administration of justice, and

– is not accompanied by specific guarantees such as, first, to prevent any risk of that section being used as an instrument of political control over the activity of those judges and prosecutors likely to undermine their independence and, secondly, to ensure that that exclusive competence may be exercised in respect of those judges and prosecutors in full compliance with the requirements arising from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.

6. Article 2 and the second subparagraph of Article 19(1) TEU must be interpreted as not precluding national legislation governing the financial liability of the State and the personal liability of judges for the damage caused by a judicial error, which defines the concept of 'judicial error' in general and abstract terms. By contrast, those same provisions must be interpreted as precluding such legislation where it provides that a finding of judicial error, made in proceedings to establish the State's

> financial liability and without the judge concerned having been heard, is binding in the subsequent proceedings relating to an action for indemnity to establish the personal liability of that judge, and where that legislation does not, in general, provide the necessary guarantees to prevent such an action for indemnity being used as an instrument of pressure on judicial activity and to ensure that the rights of defence of the judge concerned are respected, so as to dispel any reasonable doubt, in the minds of individuals, as to the imperviousness of the judges to external factors liable to have an effect on their decisions and so as to preclude a lack of appearance of independence or impartiality on the part of those judges likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in those individuals.
> 7. The principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU.

As noticed by Professor E.S. Tănăsescu[107] and Professor B. Sălăjan-Guțan,[108]

> The judgment of the CJEU on this specific question was awaited with great interest particularly against the case law of the Romanian Constitutional Court which, in Decisions no. 104/2018 and no 682/2018, ruled that 'since the meaning of Decision 2006/928/EC […] has not been clarified by the Court of Justice of the European Union as regards its content, character and temporal limit and whether all these are circumscribed to the provisions of the Treaty of accession […], that Decision cannot be considered as a reference norm for the judicial review'. As a result, the Romanian Constitutional Court refused to make any further reference to Decision 2006/928/EC and considered that the legislator is within its margin of appreciation, as provided by the 'constitutional identity' corroborated with national sovereignty, whenever it is making laws that regulate the substance matter of topics covered by the CVM.

Further, the CCR issued Decision No 390 of 8 June 2021[109] regarding the exception of unconstitutionality of the provisions of Arts. 88^1-88^9 of Law No 304/2004 on Judicial Organization, as well as the Government Emergency Ordinance No 90/2018 on certain measures for the operationalisation of the SIOJ, delivered by a majority of votes. The Court reiterated its case law on regulating the establishment of the SIOJ, the relationships between the national legal order and the European law,

107 Also judge of the CCR, appointed in 2019.
108 Tănăsescu and Sălăjan-Guțan, 2021.
109 Published in the Official Gazette No. 612 of 22 June 2021.

as well as the principle of the primacy of the Constitution and not of the EU law, also referring to the CJUE Judgment of 18 of May 2021.

Thus, the CCR stated that:

> 55. In the light of the three issues raised by the CJEU, which arise from EU law and, in particular, from the value of the rule of law provided in Article 2 TEU, the Constitutional Court has examined to what extent the rule of law, which is expressly enshrined in national law, in Article 1 (3) of the Constitution of Romania, is affected by the regulations governing the establishment of the SIOJ.
> 56. With regard to the first issue – the absence of objective and verifiable imperatives related to the good administration of justice that would justify the establishment of the SIOJ – the Constitutional Court reiterating the ruling in its case-law regarding the establishment of this section for the investigation of offences exclusively for the professional category of magistrates (see Decision No 33 of 23 January 2018 and Decision No 547 of 7 July 2020, cited above). (…) The Court finds that, in view of certain constitutional values and principles, the right to adopt norms that give content to the Fundamental Law lies with the ordinary legislator. (…)
> 57. Therefore, even if the explanatory memorandum accompanying the law establishing the SIOJ did not mention 'objective and verifiable imperatives' that required the adoption of this regulation, the Constitutional Court found that the normative content of the law shows the aspects aimed at 'good administration of justice': on the one hand, the creation of a specialized investigation structure to ensure a unitary practice regarding the execution of criminal prosecution acts for crimes committed by magistrates and, on the other hand, the regulation of an adequate form of protection of magistrates against pressure exerted on them by arbitrary notifications/denunciations.
> 58. Likewise, regarding the derogatory nature of the regulation (in terms of appointing the chief prosecutor, delegating or seconding prosecutors in this section) from the principle of career separation enshrined in the provisions of Law No. 303/2004 on the status of prosecutors, the Court mentioned that the legislator's option to regulate in the normative act by which the new prosecutorial structure is established those legal norms that have a specific character do not affect the constitutionality of the latter law, since the invoked principle is not enshrined in the constitution, and all other elements regarding the status of the prosecutor remain fully applicable to the SIOJ prosecutors. Thus, with regard to the regulation of the position of the Chief Prosecutor of the SIOJ in terms of compliance with the principle of hierarchical control, given that the SIOJ is a specialized structure within the POHCCJ, the Court has already noted that the Chief Prosecutor of this section is hierarchically subordinate to the Chief Prosecutor of the POHCCJ.
> 59. Regarding the second aspect, on which the CJEU noted that the SIOJ could be perceived as an instrument of pressure and intimidation of judges, which could lead to an apparent lack of independence or impartiality of these judges, the Constitutional Court analysed the four aspects on which the CJEU conclusion was based. (…).

> 70. Taking into account those ruled by the Constitutional Court by Decision No 547 of 7 July 2020, including by reference to the constitutional provisions laid down in Article 1 (3) regarding the rule of law, the legal provisions that established the competence of SIOJ prosecutors to exercise and withdraw appeals in the cases which lie with the section, including in the cases pending before the courts or definitively settled before its operationalization, have ceased their applicability, so that on the date of the pronouncement of the Judgment of 18 May 2021 by the CJUE they were no longer likely to take the legal effects held in the C.J.U.E. act, and the grounds of the European court appear to be without factual and legal support.

The CCR concluded that '*the legislation providing for the creation of SIOJ constitutes a choice by the national legislator*', in accordance with the constitutional provisions contained in Article 1 paragraph (3) on the rule of law and in Article 21 paras. (1) and (3) on free access to justice, the right to a fair trial, and the resolution of cases within a reasonable time '*and, implicit, in accordance with the provisions of Article 2 and 19 (1) TEU*' (paragraph 76).

It can be noted that the CCR has carried out its own analysis of the contested norms, by referring to the provisions of the Romanian Constitution that enshrine the rule of law, and also responding in its own way to the issues raised in the CJEU Judgment of 18 May 2021. Regarding this Judgment, delivered by the CJEU in Case C-355/19, the CCR held that '*this cannot be regarded as a factor which may lead to a jurisprudential reversal in terms of ascertaining the impact of Decision 2006/928 / EC*'.[110] Consequently,

> it upheld its previous case-law and found that the only act which, by virtue of its binding nature, could have constituted a rule applicable to constitutional review carried out in relation to Article 148 of the Constitution – Decision 2006/928 -, by its

110 We have to remind, in this regard, that in a previous case concerning the establishment of the SIOJ, where it had been requested to refer to the CJEU including with reference to Art. 2 of the TEU, in order to interpret the effects of the CVM, established according to Decision 2006/ 928/CE of the European Commission of 13 December 2006, the CCR rejected the application to submit some preliminary questions to the CJEU as inadmissible (Decision no 137/2019, published in Official Gazette No. 295 of 17 April 2019). The CCR held then, in essence, that '*even if these acts (Decision 2006/928/CE and the CVM reports) would comply with the conditions of clarity, precision and unequivocalness, their meaning being established by the CJEU, those acts do not constitute norms that limit to the level of constitutional relevance necessary to carry out the constitutional review by reference to them. Not having met the cumulative conditionality covered by the established case-law of the constitutional court, the Court notes that they cannot substantiate a possible infringement by the national law of the Constitution, as the only direct norm of reference within the constitutional review*' (para. (78)); '*The Court has a limited power, the constitutional review being a legality review aimed at the conformity of the primary regulatory act with the constitutional norms. In this light, the Court notes that the legal provisions by which the Section for the Investigation of offences committed with the Judiciary was established were subject to review, by Decision No. 33 of 23 January 2018, paragraphs 134—159, ascertaining their constitutionality. According to the provisions of Art. 147 para. (4) of the Constitution, the decision of the Court is generally binding*' (para. 81).

> provisions and the objectives it imposes, has no constitutional relevance, as it does not fill a gap in the Fundamental Law, nor does it enhance its rules by setting a higher standard of protection (paragraph 49).

Moreover, the CCR found that:

> the CJEU, in declaring Decision 2006/928 to be binding, has limited its effects from a twofold perspective: on the one hand, it has established that the obligations resulting from the Decision are a matter for the Romanian authorities competent to cooperate institutionally with the European Commission (paragraph 177 of the judgment), and thus for the political institutions, the Romanian Parliament and the Government of Romania, and, secondly, that the obligations are to be exercised in accordance with the principle of sincere cooperation laid down in Article 4 TEU. From both perspectives, the obligations cannot be binding on the courts, i.e. State bodies which are not empowered to collaborate with a political institution of the European Union (paragraph (84));

The CCR held also that

> the application of point 7 of the operative part of the judgment [A/N of the CJEU], according to which a court of law 'is permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19 (1) TEU' has no basis in the Constitution of Romania, since, as previously mentioned, Article 148 of the Constitution enshrines the priority of applying the European law towards the contrary provisions of the national law. However, the reports of the CVM, drawn up on the basis of Decision 2006/928, by their content and effects, as they were established by the Judgment of the CJEU of 18 May 2021, do not constitute norms of European law, which the court of law should apply as a matter of priority, removing the national norm. Therefore, the national judge cannot be put in a position to decide the priority application of certain recommendations to the detriment of the national legislation, as the reports of the CVM do not regulate, so they are not likely to enter into a dispute with the national law. This conclusion is all the more necessary in the event that the national law has been found in compliance with the Constitution by the national constitutional court in the light of the provisions of Article 148 of the Constitution (paragraph 85).

The CCR concluded, in this regard, that

> the principle of the rule of law entails legal certainty, that is to say, the legitimate expectation on the part of the addressees as to the effects of the legal provisions in force and the way in which they are applied, so that any subject of law may predictably determine his or her conduct. In so far as some courts disapply of their own motion

> the provisions of national law which they consider to be contrary to European law, whereas others apply the same national rules, considering them to be consistent with European law, the standard of foreseeability of the rule would be seriously undermined, which would give rise to serious legal uncertainty and, consequently, would lead to the infringement of the principle of the rule of law (paragraph 86).

As a consequence, the CCR rejected, as unfounded, the exception of unconstitutionality of the provisions of Article 88[1](1)-(5), Arts. 88[2]–88,[7] Article 88[8] paragraph (1) a)-c) and e) and paragraph (2), as well as those of Article 88[9] of Law No 304/2004 (with reference to the SIOJ).

Decision No 390/2021 raised criticism and debates. The main issues at stake[111] are contained within the idea that a national court does not have the power to examine the conformity of a provision of national law, which has already been found to be constitutional, with the provisions of EU law (expressed in paragraph (85) of Decision No 390/2021) and the jurisdictional interference – an aspect characterised in the dissenting opinion[112] as to Decision No 390/2021 as follows:

> 5. Beyond monist, dualist or pluralist positions regarding the system relationships between EU law and the national law of the Member States, as well as beyond the distinctions that can be made between the supremacy of the Constitution within any national normative system and the priority of application or the prevalence of EU law in relation to any normative provisions – including those of a constitutional nature – from the national law of the Member States, in the present case it should be noted that the CJEU analysis refers to EU law, and the CCR analysis refers to the Constitution of Romania. That is precisely why the Constitutional Court of Romania acted ultra vires when, not being notified by the court that correctly submitted the exception of unconstitutionality to the CCR and the preliminary questions to the CJEU, it launched into assessments regarding the power of the supranational jurisdiction (see also the Decision of the Constitutional Court No 137/2019, published in the Official Gazette of Romania Part I, no. 295 of 17 April 2019).

In the 'second wave' of preliminary rulings (Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion SRL*), the disputes concern criminal proceedings in connection with which the referring courts ask whether they can, pursuant to EU law, disapply certain decisions delivered by the CCR between 2016 and 2019, namely Decisions No 51/2016 of 16 February 2016 (Case C-379/19), No 302/2017 of 4 May 2017 (Case C-379/19), No 685/2018 of 7 November 2018

111 As it resulted from subsequent meetings between the CCR and the president of the CJEU or conferences on this topic, for example the recent one organized by the Academy of European Law – see Congress 'European Sovereignty: The Legal Dimension – A Union in Control of its Own Destiny' – ERA (online), 13-14 October, 2022; see Safta, 2022d.

112 Signed by judges of the CCR prof. univ. dr Elena-Simina Tănăsescu and dr Livia Doina Stanciu.

(Cases C-357/19, C-547/19 and C-840/19), No 26/2019 of 16 January 2019 (Case C-379/19) and No 417/2019 of 3 July 2019 (Cases C-811/19 and C-840/19). According to the CJEU, the referring courts

> point out that, under national law, the decisions of the Curtea Constituțională (Constitutional Court) are generally binding and that failure by members of the judiciary to comply with those decisions constitutes, pursuant to Article 99(ş) of Law No 303/2004, a disciplinary offence. However, as is apparent from the Romanian Constitution, the Curtea Constituțională (Constitutional Court) is not part of the Romanian judicial system and is a politico-judicial body. In addition, in delivering the judgments at issue in the main proceedings, the referring courts state that the Curtea Constituțională (Constitutional Court) exceeded the powers afforded to it by the Romanian Constitution, encroached upon the powers of the ordinary courts and undermined the independence of the latter. Furthermore, in the view of the referring courts, Decisions No 685/2018 and No 417/2019 include a systemic risk of offences intended to counter corruption going unpunished.

By the Judgment of 21 December 2021,[113] the CJEU (Grand Chamber) ruled as follows:

> 1. Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption is, as long as it has not been repealed, binding in its entirety on Romania. The benchmarks in the annex to that decision are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, to the effect that Romania is required to take the appropriate measures to meet those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports.
> [As rectified by order of 15 March 2022] Article 325(1) TFEU, read in conjunction with Article 2 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995, and Decision 2006/928 are to be interpreted as precluding national rules or a national practice under which judgments in matters of corruption and value added tax (VAT) fraud, which were not delivered, at first instance, by panels specialised in such matters or, on appeal, by panels all the members of which were selected by drawing lots, are rendered absolutely null and void, such that the cases of corruption and VAT fraud concerned must, as the case may be further to an extraordinary appeal against final judgments, be re-examined at first

113 Available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=251504&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=12461 (Accessed: 1 Febraury 2023).

> and/or second instance, where the application of those national rules or that national practice is capable of giving rise to a systemic risk of acts constituting serious fraud affecting the European Union's financial interests or corruption in general going unpunished. The obligation to ensure that such offences are subject to criminal penalties that are effective and act as a deterrent does not exempt the referring court from verifying the necessary observance of the fundamental rights guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union, but does not allow that court to apply a national standard of protection of fundamental rights entailing such a systemic risk of impunity.
> 3. Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928 are to be interpreted as not precluding national rules or a national practice under which the decisions of the national constitutional court are binding on the ordinary courts, provided that the national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive, as required by those provisions. However, those provisions of the EU Treaty and that decision are to be interpreted as precluding national rules under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability.
> 4.The principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928'.

The CCR reacted in a press release, stating, *inter alia*, that none of its decisions mentioned in the Judgment of the CJEU concerned either the creation of impunity in respect of acts constituting serious fraud offences affecting the financial interests of the European Union or corruption offences or the removal of criminal liability for those offences. The CCR pointed out that

> According to Article 147 (4) of the Constitution, the decisions of the Constitutional Court are and remain generally binding', holding that 'moreover, in its judgment of 21 December 2021, the Court of Justice also recognised the binding nature of the decisions of the Constitutional Court. However, the conclusions of the CJEU ruling that the effects of the principle of the primacy of EU law apply to all organs of a Member State, without national provisions, including those of a constitutional nature, being capable of hindering this, and according to which national courts are obliged to disapply, of their own motion, any national legislation or practice contrary to a provision of EU law, requires revision of the Constitution in force. From a practical point of view, this judgment can only produce effects after the revision of the Constitution in force, which, however, cannot be done by operation of law, but only on the

initiative of certain subjects of law, in compliance with the procedure and under the conditions laid down in the Romanian Constitution itself.[114]

After the CCR issued Decision No 390/2021, and with reference to the way in which the CCR interpreted Article 148 of the Constitution in this decision, the Romanian ordinary courts addressed the CJEU with a new series of preliminary references (the so-called 'third wave'[115]) which called into question mainly the rule of law in connection with the independence of the judiciary.

Thus, Curtea de Apel Craiova (Court of Appeal, Craiova, Romania) decided to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Does the principle of the independence of the judiciary, enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the [Charter], preclude a provision of national law, such as … Article 148(2) of the Romanian Constitution, as interpreted by the Curtea Constituțională (Constitutional Court …) in Decision No 390/2021 [of 8 June 2021], according to which national courts have no jurisdiction to examine the conformity with EU law of a provision of national law that has been found to be constitutional by a decision of the Curtea Constituțională (Constitutional Court)?

(2) Does the principle of the independence of the judiciary, enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the [Charter], preclude a provision of national law, such as … Article 99(ș) of [Law No 303/2004], which provides for the initiation of disciplinary proceedings and the application of disciplinary penalties in respect of a judge for failure to comply with a decision of the Curtea Constituțională (Constitutional Court), where that judge is called upon to [apply] the primacy of EU law over the grounds of a decision of the Curtea Constituțională (Constitutional Court), that provision of national law depriving him or her of the possibility of applying a judgment of the Court of Justice … which he or she regards as taking precedence?

(3) Does the principle of the independence of the judiciary, enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the [Charter], preclude a national judicial practice which precludes a judge, on pain of incurring disciplinary liability, from applying the case-law of the Court of Justice … in criminal proceedings in relation to a complaint regarding the reasonable duration of criminal proceedings [referred to] in Article 488[1] of the [Code of Criminal Procedure]?.

114 Available at https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/ (Accessed: 1 February 2023).

115 See Bercea, 2022, p. 58.

By the Judgment delivered in Case C-430/21-RS,[116] the CJEU (Grand Chamber) ruled as follows:

> 1. The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law.
> 2. The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court, thereby departing from case-law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law.

This sequence of decisions, the expression of a tense dialogue, and determined lively doctrinal debates in Romania can all be seen in conferences such as '*CJEU-CCR a necessary dialogue*',[117] or our own Forum proposal at the ICON S Conference (4-6 July 2022) – '*Tensions in constitutional justice. 'Courts against Courts', a recent debate in the EU. Key factors of effective dialogue between Courts at the global level*',[118] or presentations such as *'Courts against Courts? Or a way together? Developments of constitutional review in the European Union and worldwide*'.[119] We will refer to the doctrinal positions in the chapter concerning legal literature on the matter of who raised the problem of the relationship between national law, EU law, constitutional identity and the way in which these issues are interpreted by the CCR and CJEU.

Nevertheless, a significant component of the debate and the conflict between the courts refers to the value of 'soft law' norms in the defence of the rule of law, revealing '*major divergences in the understanding of the European legal framework and of its legal force*'.[120] This is, in the case of the aforementioned decisions, the MCV reports, namely the recommendations made by the European Commission in these

116 Available at https://curia.europa.eu/juris/document/document.jsf?docid=254384&doclang=ro&mode=req&occ=first&part=1&cid=2515584&fbclid=IwAR2tcN3E-WYEhLej1beZeiHQS1eCM2uKMuiAe-E4jsLPn6o4xYatklE-GZE (Accessed: 1 February 2023).

117 Available at https://evenimente.juridice.ro/cjue-ccr-un-dialog-necesar (Accessed: 1 February 2023).

118 Available at https://conference.icon-society.org/event/tensions-in-constitutional-justice-courts-against-courts-a-recent-debate-in-the-eu-key-factors-of-effective-dialogue-between-courts-at-the-global-level/ (Accessed: 1 February 2023).

119 See Safta, 2022e.

120 Ștefan, 2022.

reports. In the opinion of Dr. Oana Ștefan, the use of soft law tools – such as reports – to identify certain violations of the rule of law

> is insufficient and not adapted to the defense of some fundamental values of the Union, on which there should be no divergence of interpretation. Given the non-binding character of these instruments, their use in such areas is not likely to generate deliberations between the various levels of government, but rather to stop any communication.[121]

The case law of the CJEU concerning the disciplinary liability of the judges influenced the Romanian legislation. Recently, new laws of justice have been adopted in Romania, in which the disciplinary liability of judges for non-compliance with the CCR decisions is no longer found as a separate offence.[122] Called to rule on the constitutionality of the new laws, the CCR held that

> according to Article 52 para (3) of the Constitution, 'The State is patrimonially liable for damages caused by judicial errors. The liability of the state is established under the law and does not remove the liability of the magistrates who exercised their function in bad faith or gross negligence'. In other words, regarding the disciplinary misconduct of judges, the legislator correlated Article 126 paragraph (3) and Article 147 paragraph (4) of the Constitution with Article 52 para. (3) of the Constitution, resulting that, without being affected the binding character of the decisions of the Constitutional Court or the ÎCCJ, the liability of judges and prosecutors is engaged under the conditions of Article 52 para.(3) of the Constitution, conditions which also engage, in turn, the state's responsibility for judicial errors. Consequently, Article 271 of the law subject to control further stipulates that non-compliance with the decisions of the Constitutional Court or those of the ÎCCJ pronounced in the resolution of appeals in the interest of the law and requests for the pronouncement of a preliminary decision regarding the resolution of a legal issue constitutes a disciplinary offense when the judge/prosecutor performs his function in bad faith or with gross negligence. Therefore, Article 271 of the law does not violate Article 1 para. (5), Article 124 para. (3), Article 126 para. (3), Article 132 para. (1) and Article 147 para. (4) of the Constitution (para. (336)[123]).

121 Ibid, p. 453.

122 The disciplinary offence related to '*non-compliance with the decisions of the Constitutional Court and the decisions issued by the High Court of Cassation and Justice in the resolution of appeals in the interest of the law*' was introduced by Art. I point 3 of Law No 24/2012 for the amendment and completion of Law No 303/2004 on the status of judges and prosecutors, and Law No 317/2004 on the Superior Council of Magistracy; Law No. 303/2004 was repealed by Law No. 303/2022, published in the Official Gazette no 1102 of 16 November 2022

123 Decision No. 520/2022, published in the Official Gazette no 1100, 15 November 2022.

We could say that there was found (with many controversies and debates) a way to comply with the general binding nature of the CCR decisions, the binding nature of the CJEU judgments, and the independence of judges in the current constitutional framework of the relationships between national and EU law. It remains to be seen how these provisions will be applied and the relationships will evolve.

7. The interpretation of Article 4 of TEU (in particular with regard to national identity) reflected in the practice of the CCR

Examining the case law of the CCR, we note that the concepts of 'constitutional identity' and 'national identity' are invoked in various contexts, whose shaping has a more pronounced dynamic in the Court's recent case law, where the interpretation of Article 4 of TEU is mentioned.

The first relevant jurisprudential landmark for the emergence of the concept of constitutional identity in the CCR practice dates from 2012, when the Court was called to establish the prerogatives of the president and the prime minister in the institutional representation of Romania in the European Council. On that occasion, the Court placed its analysis in a wider context, meaning the characterisation of the EU and its competencies. The CCR held that

> the essence of the Union is the assignment by the member states of certain powers – more numerous – for the achievement of their common objectives, of course, without affecting, in the end, through this transfer of powers, the national constitutional identity – Verfassungsidentitat (see the Decision of the German Constitutional Court of June 30, 2009, pronounced in Case 2 BvE 2/08, regarding the constitutionality of the Treaty of Lisbon). (….) Member States maintain powers that are inherent in order to preserve their constitutional identity, and the transfer of powers, as well as the rethinking, emphasis or establishment of new guidelines within the already transferred powers, belong to the constitutional margin of appreciation of Member States.[124]

In the same year, in a case regarding the status of parliamentarians, the CCR enunciated in the final considerations of the decision, but without defining it, the principle of constitutional identity. The CCR thus noted that

> each Member State, under the principle of national constitutional identity, has full freedom in terms of establishing the normative framework relative to the status of

124 Decision No. 683/2012, published in the Official Gazette No. 479 of 12 July 2012.

> parliamentarians active in the national legislative forum, including the legal regime of patrimonial rights related to the exercise of these functions of public dignity.[125]

A few years later, in 2015, applying the so-called 'doctrine of interposed norms',[126] the CCR used the norms of European law as interposed in the constitutionality review and the concept of constitutional identity as an element/limit in the very content of the said doctrine. The CCR held that

> the previously mentioned European Union acts have a constitutional relevance, which means, on the one hand, that they circumscribe and subsume Article 41 para. (2) of the Constitution, by fulfilling the double conditionality previously mentioned, without violating the national constitutional identity (Decision no. 683 of June 27, 2012, published in the Official Gazette of Romania, Part I, no. 479 of July 12, 2012), and, on the other hand, that it is within the competence of the Constitutional Court finding of the existence of this normative inconsistency between the previously mentioned European Union acts and the national ones, respectively Article 86 para.(6) first sentence of Law no. 85/2006.

In the same year, in a case concerning the regulation of state aid, the CCR held that

> in the application of Article 11 (1) and Article 148 (2) and (4) of the Constitution, Romania fulfils in good faith the obligations resulting from the act of accession, not interfering with the exclusive jurisdiction of the European Union and, as established in its case-law, by virtue of the compliance clause contained by Article 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations it undertook as a Member State. Obviously, all those previously mentioned have a constitutional limit, expressed in what the Court qualified as 'national constitutional identity' (see Decision No 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012, or Decision No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015).[127]

The reference to constitutional identity also appears in subsequent decisions, but in the same enunciative manner, without explaining the content of the concept/principle asserted. Thus, the CCR held in a case concerning the regulation of state aid that

> By accessing to the legal order of the European Union, Romania accepted that, in the fields where the exclusive jurisdiction belongs to the European Union, regardless of the international treaties it signed, the implementation of the requirements resulting

125 Decision No. 964/2012, published in the Official Gazette No. 23 of 11 January 2013.
126 See Deaconu, 2022, pp. 233–258.
127 Decision No. 887/2015, published in the Official Gazette No. 191 of 15 March 2016.

> from them should be subject to the rules of the European Union. If not, it would lead to the undesirable situation that, through the international obligations undertaken bilaterally or multilaterally, the Member State would seriously affect the jurisdiction of the Union and, practically, substitute it in the mentioned fields. Hence, in the field of competition, any public aid falls under the purview of the European Commission, and its contesting procedures belong to the jurisdiction of the Union. By virtue of the provisions of Article148 para.(2) and (4) of the Constitution, Romania fulfils in good faith the obligations resulting from the act of accession, not interfering with the exclusive jurisdiction of the European Union and, as established in its case-law, by virtue of the compliance clause contained by Article 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations it undertook as a Member State. Obviously, all those previously mentioned have a constitutional limit, expressed in what the Court qualified as 'national constitutional identity' (see Decision No 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012, or Decision No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015).[128]

Likewise, the CCR noted, in a case on the matter of integrity standards, that

> there is the right of the legislator to enjoy a margin of appreciation regarding the establishment of additional incompatibilities to those provided by the constitutional text for the offices and dignities expressly provided by the Constitution or by the infra-constitutional laws or, on the contrary, to renounce to some already established by infra-constitutional acts or to opt for an adaptation of the integrity standard, depending on certain circumstances, obviously not and for a removal of the integrity standard, in compliance with the obligations resulting from Romania's membership to the European Union, for example, regarding the establishment of an agency for integrity but, by no means, regarding the obligation of the legislator to establish certain incompatibilities, conflicts of interest or procedures to be followed; in this context, under Article 148 of the Constitution, the legislator is one of the entities that ensures the fulfilment of the obligations resulting from the accession, and the law making process in this matter falls within this margin of appreciation, in compliance with the constitutional limits regarding constitutional identity, read in conjunction with national sovereignty and with the constitutional obligations arising from Article 11 and 20 of the Constitution.[129]

From the analysis of this jurisprudence, it follows that jurisprudential borrowing played an essential role in the emergence of the concept of constitutional identity. It also follows that, more than a decade after the integration into the EU, the idea of constitutional identity did not know a notable development in Romania, except

128 Decision No. 259/2017, published in the Official Gazette No. 786 of 4 October 2017.
129 Decision No. 682/2018, published in the Official Gazette No. 1050 of 11 December 2018.

for its introduction, in 2015, as an element in the doctrine of interposed norms. Nevertheless, the responsibility and preoccupation of the CCR for identifying the content of the constitutional identity are demonstrated by a Conference entitled '*National Constitutional Identity in the context of European law*', organised by the Court in 2019.[130] In that framework, one of the judges of the Court emphasised that the CCR

> has not exploited the concept of national constitutional identify to its fullest so far. This was due, inter alia, to the fact that the Court was keen on proving that European law, i.e. the values and the principles enshrined in the European legal order, are unconditionally accepted.[131]

In the same context, other judges of the CCR showed that

> until now, the Constitutional Court of Romania was not placed in the situation of conducting its own identity control. The case-law established since 2003 and developed especially recently creates however, we could tell, a 'protection shield' of the supremacy of the Constitution, which can be activated in the event the core of constitutional identity would be affected.[132]

A significant development of the concept of constitutional identity, also in relation to Article 4 of TUE, can be found in Decision No 390/2021,[133] in which the CCR held the following:

> 81. A special regulation in the Constitution of Romania refers to the relationships between national law and European Union law, which is established in Article 148 paragrasph (2) and (4), (…) Thus, the accession clause to the European Union includes in the subsidiary a clause of compliance with EU law, according to which all national bodies are in principle obliged to implement and enforce EU law. This also applies to the Constitutional Court, which ensures, under Article 148 of the Constitution, the priority of the application of European law. However, this priority of application should not be perceived in the sense of removing or disregarding the national constitutional identity, enshrined in Article 11 para. (3) in conjunction with Article 152 of the Fundamental Law, as a guarantee of a core identity of the Romanian Constitution and should not be relativized in the process of European integration. By

130 Available at https://www.ccr.ro/wp-content/uploads/2022/01/Volum-Regional-Conf-The-national-constitutional-identity-in-the-context-of-European-law-2019.pdf (Accessed: 1 February 2023).

131 Varga, 2019, available at https://www.ccr.ro/wp-content/uploads/2022/01/Volum-Regional-Conf-The-national-constitutional-identity-in-the-context-of-European-law-2019.pdf (Accessed: 1 February 2023).

132 Teodoroiu and Enache and Safta, 2019, available at https://www.ccr.ro/wp-content/uploads/2022/01/Volum-Regional-Conf-The-national-constitutional-identity-in-the-context-of-European-law-2019.pdf (Accessed: 1 February 2023).

133 Decision No. 390/2021, published in the Official Gazette No. 612 of 22 June 2021.

> virtue of this constitutional identity, the Constitutional Court is empowered to ensure the supremacy of the Fundamental Law within Romania, (see mutatis mutandis the Judgment of 30 June 2009, 2 BvE 2/08 ş.a., pronounced by the Federal Constitutional Court of the Federal Republic of Germany). According to the clause of compliance contained in the very text of Article 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations it undertook as a Member State (see Decision No 887 of 15 December 2015, published in the Official Gazette of Romania, Part I, no. 191 of 15 March 2016, para. 75), however, all those previously mentioned have a constitutional limit, established on the concept of 'national constitutional identity' (see Decision No 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012, or Decision No 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015, Decision No 104 of 6 March 2018, published in the Official Gazette of Romania, Part I, no. 446 of 29 May 2018, para. 81).
> 82. On the other hand, even Article 4 para. (2) of the TEU, expressly establishing that the Union complies with 'the equality of Member States in relation to the treaties', 'their national identity' and 'the essential powers of the State', uses the concept of 'national identity', which is 'inherent to the fundamental political and constitutional structures' of the Member States and which means that the process of constitutional integration within the E.U. has as its limit precisely the fundamental, political and constitutional structures of the Member States.

With reference to the latter decision, Professor M. Guțan expressed[134] the idea that it would include the '*broadest and most relevant*' use of the concept of constitutional identity. It was shown that, on this occasion,

> the CCR developed the two types of constitutional review of European law that it more drafted in the previous decisions, i.e. ultra vires review[135] and the identity review, but without clearly stating if they are distinct, if the ultra vires review would be subordinated to the identity review or, on the contrary, the identity review would be subordinated to the ultra vires review.[136]

Also noted was the '*constitutional loan*', meaning the case law of the Federal Constitutional Court of Germany. Likewise, the same author commented that, in Decision 390/2021, the CCR established, for the first time, the content of the Romanian constitutional identity, by referring to the provisions of Article 152 of the Constitution of Romania (the so-called eternity clause) and

134 Guțan, 2022b, pp. 28–45.

135 This type of review was launched by the Federal Constitutional Court of Germany in Decision *Maastricht* of 12 October 1993 and was aimed at '*the right to examine whether the legal instruments of the European institutions manifest themselves within the limits of the sovereign powers granted to them*'.

136 See Kovacs, 2017, p. 1716.

> it is clearly about equating the Romanian constitutional identity with the identity of the constitution. On the other hand, it is incorrect to claim that the Romanian constitutional identity, understood as the identity of the constitution, is reduced to the content of the eternity clause. As the Court states, the latter only contains an 'identity core'. Therefore, we can accept a wider content of the Romanian constitutional identity.[137]

As regards other dimensions of the constitutional identity, which are not part of the 'eternity clause' provided by Article 152 of the Romanian Constitution, we have mentioned examples in the other chapters, such as the status of parliamentarians or the national justice system organisation.

Thus, in the context of the examination of certain provisions regarding the pensions of parliamentarians, the CCR held that

> regarding the members of the European Parliament, the Court notes that, according to the provisions of Article 223 para.(2) of the Treaty on the functioning of the European Union, published in the Official Journal of the European Union, series C no. 83 of 30 March 2010, it is the European Parliament that decides, by regulations, on its own initiative and in accordance with a special legislative procedure, on the status and general requirements regarding the exercise of the offices of its members, without being opposed to the similar rules corresponding to the legislation of each Member State. To the same extent, each Member State, by virtue of the principle of national constitutional identity, has full freedom in terms of establishing the normative framework regarding the status of parliamentarians active in the national legislative forum, including the legal regime of patrimonial rights regarding the exercise of these public offices.[138]

Likewise, more recently, in the context of the normative succession and the case law that was created with reference to the regulation of the Section for the Investigation of Criminal Justice (SIIJ), the Court also substantiated an element considered to belong to the constitutional identity, namely the *national justice system* organisation. Thus, the Court held that

> it falls within the exclusive competence of the Member State to establish the way of organization, functioning and the delimitation of powers between the different structures of the criminal investigation bodies, since, as the Court held in Decision No 80 of 16 February 2014, cited above, para. 456, the Fundamental Law of the State – the Constitution is the expression of the will of the people, which means that it cannot lose its binding force only by the existence of an inconsistency between its provisions and the European ones. Likewise, the accession to the European Union

137 Ibid.
138 Decision No. 964/2012, published in the Official Gazette No. 23 of 11 January 2013.

> cannot affect the supremacy of the Constitution over the entire legal order (to the same effect, see Judgment of 11 May 2005, K 18/04, pronounced by the Constitutional Court of the Republic of Poland). Furthermore, by Decision No 683 of 27 June 2012, published in the Official Gazette of Romania, Part I, no. 479 of 12 July 2012, the Constitutional Court stated that 'the essence of the Union is the assignment by Member States of certain powers – more and more in number – for the achievement of their common objectives, of course, without affecting, in the end, the national constitutional identity through this transfer of powers' and that, 'according to this thinking, Member States maintain powers that are inherent in order to preserve their constitutional identity, and the transfer of powers, as well as the rethinking, emphasis or establishment of new guidelines within the already transferred powers, belong to the constitutional margin of appreciation of Member States'.[139]

The same idea is supported by subsequent decisions, in which the CCR cited

> the consistent nature of its case-law regarding the legislator's competence to establish or abolish various prosecution structures. Thus, the legislator's option to establish a prosecutor's office structure corresponds to his constitutional power to legislate in the field of organizing the judicial system, and the fact that a pre-existing prosecutor's office structure loses part of its legal powers does not constitute a constitutional issue, as long as the said structure of the prosecutor's office does not have a constitutional enshrinement (Decision No 33 of 23 January 2018, published in the Official Gazette of Romania, Part I, no. 146 of 15 February 2018, para. 127, Decision No 547 of 7 July 2020, published in the Official Gazette of Romania, Part I, no. 753 of 19 August 2020, para. 50, Decision No 390 of 8 June 2021, published in the Official Gazette of Romania, Part I, no. 612 of 22 June 2021, para. 62). Moreover, the abolition of a prosecution structure also falls within the competence of the legislator, and not of the courts (Decision No. 390 of June 8, 2021, paragraphs 84 and 85). However, through the analyzed law, the legislator proceeded exactly to the effect of those established by the Constitutional Court, abolishing a prosecutor's office structure and having its competence taken over by another pre-existing prosecutor's office structure, in compliance with Article 61 para. (1) of the Constitution. The Court emphasizes that the way the national justice system is organized is part of the constitutional identity of Romania.[140]

It should also be noted that, in the case law of the CCR is being used the concept of '*national identity*', such as in a decision by which it ruled in the sense that '*evocation of history and national values are elements of the identity of a people*',[141] and that

139 Decision No. 137/2019, published in the Official Gazette No. 295 of 17 April 2019, in the same regard is also Decision No. 414/2019 published in the Official Gazette No. 922 of 15 November 2019.

140 Decision No. 88/2022, published in the Official Gazette No. 243 of 11 March 2022.

141 Decision No. 592/2020 regarding the objection of unconstitutionality of the Law for the declaration of 4 June as the Day of the Treaty of Trianon, published in the Official Gazette No. 824 of 8 September 2020.

'*Parliament has intervened numerous times and established, by law, days to mark the significance of a certain event for national identity*'.[142]

Based on the few benchmarks mentioned, we would argue that, when we refer to the constitutional perspective, identity can be viewed here and now in the context of the current Constitution, but also in a historical and evolutionary context. The two components complement each other because some aspects of the present Constitution can be better understood through an assessment in a socio-historical-political context since, as argued, a constitution acquires an identity as a result of specific experiences, and the current Constitution of Romania is the result of such an experience – of a set of political aspirations and commitments, illustrative of the nation's past, and options for a future.[143]

Taking a brief look[144] at the Romanian Constitutions, starting from 1866, we find that some of the 'sacrosanct core' elements of the current Constitution are also present there. According to Article 1 of the 1866 Constitution, '*The United Romanian Principalities were an indivisible State under the name of Romania*'. The 1923 Constitution proclaims, in Article 1, that '*The Kingdom of Romania is a national, unitary and indivisible State'* – a provision that is also enshrined in Article 1 of the 1938 Constitution, according to which '*The Kingdom of Romania is national, unitary and indivisible State*'. The Constitution of 1948 sets out, in Article 1, that '*The Romanian People's Republic is a popular, unitary, independent and sovereign State*', whilst the Constitution of 1952 enshrines, in Article 17, that '*The democratic-popular Romanian State – unitary, sovereign and independent State*' and the Constitution of 1965 covers, in Article 1, the characteristics of the State as '*sovereign, independent and unitary. Its territory is inalienable and indivisible*'. Therefore, it follows that, over time, irrespective of the form of government or the political regime, certain essential elements have remained unchanged in the Constitutions, which characterise the Romanian State and which can consequently fall under the concept of constitutional identity, meaning the State's characteristics of being unitary, indivisible, and sovereign. Beyond these 'permanencies', which either cross time or fix the constitutional present (through the 'sacrosanct core of the Constitution'), we found a content of constitutional identity which emerges from the case law of the Constitutional Court previously analysed.

To sum up, according to the jurisprudence of the CCR, the Constitution provides an identity core (the limits of the revision enshrined by Article 152). Still, according to the Court, other principles and values can also be circumscribed to the constitutional identity (without a clear boundary or definition). The CCR has mentioned Article 4 of TEU in its recent case law, but has not yet engaged in a dialogue with the CJEU to identify a commonly accepted meaning of constitutional identity.

142 Ibid.
143 See Enache, 2016.
144 For an extended study on the topic see Guțan, 2022a, pp. 109-129.

8. The academic position as regards the assessment of the impact of EU law on the Romanian legal system

Examining the Romanian legal literature on the matter of EU law, there can be identified, as a general rule, various works and articles sought over time to explain the legal order of the EU,[145] the analysis of the case law of the CJEU concerning the fields of interest for the authors, the studies concerning jurisprudential developments of the acts of the EU institutions and their effects,[146] the examination of the issue related to the preliminary references[147] or of the preliminary references formulated by the Romanian courts of law, the EU law in the case law of the CCR[148] or the developments of the constitutional review at the confluence of national-European levels.[149] The legal literature concerning this field has increased over time, correlative with the development of EU law and the phenomenon of European integration.

At various times and intensities, the CCR was under the spotlight, as the case law established regarding the interpretation and application of EU law and the relationships with the CJEU was the target of critical assessments. In the context of the polemics determined by the topic of priority vs. primacy of EU law, criticism was also directed towards the CJEU. One such moment that raised lively debates was the ascertainment of the unconstitutionality of Law No 298/2008 transposing, into national law, Directive 2006/24/EC on data retention (the Data Retention Directive). The CCR declared unconstitutional the law in its entirety,[150] for going beyond a justified and proportionate limitation of the rights to privacy, secrecy of correspondence, freedom of expression and presumption of innocence, as guaranteed by the Constitution.

The CCR was criticised because it, when '*confronted with a national law transposing a piece of EU secondary legislation allegedly violating human rights, adopted a completely EU-blind attitude. The Court simply nationalized the EU source of the national law*'.[151] The same author mentioned the reactions from the European Commission, '*which called on the Romanian Parliament to comply with the obligations under the Directive, notwithstanding the decision of the CCR*'.[152] Another work[153] provided commentaries on the same moment because

145 For example Sandru and Banu, 2013.
146 See, for example, Mazilu-Babel and Zanfir, 2013a; Mazilu-Babel and Zanfir, 2013b; Mazilu-Babel and Zanfir, 2013c; Sandru, 2015.
147 For example, Şandru and Banu and Călin, 2013.
148 For example, Safta, 2015.
149 Toader and Safta, 2016.
150 Decision No. 1258/2009, Official Gazette No. 798 of 23 November 2009.
151 Viță, 2019, pp. 1623–1662.
152 European Commission, press release – IP/11/1248, 27 October 2011, Data retention: Commission requests Germany and Romania fully transpose EU rules, available at http://europa.eu/rapid/press-release_1P-11- 1248 en.htm (Accessed: 1 February 2023).
153 Efrim and Zanfir-Fortuna and Moraru, 2013.

> even though the reviewed national law was merely a translation of Directive 2006/24/EC on Data Retention, the CCR did not address the relationship between the directive and national law, the margin of appreciation that Romania had for its transposition, or the possibility of addressing a preliminary reference to the CJEU.

These specific instances of criticism are placed in a general critical context of the attitude of the CCR at that moment, qualified as hesitating, to address preliminary references ('*the Hesitating Steps of the Romanian Courts Towards Judicial Dialogue on EU Law Matters*'), including also the interpretation of Article 148 of the Constitution, called, in the same specialised literature, '*the Achilles heel in the CCR's case law after 2007, in the sense that whenever it stumbled upon it, the Court avoided analysing its legal effects within the constitutional review of national legal provisions*'.[154]

The manner in which the CCR consistently ruled on the relationship between the Constitution and EU law was also not exempt from criticism. For example, Prof. V. Stoica and co-authors[155] held, *inter alia*, that the interpretation of the phrase 'internal laws' contained in Article 148 para. (2) of the Constitution, in the sense that it would refer only to ordinary and organic laws and not to constitutional ones,

> ignores the adage ubi lex non distinguit, nec nos distinguere debemus. In addition, when the Constitution was revised in 2003, the principle of the priority of European law over domestic law, including constitutional laws, was already outlined in the jurisprudence of the CJEU, starting with the judgment of July 15, 1964, pronounced in the Costa v Enel case.

However, the most heated forms of criticism and disputes were determined by the most recent Decision No 390/2021 of the CCR, which we referred to several times in our presentation. One of the most radical instances of criticism belongs to Professor V. Perju, in a study entitled 'Roexit through the decision 390/8 June 2021 of the CCR?'.[156] He noted that

> the decision of the CCR violates the basic structure of European law, not for the first time in the Court's case-law. Contrary to European law, the judges of the CCR limit the primacy of European law to the fields in which European institutions have exclusive powers. Contrary to European law, the judges of the CCR do not recognize the primacy of European law over national constitutional norms. Contrary to European law, the judges of the CCR constrain the application of European rules in Romanian law on the fulfillment of additional conditions contrary to European case law, such as the condition that European rules 'fill a gap in the Fundamental Law' (para. 49). Contrary

154 Efrim, Zanfir-Fortuna, and Moraru, 2013.
155 Stoca, 2022, see also the opinion expressed by Professor (2022), pp. 335–336.
156 Available at https://www.hotnews.ro/stiri-opinii-24865338-roexit-prin-decizia-ccr-390-8-iunie-2021.htm (Accessed: 1 February 2023).

> to European law, which has always made a clear distinction between EU law and international law, the judges of the CCR discuss the decision of the European Court in the context of the relationship between Romanian and international law. Contrary to European law, the CCR draws the attention of the referring court that it does not have powers of not applying the national legal norms contrary to European law. A large part of the reasoning of the CCR in Decision 390 deals with the judgment of the European Court as a test that the CCR applies to the amendments to the justice laws, summing up that they are consistent with European law. This method is questionable.

Likewise, the same author emphasized that

> probably realizing how questionable the constitutional analysis is, the CCR seeks to save itself by invoking the principle of national identity protection. According to this principle, the transfer of national sovereignty to the European level is impermissible when the effect of such transfer harms the national identity. A doctrinal invention of German origin, this principle does not help the reasoning of the CCR in the present case. National identity could have certain legitimacy when invoked, as the Karlsruhe Court did last summer, to protect mechanisms for democratizing decisions in fields such as fiscal ones. However, the CCR invokes national identity with a completely different goal, namely to justify a judicial organization that has the effect of limiting the independence of the judiciary.

Professor B. S. Guțan also expressed critical opinions, arguing that the CCR '*literally renders the CJEU judgment devoid of any effect in respect of national courts and practically forbids the latter to apply EU law and disregard contrary provisions of the national legislation*'.[157] The cited author concludes her 'trilogy' entitled 'A Tale of Primacy' regarding the manner in which the CCR relates to EU law by referring to positions of the same Court in public correspondence:

> The third act, but not the end, of this 'game of Courts' came on 9 November 2021, with a letter addressed by the Romanian Constitutional Court, under the signature of its president, to the acting minister of justice, as a response to a request to assist the ministry in preparing a 'reply to Mr. Didier Reynders on the issue of the principle of priority for the application of European law in the light of the Constitutional Court Decision no. 390 of 8 June 2021'.[158]

Carrying on the observations on the positions of the CCR, in the latest post in continuation of those mentioned, under the title Who's Afraid of the 'Big Bad Court'?[159] Professor B. Guțan argued that

157 Selejan-Gutan, 2021b.
158 Selejan-Gutan, 2021c.
159 Available at https://verfassungsblog.de/author/bianca-selejan-gutan/ (Accessed: 1 February 2023).

> the end of 2021 brought a new chapter in the saga of how should the primacy of the EU law be applied by Romanian courts. A press release of the Romanian Constitutional Court, issued on 23 December 2021, raised concerns about the conformity with the principles set forth in the case law of the CJEU regarding the primacy. The press release, albeit a non-legal document, might have a dissuasive effect upon the judges who would be, otherwise, willing to disapply some norms of internal law, according to the latest judgment of the CJEU on the matter. In Romania, the disregard of the decisions of the Constitutional Court can be a ground for disciplinary action against judges.

Critical opinions were also expressed regarding the judgments issued by the CJEU. Thus, Professor M. Voicu, in an analysis of the CJEU Judgment of 18 May 2021,[160] stated that

> The CJEU requires the national courts to check whether the SIOJ 'carries out its powers in compliance with the requirements laid down by the EU's Charter of fundamental rights', without expressly mentioning them or at least indicating the specific text of the Charter, which, in fact, does not exist, because there are no provisions relative to prosecutors in the TEU, TFEU, nor in the Charter, and the subject-matter of Article 47 is 'the right to an effective remedy and a fair trial', before an 'independent and impartial court, established by law' (?!)'; 'Although, repeatedly, he stated that in the matter of the organization and functioning of the courts and prosecutor's offices, the jurisdiction falls exclusively within the national authorities, by the same judgment, the CJEU arrogated to itself this prerogative, invoking the MCV Decision 2006/928, binding for Romania and justifying the fight and against the financial interests of the EU, which is unacceptable for the authority and prestige of such a European court'; 'Likewise, the introduction of an essential criterion to decide upon the establishment and functioning of the SIIJ, that it be 'imposed by objective needs and the good administration of justice', appears as an excess of power, but also as an unacceptable confusion, because, in the constitutional and legal status of the Public Ministry and prosecutors (Articles 131-132) there are no such prerogatives, since this jurisdiction falls exclusively within the courts, which 'carry out justice' according to Article 126 of the Constitution. Furthermore, the wording of the phrase in the analyzed paragraph is confusing, complicated, with unclear expressions and atypical terms, without reference to the relevant legal and constitutional provisions and, above all, to the incidental provisions of the TEU/TFEU, entered into force from 01.01.2009 (?!).

These strong opinions, as well as others, were expressed in the context of a significant polarisation of academic interest in the subject of the relationships between EU and national law, which took place in 2021-2022, after the decisions pronounced by certain Constitutional Courts (from Germany, Poland) on the same issues. Professor

160 Voicu, 2021.

M. Duțu discussed '*A major danger: the legal disintegration of the European Union!*',[161] pointing out, with reference to the case law of the German and Polish Constitutional Courts and recurrent disputes, that such 'breakdowns' in the perception, acceptance and application of the relationship between EU law and national law, as well as the actions and positions of the Luxembourg court and those of national jurisdictions

> are not new. The current 'war of the last word' between the jurisdictions undermines the authority of the CJEU, opens up the way for encouraging confrontations and brings back into debate the principle of the primacy of EU law over national rights.

According to Professor Duțu,

> in their activity and cooperation, the CJEU and national jurisdictions must follow the rules of mutual tolerance, moderation and adaptation whenever possible, forcing themselves to resolve the tensions between the respective legal orders based on the norms of international civility. The conflict between EU-European law and the inviolable elements of the constitutional orders of the member states does not find an express solution in the texts of the founding treaties of the Union; concerns of this kind that could be circumscribed in particular to the provisions of Article 4 and 6 of the TEU are not sufficiently clear and relevant to solve the problem.

In the article '*European constitutional justice. Too much constitutional law in the European Union?*',[162] we expressed that

> The dialogue of the judges – even through a fulfillment of its consistency, is not enough. Legal certainty and the preservation of both the constitutional status of the EU and the Member States, and a future of their integration, require the use of the same language of constitutional law. The generous 'hat' of the rule of law can be a wise premise for achieving this unity, as an integrating and unifying principle, if it is used in moderation and with the assurance of support from the Member States. In this way, the political factor would support European constitutional justice to achieve the objectives of European integration, correcting the excesses of one side or the other and supplementing the jurisdictional dialogue. Furthermore, it remains to be seen how this political mechanism will be embodied at the legal level – will it be followed by legislative amendments, at the supranational and/or national level? Maybe even constitutions/treaties? Otherwise, the risk – emphasized in the specialized literature – is of the erosion of the CJEU, involved in disputes on the authoritarian way in which it seeks to maintain the European construction. We exclude the hypothesis of a possible 'alliance' of the constitutional courts against the doctrine of primacy of EU

161 Duțu, 2021.
162 Safta, 2022b.

law,[163] as long as it would endanger the membership of the States to the EU, its own constitutional framework preventing de plano such an approach and imposing, in shaping the mentioned legal relationships, a nuanced approach. However, we believe that a focus/limitation of the discussions on the relationships between the courts diverts the attention from the real issue of the constitutional framework of the EU as a whole, which requires political and legislative regulation, perhaps even starting with the full acceptance of the idea of EU constitutionalism.

The vivacity of the debates and the importance of the topic determined the organization of a national Conference, at the beginning of 2022, under the title *CJEU-CCR. A necessary dialogue*.[164] The conference benefitted from a significant representation of academics and practitioners in the field. Its works led to a volume entitled *CJEU and CCR, Identities in dialogue*, published at the end of 2022.[165] The articles

163 We cited also the work of Rasmussen, 2021.

164 See https://evenimente.juridice.ro/cjue-ccr-un-dialog-necesar (Accessed: 1 February 2023).

165 Stoica, V. (ed) 2022; the volume collects the following articles: Stoica and Bogdan and Pintilie, 2022, Bercea R. – *Cântecul sirenelor, Curtea Constituțională a României ca Ulise dezvrăjit (Mermaids' song, the Constitutional Court of Romania as Ulysses bewitched)* (pp. 50–89); Bogdan D., Mihai L. *Între Constituții și dreptul UE: Abordări în alte state membre (Between Constitutions and EU law: Approaches in other Member States)* (pp. 89–140), Carp, 20 (pp. 140–149); Dănișor D.C. *Dreptul național(ist), democrația cosmopolică și starea de drepturi europeană (National(ist) law, cosmopolitan democracy and the European state of rights)* (pp. 149–233), Deaconu Ș.– *Relația dintre dreptul UE și Constituția României. Diverse abordări (The relationship between EU law and the Romanian Constitution. Various approaches)* (pp. 233–258); Gâlea I. *Cheia de boltă a sistemului jurisdicțional al Uniunii Europene: Scurtă privire asupra rațiunii importanței acordate dialogului dintre Curtea de Justiție a Uniunii Europene și instanțele naționale* (*The keystone of the European Union's judicial system: Brief look at the reason for the importance given to the dialogue between the Court of Justice of the European Union and national courts*) (pp. 258–291); Lupu A.R.– Identitatea constituțională națională și dreptul Uniunii Europene (*National constitutional identity and European Union law*) (pp. 291–313); Motoc I. *Dialogul dintre CJUE, CEDO și Curțile Constituționale europene: reflecții despre pluralismul constituțional și art.2 TUE* (*The dialogue between the CJEU, the ECHR and the European Constitutional Courts: reflections on constitutional pluralism and art.2 TEU)* (pp. 313–333); Perju V. *Nucleu Identitar, infraconstitutionalism și deriva conceptuală în spațiul juridic românesc și european (Core Identity, infraconstitutionalism and conceptual drift in the Romanian and European legal space)* (pp. 333–352); Pintilie C. Este posibil dialogul în lipsa revizuirii Constituției? (*Is dialogue possible in the absence of revision of the Constitution?)* (pp. 352–365); Predoiu C. –Poziția Ministrului Justiției cu privire la principiul supremației dreptului Uniunii Europene (*The position of the Minister of Justice regarding the principle of supremacy of European Union law*) (pp. 365–369); Safta M. *Independența judecătorilor- Condiție a integrității dialogului judiciar în Uniunea Europeană* (*The independence of judges – Condition of the integrity of the judicial dialogue in the European Union)* (pp. 369-390); Spineanu-Matei O. *Principiul supremației dreptului Uniunii Europene* (*The principle of supremacy of European Union law*) (pp. 390–414); Stancu M., Angevin F.- *Rolul judecătorului național în cadrul contenciosului european* (*The role of the national judge in European litigation*) (pp. 414–430), Ștefan O. *Apărarea statului de drept între noua guvernanță și guvernare, între autonomia dreptului european și suveranitatea națională* (*Defending the rule of law between the new governance and governance, between the autonomy of European law and national sovereignty*) (pp. 430–463), Toader C. Principiul cooperării loiale și rolul său în rezolvarea conflictelor (*The principle of loyal cooperation and its role in conflict resolution*) (pp. 463–475); Constantin V. *Paleosuveraniști vs activism fragil* (*Paleo Sovereigns vs Fragile Activism)* (pp. 475–495)

published in this volume are relevant for the opinions, in Romanian legal literature, on topics such as the relationship between EU law and national law, the relationship between Courts at the EU level, and the national constitutional identity. Examining these articles, we can say that, in the Romanian legal literature, convergent points of view on the mentioned topics have been outlined.

In the article that opens the volume, Professor V. Stoica and the co-authors emphasised an essential terminological clarification, showing that

> In constitutional law, the supremacy is the quality of the fundamental law, in relation to which the validity of the infraconstitutional norms is assessed. This quality explains the invalidation of legal norms inconsistent with the Basic Law through a priori or a posteriori control of unconstitutionality. Non-compliance with European law does not invalidate the domestic legal norm, but removes it from application in the case brought to trial, and European law is applicable with priority. This (priority/prevalence) is the term used in Article 148 para. (2) of the Constitution. The effect of the invalidation is general for the future, the priority application is particular, and limited to the case brought to trial before the domestic court.[166]

As far as the relationship between EU law and national law, and that between Courts at the EU level, are concerned, the priority (*prioritatea*) of EU law does not seem to raise problems of interpretation, being, as expressed by Professor V. Constantin, '*a functional fact, in the absence of which the effective integration projected by the Treaties would become impossible*'.[167]

Dr. O. Spineanu-Matei, Romanian judge of the CJEU, characterising the principle of supremacy (*supremației*), underlined that it is '*a fundamental principle of EU law that makes its very existence possible, without the observance of which the entire European construction would be in danger, if not to collapse, at least to seriously falter*'.[168] At the same time, judge O. Spineanu-Matei specified that the principle of supremacy '*was not formally enunciated by any of the original EU treaties, but its existence was inferred by the CJEU more than 50 years ago*'.[169] Further, in terms of the question regarding whether the principle of the supremacy of EU law also applies in relation to the Constitutions of the Member States, the above shows that, from the point of view of the CJEU, '*the answer is clearly affirmative*'.[170]

Prof. R. Carp concluded, in his article, that supremacy (supremația)

> is not an immutable principle, whose coordinates have been established once and for all by Costa v Enel jurisprudence. This principle is not part of the provisions of

166 Stoica, 2022, p. 9.
167 Constantin, 2022, p. 477.
168 Soineanu-Matei, 2022, p. 391.
169 Ibid., p. 392.
170 Ibid., p. 400.

> the treaties on the basis of which the EU operates, but doctrine and jurisprudence recognize its extremely important role for defining the legal order of the EU. Supremacy refers not only to national infraconstitutional norms but also to constitutional norms.[171]

Also referring to the principle of the supremacy of EU law, Dr. C. Predoiu, the Minister of Justice, showed that one of the main problems raised by the principle of supremacy over time

> consisted in the evolution of its limits including by reference to the national constitutions. (…) In this context, the institutional and judicial dialogue between the supreme courts and the constitutional courts of the EU member states, on the one hand, and the CJEU, on the other hand, can lead to the clarification of certain complex issues.[172]

Likewise, Professor C. Toader, former Romanian judge of the CJEU, emphasised the importance of loyal cooperation and its role in resolving conflicts,[173] advancing the concept of 'respectful dialogue', whose basic principle is the specific and autonomous understanding of the principle of loyal (sincere) cooperation between judicial authorities, based on Article 4 (3) of TEU. According to Professor C. Toader,

> this model of judicial deference overcomes the shortcomings of other classical constitutional theories, which attempt to settle once and for all the question of who decides who decides? Thus, the idea of judicial dialogue does not necessarily translate into conflicts between courts, nor does it invalidate the authority of any court. Deference implies more than an interpretive dialogue, it means a procedural way of judicial dialogue through the preliminary ruling procedure.

Professor V. Stoica and the co-authors concluded that the various divergent solutions pronounced by the CJEU and the constitutional courts '*represent the expression of a natural potential conflict that any institutional structure with parallel and/or overlapping levels contains*'. With legal dialogue, either formally through questions for the rendering of preliminary rulings, or informally through a network of mutual consultation of national and European courts,

> it is possible and necessary to remove these divergences, based on the principle of priority of European law. Of course, this dialogue does not replace the principle of the priority of European law, but removes the asperities that the dogmatic application of this principle has generated in the past and could generate in the future.[174]

171 Carp, 2022, p. 147.
172 Predoiu, 2022, p. 368.
173 Toader, 2022, p. 473., see also Pintilie, 2022, pp. 352–364.
174 Stoica, 2022, p. 21.

As regards the topic of national constitutional identity, Dr O. Spineanu-Matei, judge of the CJEU, showed that, together with the principle of supremacy, Union law contributes to defining

> the Union as a common space, which brings and harmonizes distinct identities, giving the Court of Justice the last word regarding the interpretation of the law of the union, including when this interpretation requires a balancing of the arguments based on the provisions of Article 4 para. (2) TEU.[175]

Professor I. A. Motoc, judge of the CtEDO, emphasised that national identity, provided for in Article 4 (2) of TEU,

> means that the member states can define their structures and fundamental, political, and constitutional principles. However, with the entry into force of the Treaty of Lisbon, the decision on the compatibility of national identity with EU obligations always belongs to the CJEU, which is the only one competent to rule on its competencies. Based on this national identity, as recognized by Article 4 para. (2) TEU, the constitutional courts verify the EU acts through the prism of the identity aspects enshrined in the constitutions of each member state. In certain exceptional circumstances, member states are even allowed to invoke constitutional limits regarding the supremacy of EU law, but the extent of these constitutional limits is bounded, controlled by the principle of loyal cooperation provided for in Article 4 para. (3) TEU.[176]

In the opinion of Professor V. Stoica and the co-authors,

> the dynamic balance between national identities and European identity is the most important objective of the European construction. Opposing this identity is counterproductive. They are complementary. Every national identity also includes the European dimension, and the European identity also includes the national dimensions. Those who thought, founded and successively refined the European institutions also took into account the idea of unity, and the desire of nations to preserve their identity.(…) The doctrine of constitutional identity and the doctrine of constitutional pluralism (…) they cannot and must not justify abandoning the principle of the primacy of European law, nor sacrificing the competence of the CJEU to have the last word in disagreements with constitutional and other national courts. After all, the notion of national identity and the subsequent notion of constitutional identity are not only notions of domestic law, but also autonomous notions of European law. This last interpretation prevails in relation to the domestic law interpretation of the two notions. It is therefore natural that the CJEU (…), which also has the role of guardian of the priority of European law, has the competence to decide in the last instance in

175 Spineanu-Matei, 2022, p. 412.
176 Motoc, 2022, p. 324.

> disputes in this category. (…) Although national identity and constitutional identity are autonomous notions of European law, the definition by the CJEU of the elements included in their content must also take into account their domestic law acceptance. Moderation is the crucial condition for exercising the role of the CJEU.[177]

Regarding the CCR jurisprudence, it should be emphasised that the criticism expressed by some of the cited authors does not call into question the independence of the CCR, but instead how it uses '*strategic concepts such as that of constitutional identity,*[178] *how the CCR evades the Constitution from the sphere of influence of EU norms*[179] *or the 'still variable use of the notion of national constitutional identity*".[180]

In addition to the articles published in the volume coordinated by Professor V. Stoica, there is a significant body of legal literature in Romania that analyses the concept of constitutional identity.

Thus, it is worth noting the conceptual distinction made by Professor M. Dutu, who showed that

> the affirmation of constitutional identity is a major factor in the affirmation of national identity, the achievement of unity in diversity, the responsibility of the requirement of capitalizing on traditions and continuous adaptation to new realities, of the imperative of mutual respect of individuals, nations and States.[181]

In this light, and with reference to '*the relationship between the national identity clause and the European integration clause*', Professor Duțu believes that '*the constitutional review of laws arises as the main means of affirming constitutional identity, and the constitutional judge as the first factor of its promotion, without deviation, of the letter, spirit and specificity of the Constitution as a normative reality*'.[182] In the same author's view,

> specifying the content, from a legal point of view, of the concept of national constitutional identity, remains difficult and imprecise. Two approaches are possible in this sense: a formal one and a material one. According to the first one, only constitutional norms that cannot be subject to revision would enter into the constitutional identity of a State. (…) In the second approach, it is necessary to establish the norms that are part of the constitutional identity. Thus, the doctrine proposed numerous solutions, the proposed lists being more or less extensive, but including, in most cases, fundamental rights, institutional organization and language.

177 Stoica, 2022, pp. 14–23.
178 Perju, 2022, pp. 333–351.
179 Ibid.
180 Lupu, 2022, p. 294.
181 Duțu, 2016, p. 111.
182 Ibid.

As for the issue of constitutional identity in Romania, the same author was of the opinion that,

> under the conditions of an absolute silence of the constitutional text, of the constitutional case-law and even of the doctrine, it is obvious that the sacrosanct core of the Romanian Constitution of 1991, which expresses, to a large extent, the constitutional identity, is composed primarily by the values whose achievement forms the limits of the review of the fundamental law, set out in Article 152 (1) and (2) thereof (…) For a Member State of an integration organization such as the EU, the intangibility of such values manifests itself, internally, by forbidding the possibility of amending the legal norms for their protection by the derived constituent power, and in the European Union context it establishes the absolute limits of integration. Thus, they represent the defining criteria of constitutional identity.[183]

On the same topic, we found the extensive analysis of Professor M. Guțan in the article 'Is the Constitutional Court of Romania a standard-bearer of the national constitutional identity?'.[184] According to Professor M. Gutan,

> the national (constitutional) identity was, subsequently, generously placed at the disposal of the EC/EU Member States[185] as a legal instrument aimed at creating the framework and facilitating the dialogue between the ECJ and the national constitutional courts, under no circumstances with the aim of erecting walls, 'arming' the Member States and jeopardizing the common European project. Most commonly, without having a previous theoretical concern for their own constitutional identity, the constitutional courts of the Member States undertook this punctual instrument, from more or less sovereigntist positions. Beyond facilitating or hindering the dialogue with the ECJ, this jurisprudential approach emphasized, on the one hand, the importance of the issue of national constitutional identity and, on the other hand, the need for a wider theoretical development thereof. After all, you cannot assert and protect, as a nation, your own (constitutional) identity without being aware of it, delimiting it and conceptualizing it. Since the constitutional courts had evasive or incomplete positions regarding the content of the national constitutional identity, despite their central role, it often fell to the doctrinaires the mission to deepen and finally provide an overall view. Thus, the national constitutional identity became not only a puzzle to be unveiled and put together piece by piece by the constitutional courts, but also the object of a systematic, anticipatory reflection, which would comprehensively give substance to any future national reservation towards European constitutional integration.

183 Ibid. p. 116.

184 Guțan, 2022b, pp. 28–45.

185 The first recording of the principle of national identity, together with the principle of subsidiarity, intended to delimit the EC's ability to 'excessively' expand their powers at the expense of national and regional powers, was in the Maastricht Treaty (1992). See Fromage and de Witte, 2021, p. 412.

As regards Romania's situation, Professor M. Guțan stated, in the article cited above, that

> the assumption by the CCR of the right to establish the content of the Romanian constitutional identity from the positions of the privileged one to establish the subjective coordinates of its own identity cannot lead to abuses or the fall into irrelevance. Related to this issue, a systematic, open, objective analysis of constitutional identity is deemed necessary, in a European context or not. If Article 152 represents the essence of the Romanian constitutional identity, any analytical approach should start from understanding why, how and under what conditions those values and principles became the hard identity core of the 1991 Constitution.

The points of view expressed, although they do not fully clarify the complex issue of constitutional identity, offer some perspectives to answer questions that remain relevant:

> What exactly is constitutional identity? What does 'identity' mean? Whose identity or the identity of what? Who is allowed or entitled – granted legitimacy – to identify or determine such constitutional identity, especially in light of disagreements? Can our constitutional identity evolve? Can it be legitimately transformed? And, if so, how it can?.[186]

We conclude with the opinion of Dr. A.R. Lupu,[187] which emphasised the importance of dialogue between constitutional judges:

> the most credible solution remains that of an increasingly close collaboration between the Court of Justice and the constitutional courts, in order to bring their jurisprudence closer to the concepts of national identity and, respectively, national constitutional identity. Of course, the decades since the establishment of European construction allow us to be skeptical about rapid progress in this regard. However, we cannot forget that the essential doctrines of the Luxembourg court have been internalized over time by national judges, be they constitutional, as long as various concessions have appeared over time from European judges. Such a future may also have the problem of national constitutional identity.

186 Martí, 2013, pp. 17–36.
187 Lupu, 2022, p. 312.

9. The dialogue of the judges as a way to establish the meaning of the constitutional identity and a 'key' of a harmonious European constitutional order

We dealt extensively with this issue in the work *The Dialogue of Constitutional Judges*,[188] in which we noted several dimensions of this dialogue: by way of preliminary references (vertically, between national courts, including constitutional ones and the CJEU); within international structures, namely associations of constitutional courts, the Venice Commission and the collaborating networks established at the level of the ECHR and the CJEU; and within the various forms of bilateral cooperation.

To the mentioned forms, which we would qualify as 'institutionalized', we feel there should be added the articles and studies written by judges, attorney generals, junior barristers, assistant magistrates, and clerks, all of whom can be academics and lawyers at the same time. As has been noted by other authors,[189] the members of the CJEU have been active, for example, in spreading the message of the autonomous nature of EU law, the constitutionalisation of treaties (through the case law of the CJEU established by them), and the development of the CJEU as a constitutional court. Likewise, the dialogue between the courts is carried out through their own staff, paying mutual visits (CJEU, ECHR, constitutional courts) or participating in academic meetings. An implicit form of dialogue is the invocation by constitutional courts and national judges of the case law belonging to the CJEU and the ECHR. These forms of cooperation support the one carried out by way of preliminary references, being noteworthy the rootedness of the practice of participation in conferences such as the Congress of the Conference of European Constitutional Courts, of the presidents of the ECHR and the CJEU, and the constant participation of the representatives of the Venice Commission in various meetings of the European constitutional courts.[190] The aforementioned cooperation does not settle, in itself, conflicts; however, the declarations and the resolutions adopted on such occasions mark common positions, often of mutual support, addressing issues of common interest, positive in the overall institutional dialogue.

Furthermore, we will refer briefly to each of the main forms/dimensions of dialogue which are entirely applicable in Romania.

Regarding the preliminary references, we have repeatedly emphasised[191] our opinion on the importance of this dialogue mechanism. The preliminary reference connects the courts of law of the Member States with the CJEU, regardless of their type, namely judicial ones or special ones. Its mechanism should ensure the use

188 Toader and Safta, 2016.
189 Claes and De Visser, 2012, pp. 100–114.
190 For information, see https://www.venice.coe.int/webforms/events/ (Accessed: 1 February 2023).
191 Safta, 2022b.

of the same 'language' in all EU constitutional systems, to the effect of uniform interpretation and application of EU law. In this light, the role of the CJEU in the development of the EU legal order is noteworthy, with a certain idea being generally accepted, namely that '*no other institution has carried out such a decisive action to define the main characteristics of the order, to impress an extraordinary acceleration of its volition and to guide, unequivocally, for the purpose of intensifying the integration process*'.[192]

Romanian courts of law launched the direct dialogue with the CJEU in the first year of EU membership, specifically in January 2007. It was a lower court, the Tribunal of Ilfov County, that addressed the first question for a preliminary ruling to the CJEU in the *Jipa Case* C 33/07.[193]

The CCR launched the dialogue by way of preliminary reference much later,[194] in a case having as its subject matter the exception of unconstitutionality of the provisions of Article 277 paragraphs (2) and (4) of the Civil Code,[195] text with the marginal title

> Prohibition or equalization of certain forms of cohabitation with marriage, having the following wording: '(2) Marriages between persons of the same sex concluded or contracted abroad either by Romanian citizens or by foreign citizens shall not be recognized in Romania.[…] (4) The legal provisions regarding the free movement on the territory of Romania of any citizen belonging to the European Union countries and the European Economic Area shall remain applicable.

The exception was raised in the context of the Romanian authorities' refusal to grant a right of residence, as a family member, to the same-sex spouse (American citizen) of a Romanian citizen. The refusal was grounded by invoking the mentioned Civil Code norms. In examining the exception of unconstitutionality, the CCR presented its analysis, placing it in the centre of carrying out the right to free movement on the territory of the EU. The Court held that this case deals with the recognition of the effects of a marriage legally concluded abroad between an EU citizen and his/her same-sex spouse, a third-country national, with regard to the right to family life and the right to free movement, in terms of the prohibition of discrimination on grounds of sexual orientation. Consequently, the preliminary rulings that it formulated to the CJEU, upon the request of the authors of the exception of unconstitutionality, were determined by the lack of certainty regarding the interpretation of several concepts used by Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move

192 Tizzano, 2012, pp. 21–31.

193 https://curia.europa.eu/juris/liste.jsf?language=en&num=C-33/07 (Accessed: 1 February 2023).

194 For a presentation of the developments of the CCR up to the time of the formulation of this preliminary reference, see Vița, 2019, pp. 1623–1662.

195 Republished in the Official Gazette No. 505 of 15 July 2001.

and reside freely within the territory of the Member States amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194 / CEE, 73/148/CEE, 75/34/CEE, 75/35/CEE, 90/364/CEE, 90/365/CEE and 93/96/CEE(2), in conjunction with the Charter of Fundamental Rights of the European Union and with the recent case law of the CJEU and the European Court of Human Rights, concerning the right to a family life.

Thus, the Constitutional Court decided to suspend the trial on the exception of unconstitutionality and to address a series of preliminary rulings to the CJEU. By the Judgment of 5 June 2018, pronounced in Case C-673/16,[196] the CJEU (Grand Chamber) answered affirmatively to the first two questions, ruling that

> 1. In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.
> 2. Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

Starting from these rulings, within the constitutional review of the provisions of Article 277(2) and (4) of the Civil Code, the CCR applied the norms of European law set forth in Article 21(1) of the TFEU and Article 7(2) of Directive 2004/38, upheld the exception of unconstitutionality, and found that the provisions of Article 277(2) and (4) of the Civil Code are constitutional in so far as they permit the granting of

196 Available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=228B64B67CC671C4AEFDFFDAF7A01202?text=&docid=202542&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=863601 (Accessed: 1 February 2023).

the right of residence on the territory of the Romanian State, under the conditions laid down in European law, to the spouses – citizens of the Member States of the EU and/or citizens of non-member countries – of marriages between persons of the same sex concluded or contracted in a Member State of the EU.[197]

Regarding dialogue through the collaboration networks of the European courts, the most recent one is the Judicial Network of the European Union, which operates at the EU level[198] as an initiative that the CJEU and the Supreme and Constitutional courts of the Member States had at the Forum of Magistrates held by the CJEU in March 2017 in Luxembourg. The Judicial Network of the European Union is an *online* platform designed to promote and facilitate the flow of information between all of these courts. The new instrument is likely to increase mutual understanding between legal systems and between their own approaches regarding the settlement of legal issues – including constitutional issues – and thus increase coherence and convergence in the future development of the EU legal order. This is intended to serve as a partner network for the other European networks – a *website* that works on a collaborative basis, the supply being provided voluntarily by the CJEU and the participating courts. The CCR and the Romanian High Court of Cassation and Justice are members of the Network.

The SCN – Superior Court Network – operates within the ECHR,[199] and, according to the presentation made on the ECHR website, was established based on the idea of the importance of a more structured and effective dialogue for the implementation of the Convention, between the Court and the higher courts of the Member States (of the Council of Europe). The March 2015 Declaration following the Brussels Conference greeted '*the Court's dialogue with national higher courts and the establishment of a network in order to facilitate the exchange of information on its judgments and decisions with national courts*' and invited the court to deepen this dialogue further. The network was launched on 5 October 2015 and includes representatives of 102 courts from 44 States,[200] including the CCR and the Romanian High Court of Cassation and Justice.

The role of these networks as a dialogue instrument was suggestively characterised by the President of the ECHR, R. Spano, when he presented the SCN:

> Dialogue between the European Court of Human Rights and the national judicial systems is fundamental to the Convention system. The Superior Courts Network brings together a community of judges who have a central role to play, implementing

197 Decision No. 534/2018, published in the Official Gazette No. 842 of 3 October 2018.
198 Available at: https://curia.europa.eu/jcms/jcms/p1_2170125/ro/ (Accessed: 1 February 2023).
199 Available at https://echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c= (Accessed: 1 February 2023).
200 Available at https://www.echr.coe.int/Documents/SCN_Members_ENG.pdf (Accessed: 1 February 2023).

> the principles and values of the European Convention, which we have been sharing and defending for 70 years.[201]

Dialogue in bilateral and multilateral meetings is also important for the exchange of opinions in informal discussions between judges. As regards the CCR, we pointed out,[202] as a recent example, the meeting that took place on 30 September 2022 in Bucharest, on the occasion of the anniversary Conference '*Evolution of the European Union Law – Dialogue between the Court of Justice of the European Union and the Constitutional Courts*', organised by the National Institute of Magistracy on the occasion of the 30th anniversary, with the participation of the president of the CJEU and the president of the CCR. On the same day, the president of the CJEU and the Romanian judge to the CJEU held a meeting with the judges of the CCR at the headquarters of this court, in the Palace of the Parliament, where the mutual desire for dialogue was expressed, emphasising the CCR's openness to dialogue by way of preliminary references. These aspects are recorded in the press release of the CCR[203] of the same date, where the following were also noted, with reference to the discussions regarding the CJEU–constitutional courts relationships and the speech of President Lenaerts:

> The Court of Justice of the European Union does not rule on the EU law in a crystal ball, but interprets it in such a way that it is uniformly and equally applied in all the Member States of the European Union. The EU law has the same meaning in Romania, Belgium, Portugal, Estonia, Greece and all 27 Member States. But in order to do so, the Court of Justice needs the contributions of the national constitutional courts, which discover problems relating to the EU law, possible aspects of the interaction between the EU law and national law, including the national constitutional law, which refers questions to the Court of Justice for a preliminary ruling, and the Court of Justice seeks to interpret the European law in such a way as to harmonise the rich constitutional traditions common to the Member States.

As for the multilateral meetings, the XVIth Congress of the Conference of European Constitutional Courts '*Co-operation of Constitutional Courts in Europe – Current Situation and Perspectives*', hosted by the Constitutional Court of Austria in 2014, is relevant in terms of the topic addressed. The sub-topics of the Congress were related to the constitutional courts between Constitutional law and European law, the interaction between constitutional courts and the interaction between European Courts. The discussions within the Congress and the references to the cooperation between the constitutional courts, specifically between them and the European courts, were sprinkled with metaphors. Words such as 'pyramid', 'mosaic' or 'puzzle'

201 Available at https://www.echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c.
202 Safta, 2022c.
203 Available at https://www.ccr.ro/comunicat-de-presa-30-septembrie-2022-2.

were used precisely to emphasise the lack of hierarchy of a pyramid-type structure. The works of the Congress have released an agreement on the idea that none of these actors can be regarded as a court of last authority and final decision-making power. Furthermore, the positive effect of cooperation and interaction between the constitutional courts, as well as between them and the European courts, was emphasised, as they result in an overall strengthening of the protection of fundamental rights and freedoms in Europe.[204]

Also noteworthy here is the XVIIIth Congress of the Conference of European Constitutional Courts, hosted by the Constitutional Court of the Czech Republic, with the theme '*Human Rights and Fundamental Freedoms: The relationships of the International, Supranational and National Catalogues in the 21st Century*'. The Congress was attended by delegates from European, International and Supranational Constitutional Courts, namely Robert Spano, President of the ECHR, and Koen Lenaerts, CJEU and also of the Venice Commission. All speeches essentially expressed the need to identify a *modus vivendi* in this European space so complicated by the multitude of sources and tools for the protection of fundamental rights. The very purpose of the Congress was to analyse and rationalise different catalogues of rights at the national, supranational and international level, and their relationship with each other. The message of collaboration and dialogue of the two presidents was complemented by that of the representatives of the constitutional courts present. Very suggestive was also the intervention of the president of the Constitutional Court of the Republic of Moldova – a court to which the Chairmanship of the Conference was granted for the next 3 years. Welcoming the participation of the president of the ECHR and the president of the CJEU in this Congress, he emphasised that these courts '*cannot be denied the status of constitutional courts*'. We believe that this is the key statement of the Congress, expressing a consensus on the role of the ECHR and the CJEU in the European judicial architecture.[205]

From the perspective of the topic of constitutional identity, we appreciate, as relevant, a conference (that we could qualify as historical) held by the Constitutional Court of the Republic of Latvia and the CJEU in 2021.[206] Judges from the constitutional courts and constitutional jurisdictions of 23 Member States, as well as the CJEU, met to discuss the EU's common legal traditions and how to ensure that they complied with the constitutional traditions and national identities of the Member States in order to establish a single and harmonious European area of justice. Concluding in the speech that prefaces the volume of the Conference, the president of the Constitutional Court of Latvia emphasised, *inter alia*, the two dimensions revealed in the works and speeches:

204 Safta, 2017.

205 For a detailed presentation see Safta, 2021b, pp. 1241–1265.

206 Between 2-3 September 2021 in Riga (Latvia); the conference 'EU United in Diversity: between common constitutional traditions and national identities', Available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-06/eunited_in_diversity_-_riga_september_2021_-_conference_proceedings.pdf (Accessed 1 February 2023).

> there are the common values of the European Union, the European constitutional tradition of democracy, human dignity, the rule of law, and there is the value and importance of each Member State in this area, characterized above all by its national constitutional identity, which the countries of the European Union are committed to safeguarding. The CJEU is prepared to respect this national constitutional identity; however, it is necessary to establish criteria for defining what constitutes a national constitutional identity. This is important because it cannot be contradictory with the European constitutional tradition. It is essential to draw figurative borders between the common constitutional traditions of Europe as a whole and the sacrosanct core of the constitutional identity of each Member State.[207]

The president also addressed an interesting call to the academic community, which '*are developing comparative constitutional law theory, thereby increasingly revealing the constitutional core of each country*', to '*undertake further research on these issues*'.

Significant, due to the consistency of the debates, is also the conference hosted by the CCR in 2019, entitled 'National constitutional identity in the context of European law'. The conference enjoyed the representation of the courts of constitutional jurisdiction from Austria, the Czech Republic, the Republic of Croatia, the Federal Republic of Germany, and the Republic of Hungary, as well as the participation of a delegation from the Federalist Society for Legal Studies and Public Policy in the United States of America. At the opening of the proceedings, the president of the CCR, Prof. Valer Dorneanu, emphasised the importance of analysing the national constitutional identity – a current topic in the context of the evolution of European law and the increasingly significant shaping of the concept of European constitutional identity. The dialogue of constitutional judges must be considered essential for better knowledge, a better definition of, and a better approach to, the multiple dimensions of the relationship between the two concepts.[208]

Likewise, it should be noted that the recent Congress of the World Conference on Constitutional Justice, held in October 2022 and hosted by the Constitutional Court of the Republic of Indonesia, meant in itself a global dialogue of constitutional courts and equivalents.[209] The conclusions of the Congress are especially relevant:

> There is a need for mutual respect between constitutional courts and other state powers, also to prevent discontinuity between constitutional adjudication and initiatives of the legislature (i.e. delayed enforcement of decisions of constitutional courts), which can also be detrimental to the trust placed in constitutional courts; Openness, accessibility, and transparency in communication, without losing sight of the need for self-restraint, fosters trust in constitutional courts and enhances their standing

207 Foreword by Osipova, 2022.
208 Available at https://www.ccr.ro/12-aprilie-2019/ (Accessed: 1 February 2023).
209 Available at https://wccj5.mkri.id/ (Accessed: 1 February 2023).

> as independent institutions; When faced with fierce and unfair criticism or undue pressure from the executive and legislative branches after having taken decisions that displeased other state powers or political actors or with misinformation campaigns by lobby and pressure groups, member courts of the World Conference can rely on the solidarity of counterpart courts, expressed through the regional groups and the World Conference, which can help a court to resist such pressures. The Bureau of the World Conference is ready to offer its good offices to courts under pressure, including through statements of support. The 5th Congress called upon judges of the member courts of the World Conference to resist pressures from other state powers and to make their decisions only on the basis of the Constitution and the principles enshrined therein.[210]

Another interesting perspective highlighted by this Congress concerns the dialogue between judges and the academic community:

> similarly to judges reaching out to academia (including via calls to share expertise in particular domains of law and practices of legal pluralism), academics should actively approach judges, particularly if they hope the results of their research to reach beyond the 'ivory towers'. The recognition of the value but also challenges of both professions might help generate mutual trust and the development of more nuanced ideas for enhancing constitutional court resilience vis-à-vis autocratization.[211]

Even if we are not literally talking about a dialogue, the references to the case law of the CJEU and the ECHR by national courts have the effects of a dialogue, in terms of institutionalising legal standards and approaches at the European level. Examining the issues regarding the relations between national and EU regulations emphasised such a dialogue between national constitutional courts. Even the theory of constitutional identity emerged in the CCR jurisprudence using precedents of other constitutional courts, especially Germany.

Moreover, the transposition into national law of European acts or the adoption of regulations to give effect to the obligations assumed at the European level resulted in situations where constitutional courts, vested with the constitutional review, took into account foreign precedents in the same matter (so, a kind of dialogue with other constitutional courts). We have already mentioned such an example, meaning the transposition into national law of Directive No. 2006/24 / EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly-available electronic communications services or of public communications networks and amending Directive

210 Available at https://wccj5.mkri.id/public/pdf/2022_10_06_WCCJ5_Bali_Communique-E.pdf (Accessed: 1 February 2023).

211 Steuer, 2022.

2002/58/EC. As we pointed out in our work on the dialogue of constitutional judges,[212] after the decision of the CCR on the unconstitutionality of the law transposing the mentioned directive,[213] other courts held similar conclusions. Further, after the first unsuccessful attempt to challenge the directive raised by Ireland and Slovakia,[214] the CJEU was vested by the Constitutional Court of Austria and the Supreme Court of Ireland[215] which required the Court of Justice to examine the validity of the directive, particularly in terms of two fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, namely the fundamental right to privacy and the fundamental right of personal data protection. By the Judgment of 8 April 2014, delivered in that case, the CJEU declared the invalidity of the directive. The CJEU held, in essence, that the data to be retained under the directive make it possible, amongst other things, to know the identity of the person with whom a subscriber or registered user has communicated and by what means; to identify the time of the communication as well as the place where that communication took place; and to know the frequency of the communications of the subscriber or registered user with certain persons during a given period. The court took the view that, by requiring the retention of such data and by allowing the competent national authorities to access those data, the directive represents a particularly serious interference with human rights. The fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate, in the minds of the persons concerned, the feeling that their private lives are the subject of constant surveillance.

However, with regard to all these forms of dialogue, we take the view that the distinction between dialogue – conversation and dialogue – and deliberation made in the specialised literature[216] is also important in the qualification of the judicial dialogue and its effects. This is a useful discussion when it comes to giving real meaning to *the dialogue*, as it results in legal consequences. Thus, it is argued, for good reason, that, as regards the 'conversation', by its nature, it does not result in direct consequences, and it does not engage,[217] whereas dialogue as deliberation is very different. Making this distinction, Luc B. Tremblay emphasises, in his work *The legitimacy of judicial review: The limits of dialogue between courts and legislatures*, the fact that the latter dialogue is characterised by the existence of a certain goal: reaching a common agreement, settling issues collectively and collectively

212 Toader and Safta, 2016.

213 Decision No. 1258/2010, cited.

214 We refer to the action of Ireland of 10 February 2009, supported by Slovakia, requesting the annulment of Directive 2006/24/CE of the European Parliament and of the Council of 15 March 2006 on the ground that it has not been adopted based on a proper legal reason.

215 Joint Cases C-293/12 and C-594/12 – *Digital Rights Ireland and Seitlinger and Others*, available at https://curia.europa.eu/juris/liste.jsf?num=C-293/12 (Accessed: 1 February 2023).

216 Tremblay, 2005, pp. 617–648.

217 Obviously, a 'conversation' between judges is also important in the general economy of dialogue/co-operation between institutions; it can entail ideas, trigger mechanisms of change, and shape/reshape certain beliefs that can later result in jurisdictional activity.

determining the most correct/best solution. The cited author identifies three conditions for the existence of dialogue: '*these three conditions could be called equality, rationality, and reasoned agreement*'.[218]

Starting from these criteria and observing the dynamics of the dialogue existing at the European level between the courts located on several levels, there was raised the question as to whether this dialogue is really conducted between equal partners. There was also expressed the idea[219] that, in theory, there is equality with a division of labour: the interpretation for the CJEU and the referral to the national courts, and that in practice a vertical relationship has developed between the two, the national courts being connected to the case law of the CJEU, the distinction between interpretation and implementation being blurred, and the CJEU developing itself as a *primus inter pares*. The international meetings of the constitutional courts in recent years have addressed this debate. We have emphasised that, for example, the XVI[th] Congress of the Conference of European Constitutional Courts, hosted by the Constitutional Court of Austria, was entirely dedicated to this issue (*Constitutional courts between Constitutional law and European law; Interaction between constitutional courts; Interaction between European courts*). The discussions on the cooperation between the constitutional courts, namely between them and European Courts, were sprinkled with metaphors; words such as 'pyramid', 'mosaic' or 'puzzle' were most frequently used to exemplify these relationships and the idea that none of these actors can be seen as a court of last authority and final decision-making power.[220] However, considering the numerous debates regarding the relationships between the CJEU and the constitutional courts, the aforementioned proves that the topic is as present as possible, sometimes acquiring accents of virulence.

As for the criteria of rationality and reasoned agreement, it was noted[221] that, although there is a traditional formal way of dialogue between national courts and the CJEU (the preliminary reference laid down in Article 267 of the TFEU), the 'dialogue' is debatable, as long as the national court addresses a question and then is practically eliminated from the procedure before the CJEU; there is no more conversation, even less deliberation and agreement. National courts intervene again only after the CJEU has answered the question. Few national courts make the effort of a new preliminary reference in cases where the CJEU's answer was not helpful or created other issues of interpretation. In other terms, these courts do not engage in a real dialogue with the CJEU. We can add, to this, the reluctance of certain courts, and we envisage especially the constitutional courts which, as can be seen in the same legal literature to which we refer, do not send preliminary rulings, but rather encourage the engagement of ordinary courts with the CJEU. The use of the

218 Tremblay, 2005, pp. 617–648.; Claes and De Visser, 2012, pp. 100–114.
219 Claes and De Visser, 2012.
220 https://www.juridice.ro/494896/marieta-safta-curtile-constitutionale-au-un-rol-de-translatori.html (Accessed: 1 February 2023).
221 Claes and De Visser, 2012.

CJEU case law examples in the decisions of the constitutional courts can be qualified as dialogue, but not in the above meaning (deliberation), but more in terms of accepting/following certain case-law guidelines, often without a clear methodology/line of argumentation.

To sum up, we believe that the constitutional dialogue (in the form of preliminary references, bilateral and multilateral meetings, international congresses and conferences) is well developed in Romania. However, the issue of authority relationships remained latent, as shown by the recent turbulence which we distinctly referred to in our answers. Such moments can be overcome, as demonstrated by the ascertainment by the CCR of the unconstitutionality of the law transposing Directive 006/24/CE of the European Parliament and of the Council of 15 March 2006 regarding the retention of data generated or processed in connection with the provision of electronic communications accessible to the public or public communications networks and amending Directive 2002/58/EC.[222] Although the lack of a dialogue with the CJEU in that case was criticised, the subsequent developments, the joint debates during the visit of the CJEU judges to Romania, and, over time, even by a decision of the CJEU by which the said directive was invalidated,[223] demonstrate that a critical moment was not only overcome, but also exploited through dialogue, resulting in convergent case law of the national constitutional courts and the CJEU.

Some 'turmoil' (and therefore the need for dialogue) also exists horizontally, at the national level, in the relationships between the constitutional courts and courts of law. The recent developments in Romania, namely the preliminary references addressed to the CJEU, regarding the effects of the CCR's decisions and the disciplinary liability of national judges for non-compliance with these decisions, constitute clear proof of the tense moments and the necessary institutional dialogue for the prevention and settlement of disputes.

222 Decision No. 1258/2009, published in the Official Gazette No. 798 of 23 November 2009.

223 Judgment of the Court (Grand Chamber) of 8 April 2014, '*Electronic communications – Directive 2006/24/EC – Publicly available electronic communications services or public communications networks services – Retention of data generated or processed in connection with the provisions of such services – Validity – Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union*' in Joined Cases C-293/12 și C-594/12, requests for a preliminary ruling under Art. 267 of the TFEU from the High Court (Irlanda) and the Verfassungsgerichtshof (Austria), made by decision of 27 January and 28 November 2012, respectively, received at the Court on 11 June and 19 December 2012, in the proceedings Available at https://curia.europa.eu/juris/document/document.jsf?docid=150642&doclang=EN (Accessed: 1 February 2023).

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Chapter IX

Constitutional Identity and Relationship Between European Union Law and National Law of the Slovak Republic

Alena Krunková

Abstract

This book chapter addresses identity, an elementary theoretical concept, which also has penetrated the field of constitutional law. The identity of the Constitution as a fundamental law is a variable that determines the direction of the state. It was created in parallel with the creation of the Constitution. However, the Constitution is not immutable; its dynamism reflects, as a minimum, social change. The first part addresses the concepts of constitutional identity versus national identity. The second part analyses the impact of selected constitutional amendments on the identity of the Constitution in the Slovak Republic and the constitutional aspects of the relationship between European Union Law and the National Law of the Slovak Republic.

Keywords: identity, authority, constitution, European Union law, Slovak Republic, national law

1. Introduction

The nature of the constitution as the supreme and fundamental law of the state with the highest legal force presupposes a certain degree of authority of the constitution. The degree of authority is naturally modified by social development, either increasing or decreasing, and rarely remains constant. The authority of the

Alena Krunková (2023) 'Constitutional Identity and Relationship Between European Union Law and National Law of the Slovak Republic'. In: András Zs. Varga – Lilla Berkes (ed.) *Common Values and Constitutional Identities—Can Separate Gears Be Synchronised?,* pp. 353–389. Miskolc–Budapest, Central European Academic Publishing.

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Constitution is influenced by several factors, including its identity and legitimacy, the constitutional concept of its protection, and the political distribution of power in the state. The concept of normative authority reflects that of sovereignty. Since its independence (1 January 1993), the Slovak Republic has undergone (and is still undergoing) a rather turbulent constitutional development, which has undoubtedly been reflected in the identity and authority of the Constitution of the Slovak Republic (460/1992 Coll., as amended, the 'Constitution'). The thirtieth anniversary of the sovereign Slovak Republic raises several questions about the identity and authority of the Constitution, both internally within the legislative system and externally within the international community and the European Union (EU). For example, what factors influenced the identity and authority of the Constitution? How have amendments to the Constitution influenced them? One of the most important questions is the extent to which the authority and identity of the Constitution have been modified in the context of the Slovak Republic's membership in the EU and the position of the Constitutional Court of the Slovak Republic in this process.

2. Constitutional and national identity

Etymologically, 'identity' has its basis in the Latin word 'idem', meaning 'the same'. In terms of meaning, it can be specified as sameness or conformity in all characteristics or as a specific, integral, and unmistakable essence that distinguishes individual human beings from one another.

In general, identity can be formulated as an attribute—that is, a qualitative characteristic of a certain phenomenon or person.[1] This sameness is also somewhat diverse, as the sameness can only be determined by comparison with the differences. Thus, identity expresses the quality of similarity and difference.[2] Hence, the commonly defined features of one group can be determined using the different features of another group. According to Alexy, 'the nature of a principle—that is, the fact that a certain norm is a principle—is only cognisable in a collision with another principle and its property of being fulfilled to a different degree'.[3]

Thus, we can simplistically state that the basis of identity formation can also be a contrast to something or someone else. Identity can manifest in different ways, either explicitly or derivatively or by defining features. Nevertheless, even if it enables a certain dynamism, it is linked to the stability of its content, especially regarding the substance that it defines.

1 http://slovnikcudzichslov.sk/slovo/identita.
2 See more: Zvoníček, 2018, pp. 23–53.
3 Alexy, 2009, pp. 101–105.

In the context of the Maastricht Treaty, developments among Member States have given rise to reflections on the content and application of national identity. The original provision of Article F(1) was unsatisfactory. Therefore, the Treaty of Lisbon revised it and created a more detailed clause in Article 4(2):

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect the essential State functions, including ensuring the territorial integrity, maintaining law and order and safeguarding national security.

This concept promotes a balanced relationship between the Union and Member States, which the Member States have embraced and have begun to make use of. This was mostly the case when they wanted to protect their national identity; for example, when they challenged the validity of EU legal acts, they wanted to justify their failure to comply with their obligations under EU law or when national identity became a suitable argument for disputes between Member States and the EU.[4] In this context, national identity is a broader concept that encompasses cultural, political, and constitutional identities. However, it is important to consider constitutional identity as a key aspect in defining national identity.

However, constitutional identity cannot be associated solely with the definition of national identity in the sense of EU law. This is a traditional concept in constitutional theory,[5] although it cannot be denied that it enjoyed a renaissance in the context of the above-mentioned specification of national identity. When a constitution is created, identity is also created. However, the identity of the Constitution, in particular, must be seen not only in its normative but also in its social, political, and historical dimensions. If a constitution is ratified by referendum, the necessary legitimacy is created by the people affirming its identity. According to G. J. Jacobsohn, a constitution acquires identity through experience from a mix of political aspirations and commitments that express a nation's past and the desire to transcend that past. He sees the identity of the Constitution as changeable but resistant to its own destruction.[6] The identity of the Constitution could be most convincingly determined if it were anchored in its entirety in its original text, which is clearly impossible.

If identity is a certain qualitative attribute, constitutional identity expresses not only what a given constitution is but also what it is not. In other words, it is an abstraction of the spirit of a given constitutional text or particular constitutional system. Identity expresses what is truly essential to the Constitution and the foundations on which it is built. Thus, it is a certain dimension of constitutional identity in

4 From a certain point of view, the UK's withdrawal from the EU and the attitudes of Hungary, Poland and Germany can also be seen as a consequence of the preference for national identity.

5 Kosař and Vyhnátek, 2018, pp. 854–872.

6 Jacobsohn, 2010, p. 368.

an objective sense, and these foundations, as values, enter the Constitution in the process of its creation. Thus, constitutional values are present in the text of the Constitution. Undoubtedly, they form part of their material core, but it is not possible to equate their constitutional identity with the material core of the Constitution alone. According to Bárány, constitutional identity is expressed at the base of the Constitution and its material core.[7]

> The value base of a constitution is not identical with the material core of a constitution. The value base of a constitution consists of the values on which it is based and which are also present in its text or at least constitute its demonstrable background. The material core of a constitution consists of those parts (principles) which the constitution itself designates as part of its material core. The essentials of a democratic state governed by the rule of law are not the value base of a constitution. It is democracy and the rule of law.[8]

3. Authority and identity

The origin of the word 'authority' can be traced to Italian. 'Auctor' is a creator, a doer, and subsequently 'auctoritas' denotes power and influence. Dictionary definitions define authority as respectability, recognition, or influential personality, which is a manifestation of high expertise.[9] This concept has a cross-cutting character in the branches of science and is, for example, a grateful object of study for political scientists and sociologists.[10] Authority is related to power. In principle, it is generally accepted that authority differs substantially from power, which is based on direct coercion, in that it is legitimised in some way. It can demonstrate that a person, institution, or group has obtained basic consent to exercise their power, stimulate, coordinate, control, and organise human activities or express individual and general interests. Thus, authority is linked to legitimacy. The power of authority is used even when it is rationally impossible or difficult to justify the means chosen to achieve general values or truths.[11]

7 Bárány, 2013, pp. 113–116.

8 Ibid.

9 https://slovnik.aktuality.sk/pravopis/kratky-slovnik/?q=autorita.

10 Authority was a concern of A. Comte or Spinoza's Tractatus theologico-politicus (1670). B. Malinowski defines it as a legitimate power used to establish norms whose observance is reinforced or enforced, such as by means of sanctions. A group of authors (e.g. H. D. Lasswell, A. Kaplan, H. Arendt) tried to distinguish the concept of authority as precisely as possible from the concepts of power, influence, and coercion. G. C. Lewis showed how important it is not only to define authority or to determine what authority will be but also, above all, to examine how consent is obtained for someone to exercise authority. In the same vein, Max Weber distinguished authority based on tradition, charisma, and rational legitimacy. See more: https://encyklopedie.soc.cas.cz/w/Autorita.

11 Ibid.

As the constitution emerges and creates its own identity, it can create its own authority. This situation is influenced by several factors that can enhance or diminish the authority of the Constitution. These include, for example, the political consensus within the constitution-making process, the process of drafting and adopting the constitution, the quorum achieved in the voting on the constitution, the presentation and public acceptance of the constitution, and its approval in a referendum.

The Constitution of the Slovak Republic was created during the time of the common state with the Czech Republic, during the time of the Czechoslovak Federative Republic.[12] Its creation was the result of turbulent democratic changes that began with the fall of the totalitarian regime in November 1989. The coexistence of the Czech and Slovak people in a common state gradually became increasingly problematic. In January 1990, shortly after the November events, the Slovak National Council (the Chamber of the Federal Parliament for the Slovak Republic) adopted a declaration on the drafting of three separate constitutions: the federal constitution and the constitutions of two Member States—the Czech Republic and the Slovak Republic.[13] Unfortunately, it was not possible to synchronise the work on the three constitutions in the course of further development.[14]

The Slovak party had a stronger desire for its own constitution and constitutional system and immediately set up a constitutional drafting commission headed by Professor Karol Plank.[15] Work on the Constitution was quite intensive, with several drafts submitted from the beginning of 1991. By the end of the parliamentary term, there were nine drafts of the Constitution of the Slovak Republic, almost all of which envisaged a common state system within Czechoslovakia.[16] An important development in this respect was the June 1992 parliamentary election.[17] In Slovakia, the Movement for Democratic Slovakia (HZDS), which had no secret about its preference for an independent Slovak Republic within the framework of a constitutional settlement, won.[18] A new committee was set up under the chairmanship

12 Orosz et al., 2009, pp. 9–37.

13 Petranská Rolková, 2017, pp. 31 *et seq*.

14 A problematic issue was the degree of centralisation of the federation and the autonomy of the Member States.

15 The so-called Plank committees, modified during the more than two years of their existence, proved to be crucial in the whole process of creating the Constitution of the Slovak Republic. In August 1990, the so-called Second Plank Committee was set up, which, unlike the first one, was a joint committee of the Slovak National Council and the Government of the Slovak Republic.

16 The proposal of the then Slovak National Party and the proposal of the MP Peter Brňák, which did not envisage a federal structure, were fundamentally different from all the other proposals.

17 The elections were held in an unconventional way, two years after the so-called first free elections in June 1990, which were a kind of trial period for democracy.

18 On 17 July 1992, the HZDS, together with the Slovak National Party and the Party of the Democratic Left, supported the proclamation of the Declaration of the Slovak National Council on the Sovereignty of the Slovak Republic, which aggravated the already rather tense relations between the Czech and Slovak political representatives and in a way triggered the process of the division of Czechoslovakia.

of the academician Milan Čič.[19] The text of the Slovak Republic Constitution was drafted and adopted in a relatively hectic manner, as is sometimes the case with the constitutions of newly emerging states. This was reflected in the fact that the draft constitution only underwent an accelerated interministerial comment procedure that took place in a conference format.[20] The draft constitution was discussed in the fifth session of the 10th Constitutional Electoral Period, which lasted two days.[21] The Constitution was adopted by acclamation on the evening of 1 September 1992; 114 of the 134 members of the Slovak National Council voted in favour of the adoption of the Constitution of the Slovak Republic.[22] Despite the relatively high number of votes in favour, the adoption of the constitution caused embarrassment, especially on the Czech side, where it was seen as a clear signal for the dissolution of the federation.[23] Although the process of its creation diminished its authority in some way, the euphoria of the new independent state and the fact that a new legal system began to be created, partly in support of the legal system of the former federation[24], partially offset the authority of the Constitution. Notably, a country that fought so hard for independence and full sovereignty 30 years ago did not hesitate to accelerate its integration efforts later in the context of its accession to the EU.

4. Constitution of the Slovak Republic and constitutional identity

Like other Constitutions, the Constitution of the Slovak Republic created its identity during its creation, which was influenced by relevant historical events. By

19 The academician Milan Čič was the first Prime Minister of the Government of National Understanding after the November Revolution in the period from 12 December 1989 to 26 June 1990, and from 13 December 1989 to 27 June 1990, he was also the Deputy Prime Minister of the Czech and Slovak Federative Republic. From July 1992, he was the Deputy Prime Minister of the Czech and Slovak Federative Republic with oversight over legislation. After the dissolution of the federation and the establishment of the independent Slovak Republic, as a plenipotentiary of the Government of the Slovak Republic, he focused on the establishment of the Constitutional Court of the Slovak Republic. After its establishment, he became its first Chairman. He held this position for the whole of his first term of office (seven years) until January 2000.

20 It was also strange that the draft Constitution was submitted to the parliament without an explanatory memorandum, which was prepared later.

21 Petranská Rolková, 2017, pp. 33 *et seq*.

22 Paradoxically, the Constitution of the Slovak Republic was published in the Federal Czech-Slovak Collection of Laws (in Volume 92/1992, under No. 460/1992 Coll.), while the Constitution of the Czech Republic became the first law of independent Czech legislation under No. 1/1993 Coll.

23 Palúš and Somorová, 2008; 2010.

24 Some laws from the period of the common state with the Czech Republic are still in force in the Slovak Republic (e.g. Act No. 40/1964 Coll. Civil Code, as amended, Act No. 83/1990 Coll. on association of citizens, as amended).

defining identity, the constitution can also be identified.[25] In the original text of the Constitution, a large part of its identity in relation to the self-determination of the nation is found in the preamble, in which national and civic principles were eventually combined.[26] In material terms, the identity of the Constitution was created in accordance with the basic principles of modern constitutionalism: the principles of the sovereign state, democracy, separation of powers, pluralism, the rule of law, legal certainty, the principle of the guarantee and protection of fundamental rights and freedoms, republican parliamentarianism, the unitary state, local self-government, and the principle of a socially ecologically oriented market economy.[27]

It can be stated with some generality that interference with these principles would constitute an interference with the identity of the Constitution; as constitutional principles express the essence of the whole social value system, they carry the axiological meaning of the Constitution. They are an expression of the most important values of society, and, thus, express the essence of the entire social value system. Constitutional principles must be considered in the drafting of all pieces of legislation; thus, by changing them *ex constitutione,* the legal system changes as well.

Based on features identical to the model forms of government, the constitution defined its identity relative to the parliamentary form of government, where the National Council of the Slovak Republic (the 'National Council of the SR') has played a key role since the beginning regarding other constitutional bodies and the exercise of power in the State. This overlap with the classical parliamentary form of government, with minimal deviations, created an appropriate framework for its implementation, given the period in which the constitution was created.[28] *'The Constitution of the Slovak Republic, in its original wording, despite some reservations, was a very solid piece of legislation, especially in the context of the time and the socio-political conditions in which it was adopted'.*[29] The scope of this study does not allow for a more detailed analysis of all the aspects of constitutional identity that have been proposed. The next section will focus mainly on those that have become prominent in the context of the selected amendments.[30]

25 See more on the creation process of the Constitution of the Slovak Republic, *e.g.* Orosz et al., 2009.

26 The final text, after extensive discussion, is as follows: '*We, the Slovak Nation, bearing in mind the political and cultural heritage of our predecessors and the experience gained through centuries of struggle for our national existence and statehood, mindful of the spiritual bequest of Cyril and Methodius and the historical legacy of Great Moravia, recognising the natural right of nations to self-determination, together with members of national minorities and ethnic groups living on the territory of the Slovak Republic, in the interest of continuous peaceful cooperation with other democratic countries, endeavouring to implement democratic form of government, to guarantee a life of freedom, and to promote spiritual culture and economic prosperity, thus we, the citizens of the Slovak Republic, have, therewith and through our representatives, adopted…'.*

27 See more, *e.g.* Giba et al., 2019, pp. 128 *et seq.*; Palúš and Somorová, 2008; 2010.

28 See, *e.g.* Petranská, 2017. Orosz et al., 2009, p. 48.

29 Orosz and Svák et al., 2021, p. xxxv.

30 See more on the amendments of the Constitution, *e.g.* Hodás, 2017, pp. 13 *et seq*; Orosz et al., 2009, pp. 49 *et seq*; Orosz and Svák et al., 2021.

5. Constitutional identity and selected amendments to the Constitution

However, the concept of parliamentarianism, with the strong constitutional position of the National Council of the SR, was not sustainable in the long term in the Slovak Republic. The original intention of the constitution-making body regarding the office of the president proved insufficient in the 1998 presidential elections. According to the original text of the Constitution, the president was elected by the National Council of the SR, with a 3/5 qualified constitutional majority of all members of the National Council of the SR required for election.[31] This majority was also required for the re-election of the president; no reduction of the quorum was envisaged for the re-election. Given the political situation in Slovakia, there were real concerns about whether the parliament would elect the president. It was the historic first amendment of the Constitution, implemented by Constitutional Act No. 244/1998 Coll., which affected the position of the president and heralded the erosion of the identity of the Constitution regarding the existing parliament–president–government concept. Constitutionally and politically, it was not negatively evaluated, as it somewhat eliminated the systemic defects of the Constitution.[32] If the office of the president was vacant, the amendment divided the exercise of certain presidential powers between the government—explicitly, the Prime Minister, as in Article 105(1)—and the President of the National Council. Of the original non-transferrable presidential powers, only minimal powers (e.g. the conferring of honours) remained in the Constitution. A subsequent amendment by Constitutional Act No. 9/1999 Coll. continued to interfere with the position of the president, changed the method of electing the president to direct election by citizens (Article 101 of the Constitution), and partly modified the president's constitutional position, for example, by defining the powers to act as arbitrators (Article 102(1)(e) of the Constitution) and weakening the president's position by introducing the institution of countersignature (Article 102(2) of the Constitution).

Although the modification of the creation of the president affected the original concept of the Constitution, it also affected its identity sustainably. However, much more extensive interference with the president's position was made by the tenth amendment to the Constitution, Constitutional Act No 356/2011 Coll., which *de facto* strengthened the powers of the president in the so-called crisis regime.[33] Thus, the

31 Which is 90 out of a total of 150 MPs.

32 The non-transferrable powers of the President of the Republic included the power to appoint and remove Government members (i.e. if the President was not elected, there would be no one to appoint the Government.

33 Following the fall of the Government, a third para. was added to Art. 115: *(1) The President of the Slovak Republic shall recall the Government if the National Council of the Slovak Republic passes a vote of no-confidence in the Government or if it turns down the Government's request to pass a vote on confidence in it. (2) If the President of the Slovak Republic accepts the Government's resignation, he or she*

powers of the President do not fit into the concept of a parliamentary form of government. Moreover, in the period in question (from the recall of the government), the National Council of the SR had no real power to control the government. Meanwhile, when to put an end to the situation created and how to start the process of establishing a new government is in the president's hands. Given the real political events in the Slovak Republic, a situation may arise when the president activates Article 115(3). Its actual use should be the result of mature and statesman-like decisions that are naturally influenced by the wisdom and moral strength of the personality who holds the office of the President of the Slovak Republic.

The position of the president was also affected by the sixteenth amendment to the Constitution (Constitutional Act No. 71/2017 Coll), a controversial amendment resulting from considerable social pressure. It expanded the powers of the National Council of the SR to include the possibility of annulling the president's decisions regarding amnesty or pardon.[34] Meanwhile, it broke the principle of the prohibition of officiality in proceedings before the Constitutional Court of the Slovak Republic (the 'Constitutional Court of the SR').[35] Consequently, the decision of the Constitutional Court of the SR in the matter[36] became fundamental in the direction of constitutionality from the perspective of values and, thus, the very identity of the Constitution. By balancing legal principles, the Constitutional Court of the SR allowed interference with the powers of the president regarding granting pardons or amnesties.

> In an objective balancing of constitutional principles, which were affected on the one hand by the resolution of the National Council under review and on the other hand by the derogated decisions of the Prime Minister on amnesties, in the opinion of the Constitutional Court, the preference of the legal certainty of persons who are reasonably suspected of committing serious crimes cannot stand. The annulment of an amnesty (or pardon) in the form of an abolition does not call into question the fundamental right of the persons concerned to the presumption of innocence and all

shall entrust it with the execution of its duties until a new Government is appointed. (3) If the President of the Slovak Republic recalls the Government in accordance with para. (1), then by a decision promulgated in the Collection of Laws of the Slovak Republic, he or she shall charge the Government with further performing its competences until a new Government is appointed, but solely those competences set out in Art. 119(a), (b), (e), (f), (m), (n), (o), (p), and (r); however, the performance of competences of the Government set out in Art. 119(m) and (r) shall require the prior approval of the President of the Slovak Republic in each individual case.

34 Art. 86(i) of the Constitution of the SR: *'adopting resolutions annulling a presidential decision under Art. 102(1)(j) if this decision violates the principles of a democratic state governed by the rule of law; the resolution adopted shall be generally binding and shall be promulgated in the same manner as prescribed for the promulgation of laws'.*

35 *Art. 129a of the Constitution of the SR: 'The Constitutional Court shall decide on the compliance of resolutions of the National Council of the Slovak Republic annulling an amnesty or a pardon adopted under Art. 86(i) with the Constitution of the Slovak Republic. The Constitutional Court shall commence proceedings in cases referred to in the first sentence upon its own motion; Art. 125 shall apply mutatis mutandis'.*

36 Finding of the Constitutional Court of the SR in Case No. PL. ÚS 7/2017 of 31 May 2017

the fundamental guarantees of a fair criminal trial guaranteed by the Constitution and international treaties on human rights and fundamental freedoms.[37]

The indicated direction was pursued by the Constitutional Court of the SR in Case No. PL. ÚS 21/2014 of 30 January 2019, where the Constitutional Court based its reasoning on a certain change in the concept of the roles of legal principles and in their value shift.[38] Thus, the Constitutional Court of the SR clarified the overcoming of the thesis that the law is only what materialises in the applicable legislation, rules, or sources of law. In any case, the noted amendments to the Constitution, modifying the position of the president, also modified its identity.

6. Constitutional identity and the accession of the Slovak Republic to the European Union

Of the other amendments that have affected the identity of the Constitution, it is important not to forget the one that resonated in the context of the Slovak Republic's preparations for accession to the EU (in this context, it also became known as the Euro Amendment). This was the third amendment to the Constitution (Constitutional Act No. 90/2001 Coll.), visibly shifting its identity. Although this so-called major amendment to the Constitution was the most extensive in terms of content

37 *'…the Constitutional Court, after evaluating the negative consequences of the interference with the legal certainty of persons who were amnestied by the decisions of the Prime Minister for acts related to the abduction of Michal Kováč Jr. to a foreign country, caused by the resolution under review, and balancing it with the principles of a democratic state governed by the rule of law, which, according to the above-mentioned conclusions of the Constitutional Court, have been violated by the decisions of the Prime Minister on amnesties in the parts relating to the 'abduction' (the principle of prohibition of arbitrariness, the principle of legality, the principle of protection of human rights and fundamental values in conjunction with the principle of respect for international obligations, the principle of separation of powers, the principle of transparency and public accountability in the exercise of public authority, and the principle of legal certainty and the protection of citizens' confidence in the rule of law), and ultimately guided by the key principle of the rule of law in a substantive sense – the principle of justice, which constitutes the fundamental basis for the exercise of judicial power..'.* – Ibid.

38 *'…In this context, the Constitutional Court also referred to the oath of the Constitutional Court judge, whose task is, among other things, to protect the rule of law. Given that the constitution does not contain explicit provisions on immutable articles, it is only possible to speak of an implicit material core of the Constitution, the scope of which is determined by the case law of the Constitutional Court. A fundamental decision in this respect was the Finding in Case No. PL. ÚS 7/2017 (the so-called Mečiar amnesties), in which the Constitutional Court stated that the material core of the Constitution consists of the principles of a democratic state governed by the rule of law. As regards these principles, their enumeration is not definitive and is constantly evolving; therefore, it is necessary to assess interference with the material core of the Constitution on a case-by-case basis, taking into account also the intensity of any interference…'* – see the Finding of the Constitutional Court of the SR in Case No. PL. ÚS 21/2014 of 30 January 2019.

(it changed approximately 40% of the original text), it was adopted by a marginal constitutional majority (90 MPs voted in favour of it). This amendment modified the identity of the unitary state regarding the Slovak Republic's accession to the EU. Objectively, it can be assessed as a necessary amendment to the Constitution, as it constituted a necessary constitutional framework for the harmonisation of Slovak law with EU law. Beyond specifying relations with international and European communities (ECs), it also affected the regulation of a wide range of national legal institutions (e.g. the judiciary, constitutional judiciary, local self-government, Supreme Audit Office, and Public Defender of Rights). It can be stated that the Constitution has significantly expanded and, in a way, redirected its identity with this amendment by subsuming the prefix euro.

From a substantive perspective, this was a justified constitutional amendment related to inclusion in international structures, although, since the establishment of its independence, the Slovak Republic has become a member of several international organisations (e.g. the United Nations and the Council of Europe) only based on the established rules of international law.[39] The text of the Constitution was amended only before the accession of the Slovak Republic to the EU, mainly in connection with the fact that the sovereignty of the Slovak Republic was expected to be limited as a result of the transfer of powers to the Union.[40]

Meanwhile, it was considered that there would be a need for the reception of the already existing legislation but not the new Slovak Republic legislation. The Explanatory Memorandum to the prepared constitutional amendment states:

> A new state acceding to the European Communities is contractually obliged to adopt 'the acquis communautaire', i.e. it is obliged not only to accede to all the treaties establishing the European Communities, but also to adopt all the legal acts adopted by the Community authorities at the time of the state's accession. This includes, for example, the case-law of the Court of Justice of the European Communities).
>
> European Community law (also known as Community law, European law, Community – European Union law) is a system of supranational law. It differs from ordinary legal systems in particular in that the European Communities have acquired from the Member States the power to create laws which are binding not only on

39 See, *e.g.* Jánošíková, 2013, pp. 249–264.

40 *'Following the transfer of sovereignty, most Member States have included in their constitutional texts not only general receptive provisions guaranteeing the primacy of Community law over national law, but also, for example, the direct binding force of general rules of international law (e.g. Art. 25 of the Basic Law of the Federal Republic of Germany, Art. 8 of the Constitution of the Portuguese Republic, Art. 9 of the Constitution of the Republic of Austria, and others). The vast majority of these countries have applied a monist conception of the relationship between international and domestic law in this respect (an exception is, for example, the United Kingdom of Great Britain and Northern Ireland, which applies a dualist conception).'* Explanatory Memorandum to Constitutional Act No. 90/2001 Coll., available at: https://www.nrsr.sk › web › Dynamic › Download

> the Member States themselves but also on natural and legal persons established on their territory. Community law is therefore a specific and independent legal system which, as a whole, cannot be defined either as international law or as the national law of the individual Member States of the European Communities. It comprises so-called primary law (the treaties establishing the European Communities, the treaties amending them, the treaties by which the new Member States acceded and the international treaties to which the EC is a party), secondary law (regulations, directives, decisions, recommendations, opinions and acts adopted by the Commission pursuant to the treaties establishing the European Communities or on the basis of a mandate from the Council), the judgments of the Court of Justice of the European Communities and the customary law applicable in the EC, including unwritten principles which, in the course of the judicial development of the law, have been taken over from the national law of individual countries and principles of international law and further developed by the Court of Justice of the European Communities (in particular, the Court's opinions on the validity of human and fundamental rights in Community law).
>
> The provisions of the national legal systems of the Member States of the European Communities and of the European Union may not therefore be contrary to the primary law of the European Communities, to the secondary law of the European Communities or to the case-law of the Court of Justice of the European Communities. For this reason, these States have adapted the text of their constitutions and, consequently, their legal systems in order to make them compatible with Community law.[41]

Experts have discussed the accession of the Slovak Republic to the EU since the establishment of the independent Slovak Republic.[42] More intensive (sometimes heated and even contradictory) discussions took place from 1999 onwards when work gradually began on the actual text of the constitutional amendment.[43] Progressive and beneficial amendments to the Constitution were also proposed, which unfortunately did not make it into the final text of the amendment in question (e.g.

41 Ibid.

42 The explanatory memorandum to the amendment states that *'by concluding the Association Agreement in 1993, the Slovak Republic committed itself to joining the European Communities and the European Union (Communication of the Ministry of Foreign Affairs of the Slovak Republic No. 158/1997 Coll.; Amendments No. 4/1999 Coll. and No. 107/2000 Coll.). The implementation of this international treaty requires not only the approximation of Slovak law to European Communities law, but also the creation of constitutional conditions for the future ratification of all fundamental international treaties on which the European Communities and the European Union are based and, in particular, for their subsequent application in the manner required for all Member States of these international organisations'.*
Explanatory Memorandum to Constitutional Act No. 90/2001 Coll., available at: https://www.nrsr.sk › web › Dynamic › Download.

43 Between May 1999 and May 2000, 52 lengthy articles on the content of the proposed amendment were published in the press. The intensity of these articles increased, with 117 published between January 2000 and February 2001. The television debates were equally intense. During the preparatory work, 27 versions of draft amendments of the Constitution were prepared.
See more: Lešková, 2021, pp. 60–61.

the constitutional definition of the legal force and effects of secondary community law).[44]

In the context of EU membership, two major issues had to be resolved: how powers would be transferred to the ECs and the EU and the rules for integrating the already extensive EC and EU law. Both issues were essential for the successful future coexistence of the EU and Slovak law. On both issues, the new wording of the then rather short Article 7 of the Constitution of the Slovak Republic is crucial.[45] The key to this was the addition of a second paragraph to the Article:

> The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its rights to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Article 120(2).[46]

The relatively clear and somewhat standard constitutional wording raises several questions regarding its interpretation; for example, in connection with the fact that Article 7(2) of the constitution does not speak of a transfer of powers but only of a transfer of *'the exercise of part of its rights'*. According to the wording of Article 7(2), the

44 Jánošíková, 2013, pp. 249–264.

45 Original wording No. 7 before the amendment: *'The Slovak Republic may, by its own discretion, enter into a state union with other states. The right to withdraw from this union may not be restricted. A constitutional law, which shall be confirmed by a referendum, shall decide on the entry into a state union, or on the withdrawal from such union.'*

46 Current wording of Art. 7: '(1) The Slovak Republic may, by its own discretion, enter into a state union with other states. A constitutional law, which shall be confirmed by a referendum, shall decide on the entry into a state union, or on the withdrawal from such union. (2) The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its rights to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Art. 120(2). (3) The Slovak Republic may for purpose of maintaining peace, security and democratic order, under conditions established by an international treaty, join an organisation of mutual collective security. (4) The validity of international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which a membership of the Slovak Republic in international organisations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary and international treaties which directly confer rights or impose duties on natural persons or legal persons, require the approval of the National Council of the Slovak Republic before ratification. (5) International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws'.

Slovak Republic may only transfer the exercise of a part of its rights to the ECs and the EU. Currently, if the transfer of the exercise of a part of its rights were to be modified, it would only be in relation to the EU and Euratom.[47] At the time of the amendment to the Constitution, inspired by some Member States, this was considered the best possible solution.[48] Accession treaties are international and induce international membership. Thus, the amendment to the Constitution also reflected the newly emerging need to specify international treaties that have taken on a multilevel character.

The Constitution specified several categories of international treaties, namely international treaties by which the Slovak Republic may, for maintaining peace, security, and democratic order, join an organisation of mutual collective security—Article 7(3)—and international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which membership of the Slovak Republic in international organisations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary, and international treaties that directly confer rights or impose duties on natural persons or legal persons—Article 7(4). Their validity requires the approval of the National Council of the SR before ratification, which allows the members of parliament to discuss such a treaty before its entry into force. Meanwhile, along with Article 125a, a preliminary review of constitutionality was provided, which enables the President and the Government of the Slovak Republic to submit a proposal to the Constitutional Court to review the conformity of a negotiated international treaty before its ratification by the National Council of the SR.

International treaties on human rights and fundamental freedoms, international treaties for which exercising a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons, which were ratified and promulgated in the way laid down by law, shall have precedence over laws in accordance with Article 7(5).[49] This Article establishes the primacy

47 Since the entry into force of the Lisbon Treaty (1 December 2009), there is only the EU and Euratom.

48 The Constitutions of Belgium and Luxembourg have similar provisions – see: Klokočka and Wagnerová, 2004.

49 *'The constitutional statement according to which international treaties for whose exercise a law is not necessary, which were ratified and promulgated in the way laid down by a law and by which the Slovak Republic is bound shall have precedence over laws means not only that the constitution-maker considers such treaties to be part of the legal system of the Slovak Republic, but also that in the hierarchy of legal norms it assigns them a place between the Constitution (constitutional laws) and the laws of the National Council of the Slovak Republic.'*
'The rule of precedence of directly binding international treaties approved by the National Council of the Slovak Republic will also result in the judges being bound by these international treaties (the proposed wording of Art. 144(1) of the Constitution states in this regard that judges, in the performance of their function, shall be independent and bound by the Constitution, by constitutional laws, by an international treaty pursuant to Art. 7(2) and (5), and by laws). It is therefore assumed that in the event of a conflict between a law and an international treaty approved by the National Council of the Slovak Republic, the judges will give precedence to the international treaty, i.e. they will not apply the law'.
Explanatory Memorandum to Constitutional Act No. 90/2001 Coll., available at: https://www.nrsr.sk › web › Dynamic › Download.

of the aforementioned international treaties over law. Hierarchically, they remain below the Constitution in the legal system, which is ultimately guaranteed by the Constitutional Court of the Slovak Republic in accordance with Article 125a.[50] The international treaties by which the Slovak Republic became part of the EC and EU were perceived in this regime.

However, this also deconstructs the traditional grouping of legal rules, the top of which is the Constitution, whose position is diminished by the case law of the Court of Justice of the European Union (CJEU). By rejecting the classic intergovernmental subtext of the founding (international) treaties, according to which only the Contracting (Member) States have direct rights and obligations, the Court of Justice has undermined the principle of the unchallengeability of the legal system.[51] The international character of the Communities and the literal interpretation of the founding treaties have been discarded through the case law of the CJEU in favour of quasi-constitutional principles to be considered in any interpretation of EU law. This has transformed the communities of sovereign Member States into supranational communities, despite the initial opposition of some governments or constitutional courts of the Member States (Germany, Italy, Ireland, Spain, France, Italy, Denmark, and the Czech Republic). The supranational understanding of integration in the eyes of the CJEU, thus, dominates today's pan-European legal discourse despite many reservations.[52]

Based on the current experience, despite the above, the impact of constitutional changes has gone well beyond what was anticipated.[53] However, the optimism of the Explanatory Memorandum and the relatively unambiguous provisions of the Constitution have given rise to several application problems over time. One is that the processes of integration and globalisation undermine the unchallengeability of the legal system, which is a fundamental and necessary condition for effective functioning. For example, they have led to a perceived diametrical difference between the application of international treaties while maintaining the national degree of legal force and the approach of European law. Similarly, the CJEU does not consider the hierarchical order of the sources of national law in its decision-making.[54]

50 *'It is therefore not possible to assume that an international treaty would be concluded whose the content would contradict the Constitution of the Slovak Republic, nor that the content of such an international treaty would make it impossible to apply the constitutional standard of protection of human rights and fundamental freedoms in the Slovak Republic'.* – Ibid.

51 Breichová Lapčáková, 2020, p. 108.

52 Baraník, 2017, pp. 238–243.

53 See, *e.g.* Orosz, 2001, pp. 969–991.

54 Breichová Lapčáková, 2020, p. 108.

7. Constitutional aspect of the relationship between European Union law and national law of the Slovak Republic

Despite the Court's preference for uniformity of application, each national law has its own way of national acceptance of EU Law, including the Slovak Republic. The fact that, from the perspective of EU law, it is 'only' a national interpretation of the effects of EU law does not change this. By accessing the EU, Member States committed themselves to respecting all EU laws, which became part of their national laws at the moment of membership. The CJEU has given Union law a direct effect and immediate primacy of application over the laws of Member States. In its fundamental case law, the CJEU has defined EU law as superior to all national laws of Member States, irrespective of their national legal force or constitutional review procedures.[55] Although national laws (especially through the doctrines of constitutional courts) interpret these effects in different ways, they are obliged to accept them in light of the above. In case of violation or non-respect of the effects of EU legal acts by Member States, there is an adequate sanctioning mechanism at the union level, for example, in the form of non-negligible financial sanctions. However, this problem arises when the effects of the application of EU Law are disproportionate to specific national conditions, which naturally creates a conflict and raises the question of the appropriateness of the application of EU Law. Even in such cases, the constitutional court should prioritise the constitutionality of national law. The Constitutional Court of the Slovak Republic is one of the most restrained constitutional courts on these issues; its rather modest case law in this respect is discussed below.

The relationship between EU law and the national law of the Slovak Republic from a constitutional perspective is specified in two lines:

1) Vertical separation of powers relating to the transfer of the exercise of powers under Article 7(2),
2) The line of transformation of Union Law and its subsequent coexistence within the national law of the Slovak Republic.

7.1. On the transfer of powers

The constitutional basis for the operation of EU Law in Slovak Law is Article 7(2). This is the so-called delegation or transfer clause, providing the necessary constitutional legal basis for the proper fulfilment of the obligations assumed by the Slovak Republic when concluding the Europe Agreement establishing an association between the Slovak Republic, on the one hand, and the ECs and their Member States, on the other hand.

55 We refer, *e.g.* to Judgement of 3 June 1964, *Costa v E.N.E.L.* 6/64; as well as Judgement of 17 December 1970, *Internationale Handelsgesellschaft mbH*, C-11/70; and Judgement of 9 March 1978, *Simmenthal* 106/77.

> The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its rights to the European Communities and the European Union.—Article 7(2)

The constitutional text allows the Slovak Republic to transfer the exercise of a part of its rights to the EU. This refers to the conclusion of an international treaty which, if adopted, becomes part of the union's primary law. Given the international character of the founding treaties, this part is also the determining regime for the operation of EU law in Slovak law. Under this regime, the Slovak Republic (together with other acceding states) concluded an EU Accession Treaty with the original EU Member States. The National Council expressed its approval at its meeting on 1 July 2003. The president signed an instrument for ratification on 26 August 2003. The Treaty was promulgated in the Official Gazette of the Slovak Republic by Communication of the Ministry of Foreign Affairs of the Slovak Republic No. 185/2004 Coll., as required by Slovak legislation.

The first part of Article 7(2) of the Constitution explicitly speaks only of the transfer of 'the exercise of a part of its rights', not of the transfer of rights or powers themselves. Based on this provision, there was no surrender of national sovereignty to a supranational organisation; therefore, we cannot speak of a surrender or transfer of sovereignty. This provision is unusual and rather imprecise from the perspective of international law, since states delegate powers, not the exercise of rights, to international organisations. However, a comparative perspective shows that even constitutional articles that allow for the transfer of the exercise of power do not entail the loss of a state's sovereignty. In contrast, the sovereign act of a temporary transfer of powers can also be understood as a declaration of the full sovereignty of a particular state. Only a fully sovereign state can perform such an act.[56] Meanwhile, the wording of Article 7(2) also implies that it cannot transfer the exercise of all rights held by the Slovak Republic but only the exercise of some of those rights.

The transfer of the exercise of powers was also linked to the holding of a referendum on the Slovak Republic's accession to the EU in May 2003, with a simple question—*'Do you agree to the proposal that the Slovak Republic should become a Member State of the European Union?'* This referendum was the fifth such attempt in Slovakia. To date, 52.15% of eligible voters have participated, making it the only valid referendum among all national referenda held in Slovakia to date.[57] The required turnout threshold for the validity of the referendum was only just exceeded, despite a state-funded information agenda, and the consensus of all relevant political

56 Orosz and Svák et al., 2021 pp. 182 *et seq*.

57 The way the referendum was initiated was also specific—the President announced it based on a resolution of the National Council of the SR under Art. 95 of the Constitution, and all 147 participating MPs voted unanimously in favour of the resolution, including MPs from the then Communist Party of Slovakia (KSS), which had a strong negative attitude towards the EU.

parties with the help of dissenting voters, without whom the turnout would have reached only 48.9%. Thus, the mobilising effect of the official campaign was very limited. Accession to the EU was a long-term agenda of all previous Slovak governments, and thus, even though at certain stages it was more declaratory than a realistic policy, most citizens identified with this foreign policy goal, which was confirmed by long-term opinion polls. Nevertheless, during the referendum, there were concerns about reaching the required turnout threshold.[58] Since one of the arguments in favour of participation in the referendum was the claim that it was constitutionally mandatory, it is important to point out certain constitutional contexts.

From a substantive perspective, the Constitution distinguishes between obligatory and optional referenda. The provisions of the Constitution of the Slovak Republic concerning the regulation of obligatory referenda appear to be the least controversial (Article 93.1 and Article 7). In this context (Article 93.1), it is necessary to hold a referendum if the parliament adopts a constitutional law on joining a state union with other states or on secession from such a union. The Constitution lays down the obligation to call and hold a referendum in such a situation. It was also confirmed by the opinion of the Constitutional Court of the Slovak Republic— 'Mandatory referendum can be defined as a referendum by which a fundamental decision of the Parliament, whose nature is defined by the Constitution, must be approved by the citizens' (II. ÚS 31/97).

This referendum is a necessary precondition for the effectiveness of constitutional law, in that the Slovak Republic would join a state union with other states (or would secede from such a union). Therefore, this is also a ratification referendum, as without a positive result, the constitutional law will not come into force, and the effects arising from it (the entry of the Slovak Republic into the state union) will not be valid. If constitutional bodies decided to join a state union with another state, it would be up to the citizens of the Slovak Republic to express their opinion on whether they would accept the will of their legitimate state bodies. If the results of the referendum were positive, constitutional law would be enforced. Meanwhile, the Constitution would also change, and the subsequent decision-making of the Parliament would no longer be necessary. If the opinion expressed in the referendum was negative, the nation would exercise its right of veto, and the discussion on joining the state union (or secession from it) would have to be postponed for at least three years, as per Article 99.2 of the Constitution. Therefore, the adopted constitutional law was not enforced. The

58 The referendum was held on two days, 16 and 17 May 2003. The fact that the President used his constitutional power to set two voting days instead of one can be seen as an intention to ensure greater voter participation. Meanwhile, it allowed the political parties to continue their agitation in the event that the turnout on the first day did not reach the necessary 50% threshold, which in fact happened. Thus, on the evening of 16 May, the chairmen of the parliamentary parties met in the building of the National Council of the SR and called on the citizens to increase their participation during the second voting day. Similarly, on the next day, at lunchtime on 17 May, the top constitutional officials met and called on citizens to participate in the referendum.

results of the referendum would lead to a valid but ineffective constitutional law. The Constitution also provides for an optional referendum in Article 93.2 on other important issues of public interest.

The fact that the EU was not a state refutes any doubt that the referendum on accession to the EU was optional under the Constitution of the Slovak Republic. Notwithstanding the above, the fundamental objective—that is, the confirmation of this foreign-policy agenda—was achieved in the referendum, and the government could, thus, present its mandate to conclude accession negotiations related to accession to the EU. Meanwhile, it confirmed its legitimacy in transferring the exercise of power to the EU.

7.2. On the transformation of European Union law

EU law must be viewed on its own terms. Thus, primary and secondary sources of EU law work differently in the Slovak Republic.

7.2.1. Primary law and the Constitution of the Slovak Republic

The relationship between the primary law of the then ECs and the EU and the national law of the Slovak Republic had to be addressed comprehensively by an amendment of the Constitution within the framework of the regulation of the relation of the Slovak Republic to international law. In its original wording, the Constitution did not regulate this category of relations to a great extent. As already mentioned, the relationship to international law was, until then, assessed as moderately dualistic, as the Constitution provided for the primacy of only one group of international treaties over laws (i.e. international treaties on human rights and fundamental freedoms) but only provided that these treaties ensured a greater scope of constitutional rights and freedoms. Other international treaties can be applied in preference based only on specific clauses contained in individual laws. However, the dualistic concept of the relationship between international and national law, of which the Constitution provisions were characteristic until the relevant amendment, could jeopardise the fulfilment of the obligations the Slovak Republic would assume by acceding to the EU. As already mentioned, the case law of the CJEU upholds the principle of community monism, which is linked to the principles of primacy and the direct applicability of union law at the member-state level. Therefore, the regulation of the relationship between national and international laws has also been considered vital from the perspective of EU law. Therefore, in the context of the amendment of the Constitution in question, a new paragraph 2 was added to the original Article 1 of the Constitution[59], according to which the Slovak Republic acknowledges and adheres to the general rules of international law,

59 Wording of Art. 1 in the original text of the Constitution of the Slovak Republic: *'The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion'.*

international treaties by which it is bound, and its other international obligations.[60] Regarding the primary sources of European law, we perceive Article 1(2) only in a subsidiary way because it does not establish norms of international law as part of Slovak law, and primacy over national law, which is considered a means of fulfilling obligations arising from international law, is guaranteed by the Constitution only for certain groups of international treaties.[61] The Constitutional text still lacks a declaration that the norms of international law become part of the Slovak legal system. However, based on the amendment in question, under Article 7(5) of the Constitution of the Slovak Republic, there is room for a monistic solution to the relationship between a wider range of international treaties and national law. Even so, this applies only to a narrower category of international treaties, namely, international treaties on human rights and fundamental freedoms, for which exercising a law is not necessary, and international treaties which directly confer rights or impose duties on natural or legal persons that have precedence over laws. Primary Union law may, thus, be classified as international treaties for which exercising a law is not necessary and international treaties which directly confer rights or impose duties on natural or legal persons. This interpretation is also supported by the fact that, in 2003, the National Council expressed its approval of the Treaty on the Accession of the Slovak Republic to the EU and simultaneously decided that it was a treaty under Article 7(5).[62]

The special position of these categories of international treaties was also specified based on Articles 125 and 144(1) of the Constitution, which were modified by relevant amendments to the Constitution. Article 125 of the Constitution regulates the procedure for the conformity of laws before the Constitutional Court, within which the Constitutional Court may also consider the conformity of laws with international treaties approved by the National Council of the SR. Article 7 (4) of the Constitution of the Slovak Republic specifies international treaties that require the approval of the National Council before ratification by the president. This includes all groups of international treaties which, as per Article 7(5) of the Constitution, take precedence over laws. Thus, in the hierarchy of sources of law, international treaties to which the National Council of the SR has expressed its approval can be placed between the Constitution and constitutional laws, on the one hand, and laws, on the other. The protection of the constitutionality of these international treaties in

60 Current wording of Art. 1 of the Constitution of the Slovak Republic: *'(1) The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion. (2) The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations'.*

61 Jánošíková, 2013, pp. 249–264.

62 The same is also clear from Communication of the Ministry of Foreign Affairs No. 185/2004 Coll. regarding the EU Accession Treaty, which states that the National Council agreed to ratify the EU Accession Treaty and decided that it is an international treaty under Art. 7(5) of the Constitution, which has precedence over laws, as well as from Communication No. 486/2009 Coll. concerning the Treaty of Lisbon.

the ratification process results from the special preventive constitutionality review procedure under Article 125a.[63]

In this context, we refer to Article 144 of the Constitution of the Slovak Republic.[64] The first paragraph of this Article regulates the sources of law by which judges are bound in their decisions, which include international treaties under Article 7(2) of the Constitution (i.e. international treaties by which the Slovak Republic has transferred the exercise of a part of its rights to the EU) and international treaties under Article 7(5) of the Constitution (i.e. international treaties which have precedence over laws). The order to bind the judges of the general courts directly through these international treaties may, thus, be regarded as a means of ensuring their primacy, as provided for in Article 7(5) of the Constitution.

7.2.2. Secondary law and the Constitution of the Slovak Republic

The basic line of the EU legal system regarding secondary law is determined by the Constitution of the Slovak Republic in the second sentence of Article 7(2): *'Legally binding acts of the European Communities and the European Union shall have precedence over the laws of the Slovak Republic'*. The Constitution explicitly refers to the so-called secondary law of the EU, which has been or will be adopted by the bodies of the EU based on the delegation of powers by Member States. Thus, the Constitutional text refers quite clearly to the dichotomy of the union's primary and secondary laws. By not explicitly mentioning primary law, the Constitution maintains it within the above-mentioned regime of international treaties.

We cannot conclude that the method chosen in this manner, which declares the primacy of secondary EU Law over law, is the most appropriate solution. According to Jánošiková, the term 'legally binding EC and EU acts' was used inappropriately, particularly given that at the time when the amendment of the Constitution was adopted (2001), EU law consisted of two parts: community law and union law. Traditionally, priority has been given to community law acts. However, the Slovak

63 Art. 125a *'(1) The Constitutional Court shall decide on the conformity of negotiated international treaties to which the approval of the National Council of the Slovak Republic is necessary with the Constitution or a constitutional law. (2) The President of the Slovak Republic or the Government may submit a proposal for a decision pursuant to para. 1 to the Constitutional Court prior to the presentation of a negotiated international treaty for discussion of the National Council of the Slovak Republic. (3) The Constitutional Court shall decide on a proposal pursuant to para. 2 within a period laid down by a law; if the Constitutional Court holds in its decision that the international treaty is not in conformity with the Constitution or a constitutional law, such international treaty may not be ratified'*.

64 Art. 144 *'(1) Judges, in the performance of their function, shall be independent and, in decision making shall be bound by the Constitution, by constitutional laws, by an international treaty pursuant to Art. 7(2) and (5), and by laws. (2) If a court assumes that other generally binding legal regulation, its part, or its individual provisions which concern a pending matter contradicts the Constitution, a constitutional law, an international treaty pursuant to Art. 7(5) or a law, it shall suspend the proceedings and shall submit a proposal for the commence of proceedings according to Art. 125(1). The legal opinion of the Constitutional Court of the Slovak Republic contained in the decision shall be binding for the court'*.

Republic voluntarily guaranteed the primacy of legal acts of union law. Another problem in the formulation of the primacy of secondary union law over the law concerns the temporal effects of Article 7(2) of the Constitution. The amendment to the Constitution came into force on 1 July 2001 almost three years before the Slovak Republic's membership in the EU. The Slovak Republic, thus, guaranteed primacy over its laws of legally binding acts of an international organisation of which it was not yet a member. This paradox cannot be mitigated by the obligation to ensure that its legislation will be gradually made compatible with that of the Union, which the Slovak Republic assumed in Article 69 of the Europe Agreement, establishing an association between the Slovak Republic, on the one hand, and the ECs and their Member States, on the other.[65]

The second sentence of Article 7(2), thus, gives secondary EU law supra-legislative status. Given the effects of EU Law and its characteristics, as shaped by the case law of the Court of Justice, the national formal assignment of supra-legislative status is, in Baránik's view, manifestly nonsensical, and one can reasonably doubt the compatibility of any confirmatory clause with primary or secondary EU law. Such additional national confirmation of the effects of EU Law could reduce the effectiveness of the operation of EU Law, which is by its nature unacceptable. The approach where a Member State, through its national law, seeks to give EU law national effects directly contradicts the established case law of the Court of Justice, even with the terminology of the EC or the EU. By joining the EU, the Slovak Republic respected these effects. Therefore, it is impossible to accept an explanation according to which EU law exists in the Slovak legal system in a legal regime determined exclusively by Articles 7(2) and (5). These provisions justify the national effects of primary and secondary EU laws inadequately and rigidly.[66] There are many open questions in this regard, which is why an inter-systemic solution, in which the Constitution, by explicit definition, opens itself up to EU law and neutrally states that EU law enjoys a status in a given legal system it itself establishes, may be preferable. The solution offered by the Constitution of the Slovak Republic is based on leaving room for interpretation by the Constitutional Court, but in the Slovak Republic (unlike other Member States), its activity in this direction is not widespread.

Article 7(2) continues with the third sentence, *'The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Article 120(2)'*, which is already more explicit in terms of interpretation. It lays down the method of national implementation of those Union acts that need transposition into national law to be applied in the legal system (i.e. to be in effect). The Constitution provides for two basic ways in which implementation can be realised: via a law or the so-called approximation regulation of the government. This provision is inherently non-controversial and deals only with the effects of legal acts that require national implementation for their national effect.

65 Jánošíková, 2013, p. 249–264.
66 Orosz and Svák et al., 2021, p. 104.

Moreover, it is sufficiently flexible to respond to potential requirements of EU law.[67] To regulate relations between the Union and the Slovak Republic, it is necessary to remember the existence of Constitutional Act No. 397/2004 Coll. on cooperation between the National Council of the SR and the Government of the Slovak Republic on EU matters. It is one of the few pieces of legislation that remains in force in its original form and has never been amended. However, it is not because it exhaustively regulates relevant relations.

This constitutional law was adopted in a relatively short period after the Slovak Republic acceded to the EU on 24 June 2004. At that time, it was fully in line with the trend towards eliminating the democratic deficit within the union by strengthening the influence of national parliaments on decision-making on matters concerning the EU. This trend was later embraced by the Union through the Treaty of Lisbon. The adoption of this constitutional law was not a requirement for a state to become a member of a union under EU law. It was also not a regulation of matters whose national constitutional solution would have been required by union law. It was, and is, a matter for the state to decide whether to regulate these matters at a national level.

The Slovak Republic chose to regulate this in the form of constitutional law, thus blocking a more flexible method of its (sometimes necessary) amendment. According to this constitutional law, the government or an authorised member of the government shall submit to the National Council of the SR drafts of legally binding acts and other acts of the ECs and the EU to be discussed by the representatives of the Governments of the Member States of the European Union and shall inform it of other matters related to the Slovak Republic's membership in the ECs and the EU—Article 1(1). This constitutional law, thus, introduced an information obligation of the government towards the National Council of the SR regarding drafts of legally binding acts and other acts of the then ECs and the Union and matters related to the membership of the Slovak Republic in the EU. The Government (or its authorised member) shall, simultaneously with the draft acts of the union, provide a draft opinion of the Slovak Republic on these drafts, which includes an assessment of their impact and effect on the Slovak Republic, sufficiently in advance for discussion—Article 1(2).

The National Council of the SR has, thus, acquired the authority to grant a member of the government an imperative mandate in connection with the opinion to be presented by a member of the government when representing the Slovak Republic in relevant institutions of the EC and the Union. It remains an unanswered question as to why the issue of the influence of the National Council on decision-making on union matters was not addressed in the 2001 amendment to the Constitution. The adoption of this constitutional law deepened undesirable practices in the Slovak Republic through the adoption of constitutional laws with no constitutional authority.[68]

67 Ibid.

68 See more, *e.g.* Breichová Lapčáková, 2011, pp. 1–15.

Leaving aside its questionable form, from a substantive perspective, this rather brief constitutional law has some inaccuracies.[69] According to it, the National Council of the SR has the power to approve the opinions of the Slovak Republic on drafts of legally binding acts and other acts of the ECs and the EU to be decided upon by the representatives of the governments of the Member States of the EU—Article 2(1). In this spirit, a direct contradiction is visible in Article 2(2), according to which the National Council of the SR may be authorised by law by its committee to exercise its powers, as referred to in para. 1. However, the Constitution does not contain a constitutional law establishing the responsibility of a member of the government towards a committee of the National Council (the Constitution envisages only responsibility towards the National Council as a whole), nor does it contain a constitutional law explicitly allowing for the relevant committee of the National Council to adopt opinions binding to the member of the government concerned. The National Council of the SR may also approve the opinions of the Slovak Republic concerning other EU matters if requested by the government or by at least one-fifth of the members of the National Council of the SR—Article 2(3). If the National Council of the SR approves the draft opinion of the Slovak Republic, it will be binding to a member of the government representing the Slovak Republic in the relevant body of the EC and the EU. If the National Council of the SR does not comment on the draft opinion of the Slovak Republic within two weeks of its submission or if it does not approve the draft opinion of the Slovak Republic without adopting another opinion on the matter, the member of the government shall be bound by the draft opinion of the Slovak Republic—Article 2(4). A member of the government may deviate from the opinion of the Slovak Republic adopted by the National Council of the SR only if necessary, and due consideration is given to the interests of the Slovak Republic. In such a case, he shall inform the National Council of the SR without delay and explain the reasons for taking such action. However, should this become necessary, a member of the government may ask the National Council of the SR to alter its original opinion of the Slovak Republic—Article 2(5). Moreover, the position of the National Council of the SR is also strengthened by the fact that, according to this constitutional law, at least once a year, on the basis of a report submitted by the government, it shall discuss matters relating to the Slovak Republic's membership in the EU and approve recommendations to the government for the following period—Article 2(6). As noted, this constitutional law has not been amended despite several attempts to do so.[70]

69 Constitutional Act No. 397/2004 Coll. on the cooperation between the National Council of the SR and the Government of the Slovak Republic in EU matters consists of only four articles, the first three dealing with the substance, and the last one providing for its entry into force.

70 The last proposal for amendment was in the first half of 2022, where it was proposed, among other things, that if the National Council of the SR does not comment on the draft opinion of the Slovak Republic within two weeks of its submission by the Government of the Slovak Republic, the member of the Government shall be bound by the draft opinion of the Slovak Republic that was submitted by the Government of the Slovak Republic.

8. The Position of the Constitutional Court of the Slovak Republic in the relationship between European Union law and national law of the Slovak Republic

Constitutional courts play an important role in Member States, not only in the protection of constitutionality. They are the highest judicial authorities and their decisions often define the direction of the state. Based on their jurisprudence, it is possible to perceive the value setting and direction of the state. The position of constitutional courts is not the same in the Member States. The Constitutional Court of the Slovak Republic gradually and cautiously developed its adjudication activity regarding the EU laws. Article 7 (2) of the Constitution provides room for clarification, explanation, and a comprehensive definition of the relationship between the Slovak constitutional order and the EU law. However, thus far, the Constitutional Court of the Slovak Republic has done so partially and cautiously.

There have been few court decisions in the Constitutional Court of the Slovak Republic related to EU law. Since the Slovak Republic acceded to the European Union, the Constitutional Court of the Slovak Republic first dealt with EU law when assessing the decisions of other public authorities relative to the requirement for a Euroconform interpretation of national legal acts and ensuring the effectiveness and full effect of EU law. He also defined his position relative to the requirement to respect EU laws. In this respect, he defined his decision-making activities as part of his constitutional duty arising from Article 1(2) of the Constitution of the Slovak Republic.

First, we should mention the decision of the Constitutional Court, in which it specified the EU's state law definition. This was *the Ruling of the Constitutional Court of the Slovak Republic in the case II. ÚS 171/05 of 27 February 2008*. In the proceedings on the constitutional complaint of 11 July 2005, the Constitutional Court of the Slovak Republic dealt with the question of whether the EU was a state union. The proceedings were closely related to the ratification of the treaty that established a Constitution for Europe. The applicants argued that the Slovak Republic had entered into a state union within the meaning of Article 7 (1) of the Constitution. According to this Article, the decision to join a state union is made by constitutional law, which is confirmed by a referendum. As this had not been done, the applicants argued that their fundamental right to participate directly in the administration of public affairs by referendum had been violated. However, the Constitutional Court did not share the applicants' arguments. It stated that

> The question of the legal nature of the European Union in its present state, after the eventual entry into force of the Treaty, and in the future in general, is in many respects an extremely complex question with intertwined international and national aspects. The Constitutional Court notes that the development in the European Union is undoubtedly tending towards a state form, i.e. a state union, but in the opinion

> of the Constitutional Court it is not yet possible to determine in a serious way the moment when this will happen. The evidence in the present proceedings has shown that the European Union, even in its present state, has a number of features and functions which, within the framework of accepted legal theory, can be subsumed under the characteristics of a state union (which is not disputed by the applicants). On the other hand, even after the entry into force of the Treaty, there would be differences and specificities in the legal status of the European Union, including the regime for the exercise of its competence under the Treaty, which, in their totality, significantly undermine the applicants' thesis on the exclusive nature of the European Union as a State Union after the adoption of the Treaty (e.g. the manner in which decisions are to be taken outside the organs of the Union and the notion of the territory of the European Union, which is only affected by the Treaty on a piecemeal basis, and which does not create a legal basis for a uniformly understood territory within a State Union, etc.). As stated above, the applicants have also used definitions and opinions from the field of legal theory as a basis for their argumentation on this issue. It must be said, however, that the Constitutional Court considers their choice of authorial citations to be largely one-sided, since there are undoubtedly differing views in this area, both at home and abroad. Moreover, the Constitutional Court does not consider it adequate to subordinate the assessment of the legal nature of the European Union to the conventional categories of legal theory, precisely because of the uniqueness of the European Union and the many specific features that characterize it.

The Constitutional Court further stated,

> It does not follow from these or any other provision of the Treaty that the Treaty establishes a common state of the members of the European Union or that the European Union, as a political and economic grouping of Member States, is to acquire the nature of a state union after the adoption of the Treaty, and, according to the Constitutional Court, the Slovak Republic cannot itself confer this status on the European Union. Such a decision can only be taken by the European Union institutions with the consent of all Member States. In the light of all the foregoing, the Constitutional Court finds that, within the limits of the present case, it does not consider that the applicants' fundamental allegation that the European Union will be a State Union once the Treaty is approved has been proved.

Although the Constitutional Court did not take the opportunity given by this complaint to clarify the content of the not-so-happy term 'EU' in Article 7 (1) of the Constitution, its decision nevertheless contains an important conclusion from the perspective of the constitutional perception of international treaties by which the Slovak Republic delegates the exercise of part of its rights to the EC/EU. According to this ruling,

> (…) all other acts and actions taken by the Slovak Republic within the framework of the relevant ties with the European Communities and the European Union must, in terms of the approval process, be subject to the constitutional norm contained in Article 7 (2), first sentence, of the Constitution. This does not change the fact that even if it is an act that changes the qualitative parameters of cooperation between the members of the grouping, as is the case with the Treaty. It follows from the foregoing that, irrespective of the nature of the European Union, neither the accession of the Slovak Republic to the European Union nor any other acts initiated either by the European Union or by the Slovak Republic can create a situation which would be causally related to the purpose and content of the provisions of Article 7 (1) of the Constitution.

It follows from these conclusions of the Constitutional Court's ruling that any treaty concluded by the Slovak Republic following its membership in the EU cannot fall under the application of Article 7 (1) of the Constitution; that is, it is not even a possible treaty in which the states explicitly state that it establishes between them a state union called the EU. Regarding further decision-making activities, in the framework of individual proceedings on the compatibility of legislation under Article 125 of the Constitution, the Constitutional Court dealt with the law of the EU at two main, partly overlapping levels:

1. When assessing the question of whether Slovak legislation complies with EU law; that is, when assessing the euro conformity of Slovak legislation (e.g. decisions of the Constitutional Court adopted in proceedings under Case No. PL. ÚS 3/09, Case No. PL. ÚS 105/2011 and Case No. PL. ÚS 10/2014),

2. When assessing whether Slovak legislation, which has its origin or is based on the law of the European Union, complies with the Slovak Constitution; that is, when assessing the constitutional conformity of Slovak legislation, the existence of which is conditioned by the law of the EU (e.g. decisions of the Constitutional Court adopted in the proceedings filed under PL. ÚS 12/2012, PL. ÚS 115/2011, PL. ÚS 10/2014).[71]

Some of the reasoning in these decisions was more relevant to EU law, while others were less relevant. In the following section, we select the decisions that have defined, at least in a minimal way, the position of the Constitutional Court of the Slovak Republic towards the EU legal order. Most regard primary EU laws.

One of the judgements in which the Constitutional Court of the Slovak Republic dealt with the relationship between Slovak constitutional law and EU law was *the Ruling of the Constitutional Court of the Slovak Republic of 26 January 2011, Case No. PL. ÚS 3/09.* The complainants were a group of members of the National Council of

71 Macejková, I. *European Union law in the decision-making activity of the Constitutional Court of the Slovak Republic,* [Online]. Available at: https://www.ustavnysud.sk/documents/10182/0/Presentation-Ms_Macejkova.pdf/c4af38fe-b1d4-4fd2-957c-35f28a321717.

the SR, in their petition for initiation of proceedings they objected to the incompatibility of the provisions of Act No. 581/2004 Coll. on health insurance companies, as amended, with, *inter alia*, the provisions of the founding treaties (the Treaty on EU and the Treaty on the Functioning of the EU). The applicants alleged infringement of Articles 18, 49, 54, and 63 of the Treaty on the Functioning of the EU, which presupposed that the Constitutional Court would be active regarding the primary law of the EU.

The appellants proceeded on the basis that *'primary Community law is based on international treaties (in particular the EC Treaty), which directly create rights or obligations of natural persons or legal persons (Article 7 (5) of the Constitution), and therefore takes precedence over Slovak laws'* while the Constitutional Court *'may, in accordance with Article 125 (1) (a) of the Constitution, also conduct proceedings on the compatibility of laws with those international treaties which constitute primary Community law'*; that is, norms of primary EU law, in the opinion of the group of Members of the European Parliament, constitute a 'special derogation criterion' applicable by the Constitutional Court in proceedings on the compatibility of legislation, pursuant to Article 125 (1) (a) of the Constitution.[72] The Constitutional Court stated that

> In the course of its previous adjudication under Article 125 (1) (a) of the Constitution, the Constitutional Court has not yet been confronted with such an application under which it would have to exercise this power also in relation to the alleged inconsistency of a national legal norm with an international treaty forming part of the primary law of the European Union.

He also defined the Treaty on the Functioning of the European Union—that is, the norm of primary law—as an international treaty that directly creates the rights or obligations of natural persons or legal entities, pursuant to Article 7 (5) of the Constitution of the Slovak Republic. Thus, he adhered to the characterisation of the founding EU treaties as international treaties. Hence, the Constitutional Court of the Slovak Republic classified primary EU Law as a *'special sub-category of international treaties'*. According to a Constitutional Court,

> These are treaties by which the Slovak Republic has transferred the exercise of part of its rights to the European Communities and the European Union. However, even this constitutional exclusion of the international treaty(s) by which the Slovak Republic has transferred the exercise of part of its rights to the European Communities and

72 Pursuant to Art. 125 (1) (a) of the Constitution of the Slovak Republic, the Constitutional Court decides on the conformity of laws with the Constitution, with constitutional laws and with international treaties to which the National Council has given its consent and which have been ratified and promulgated in the manner prescribed by law. It follows from this text that the jurisdiction of the Constitutional Court under Art. 125(1)(a) of the Constitution is limited to those international treaties that have been approved by the National Council and ratified and promulgated in the manner prescribed by law.

> the European Union does not alter the scope of the jurisdiction of the Constitutional Court under Article 125 (1) of the Constitution, since the basis for such exclusion was only the purpose of such international treaty(s), which otherwise remains a treaty to which the National Council has given its consent and which has been ratified and promulgated in the manner provided for by law.

The Constitutional Court added that both the Treaty of Accession to the EU and the Treaty of Lisbon, amending the EU and EC Treaties, were categorised nationally as international treaties under Article 7(5). According to the Constitutional Court, these were undoubtedly international treaties meeting the criteria of Article 125(1).[73]

Despite a specific constitutional Article referring to EU law, the Constitutional Court of the Slovak Republic directly confirms the international character of the EU law. Thus, it seeks to gain control over it, which it cannot have in the case of EU law or its specific effects. Finally, in this decision, the Constitutional Court reached the fundamental question of examining the hypothetical conflict between the Constitution and EU primary law. In this regard, it states that:

> The Constitutional Court is of the opinion that if, in proceedings under Article 125 (1) (a) of the Constitution, it finds and decides that the contested law, part of it or some of its provisions are incompatible with the Constitution or a constitutional law, it is no longer necessary, in principle, to examine their incompatibility with European Union law (despite the fact that the appellants suggest that it is not necessary to examine their incompatibility with European Union law), because even their possible inconsistency would only lead to the same result and the same legal effects as those achieved by a decision according to which the contested legislation is incompatible

73 *'The National Council, by Resolution No.365 of 1 July 2003, expressed its consent to the Treaty on the Accession of the Slovak Republic to the European Union (hereinafter referred to as the 'Accession Treaty') and at the same time decided that it is a treaty pursuant to Art. 7 (5) of the Constitution, which takes precedence over the laws of the Slovak Republic. The President of the Slovak Republic ratified the Treaty on 26 August 2003, the Treaty entered into force on 1 May 2004 and was published in the Collection of Laws of the Slovak Republic under No 185/2004 Coll. The Accession Treaty also amended the Treaty establishing the European Community and the EU Treaty. By Resolution 809 of 10 April 2008, the National Council gave its consent to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (this Treaty renamed, among other changes, the Treaty establishing the European Community as the Treaty on the Functioning of the EU; the consolidated text of the EU Treaty and the Treaty on the Functioning of the EU, i.e. the text incorporating the changes brought about by the Lisbon Treaty, was published in the Official Journal of the EU C83 of 30 March 2010, see note), and at the same time decided that it is a treaty under Art. 7 (5) of the Constitution, which takes precedence over the laws of the Slovak Republic. The President of the Slovak Republic signed the instrument of ratification on 12 May 2008 and the Lisbon Treaty entered into force on 1 December 2009. It was published in the Collection of Laws of the Slovak Republic under No 486/2009 Coll. On this basis, the subcategory of international treaties under Art. 7 (2) of the Constitution includes the Accession Treaty and, through it, the Treaty establishing the European Community and the Treaty on European Union and the Treaty of Lisbon, which, among other things, renamed the Treaty establishing the European Community as the Treaty on the Functioning of the European Union. At the same time, these are undoubtedly treaties that meet the criteria laid down in Art. 125 (1) of the Constitution'.*

> with the Constitution or a constitutional law. Such a 'self-limiting' approach to the exercise of its jurisdiction is essentially justified by the Constitutional Court on the grounds that, once a declaration of incompatibility with the Constitution or constitutional laws has been made, the subject-matter of the proceedings on the compatibility of legislation in relation to the alleged incompatibility with European Union law, such as the Treaty on the Functioning of the European Union, ceases to exist, as is the case in the present case.

From the further decision-making activity of the Constitutional Court of the Slovak Republic, we analyse a decision that partly follows the above conclusions. The case law of the Constitutional Court of the Slovak Republic in matters of EU law has been and is being developed gradually, but so far in a uniform line. By its *ruling of 29 April 2015, Case No. PL. ÚS 10/2014*, the Constitutional Court of the Slovak Republic confirmed the previous perception of the EU's primary law of the European Union. In this case, a group of members of the National Council of the SR initiated proceedings under Article 125(1)(a) on the compatibility of several legal regulations with, *inter alia*, the provisions of the Charter of Fundamental Rights of the European Union.[74] First, the Constitutional Court of the Slovak Republic defined the position of the Charter of Fundamental Rights of the European Union:

> On this basis, the Treaty of Accession and, through it, the Treaty establishing the European Community and the Treaty on European Union and the Treaty of Lisbon, which renamed the Treaty establishing the European Community as the Treaty on the Functioning of the European Union, may also be included in the sub-category of international treaties pursuant to Article 7 (5) of the Constitution. On the basis of Article 6 (1) of the Treaty on European Union, which gives the Charter the same legal force as the treaties on which the Union is founded, the Charter may be accorded the same status in the legal order of the Slovak Republic as international treaties under Article 7 (5) of the Constitution. At the same time, these are undoubtedly treaties which meet the criteria laid down in Article 125 (1) of the Constitution. Based on the constant jurisprudence of the Constitutional Court, which, in accordance with the principle of pacta sunt servanda, requires that fundamental rights and freedoms under the Constitution be *interpreted and* applied at least in the sense and spirit of international treaties on human rights and fundamental freedoms (PL. ÚS 5/93, PL. ÚS 15/98, PL. ÚS 17/00, PL. ÚS 24/2014, PL. ÚS 24/2014) and the relevant case-law issued thereon (II. ÚS 55/98, PL. ÚS 24/2014), fundamental rights and freedoms under the Constitution must, where the contested national legislation falls within the scope of Union law, also be interpreted and applied within the meaning and spirit of the Charter and the relevant case-law of the Court of Justice issued thereon.

74 Available at: file:///C:/Users/krunkova/Downloads/Rozhodnutie%20-%20N%C3%A1lez%20PL.%20%C3%9AS%2010_2014%20(1).pdf.

> However, the Constitutional Court considers it necessary to point out its previous case-law (PL. ÚS 3/09), according to which, in the event that in proceedings under Article 125 (1) (a) of the Constitution, the Constitutional Court finds and decides that the contested law, part of it or some of its provisions are not in accordance with the Constitution or a constitutional law, it is no longer necessary in principle to examine their incompatibility with the law of the European Union (even though the appellants propose to do so), because even their possible incompatibility would only lead to the same result and the same legal effects as those achieved by the decision according to which the contested legislation is not in accordance with the Constitution or a constitutional law. The Constitutional Court justifies such a 'self-limiting' approach to the exercise of its jurisdiction on the grounds that once a declaration of incompatibility with the Constitution or constitutional laws has been made, the subject matter of the proceedings on the compatibility of legislation in relation to the alleged incompatibility with European Union law ceases to exist.

Thus, the Constitutional Court of the Slovak Republic confirmed that the law of the EU and its compliance with national legislation are implemented only secondarily; that is, only when the provision of legal regulation is not found to be incompatible with the Constitution of the Slovak Republic. Meanwhile, the Constitutional Court of the Slovak Republic recalled that it was

> an independent judicial body for the protection of constitutionality according to Article 124 of the Constitution. Therefore, even after the accession of the Slovak Republic to the European Union, the norms of the constitutional order of the Slovak Republic remain the frame of reference for the Constitutional Court's review. However, the Constitutional Court cannot disregard the impact of the law of the European Union on the creation, application and interpretation of national law in the field of legislation, the origin, operation and purpose of which are rooted in the law of the European Union (cf. the ruling of the Constitutional Court of the Czech Republic, Case No. Pl. ÚS 24/10, para. 25). European Union law has that effect on national law where the national legislation falls within the scope of European Union law.

Notably, in this decision, the Constitutional Court expressed respect for the principle of sovereignty of the Slovak Republic. First, it views the Slovak constitutional order as the primary lens for examining compliance with the Constitution, which is correct. The Court does not ignore the norms of international and European law. However, these follow only the next steps of the analysis. This decision represents an imaginary first step towards strengthening the position of the Slovak constitutional order relative to the law of the EU, which began to develop with the Ruling of the Constitutional Court of the Slovak Republic (Case No. PL. ÚS 3/09).[75]

75 Orosz and Svák et al., 2021, p.109.

In these and other decisions, the Constitutional Court relies heavily on the classic doctrines of the CJEU but also tries to keep its place in the national review of its compatibility with the law. It links the constitutional status of EU Law to the constitutional concepts of Article 7(2) and (5). Its decision-making is linked to primary union law, and it has only marginally dealt with secondary law issues. On the relationship between EU law and the internal state law of the Slovak Republic, he maintained his moderate optics. Given its constitutional mandate, the Constitutional Court of the Slovak Republic cannot give EU Law explicit supra-constitutional status, though the case law of the Court of Justice requires it in principle. It is a pity that, relative to EU law, it has not yet formulated any limits by which it would not allow a breach under any circumstances, as with the Constitutional Courts of other Member States.

Thus, the decision-making activity of the Constitutional Court of the Slovak Republic shows that the primary law of the EU does not 'only' have the priority of application over laws but the Constitutional Court also perceives it as a potentially supra-constitutional source. Unfortunately, this was the end of the Constitutional Court's clarification of the relationship between constitutional law and EU law. Nor has it commented on the definition of constitutional or national identity.

In conclusion, we would like to mention *the Resolution of the Constitutional Court of the Slovak Republic of 11 January 2017, Case No. I. ÚS 14/2017*, which ended with the rejection of the constitutional complaint. However, in its reasoning, it contained suggestive parts. In this constitutional complaint, the complainant objected, *inter alia*, to the inconsistency in the application of the law by the general courts of the Slovak Republic with the case law of the CJEU, and the violation of the Euroconforming interpretation of EU law. The Constitutional Court rejected the complaint, stating the following:

> …a violation of an EU right does not always entail a violation of a constitutional right. Such a legal effect occurs only when the violation of a source of EU law has constitutional intensity. The Constitutional Court does not have jurisdiction to review compliance with the source of EU law not only under the conditions defined in the case-law of the Court of Justice of the EC/EU, but also in disputes over law that do not reach the constitutional intensity of illegality. The fact that EU law has been violated does not in itself establish the constitutional intensity of the unlawful situation.

In reasoning, the Constitutional Court partly touched on the sources of secondary law.

> To the sources of primary European law in the category of 'legally binding EC/EU acts' (Article 7 (2) of the Constitution) must be added, from secondary European law, regulations and case-law of the Court of Justice, which would easily escape the protection of the primacy clause in the Slovak view of judicial decisions as a source of law if a more conservative notion, such as the notion of 'legally binding acts of the EC and the EU', were used in the Constitution. As a separate issue in relation to the

interpretation of 'legally binding EC/EU acts', EU directives should be mentioned. In their case, an alternative interpretation is possible, whereas in the first version, when interpreted according to the 'nomenclature' of EC/EU sources of law, the directives cannot be classified as 'legally binding acts' under Article 7 (2) of the Constitution. On the contrary, in the second version, the directives belong to the sources of EC/EU law which, according to Article 7 (2) of the Constitution, may take precedence over the laws of the Slovak Republic. The alternative is determined by the very nature of the directives, predetermined by their content, which is mostly addressed only to Member States, but sometimes also regulates the rights of natural persons and legal entities. Thus defined, the question of 'legally binding EC/EU acts' loses its hitherto political or academic character and becomes a very important legal question of interpretation and application of European law at the interface with constitutional law. In the first alternative interpretation of the term 'legally binding EC/EU acts', directives cannot be subsumed under this term either, since they are intended to create a positive obligation for Member States to adopt national legislation with the prescribed 'directive' content within specified time limits, but are not applicable for direct application as a source of national law. If a State does not fulfil a positive obligation at all, if it does not fulfil the obligation in its entirety or if it does not fulfil it in time, the transposition of the Directive into national law does not take place by priority application of the Directive over national legislation. Proceedings to compel a Member State to transpose the Directive shall be initiated against a State which fails to establish national legislation complying with the Directive. Therefore, in accordance with European law, the Directives cannot be characterized as legally binding EC/EU acts under Article 7 (2) of the Constitution. In the second alternative, the purpose of directives in European law must be put in the background, 'on the back burner'. In the process of transposition of directives into the legal order of the Slovak Republic, not only hypothetically, but also factually, mistakes are made. The directives are transposed incorrectly, part of their content does not become part of the legal order of the Slovak Republic. In such cases, the content of the Directive, which does not make it into the law but 'goes beyond' it, could become part of the regulation applied in Slovakia under the provision of Article 7 (2) of the Constitution, by means of an interpretation of the law derived from the primacy of the 'legally binding act of the Directive' over the laws of the Slovak Republic so that the set of rights and obligations determined by the Directive, but not by law, would be enforced by the public authorities in the Slovak Republic at the stage of application of the law pursuant to Article 7 (2) in conjunction with Article 152 (4) of the Constitution. From the point of view of the topic of 'legally binding EC and EU acts' as a constitutional notion relevant in the territory of the Slovak Republic, this means that directives with precedence over the laws of the Slovak Republic based on the case-law of the Court of Justice will in the foreseeable future be the exception rather than the rule. If the exception were to be converted into a rule, for example, in the event of an error in the transposition of a directive, then the legal basis for such an interpretation is not the case-law of the Court, but Article 7 (2) of the Constitution and its interpretation beyond the case-law.

Based on the above, it can be concluded that Article 7 (2) does not sufficiently regulate the relationship between the secondary law of the European Union and the national law of the Slovak Republic and does not provide definitive answers to several fundamental questions concerning the relationship between EU law and the Slovak constitutional legal order. Sources of secondary law cannot be classified as a subcategory of international treaties under Article 7 (5). As a subject of international law, the Slovak Republic has never consented; therefore, it cannot be assessed through the lens of international law.

9. Conclusion

Initiatives aimed at changing and amending the Constitution of the Slovak Republic fundamentally reduced its stability, seriousness, and authority. This has also negatively impacted the political and legal culture in Slovakia. The changes to the Constitution were not only driven by pragmatic reasons but also reflected political influences. Amendments related to the accession of the Slovak Republic to the EU and elections in the European Parliament were necessary. However, Constitutional Act No. 397/2004 on 24 June 2004 on cooperation between the National Council of the SR and the Government of the Slovak Republic in the EU matters in the relationship of the National Council of the SR and cannot be seen in the same spirit. This fundamentally undermined the compactness of the relationship between the Government and the National Assembly as regulated by the Constitution. Currently, it is possible to speak of a low degree of compatibility between the Constitution and Constitutional Law. If these relations were to be regulated, it should not have been by constitutional law but directly in the Constitution.

Thus, although the relationship between constitutional law and EU law is undoubtedly bidirectional, according to the doctrines of the Court of Justice, EU law will prevail in Slovakia in most cases. However, a national legal order could carve out certain inviolable zones (e.g. implicit or explicit material cores) that protect the fundamental political decisions of the national sovereign. EU Law, when applied, must not undermine the foundations of the existence of constitutional orders. Moreover, the question of the unconditional primacy of the application of EU Law remains unresolved in positive law to this day, as it has only been confirmed in the case law of the Court of Justice. Numerous amendments to the Constitution of the Slovak Republic have confirmed that the matter of the constitution has ceased to be a static variable and that its dynamism is currently significant.

The identity of the Constitution also shifts or shapes it dynamically. The categorical assertion that the Constitution should rigidly preserve its original identity even after its amendments is probably not appropriate. This is confirmed by objective shifts in identity, as was the case, for example, in connection with the Slovak

Republic's accession to the EU. However, the question remains as to whether the degree of identity deviation is proportional to the key aspects on which the constitution is based. The Constitutional Court of the SR indicated some profiling in this respect in its decisions concerning the material core of the Constitution. However, the performance of this role should be performed cautiously, as it can easily slip into the performance of the so-called contra-principle role. Its essence lies in interfering with the established, universally recognised principles of constitutionalism the Constitution should contain and protect. The State's commitment to its law is the foundation of any State governed by the rule of law, which ensures the regulation of the means of State power and limits its use.

However, is the path for determining the identity of the Constitution through the decisions of the Constitutional Court the only way if we have a fully functioning constitution-making body with no fundamental challenge in obtaining a constitutional majority? Is it necessary to amend the Constitution in such a way that we unwittingly divert its identity? What is the appropriate balance between amending the Constitution and preserving its identity? Thus, the materialisation of the considerations presented above continues to create room for raising several polemical questions that are open to further rational exploration and are certainly not meant to be merely archival.

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Chapter X

Comparative Analysis: The Shells that Embrace Constitutional Identity

Lilla Berkes

Abstract

This book is the result of extensive and wide-ranging research aimed at understanding the constitutional jurisdictional responses of member states to the evolution of European Union (EU) law or the EU itself. This study focuses on the emerging reference to constitutional identity; however, to understand the rationale and function of this reference, we examine the context of the shells surrounding it. We identified the same or similar patterns and ideas. For enhanced examination and interpretation, we also examined the shells surrounding constitutional identity, placing it in its current context, by examining the jurisprudence of member states that joined this supranational organisation in essentially three different periods and whose legal development was thus adapted to this constantly evolving organisation. Therefore, this study focuses on questions such as whether there are similar patterns, a common approach regarding the primacy of EU law, the competences of the EU, and member states' constitutional identity and values. We aim to better understand the directions and tendencies of the institutions and laws of the EU, as well as national sovereignty, identity, and constitutional development in member states. The study followed a comparative approach, and its methodology was based on a questionnaire.

Keywords: constitutional identity, comparative analysis, historical background, constitutional courts, European Union, preliminary procedure, constitutional dialogue

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1. Introduction to the research

The book is the result of extensive and wide-ranging research, which sought to examine no less a question than to understand the constitutional jurisdictional responses of the member states to the evolution of European Union (EU) law or the EU itself. The idea for this research arose from the widespread realisation that the actual implementation of EU law and the decisions of the Court of Justice of the EU are increasingly a matter of debate, both in the political and legal arenas. Debates focus on issues such as the relationship between the primacy of EU law and constitutions, the protection of constitutional traditions and constitutional identity, the role of national constitutional courts, the role of constitutional dialogue, and the legal identity of the EU. Questions arise regarding constitutional identity: what can be considered part of the constitutional identity of a Member State, what are the issues that form an indisputable part of it, and which must be defended by the Constitutional Court? There is also a legal debate about the extent, justification, and existence or lack of authority of EU institutions to extend their powers.

These questions could have been explored over many years and volumes, and even then, we may not have obtained a tangible result. In this study, we identified the same or similar patterns, trends, and ideas. The world is changing, as is the EU. The organisation that once sought to avoid previous war conflicts, based on peace and economic prosperity, has now moved on and started on the road to a political union. Although it is notable, as Giacinto della Cananea points out[1], that from the outset, the economic dimension of European integration was accompanied by a political dimension, it is widely believed that this change really began after the Treaty of Maastricht and that economic issues had dominated before that. The general perception has been focused on economic prosperity, and perhaps it can be argued that when the regime-changing states joined, it was this economic prosperity, alongside the 'return to the West', that they most desired, as they had not had this development for the previous half century.

However, soon after the accession of regime-changing countries, a series of crises swept the region—economic crisis, refugee crisis, epidemic, and war—in a short period of time, which did not favour calm development but, on the contrary, exacerbated differences. Therefore, the system established by the Lisbon Treaty and its political community of values are being tested under difficult circumstances. It is a system that is intended to synthesise a variety of interests and values: the interests of the states that have been involved in the development of the EU (almost) since its founding, which have been developing organically with it over a long period of time, and the interests of the states that joined in the mid-2000s and on, which have been rapidly reforming their structures and legal systems as a result of the change of regime and adapting them to the existing system to join, and which have now

1 della Cananea, 2023, p. 82.

been joined by the interests and perceptions of the EU as an institutional system. In this multi-stakeholder system, which seeks to achieve a state of equilibrium, there is tension between the principle of subsidiarity, which protects the values and interests of the member states, the principle of recognition of the specific identity of the member states, and the interests that go beyond these, which are embodied in the primacy of EU law. Cogs meet and drive the engine of progress, but sometimes these cogs do not fit properly, get stuck, or get caught.

This study focused on the concept of constitutional identity. As Rosenfeld stated, constitutional identities such as national identity can be conceived as belonging to a collective self, which can be constructed on the basis of sameness or selfhood, based on the dynamic interaction between projections of sameness and images of selfhood. The interaction in question may, at times, evoke complementarity or contradiction.[2] Constitutional identity can also have multiple functions. The starting idea of the research was that the concept emerged in the Eastern European states in the context of the frictions between the EU and the member states and thus has a close connection with conceptions of sovereignty. As Jacobsohn points out, it can be assumed that the dynamics of constitutional identity are less a result of any specific set of cultural or historical background factors than the expression of a developmental process endemic to constitutionalism. With significant differences in political, cultural, and institutional arrangements, there will be great variations across countries in the specific ways in which the process unfolds.[3] Simultaneously, we must also consider that answers to legal questions depend on the system from which the researcher attempts to find them: the validity of viewpoints needs to be tested repeatedly to determine whether their relative worth has changed and to see whether new viewpoints or factors have arisen.[4] Therefore, identifying starting points and common questions that would provide answers on a similar basis is crucial.

One of these starting points was the idea that if the EU and its member states' scope for action are at the heart of constitutional identity, they must have a strong link with the field of political debate. Thus, two tendencies can be discerned in the legal literature: one approach argues that the concept of constitutional identity should be at the centre of constitutional theory, while critics of the principle 'have been sceptical that identity can be anything more than a tendentiously applied label used to advance a politically and constitutionally desirable result'.[5] Moreover, Fabbrini and Sajó summarise the contradiction as follows: the respect for national identity inherent in the fundamental, political, and constitutional structures is an accepted principle of EU law and it reflects a compromise in the integration process, the concept of national constitutional identity as applied by an increasing number of constitutional courts and governments represents a real and present danger to the

2 Rosenfeld, 2012, p. 2.
3 Jacobsohn, 2010, p. 348.
4 Vranken, 2011, p. 115.
5 Jacobsohn, 2010, p. 3.

process of European integration, as the doctrine is drenched with neo-sovereigntist features and is contrary to the rule of law.[6] Similarly, a recent work considers the rise of constitutional identity in the fact that while there is constitutional pluralism in the EU, in which EU constitutionalism and national constitutionalism coexist in principle, they are in fact irritating each other, each claiming the final say but ultimately neither being able to have it. However, constitutional identity can also be abused, as the author criticises, for example, its use for political purposes to detach it from constitutionalism.[7]

As the above references highlight, in many cases, authors have a sharp attitude towards the role of constitutional identity, while there are few (if any) constitutional institutions that do not interconnect with political values and interests. Therefore, this study aims to demonstrate a much more complex reality. This complexity is already present in the study by Tímea Drinóczi, who concluded that 'there can be three models, two attitudes, two legal procedures, and one communication channel detected in which the notion of constitutional identity displays legal relevance. The three models are confrontation with EU law, confrontational individualistic detachment, and cooperation with embedded identity; the two attitudes are EU-friendly and antagonistic; the two legal procedures are against EU law and constitutional amendments; and one communication channel is a preliminary ruling procedure.[8] The study, which summarised the results of her research, was written in 2018 and focused mainly on the case law of three countries: Germany, Hungary, and Italy.

The present research covers a wide range of issues and recent developments, but the focus is still on the reasons for and function of reference to constitutional identity. To make this effectively explorable and meaningful, the shells surrounding constitutional identity were also examined. Therefore, this study focuses on questions such as whether there are similar patterns, a common approach regarding the primacy of EU law, the competences of the EU, and member states' constitutional identity and constitutional values. The idea was that through this research, we can better understand the directions and tendencies of the institutions and laws of the EU as well as national sovereignty, identity, and constitutional development in member states. Through these shells—the relationship between EU law and national law, the competences of the EU and the member states, and the constitutional means of resolving frictions—we can situate and understand the role of constitutional identity and its changes in the practice of Constitutional Courts.

Three founding member states—France, Germany, and Italy—and the regime-changing countries of Central Europe—Poland, the Czech Republic, Slovakia, Romania, Hungary, and Croatia—participated in the research. The study followed a comparative approach, and its methodology was based on a questionnaire. The questionnaire primarily focused on the constitutional perception of the relationship

6 Fabbrini and Sajó: p. 458.
7 Scholtes, 2023, p. 27, 321.
8 Drinóczi, 2020, p. 122, 84.

between EU law and national law, the cases and limits of constitutional court intervention, and the role of constitutional identity and dialogue as balancing factors. The questions were as follows:

- How are EU legal acts incorporated into national law?
- What is the approach of member states when additional powers are transferred, compared to those conferred at the time of accession? Does this require formal legislation, or is it subject to (constitutional) court interpretation?
- Has there been any internal examination or legal procedure at the member-state level of the entry into force of the Constitutional Treaty and the Lisbon Treaty and its impact on the legal order of the member states?
- On which issues has the National Constitutional Court refused to intervene to protect national law and competence, and on what grounds?
- On which issues has the National Constitutional Court acted in defence of national law and competence, and how? What was the scope of the case from the perspective of the exercise of competence by the EU and by the member states?
- Has the interpretation of Article 2 of the TEU (in particular with regard to the rule of law) been reflected in the practice of national constitutional courts and Supreme Courts, and if so, on what grounds did the court base its decision?
- Has the interpretation of Article 4 of the TEU (in particular with regard to national identity) been reflected in the practice of national constitutional courts and Supreme Courts, and if so, on what grounds did the court base its decision?
- How has the academic position changed from accession to the present day with regard to the assessment of the impact of EU law on member states (e.g., primacy of EU law, relevance of Court of Justice decisions)?
- In connection with the above questions, is there a method of constitutional dialogue in force in a member state? Which institutions have developed this practice?

To put it simply, we aimed to identify which level in the hierarchy of norms the EU legal acts are incorporated into, how the courts (and law enforcement) resolve the conflict in this hierarchy, whether disputes arose regarding the level of incorporation, the reactions to the tendency of how the EU institutions widened their jurisdiction, whether this question arose either when the Constitutional Treaty or the Lisbon Treaty was adopted or afterwards, what were the core questions when the constitutional courts decided to intervene, and why these questions arose. To examine these questions, the authors had to present not only the basic functioning of their own legal system but also the specific circumstances under which any questions of interpretation or conflicts arose. In some cases, this meant reviewing an extremely long period, but simultaneously, this focal point allowed us to adequately highlight whether there were common patterns, typical areas where issues arose, and whether there was a clear interplay between national practices.

2. EU law meets national law, before Maastricht

One of the basic findings that emerged from the national chapters was that, overall, at the legislative and constitutional levels, the conflict between EU law and national law did not emerge as a major issue until the 1990s. The basic pattern is that the constitutions are narrow on the issue (they regulate the division of powers but not the place and role of EU law); rather, it was the national constitutional courts that gave substance to the issue, and this jurisprudential practice was taken over by subsequent constitutional amendments. In the case of countries that joined in the mid-2000s, these patterns may have been familiar, but in the period leading up to accession, there were few decisions at the constitutional court level in which the constitutional court itself told the constituent powers the issues it should decide on. Perhaps the Romanian Constitutional Court, which was the most open in this respect, explicitly drew the attention of the constitutional legislature to the fact that one of the key issues for the proper regulation of accession at the constitutional level was the integration of the acquis communautaire into national law and the definition of the relationship between community normative acts and national law.[9]

Returning to the founding states, the type of constitutional development described above also means that in the early decades, the development of EU law was not so significant in the eyes of the legislating, constituent power – that is, sovereignty, the operation of the state, and the exercise of rights – which would have required detailed constitutional regulation, even though the European Court of Justice's judgement in Costa[10], with the doctrine of supremacy, foreshadowed possible conflicts. Thus, the jurisdiction was confronted with the question on an ad hoc basis and had to answer it without significant support.

Another insight is that when constitutional courts have been confronted with these issues, they have adopted a cautious approach. During the different periods of integration, a more positive approach can be observed, with constitutional courts recognising and naming potential problems. In some cases, they have been quite vocal, only not applying their seemingly strong findings, softening them step-by-step, and seeking a balance point using different argumentation methods. The approach was essentially pro-European, and conflicts were resolved to the greatest extent feasible through legal interpretation.

Germany is a prime example of such development. In the chapter on Germany, we first observe the absence of any major constitutional legislation[11]. Until the 1992 constitutional amendment, it was virtually the German Federal Constitutional Court that gave substance to the constitutionality of EU membership. In 1992, an extensive

9 Decision 148/2003.

10 C-6/64 – *Costa v. ENEL*.

11 European integration had not been specifically addressed in the Basic Law, there was only a brief reference in the preamble, and it has also been silent regarding the interaction between domestic and international law.

provision was inserted in Article 23, which followed the German Federal Constitutional Court's view that the eternity clause in Basic Law operates as a limit to European integration and also stated guidelines for the interaction between domestic and supranational institutions in the post-Maastricht world. Regarding the interaction between domestic and international law, the Constitutional Court essentially followed the principle that, since international law generally requires national implementation, it is inferior to constitutional norms, and in addition to that, even the *lex posterior* rule was followed.[12] A similar approach was observed by another founder, Italy.[13]

However, there is also a consistent (and self-evident) pro-European approach that tilts concerns raised in the direction of the EU's powers and laws. The German Basic Law's 'friendliness towards international law' (*Völkerrechtsfreundlichkeit*) and the Federal Constitutional Court's approach, affording special treatment to the law of the EU, are examples of this[14], but the research shows that there is no major difference in this respect in either state.

However, there are nuances in the way this pro-European approach and the special perception of EU law are reflected in case law. From the beginning, the German Federal Constitutional Court has gone along with all the pertinent rulings of the European Court of Justice, allowing for the direct effect and supremacy of European law, both primary and secondary, including even the European Court of Justice's partial extension of these principles to directives. From the 1970s onwards, it began to address whether there were any limits under German law to the supremacy of an evolving law of the EU, and the Constitutional Court has consistently emphasised that there were such limits and that it was itself the competent institution to enforce them (see the well-known Solange decisions). In fact, the Federal Constitutional Court had not done this until the 1990s, when the Maastricht Treaty was adopted.[15]

In contrast, the Italian Constitutional Court initially refused to consider EU law 'superior' to national law, also on the basis of the classical and universal principle of *lex posterior* interpretation.[16] However, the practice began to soften, and in the 1984 *Granital* decision, the Court of Cassation accepted the primacy of EU law over national law. However, it reserved the power to assess the conformity of community norms with the principles of the constitutional order and the inalienable rights of the human person, thus remaining on the grounds of constitutional protection, imposing conditions, and limiting the validity of supremacy. Thus, the approach to supremacy has been essentially flexible, with the language of the Constitutional Court in favour of the Constitution, but the basis for the meeting of the two legal systems is that they are mutually autonomous but coordinated and communicating.[17]

12 Graser, 2023, p. 16.
13 della Cananea, 2023, p. 88–90.
14 Graser, 2023, p. 17.
15 Graser, 2023, p. 23.
16 ICC, Judgment 14/1964, [1964] CMLR, p. 425, and ICC, Judgment 183/1973, *Frontini [*1974] CMLR
17 della Canaea, 2023, p. 84.

3. The meeting of EU law and national law, after the Maastricht Treaty

The change in the perception of EU law in Western Europe was marked by the anticipation of its enlargement to Eastern Europe and the building of the road to political unions through the Maastricht Treaty. Although there was basic euphoria surrounding the enlargement, the period of preparation coincided with the process of EU transformation following the Maastricht Treaty.[18] A crossover point came with the adoption of the European Single Act (which implied the completion of the single market and the introduction of several hundred directives) and the ratification of the Maastricht Treaty, loaded with changes, both substantive and symbolic (e.g., currency, justice and home affairs, defence, and security). As Yves Mény pointed out, the functional shift in powers between member states and European institutions first led to a progressive but continuous transfer of powers to the benefit of Brussels bodies and the detriment of national institutions, a process marked by blockages followed by sharp accelerations. Despite some hesitation, this evolution has never stopped because staging posts have always been found onwards.[19] These issues have already reached a level that has moved the constituent powers, and the attitude has been cautious.

In Germany, the amendment to the Basic Law, while incorporating the Solange criteria, stipulates conditions for the participation of domestic institutions in activities at the supranational level, with a focus on the requirements of democracy.[20] France followed a path similar to the Maastricht Treaty, but the focus was on sovereignty issues. At the heart of the conception of sovereignty, the fundamental conditions for the exercise of sovereignty lay in the obligation of the state to ensure respect for the institutions of the republic, continuity of the life of the nation, and a guarantee of the rights and freedoms of its citizens. The Conseil d'Etat has also been consistent in examining, on a sovereign basis, the intersection of EU law or powers with national law. According to decisions on the Maastricht Treaty (most notably the Maastricht I Treaty decision of 9 April 1992[21]), the Treaty undermines sovereignty in three ways: by allowing foreigners to participate in elections for the appointment of members of the Parliamentary Assembly, by allowing France to impose monetary and exchange rate policies without its consent, and by depriving France of its discretionary right to regulate the entry of foreigners into its territory.[22] However, no major obstacles to progress have been put in place here either. Surprisingly, in Italy, the Maastricht Treaty did not receive much attention from most leading politicians or voters. One reason is the lack of a constitutional theory that would reconcile the

18 On the perception of accession in Eastern Europe, see e.g. Baldwin, Francois and Portes, 1997; Devrim and Schulz, 2009.
19 Mény, 2001, p. 35.
20 Graser, 2023, p. 23.
21 9 April 1992, 92-308 DC.
22 Mathieu, 2023, p. 72.

principles of national sovereignty with the reality of European integration and its new structures and processes. The constitutional amendment to place EU law in the legal system also had to wait until 2001.[23]

Thus, the pre-Maastricht period was a period of constitutional courts seeking their way without the support of constituent powers, on similar principles and solutions, without seriously stalling the integration process. Following the adoption of the Maastricht Treaty and its constitutional tests, there was again a quieter period in which the supremacy of EU law was increasingly reinforced, not only by the development of the Court of Justice of the EU but also by the partnership of ordinary courts, which were very active in initiating preliminary rulings, while the national constitutional courts did not intervene in these matters. In France, in 2004, the Conseil Constitutionelle established that the transposition of community directives into national law was a constitutional requirement.[24] While it reserves the right to examine whether European law is contrary to the rule or principle inherent in France's constitutional identity[25], as Bertrand Mathieu has pointed out, the application of the requirements here is also restrained, serving more as a deterrent than an effective means of dividing powers between matters covered by national law and those covered by EU law.[26]

Article 11 of the Italian Constitution also fits into this conceptual framework, since at its root lies the idea that shared sovereignty is not only conceivable and acceptable but also necessary in light of the goals—peace and justice among the peoples of the world—that the state, no state, could achieve alone. Membership in international organisations was therefore seen as the only legitimate way to achieve constitutional goals.[27]

Comparatively, the accession preparations of the regime-changing countries and their post-accession years showed different attitudes. As Petar Bacic[28] and Alena Krunková[29] explicitly point out, a constitutional identity search and construction took place in these countries after the regime change, which involved both a confrontation with the historical past and its closure, the imprint of which was reflected in the constitutions and the development of the desired democratic system. Accession to the EU was one of the culminations of this process, which entailed the necessary amendments to the constitutions. The basic pattern was the (necessary) definition at the constitutional level of the transfer of powers (Slovakia has followed a particular path in this respect, not transferring its powers but excising some of its rights[30]). However, the question of the relationship between EU law and national law

23 della Cananea, 2023, p. 86.
24 10 June 2004, 2004-496 DC.
25 27 July 2006, 2006-540 DC; 15 October 2021 2021-940 QPC (Sté Air France).
26 Mathieu, 2023, p. 72.
27 della Cananea, 2023, p. 81.
28 Bacic, 2023, p. 106.
29 Krunková, 2023, p. 354.
30 Krunková, 2023, pp. 365–366.

and the definition of the supremacy of EU law has been a matter of mixed solutions, ranging from silence to explicit designation.

Michal Petr shows that in the Czech Republic, there was a significant academic debate on the latter issue before accession[31], and in the other chapters, there are several examples of constitutional courts addressing issues regarding the EU in the 2000s. In contrast, in Hungary, the question of competence and the supremacy of EU law did not raise much interest, neither during the preparation for accession nor afterwards, and for many years, the Constitutional Court itself avoided discussing the issue.[32]

In the constitutional court decisions of regime-changing states, the benefits of accession, and with it, of the EU, were very prominent. However, this did not mean that the same or similar issues of sovereignty, functioning of institutions, or application of EU law did not arise. A few examples are highlighted. In Slovakia, the question of whether the EU is a state was examined[33], and the Polish Constitutional Court ruled at the time of accession that Poland and other member states reserved the right to assess whether the EU legislative authorities had acted within the limits of the powers conferred on them when adopting a particular act (law) and whether they had exercised their powers in accordance with the principles of subsidiarity and proportionality. If this is exceeded, then the acts (laws) adopted are not subject to the principle of the primacy of community law. It also defined the scope of the non-transferable powers of the state—the core of the powers enabling the sovereign and democratic determination of the fate of the republic—in a judgement reviewing the constitutionality of the Accession Treaty. This decision was also the most far-reaching among the states that acceded in 2004, in that it explicitly stated that the relevant provisions of the Constitution could not provide a basis for conferring legislative or decision-making powers on an international organisation (or one of its institutions), contrary to the Constitution of the Republic of Poland.[34] In the Czech Republic, the Constitutional Court has also set out in detail its position on EU law in its judgement 'Sugar Quotas III'.[35] The specificity of the decision is that it included EU law in the constitutional provision on the delegation of powers in such a way that it opens up the national legal order to the operation of community law but also implies that its legal effects are determined by EU law itself.[36]

Therefore, despite the pro-European nature of the issue as described in the individual chapters, there is still a wide practice of constitutional courts in the field of the transfer of powers and the application of EU law. However, constitutional courts are under no illusions: although they detect possible danger zones, they tend to avoid them by interpreting the issue in accordance with EU law or by leaving the

31 Petr, 2023, p. 156.
32 Berkes and Varga, 2023, pp. 171–173.
33 Decision No II ÚS 171/05 of 27 February 2008.
34 Judgment K 18/04.
35 CCC Pl. ÚS 50/04, 8 March 2006.
36 Petr, 2023, p. 139.

responsibility to the legislator. In this respect, the period following the adoption of the Lisbon Treaty, although not without major turbulence, did not have a paradigm shift overall.

4. Consequences of the Lisbon Treaty: the rise of constitutional identity?

The Lisbon Treaty led to a series of comprehensive investigations. The Treaty has brought about a significant change in the relationship between the EU and member states, which has been noted by most constitutional courts and constituent powers that have expressed various reservations. However, it is not these decisions per se that are of particular importance, but the path followed by the national constitutional courts from 2009/2010 to 2023 and the results they achieved with these reservations.

In the case of Germany, Alexander Graser writes that the German Constitutional Court is likely to be in a calming period, at least in his view, with indications that no further action is likely following the surprise PSPP decision. In its 2009 Lisbon ruling, the German Constitutional Court stressed that European integration had to leave sufficient space to the 'Member States for the political formation of economic, cultural, and social living conditions'. The German Federal Constitution laid down detailed cornerstones in response to a number of petitions for protection against excessive integration. However, although it was noted that the areas listed in the decision were being pushed forcefully by the EU, the Court did not find any clause that could not be constructed in a way deemed compatible with the Basic Law's requirements. However, it left room for manoeuvring. On the one hand, it announced that in the future, it was going to perform ultra vires control, and the court also coined the term 'identity review' to safeguard against potential infringements of the inviolable core content of the constitutional identity of the Basic Law.[37] All of these seem to be a serious set of criteria, but as the author pointed out, in the following years, the Constitutional Court softened them and offered the possibility of a preliminary ruling procedure in the event of possible conflicts that seemed irresolvable. This criterion was subsequently narrowed down to the necessary cases, and the Court interpreted EU law in a way that was in line with the German Constitution (in 2015, in the European Arrest Warrant case).[38]

By 2020, the German Federal Constitutional Court had tried to balance EU law and German law with a number of criteria: fundamental rights control, democracy criteria, rule of law critique, ultra vires control, and protection of constitutional

37 Graser, 2023, p. 29.

38 BVerfGE 140, 317 – Europäischer Haftbefehl II. (Identitätskontrolle; Solange III.).

identity; however, it did not constitute a real obstacle. Perhaps these decisions can also be seen as a kind of pathfinding in which they do not fully reach their destination.

Budgetary autonomy brought about a new phase of friction, with the PSPP's decision[39] being the most prominent. The German Federal Constitutional Court exercised the possibility of a preliminary ruling procedure and, as a result of its proceedings, found that identity control had not been infringed but that ultra vires control had been. The strongest decision was made in the financial case. At the same time, as the author shows, problems arising from the decision were easily resolved by the European Central Bank. The overall effect of the decision was political rather than legal.[40] At the end of 2022, the Own Resources Decision,[41] although it maintained the previous criteria, was significantly relaxed by the Constitutional Court—in the author's words, almost completely abdicated on the part of the Court.[42]

Meanwhile, the constitutional courts of the regime-changing states showed little concern regarding the emergence of the Lisbon system. In the Czech Republic, although concerns about sovereignty and the ultra vires exercise of powers were raised in the constitutional review of the Lisbon Treaty, the Constitutional Court rejected the petitions in both cases, concluding that sovereignty was strengthened and that the EU remained based on the values of respect for human dignity, freedom, democracy, the rule of law in a substantive sense, and respect for human rights.[43] In practice, this is also organically linked to the tendency of the Constitutional Court to rule in favour of EU law and interpret Czech constitutional law in line with EU law.[44] The decision-making activity of the Constitutional Court of the Slovak Republic shows that the primary law of the EU definitely does not 'only' have precedence in application over the law but is also perceived by the Constitutional Court as a potentially supra-constitutional source, while it has not yet formulated any impenetrable limits or declared any definition of constitutional or national identity.[45] In Hungary, when the Lisbon Treaty was adopted, no constitutional review was performed, and there was no particular public law debate. During the ex-post review, similar to the Czech Republic, the Hungarian Constitutional Court seized the positive side of the treaty. Although it stated that it reserved the right to exercise control over any further transfer of powers, it also concluded that the Treaty of Lisbon had transferred sovereignty to the extent necessary, did not create a European superstate, did not fundamentally change the EU, ensured the exercise of control by the national parliaments by applying the principles of subsidiarity and

39 BVerfGE 154,17 – PSPP-Programm.
40 Graser, 2023, pp. 34–37.
41 BVerfGE, Judgment of the Second Senate of 6 December 2022 – 2 BvR 547/21.
42 Graser, 2023, pp. 38–40.
43 CCC Pl. ÚS 19/08, 26 November 2008, para 217, Petr, 2023, pp. 148–151.
44 Petr, 2023, p. 157.
45 Krunková, 2023, p. 384.

proportionality to a greater extent than before, and that the Parliament could play an active and proactive role.[46]

Croatia has followed a particular path in this respect. It has devoted a separate chapter in its Constitution to the EU, which not only contains provisions on the division of competences and cooperation with EU organisations and participation in decision-making but also regulates in detail the relationship between EU law and Croatian law (Article 145). Article 145 regulates the protection of citizens' substantive rights before Croatian courts based on the principle of equivalent legal protection. It also speaks about the direct and indirect scope of EU law as its fundamental features, as well as the principle of primacy of EU law (although without explicitly addressing it).[47] Such detailed constitutional recognition of the importance of EU law does not leave much room for the kind of pathfinding we have seen in other states. This necessarily brings with it a pro-European approach, as articulated by the Croatian Constitutional Court[48], but there is also a certain reticence. On the one hand, the Constitutional Court rarely refers to CJEU decisions, and on the other hand, it has not used the preliminary ruling procedure.[49] It could even be considered a paradigm shift to rule that 'there is no need to further examine the merits of the compatibility of the referendum question with EU law since the Constitution, by its own legal force, takes precedence over EU law'[50]. However, the Constitutional Court did not elaborate on the relationship between national law and EU law and did not link the concept of Croatian constitutional identity with the relevant provisions of the EU Treaties. Therefore, determining if it pioneers a novel constitutional legal concept remains inconclusive.[51]

This period witnessed the emergence of a more pronounced constitutional identity and an equivalent concept. While the founding states we studied have been examples of constitutionally formulating the limits to which they adhere in the supranational legal order for decades, the content and name of these limits have also changed over time. German examples have been referred to several times, from the Solange I decision to the Own Resources Decision, through which we can see the search for the way in which these specificities have been formulated. At the same time, the protection of the 'inner core' of the constitution in the regime-changing states emerged at a time when a more streamlined constitutional court doctrine was available, which may be attributed to the more uniform language of the courts in the use of concepts.

In this sense, constitutional identity is linked to the protection of the Constitution and to the value of the primacy of the Constitution, as pointed out, for example, by the Romanian Constitutional Court—a kind of *central identity, a* guarantee that 'must

46 Berkes and Varga, 2023, pp. 181–184.
47 Bacic, 2023, p. 122.
48 Decision U-III-1410/2007 of 13 February 2008.
49 Bacic, 2023, p. 128.
50 Decision U-VIIR-1158/2015 of 21 April 2015 (para. 43.1), NN 46/2015.
51 Bacic, 2023, pp. 130–131.

not be relativised in the process of European integration[52]. The founding states originally defined limits in terms of abstract values such as sovereignty, democracy, the rule of law, and the level of protection of fundamental rights, which can be found in the jurisprudence of later acceding states. This was reflected, for example, in Poland, where constitutional identity had an inherent meaning in relation to respect for the constitutional identity of the judiciary and where the Constitutional Court also emphasised democracy, the rule of law, the protection of human dignity, and constitutional rights in defining non-transferable powers.[53] The Polish example perhaps differs most from the decisions dealt with in the individual chapters in its openness: From the outset, the Polish Constitutional Court linked the concept of constitutional identity to the protection of sovereignty, elaborating on the content of the latter. However, this openness distracts attention from the fact that the Constitutional Court has also stated that the concept of the EU, as set out in the Lisbon Treaty, seeks to respect both the principle of preserving sovereignty in the integration process and the principle of promoting European integration and the process of cooperation between states.[54] The Czech Republic also tends to follow the classical line, whereby the Constitutional Court equates Czech constitutional identity with the material core of the Constitution.[55]

Conversely, there has been a change in recent decisions on this subject, in that while constitutional courts were formulated along the lines of the abstract values mentioned above, the protection of the specific functioning of institutions is becoming increasingly common in current conceptions. In Romania, the status of members of parliament[56], the regulation of conflicts of interest[57], the retirement of judges[58], or even the organisation of the judiciary[59] are linked to constitutional identity. This is true even if we consider that in Romania, after its publication in 2015, the concept of constitutional identity was not elaborated in detail for a long time. Although there was a demand for it, the Constitutional Court was more concerned with proving the unconditional acceptance of European law, that is, the values and principles enshrined in the European legal order.[60] The functioning of Poland's judiciary falls within the scope of its constitutional identity.[61] Similarly, in Hungary, recognition of the judiciary's powers is included among the elements of constitutional identity, albeit only in passing.[62]

52 Decision 390/2021.
53 Judgment of 24 November 2010 Ref. No. K 32/09.
54 Stepkowski, 2023, pp. 246, 251.
55 Petr, 2023, p. 145.
56 Decision No 964/2012.
57 Decision No 682/2018.
58 Decision No 533/2018.
59 For developments, see chapter 7.
60 Toader and Safta, 2023, p. 318.
61 See in details Stepkowski, 2023, Chapter 6.
62 Decision 22/2016 (XII. 5.), Berkes and Varga, 2023, p. 194.

Another trend is the convergence of constitutional identity with elements of national identity. One example is Croatia, where the idea of constitutional identity and even the primacy of the Constitution have been formulated in the context of the rights of national minorities.[63] The Romanian Constitutional Court has used the notion of national identity in several decisions, with Toader and Safta highlighting how the two components complement each other in the Constitution.[64] The Constitutional Court also considered the eternity clause in Article 152 as part of constitutional identity in its 2021 decision[65]; official language and territorial integrity are part of the eternity clause. The Hungarian Constitutional Court also, in 2021[66], linked constitutional identity and the achievements of the historical constitution, which included the protection of the values that constitute the constitutional identity of the country (including linguistic, historical, and cultural traditions, and certain steps in the struggle for sovereignty and freedom of the country).[67]

6. In place of a conclusion: what is a possible solution? Constitutional dialogue, or lack thereof

Each chapter shows great variations in the means and reasoning used by constitutional courts when confronted with questions about EU law and powers. However, they are consistent in that intervention is rare and there is a strong emphasis on the pro-European approach. Two paths seem to emerge: In the case of Germany, Alexander Graser assumes a step backward, a weakening of the Constitutional Court's power[68], while Aleksander Stepkowsi's chapter paints a picture of a Constitutional Court that exercises its powers rigorously[69]. Additionally, in countries where the content of constitutional identity is not elaborated in detail, the need for this to happen is present, while the expansive development of EU law provides fewer opportunities for it. If we look at the cases presented in the chapters, it is apparent that problems arise, in some cases along very similar lines. We can therefore ask how, bearing in mind the common value of the pro-European approach, these problems can be effectively resolved. All courts and constitutional courts use the instrument of the interpretation of the law; however, there are limitations to this. The other available tool is dialogue between courts. However, this recognition by the CJEU was mostly a preliminary ruling procedure. Of the countries concerned, only the Czech

63 Decision U-I-3597/2010, Bacic, 2023, p. 111.
64 Toader and Safta, 2023, p. 322.
65 Decision 390/2021, Toader and Safta, 2023, p. 322.
66 Decision 32/2021 (XII. 20.).
67 Berkes and Varga, 2023, pp. 189, 200.
68 Graser, 2023, pp. 43–44.
69 Stepkowski, 2023, pp. 260–261.

Constitutional Court has attempted to engage in dialogue with the CJEU through other channels in a specific case, with dismal results, to say the least.[70] Simultaneously, while ordinary courts are active in initiating preliminary rulings to harmonise national law with EU law, this is more difficult for national constitutional courts.

The Italian Constitutional Court did not consider itself a 'court' in the sense of Article 267 TFEU (structurally, only one-third of its members are professional judges; two-thirds are appointed by political institutions, the President of the Republic, and the Parliament; functionally, its main competence is not to rule on disputes between individuals or between individuals and public authorities, but to verify the constitutionality of legislation), and it also treated the institution with reservations. When it first decided to refer to a question for a preliminary ruling in 2008[71], it limited its scope to inter-institutional disputes (between the state and regions, regions, and regions). The second case concerned the complex interaction between EU financial protection rules and domestic rules regarding the duration of criminal proceedings.[72] However, in this case, as Giacinto della Cananea pointed out, the question of the protection of national identity had already arisen (or could have arisen), but the Italian Constitutional Court chose dialogue rather than acting as the last defender of national identity. The third step was to interpret the right to silence in the context of the administrative procedure led by the financial market regulator CONSOB.[73] Although the German Constitutional Court ruled that in the case of ultra vires investigations, the Court of Justice of the EU must be given the opportunity to interpret the treaties in the context of a preliminary ruling procedure and to rule on the validity and interpretation of the acts in question, if it has not yet clarified the questions raised[74], reserving this finding for identity control, the author also presents a case in which it has refrained from doing so.[75] Similar to Germany, the French Conseil Constitutionelle also used a preliminary ruling procedure, but this is not common practice. The case, which was brought in 2013, concerned the validity of a European arrest warrant (like its German counterpart), the aim being to ensure that the law complied with the Constitution, and the result was the annulment of a provision of domestic law.[76] The Hungarian Constitutional Court has not yet used this instrument, although it has accepted the possibility in its recent practice.[77] The Croatian Constitutional Court, in its June 2020 decision[78], also stated that it considers itself to be a national court that can issue preliminary rulings within the limits of

70 Petr, 2023, pp. 153–155.
71 Order No 104/2008.
72 Taricco II case (C-42/17 – M.A.S. and M.B.).
73 della Cananea, 2023, pp. 89–90.
74 BVerfGE 126, 286.
75 Graser, 2023, p. 32.
76 Decision 2004-505 DC of 19 November 2004. The effect of the decision is not far-reaching, it does not change the legal status and primacy of the Constitution in the domestic legal order. Mathieu, 2023, p. 72.
77 Berkes and Varga, 2023, pp. 216–217.
78 U-III-970/2019 of 24 June 2020.

the powers conferred on it but has not yet made use of this possibility.[79] The chapter on Romania also shows that, although the Constitutional Court has made use of this instrument, other forms of dialogue (e.g., interjudicial dialogue, bilateral and multilateral meetings, international congresses, and conferences) are more widespread.[80] Therefore, we cannot conclude with confidence that this instrument is an effective solution. In principle, constitutional courts and the CJEU speak different languages and have different functions, preferences, and values regarding protection.

As indicated in the introduction to this chapter, the initial idea of the research was that the concept of constitutional identity emerged in the context of frictions between the EU and the member states in Eastern Europe, which were the focus of the research and thus have a close link with perceptions of sovereignty. The notion that the concept and role of constitutional identity can play a significant role in the practice of constitutional courts, even if it does not actually function as a 'weapon', guided this research. Previous research has provided concepts with a variety of nuances. First, it operates in the pro-European legal space. This pro-European approach does not manifest itself in the form of ordinary courts actively referring to EU law and CJEU judgements, but rather in the avoidance of conflict and interference and in the interpretation of law in accordance with EU law. Conversely, constitutional identity is in fact a manifestation of the same concept at different times under different names; the cited examples show that constitutional courts have all along been bastions around what they considered the defining core of their own constitutions—democracy, fundamental rights, rule of law, etc. It may be thought-provoking for the Court of Justice of the EU that while diverse interests have given rise to this kind of resistance, this does not mean that it is a particularistic issue; rather, it highlights the need to rethink the role of constitutional courts in the European space. Indeed, constitutional courts are not hurdles or deadweights of integration but rather a kind of sentinel that holds up a mirror to the institutions of the EU. In the diversity of the European space, which is seen as a value, these actors can be representatives of different perceptions with which it is possible and worthwhile to engage in dialogue, even within a more flexible framework.[81] Therefore, new forms of dialogue between these institutions could (and should) emerge with arrangements that are more flexible than the preliminary ruling process, allowing for genuine dialogue. This issue is linked to the future of the EU and the role and fate of national constitutional courts. It is in our best interests not to allow a constitutional court, an institution that is the basis of our statehood and nation.

79 Bacic, 2023 p. 128.
80 Toader and Safta, 2023 p. 345.
81 Trócsányi, 2023, pp. 261–262.

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