Chapter 3

Constitutional Identity versus "Ever Closer Union" from the Perspective of a Central-Eastern European Country: Poland

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Abstract

This article is devoted to one of the most important aspects of Poland's membership in the European Union. Strictly speaking, it aims to answer the question of what the constitutional identity of the Republic of Poland is as a member state in the context of the treaty formula "ever closer union". The following chapters of the study analyze the following issues: the concept of "ever closer union" and the historical development of the EU, "Ever closer union" and the constitutional identity of the Third Republic of Poland in the pre-accession period, "Ever closer union" and the constitutional identity of the Third Republic of Poland in the post-accession period, "Ever closer union" during the Lisbon Treaty period. The key research conclusion indicates variability, but also differences of opinion, in the perception of the concept of constitutional identity in Polish conditions.

Keywords: Ever closer union, constitutional identity, Poland, European Union

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1. The concept of "ever closer union" and the historical development of the EU

From its inception, the process of European integration was aimed at building a strong and multifaceted community of European states and peoples. Already the founding fathers emphasised the need for efforts in this direction, laying solid foundations for the construction of a new political organism of a unified Europe. The legal expression of this thinking was given for the first time by the formula "ever closer union among the peoples of Europe" contained in the preamble of the 1957 Treaty of Rome, which – by the way – '(...) has remained in the EU Treaties ever since, surviving several Treaty amendments and one attempt to remove it and another to replace it with the phrase "federal union".'[1] It became clear to the European political establishment that the future fate of the continent would be determined by the search for further areas of political consensus and the strengthening of the ties that united them. A consolidating Europe was to discard old habits of international rivalry and replace them with deepening economic, social and political cooperation. It was also to expand, as far as politically possible, its territorial reach and the number of its constituent states.

The assumption made in the first phase of the creation of the Community underpinned the thinking of the European elite and started a long path of evolutionary change. It was obvious to all those involved in the new project that Europe had to develop into an increasingly unified entity, while at the same time taking on the characteristics of a systemic distinction. Jean Monnet's philosophy of "small steps" in integration and the plan to strengthen cooperation in various fields certainly served this purpose. Interestingly, the concept of the "ever closer union" at this stage of evolution was not accompanied by any concrete visions of the future or ideas as to how the Community should be organised. Its implementation was therefore not linked to the pursuit of a specific goal, but remained focused on the need for continuous development. For the concept meant

> (...) that the European Union is defined not by its but by its movement: we do not commit to a federal Europe or to the United States of Europe. We are only committed to getting gradually closer to each other.[2]

At that time, still, one might think, its essence was 'subsidiarity, the principle that decisions are made at the lowest appropriate level'[3], but above all the widely promoted idea of peace among Europeans.

1 Miller, 2015, no page.
2 De Ruyt, 2018, p. 1.
3 De Ruyt, 2018, p. 1.

Already in the 1970s and 1980s, there was a clear shift in the understanding of the indicated clause, showing everyone that a much deeper meaning could be ascribed to it, related to the construction of a centralised Europe and the creation of a leading centre of power at European level. The proposals made at the time to transform the Community into a federal state were an important influence on this line of thinking. Their appearance in European discourse revealed a strong current of aspiration to enter a new stage of political and constitutional change. Advocates of federalisation, led by Antonio Spinelli, emphasised the benefits of this idea and, at the same time, drew attention to the need to realise such a model of development for a unifying Europe[4]. The idea they put forward was to enact a new European treaty conceived as a new constitution for Europe. With this document, they wanted to bring about a far-reaching political and constitutional consolidation of the Union and thus give the European Union the attributes of a federal state. In doing so, they completely ignored the actual state of social and political relations, including in particular the still pronounced divisions between the individual Member States. It is therefore not surprising that the concept promoted by these circles, which was in fact a negation of the idea of evolutionary integration, was met with dissatisfaction by most national authorities. Spinelli's project, despite the clear approval of a large part of the European elite (as evidenced by the green light given by a European Parliament resolution adopted in 1984), ultimately collapsed as too bold an initiative. This did not, however, spell the end of pro-federalisation activities, nor did it bury the very idea of federalisation. It continued to live on in the minds of European politicians, inspiring and encouraging further efforts to strengthen the integration process and contribute to the introduction of further systemic reforms. As is widely known, these reforms have resulted in successive treaties binding the Union together and tightening the bonds of its constituent states. All of them, with their references to the "ever closer union" clause, had at their bottom the need to realise pro-federation aspirations (Single European Act of 1986: Member States were 'moved by the will to ... transform relations as a whole among their States into a European Union'; Maastricht Treaty of 1992 – Preamble: 'Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'; The Amsterdam Treaty of 1997 and Nice Treaty of 2001: "ever closer union": 'in which decisions are taken as openly as possible and as closely as possible to the citizen'). Therefore, as a result of their adoption, there was a process of seizure of further competences belonging to the nation states, resulting in an automatic expansion of the sphere of authority allowing for the management of the community from the central level. Under the new dynamics, the Union was becoming an increasingly integrated organism, characterised by an increasing influence of the centre on the functioning of the member states. Thus, the organisational form, based in its beginnings on an international agreement between several capitals, was slowly

4 Matusik, 2009, p. 117.

losing its original character and taking on features typical of a state organisation. Its place was being taken, in an evolutionary manner, by a structure which, from a constitutional point of view, could be seen as a creature suspended between a state and a confederation, operating through meetings of ministers and a joint bureaucracy.[5] It was thus undoubtedly a new developmental stage of the organisation, determined by a full awareness and a strong desire to give the Union a quasi-state format. The concept of the "ever closer union" retained its relevance in ideological terms, but the process of its implementation gained a distinctly different context.

The idea of imposing a rigidly defined constitutional concept on an integrating Europe and adopting a European constitution to this end was put on hold for almost 20 years. Throughout this period, the Community continued to gain an increasingly clear political identity and legal and institutional structure, but this was due in part, step by step, to the modifications to the Treaties. The idea of a comprehensive and profound reform of the system came only at the beginning of the 21st century as a result of the then already prepared enlargement of the EU to include the countries of Central Europe. Under its influence, work began on the famous Treaty establishing a Constitution for Europe, culminating in the presentation of a draft of this act. Once again, the concept of the "ever closer union" was confronted with an attempt to speed up the process of change, and once again the idea of an evolutionary development of the EU that had originally been inscribed in it was defended. For, as is well known, the aforementioned treaty ultimately collapsed as a result of its rejection by referendum by the French and Dutch peoples (Kuzalewska, 2011).

The failure of the proponents of this direction was compensated by the adoption of the last of the treaties of the integrating Union so far – the Treaty of Lisbon. This act, too, contained explicit references to "ever closer union" (Lisbon Treaty of 2009: The Preamble to the Treaty on European Union: 'resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'; Article 1 TEU 'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen'; The Preamble to the Treaty on the Functioning of the European Union: 'determined to lay the foundations of an ever closer union among the peoples of Europe (...)') and created an additional sphere of supranational links and new EU competences. In this sense, it was already part of a permanent and established line. More important than the provisions of the Treaty, however, were the developments that could be observed after the entry into force and during the subsequent period of the Lisbon Treaty. Indeed, this period was full of phenomena that clearly strengthened the European Union and brought with it an increase in the importance of its key institutions, especially the European Commission. The latter could, moreover, be seen as a kind of paradox, if one takes into account the fact that, in the layer of normative declarations, the Lisbon Treaty promised to

5 Kissinger, 2017, p. 93.

elevate the role of the European Parliament in EU decision-making processes and, at the same time, to include national parliaments in these processes.[6] Undoubtedly, the anti-crisis measures taken centrally to create instruments to facilitate the Union's passage as a community through the 2009 financial crisis, the 2015 migration crisis or the COVID-19 pandemic crisis of 2020 and 2021; the friction between Brussels and some Member States, especially in the area of the so-called rule of law; or, finally, the geopolitical developments caused by the war in Ukraine starting in 2022 and the resulting geopolitical implications in Europe and the world.

On the other hand, however, it must be acknowledged that the post-Lisbon period was marked by a parallel partial regression in the implementation of the "ever closer union" clause. For it should not escape our notice that it was precisely at this time, i.e. in the second half of the last decade, that the United Kingdom left the EU structures, resulting in the first shrinkage in the history of the European Union of the community of nations and states on which it is based. To the disappointment of many Europeans, the Union proved to be a less forward-looking and promising organisation than it might have seemed. Fears grew that the process of disintegration would extend to other states in the future and thus lead to further decomposition of European structures.

Interestingly and tellingly at the same time, Brexit coincided with increased calls for accelerating the processes of federalisation of the European Union. Both in Brussels and in leading European capitals such as Berlin and Paris, supporters of this project spoke out and began openly arguing for this direction of political and constitutional change.[7] From there, demands for a revision of the current state of treaty regulation and the adoption of a new treaty grew. And hence the legislative initiative in 2023 to launch work on a new formula for the organisation of the European Union as a supranational federation.

2. "Ever closer union" and the constitutional identity of the Third Republic of Poland in the pre-accession period

Following the collapse of the communist regime: the Polish People's Republic in 1989, Poland's integration into the structures of the European Union became one of the greatest aspirations of society and the authorities of the Third Republic. For this reason, from the very beginning, activities were initiated which treated accession as a national priority and which were calculated to realise this direction. The enthusiasm that unleashed these aspirations had its origins in a critical assessment of communism and, at the same time, a positive perception of the European Union.

6 Wójtowicz, 2012, pp. 184–185.
7 Reding, 2012; Scholz, 2022.

Undoubtedly, public opinion and the political elite, discouraged by the economic and social consequences of belonging to the Soviet sphere of influence, saw the Union as an organisation ensuring prosperity and promoting the values that guaranteed the success of Western democracies after the Second World War. For the majority of Poles, the Union was a kind of "promised land", a "land of everlasting happiness", in other words: a place from which it was worthwhile to draw all kinds of patterns. Such thinking must have influenced the process of transformation of the state's political order and thus contributed to the shaping of its new constitutional identity.

Indeed, at the beginning of the 1990s, when the constitutional foundations of Poland's young democracy were being laid, solutions known in several Western European countries were widely applied. For the legislator, who was faced with the necessity to carry out this task, reaching for democratic standards was quite obvious. Already at that time he was fully aware that, if the Republic of Poland was to join the ranks of the Member States of the European Union in the future – and this was, after all, a great Polish aspiration – the formation of a constitutional system that would meet those standards was a sine qua non condition for the success of the efforts undertaken in this field. He was well aware that in the Union's documents to date, such as the Treaties, but also in the declarations devoted to systemic issues (Declaration on European Identity of 1973, Declaration on the European Union of 1983), the model of liberal democracy was presented as the preferred systemic model of the Member State. This included basic assumptions such as the rule of law, the protection of individual rights, the separation of powers, democratic elections, etc.

It is therefore not surprising that the successive constitutional acts adopted at the beginning of the 1990s (amendments to the 1952 Constitution of the People's Republic of Poland and two later constitutions: the so-called Small Constitution of 1992 and the Constitution of 1997), aiming at the reform of the state system of the Republic, were within the limits set by the norms commonly recognised in the West. In this respect, the Third Republic of Poland and its legislative system achievements have never raised any major objections. Interestingly, however, the adopted direction of change did not mean using only legal solutions found in other European countries. It should be noted that the Polish legislator, while remaining open to models coming from outside, at the same time reached very widely to the legislation of the People's Republic of Poland and adapted the legal constructions and institutions shaped within its framework for the use of the new regime. In this way a new constitutional identity of the Polish state was formed, which was a "mixture" of elements of the communist system and Western European systems, especially German and French ones; something which combined values and institutions stemming from the domestic systemic tradition and those derived from the systems of liberal democracies. In this respect, the adopted system of government was particularly distinctive, as it was characterised by clear references to the solutions of the previous era in the shaping of the legal position of the Parliament (especially of its first chamber – the Sejm) and, at the same time, by broad references to German and French models in the way the executive organs were shaped (a strong legal position of the Prime

Minister on the German model, and a significant role of the Head of State on the French model). In its construction, as if in a lens, the remnants of the past and the present times are simultaneously concentrated.[8]

It is characteristic that during the indicated period almost no one in Poland noticed the already visible federalisation tendencies of the EU system and the European elites' understanding of the "ever closer union" clause embedded in this context. The mainstream of public debate focused almost exclusively on the positive aspects of Poland's participation in EU structures and, at the same time, completely marginalised voices pointing to the existence of this phenomenon. These, if they appeared at all, were formulated very rarely, mainly by representatives of groupings operating outside the political mainstream. As a result, there was no serious discussion of the aims behind the introduction of successive treaties, which, although they consolidated the Union on important issues that required consolidation, had aspirations towards the creation of a European state somewhere underneath. There was no consideration of the real problems afflicting the Union, problems that had been the subject of heated debates in Western countries, especially after the Maastricht Treaty came into force. There was thus no recognition of the democratic deficit, with all its dangers, including – or indeed above all – the lack of democratic control by the public over politicians endowed with enormous powers. The absence of the principle of tri-partition of power in the way the institutional architecture of the EU was shaped and the impossibility of meeting the standards that a democratic political system excludes excessive concentration of power and emphasises the necessity of a mechanism of mutual braking and balancing of powers (as it is known, in the EU we are dealing with a system of institutional balance, which is something completely different from tri-partition[9] was also overlooked. Finally, the associated dangers to the legal status of the individual were not perceived, strictly speaking the fact that the EU institutions operating within such a structured system of government have extensive arbitrary power and thus have broad possibilities to violate the individual's fundamental rights.

It was in this atmosphere that the accession negotiations to bring Poland into the European Union were inaugurated in 1998. Poland was entering them as a solidified, though obviously still very young, democracy, with a fully developed constitutional system and fully formed structures of a modern state. There was full awareness on the part of the authorities and society that accession would mean giving up part of its sovereignty and participating in an organisation subject to constant change. Essentially, however, no one took into account the fact that, in the long term, this could mean Poland becoming a constituent part of a pan-European federation and the consequent need to lose its own statehood. This carefree perception was influenced by the previous experiences of other Member States, the content of the provisions of the treaties already in force at the time, the course and results of the

8 Grzybowski, 2012, p. 130; Kruk, 1998, pp. 28–29.
9 Poboży, 2015, p. 1; A. Moravcsik, 2002, p. 609.

negotiations conducted, and finally the declarations formulated by European politicians. These factors put to sleep any suspicions, giving rise to the conviction that both the constitutional identity of the Republic of Poland and its subjective status as a sovereign state would be fully respected by the EU authorities.

3. "Ever closer union" and the constitutional identity of the Third Republic of Poland in the post-accession period

A lack of reflection on the direction in which the European Union was heading was also characteristic of the period immediately following accession, i.e. after 2004. The enthusiasm prevailing in the country precluded any serious discussion in this regard and eliminated political foresight, even if only based on speculation. The European Union was looked upon as a project allowing gradual but limited integration of the state into international structures. Under no circumstances was the slightest risk of annihilation of statehood within the federal formula to be reckoned with. This view was not even weakened by the fact that, as late as 2003, another treaty strengthening Community structures was adopted – the Treaty of Nice – and in 2004 work began on a treaty incorporating in its name the concept of a European constitution (the Treaty establishing a Constitution for Europe, obviously pushed through without success). Thus, the obvious signals of the direction of the political and constitutional development of the community were ignored. As one might think, the reason for this thinking was the widespread conviction that the process of European integration was limited by impassable, constitutionally defined barriers. These barriers were intended to protect Poland against too far-reaching interference of the European Union institutions in its internal system and thus guarantee subjective participation in European structures. Specifically, these were: the principle of supremacy of the Constitution expressed by Article 8 of the Constitution (this provision states specifically that the Constitution is the supreme law of the Republic of Poland), and the clause in Article 90(1) of this act assuming a limited scope of transfer of competences by the Republic of Poland to the European Union (according to this clause, the Republic of Poland may, on the basis of an international agreement, transfer to an international organisation or international body the competences of organs of state authority in certain matters).

The indicated regulations played a key role in the first ruling of the Polish Constitutional Tribunal of May 11, 2005, which demonstrated clear support for the idea of European integration, but at the same time very clearly defined its permissible legal framework. They were issued as part of the control of compliance with the Constitution of the Republic of Poland of the Accession Treaty of April 16, 2003 (including the act specifying the conditions of accession to the EU and its final act). His main thesis states that

> the Polish legislator, realizing the importance of international agreements on the transfer of competences belonging to public authorities "in certain matters" to an international organization or international institution (...), introduces important guarantees against too easy or insufficient justified 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.[10]

An assessment of the content of the ruling in question leaves no doubt that the judges ruling were fully aware of the dynamic significance of the concept of "ever closer union" and the related further evolution of relations between the European Union and the Member States. At the same time, it shows that these judges had set as their objective the protection of the domestic Constitution and the legal order shaped on its basis. It is, after all, difficult to understand otherwise the concept formulated within this statement of the permissible scope of transfer of national competences to the Union and the indication of the limits of interference of the treaties in the constitutional system of the state. While appreciating such a line of thought, it is difficult to believe that it is the result of an in-depth analysis of the dangers associated with a pro-federalist interpretation of the "ever closer union". Rather, it should be combined with an instinctive following of similar, indeed anti-federalist, rulings made in the past by the Union Constitutional Court of the Federal Republic of Germany.

The initial enthusiasm was quite quickly disrupted by fears, articulated for the first time in the public space, about too far-reaching interference of the EU institutions in the matters of the political system of the Third Republic. Their emergence was related to the preparation of the Lisbon Treaty in 2007, whose provisions reformed the system of EU institutions and at the same time gave legal force to the Charter of Fundamental Rights. Part of the Polish political class saw in the new solutions a threat to the constitutional identity of the Polish state. For this reason, it led to Poland's accession to the so-called British Protocol, which – taking the form of declarations included in the annexes to the treaty – was to preserve national legislation as the basis for the protection of the individual and thus limit the direct effectiveness of certain rights contained in the Charter (especially social rights – Title IV of the Charter). By its very nature, the adopted document created a safeguard against undue interference by Union bodies in the sphere of fundamental rights regulated under national legislation. As subsequent experience, in particular the 2017 case of the Polish dispute with the Union over justice reform, has shown. (Osiatyński Archive, 2018), the Protocol failed to fulfil its assigned role as a shield protecting the Polish constitutional order from the temptations of external factors. Neither in the jurisprudence of the Court of Justice of the European Union[11] nor in the practice of law application by other EU bodies has its legally binding force been recognised.

10 Case K 18/04.

11 Case 411/10 and case 493/10; Obserwator konstytucyjny, 2012.

4. "Ever closer union" during the Lisbon Treaty period

The scepticism of part of the Polish political class towards an even more far-reaching strengthening of the European Union under the provisions of the Lisbon Treaty was expressed already at the stage of the drafting of this act. For this reason, almost immediately after its ratification by the President, which was carried out not without objections on the part of the ratifying party, a request was submitted to the Constitutional Tribunal for a review of the treaty's constitutionality. According to the petitioners, the new solutions in several areas led to an excessively strong disruption of the constitutional mechanism of power, thus raising objections from the point of view of the Basic Law. Although the Court in its judgement issued on November 24 in 2010 (Case K 32/09) did not share this position, at the same time it decided to defend and develop the theses already formulated in 2005. His statement included several important elements. First and foremost, he stood firm on the defence of Polish sovereignty, emphasising that

> (...) the sovereignty of the Republic and its independence, understood as the distinctiveness of Poland's state existence within its present borders, under the conditions of membership in the European Union on the principles laid down in the Constitution, imply confirmation of the primacy of the Polish Nation to determine its own fate. The normative expression of this principle is the Constitution, and in particular the provisions of the Preamble, Article 2, Article 4, Article 5, Article 8, Article 90, Article 104(2) and Article 126(1), in the light of which the sovereignty of the Republic is expressed in the non-transferable competences of the organs of state power, which constitute the 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 as a democratic state under the rule of law (...).

Furthermore, he presented for the first time a way of understanding the concept of the constitutional identity of the Republic, saying that it is constituted by the powers covered by the prohibition of transfer, those which reflect the values on which the Constitution is based. In his view,

> (...) Constitutional identity is (...) a notion that determines the scope of the exclusion from the competence to delegate of matters belonging (...) to the "hard core", cardinal to the foundations of the system of a given state (...)

the delegation of which would not be possible on the basis of Article 90 of the Constitution. Regardless of the difficulties associated with establishing a detailed catalog of non-transferable competences, the matters covered by the total ban on transfer include the provisions defining the fundamental principles of the Constitution and the provisions on individual rights defining the 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 implementation of constitutional values and the prohibition of transferring constitutional power and competences to create competences (...). In this context, he finally referred to the meaning of Art. 90 of the Constitution. He stated:

> (…) the 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 European Union. The Constitutional Court has declared as inadmissible to consider that the initial transfer of competences to the European Union as it took place in 2004, has given an open way for further transfers, no longer obeying procedural requirements set out in the Article 90. As Constitutional Court emphasized in its statement, (…) those requirements still apply to future changes in the Treaty on EU, if those changes result in the subsequent transfer of competencies to the European Union. It means in particular, that an international treaty aiming at delegating additional competences to the European Union or to some of its institutions, must not be ratified by means of procedure set for 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 competences.

The Tribunal's statement protecting the Polish constitutional order coincided with new actions of the European Union, which constituted another element in the process of strengthening its institutions and weakening the institutions of the Member States. It was clear from this that the conservative approach of the Polish authorities would face growing external pressure and the related further attempts to deepen integration in the extreme version of the "ever closer union". This portended misunderstandings and tensions between Brussels and Warsaw in the future.

The financial and banking crisis of 2009 provided an opportunity to introduce solutions that would expand the limits of the European Union's authority. It was under its influence that the European Union, striving to create mechanisms that would preventively prevent similar situations pro futuro, decided to expand the package of instruments for economic supervision of states. Member States. In this way, it was established, among others, European Semester procedurę[12] making national financial and economic policy even more dependent on Brussels. This, of course, applied to Poland as a member state, although only to a limited extent. It should be noted that the new regulations provided for the deepest interference of EU institutions in relations with countries belonging to the euro zone.

As a side note, let us note that the newly baked financial mechanisms have become another reason for the Constitutional Tribunal to take a position. In 2013,

12 Dawson, 2015, p. 23.

the Tribunal examined the constitutionality of the Act of 11 May 2012 on the ratification of the decision of the European Council of 25 March 2011 amending Art. 136 of the Treaty on the Functioning of the European Union with regard to the stabilization mechanism for Member States whose currency is the euro. In his judgment of June 26, 2013.[13] previous theses regarding the issue of sovereignty and constitutional identity were repeated. They state:

> The basis for the Polish state to transfer the powers of Polish state bodies to international organizations are the principle of statehood and the principle of sovereignty. A modern reading of the principle of sovereignty and statehood leads to the conclusion that the implementation of the state's constitutional tasks, in particular tasks related to the protection of human rights, requires opening the Polish legal order to international law. Without such opening, the Polish state would not be able to carry out these tasks.
>
> And further:
> The essence of Art. 90 of the Constitution guarantees the meaning of the restrictions contained therein from the point of view of the sovereignty of the Nation and the State. They consist in the fact that the transfer of competences of state authorities is permissible: (1) only to an international organization or international body, (2) only in certain matters and (3) only with the consent of the Parliament or the sovereign acting in the form of a national referendum. The triad of constitutional restrictions mentioned here must be maintained to ensure the compliance of the transfer with the Constitution (…).
>
> And last but not least:
> The effect of the transfer of competences is usually a complex system of dependencies between the state, its bodies and the international organization. Therefore, the transfer of competences should always be assessed from the point of view of the principles shaping constitutional identity. The guarantee of maintaining the constitutional identity of the Republic of Poland remains Art. 90 of the Constitution and the limits of the transfer of competences specified therein.

The growing expansion of the EU empire and the tough defense of Poland's constitutional identity finally led to an open conflict between the authorities of the European Union and the authorities of the Republic of Poland in the second half of the last decade. Specifically, the issue of the justice reforms carried out in Poland, which EU decision-makers accused of lack of compliance with the applicable treaties, became the axis of disagreement.[14] In this dispute, the issue of whether the institutions of the European Union are entitled to interfere in the constitutional system

13 Case K 33/12.
14 Kryszkiewicz, 2021, no page.

of the Republic of Poland without explicit support in the provisions of the treaties (the treaties do not allow them to express their opinion on this matter expressis verbis) has become crucial in this dispute, relying only on the provisions included in the treaties. axiological norms. At the same time, controversies surrounding the understanding of the concept of the rule of law in the context of legislative solutions established in Poland and the requirements formulated in this respect at the level of EU legislation came to the fore. Considering the actions of the Polish authorities to be in violation of the treaties, the European Union decided to demonstrate force and take a number of different actions to present its position. These included: the treaty procedure on violations of the rule of law, which has been launched several times since 2017, numerous resolutions of the European Parliament, and, finally, rulings of the Court of Justice of the European Union regarding the issue of the independence of the Polish judiciary. The latter, in several cases proclaiming not only the lack of compliance of the reforms undertaken with the treaties, but also the primacy of EU law over the national constitution.[15]

In the judgment issued on 14 July 2021 the Constitutional Court has decided upon the admissibility of applying preventive measures by the Court of Justice of the European Union (Case P 7/20). Specifically, he explained whether Article 4(3) provided in the TUE, second sentence, read in conjunction with Article 279 of the TFEU, to the extent that it results – considering regulations of the Polish Constitution – in the obligation of an EU Member State to implement interim measures affecting the operation of the national judicial system. Referring to this issue, he stated unequivocally that

> Art. 4 section 3, second sentence of the Treaty on European Union (…) in connection with Art. 279 of the Treaty on the Functioning of the European Union (...) to the extent that the Court of Justice of the European Union imposes ultra vires obligations on the Republic of Poland as a Member State of the European Union by issuing interim measures relating to the structure and jurisdiction of Polish courts and the procedure before Polish courts, is inconsistent with Art. 2, art. 7, art. 8 section 1 and art. 90 section 1 in connection with Art. 4 section 1 of the Constitution of the Republic of Poland and in this respect is not covered by the principles of priority and direct application specified in Art. 91 section 1-3 of the Constitution.

In turn, in the judgment of 7 October 2021, the Constitutional Court has challenged the way that the provisions of the Treaty on EU (to be exact: Article 1(1) and (2) in conjunction with Article 4(3) TEU as interpreted by the CJEU, as well as Article 19 in conjunction with Article 2 of the TEU) were interpreted by the Court of Justice of the European Union. Of particular importance was the thesis in which the Tribunal openly referred to the normative meaning of the "ever closer union"

15 Case 619/18; joined Cases: 585/18, 624/18 and 625/18; Case 824/14; Case 791/19, Case 487/19.

clause from the point of view of the functioning of the Polish constitutional order. Its formulation made it possible to answer the question whether

> (...) the constantly strengthening relationship which is a field of loyal (sincere) mutual cooperation within the EU may lead to a waiver from the application of the Constitution or to the application of legal provisions contrary to the Constitution.

Here, the Tribunal presented a line already known from previous judgments and took a clear position emphasizing the primacy of the Polish constitution over EU law. He stated that

> (...) the norm derived from Art. 1, first and second paragraphs of the TEU in connection with joke. 4 section 3 TEU, which authorizes or obliges the body applying the law to depart from the application of the Constitution of the Republic of Poland or orders the application of legal provisions in a manner inconsistent with the Constitution of the Republic of Poland, raises far-reaching and justified constitutional doubts, and is not confirmed in the text of the treaties subject to review by the Constitutional Tribunal.

As a supplement, it is worth noting that not all institutions of the Polish judiciary have adopted the perspective outlined by the Constitutional Tribunal. Some of them – sharing the point of view of the EU institutions – considered that the decisions of the Court of Justice of the European Union were an expression of the correct understanding of the treaty norms. The differences that emerged here were evidence of a far-reaching crack in the assessment made by Polish legal elites of the previously mentioned justice reforms. An important decision here is the resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labor Law and Social Security Chamber adopted on January 23, 2020.[16] In this resolution, some judges of the Supreme Court, citing the existing case law of the Court of Justice of the European Union, took the position that the mechanisms for nominating judges of the Republic of Poland adopted in 2017 were incompatible with EU law. A fragment of the statement was eloquent:

> If, however, the Constitution of Poland, in particular Article 179 which provides that judges shall be appointed by the President of the Republic of Poland on application of the National Council for the Judiciary, are found to prevent review of the independence and impartiality of a court adjudicating in a given case, then the Polish Constitution would be in fundamental conflict with Article 47 of the Charter. In the territory of the European Union, independence and impartiality of courts must be real; and their independence and impartiality cannot be uncontestably decreed

16 Case BSA I-4110-1/20.

by the mere fact of being appointed to the office of a judge by the President of the Republic of Poland.

The dispute presented above clearly revealed differences of opinion in the perception of the relationship between the "ever closer union" clauses and the constitutional identity of the Polish state. At the same time, he clearly criticized the direction of the political changes taking place in the EU and the attempts of the EU institutions that determined it. Against this background, the European Union's desire to take over the competences of the Republic of Poland that are not directly granted in the treaties and thus disrupt the formula of relations between Warsaw and Brussels in the current state of treaty regulation has become all too visible. The concept of federalization of the European Union, which European elites have been talking about and consistently implementing for a long time, is gaining new dynamics. On the eve of the discussion about subsequent treaty changes that is just beginning, no one can have any doubts about this.

5. Conclusions

The considerations presented above lead to several key conclusions. Firstly, it is quite clear from them that the progressing process of European integration, based on a dynamic interpretation of the "ever closer union" clause, is intended to involve an increasingly broader transfer of national competences to the EU decision-making center and, correlated with this process, increasingly bold restrictions on the power of the Member States, including RP. Secondly, Poland has so far adopted a very assertive position, emphasizing throughout its membership in the European Union a strong attachment to its constitutional identity and thus showing its readiness to defend its domestic constitutional order against external interference. Thirdly, it is currently difficult to predict how far the process of political transformation will go, and where – if at all – the final border separating the sphere of empire of the European Union and the Republic of Poland will be drawn. One can only hope that the observed pressure from EU decision-makers will not turn out to be exaggerated and will not result in any negative consequences. Faced with the dilemma of 'how much unity Europe needs and how much diversity it can endure' and at the same time 'how much diversity Europe must retain to achieve unity'[17], these decision-makers should realize that when implementing pro-federal agenda – regardless of its substantive assessment as a systemic concept for the future of Europe – there is a high risk of "crossing the Rubicon" and, as a result, triggering disintegrating tendencies. If this happened, the Europeans' dream of implementing an "ever closer union" could

17 Kissinger, 2017, p. 93.

be replaced by the dark vision of a “forever closed union”. And this is certainly not something anyone living in Europe should wish for.

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