

CHAPTER 4

THE VIEW FROM OUTSIDE: EQUALITY OF MEMBER STATES FROM THE PERSPECTIVE OF NATIONAL CONSTITUTIONAL LAWS AND COURTS



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Abstract

This study focuses on the development of the relationship between national courts and the European Union's supranational legal institutions as part of the changes in the understanding of the concept of the rule of law. These changes have led to complex relationships between sovereignty, legal authority, and judicial independence.

The disintegration of empires after the World Wars and the formation of international institutions have changed the global power balance, and through these changes, the rule of law concept became a cornerstone of modern European legal systems. This development also embraced the increasing prominence of courts. The 20th century required new constitutional frameworks, which were often enforced by independent constitutional courts, and the role of the courts, especially constitutional courts, has changed. They have become crucial in maintaining the balance of power within states, particularly in newly democratised countries. This process has often led to judicial activism coupled with supranational influences, which have led to tensions within the state and between national sovereignty and EU law.

This study discusses the challenges posed by the increasing authority of the Court of justice of the European Union (CJEU) and how the concept of constitutional dialogue has given way to a more hierarchical relationship between the CJEU and national courts. The study further suggests the need for greater cooperation among national, supreme, and constitutional courts.

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1. Introduction

As a result of one of the previous studies¹ of the Central European Professor's Network, we concluded that, after about 2000 years of transformation of the institutional architecture of Europe, the imperial heritage of Rome, broken by Westphalia, led to the replacement of the double – public and spiritual – interdependent but autonomous authorities with the single sovereignty of the monarch of the state, and later by the authority of the institutions of sovereign states. Spiritual authority (the institution of the common religion, the Christian Church) became subordinated to the monarch. Since then, the sovereign single authority has been the essence of the new structure. Many centuries passed, and Europe's genetic willingness to create an empire was combined with the long experience of personal, later institutional, and national sovereignty.

The predominance of Westphalia over Roman heritage came to a quick but bloody end during the two World Wars. By forming the United Nations, Council of Europe, the European Communities, and European Union, a special recombination of the past is at stake. Formally, in continuity with Westphalia, sovereignty belongs to the Member States, while inter- and supranational institutions have been extended without limits on their range of influence. The principles of 'ever closer union', primacy of European law, and common values synthesised in the new dogma of the rule of law are intended to substitute the missing common spiritual braid (lost with the authority of the Church), limiting the mere physical power of sovereignty.

This conclusion raises a new question: Who decides the values and who decides the rule of law? At this point we face the situation – a consequence of Westphalia – that the authority of values, of rule of law, is the same as the authority of public power. The two authorities in Rome have been integrated into a unique superpower: a single final authority. As a visible manifestation, we have a pattern of double authority – common principles and sovereign power replacing formal spiritual and public ones – but because of their integration, there is no institutional autonomy affecting their mutual control. We have a single final authority that controls both the principles and public power.

How is this new inter- or supranational order operated? As a chapter of the Roma – Westphalia – Internationalism development of Europe radiates into the world order, we find national and international courts as centres of power. This is the reason why we should focus on courts or jurisdictions if we want to understand the real or apparent equality Member States of the EU.

1 Varga and Berkes, 2024.

2. How Have Courts Won the Apex Position Within Public Institutions?

When the role of courts is in the focus of the description of the actual model of constitutionalism based on the principle of the rule of law, the development of the legal thinking of the 19th century cannot be avoided.

The global (and nowadays normative) paradigm of the rule of law did not arise suddenly but had direct historical and legal antecedents. This paradigm necessarily places it in both historical and legal-theoretical contexts. Thinking about the nature of law and state has always been concerned with the issue of the limits of the exercise of power. On the one hand, is the sovereign, the holder of the main state power – about whom the main proposition is precisely that there is no authority superior to him in a given area (otherwise, he would not be the sovereign) – bound in the exercise of power by any limitations independent of him?

There were at least three answers to the limitations of the law and the exercise of state power, different in terms of their appearance and wording, yet similar in their consequences, the elements of which appear in today's paradigm of the rule of law. These are French constitutionalism, English rule of law, and German *Rechtsstaat*.² The rule of law (or constitutionalism, used in the same sense) can therefore be directly traced back to the basic legal values, which are partly historical (they have origins and continuity and refer to a specific legal system) and partly universal (they follow from the concept of law and cannot be abandoned by a single legal system or in its time state). Historicity and universality, the two abstract core values, are actually identical to the concepts of natural law.

Attention should be paid to this role within European culture. The role of the Roman Civil law '*ius civile*' does not require further argument. However, the role of the Old Testament and its respect for the law also have an important impact as another source of the Christian concept of law. The historical and theological descriptions of the five books of Moses (*Pentateuch*, *Torah*) are interwoven into various legal texts. Their form and origin are different (as a result of the different redactions of the text), but they are united in that they attribute 'divine authority to the legislation of Israel'. The legal order is, therefore, of a sacred nature, regardless of whether it has a theological, ritualistic, or specifically social purpose.³ This legal order also included respect for the dignity of man (considered to be derived from his divinity), requirements of freedom and justice, and social responsibility (as a prototype of social rights). Christianity first adopted this theory in moral, theological, and then

² The Council of Europe and the Rule of Law – An overview. CM(2008)170.

³ Rózsa, 2016, p. 156.

legal forms.⁴ After becoming the official religion, this concept of law that limits and defines state action became general.⁵

After reviewing the ideological history of the rule of law – from the Old Testament and the Roman respect for the law, which formed the foundations of European legal culture, to Christian natural law and the doctrine of the rule of law, which has become normative today – we can now present a closer history of the development of the idea of the rule of law.

The 19th century was the era of great codifications.⁶ Undoubtedly, since the Middle Ages, there have been efforts to collect and systematise the norms governing individual legal relationships, such as the *Decretum Gratiani*,⁷ *Sachsenspiegel*,⁸ or Werbőczy's half-millennium *Tripartitum*.⁹ However, the large law books compiled on the basis of codified, well-thought-out principles and uniform dogmatics begin with the Napoleonic *Code Civile*¹⁰ and go through the Austrian *Allgemeines Bürgerliches Gesetzbuch*¹¹ to the German *Bürgerliches Gesetzbuch*.¹² We can say that the concept of the 19th century's rule of law is determined by the primacy of the codifying legislation. Legal sources discussed by the legislative body, codified and accessible to everyone, seemed to be the appropriate antidote to random decisions, which carry the possibility of arbitrariness. This process of legal development was affected by the unstable period of state disintegration and state birth in the beginning of the 20th century. The legal consequence of this was the need for organisation of the new states, which was legally carried out by the charter constitutions.¹³ The new charter constitutions had to be enforced; Kelsen's Austrian constitutional court, which then spread as a continental model in many European countries, seemed to be a suitable tool for this.¹⁴ As described by Professor Béla Pokol nearly a quarter of a century ago, constitutional adjudication in the 1920s could not be entrusted to ordinary courts.¹⁵ In fact, judges of the ordinary courts, who absolutely respected the authoritative codes, were not expected to set aside the time-tested codes in the event of a dispute and base judgments on an abstract constitutional law developed during political debates. That is why an independent constitutional court was necessary. Kelsen is right in this respect that the German Imperial Court was incompetent to protect the Weimar-constitution.¹⁶

4 Beran and Lenhardt, 2021, pp. 29–42.

5 Beran and Lenhardt, 2021, pp. 44–46.

6 Vékás, 2014.

7 Erdő, 1998, pp. 36–46.

8 Künssberg, 1933

9 Máthé, 2014.

10 Vékás, 2014.

11 Brauneder, 2011, pp. 127–135.

12 Vékás, 2014.

13 Póczy, 2012, p. 123.

14 Paczolay, 1995.

15 Pokol, 1994, pp. 35, 94–95.

16 De Visser, 2014, p. 63.

Thus, this model proved to be suitable not only for other countries but also for other eras. It is no coincidence that many countries, including Hungary, consider this type of constitutional court necessary to restore the rule of law after dictatorships. However, these dictatorships – in Western Europe in the first half of the 20th century and in Central Europe almost all the way up to the system changes of 1989–1990 – were based on the exclusivity of the executive power. Therefore, the constitutional adjudication in the new systems necessarily did not only aim to achieve constitutionally compliant practices of the legislative power (and the legislature in general) but also – correctly – sought to limit and adapt the operation of the executive power to the system of separation of powers in the rule of law.

Simultaneously, from the middle of the 20th century, strong international and supranational institutions were created, including the United Nations, Council of Europe, and European Communities, which later became the European Union. The effectiveness of the new supranational institutions was marked by the creation and operation of their own courts, independent of the Member States (International Criminal Court, ECtHR, and CJEU). However, these strong institutions were only communities of law, and their creators and members could provide them with rights but not political or social values. This meant that powerful courts could only consider their own substantive law, not any other values, but their decisions significantly shaped the law of the institutions in question, binding everyone, and also affected the rights of their founders.¹⁷ It should be mentioned that international and supranational institutions have also recognised the advantages of free judicial law-making, of which a vivid example is the *van Gend & Loos* case (Court of Justice of the European Communities), which declared the primacy of the law of the European Union (or, at that time, the Communities) as early as 1963. The consequence of the declaration of primacy was as follows: political accountability remained the ‘burden’ of the Member States, but their freedom of decision-making was significantly reduced after EU law became enforceable on them through integrationist judicial control.¹⁸

This judicial pattern – reinforced by the particularly activist practice of the United States Supreme Court¹⁹ during this period – prefers the judicial rule of law.²⁰ Based on the Central European experience, it seems that the model of the activist judicial interpretation of the rule of law can be a suitable and effective tool for the protection of the Constitution in short periods of time (after political transitions), but it cannot be maintained in the long term in the same way as any state model based on the dominance of any other branch of power. It also leads to arbitrariness, and in the case of constitutional courts, this danger is particularly strong since there is no control over them. It is precisely this uncontrollability that demands that, except for short transitional periods, constitutional courts voluntarily reintegrate into

17 Pünköszt, 2014.

18 Harlow, 2003, pp. 79–83; Craig, 2006, pp. 329–343; MacCormick, 2002.

19 Lindquist and Cross, 2009, pp. 3, 47, 105.

20 Pokol, 2014, pp. 56–64.

power-sharing systems. The separation of powers means that no branch of power has unlimited power, including the courts. In any case, the court practice relies on the normative concept of the rule of law.

3. The Principle of the Rule of Law Left in the Hand of the Courts

The victory of the rule of law over all other legal principles (and values) was led by the Treaty of Maastricht (1992) and achieved by the Lisbon Treaty (2007) and the Report on the Rule of Law by the Venice Commission (2011).

Parties who signed the Treaty of Maastricht confirmed ‘their attachment to the principles of liberty, democracy, and respect for human rights and fundamental freedoms and to the rule of law’ at the beginning of the preamble (and later the text of the treaty mentioned this principle several times). It was the Lisbon Treaty that (after the fall of the Treaty Establishing a Constitution for Europe) elevated the principle of rule of law to a normative rank in its Art. 1a (known as Art. 2 of the consolidated version of the Treaty on European Union in force from 1st December, 2009):

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

However, this normative principle of the rule of law of the EU was not active for several years. It was the Venice Commission that breathed life into it. Its immediate precursor was the Decision in 2007 of the Parliamentary Assembly on the principle of the rule of law,²¹ as well as the Overview on the rule of law discussed in 2008 by the Committee of Ministers of the Council of Europe.²² This Overview expressed the mutual dependence of three pillars:

There can be no democracy without the rule of law and respect for human rights; there can be no rule of law without democracy and respect for human rights, and no respect for human rights without democracy and the rule of law.²³

21 Parliamentary Assembly, Resolution 1594 (2007).

22 Ministers’ Deputies, CM(2008)170.

23 Ministers’ Deputies, CM(2008)170, Sec. 27.

The 2011 Report of the Venice Commission on the rule of law was built on this background. The thesis sentence in the Report is Tom Bingham's definition of the rule of law.

...all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.²⁴

With this report, Europe got a comprehensive theory of rule of law and the courts of justice as instruments for enforcement of this principle.

However, the Venice Commission is an institution of the Council of Europe and not of the EU, so it could not provide direct protection for the normative principle of rule of law of the Treaty on European Union (and its Art. 2). This goal was achieved indirectly.

Upon the request of the Council and Parliament, by 2014, the European Commission elaborated a new device entitled A new EU framework to strengthen the Rule of Law²⁵ which, in fact, is partially a political and partially a legal procedure. The main characteristic of this framework is that it elevates the concept of the rule of law from Art. 2. This concept is protected with special emphasis in every case when some kind of systemic threat is imposed against the rule of law (4.1) that needs to be handled. This wording leaves no doubt that the content of the rule of law is uncertain, leaving space to formulate different charges of violation.

The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national 'rule of law safeguards' do not seem capable of effectively addressing those threats.²⁶

Besides the theoretical aspects, the Communication contains a practical surprise:

The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis.²⁷

24 CDL-AD(2011)003rev. Sec. 36, reference in the Report: Bingham 2010.

25 Communication from the Commission to the European Parliament and the Council. A new EU framework for strengthening the rule of law, COM(2014) 158 final.

26 COM(2014) 158 final, Sec. 4.1.

27 COM(2014) 158 final, Sec. 4.2.

The question of whether the Member State violates the value of the rule of law is not necessarily assessed by the European Commission. The European Commission might take over the findings of the constitutional consulting body of the Council of Europe, which the Venice Commission assessed by informal procedures. The framework states that, although the approach to the rule of law might be different on the national level, the decisions of the CJEU and of the ECtHR, as well as the documents compiled by the Council of Europe ‘building notably on the expertise of the Venice Commission [...] define the core meaning of the rule of law as a common value of the EU’.

The Commission attached several appendices to the communication, of which the first details the sources of the rule of law paradigm: the decisions of the CJEU (with special attention to the decisions regarding the EU Charter of Fundamental Rights) and further remarks that the Council of Europe and the ECtHR do not define the concept of the rule of law. This refers to a report by the Venice Commission in 2011. The definition in this report is almost identical to that in the quoted framework.

The ‘framework’ therefore connected the rule of law protection mechanism of the supranational European Union, which bears the hallmarks of statehood, with the legal practice based on the ‘soft’ opinions of the pan-European international organisation based on a much wider membership (47 member states), the constitutional advisory body of the Council of Europe, the Venice Commission. This solution was surprising but neither accidental nor unprecedented. This is no coincidence, as all EU Member States are members of the European Council. It is not without precedent because, in 2011, the Venice Commission drafted a basic document (according to its form, a report) on the protection of the rule of law.²⁸

As a result of everything, an unprecedented institutional connection (European Commission + Venice Commission, then ECtHR + European Parliament + CJEU) was formed. Owing to the normative formulation of the rule-of-law paradigm, its selection from the range of other basic values, and its applicability to any other internal or international legal regulations, it enables free interpretation and use of any legislation or even the constitution of any country.

Hence, the principle of primacy established by the treaty cannot be contested: all constitutional and ordinary courts of the EU’s Member States are obliged to align their jurisprudence with its provisions and, consequently, with the principle of the rule of law. Apparently, there is no difficulty in doing so. With respect to law, a brief rule of law is a common constitutional heritage of Europe (see Art. 6 of the treaty). On the other hand, every legal family, all the Member States of the EU, have their particular legal history manifested in various considerations on rule of law. What does it mean? It means that respect of rule of law does not lead to uniform interpretations. And, in the end, who will decide on the authentic, compulsory interpretation of this principle? Of course, the final interpreter of the Treaty, the Court of Justice of the European Union.

28 CDL-AD(2011)003rev, Report on the Rule of Law.

These two dimensions outline the equality or inequality of courts when the rule of law is at stake. The first dimension is the equality of the structure of the judiciary of the Member States, and the second dimension is the congruency of standards of independence of the CJEU and the courts of the Member States.

4. First Dimension: Equality of Structure of the Judiciary and the Date of Accession to the EU

The importance of the framework and the institutional link between the Venice Commission and the European Commission is outlined by the incoherent approach of the Venice Commission to the structure, administration, and functioning of the judiciary.

Looking at the opinions of the Venice Commission, we find that almost all of them answer the question of how judicial reform should be performed. However, there is no answer as to why judicial reform is needed. This is dubious if we consider that the stability of the judiciary is one of its basic characteristics (almost evident if compared with the executive, almost in permanent change). Such reforms are rare in Western Europe; they are more frequent in Central Europe and quite common in the Balkans and Eastern states. Two main motives were identified: (a) First, it is a historical experience that political transitions at the end of the 20th century did not affect judges, courts, and the judicial system. The missed lustration led to the frustration of political branches in later decades. Political institutions responsible to their voters saw in courts obstructive factors: parliaments could adopt new laws or even constitutions, and courts could and did prevent their prevalence. For example, this was the case in Hungary. The Constitutional Court declared in one of its first decisions in 1990 that its practice is influenced by the so called ‘invisible constitution’, a set of rights and principles not included in the charter constitution but ‘melted out’ by the Court. (b) On the institutional side, Western Europe invented the judicial councils composed by elected judges and other – elected or ex officio – members, as a new form of administration of courts that reduced or even abrogated the role of the executive and of ministries of justice. However, many of the important legal families did not go along the road. In France, Germany, and Austria, ministries of justice still have an important (or even decisive) role in the administration of the courts. The Venice Commission does not criticise this, but at the same time, in the case of Central, Balkanic, and Eastern states, deliverance of administrative power over the judiciary (from the ministries of justice to the judicial councils) is definitely expected. The official explication of the double standard is originated from the different assessment of the so called ‘old’ and ‘new’ democracies:

In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies, explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges.²⁹

The double standard is not, of course, well founded, but EU institutions have strong instruments to enforce it. As previously mentioned, this was the first flaming factor in debates among EU institutions and Member States. This appears to be the root cause of these disagreements. In Central Europe, it has been 35 years since this transition. Was Germany or Italy in 1980 a ‘new democracy’? We will not remember this word here. On the contrary, in 1973, in Copenhagen, the nine Member States of the European Communities, Germany and Italy among them, formulated for the first time a Declaration on European Identity.³⁰ If 35 years after the end of World War II, 31 years after the foundation of the Council of Europe, and 29 years after the foundation of the European Coal and Steel Community, the first predecessor institution of the EU, Germany and Italy were among the parents of the new dream of European identity and were not called ‘new’ democracies, what is the ground to use this humiliating ‘title’ today for states of Central Europe?

Over time, this argument has lost substance. First, an ontological argument may be raised: What is the starting point of this comparison? The fall of the Roman Empire? Westphalia? The Glorious Revolution? French Revolution? 1848? 1920? The end of World War II? Or the Foundation of the European Council? The farther our starting point is, the less Member States qualify as ‘old’ democracies. Second, a mathematical argument should be considered: the ratio of the age difference between the ‘old’ and ‘new’ democracies decreases each year. Thirdly, this difference may be disobliging to peoples of the different ‘new’ democracies (by way of example: Poland was the country attacked by nazis; this caused the second World War, but this country together with Czechoslovakia did not choose their authoritarian communist regime. They were left in the hands of Stalin by ‘old’ democracies. However, these two countries could serve as examples for any democracy: Poland was the first ‘new’ democracy that performed a transition in a truly democratic and peaceful way, and the people of Czechoslovakia managed the ‘divorce’ that resulted in the creation of the Czech Republic and the Slovak Republic in a manner that may stand as an example to the whole world).

29 CDL-PI(2015)001, Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges, Sec. 2.2.3.1., based on CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, § 2–3, 59 and 12–17.

30 Declaration on European Identity (Copenhagen, 14 December 1973), Bulletin of the European Communities. December 1973, No 12, pp. 118–122.

However, the reality is that the Venice Commission, and following it, the European Commission, expects from some countries implementation of a judiciary model that is not realised in Western states. It is not realised for good reasons. The permanent reforms in states that built up judicial councils proves that this experiment is not definitely successful.³¹ However, not only the practice (jurisdiction) but also the administration of justice is kept under control in order to have courts under supranational control. It causes conflicts, but not only in this dimension.

When speaking about the normative principle of the rule of law protected by the courts, this declared inequality is highly disturbing. If the different member states of the Council of Europe and the European Union and their courts are unequal by doctrine, their interpretations of the law (of constitutional principles and finally of the rule of law) also have different weights. Even the same conclusions of the different courts may be correct and binding in one case and false and void in another, depending on the 'age' of the democracy (of the state as a member of the inter- or supranational institutions).

5. Second Dimension: Are National Courts Equal Parties When Engaged in Dialogue With the CJEU?

The relationship between EU law and the laws of Member States was initially characterised by parallelism. Parallel legal orders coexist based on plurality.³² Competencies emerging from sovereignty were either conferred on the EU (at the beginning of the communities) or kept within the national constitutional field (with some exercised jointly). This plurality of legal orders was completed with a plurality of jurisdictions: the final interpretation of EU law fell in the jurisdiction of the CJEU; the guardians of national constitutions were constitutional courts, while interpreters of the rest of the national laws were the supreme courts (one or more in a specific country, depending on their legal history).

Necessarily, situations arose from the beginning when interpretations by different courts clashed³³ (e.g. *Internationale Handelsgesellschaft* and the *Solange* answers by the German Bundesverfassungsgericht). The CJEU has excluded step-by-step exceptions to the primacy of EU law emerging from different phases of legal collisions. The symbolic beginnings of the first stage were the *Van Gend & Loos*

31 48. Although public trust over the past 20 years in the efficiency of this approach has not been unequivocal in some countries, no other more efficient form of guarantee has been developed and accepted since. (...) 49. On the other hand, the establishment of a judicial council, even if it is endowed with sufficient constitutional guarantees, is no guarantee for ensuring judicial independence in itself. See: CDL-AD(2018)003.

32 Thym, 2012, pp. 246–247; CJEU C-16/65 (Schwarze).

33 Belov, 2018, pp. 45–46, 54.

(C-26/62) and *Costa Enel* (C-6/64) cases, in which the CJEU (or its predecessor), without any binding rule of the treaties, formulated the concept of new legal order of European Community Law and the obligation of application of the courts of the Member State, which led to the obligation to disregard the law of the Member State. The second phase was opened by the *Internationale Handelsgesellschaft* (C-11/70), which already formulated the primacy of the law of the European Communities vis-à-vis the constitutions of the Member States, which was confirmed in the *Simmenthal* case (C-106/77) by stating that the ordinary courts of the Member States cannot wait for the enforcement of primacy to the national legislature or constitutional court in order to resolve the collision, but they have to do it themselves. The last phase was more recent. In case *C.I.* C-107/23, answering a preliminary ruling request by a Romanian Court, the CJEU ruled that the primacy of European Union law requires that the ordinary court of a Member State disregard the decision of the constitutional court or supreme court of the same Member State, which is binding under national law, if the ordinary court deems it necessary to fulfil its obligation arising from a directly enforceable provision of EU law. With this step, the CJEU entered as an actor into relations among the different national courts of a particular state, and moreover, ruled that not only must a legislative act be left out of consideration if it contradicts EU law, but that this stipulation must apply even to a final judgment of a national court.

Until this point, the magic word for the relationship between courts was dialogue.³⁴ The process of constitutional dialogue essentially began with the Lisbon Treaty, which, in Art. 5 (as Art. 4 of the consolidated text of the Treaty on European Union), adopted the provisions of Art. F of the Maastricht Treaty and clearly formulated the obligation to respect national identity, which obviously binds the institutions of the European Union. In the past decade and a half, the constitutional courts of the Member States have continuously interpreted the rule based on the obligation to respect national (or constitutional) identity, which includes areas of law that cannot be touched by the law of the European Union and its institutions. This process was closed by the *C.I.* decision, eliminating the reasonable balance between the law of the European Union and the law of the Member States. With *C.I.*, the CJEU extended the conflict between national legislation and CJEU to the third branch of power. In other words, such a decision ended the so-called constitutional dialogue and recognise a single binding legal authority, the CJEU itself. Since this, the courts are no more equal.

Several signs indicate that the national courts, even the constitutional courts of the Member States, can never win the collision.³⁵

Opinion 2/2013, issued by the CJEU on December 18, 2014, prohibited the application of Art. 6, Sec. (2) of the TEU which required the European Union to join the European Convention on Human Rights (which would have entailed the operation of

³⁴ Berkes, 2023, pp. 75–77.

³⁵ Kochenov and van Wolferen, 2018, p. 14; Karakamisheva-Jovanovska, 2023, p. 72; Sehnálek and Stelík, 2019, p. 197; Mayer, 2005, p. 1505.; Petr, 2023, pp. 153–155, 158.

the European Union coming under the jurisdiction of the ECtHR). This breach of obligation that can be filed upon prejudice to the rule of law, initiated by the European Commission and pursued by the CJEU, is hardly favourable for the Member States. Pursuant to the TEU Art. 6, Sec. (2):

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

The TEU unambiguously states that the union *accedes*. A sentence formulated in the indicative mode is obviously prescriptive for accession. In this regard, the Commission asked for an opinion from the CJEU in its draft of the accession treaty.

The CJEU took the stance that the EU has a newly formulated legal order, which enjoys priority with regard to the legal orders of the Member States. It protects the fundamental rights via the Charter, and this protection (the content analysis of the rights) shall remain within the autonomy of the EU law. Accomplishing the process of integration is the fundamental aim of the Union. The ECtHR would be able to undermine the autonomy of the EU law; this is the reason why the draft version of the accession of the EU to the European Convention on Human Rights is not in harmony with Art. 6, Sec. (2) of the TEU.³⁶ It is difficult to interpret this otherwise than the CJEU having rewritten the TEU (that is, the rule enshrined in the international treaty passed and ratified by each of the Member States). This is the very Treaty the CJEU is meant to protect. The CJEU opposed the unambiguous provision of the TEU, and there is no legal device to counter its decision due to the CJEU's unaccountability. The arbitrary decision is surprising, mostly in the light of the presumption that, in the name of the value of the rule of law, the CJEU would never accept similar opposition with the ECtHR from the Member States.

The position of the President of the CJEU, published in a journal,³⁷ should be interpreted as a similar signal.

If a Member State calls into question the primacy of EU law as interpreted by the Court of Justice and engages in a unilateral course of action, it shows disrespect towards the other Member States and their peoples that continue to honour the Treaties on a reciprocal basis. Such a unilateral course of action also sends the message that EU law does not apply with the same force throughout the EU and that 'some Member States are more equal than others'. However, there is no place for unilateralism in the EU, since it stands in the way of upholding the values of respect for unity (*Einigkeit*), the law (*Recht*), and freedom (*Freiheit*) to which we Europeans are all reciprocally committed.

³⁶ Avis 2/13 – Avis au titre de l'Art. 218, para. 11, TFUE, 158, 166, 168, 170, 172, 194.

³⁷ Lenaerts, 2020.

This opinion, even if personal, deems unacceptable on the part of the Member States, any interpretation narrowing the unconditional primacy of the law of the European Union.

Cases related to the Polish Constitutional Court and the Supreme Court should also be considered as such a sign. The CJEU in cases of *A.K. and others* (C 585/18, C 624/18, and C 625/18) stated that CJEU is entitled to determine whether a Member State court fulfils the criteria of independence. It applied this immediately and did not classify the Polish disciplinary court system as sufficiently independent. As a result of the unprecedented institutional merger between the European Commission and the Council of Europe described above, the Venice Commission adopted it in its emergency opinion issued on January 16, 2020 (CDL-PI(2020)002, 12-16, 20-23), referring to CJEU interpretation as a mandatory criterion under international law. After such a history, it should not have been surprising that, in the ruling of the CJEU in C-791/19 *R Commission v. Poland*, citing judicial independence and impartiality, it was ordered that the operation of the statutory Polish disciplinary court should be suspended, and, as a result, a Polish court established by law may not rule in the proceedings initiated, among other things, due to the political involvement of judges.

At first glance, the decision of the CJEU appears to be appropriate, but this is not the case. There is no authority for any institution in the EU to determine the judicial system of its Member States, but it is even worse that a judgment is an obvious challenge to judicial independence, even if it is apparently done in the name of judicial independence. Independence is a *sine qua non* condition of the judiciary. Moreover, it was not invented in the postmodern age. We can safely say that judicial independence in Europe, including its central part, is an achievement of our historical constitutions,³⁸ which have been solidified as an element of identity and would, therefore, be difficult to renounce even if someone wants to do so. However, this ruling of the CJEU not only allows, but actually expects, that Member States, even traditionally constitutional democracies, resign themselves to the independence of their courts.

Judicial independence is not privileged or unlimited. The power inherent in case-by-case legal interpretation makes this requirement significant, the essence of which is that no one can influence the judge or force him to decide against the laws. As a limit to independence, the judge cannot deviate from the text of the legislation during interpretation. The unlimited freedom of legal interpretation unilaterally elevates judicial power over legislative power. From that point, it is only a step away if we formally allow judges to ignore the law. Added to this is the consequence of the decision and the permissibility of the political involvement of judges.

Judicial independence as a constitutional principle requires courts to be protected from the influence of the political branches of power. However, on the other side of this, the courts do not participate in the contest of power either, and they have to renounce political power.

38 Stępkowski, 2023, p. 254.

Therefore, the Judiciary is a politically neutral branch of power. Of course, there is no doubt that judges have and can have a worldview; they may even have political preferences, but we expect them to not reflect their preferences directly in their judgments, and we should expect similar restraints in their public activities. It is difficult to imagine that judicial independence could be extended to the extent that it would allow courts to question the Constitution or state laws, the legitimacy of constitutional institutions, or the independence of other courts in general.

Therefore, the decision of the CJEU, in cases initiated by Polish judges, was dangerous. When it is ruled as a violation of judicial independence if a Parliament adopts a law with which the judges do not agree, this does not mean strengthening independence, but actually renouncing independence. The asymmetric interpretation of independence, which prevents judges or, even more so, judicial organisations, from undertaking political contests (because they cannot undertake them) but, at the same time, enables attempts to influence public opinion and even the legislative power, is absurd.

The position of the CJEU is a challenge, in the face of which the urgent task is to rediscover and enforce the natural limits of judicial independence. Unconditional limits include legislation from which the courts cannot deviate. If they were to secede, the basis of their own independence would be called into question, as the Constitutional Court in Hungary has repeatedly pointed out. Abstention from political activity should be required as an internal limitation. Judges may therefore not engage in direct political activity, neither in the form of a movement (in their private life) nor (in fact, even less) while sitting on the bench. Moreover, this can be formulated in one more dimension: judicial independence not only against the other two branches of power of one's own state, not only against other states and international institutions, but also against the influence of judicial self-interest protection. Perhaps it is not an exaggeration to add to this (as the conflict of interest and exclusion rules clearly indicate this) that a kind of independence is also required in the face of personal self-interest.

Other disturbing cases could be mentioned, including case *WZ*, C-487/19 against Poland; case *IS*, C-564/19 against Hungary; and the preparation of infringement procedures due to the PSPP decision of the German *Bundesverfassungsgericht* (2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, and 2 BvR 1651/15).

6. The Challenge and Possible Antidote

As argued, the CJEU increases its assumption that it functions as a supranational Supreme Court above the Supreme and constitutional courts of Member States, in the same manner as national Supreme Courts have precedence over the lower courts in

Member States.³⁹ It gradually took over the general task of the Supreme Court of the Member States (the uniform application of law) only now on an EU scale, ensuring the uniform application of EU law.⁴⁰ Significant support was granted by the Charter of Fundamental Rights, which abolished this parallel legal system. Because of this uniform interpretation, all legal issues came under the primacy of the CJEU.⁴¹ If we add to this that the CJEU refused to accept the jurisdiction of the ECtHR while the national courts were bound by it, it seems that the principle of equality of courts is a thing of legal history.

This phenomenon is not only important at the theoretical level but also has direct practical consequences. It affects the future of the Supreme Court and the constitutional courts of EU Member States. First, it raises the question of whether there is a need for the Supreme Court in the architecture of today's judicial system. The fact is that the current judicial organisation within the EU would work very well without Supreme Courts and often without national constitutional courts.

The CJEU can be involved in proceedings from any level of the court of Member States by initiating a preliminary ruling procedure at any stage of the proceedings. The involvement of the National Supreme Court in this procedure is not inevitable. This situation shows that, from the viewpoint of both the parties to a case and the CJEU, the national Supreme Court can safely be disregarded. This is what the CJEU expressed several times: The task of national courts, including Supreme courts and constitutional courts, is to guarantee the primacy of the law of the European Union. With this toolkit, the lower courts are actually ahead of the Supreme Court, obtaining a binding legal interpretation from the CJEU, and the Supreme Court cannot do anything about it; the supreme courts are obliged to accept it.

There is another new 'development': the LIBE Committee of the European Parliament has submitted a draft resolution to the European Parliament (2022/2143(INI)) (which was later accepted) in which it stated the same point. National, Supreme, and constitutional courts are obligated to enforce the primacy of EU law at all costs. It is added to this that it was very sad that the primacy of the rule of law of the European Union was not mentioned in the Treaty on European Union and that it ought to be included in the very next amendment. Seemingly, there has been no notable reaction to France and the Netherlands stating in a referendum that they did not want this.

If national supreme courts are not focusing on their tasks emerging from the national constitutions (that is, to ensure uniform application of law and to protect the primacy of the national constitution), we will lose our importance. From the point of view of the primacy of the European law, these courts can be forgotten.

Therefore, the way out is the cooperation of the Supreme Court and the constitutional courts of the Member States. The legal institution of a constitutional complaint can provide great help through which constitutional courts can offset the influence

39 Dyevre, 2013, p. 34.

40 Paris, 2018, p. 223.

41 Nagy, 2023, pp. 9, 35.

of the CJEU. If a constitutional court annuls decisions of the lower courts or even the Supreme Court that follow the legal interpretation of the CJEU but are contrary to the constitution, they create an obstacle against which only a formal tool (the infringement procedure against the Member State) is available. However, this did not have an immediate effect.

Fortunately, serious arguments can be enshrined through these infringement procedures. According to Art. 4 of the TEU, not all powers conferred on the Union by the Treaties remain with Member States. Furthermore, the Union respects the equality of the Member States before the treaties, as well as their national identity, which is an inseparable part of their basic political and constitutional system. Namely, the structure of the Member State's legal system, the constitution of the Member States as the basis of the legal system, the court organisation of the Member State, and the binding effect of the decisions of some Member State courts on other courts are issues on which neither the TEU, the accession treaties, nor any other international convention entrusted with the decision by the CJEU can adjudicate.

At the same time, the procedural rules and the establishment of the judicial system remain clearly within the competence of the Member States; therefore, the protection of rights derived from EU law and the development of procedural rules regarding court remedies provided to legal entities are the responsibility of the internal legislators of each Member State (the non-exhaustive position by the Court of Justice of the European Union, for example: *ÖBB Personenverkehr* judgment, C 417/13, EU:C:2015:38, Point 61, *Fiamingo and others* judgment, C 362/13, C 363/13 and C 407/13, EU:C:2014:2044, Point 63).

In this context, the rulings of the CJEU can be interpreted as defining an exception (*exceptio iuris*) from the binding force of the decision of the constitutional courts of the Member States: the decision of the constitutional court is binding to everyone unless it is excluded by the CJEU. This position would, therefore, eliminate all limitations on the unconditional enforcement of EU law in such a way that the courts of the Member States would essentially be removed from the sovereignty of the Member State. In essence, there would no longer be powers that remained with the Member State by virtue of the TEU; the CJEU could remove them without limit.

However, the system of legal remedies within the Member States and the determination of which court is bound by the decision of a judicial (constitutional) forum is an internal legal issue on which the Court of Justice of the European Union could not take a position; consequently, it would not even arise, for example, that the ordinary court should ignore the binding decision of the constitutional court based on the rules of the Member States. If such a lower court does and the Constitutional Court reviews the constitutionality of the legislation applied in the individual case based on a constitutional complaint, the decision will be annulled.

Sooner or later, the relevant Supreme Court must find a solution that is in line with the Constitution and EU law. It is a slow and laborious solution, but currently, it is the only solution that can restore the equality of judges.

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PART II

INSTITUTIONALIZING
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