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KÁROLY BENKE*

The Saga May Continue: On the Intricate Dialogue Between the Constitutional Court of Romania and the Court of Justice of the European Union

ABSTRACT: *This study tracks the evolution of the jurisprudence of the Constitutional Court of Romania (CC) vis-à-vis the complex relationship between national law and European Union (EU) law. In this study, the decisions issued by the CC were identified, examined, and grouped chronologically, and based on how the Court related to EU law, its jurisprudential evolution was periodised. This relationship is reflected in the jurisprudence of the CC and of the Court of Justice of the European Union (CJEU). If this relationship was initially one of collaboration, subsequent jurisprudential tensions arose between the two courts, especially in terms of reconciling the principle of the supremacy of the Constitution with that of the priority of application of EU law. The doctrine of counter-limits, embraced by the CC, according to the German model, has a special role to play in this equation. This study brings to fore all these aspects in an exhaustive way and tries to provide a truthful picture of how the national legal order interacts with that of the EU through the lens of the jurisprudence of both, the CC and CJEU.*

KEYWORDS: judicial dialogue, constitutional courts, constitutional review, supremacy of the Constitution, counter-limits doctrine, national constitutional identity, *ultra vires* review, national legal order, primacy of European Union law

1. Preliminary remarks

Member states of the European Union (EU) are experiencing an unprecedented jurisprudential evolution and witnessing developments carried out both by

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their national constitutional courts and the Court of Justice of the European Union (CJEU). This is a historical moment as new paradigms in the relationships between constitutional courts and the CJEU, and the national Constitution and EU law have been established. Every observer has tried to identify the seeds of dialogue between both courts in their decisions, searching not only the quantitative dimension, but also the qualitative one. Sometimes both courts fail to consider the qualitative dimension in their relationship as they forget that this dialogue is bidirectional and has to have two inseparable elements, even if one is dominant and the other one is recessive. The latter is the national level, whereas the former is the supranational one, whose guardian, the CJEU, protects the constituent treaties of the EU and guides national jurisprudence and changes its course if it questions the fundamental principles of the EU. The CJEU can prevent any deviation from the obligations imposed on Member States by the treaties. However, the national-supranational relationship cannot be characterized in terms of force. We appreciate that collaboration and the development of principles common to both legal orders are essential. The tensions that can arise in such a relationship can be ephemeral and are only meant to sound the alarm to open and strengthen formal and informal dialogue between both constitutional levels.

2. The Constitutional Court of Romania: A guarantor for the supremacy of the Constitution

The Constitutional Court of Romania (CC) was established by the 1991 Constitution and began its activity in June 1992, when it delivered its first six decisions. The main challenge of the CC was to bring the Romanian legal order in line with the new Constitution. To fulfil its mission, it had to interpret constitutional notions and concepts according to the treaties Romania is a party to. Some of the excellent decisions it passed applied the standard of the European Convention on Human Rights (ECtHR) in the constitutional review process.[1] However, the new challenges in the constitutional review appeared once the Copenhagen European Council decided on the accession of 10 new Member States and adopted a roadmap for

1 See, for example, Decision No. 81/1994, published in the Official Gazette of Romania, Part I, No. 14 on 25 January 1995, concerning the unconstitutionality of the criminal offence regarding sexual relations between persons of the same sex; Decision No. 91/1996, published in the Official Gazette of Romania, Part I, No. 350 on 27 December 1996, that struck down a legal provision in labour law that barred the right of the sanctioned employee in some specific cases to fill a petition to a tribunal established by law; and Decision No. 349/2001, published in the Official Gazette of Romania, Part I, No. 240 on 10 April 2001, in which the CC recognized the right of the mother and child born during the marriage to initiate an action to deny paternity.

Romania (11-12 December 2002) and the Romanian Parliament ratified the Treaty of Accession to the EU.[2]

The CC entered a new period in which it had to connect its case law to ECHR and CJEU case laws. Through its case law, the CC plays an instrumental role in structing the relationship between the national and supranational levels. There is a history of 20 years of constitutional dialogue with the EU and CJEU, wherein cooperation alternated with jurisprudential tensions. By exploring the tendencies and orientation of the case law of the CC, we can periodise it. With this, five distinct timeframes were identified: (1) 2003-2006 was the pre-accession period in which the CC tried to create a jurisprudential connection with the EU/CJEU; (2) 2007-2008 was a period of adaptation characterised by amateur or contradictory decisions; (3) 2009-2018 was a period where the CC was discernibly more confident, open to direct dialogue with the CJEU, and had consolidated case laws; (4) 2018-2022 was a period of jurisprudential tension and failed dialogue; and (5) the period after 2022 marked a turn to a lenient approach towards the CJEU.

3. The CC approach to the CJEU case law before accession (2003–2006)

The CC dealt with the relationship between national and EU laws even before Romania's accession to the EU. Romania's aspirations to join the EU formed the backdrop for the first CC decision that tackled the issue of this relationship. To fulfil this goal, it was necessary to amend the Constitution. The CC has an instrumental role to play in the amendment process in that it exercises its competence to review the constitutionality of the amendment in itself.

In the decision delivered in the course of amending the Constitution, more precisely during the constitutional review of the amendment initiative,[3] the CC emphasized that the act of accession has a double consequence, namely the transfer of some powers to EU institutions and the joint exercise, with other Member States, of the powers provided for in these treaties. For the first, the CC noted that by the mere membership of a state to an international treaty, its competences are diminished to remaining within the limits established by the international regulation and, consequently, there appears to be some limitation to the competence of state authority, that is, a relativisation of national sovereignty. However, this consequence must be correlated with the second one, namely Romania's integration into the EU. The CC noted that integration has the significance of sharing the exercise of these sovereign attributes with other Member States in the international arena. Therefore, it does not mean that the

2 Law No. 157/2005, published in the Official Gazette of Romania, Part I, No. 465 on 1 June 2005.

3 Decision No. 148/2003, published in the Official Gazette of Romania, Part I, No. 317 on 12 May 2003.

structures/bodies of the EU acquire, by endowment, "sovereignty" of their own by the acts of transfer of some state attributions. In reality, EU Member States have decided to jointly exercise certain powers that traditionally belong to the field of national sovereignty. Romania's desire to join the Euro-Atlantic structures is legitimised by its interests and the question of sovereignty cannot be opposed to the goal of membership.

Through this decision, the CC addressed the integration of EU and domestic laws, and the determination of the relationship between normative EU and domestic laws. The Court appreciated that accession to the EU starts from the fact that EU Member States agreed to place the *acquis communautaire* – the constitutive treaties of the EU and other binding normative EU acts – on an intermediate position between the Constitution and other laws.[4]

The Parliament adopted Law No. 429/2003 on the amendment of the Constitution of Romania.[5] In relation to the EU integration *sedes materiae,* Article 148 of

4 We consider that such a finding made back in 2003 goes against the very jurisprudence of the CJEU, which, in the case of *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos vs. Nederlandse Administratie der Belastingen* (1963), established: 'the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, although only for a limited number of domains, and its legal subjects are not only the states members, but also their nationals.' In the case of *Flaminio Costa vs. ENEL* (1964) ruled that, 'by creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.' The CJEU pointed out that 'the executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the treaty [...] and giving rise to the discrimination [...].' Moreover, the precedence of community law is confirmed by Art. 189, whereby a regulation "shall be binding" and 'directly applicable in all member states.' The CJEU ruling in *Costa v. ENEL* is thus appropriately considered a "legal revolution" because, while it did not create the principle of internal primacy of what is now EU law *ex nihilo*, it did constitute an essential step in the deepening of that doctrine, by empowering national courts to set aside domestic statutes at variance with EU law – See: Arena, 2019, pp. 1033 –1034. The CJEU, in the *Internationale Handelsgesellschaft mbH vs. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970), established that 'the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of its constitutional structure.' Without any doubt, the CJEU recognizes the priority of community norms vis-à-vis national norms at any level, whether or not constitutional (see the Judgment dated 16 December 2000, delivered in Case C-446/98 *Fazenda Pública and Câmara Municipal do Porto*).

5 It was approved by the national referendum of 18–19 October 2003, and came into force on 29 October 2003, the date of the publication in the Official Gazette of Romania, Part I, No. 758 of 29 October 2003 of the Decision of the Constitutional Court No. 3 of 22 October 2003 for the confirmation of the result of the national referendum of 18-19 October 2003 concerning the Law on the Amendment of the Constitution of Romania.

the Constitution[6] lays down the essential provisions for the application of EU law in Romania, granting it primacy/precedence over national law.

In the timeframe under analysis, the CC invoked a decision of the CJEU before Romania's accession to the EU.[7] Thus, the CC was called to rule on the constitutionality of a text from Law No. 51/1995 for the organisation and practice of the lawyer's profession, which conditioned the acceptance into the profession on the formulation of such a request with at least five years before reaching the standard retirement age. The CC noted that although the Constitution regulates the principle of equality, it does not list age as a criterion for non-discrimination. Therefore, it interpreted the Constitution by making a reference to the ECtHR and mentioned that in the EU legal order, age is a criterion for non-discrimination. The CC relied on the decision delivered in C-144/04 *W. Mangold against R. Helm* on 22 November 2005.[8]

Both decisions concern the relationship between the national and supranational levels and are an expression of a friendly orientation towards EU law. The first decision contains a warning in that it places EU acts in a hierarchical key and grants them an intermediate position between laws and the Constitution, which means that in the conditions for a normative conflict with the Constitution, the latter, given its *supreme* position, prevails/has priority of application. In its early case law, the CC combines both legal orders in a hierarchical system and excludes the primacy of EU law vis-à-vis the national Constitution.

6 Art. 148 of the Constitution states thus: (1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.
(2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.
(3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union.
(4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.
(5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.

7 Decision No. 513/2006, published in the Official Gazette of Romania, Part I, No. 598 on 11 July 2006.

8 As for the establishment of an age criterion in the matter of concluding employment contracts, the CC assumed some of the CJEU's recitals: 'a [...] legislation, which considers the worker's age as the only criterion for applying a fixed-term employment contract, without having demonstrated that fixing an age threshold [...] is objectively necessary to achieve a goal of professional insertion [...], it must be considered as exceeding the appropriate and necessary framework to achieve the objective pursued.'

4. Contradictory evolution (2007-2008)

The next period was filled with contradictory developments (2007-2008) as the openness towards EU law alternated with a fear of referring to the CJEU requests for preliminary rulings, alongside some clumsiness in using the EU's mandatory norms as a reference standard within the framework of constitutional review.

In a decision delivered immediately after the accession,[9] the CC considered itself competent to verify the compatibility of domestic law with Community law, establishing that if the provisions of the reviewed law, which instituted state aid in favour of small and medium-sized producers in the beer industry, will be correlated with those of the Economic Community Treaty, Romanian law may be compatible with Community law. The Court used cautious language and did not establish that state aid is compatible with Community law, but rather said that it can be compatible to the extent that the Commission authorizes the aid scheme. The decision is a lot like an opinion given to the responsible national authorities, showing them the procedures that have to be followed.

A contemporary issue in relation to the CC's activity concerns the possibility of reviewing the conformity of national laws with EU laws, invoking Article 148(2) of the Constitution. Tackling this,[10] the Court established, in relation to the request of the author of the exception of unconstitutionality to carry out a review on the compliance of domestic law with EU law to standardise judicial practice in the matter, that the national general court of laws are the ones that are called in such situations to address the CJEU to ensure the effective and homogeneous application of Community legislation. Contradicting this, without motivating the reversal of the solution established by Decision No. 59/2007, the Court, by Decision No. 1031/2007,[11] ruled that it is competent to verify the compliance of the national regulation with EU law based on Article 148(2) of the Constitution. In a subsequent decision, the Court ruled that the review of the compliance of the national legislation with that of the Community does not represent a constitutional issue, but rather belongs to the application of the law by the court of law, so that such an aspect does not fall under the jurisdiction of the CC.[12]

An interesting issue arose in Decision No. 604/2008,[13] where the CC did not question the conformity of the national text with EU law, but rather analyzed the margin of action left at the discretion of the Member State by EU law. The Court

9 Decision No. 59/2007, published in the Official Gazette of Romania, Part I, No. 98 on 8 February 2007.

10 Decision No. 558/2007, published in the Official Gazette of Romania, Part I, No. 464 on 10 July 2007.

11 Published in the Official Gazette of Romania, Part I, No. 10 on 7 January 2007.

12 Decision No. 413/2008, published in the Official Gazette of Romania, Part I, No. 386 on 21 May 2008.

13 Published in the Official Gazette of Romania, Part I, No. 469 on 25 June 2008.

correctly established the unconstitutionality of the national provision analyzed, the practical reason being that the national legislator violated the Constitution (the reference text) by not using all its available margin of appreciation.

In this timeframe, there is an inconstant jurisprudence of the CC vis-à-vis the relationship between national and EU laws; the CC considers itself competent to assess the conformity of national law with EU law and interprets the latter to exercise this control of conformity that seems to add some kind of constitutional value to EU law.

According to the legal literature of those times,[14] the CC had the competence to declare the unconstitutionality of the national law only if it implicitly or explicitly contradicted the text of the Constitution. If the national law was constitutional, even if it was contrary to EU law, the national general court of laws would have to apply the latter and, eventually, the Parliament could modify or repeal the national legislative solution. The unconstitutionality of a national law could not result from simple non-conformity with EU law, but only from a breach of the Constitution.

As for the dialogue between the CCR and CJEU, in relation to the request for a preliminary ruling, we note that the CC denied such requests in two decisions during this period, 'because the legal conditions are not met.'[15] CC did not offer other arguments. Thus, it is obvious that the refusal was not motivated. Such a situation is explicable while taking into consideration the novelty of this legal remedy, the lack of experience, the fear of the court in this respect and its reluctance to consider itself a court within the meaning of Article 267 of the TFEU.

5. Open cooperation within the framework of national constitutional identity (2009-2018)

In its case law, the CC established that Article 148(2) of the Constitution implicitly includes a clause for internal laws to comply with EU mandatory acts.[16] However, the reader must be careful in scrutinizing this recital, as the Constitution makes a clear distinction between itself and other internal laws. It uses both notions either together or separately, so the CC follows the same matrix. A former decision of the CC proves that this is the correct meaning of the aforementioned recital. In this decision, the CC observed that an initiative for the amendment of the Constitution established that EU law applies without any distinction in the national legal

14 Trócsányi and Csink, 2008, p. 68.

15 Decision Nos. 392 and 394/2008, published in the Official Gazette of Romania, Part I, No. 309 on 21 April 2008.

16 Decision No. 64/2015, published in the Official Gazette of Romania, Part I, No. 286 on 28 April 2015, para. 32. The decision can be considered Euro-friendly, but with self-imposed limits on the aspects of national constitutional identity (expressly highlighted in the decision), a concept that is undefined and open to interpretation – see Pivniceru and Benke, 2015, p. 456.

order and that the same initiative did not distinguish between the Constitution and other internal laws.[17] Under these conditions, the Court was dissatisfied by the initiative for the amendment of the Constitution as it placed the Constitution in the background of the legal order of the EU. Or, the fundamental law of the state – the Constitution is the expression of the will of the people, which means that it cannot lose its binding force in a situation where there appears to be a normative inconsistency between its own and European provisions. Joining the EU cannot affect the supremacy of the Constitution over the entire legal order.[18] The CC referred to a decision of the Polish Constitutional Court and cited relevant recitals that tackle the issue of the relationship between Constitutional and EU laws.[19]

The CC felt that its competence to review the constitutionality of laws is threatened, considering that such a constitutional regulation reduces its competence only to the areas in which the Member State has exclusive competences and to the constitutional review of the primary normative acts adopted at the national level in the other areas. Such a matrix, in the CC's view would exempt from its review a large sphere of national normative acts and consequently the effects of its decisions would be considerably limited. Or, in the conception of the CC, regardless of the fields that the normative acts regulate, they must respect the supremacy of the Constitution and be subject to constitutional review, even with the consequence of the inapplicability of EU laws that do not fit the paradigm of the Romanian Constitution.

Despite the CC's fear of decreasing its powers in areas that are in the exclusive competence of the EU, the CC pointed out that in adhering to the legal order of the EU, Romania accepted that, in the fields in which the exclusive competence belongs to the EU, regardless of other international treaties concluded by the Romanian state, the implementation of the obligations that are incumbent in those specific fields should be subject to the rules of the EU. Otherwise, it would lead to an undesirable situation where, through the international obligations assumed bilaterally or multilaterally, the Member State would seriously affect the competence of the EU and practically substitute it in the mentioned fields. That is why, in the field of competition, any state aid falls under the purview of the European

17 The initiative for the amendment of the Constitution proposed to replace the text of Art. 148(2) of the Constitution in force, according to which, as a result of the accession, the provisions of the constituent treaties of the EU and other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act, with the following text: 'Romania ensures compliance, within the national legal order, with European Union law, in accordance with the obligations assumed by the act of accession and by the other treaties signed within the Union.'

18 Decision No. 80/2014, published in the Official Gazette of Romania, Part I, No. 246 on 7 April 2014, para. 455–456.

19 Judgement of 11 May 2005, delivered by the Polish Constitutional Court in case K 18/04 [Online]. Available at: https://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf (Accessed: 15 July 2023).

Commission and the procedures for contesting it belong to the jurisdiction of the EU. Therefore, in the application of Article 11(1) and Article 148(2) and (4) of the Constitution, Romania applies in good faith the obligations resulting from the act of accession, without interfering with the exclusive competence of the EU, and, as established in its jurisprudence, by virtue of the compliance clause included in the text of Article 148 of the Constitution, Romania generally cannot adopt a normative act contrary to the obligations it undertook as a Member State.[20]

The CC – in its decisions delivered in the period of reference – emphasized that the essence of the EU is the conferral of powers made by the Member States — more and more in number —to achieve their common objectives, without undermining the national constitutional identity (*Verfassungsidentität*) by the transfer of competences. Therefore, Member States retain competences that are inherent in order to preserve their constitutional identity. The transfer of competences and the possibility to reconsider, increase or establish new guidelines within the competences already transferred fall within the constitutional discretion of the Member States. The EU can act only within the limits of the competences conferred upon it. Article 5(2) of the Treaty of the EU expressly states that:

> under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

This proves that the EU, at the very moment, is still a union of states.[21] The CC used for the first time in the aforementioned decision the concept of 'national constitutional identity,' a decision delivered by the CC within its attribution to solve legal conflicts of a constitutional nature, provided by Article 146 e) of the Constitution. In this decision, the CC had to identify the national authority – the President of the Republic or Prime Minister – that is competent to participate in the European Council reunions. Then, the CC used this concept when it performed *a posteriori* constitutional review, considering that each EU Member State has complete freedom in terms of establishing the normative framework relative to the status of the members of the national Parliament, including the legal regime of the patrimonial rights acquired in the exercise of these functions of public dignity.[22] The CC emphasized in another decision that concerned a constitutional review of a

20 Decision No. 887/2015, published in the Official Gazette of Romania, Part I, No. 191 on 15 March 2015, para. 75.

21 Decision No. 683/2012, published in the Official Gazette of Romania, Part I, No. 479 on 12 July 2012.

22 Decision No. 964/2012, published in the Official Gazette of Romania, Part I, No. 23 on 11 January 2013.

law adopted in the exclusive sphere of competence of the EU that cooperation with the EU has a constitutional limit, namely the 'national constitutional identity.'[23] No other developments were made on this subject throughout the reference period.

However, according to a legal scholar,[24] the content of the national constitutional identity of Romania can be assessed by making a reference to the identity,[25] eternity,[26] and integration clauses,[27] all in the Romanian Constitution and, the conclusion is that the identity and eternity clauses are part of the national constitutional identity, which means that the independence of justice, being part of the eternity clause, is a question of national constitutional identity. In another view,[28] the content of this concept cannot be established strictly and exhaustively. However, it can be shaped according to the constitutional values that define the state and its existence. The Christian values that structure and guide the system of rights and liberties that are set forth in the Constitution, the special protection of national minorities, and/or *jus cogens* principles are relevant here. Therefore, the national constitutional identity concerns the people's profound roots. There is no constitutional provision that contains such an *expressis verbis* clause, as it is the task of the CC to interpret the Constitution to identify the values and principles inherent in such an identity.

The CC has a constant position[29] in that it is not within its competence to assess the conformity of a provision of national law with the texts of the constitutive treaties of the EU, through the content of Article 148 of the Constitution. The Court specified that such competence, to establish whether or not there is a contradiction between national laws and these treaties, belongs to the national general courts of law, in the context of the disputes they have to resolve. If the CC were to consider itself competent to rule on the conformity between national and

23 Decision No. 887/2015, para. 75.

24 Varga, 2019, pp. 20–28.

25 Arts. 1–14 of the Romanian Constitution, which concern the general principles of the state; Art. 61, which enshrines the bicameral parliament; the Articles describing the particularities of the executive branch; Art. 115, which lays down the legislative delegation; and Art. 114 which regulates the institution of Government accountability, or those provisions regulating the mode of organization and functioning of justice.

26 Art. 152 of the Romanian Constitution provides that 'the national, independent, unitary, and indivisible character of the Romanian State, the Republican form of government, territorial integrity, independence of justice, political pluralism and official language' cannot be the subject of Constitution amendments; 'no revision shall be made if it results in the suppression of the citizens' rights and freedoms, or of the safeguards thereof.'

27 Art. 148(2) of the Romanian Constitution provides for the compliance of internal laws with EU acts.

28 Puskás and Benke, 2017, pp. 432–433.

29 Decision No. 1596/2009, published in the Official Gazette of Romania, Part I, No. 37 on 18 January 2010, Decision No. 137/2010, published in the Official Gazette of Romania, Part I, No. 182 on 22 March 2010, Decision No. 1.249/2010, published in the Official Gazette of Romania, Part I, No. 764 on 16 November 2010, Decision No. 668/2011, published in the Official Gazette of Romania, Part I, No. 487 on 8 July 2011.

EU law, it would lead to a possible conflict of jurisdiction between the national constitutional court and the CJEU, which, at this level, is unacceptable. The aforementioned phrase is apodictically repeated in 31 decisions during the reference period and 4 decisions delivered between 2021 and 2023, an aspect that entitles us to consider this recital a jurisprudential landmark that defines the way in which the CC relates to EU law.

The CC neither has the authority to interpret the Community rules nor to clarify or establish their content, as this authority rests with the CJEU.[30] In another decision, the CC insisted on the fact that the interpretation of EU law engages the exclusive competence of the Luxembourg Court.[31] To the extent that EU law has a clear and precise meaning, established by the jurisprudence of the CJEU, in other words it meets the CILFIT criteria, the question arises as to whether it can be capitalised in some way within the constitutional review of the national legal norms.

In this context, it can be revealed another jurisprudential landmark crystallized in this period, namely the one established by Decision No. 668/2011, which enshrines the paradigm of using EU law in the framework of constitutional review as a *norma interposta*[32] to the reference rule. Such an operation – that involves the use of EU law within the constitutional review – implies, pursuant to Article 148(2) and (4) of the Romanian Constitution, a cumulative conditionality: The EU norm has to be sufficiently clear, precise and unequivocal by itself or its meaning must have been established in a clear, precise, and unambiguous manner by the CJEU and must be subject to a certain level of constitutional relevance, so that its normative content can support a possible violation of the Constitution by the national law, which is the only direct rule of reference for the review of constitutionality. In such cases, the CC's approach is distinct from the mere application and interpretation of the law, which lies with the courts and administrative authorities, or any legislative policy matters promoted by the Parliament or Government, as the case may be.

In light of such cumulative conditionality, it remains at the discretion of the CC to apply the decisions of the CJEU within the constitutional review or to formulate requests for preliminary ruling in order to establish the content of the EU norm. This is a matter of cooperation between the national constitutional court and CJEU and is part of the judicial dialogue between them, without calling

30 Decision No. 383/2011, published in the Official Gazette of Romania, Part I, No. 281 on 21 April 2011.

31 Decision No. 609/2014, published in the Official Gazette of Romania, Part I, No. 35 on 15 January 2015, para. 18.

32 The notion of *norma interposta* is inspired from the jurisprudence of the Italian Constitutional Court, that decided that European directives are "interposed norms," and are part of the parameters for evaluating the conformity of laws with the Constitution [Decision Nos. 129/2006, 7/2004, 166/2004, 406/2005, and 348/2007 in Mezzetti, 2007, p. 1042].

into question aspects related to the establishment of hierarchies between these courts.[33]

Within the framework of the constitutional review, the sole reference norm is the Constitution. The interposed norm can also be the binding act of the EU, but this means that it must first be applicable in the case,[34] have a precisely determined meaning, either from its wording or through jurisprudence, and have constitutional relevance; in other words, it is essential to find its expression in a constitutional provision that includes or targets its normative sphere.[35] The first condition operates with objective, comprehensible criteria, whereas the second is subjective, where the appreciation of the constitutional judge is decisive. Thus, the latter can be used to avoid a constitutional review of the national legal norm through the filter of the interposed mandatory European rule, especially in sensitive cases where constitutional judges are reluctant to strike down the national legal norm.

The CC signals the failure of the EU norm to meet the second condition (i.e. constitutional relevance) in order to be applied as *norma interposta* within the constitutional review if there is a question of the legislature's obligation to adopt norms in line with the decision of the CJEU[36] or if there are no fundamental constitutional principles and norms at stake, such as, for example, those that enshrine fundamental rights, freedoms, and duties or concern public authorities regulated by the Constitution.[37] The mere obligation of the state to inform the European Commission of normative projects that aim to establish or modify state aid has no constitutional relevance.[38]

However, the Court has held in its case law that the provisions of the Charter of Fundamental Rights of the European Union have constitutional relevance and may be used in the context of the review of constitutionality.[39] The Court noted that

33 The preliminary ruling procedure is seen and promoted as a form of judicial dialogue to request a technical justification for solutions that the national judge pronounces, without affecting his competence or independence – see Toader and Safta, 2013, p. 154.

34 Decision No. 468/2012, published in the Official Gazette of Romania, Part I, No. 524 on 27 July 2012.

35 In Decision No. 553/2013, published in the Official Gazette of Romania, Part I, No. 97 on 7 February 2014, the CC noted that a certain directive has constitutional relevance as it is in a direct connection with the principle of equality. See, also, Decision No. 64/2015, para. 32, where EU acts invoked were in connection with the social protection of labour, or Decision No. 751/2016, published in the Official Gazette of Romania, Part I, No. 270 on 18 April 2016, para. 57, where the relevant provisions of the Charter of Fundamental Rights of the European Union tackle a constitutional right, namely economic freedom.

36 Decision No. 668/2011.

37 Decision No. 64/2018, published in the Official Gazette of Romania, Part I, No. 336 26 April 2018, para. 54.

38 Decision No. 157/2014, published in the Official Gazette of Romania, Part I, No. 296 on 23 April 2014, para. 65, 70, 71.

39 Decision No. 871/2010, published in the Official Gazette of Romania, Part I, No. 433 on 28 June 2010, Decision No. 1479/2011 published in the Official Gazette of Romania, Part I, No. 59 on 25 January 2012, or Decision No. 967/2012, published in the Official Gazette of Romania, Part I, No. 853 on 18 December 2012.

the Charter is a legal act with a distinctive nature and features in comparison with international treaties and its provisions are applicable to the review of constitutionality insofar as they ensure, guarantee, and develop constitutional provisions vis-à-vis fundamental rights, that is, insofar as their level of protection is at least equal to that of the constitutional human rights standards. Consequently, the CC noted that, according to Article 52(3) of the Charter, to the extent that it contains rights that correspond to those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and extent are the same as those provided by this convention; in the CC case law, the ECHR and Charter provide the same level of protection of human rights, except where the CJEU provides an expressly higher standard of protection.[40] The Court has indicated that there is no reason to depart from this jurisprudence and to apply it *mutatis mutandis* vis-à-vis the requirements resulting from the constitutive treaties of the EU and its secondary acts.[41]

It has to be noted that, during the indicated period, the CC rejected as inadmissible a party's claim to address a request of preliminary ruling, since the question proposed by the author of the exception of unconstitutionality was not intended to determine the meaning of Article 49 of the Charter in the sense established by Decision No. 668 of May 18, 2011, but the verification of the compatibility of national legislation with that of the EU, which exceeds the competence of the CJEU, provided for by Article 267 TFEU. The request made has aimed at restructuring the sanctioning treatment of certain criminal offences and has no constitutional relevance from the perspective of constitutional review, but one that relates to possible issues of legislative policy.[42]

In another case, the CC formulated a request for a preliminary ruling from the CJEU by a sentence rendered on 29 November 2016, without indicating its reasoning within the aforementioned sentence. Thus, that sentence includes only the questions addressed to the CJEU, but a separate document was drawn up, called 'request for preliminary ruling.' In this referral, the CC did not justify whether it has the competence to make preliminary requests, considering that the doctrinal issues regarding the qualification of the constitutional courts as courts within the meaning of Article 267 of the TFEU have already been overcome. However, the CC insisted on the doctrine of cumulative conditionality[43] resulting from his jurisprudence and argued the referral from the point of view of the relevance and novelty of the legal issue that is not circumscribed by the

40 Decision No. 46/2017, published in the Official Gazette of Romania, Part I, No. 404 on May 30, 2017, para. 38.
41 Decision No. 64/2015, para. 30.
42 Decision No. 790/2015, published in the Official Gazette of Romania, Part I, No. 6 on January 6, 2016, para. 5.
43 See page 10 of the request (unpublished).

CILFIT criteria.[44] The issue in this case was that a valid marriage concluded in a Member State of the EU by a Romanian citizen with a partner of the same sex, of American citizenship, had no legal effect in Romania and the spouses could not benefit from the guarantees circumscribed to the right to family life, enshrined equally by the constitutional norms, the European Convention of Human Rights, and the Charter of Fundamental Rights of the European Union. All these seemed to affect the exercise of the 'right to free movement' as regulated by the Charter of Fundamental Rights and Directive 2004/38/EC of the European Parliament and of the Council of April 29, 2004 regarding the right to free movement and residence on the territory of the Member States for Union citizens and their family members, rules to which Article 277(4) of the Civil Code contains an explicit link.

The CJEU decided that, within the meaning of Article 21(1) of the TFEU, a third-country national of the same sex as an EU citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the EU citizen is a national for more than three months. Following the pronouncement of this decision of the CJEU, the CC reopened the debates on the case *a quo* and established that the rules of European law contained in Article 21(1) of the TFEU and in Article 7(2) of Directive 2004/38, are interposed in the constitutional review to Article 148(4) of the Constitution, have both a precise and unequivocal meaning, clearly established by the CJEU, and constitutional relevance, as they refer to a fundamental right, namely the right to personal and family privacy. Consequently, the CC – with a mere 5-3 majority – found that the provisions of Article 277(2) and (4) of the Civil Code are constitutional insofar as they allow the granting of the right of residence on the territory of the Romanian state, under the conditions stipulated by European law, to spouses – citizens of the Member States of the EU and/or citizens of third states – from marriages between persons of the same sex, concluded or contracted in a Member State of the EU.[45] This decision illustrates the judicial dialogue between the CC and CJEU and proves that a *norma interposta* is value added content to the relevant right/liberty/principle provided by the national

44 The Court emphasized that the incidence of EU law and, therefore, the relevance of the preliminary questions in the case, is given by the fact that the effect of the marriage concluded in a member state of the EU that is requested to be recognized in Romania concerns the regime of granting the right of residence on Romanian territory for the same-sex spouse of a Romanian citizen. He can prevail like any EU citizen by the provisions relating to free movement on the territory of any state of the EU, provisions to which the specific norms criticized in the present case as being unconstitutional refer directly (Art. 277(4) of the Civil Code). However, it is unclear, from the perspective of the same rules, the situation of the other spouse of the same sex that is not an EU citizen (in this case, a citizen of the US), but who acquired this status following the valid conclusion of a married in a member state of the EU.

45 Decision No. 534/2018, published in the Official Gazette of Romania, Part I, No. 842 on 3 October 2018.

Constitution. To avoid a methodological fallacy, it must be noted that Article 21(1) of the TFEU is *norma interposta* to Article 26 of the Constitution, concerning personal and family privacy based on Article 148 of the Constitution.

Commission Decision No. 2006/928/EC of 13 December 2006, established a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption.[46] With this, the representatives of the Commission paid documentary visits to Romania to assess the progress made in order to achieve objectives in the field of the reform of the judicial system and the fight against corruption, wherein they drew up evaluation reports. The objectives pursued by this act, especially through benchmark No. 1, tackled certain issues that are in the sphere of the constitutional provisions regarding the judicial authority/right to a fair trial, however, as its content is extremely variable and subjective, the question arose as to whether the respective EU act specifically addresses certain authorities or the Romanian state in general.

At the beginning of this timeframe of approximation of the jurisprudence of the CC to the normative requirements of the EU, the CC seemed to have considered itself bound by the obligations established by that decision. Thus, it used this act in the framework of the constitutional review as an independent one, however, as an *obiter dictum* independent argument. It worth to be mentioned Decision No. 1519/2011,[47] in which the Court was called to decide on the constitutionality of a ban concerning the exercise of the specific activities performed by the lawyers – they were banned to exercise their activity in courts/prosecution units where the lawyer's husband or relative or his/her relative up to the third degree inclusive fulfils the function of judge or prosecutor. It has appreciated that the provisions of the civil and criminal procedure codes regarding abstention and recusal are likely to satisfy the requirements contained in Decision No. 2006/928/EC regarding the existence, in all Member States, of an impartial, independent and efficient judicial and administrative system, endowed with sufficient means, among other things, to fight against corruption. This referred to the fact that an additional procedural requirement on the conflict of interest was not compelled by Decision

46 Published in the Official Journal of the European Union series L No. 354 on 14 December 2006. The four specific benchmarks to be addressed by Romania are the following:
1. Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy. Report and monitor the impact of the new civil and penal procedures codes.
2. Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken.
3. Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption.
4. Take additional measures to prevent and fight against corruption, in particular within the local government.

47 Published in the Official Gazette of Romania, Part I, No. 67 on 27 January 2012.

No. 2006/928/EC, so it was up to the CC to declare the ban unconstitutional. This constitutional strategy was repeated immediately in 2012,[48] when the Court tried to identify in an evaluation report drawn up by the representatives of the European Commission in the basis of Decision No. 2006/928/EC a justification/a point of support in its analysis regarding the relationship between the independence and responsibility of the judge from the courts with general jurisdiction. The Court observed that

> in the Report of the Commission to the European Parliament and the Council regarding the progress made by Romania within the cooperation and verification mechanism, dated July 20, 2011, it is noted that «Romania has not yet engaged in a process of in-depth reform of the disciplinary system». Or, the membership of the EU imposes on the Romanian state the obligation to apply this mechanism and follow the recommendations established in this framework. According to the statement of reasons, the criticized law gives expression to this obligation, by regulating the misconduct for which judges and prosecutors are subject to disciplinary action and including in this category acts that violate the duties specific to the position or affect the prestige of the position held. Also, the normative act gives effect to the recommendations to strengthen the capacity and organization of the Judicial Inspection, as well as to continue the process of its reform.

Thus, the CC considered the decision and its report a form of soft law that may have relevance in the assessment of the constitutionality of legal norms, but never recognized constitutional value. In the reference period, the use of Decision No. 2006/928/EC in the constitutional review has been ephemeral, the two mentioned decisions being delivered between December 2011 and February 2012. In the six years that followed, this EC decision was "forgotten" in the CC's case law. As we'll see, it appears a mere reference to it in a CC's decision of 2018, but none could anticipate the storm that will break out in connection with this EC decision after 2019.

6. Jurisprudential tensions and failed dialogue (2018-2022)

Between 2018 and 2022, the CC tried to be more active in terms of establishing a relationship between domestic laws and the Constitution, and the binding acts of the EU, which led to the emergence of jurisprudential disputes with the CJEU. All these disputes are not isolated in the greater picture of the EU as the "younger"

48 Decision No. 51/2012, published in the Official Gazette of Romania, Part I, No. 90 on 3 February 2012.

Member States are studying the doctrinal model developed by the Constitutional Court of Germany.

According to Andreas Paulus,[49] in the context of the coexistence of two legal orders, the Federal Constitutional Court developed three doctrinal instruments, the counter-limits, regarding the binding nature of international treaties and integration into international institutions, namely the effective protection of human rights (Solange decisions), the constitutionality control of ultra vires acts, and the absolute protection of constitutional identity.

The first counter-limit (effective protection of human rights) concerns the fact that the supranational institution (EU) must ensure the effective protection of human rights equivalent to that provided by German Basic Law. "As long as" the international institution fulfils this constitutional requirement, the Federal Constitutional Court is willing to refrain from judicial review of the secondary legislation in question.

The second counter-limit (*ultra vires* control) starts from the premise that the legal order of integration can coexist with the domestic legal order only if both remain within the limits of their competence. If an international institution acts beyond the powers conferred upon it, it acts ultra vires. Before declaring an act of the EU ultra vires, the Federal Constitutional Court addresses a request for a preliminary ruling on the legal aspect underlying it to the CJEU pursuant to Article 267 of the TFEU. Thus, the CJEU will always have the possibility of self-correction. Before any action, a dialogue takes place between the national court and European Court.

The third counter-limit refers to substantive compliance with the fundamental constitutional provisions of the Member State. In principle, the invocation of constitutional identity regarding the non-application or denunciation of a treaty goes against the principles of international law. Therefore, identity control should be used with great caution. The case law of the CC indicates that only the latter "counter-limit" has been mentioned and developed to a certain extent, but the other two has no jurisprudential consecration.[50]

The first jurisprudential dispute between the CC and CJEU – that raised the problem of national constitutional identity – concerned the legal nature and effects of Decision No. 2006/928, adopted by the European Commission. By an early decision – No. 104/2018,[51] the CC established that, through the lens of the doctrine of cumulative conditionality, it can exercise its discretion to apply within the framework of the constitutional review the judgements of the CJEU – in terms

49 Paulus, 2019, pp. 34–35.

50 However, the three "counter limits" were mentioned in a dissenting opinion signed by judge Iulia Antoanella Motoc to Decision No. 1656/2010, published in the Official Gazette of Romania, Part I, No. 79 on 1 January 2010. It was a theoretical desire to lay down these "counter limits", as the link between them and the case at stake is disputable.

51 Published in the Official Gazette of Romania, Part I, No. 446 on 29 May 2018.

of constitutional relevance – or to formulate requests for preliminary rulings to establish the content of the European norm. The CC noted that the meaning of Decision No. 2006/928/EC was not clarified by the CJEU in terms of its content, character, and temporal extent; thus, it cannot constitute a *norma interposta* in the framework of constitutional review in light of Article 148 of the Constitution. Even if Decision No. 2006/928/EC would be considered an indicator regarding the evaluation of the constitutionality of the norm, in other words if it passes the test of cumulative conditionality, it would not have an impact on the case, because its content recommends general aspects[52] and not specific ones that could be valued in the case.[53] The CC has never tried to review the constitutionality of Decision No. 2006/928/EC – as it has no competence to carry out a review that concerns a normative act that is not part of the national legal order – but rather not to use it as *norma interposta* within the aforesaid review.

The CC, in a subsequent decision,[54] noted that the objectives pursued by Decision No. 928/2006/CE therefore fall under the principle of the rule of law and the right to a fair trial, expressly consecrated by Articles 1(3) and 21 of the Romanian Constitution. However, without diminishing the importance of regulating such objectives, the Court finds that EU law does not provide concrete obligations (except for the one concerning the establishment of an integrity agency) or effective guarantees that, together or separately, contribute to the accomplishment of the principle of the rule of law, but draws a series of guidelines of maximum generality and predominantly political value. However, such an act, even mandatory for the state to which it is addressed, cannot have constitutional relevance, as it neither develops a constitutional norm nor fills a gap in national fundamental law. The Court emphasized that the reports issued pursuant to Decision No. 2006/928 cannot have constitutional relevance. Thus, the reports, although are acts adopted on the basis of a decision, contain only provisions of a recommendation nature, following the evaluation carried out; or, through a recommendation, the institutions make their opinion known and suggest directions for action, without imposing any legal obligation on the recipients of the recommendation.[55] The CC concluded that even if these acts (Decision No. 2006/928/CE and the reports issued based on

52 The CC noted that benchmarks No. 1, 3, and 4 contain the general obligation, and only benchmark No. 2 has a specific normative aspect (to establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions based on which dissuasive sanctions can be taken).

53 See para. 82, 88, 89.

54 Decision No. 137/2019, paras. 72–78, published in the Official Gazette of Romania, Part I, No. 295 on 17 April 2019.

55 Decision No. 520/2022, published in the Official Gazette of Romania, Part I, No. 1100 on 15 November 2022, para. 295. The CC noted that the CVM recommendations cannot be analyzed within the framework of the constitutionality review of norms, however, they can be capitalized upon by the legislator in evaluating the opportunity of the various legislative solutions promoted.

it) respect the conditions of clarity, precision, and unequivocalness, they cannot have constitutional relevance to carry out the constitutional review.

The CJEU established that Decision No. 2006/928/CE is binding in its entirety on Romania, as long as it remains in force.[56] The benchmarks in the Annex to Decision No. 2006/928 are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, in that Romania is required to take appropriate measures for the sake of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission based on that decision and the recommendations made in those reports.

The stake of these decisions was the establishment and the operation of the specialized section of the Public Prosecutor's Office attached to the High Court of Cassation and Justice with exclusive competence to conduct investigations into offences committed by judges and prosecutors (hereinafter – SIIJ). In this context, it has to be pointed out that the general court of laws, being dissatisfied by the establishment of the SIIJ, invoked Romania's obligations under Decision No. 2006/928 and made requests for preliminary rulings to the CJEU in order to annihilate its activity.

In the same judgement, the CJEU stated that Article 2 and the second subparagraph of Article 19(1) TEU and Decision No. 2006/928 must be interpreted as precluding national legislation providing for the establishment of SIIJ, where the creation of such a section is not justified by objective and verifiable requirements relating to the sound administration of justice, and is not accompanied by specific guarantees. These findings of the operative part of the CJEU's judgement questioned Decision Nos. 33/2018[57] and 137/2019[58] delivered by the CC as in these two decisions it has maintained the presumption of constitutionality of the law that established the SIIJ[59] and the emergency ordinance that operationalized it.[60] The CJEU noted that Decision No. 2006/928 aimed to ensure that Romania complies with the value of the rule of law, whereas the CC considered that it had no constitutional relevance within the constitutional review of norms. Thus, the same law/ emergency ordinance was constitutional and contrary to EU law. Thus, Decision No. 2006/928, through the CJEU judgement, must have had at least a *norma interposta* value aspect denied by the CC but valued by the general courts of law and Romanian authorities.

56 Judgement of 18 May 2021, delivered in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, para. 165 and point No. 2 of the operative part of the judgement.

57 Published in the Official Gazette of Romania, Part I, No. 146 on 15 February 2018.

58 See note 49.

59 Law No. 207/2018, published in the Official Gazette of Romania, Part I, No. 636 on 20 July 2018.

60 Governmental Emergency Ordinance No. 90/2018, published in the Official Gazette of Romania, Part I, No. 862 on 10 October 2018.

According to CJEU case law, it was expressly re-affirmed in the analyzed judgement that the principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision No. 2006/928, which it considers contrary to that decision (point 7 of the operative part of the CJEU decision).

The next move was made by the CC, which noted in its decision[61] that although Article 267 of the TFEU does not enable the CJEU to apply the rules of EU law to a specific case, but only allows it to rule on the interpretation of treaties and acts adopted by the EU's institutions, leaving the referring court with the task of ruling on these aspects after having made the necessary assessments, the CJEU did more than 'provide the national court with the elements of interpretation of Union law that could be useful in assessing the effects of one of its provisions', as it established in its own case law. The CC found that the CJEU, declaring the binding character of Decision No. 2006/928, limited its effects because it pointed out that the Romanian authorities have to collaborate institutionally with the European Commission. However, the courts are not empowered to collaborate with a political institution of the EU, but only the national political institutions, such as the Parliament and Government of Romania. Even if Decision No. 2006/928 is binding on the Romanian state, the courts cannot give it precedence over national legislation in force as its content is too general – listing out only a series of objectives to be achieved by the Romanian state – and it is up to the national political institutions to implement or improve the national normative framework in question. Therefore, the CC found that Point 7 of the operative part of the CJEU decision has *no legal basis* in the Romanian Constitution.

According to the CC decision, the national judge cannot be put in a position to decide on the priority application of some recommendations to the detriment of national legislation, as the reports issued based on Decision No. 2006/928 are not regulations. Thus, so they are not likely to come in conflict with internal legislation. This conclusion is necessary in the hypothesis in which national legislation was declared in line with the Constitution by the national constitutional court through the lenses of Article 148 of the Constitution, which requires compliance with the principle of the priority of EU law. The CC found that the only act which, by virtue of its binding character, could have constituted a norm interposed to the constitutionality review carried out by reference to Article 148 of the Constitution – Decision No. 2006/928 – through the provisions and objectives it imposes, has no

61 Decision No. 390/2021, published in the Official Gazette of Romania, Part I, No. 612 on 22 June 2021 [Online]. Available at: https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_390_2021_EN.pdf (Accessed: 11 October 2023).

constitutional relevance, as it neither fills a gap in the Constitution, nor develops its norms by establishing a higher standard of protection.

As a consequence of the CC's decision, the general courts of law could not set aside the legal norms on the establishment and operation of the SIIJ any longer, as the CC ruled that the aforementioned normative acts are in line with Article 148 of the Constitution.

The following step was taken by the CJEU[62] after a general court of law requested a preliminary ruling. It decided that European law precludes national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law.

The CJEU noted that Romanian general courts of law are, in principle, competent to assess compatibility with the rules of EU law of the national legislative provisions without referring to the CC with a request for this purpose. However, as a consequence of the CC's Decision No. 390/2021, they are deprived of this competence when the CC ruled that these legislative provisions are in accordance with a national constitutional provision that provides for the primacy of EU law, as these courts are obliged to comply with this decision. Such a national rule or practice would constitute an obstacle to the full effectiveness of the EU law rules in question, to the extent that it would prevent the common law court called to ensure the application of EU law from assessing the compatibility of these legislative provisions with this right. The application of such a rule or national practice would affect the effectiveness of the cooperation between the CJEU and national courts established through the preliminary referral mechanism, discouraging the common law court called to resolve the dispute to refer to the CJEU through a preliminary request, in order to comply with the decisions of the constitutional court of the Member State concerned. The CJEU emphasized that these findings are all the more necessary in a situation where a decision of the constitutional court of the Member State in question refuses to comply with a preliminary ruling by the CJEU, based, among other things, on the constitutional identity of this Member State and on the grounds that the Court exceeded its jurisdiction.

After this judgement of the CJEU, it became clear that the national courts of law retained the competence to assess the compatibility of national law with EU law, regardless of the findings of the CC. As an intermediate conclusion, the Decision of 18 May 2021, delivered by the CJEU, went too far with Recital 7 of the operative part, as it solved a hypothetical case that has not occurred thus far. In response, the CC delivered a questionable recital in Decision No. 390/2021 on the lack of competence of the general courts of law to disapply a national norm that

62 Judgment of 22 February 2022, delivered in case C-430/21, point 1 of the operative part.

was found constitutional vis-à-vis Article 148 of the Romanian Constitution, an aspect that was "rectified" by the CJEU.

Another debate between the two courts concerned the relationship between the national Constitution and EU law and the limits of EU law primacy vis-à-vis the national legal order. There is no divergence between both courts when it comes to EU law primacy in relation to infra-constitutional acts. However, if we add the national Constitution into this equation, it seems that an irreconcilable divergence will appear.

From the CC's perspective,[63] the accession clause to the EU contains a clause of conformity with EU law, according to which all national bodies of the state are, in principle, obliged to implement and apply EU law. This also applies to the CC, which, by virtue of Article 148 of the Constitution prioritizes the application of EU law. However, this priority must not be perceived as removing or disregarding the national constitutional identity, which the CC considers a guarantee of a substantive core identity of the Romanian Constitution, which in turn, cannot be relativized in the process of European integration. By virtue of that constitutional identity, the CC is empowered to guarantee the supremacy of the Constitution in Romania. Taking into account that – according to the CC – Article 148 of the Constitution does not give EU law priority over the Romanian Constitution, it appears that the primacy of EU law applies only in relation to national legal acts that have no constitutional status and cannot be opposed to the Constitution itself.

In accordance with the settled case law of the CJEU, the effects of the principle of the primacy of EU law are binding on all bodies of a Member State and no provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, can prevent that.[64]

Moreover, the CJEU has shown that Article 4(2) TEU[65] authorizes the CJEU to check whether an obligation of Union law violates the national identity of a Member State, but not a constitutional court of a Member State, which, if it considers that a provision of derivative Union law, as interpreted by the CJEU, violates the obligation to respect the national identity of this Member State, it must refer to the CJEU a request for a preliminary ruling to assess the validity of this provision in the light of Article 4(2) TEU. The CJEU emphasized that as it has exclusive competence to provide the definitive interpretation of EU law, the constitutional court of a Member State cannot, based on its own interpretation of some provisions of EU law, validly rule that the CJEU has issued a judgement that exceeds its scope of competence and therefore refuse to comply with its preliminary judgement.

63 CC Decision No. 390/2021, para. 81.

64 Judgement of 18 May 2021, delivered in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, para. 245.

65 Art. 4(2) TEU states: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. (...).'

To complicate things further, through a subsequent decision, the CC emphasized that the organization of the national justice system forms part of the constitutional identity of the Romanian state,[66] being the first and only decision in which a certain aspect/field is qualified by the CC as being part of the national constitutional identity. It seems that the two highest constitutional judicial bodies in Romania and EU have reached a deadlock in the question of priority of the national Constitution over EU law and vice versa.

We wonder whether the use of the concept of "national constitutional identity" was necessary in a case related to the establishment and operation of a prosecution unit, taking into consideration that such a unit has not existed in Romania's constitutional history after 1991. Perhaps the CC overbid by using this concept in a relative trivial case, failing the opportunity to develop a dialogue-based relationship that began in 2016. The CJEU decision dated 18 May 2021, is far too blunt when compared to the jurisprudential reality generated by CC Decision No. 137/2019 and is based on some reports made pursuant to Decision No. 2006/928, decision that was repealed soon after the constitutional disputes had ceased – on the 15th of September 2023. The CJEU took into consideration unilateral and unverified information in drafting its judgement. It relied, in its reasoning, among other things, on outdated information provided by a Commission report from 2019 and generated its conclusion that the said prosecution unit can become an instrument of pressure and intimidation in the hands of judges. The CJEU failed to take into account subsequent case law vis-à-vis the aforementioned prosecution unit, as in 2020, a decision on unconstitutionality removed these fears in that the CC found the unconstitutionality of the legal provisions that excluded from the competence of the general prosecutor of Romania the capacity to control the activity of the chief prosecutor of the SIIJ. Thus, we appreciate that, although the decision of the CJEU dated 18 May 2021 intended to generate a chilling effect, in reality, it paved the way for the CC to deliver a bellicose decision that practically blocked the dialogue between both courts.

To prevent the courts from analyzing the compatibility between national legislation concerning the SIIJ and EU law, the CC established that once the constitutionality of this legislation was established vis-à-vis Article 148 of the Constitution, it follows that there is no contradiction between both legal orders, and thus, the courts can no longer carry out such an evaluation themselves. This recital was meant to prevent the national courts from disapplying national law considering that it contradicts EU law. Such a jurisprudential orientation – that contradicted the previous case law of the CJEU – caused dissatisfaction in the courts and it was only a question of time when such a court would decide to request a preliminary ruling in this respect. The CJEU answered in its Judgement of 22 February

66 Decision No. 88/2022, published in the Official Gazette of Romania, Part I, No. 243 on 11 March 2022, para. 79.

2022, according to which the primacy of the EU law precludes national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law. We can conclude that the CJEU overruled the CC decision – even if not the operative part, at least the decisive recital.

Such a dispute between the CC and CJEU does not bode well. The CC cannot wage a dispute in connection with a case that does not concern a real national constitutional identity issue and with a decision wherein the recitals are often disputable, confusing, and difficult to understand.

The Constitution is supreme in the national legal order. However, although this is mentioned in Decision No. 390/2021 as an intrinsic part of the national constitutional identity, it cannot be invoked against the EU. Lenaerts' statement in 1990 that 'There is simply no nucleus of sovereignty that the Member States can invoke, as such, against the Community'[67] comes to fore. The identity substrate that can be opposed to the EU is a much finer one. It touches the very root of the state's existence, peculiarities of wider generally accepted principles, or the key, deep, and sensitive elements of fundamental rights and freedoms. It does not comprise generally applicable principles throughout the European constitutional space because this would prove that we are discussing a European society or identity aspect, and not a national one. The national/legal peculiarities of a state and the key, deep, and sensitive elements of fundamental rights and freedoms (often in direct relation to morality) are part of the concept of national identity and can only be successfully opposed to the EU.[68] Therefore, the problem raised in the very case must be one for which is worth to have a dispute, and the one who initiates or continues such a dispute must have sufficient arguments and tools; otherwise, in case of a sciolist jurisprudential dispute regarding the possible limits of the principle of priority of application of EU law, a CC or its members place themselves in a paradigm that has nothing in common with dialogue based on concepts, but on temperament, emotion, experience, personal context, ideology or on a so-called "objective" understanding of what would be the "best" legislative policy to address a problem.[69] A CC – and especially the Romanian one – must take

67 Lenaerts, 1990, p. 220. For further developments, see Iancu, 2023, pp. 279–281.

68 See, for example, the CJEU Judgement of 7 September 2022, delivered in case C-391/20, according to which 'Article 49 of the TFEU must be interpreted as not precluding legislation of a Member State which, in principle, obliges higher education institutions to provide teaching solely in the official language of that Member State, in so far as such legislation is justified on grounds related to the protection of its national identity, that is to say, that it is necessary and proportionate to the protection of the legitimate aim pursued.'

69 Posner, 2021, p. 187.

over in jurisprudential disputes what A. von Bogdandy called the Italian model of dialogue with the CJEU,[70] as an open confrontation is not desirable.

The fourth aspect addressed in this dialogue pertained to the application of some decisions of the CC in criminal procedural matters. Between 2016 and 2019, at least five decisions of the CC were issued, which found the unconstitutionality of some legal provisions concerning the methods of obtaining evidence[71] and the *rationae materiae* competence of the prosecutors' offices,[72] and established the existence of legal conflicts of a constitutional nature determined by the collaboration of the prosecutors' offices with the intelligence services of the state[73] and the unlawful composition of the trial panels of the High Court of Cassation and Justice.[74] According to Article 147(4) of the Constitution, the CC's decisions are generally binding; thus, the unconstitutionality of the provisions lead to their inapplicability in pending cases. The decision by which the existence of a legal conflict of a constitutional nature was ascertained is mandatory. The courts must obey the constitutional conduct established by the provision of the CC decision. As a combined effect of these decisions, the possibility of ceasing criminal trials owing to the elimination of evidence or expiry of the period of limitation has become the burning issue of the day. Having been notified, the CJEU had a rather reserved position on the courts' claims against the CC's decisions, considering that only one of the five decisions can lead to 'a systemic risk of impunity for acts that constitute serious fraud crimes that harm the financial interests of the Union or of corruption in general,' leaving the courts the discretion to evaluate the existence of such a risk. The CJEU turned into an arbiter of the conformity of CC decisions with EU law, conditioning its application by imposing requirements whose evaluation is given to national courts with general jurisdiction.

Thus, from the subtext of the CJEU decision, it can be understood that 4 of the 5 decisions invoked by the referring courts do not contain problems in terms of their compliance with EU law, they being binding for general courts of law, only

70 Bogdandy, 2022, pp. 13–15. According to Bogdandy, the Italian approach involves continuous dialogue, minimalistic moves, and never making the first step, as such behavior always keeps all options open for the CC.

71 Decision No. 51/2016, published in the Official Gazette of Romania, Part I, No. 190 on 14 March 2016.

72 Decision No. 302/2017, published in the Official Gazette of Romania, Part I, No. 566 on 17 July 2017.

73 Decision No. 26/2019, published in the Official Gazette of Romania, Part I, No. 193 on 12 March 2019 [Online]. Available at: https://www.ccr.ro/wp-content/uploads/2021/03/Decision-No-26_2019.pdf (Accessed: 11 October 2023).

74 Decision No. 685/2018, published in the Official Gazette of Romania, Part I, No. 1021 on 29 November 2018 [Online]. Available at: https://www.ccr.ro/wp-content/uploads/2021/03/Decision-No-685_2018.pdf (Accessed: 11 October 2023) and Decision No. 417/2019, published in the Official Gazette of Romania, Part I, No. 825 on 10 October 2019 [Online]. Available at: https://www.ccr.ro/wp-content/uploads/2021/03/Decision-No-417-2019.pdf (Accessed: 11 October 2023).

if the national law guarantees the independence of the said constitutional court especially towards the legislative and executive powers; it has to be stressed out that the condition imposed to be verified by the national courts – the independence of the constitutional court – is obviously fulfilled, being an objective one. In relation to the fifth decision of the CC,[75] the imposed condition is subjective and left to the discretion of the courts, which, in reality, do not have the means to assess when there is a systemic risk of impunity for criminal offences that make it necessary to not apply a CC decision. The decision of the CC – questionable *per se*[76] – can be applied only under a negative condition – as long as it does not create a systemic risk of impunity assessed by the general courts of law. The CJEU decision is a refined one as it does not annul/leave without effect a decision of the CC, but leaves it to the national court of the case to decide whether or not to apply the decision of the CC. The CJEU, being aware that the national courts do not have a sufficient means to determine the systemic risk of impunity, relies on the sense of justice of the judge *a quo*. The CJEU offers the constitutional courts a "Greek gift" – maintaining the illusion on the binding force of their decision – and the national courts of law an illusion of power that they and only they can evaluate a CC decision vis-à-vis EU law on a quantitative/qualitative criterion that does not belong to the interpretative competence of the justice system – the indicated criterion is rather a policy standard. Such a premise can only generate a non-unitary judicial practice, which is not in the interest of legal security.

In a nutshell, the solution of the CJEU is a Solomonic one: national constitutional courts' decisions are mandatory as long as the CJEU does not relativize them. Consequently, the CC has to refrain from entering into jurisprudential clashes with the CJEU because, otherwise, there is a risk of non-application of its decisions by the national courts if the latter is dissatisfied by the CC's stance. Thus, there is a two-step test on overruling a CC decision: The first is up to the CJEU to relativise it and the national court has the competence to disapply it.

The fifth debated aspect concerned the judge's responsibility for non-compliance with CC decisions. This issue was not raised by any previous decision of the CC. However, in disputes concerning the legal regulations pertaining to the SIIJ, which were considered constitutional by the CC and to have contravened EU law, the question arose as to whether or not the judge committed a disciplinary offence amounting to non-compliance with CC decisions in the hypothesis that he/ she chooses to apply EU law and disapply the CC decisions.[77] According to the CJEU, the principle of primacy of EU law is to be interpreted as precluding national rules or practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without

75 Decision No. 417/2019.

76 For more details, see Iancu, 2022.

77 Art. 99 letter ș) of Law No. 303/2004 provided that non-compliance with the decisions of the Constitutional Court constitutes a disciplinary offense.

committing a disciplinary offence, disapply, on their own authority, the case law established in those decisions, even though they are of the view, in light of a judgement of the CJEU, that that case law is contrary to EU law.[78] The CJEU pointed out that EU law must be interpreted as precluding national rules or practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court, thus departing from the case law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law.[79]

Finally, in relation to the application of Article 267 of the TFEU in the procedure before the CC, in Decision No. 533/2018.[80] para. 40–41, the CC considered that a request for preliminary ruling is inadmissible in the *a priori* constitutional review. Such a review does not even *lato sensu* imply a pending case, that is, the existence of a legal relationship, as a law that is not in force cannot generate a case, unlike the hypothesis of the *a posteriori* constitutional review by way of the exception of unconstitutionality. However, in another decision,[81] the CC departed from this point as it noted that it is not necessary to request a preliminary ruling on the interpretation of Decision No. 2006/928, which proves that even within the *a priori* norm control, such requests can be formulated if necessary, in order to deliver a judgement. In conclusion, taking into account this jurisprudential development, the CC considered itself competent to formulate requests for preliminary ruling in the *a posteriori* and *a priori* constitutional review.[82]

7. The lenient phase (2022–)

After the judgements delivered by the CJEU in the field of disciplinary liability of the judges *vis-a-vis* the non-observance of the CC's decisions, the Parliament adopted a new law on the status of judges in which this disciplinary offence was eliminated.[83] This law was challenged at the CC within the *a priori* constitutional review and, among other aspects, criticized because it no longer regulates such a disciplinary offence. The CC observed that non-compliance with its decisions was no longer regulated as a distinct disciplinary offence under the law, but this does not mean that such conduct cannot engage the disciplinary liability of a judge to the extent that it is proven that he exercised his function with bad faith or gross

78 Judgement of 21 December 2021, delivered in joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19.
79 Judgment of 22 February 2022, delivered in case C-430/21.
80 Published in the Official Gazette of Romania, Part I, No. 673 on 2 August 2018.
81 See Decision No. 137/2019.
82 For more details, see Enache and Titirișcă, 2021, pp. 107–129.
83 See Law No. 304/2022, published in the Official Gazette of Romania, Part I, No. 1102 on 16 November 2022.

negligence.[84] Such non-adherence is considered a judicial error in Romanian law and according to Article 52(3), the state shall bear patrimony liability for prejudice caused by judicial errors. It was necessary to restrain the sphere of the disciplinary offence comprising non-adherence to the CC's decisions only to those that are made with bad faith or gross negligence in order to avoid a jurisprudential dispute with the CJEU and to guarantee the possibility of engaging the patrimonial liability of the state and securing the right of a person aggrieved by a public authority to obtain damages. However, this decision marks a new phase in the relations between the CC and CJEU. Thus, the CC indirectly took over the jurisprudence of the CJEU in matters concerning the disciplinary liability of judges for non-compliance with the decisions of the CC, even if it did not refer to it. Even in the absence of direct references, the subtext of the decision is clear. This is also a form of dialogue between the two courts, and a tacit one at that.

8. Conclusions

Anne-Marie Slaughter[85] identified five different categories of judicial interaction that result in the exchange of ideas and cooperation in cases involving national or international law, namely: relations between national courts and the CJEU; interaction between national courts and the ECtHR; judicial cooperation in dealing with transnational disputes or "judicial comity"; constitutional interactions or "constitutional cross-fertilisation"; and direct meetings among judges.

The interaction between national and international courts involves "vertical" relations, whereas that between the courts across national and regional borders involve "horizontal" relations. However, there has to be a "cooperative relationship" between national constitutional courts and the CJEU; this relationship is defined court-to-court and based explicitly on the competencies of both entities in domestic and EU law.[86] This cooperative relation has to be mutual, so both courts have to be willing to listen to each other's points of view. Compromise is always a solution.

In this paradigm, the only form of symbiosis among the 27 Member States and the European legal system within the framework of the current Treaties is an intensive and egalitarian dialogue between the CJEU and national constitutional court. Where the case in question relates to a matter of principle vis-à-vis the jurisdiction or the role of constitutional courts, this consultation procedure must be carried out with all constitutional courts in the EU.[87] If the CJEU faces a problem that calls into question the constitutional identity of the Member State,

84 Decision No. 520/2022, paras. 331–335.
85 Slaughter, 2000, p. 1104.
86 See, Slaughter, 2000, pp. 1107 et seq.
87 Sulyok and Dorneanu, 2022.

it is necessary to open a dialogue with the national constitutional court through a communication mechanism that makes it possible to acknowledge its position and the legal arguments that substantiate it. Between both jurisdictions, there cannot and should not be a relationship of opposition or legal hierarchy, but of complementarity. Possible jurisprudential tensions can be avoided by harmonizing decisions at the level of respect for the constitutive principles established at the EU and national levels, and which, in essence, make up the common heritage of the constitutional legal civilization.[88]

It is also the case with the Romanian Constitutional Court. It seems that formal and informal dialogue is welcomed, especially when the relations between the national Constitution and EU law is at stake and the "counter-limits" doctrine comes to fore. A hierarchical approach is not the best way to flatten the differences of opinion between them. We have to admit that the competence-competence doctrine is eroded by the ever-expansive jurisdiction of the CJEU. This is why dialogue in every form has to characterize this relationship. In the future, the CC will be more cautious when it has to deliver decisions that can have a certain impact on the application of EU law and will adhere to the so-called Italian model of dialogue[89] shaped in *Taricco 1* and *2*.[90] It remains to be seen whether the CC will maintain its case law concerning the relationship between the national Constitution and EU law or will adapt it to suit the CJEU's decisions. However, both courts have to "negotiate" to avoid such jurisprudential clashes.[91]

As for the CJEU approach to the CC, I would mention its recent Judgement of 24 July 2023, delivered in Case C-107/23 PPU, which is very similar to *Taricco 2* as it recognizes the *pro futuro* effects of a CC decision that concerns the unconstitutionality of the interruption cases of the period of limitation for criminal liability,[92] even if, as a consequence, a considerable number of criminal cases, including those relating to offences of serious fraud affecting the financial interests of the EU, will be discontinued because of the expiry of the period of limitation for criminal liability. However, even if Romanian law concerning the interruption of the period of limitation for criminal liability fall within the scope of substantive criminal law, the CJEU denied its retroactive application based on *lex mitior* and, consequently, allowed the national courts to disapply a ruling delivered by the

88 Enache, 2021, p. 97.

89 The Romanian legal literature emphasizes that the preliminary reference procedure does not resolve all conflicts and sometimes creates conflicts if the courts on the two levels position themselves in an authoritarian manner – see Safta, 2022. This is why the Italian model of dialogue is more appropriate for the Romanian Constitutional Court. Otherwise, it would place itself in an irreconcilable position vis-à-vis the CJEU.

90 Amalfitano and Pollicio, 2018.

91 Toader and Safta, 2013, p. 161.

92 See Decision No. 297/2018, published in the Official Gazette of Romania, Part I, No. 518 on 25 June 2018, and Decision No. 358/2022, published in the Official Gazette of Romania, Part I, No. 565 of 9 June 2022.

High Court of Cassation and Justice for unifying the judicial practice according to which the normative text that has remained after the CC decisions is a more lenient law and has to be applied retroactively.[93]

However, in the absence of a compromise, the question concerning counter-limits remains: Which Court is the best placed to assess such an issue? Is it a question of competence or of power? *Quis custodiet ipsos custodes*?

93 Decision no. 67/2022, published in the Official Gazette of Romania, Part I, No. 1141 on 28 November 2022.

Bibliography

- Amalfitano, C., Pollicio, O. (2018) 'Two Courts, two Languages? The Taricco Saga Ends on a Worrying Note' *Verfassungsblog* [Online]. Available at: https://verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note/ (Accessed: 15 July 2023).
- Arena, A. (2019) 'From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of Costa v. ENEL', *European Journal of International Law,* 30(3), pp. 1017–1037; https://doi.org/10.1093/ejil/chz056.
- Bogdandy, A. (2022) 'To be a constitutional judge in the European society – On responsibilities and styles', *The Constitutional Court Bulletin,* 24(1), pp. 13–15.
- Enache, M. (2021) 'De la redactarea la exegeza Constituției României din 1991 – experiențe și reflecții' in Dorneanu, V. et al. (eds.) *Patrimoniul constituțional și valorile democratice*, Bucharest: Hamangiu Publishing, pp. 77–98.
- Enache, M., Titirișcă, C. (2021) 'References for Preliminary Rulings Submitted in a priori Constitutional Review. Insights from Romania in Light of Decision No.137 of 13 March 2019 of the Romanian Constitutional Court', *European Constitutional Law Review,* 17(1), pp. 107–129; https://doi.org/10.1017/S1574019621000122.
- Iancu, B. (2022) 'Goat, Cabbage and Wolf' *Verfassungsblog* [Online]. Available at: https://verfassungsblog.de/goat-cabbage-and-wolf/ (Accessed:15 July 2023).
- Iancu, B. (2023) 'Pe aici nu se trece – Identitate și prioritate la București – Varșovia – Karlsruhe – Roma – Madrid – Luxemburg' in Dima B., Perju, V. (eds.) *După 30 de ani – Justiția constituțională în România*, Bucharest: Humanitas Publishing, pp. 272–298.
- Lenaerts, K. (1990) 'Constitutionalism and the Many Faces of Federalism', *The American Journal of Comparative Law,* 38(2), pp. 205–263; https://doi.org/10.2307/840100.
- Mezzetti, L. (2007) *Diritto costituzionale – Casebook – La Costituzione italiana annotata con la giurisprudenza della Corte Costituzionale*. Napoli: Esselibri-Simone Publishing.
- Paulus, A. (2019) 'The relationship between national constitutional identity and the principle of predominance of the law of treaties. A German Constitutionalist view' in Dorneanu, V., Krupenschi, C.M. (eds.) *The national constitutional identity in the context of European law*. Bucharest: Hamangiu Publishing, pp. 29–36.
- Pivniceru, M-M., Benke, K. (2015) 'Constitutional Court of Romania: Constitutionalization of the Obligations under International Treaties and European Union binding Acts', *Vienna Journal on International Constitutional Law,* 9(3), pp. 451–456; https://doi.org/10.1515/icl-2015-0310.
- Posner, R. A. (2021) *Cum gândesc judecătorii*. Chișinău: Institutul Național al Justiției.
- Puskás, V.Z., Benke, K. (2017) 'The regulatory role of judicial activism. The experience of the Constitutional Court of Romania – an ongoing evolution' in Constitutional Court of Latvia (ed.) *Judicial activism of the Constitutional Court in a Democratic State*. Riga, pp. 419–433.
- Safta, M. (2022) 'Justiția constituțională europeană. Prea mult drept constituțional în Uniunea Europeană?' Juridice Essentials [Online]. Available at: https://www.

juridice.ro/essentials/5257/justitia-constitutionala-europeana-prea-mult-drept-constitutional-in-uniunea-europeana (Accessed: 15 July 2023).

- Slaughter, A-M. (2000) 'Judicial globalization', *Virginia Journal of International Law,* 40(1103), pp. 1103–1124.
- Sulyok, T., Dorneanu, V. (2022) 'Constitutional courts are the keystones of national ethos' *Hungarian Conservative* [Online]. Available at: https://www.hungarianconservative.com/articles/philosophy/constitutional-courts-are-the-keystones-of-national-ethos (Accessed: 15 July 2023).
- Toader, T., Safta, M. (2013) 'Dialogul dintre Curtea Constituțională a României și Curtea de Justiție a Uniunii Europene', *Dreptul*, 12/2013, pp. 129–162.
- Trócsányi, L., Csink, L. (2008) 'Alkotmány v. közösségi jog: az Alkotmánybíróság helye az Európai Unióban', *Jogtudományi Közlöny*, 63(2), pp. 63–69.
- Varga, A. (2019) 'Determining the content of constitutional identity – regulatory and case-law enshrinement' in Dorneanu, V., Krupenschi, C.M. (eds.) *The national constitutional identity in the context of European law*. Bucharest: Hamangiu Publishing, pp. 20–28.

MARTA DRAGIČEVIĆ PRTENJAČA*

The Rule of Law in Croatian Criminal Justice with a Case Study on Its Breach by Tackling War Profiteering and Privatisation

ABSTRACT: *The rule of law, as enshrined in the Croatian Constitution, establishes the highest values of the constitutional order, including the principles of constitutionality and legality. It ensures that laws and procedures in Criminal Law are well-defined and accessible to all, and provide legal certainty. The presumption of innocence safeguards the rights of the accused and ensures fair trials. The text emphasises the importance of the separation of powers and the role of the Constitutional Court in upholding constitutionality and the principle of legality as one of the main principles of (substantive) Criminal Law. Special reference is made to the constitutional amendments and legal measures taken to address criminal offences related to privatisation and ownership transformation and the Law on Exemption from the Statute of Limitations for War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatisation, which is a unique "phenomenon" ensuing from the retroactive application of the law contrary to the principle of legality, existing only in Croatian Criminal Law. This paper explores the interplay between the rule of law and Criminal Law in Croatia, highlighting the principles and legal framework that ensure justice and the protection of individual rights in the criminal justice system.*

KEYWORDS: rule of law, principle of legality, croatian criminal justice system, the law on exemption

1. Introduction

The concept of the Rule of Law may seem easy to understand, but challenging to articulate. As Smerdel noted, the "rule of law" is a system of political power

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based on respect for the Constitution, laws, and other regulations, both by citizens (addressees of legal norms) and those that hold state power (addressors of legal norms).[1] The rule of law is a principle wherein every person and entity is subject to the law, regardless of their social status, wealth, or power.[2] It upholds the principle that all individuals are equal before the law.[3] It ensures that laws are applied consistently and impartially, without discrimination or favouritism.[4] It is the foundation of democratic societies and ensures that everyone is treated equally under the law.[5] The Report of the Secretary General of the United Nations states that the rule of law[6]

> refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[7]

The rule of law also means that laws must be clear, predictable, and applied consistently.[8] This fundamental aspect guarantees that every person, regardless of their social status, wealth, or influence, is subject to the same legal standards. It provides a fair and level-playing field, promoting trust and confidence in the justice system.[9] This principle is essential in maintaining peace, stability, and order in society.[10] The rule of law should safeguard the autonomy and dignity of the individual, allowing people to express and realise their feelings, opinions, communication, and actions freely.[11] They are strictly limited by the law, that is, acting in accordance with positive law.[12] As Lauc noted, all laws, other regulations, and the actions of the authorities must be based on the law, that is, on a regulation

1 Smerdel, 2020, p. 9.
2 Omejec, 2013, p. 1087.
3 Ibid.
4 Ibid.
5 Ibid.
6 Security Council, 2004.
7 Security Council, 2004, p. 4, para. 6
8 Omejec, 2013, p. 1087.
9 Ibid.
10 Lauc, 2016, p. 51.
11 Ibid.
12 Ibid.

based on the law.[13] This expresses the constitutional principles of constitutionality and legality.[14] It asserts that all laws, regulations, and actions of authorities must be grounded in the law, specifically in a regulation that aligns with the law and Constitution. This fundamental principle is rooted in constitutional law in many legal systems world over.[15] The principle of constitutionality refers to the idea that all laws and regulations must conform to the provisions and principles outlined in the Constitution. The Constitution is the supreme law of a country and sets out the fundamental rights, powers, and structural features of the government. Any law or regulation that contradicts the Constitution is considered unconstitutional and can be deemed invalid by the courts.[16] The principle of legality encompasses the notion that all exercises of public power must have a legal basis. It requires that governmental actions and decisions be grounded in and authorised by law. This principle ensures that authorities do not exceed their powers or act arbitrarily, promoting the rule of law and protecting individuals' rights and freedoms.[17] By adhering to the principles of constitutionality and legality, a government upholds the fundamental principles of democratic governance, separation of powers, and the protection of individual rights.[18] It provides a framework for legal certainty, accountability, and the proper functioning of a just and fair legal system.[19] The formal aspect of the rule of law refers to shaping state action, especially the division of power and competence of the legislative, executive, and judicial authorities.[20] Human rights and fundamental freedoms can only be limited by law.[21] Stein emphasised that

> the principles constituting the rule of law identified in this definition are both procedural and substantive. The principles are procedural, for example, in that the laws must be the supreme law of the land, publicly promulgated, equally enforced, and adjudicated by an independent judiciary. Additional procedural rules require that the laws must be fairly and equally applied, and that separation of powers must be observed in the enactment and adjudicative processes.
> The principles of the rule of law are also substantive, in that the laws must be just and consistent with the norms and standards of

13 Ibid.
14 Smerdel, 2020, p. 9.
15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.
20 Ibid.
21 Ibid.

> international human rights law. Also, the rule of law requires the avoidance of arbitrariness in the law.[22]

A hierarchy of legal regulations characterises the rule of law. This implies positioning the democratic Constitution as the highest legal act and the most important social project.[23] Smerdel noted that despite these changes, however, the functions of the Constitution and their purpose remain stable and unchanged, despite some changes.[24] The functions of the rule of law are as follows: Limiting power; promoting and protecting human rights and fundamental freedoms; building and strengthening democratic constitutional and legal institutions and realisation of the constitutional principle (and ideal) of the rule of law.[25] Lauc noted that 'the concept of constitutional governance is based on the ideas of the rule of law and constitutionalism, which boils down to the idea of obeying laws and not people.'[26] Constitutional rule is a rule in which the Constitution and the law limit each holder of power.[27] Thus, all people should be equal in front of the law. Even if this sounds very encouraging and good, there have been some obvious abuses of this principle, especially in German history. As Lauc emphasised

> the concept of the rule of law (*Rechtstaat*),[28] developed in German doctrine at the end of the 19th and the beginning of the 20th century, placed more emphasis on the formal aspect, i.e. on the hierarchy and respect for legal regulations, than on their content. [29]

The French concept of the rule of law (*etat de droit*) is important[30] and is the base of today's concept of the rule of law. The material aspect of the rule of law is considered a set of ideals and reveals somewhat deeper and broader substantive perspectives.[31] Therefore, it focuses less on the form and procedure and more on the values and goals to be achieved, promoted, and/or embodied. [32] It insists on full respect for personal civil liberties – freedom of thought and expression, conscience and religion, movement, and public assembly, equality before law, the right to appeal, etc.[33] According to this, 'the rule of law does not exist in a society

22 Stein, 2019.
23 Lauc, 2016, p. 48.
24 Smerdel, 2020, p. 3.
25 Ibid.
26 Lauc, 2016, p. 48.
27 Ibid.
28 See Radbruch, 1946, pp. 1, 11; more information are available at: VC (no date).
29 Lauc, 2016, p. 49.
30 Ibid.
31 Ibid., p. 51.
32 Ibid.
33 Ibid., pp. 51–52.

whose legal system is not specifically designed and intended to operationalise the values of freedom, dignity, fairness, justice, democracy, and human rights.'[34] Fundamental human rights must be respected and the welfare state must exist. As Lauc emphasised 'the rule of law exists only when the legal system is built on a certain public morality, that is, on the understanding that good and bad regulations should be distinguished in relation to their content.'[35] This material aspect of the rule of law is present and evident in legal systems 'that inherit the European continental legal tradition.'[36] Lauc[37] reiterated the importance of the Report on the rule of law of the Venice Commission of the Council of Europe (2011).[38] The Venice Commission[39] established the 'necessary elements of the rule of law,' as well as those *Rechtsstaat*, which are not only formal, but also substantial or material for 'which it seems that a consensus could be found,' namely:

> 1. legality, including a transparent, accountable, and democratic process of passing laws; 2. legal certainty; 3. prohibition of arbitrariness; 4. access to justice before independent and impartial courts, including judicial review of administrative acts (access to justice before independent and impartial courts, including judicial review of administrative acts); 5. respect of human rights and 6. prohibition of discrimination and equality before the law (non-discrimination and equality before the law).[40]

Later, this definition was expanded with eight "constituent parts" of the rule of law:

> 1. accessibility of the law, which means that it must be intelligible, clear, and predictable; 2. questions of legal right must normally be decided on the basis of the law, not on the basis of discretion; 3. equality before the law; 4. powers must be exercised lawfully, fairly and reasonably; 5. human rights must be protected; 6. means must be provided to resolve disputes without excessive cost or delay; 7. trials must be fair and 8. the duty of the state to comply with its obligations under international and national law. [41]

34 Ibid.
35 Ibid., p. 51.
36 Ibid., p. 52.
37 Ibid., p. 57.
38 VC, 2011.
39 Craig, 2019, pp. 156–187.
40 Lauc, 2016, p. 57.
41 Ibid.

In recent times, the concept of the rule of law has become increasingly vital as our societies face various challenges and undergo several transformations. From technological advancements to geopolitical shifts, from global pandemics to socioeconomic inequalities, the rule of law plays a critical role in navigating complex and ever-changing landscapes.[42] Therefore, Varga raised a pertinent question on the relevance of values regarding the rule of law established decades or even centuries ago in today's context.[43] He pondered over how our current framework of the rule of law can effectively address the challenges posed by modern dynamics.[44] The classical system of checks and balances, developed nearly two centuries ago, struggles to function and operate efficiently in response to the influence of various factors. [45] As Varga noted, these factors include the power wielded by print and electronic media, the pressure exerted by large organisations, the financial coercion facilitated by international agents of globalisation and organised crime, which often operate with state support.[46] These entities assert themselves with increasing arrogance, without assuming responsibility, in a domain that is largely devoid of regulations, but enabled by global economic trends and advanced technologies.[47] The traditional regime of the rule of law fails to offer suitable regulations or solutions to effectively manage the encroachment of these new powers, which significantly influence our future.[48]

The 2023 EU Rule of Law Report, follows the pattern of previous years by addressing significant common themes, trends, challenges, and positive developments,[49] and includes specific recommendations to Member States and provides updates on the progress made in implementing the recommendations issued last year.[50] These recommendations are structured into four key pillars: (a) Justice systems in the Member States, (b) Anti-corruption frameworks, (c) Media freedom and pluralism, and (d) Institutional issues related to checks and balances.[51] Therefore, these four pillars are cornerstones for monitoring the rule of law in each Member state.

Justice systems hold significant relevance, with a key focus on their independence, quality, and efficiency.[52] These parameters are vital to uphold the effective application and enforcement of EU law while preserving the integrity of the rule

42 Varga, 2021, pp. 95.
43 Varga, 2021, pp. 95–99.
44 Ibid.
45 Ibid.
46 Varga, 2021, p. 95.
47 Ibid.
48 Ibid.
49 European Commission, 2023a.
50 The report presents examples that reflect these trends, sourced from assessments found in the 27 country chapters, which form an integral part of the report and provide detailed contextual information for each Member State. – European Commission, 2023a, p. 2.
51 Ibid.
52 Ibid.

of law. The presence of well-functioning and fully independent justice systems is essential in ensuring the equitable treatment for citizens and businesses alike.[53] These systems play a crucial role in facilitating judicial cooperation within the EU, supporting the smooth functioning of the Single Market, and upholding the overall legal order of the EU.[54] There are anti-corruption frameworks, with a focus on evaluating the effectiveness of national anti-corruption policies and assessing various key areas of action taken by Member States to prevent and combat corruption.[55] Effective anti-corruption measures, transparency, and integrity are crucial to strengthening and ensuring the credibility of state power. They play a significant role in fostering trust among citizens and businesses in public authorities.[56] This is supported by media freedoms and pluralism, which ensure transparency and public awareness as 'watch dogs.'[57] Therefore, core aspects such as the independence of media regulatory authorities, transparency and concentration of media ownership, fairness and transparency in the allocation of state advertising, safety of journalists, access to information, and governance of public service media are very important.[58] These factors are essential for the media to fulfil its role in a healthy democracy and to preserve the rule of law.[59]

The 2023 EU Rule of Law Report considers institutional issues related to checks and balances, focusing on key areas that are crucial for upholding the rule of law.[60] These include the quality and inclusiveness of the national legislative process, the role of Constitutional Courts, and independent authorities like the Ombudsperson, equality bodies, and national human rights institutions. The Report examines the role of civil society organisations in safeguarding the rule of law.[61]

2. The rule of law in Croatia

The rule of law is the cornerstone of modern legal systems, providing the framework for a just and orderly society. It encompasses principles such as equality before law, legal certainty, accountability, and access to justice.

According to the EU 2023 Rule of Law Report, Croatia and Poland have a considerably low level of perceived independence, falling below 30%, while Finland, Denmark, Austria, Germany, and Luxembourg exhibit a notably high

53 Ibid.
54 Ibid.
55 Ibid.
56 Ibid.
57 Ibid.
58 Ibid.
59 Ibid.
60 Ibid.
61 Ibid.

perceived level of independence among the general public, exceeding 75%.[62] Some reservations must be made towards such data, as even the authors of the Report in the relevant methodology section of this publication advise using such findings critically, noting that 'while perception indicators and surveys remain a useful source of information, they are to be interpreted with caution and within the relevant context.'[63]

Efforts are underway in Croatia, as acknowledged by the Rule of Law Report, to address concerns regarding the remuneration of judges, state prosecutors, and judicial staff, while simultaneously making advancements in expanding electronic communication tools and reducing backlogs within the justice system.[64] However, significant hurdles related to efficiency and quality persist, as reflected in the general increase in trial durations. Consequently, Croatia recently witnessed an almost eight-week-long strike within the judiciary, which has recently ended. This labour action has undoubtedly contributed to an increase in the duration of Court proceedings.[65] Croatia has witnessed an increased adoption of electronic communication systems, integrating most remaining courts into a unified system that is already utilised by all other courts.[66] Thus, the prolonged duration of proceedings for investigating, prosecuting, and adjudicating corruption offences continues to undermine the effectiveness of the anti-corruption system.[67] Legislation to address this issue has not yet been introduced.[68] Nonetheless, there have been effective investigations of high-level corruption, leading to an overall rise in the number of indictments and judgements.[69]

The adoption of Codes of Conduct for Members of Parliament in Croatia, accompanied by the substantial compliance of nearly all local and regional administrations, showcases a commitment to ethical standards.[70] Ongoing discussions on new lobbying legislation are taking place in Belgium, Czechia, Croatia, Spain, Ireland, and Portugal, demonstrating a collective effort to enhance transparency and accountability.[71] In Croatia, no further measures have been taken since the last legislative reform in 2021 to strengthen the framework for the public tender procedure concerning state advertising in local and regional media.[72] The Media

62 European Commission, 2023, p. 4.
63 Euroean Commission, 2023b, European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report [Online]. Available at: https://commission.europa.eu/system/files/2023-07/63_1_52674_rol_methodology_en.pdf, p. 1 (Accessed: 04 September 2023).
64 Ibid., p. 9.
65 Lukić, 2023.
66 European Commission, 2023a, p. 2.
67 Ibid.
68 Ibid., p. 13.
69 Ibid.
70 Ibid., p. 14.
71 Ibid., p. 15.
72 Ibid., p. 20.

Pluralism Monitor underscores the significance of media pluralism, showing that it is classified as 'high risk' and 'very high risk' in five (Croatia, Cyprus, Greece, Slovenia, and Malta) and four (Bulgaria, Poland, Romania, and Hungary) Member States, respectively.[73] Although revisions have been made to the law on general access to information and public documents in Croatia, delays in implementation persist in certain cases.[74] Whereas progress has been made in addressing the recommendations of the People's Ombudsperson in Croatia, challenges remain in ensuring unfettered access to information.[75]

After the adoption of the 2022 Rule of Law Report, the Commission, in collaboration with the Fundamental Rights Agency and national stakeholders, initiated the inaugural 'national rule of law dialogues' in Belgium, Germany, and Croatia.[76] These dialogues serve as crucial platforms for constructive engagement and the exchange of ideas.[77] Consequently, in Croatia, as a response to recommendations from the previous year, the Constitutional Court decision eliminated periodic security checks on judges, and similar removals are expected for state attorneys through upcoming amendments.[78]

■ *2.1. Examining the rule of law and the Croatian Constitution: Insights from the Constitutional Court*

The Constitution of the Republic of Croatia[79] plays a significant role in upholding the rule of law, which is regulated through (substantive and procedural) Criminal Law. Article 3 establishes the highest values of the constitutional order, including the rule of law, the values of which form the basis for interpreting the Constitution and laws and other regulations. Thus, in Article 5, the Constitution stipulates the principle of constitutionality and legality,[80] which was mentioned at the beginning of the paper. Everyone is obliged to adhere to the Constitution and the law and respect the legal order of the Republic of Croatia.[81]

The principle of constitutionality and legality[82] is a formal hierarchy and requires the democratic content of a political system that protects human rights and fundamental freedoms in the relations between citizens and public authorities.[83] According to Lautenbach, acting in accordance with the law is an essential

73 Ibid., p. 19.
74 Ibid., p. 21.
75 Ibid., p. 25.
76 Ibid., p. 29.
77 European Commission, 2023a, p. 29.
78 European Commission, 2023a, p. 8.
79 Constitution of the Republic of Croatia, OG, 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.
80 Art. 5(1) of the Constitution.
81 Art. 5(1) of the Constitution.
82 Art. 31 of the Constitution.
83 Lauc, 2016, p. 60.

aspect of legality, and establishes certain standards that laws must be met, including generality and clarity.[84] Consequently, legality encompasses the law and serves as a fundamental principle of the rule of law and modern governance.[85] It ensures the protection of individuals' rights against arbitrary intervention by the state, thus guaranteeing their security.[86] Lautenbach highlighted that legality supports individual autonomy by enabling people to make plans for their lives.[87]

By defining the highest values of the constitutional order, which are used to interpret the Constitution,[88] the possibility of abandoning grammatical interpretation in the process of the 'judicialisation of political decision-making' is opened via teleological interpretation. This means activating the activist role of the constitutional judiciary.[89] Lauc reiterated that the Constitutional Court of the Republic of Croatia increasingly takes on an activist role, in creatively interpreting the Constitution, especially the highest values of the constitutional order and providing teleological interpretations.[90] The Constitutional Court has repeatedly defined the principle of constitutionality and legality. In its decision, it stated that the rule of law

> presupposes full constitutionality and legality in the sense of Article 5 of the Constitution, it is more than just the requirement to act in accordance with the law: it also includes requirements concerning the content of the law. Therefore, the rule of law in itself cannot be law in the same sense as the laws enacted by the legislator. The rule of law is not only the rule of law but the rule by law, which – in addition to the requirement for constitutionality and legality, as the most important principle of any regulated legal order – contains additional requirements concerning the laws themselves and their content. [91]

The Court pointed out that laws must be general and equal for everyone in a legal order based on the rule of law.[92] Legal consequences must be certain for those to whom the law will be applied,[93] and must be suited to the legitimate expectations of

84 Lautenbach, 2013, pp. 18–69.
85 Ibid.
86 Ibid.
87 Ibid.
88 Art. 3 of the Constitution.
89 Lauc, 2016, p. 60.
90 Ibid.
91 Decision and Ruling of the Constitutional Court of the Republic of Croatia number: U-I-659/1994, U-I-146/1996, U-I-228/1996, U-I-508/1996, U-I-589/1999 of 15 March 2000., para. 11, OG, 31/2000 [Online]. Available at: https://narodne-novine.nn.hr/clanci/sluzbeni/2000_03_31_659.html (Accessed: 10 May 2023).
92 Constitutional Court Decision and Ruling, U-I-659/1994, U-I-146/1996, U-I-228/1996, U-I-508/1996, U-I-589/1999, para. 11.1.
93 Ibid.

the parties in each case to which the law applies.[94] As one of the main pillars of the rule of law, the Court has emphasised the principle of separation of powers under Article 4 of the Constitution.[95] It is one of those rules for the organisation of state power that are useful insofar as it serves and defends the rule of law.[96] It is one of the most important elements of the rule of law because it prevents the possibility of concentration of authority and political power in (only) one body.[97] The Court has pointed out that the separation of the three powers should not be interpreted mechanically because they are all state authorities that are functionally intertwined and mutually imbued with a multitude of the most diverse relationships and mutual influences, with the predominant goal of mutual supervision.[98]

The Report presented to the Croatian Parliament on the Legal Force, Nature, and Effects of Constitutional Laws for the Implementation of the Constitution of the Republic of Croatia highlighted certain key points. In line with the principle of the rule of law, which represents the fundamental basis for interpreting the Constitution,[99] the Constitutional Court deems it necessary to communicate to the Croatian Parliament the clear requirements that arise concerning future practices related to the adoption of constitutional laws for implementing the Constitution.[100] To uphold the principle of legal certainty within the objective constitutional order of the Republic of Croatia, it is imperative to establish clear and precise regulations regarding the legal force, nature, and effects of constitutional laws for implementing the Constitution in future amendment procedures. The demands for legal consistency and principles derived from the rule of law, particularly legal certainty and the certainty of an objective legal order, emphasise the need to align the current legislative practices related to constitutional laws for implementing the Constitution with constitutionally acceptable standards. It is essential to standardise these practices uniformly in all future cases.[101]

Lauc noted that one of the fundamental requirements that must be met for a law to be declared in accordance with the principle of the rule of law is certainty vis-à-vis everyone to whom the law should be applied.[102] This principle will be respected only if the legal provisions are going to be precise enough to those, to whom they refer, in terms of their rights and obligations.[103] Lauc noted that according to the Constitutional Court, the principle of the rule of law consumes

94 Ibid.
95 Ibid., para. 12.
96 Ibid.
97 Ibid.
98 Ibid.
99 Art. 3 of the Constitutions.
100 Lauc, 2016, pp. 62–63.
101 Ibid., pp. 62–63.
102 Ibid., p. 61.
103 Ibid.

the principle of proportionality, that is, fairness.[104] The Croatian Constitutional Court had constitutionalised this principle stating that any restriction (even when necessary and based on the Constitution) represents an exceptional situation because it deviates from the general rules on constitutional freedoms and rights.[105] This rule on the proportionality of restrictions to the goal and purpose that the law seeks to achieve is a general constitutional principle immanent in all constitutional provisions on freedoms and rights.[106]

The Constitutional Court emphasises that the strict requirements of the rule of law and legal certainty naturally apply to the transitional and final provisions of law. These provisions reflect the legislature's commitment to protecting constitutional assets and upholding constitutional guarantees, demonstrating the credibility of the objective legal order itself.[107] The Constitutional Court addressed the Parliament through the Report to the Croatian Parliament on constitutionally unacceptable effects of the revised texts of the Constitution of the Republic of Croatia, constitutional laws, laws, other regulations, and general acts,[108] and stated that amended law must not encroach on the systematics of the legal text and numbering of articles. It must enter into force on a specified day.[109] Only such amendments align with the principle of the rule of law, especially the principle of the legal security of objective law.[110]

Lauc explained the significant influence and primary role of the Constitutional Court in upholding constitutionality and legality.[111] For example, in the Report on the Legislative Practice of Consecutive Multi-year Derogation of Recognised Rights, it is firmly stated that such a practice is unacceptable in a democratic state governed by the rule of law.[112]

The Constitutional Court highlights that evaluating the conformity of a legal norm with the rule of law goes beyond considering its potential consequences. Instead, it primarily focuses on what a legal norm of transitional or final nature must be in a democratic society founded on the rule of law. This assessment

104 Ibid.
105 Ibid.
106 With the constitutional changes of 2000, this principle was included in Art. 16(2) of the Constitution of the Republic of Croatia, Lauc, 2016, p. 61.
107 Lauc, 2016, p. 62.
108 The Report to the Croatian Parliament on constitutionally unacceptable effects of the revised texts of the Constitution of the Republic of Croatia, Constitutional laws, laws, other regulations and general acts U-X-80/2005, OG, 37/2011 [Online]. Available at: https://www.iusinfo.hr/zakonodavstvo/izvjesce-o-ustavnopravno-neprihvatljivim-ucincima-prociscenih-tekstova-ustava-republike-hrvatske-ustavnih-zakon-zakona-drugih-propisa-i-opcih-akata-1/clanak-1 (Accessed: 10 May 2023).
109 Lauc, 2016, p. 63.
110 The Report to the Croatian Parliament on constitutionally unacceptable effects of the revised texts of the Constitution of the Republic of Croatia, Constitutional laws, laws, other regulations and general acts U-X-80/2005, para. 9.
111 Lauc, 2016, p. 62.
112 Lauc, 2016, p. 62.

considers the requirements of precision, certainty, predictability, and accessibility, aiming to realise the principles of legal security and certainty, and the protection of constitutional values. The legal framework of a constitutional state should not be equated with mere oversight, omission, or clumsiness on part of the drafters, government, or Parliament, but rather serve as a crucial element to be meticulously crafted and respected.[113]

The Constitution contains many principles concerning Criminal Law, and only the most important one will be mentioned, namely the principles of legality[114] and legal certainty, which are fundamental aspects of the rule of law, and emphasise the importance of clear and predictable laws and procedures. In Criminal Law, the principle of legal certainty, specifically its principle of legality, requires that all aspects related to criminal offences be clearly defined and made accessible to everyone. This principle (of legality) ensures that individuals can understand the boundaries of lawful behaviour and have confidence in the justice system's predictability and consistency. Therefore, criminal offences are regulated by law, and most of them are regulated by the Penal Code (PC),[115] whereas procedural matters and aspects of crime, such as investigating, prosecuting, and adjudicating criminal cases, are regulated by the Criminal Procedure Act (CPA),[116] thus ensuring that individuals accused of crimes are treated fairly throughout the legal process.[117]

■ *2.2. The rule of law and Criminal Law in Croatia*

This chapter explores the crucial relationship between the rule of law and Criminal Law in Croatia, focusing on the interplay of these concepts in safeguarding individual rights, maintaining social order, and ensuring that justice is served.

Criminal law and the Penal Code serve as a check on the power of the state. It establishes clear boundaries for state action, defining the conduct that is considered criminal and specifying the conditions under which the state can interfere with individuals' rights and liberties. It ensures that state authorities are subject to legal constraints and held accountable for their actions. It protects individuals from the arbitrary exercise of power and guards against abuses by ensuring that state interventions are lawful, justified, and proportional. The principle of legality guarantees this.[118] Criminal law plays a vital role in maintaining social order

113 Ibid.
114 Art. 31 of the Constitution.
115 Penal Code, OG, 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22.
116 Criminal Procedure Act, OG, 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130/20, 80/22.
117 These rights include the rights to a prompt and public trial, be informed of the charges, confront witnesses, present evidence, and legal representation, etc. By upholding these rights, criminal law offers safeguards against arbitrary arrest, wrongful conviction, and other miscarriages of justice.
118 VC, 2011, p. 10, para. 44.

by defining and prohibiting behaviour that threatens individuals and society.[119] It establishes a rule system that delineates acceptable conduct and provides a deterrent effect against potential offenders. By defining criminal offences clearly and prescribing penalties, Criminal Law contributes to the prevention of crime, protection of public safety, and preservation of social cohesion.

Lautenbach highlighted that the European Court of Human Rights (ECtHR) aims to interpret the principle of legality consistently across various articles of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or ECHR or the Convention).[120] Article 7 (No punishment without law) of the Convention emphasises that domestic laws must be accessible and foreseeable.[121] The requirement of foreseeability includes the principle of non-retroactivity, ensuring that individuals cannot be punished for actions that were not considered illegal when they were committed.[122] The interpretation of Article 7 aligns with the concept of accessibility and foreseeability, as these principles also apply to other articles of the Convention.[123] The strictness of the review of non-retroactivity varies based on the area of the law and individuals affected by it.[124] The text discusses two instances that illustrate how non-retroactivity is interpreted in light of foreseeability vis-à-vis Article 7, revealing that non-retroactivity is not as stringent as one may expect in this vital safeguard within Criminal Law.[125] The right not to be punished without a previously enacted law establishes particular requirements that national laws must adhere to.[126] These requirements of foreseeability align with the significant role of Article 7 in upholding the rule of law. The ECtHR considers the principle of *nulla poena* (no punishment without law) one of the fundamental principles of the rule of law.[127]

Under the rule of law, all individuals, regardless of their status, are entitled to equal treatment, that is equality, before the law. In the realm of Criminal Law, this principle ensures that no one is above the law and that individuals are held accountable for their actions based on the same legal standards. It prohibits discrimination and guarantees that the legal system treats everyone fairly, without bias or favouritism. The rule of law necessitates that individuals have access to justice, that is, access to justice in Criminal Law or the right to a fair trial (in

119 For more about principle of legality see: Horvatić, Derenčinović and Cvitanović, 2016, pp. 126–133; Novoselec, 2016, pp. 47–63.
120 The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) [Online]. Available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG (Accessed: 15 July 2023).
121 Lautenbach, 2013, p. 106.
122 Ibid.
123 Ibid.
124 Ibid.
125 Ibid.
126 Ibid.
127 Ibid.

procedural Criminal Law),[128] ensuring that they can seek redress and protection of their rights through a functioning legal system. It guarantees that victims, witnesses, and the accused have rights (of a substantive and procedural nature) and can participate effectively in the legal process.[129] The rule of law makes it mandatory for the state to provide mechanisms for individuals to seek remedies and challenge violations of their rights in the criminal justice system. Thus, one fundamental principle of Criminal Law, which the Constitution also proclaims, is the presumption of innocence,[130] regulated in greater detail by CPA. It asserts that individuals are considered innocent until proven guilty. This principle safeguards the rights of the accused by placing the burden of proof on the prosecution, requiring them to establish guilt beyond all reasonable doubt. The presumption of innocence ensures that individuals are not unjustly deprived of their liberty or stigmatised by mere accusations.

Accountability is a crucial component of the rule of law and Criminal Law. The rule of law demands that those who violate the law, including those accused of committing criminal offences, be held accountable for their actions.[131] Criminal law provides the legal framework through the Penal Code for defining offences and establishing penalties for those who commit them. A transparent and fair criminal justice system achieves accountability by conducting impartial investigations, fair trials, and appropriate sentencing.

Criminal law seeks to ensure that the punishment for offences is proportional to the severity of the crime. According to the principle of proportionality,[132] penalties should neither be too lenient nor excessively harsh. This ensures that the punishment fits the offence and prevents arbitrary or unjust sentencing. By adhering to the principle of proportionality, Criminal Law seeks to achieve a fair balance between the rights of the accused and the interests of society.

3. Case Study on the Breach of the rule of law by Tackling War Profiteering and Privatisation

The principle of legality is important in substantive Criminal Law. Among its various components or subprinciples is the prohibition of retroactivity. This principle has an exception known as the Principle of *Lex Mitior*.[133] The ECtHR has established that foreseeability encompasses the principle of *lex mitior*, regarding

128 Art. 29 of the Constitution.
129 For more about the rights of victims in criminal law see Bezić and Šprem, 2020, pp. 603–635; Stipišić, 2018, pp. 547–574; Ivičević Karas, Burić and Filipović, 2019, pp. 468– 489; Drožđan-Kranjčec, 2022.
130 Art. 28 of the Constitution.
131 Art. 20 of the Constitution.
132 Art. 67 of the Penal Code.
133 Art. 3(2) of the Penal Code.

Article 7 and non-retroactivity carries specific meaning. In *Scoppola v Italy*,[134] the Court recognised a legal development towards a European and international consensus that a more lenient penalty be applied even if it was enacted after the commission of the offence. The ECtHR referred to the Charter of Fundamental Rights of the European Union and the Statute of the International Criminal Tribunal for the former Yugoslavia.[135] Consequently, it confirmed that *lex mitior* aligns with the rule of law.[136] Therefore, in criminal cases, domestic courts must retroactively apply newly enacted laws if they benefit the accused.[137]

The Croatian Parliament expressed its intention (in 2010) to pass a special law aimed at recovering the funds and money that were deemed "lost" during the transition and privatisation process in Croatia. Consequently, an amendment to the Croatian Constitution was necessary. Article 31 of the Constitution, which deals with the Statute of Limitations and the principle of legality was amended.

In 2010, an Amendment to the Constitution introduced a new provision, paragraph 4, under Article 31 (principle of legality).[138] This addition states that criminal offences related to war profiteering and arising from the process of ownership transformation and privatisation, committed during the Homeland War and peaceful reintegration, war circumstances, and immediate threats to the independence and territorial integrity of the state, will not be subject to the Statute of Limitations. Any financial gain or property benefit (pecuniary advantage) obtained through these acts or associated with them will be subject to confiscation.[139]

After the constitutional amendment, the Law on Exemption from the Statute of Limitations for War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatisation was enacted in 2011 (Law on Exemption).[140] In 2011, the Law on Exemption, accompanied by a new Penal Code[141] and certain provisions thereof, played a crucial role in providing comprehensive clarifications and enabling the practical application of the recently amended constitutional provision.[142] The Law on Exemption outlined and identified specific criminal offences that are exempt from the Statute of Limitations.[143]

134 *Scoppola v Italy* (Application no. 10249/03), Judgment, 17 September 2009, paras. 105–108.
135 Lautehbach, 2013, p. 106.
136 Ibid.
137 Ibid.
138 Art. 5 of the Decision on the proclamation of changes to the Constitution of the Republic of Croatia OG, 76/2010; Novoselec and Novosel, 2011, pp. 603–619.
139 Novoselec, 2015, p. 437.
140 The Law on Exemption from the Statute of Limitations for War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatization, OG, 57/11.
141 Roksandić Vidlička, 2017, pp. 116–117.
142 Art. 31(4) of the Penal Code.
143 Novoselec, 2015, p. 437.

The 2004 Croatian State Audit Report[144] played a significant role in bringing the entire issue of transformation and privatisation into the spotlight. Following its publication, attempts were made to tackle the challenges associated with transformation and privatisation through legal measures. However, in terms of Criminal Law, the Report held limited relevance in numerous cases owing to the Statute of Limitations that had either already expired or was nearing expiry for the crimes committed during the transformation and privatisation process. This sentiment was echoed in the Transformation and Privatisation Revision Report.[145]

Acknowledging the aforementioned legal barrier, the importance of a criminal policy response was still acknowledged owing to the constitutional pursuit of social justice in Croatia and the imperative to address the irregularities exposed in the Report.[146] Thus, constitutional amendments were introduced in 2010 to enable the retrospective prosecution of all transitional economic crimes. These amendments sought to emphasise that the expected economic gains from transformation and privatisation had not been realised and had failed to substantially contribute to Croatia's economic development.[147]

The Decision Proposal to Amend the Constitution of Croatia[148] highlighted the adverse effects stemming from the process of transformation and privatisation. These effects included a rise in domestic and foreign debt, a substantial increase in unemployment, the disproportionate enrichment of certain individuals, and unjust impoverishment of many. It resulted in a decrease in real wages and pensions in relation to the cost of living, among other consequences.[149] In light of these circumstances, the proponents of the idea emphasised that while the Statute of Limitations is designed to uphold legal certainty for citizens, it should not enable perpetrators to legitimise the repercussions of their actions.[150]

While the constitutional amendment sought to prevent perpetrators from exploiting the Statute of Limitations, the Law on Exemption has limited applicability, covering only specific cases.[151] This law addresses crimes related to privatisation and ownership transformation that occurred during the Homeland War, peaceful reintegration, warfare, and direct threats to the independence and territorial integrity of the state. Consequently, not all instances of privatisation and

144 Roksandić Vidlička, 2017, p. 115; Josipović, 2018, pp. 197–259.
145 Novoselec, Roksandić Vidlička and Maršavelski, 2015, pp. 198–217.
146 Final State Audit Office Report on Revision of Ownership Transformation and Privatization 2004, p. 41.
147 Roksandić Vidlička, 2017, p. 115; see also Roksandić Vidlička, 2019, pp. 436–473; see also Roksandić Vidlička, 2014, pp. 1091–1119.
148 Decision Proposal to Amend the Constitution of Croatia 2009, p. 8 [Online]. Available at: https://www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080001/PROMJENA%20USTAVA%20RH.pdf (Accessed: 15 May 2023).
149 Novoselec, 2015, pp. 437–451.
150 Decision Proposal to Amend the Constitution of Croatia 2009, p. 8.
151 Roksandić Vidlička, 2017, pp. 116–117.

ownership transformation crimes are encompassed by this law.[152] Approximately 10 cases have been brought to trial by applying the Law on Exemption, attracting significant media attention. Doubts have been raised in relation to the number of crimes and cases that should have been addressed under the Law on Exemption.[153] Roksandić Vidlička suggested that there could be over 61 cases awaiting prosecution based on available information. The Law on Exemption from the Statute of Limitations could potentially apply to 116 cases currently under investigation or in criminal proceedings.[154] These findings raise concerns as they contradict the stated purpose of amending the Constitution to prevent perpetrators from taking advantage of the Statute of Limitations.[155]

Prosecutors have faced significant challenges in implementing a constitutional amendment pertaining to war profiteering crimes, especially concerning the principle of legal certainty.[156] Prosecuting these crimes presents difficulties owing to the passage of time, lack of reliable witnesses, defunct companies, destroyed financial records, and hurdles in gathering evidence. The introduction of retroactive amendments creates uncertainties in the legal framework, whereas financial accounting regulations establish specific timeframes for retaining accounting documents and financial reports.[157] The prosecution of transitional economic offences that took place over two decades ago involves legal obstacles, political opposition, and the potential for manipulation in prosecutorial selectivity.[158] Nonetheless, there have been instances where the Law on Exemption has been applied in prosecuting such cases.[159]

The prosecution's focus primarily revolved around former Croatian Prime Minister IS, who faced charges related to the abuse of his position rather than being directly linked to war profiteering or privatisation offences.[160] This case involved IS' indictment in 2011 for his involvement in a loan negotiation with Austrian bank Hypo Alpe-Adria-Bank International AG. While serving as the Croatian Deputy Minister of Foreign Affairs, IS reached an agreement with the bank to receive a commission of 7 million Austrian Schillings in exchange for facilitating their entry into the Croatian market. He was charged with war profiteering and abuse of office. The application of the Law on Exemption from the Statute of Limitations was relevant in this case as IS had exploited his position to gain illicit property during a challenging period in the country marked by high inflation

152 Ibid.
153 Ibid.
154 Ibid.
155 Ibid.
156 Ibid., p. 116.
157 Ibid.
158 Ibid.
159 Ibid.
160 Ibid., pp. 116–117.

and interest rates.[161] In September 2011, IS faced separate charges for allegedly accepting a €10 million bribe during his tenure as the Prime Minister of Croatia.[162] The bribe was purportedly received from ZH, the chairman of the management board of Hungarian oil company MOL, in exchange for granting control over the Croatian oil company INA to MOL.[163] The indictment asserted that the deal was made in 2008, with the bribe being offered in return for taking action to amend the Shareholder's Agreement. Both sets of charges were consolidated into a single trial, and the verdict was delivered on 20 November 2012. IS was found guilty of abusing his position for personal gain rather than serving the country's best interests. The judgement delivered a strong message on the significance of public office being carried out for the benefit of society, highlighting the detrimental impact of IS' actions on Croatia's reputation.[164] Consequently, he was sentenced to eight-and-a-half years of imprisonment (2014).[165] The verdict in this case was challenged before the Constitutional Court of the Republic of Croatia, and the Court overturned the initial ruling (2015).[166] The primary reason for this decision was the courts' inability to provide justification for the application of the relevant Penal Code and the Law on Exemption.[167] The courts failed to assess whether the Statute of Limitations for the underlying criminal offence had expired and to determine the proper application of the Law on Exemption in such circumstances.[168] The Constitutional Court pointed out that the lower courts failed to determine whether the supplementary elements outlined in Article 7(1) of the Law on Exemption were applicable to the specific case.[169] The Constitutional Court had a significant role in interpreting the Constitution, especially Article 31(4), and in overturning this case. The case concluded recently. The former Croatian Prime Minister was found not guilty in the Hypo case (not final at the time of writing), but received a prison sentence of six years for the INA-Mol affair (one of the cases elaborated upon previously). Having faced multiple proceedings over the course of the past 13 years (with a total of 5 cases, 3 of which resulted in guilty verdicts and reached their final decisions), it became necessary to consolidate sentences from all conclusive judgements. The consolidated sentence was 18 years of imprisonment. He was obligated to reimburse HRK 34 million (equivalent to approximately EUR 4.5 million).[170]

161 Ibid., p. 117.
162 Ibid., p. 118.
163 Ibid.
164 Ibid.
165 Croatia Supreme Court decision, Kž- Us 94/13, 3 April 2014.
166 Constitutional Court Decision, U-III-4149/2014 of 24 July 2015.
167 For more see Derenčinović, 2015, pp. 7–14. For the "dissenting opinion", a different, standpoint see the argumentation in Đurđević, 2018, pp. 261–302.
168 Constitutional Court Decision, U-III-4149/2014 of 24 July 2015, pp. 34–43.
169 Ibid.
170 Jakelić, 2023; Dešković, 2023 and finally *Visoki kazneni sud smanjio S. kaznu za osam mjeseci*.

Roksandić Vidlička considered this Law on Exemption a legal instrument that reflects Criminal lLw cases involving transitional justice. However, she stated that the use of retroactive Criminal Law in cases of transitional justice, which involves addressing human rights violations and establishing accountability during periods of conflict or repression, raises concerns regarding the rule of law.[171] Thus, the retroactive application of Criminal Law is considered the "law of last resort" and should be used sparingly when other means of addressing the issue have proven inadequate.[172] One main concern is the potential for injustice resulting from prosecutorial selectivity. Prosecutors have discretionary power to choose the cases they want to pursue and individuals they want to prosecute. In transitional justice contexts, this selectivity can be influenced by political factors, biases, and/or limited resources, leading to an uneven application of justice. This approach undermines fairness, equality, and the rule of law, which are crucial for building a just and stable society.[173]

According to Lautenbach, the ECtHR has recognised that the right not to be punished without a previously enacted law includes considering statutory limitation periods.[174] In *Kononov v. Latvia*, the ECtHR assessed whether domestic law could serve as a valid legal basis for a conviction.[175] It concluded that the statutory limitation periods had definitively expired.[176] It observed that limitation periods exist to ensure legal certainty.[177] Therefore, punishing the applicant nearly half a century after the expiry of a limitation period goes against the principle of foreseeability.[178] Previous ECtHR judgements have emphasised that foreseeability entails that punishment should not exceed the boundaries set by the legal provision that renders the act punishable. The Court has stressed the importance of adhering to limitation periods as they contribute to legal certainty.[179]

Cvitanović, Derenčinović, and Dragičević Prtenjača[180] have emphasised how efforts to address the 'transitional injustices' stemming from war profiteering and criminal acts in the process of conversion and privatisation through constitutional amendments in 2010 and the Law on Exemption have proven to be entirely unsuccessful.[181] These attempts have caused significant harm, the full extent of which may only become apparent over time. The retroactive prosecution of criminal offences from the conversion and privatisation process and war profiteering,

171 Roksandić Vidlička, 2017, p. 6.
172 Ibid.
173 Ibid.
174 Lautehbach, 2013, p. 106.
175 *Kononov v. Latvia* (Application no. 36376/04), Judgment, 17 May 2010, paras. 142–146.
176 Ibid.
177 Lautehbach, 2013, p. 106.
178 Ibid.
179 Ibid.
180 Cvitanović, Derenčinović and Dragičević Prtenjača, 2019, p. 481.
181 Ibid.

which occurred approximately 21 to 29 years ago and fall outside the Statute of Limitations, has violated a fundamental principle of substantive Criminal Law, namely the principle of legality.[182] This violation encompasses the prohibition of retroactivity related to extended statutes of limitations and the temporal nature of the Law on Exemption and the principles of legality and legal certainty.[183] The principle of legality is a cornerstone in Criminal Law and a fundamental aspect of upholding the rule of law and safeguarding human rights.[184] International bodies, such as the ECtHR, consider the principle of legality a non-derogable right. By introducing the concept of non-statute barred criminal offences of war profiteering into Croatian Criminal Law, the violation of this principle has called into question the principles of legality and legal certainty based on the rule of law, and has created uncertainty owing to the vague and ambiguous nature of the implementing legislation (Law on Exemption), which fails to adhere to the principle of *lex certa*.

The principle of legality protects against arbitrary actions by competent authorities, including legislators as lawmakers and the judiciary, including courts and the state attorney's office as enforcers. It serves as a foundation for the actions of these bodies in implementing and applying substantive Criminal Law. Several other important constitutional principles, such as equality and justice, have been disregarded, leading to negative consequences for the state of criminal justice, particularly in terms of the public's perception of the judiciary's effectiveness.[185]

Roksandić Vidlička noted that transitional justice processes involve various mechanisms beyond criminal prosecution, such as truth commissions, reparations programmes, and institutional reforms.[186] She explained that these approaches aim to address the broader societal impact of past human rights abuses while balancing the need for justice and reconciliation. Relying solely on criminal prosecution may neglect these important aspects of transitional justice.[187] Considering the complexities of each unique transitional context, a comprehensive approach is needed to balance justice, accountability, and the rule of law while avoiding further injustices.[188] Despite the legal changes, the number of prosecutions and scope of the law's applicability suggest ongoing challenges in addressing war profiteering and privatisation offences committed during specified periods.

Hungary had a similar case. However, in 1993, the Constitutional Court of Hungary declared a law that aimed to retroactively exempt criminal offences committed during communist rule from the Statute of Limitations unconstitutional.[189]

182 Ibid.
183 Ibid.
184 Ibid.
185 Ibid.
186 Roksandić Vidlička, 2017, p. 6.
187 Ibid.
188 Ibid.
189 VC, 2009, para. 16.

The Court's rationale was based on the violation of the principle of legality, which is safeguarded by the Hungarian Constitution. It determined that retroactively abolishing the Statute of Limitations after it had already begun is inconsistent with this principle.[190] However, the Court identified two exceptions to this prohibition: First, if the law in force at the time of the offence explicitly stated that the Statute of Limitations did not apply,[191] and second, if the offence constituted a crime against humanity or war crime, the obligations under international treaties would take precedence.[192]

According to the Opinion of the Venice Commission, which was requested by Hungary regarding the fourth amendment to the Hungarian Constitution in 2013, the provision in the constitutional amendment regarding the non-obsolescence (concept of non-statute barred offenses or criminal offences which have no statute of limitations) nature of 'inhuman crimes committed against the Hungarian people during the socialist and communist dictatorship' is deemed unacceptable.[193] The Venice Commission concluded that 'provisions regulating this must at least allow for sufficient flexibility with regard to proportionality, taking into account the individual circumstances of each concrete case'.[194] The Commission expresses concerns that incorporating lustration measures into the Constitution after a significant period since the democratisation process began could potentially prioritise retaliation over democracy.[195] Ochoa and Wistrich noted that 'the prompt enforcement results in greater deterrence'[196] and 'the incremental value of deterrence obtained by the pursuit of old claims is likely to be minimal'.[197] According to them, the core function of the law, especially Criminal Law is to influence behaviour, with a primary focus on deterrence rather than compensation while swift enforcement plays a pivotal role in enhancing deterrence.[198] Immediate punishment is more effective in deterring wrongdoing when compared to delayed consequences, and any delay in imposing penalties provides wrongdoers with the opportunity to commit more offences before facing the deterrent effects of punishment. [199] The pursuit of older claims for the sake of deterrence yields minimal benefits, as the wrongdoer may have reformed or offences that are more recent can be addressed more efficiently and economically. [200]

190 Ibid.
191 Ibid.
192 Ibid.
193 VC, 2013, paras. 27–29.
194 Ibid., para. 29.
195 Ibid., paras. 27–29.
196 Ochoa and Wistrich, 1997, p. 492.
197 Ibid.
198 Ibid.
199 Ochoa and Wistrich, 1997, p. 492.
200 Ibid.

The application of the Law on Exemption raises important questions regarding the legal nature of the Statute of Limitations and thus forms the crux of the matter. In Croatia, there are varying perspectives on whether the Statute of Limitations is classified as part of substantive or procedural Criminal Law, or if it is mixed, encompassing both elements.[201] If it is considered substantive Criminal Law or mixed, the principle of legality must be obeyed. However, if it is purely procedural, the principle of legality cannot be applied. At the time of writing, the Statute of Limitations in Croatia was mixed. Following the amendment of the Croatian Constitution, especially the provision that upholds legality vis-à-vis the enactment of the Law on Exemption, and the introduction of the Law on Exemption, which explicitly deals with the Statute of Limitations for specific types of criminal offences, it can be inferred that all pertinent aspects have been duly addressed. Therefore, the principle of legality and its subprinciple, the prohibition of retroactivity, should be applied in this context.

The proponents of this unprecedented solution in contemporary comparative Criminal Law did not consider the fact that 'correcting' something that transpired almost 21 to 29 years ago (that is, 20 years until the passing of the Exemption Act) through the delayed administration of justice actually leads to injustice. This reasoning is further supported by the Venice Commission,[202] which concluded in the case of lustration in Hungary that delayed implementation of the law and justice, owing to the passage of a significant amount of time, has the opposite effect and violates the principles of fairness[203] and the rule of law.

4. Concluding remarks

The role of the rule of law is important in maintaining a just and orderly society and outlines the principles that are fundamental to the rule of law such as equality before the law, legal certainty, accountability, and access to justice. The Croatian Constitution plays a significant role in upholding the rule of law. Article 3 explicitly establishes the constitutional order's highest values, including the rule of law. Article 5 stipulates the principle of constitutionality and legality. Article 31 regulates the principle of legality, which requires everyone to adhere to the Constitution and the law and to respect the legal order of the Republic of Croatia. The role of the Constitutional Court in upholding constitutionality and legality in Croatia

201 Dragičević Prtenjača and Vejnović, 2016, pp. 94–141.

202 See also European Commission for Democracy Through Law (Venice Commission) – Report 'Lustration: the Experience of Hungary' by Prof. Dr Andras Zs. Varga (Judge at the Constitutional Court of Hungary, Member, Hungary, Strasbourg, 19 November 2015 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2015)026-e (Accessed: 2 July 2023).

203 Cvitanović, Derenčinović and Dragičević Prtenjača, 2019, p. 481.

is important. The Court plays a significant role in interpreting the Constitution, including the highest values of the constitutional order. It defines the principle of constitutionality and legality and emphasises the importance of the separation of powers as a key element of the rule of law.

The rule of law and Criminal Law are interconnected, mutually reinforcing, and underpin the functioning of a just and democratic society. The rule of law ensures that Criminal Law is applied consistently, fairly, and with respect for individual rights. Criminal law upholds the rule of law by providing the legal framework for holding individuals accountable, safeguarding individual rights, and maintaining social order through various principles. One of the most important principles is the principle of legality, which requires that all aspects related to criminal offences be clearly defined and made accessible to everyone. By adhering to these principles, societies can foster a justice system that respects all individuals' rights and liberties while effectively addressing and preventing criminal behaviour. However, Croatia amended the Constitution to prevent perpetrators from benefiting from criminal offences mainly of an economic nature committed during ownership transformation and privatisation, with the argument that the Statute of Limitations cannot be an obstacle for non-prosecution, thus promoting social justice. Croatia enacted the Law on Exemption in 2011. It offers doubtful solutions that were not previously known to Croatian Criminal Law (which is a part of the continental law system). This Law enables the retroactive prosecution of specific crimes associated with privatisation and ownership transformation, which goes against the principle of legality and the prohibition of the retroactive application of the law. Unlike Hungary, which did not take a similar approach, this law stands out as an exceptional example worldwide, and it can be inferred that it does not align with the principles of the rule of law.

Bibliography

- Bezić, R., Šprem, P. (2020) 'Zaštita žrtava u kaznenom postupku – praktična implementacija direktive 2012/29/EU', *Hrvatski ljetopis za kaznene znanosti i praksu*, Zagreb, Hrvatsko udruženje za kaznene znanosti i praksu, 27(2), pp. 603–635.
- Craig, P. (2019) 'Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy' in Shaffer, G., Ginsburg, T., Halliday, T.C. (eds.) *Constitution-Making and Transnational Legal Order*. Cambridge: Cambridge University Press, pp. 156–187; https://doi.org/10.1017/9781108561792.006.
- Cvitanović, L., Derenčinović, D., Dragičević Prtenjača, M. (2019) 'Nezastarijevanje ratnog profiterstva u raljama načela zakonitosti, pravednosti i učinkovitosti', *Zbornik Pravnog fakulteta u Zagrebu*, 69(4), pp. 459–486; https://doi.org/10.3935/zpfz.69.4.01.
- Derenčinović, D. (2015) 'Doprinos Ustavnog suda Republike Hrvatske u definiranju okvira za tumačenje ustavne odredbe o nezastarijevanju ratnog profiterstva i kaznenih djela počinjenih u vrijeme pretvorbe i privatizacije', *Sveske za javno parvo,* 6(21), pp. 7–14.
- Dešković, M. (2023) 'Konačno je poznato do kada će Sanader biti iza rešetaka, iz zatvora bi mogao izaći s 80 godina', *Jutarnji list,* 20 January [Online]. Available at: https://www.jutarnji.hr/vijesti/crna-kronika/konacno-je-poznato-do-kada-ce-sanader-biti-iza-resetaka-iz-zatvora-bi-mogao-izaci-s-80-godina-15297317 (Accessed: 1 July 2023).
- Dragičević Prtenjača, M., Vejnović, A. (2016) 'Ratio legis zastare u kaznenom pravu s naglaskom na problematiku njezine pravne naravi', *Godišnjak Akademije pravnih znanosti Hrvatske,* 7(1), pp. 9–141.
- Drožđan-Kranjčec, A. (ed.) (2022) *Žrtve kaznenih djela u hrvatskom kaznenopravnom sustavu – rezultati istraživanja i iskustva iz prakse,* Horvat tisak [Online]. Available at: https://pzs.hr/wp-content/uploads/2023/02/Zrtve-kaznenih-djela-u-hrvatskom-kaznenopravnom-sustavu-rezultati-istrazivanja.pdf (Accessed: 4 September 2023).
- Đurđević, Z. (2018) 'Nedostatni i irelevantni ustavni razlozi za ukidanje kaznenih presuda po ustavnoj tužbi bivšeg predsjednika vlade RH u predmetu "INA MOL" (Odluka Ustavnog suda RH U-III-4149/2014)', *Hrvatski ljetopis za kaznene znanosti i praksu,* Zagreb, Hrvatsko udruženje za kaznene znanosti i praksu, 25(2), pp. 261–302 [Online]. Available at: https://hrcak.srce.hr/file/319615 (Accessed: 1 July 2023).
- European Commission (2023a) 'The 2023 EU Rule of Law Report, (European Commission, COM(2023) 800 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (2023 Rule of Law Report) Brussels' *European Commission,* 5 July [Online]. Available at: https://commission.europa.eu/system/files/2023-07/1_1_52565_communication_rol_en.pdf (Accessed: 07 July 2023).
- European Commission (2023b) 'European Rule of Law mechanism? Methodology for the preparation of the Annual Rule of Law Report' 5 July [Online]. Available at: https://commission.europa.eu/system/files/2023-07/63_1_52674_rol_methodology_en.pdf (Accessed: 4 September 2023).

- Horvatić, Ž., Derenčinović, D., Cvitanović, L. (2016) *Kazneno pravo – opći dio I – Kazneno pravo i kazneni zakon*. Zagreb: Pravni fakultet Sveučilišta u Zagrebu.
- Ivičević Karas, E., Burić, Z., Filipović, H. (2019) 'Prva iskustva policijskih službenika u provođenju pojedinačne procjene žrtava kaznenih djela', *Policija i sigurnost,* 28(4), pp. 468–489.
- Jakelić, I (2023) 'Sud odlučio: Sanader zbog afera Planinska, Ina-MOL i Fimi media u zatvoru mora ukupno biti 18 godina', *Vecernji list,* 10 January [Online]. Available at: https://www.vecernji.hr/vijesti/sud-odlucio-da-sanader-zbog-afera-planinska-ina-mol-i-fimi-media-u-zatvoru-mora-ukupno-biti-18-godina-1650710 (Accessed: 1 July 2023).
- Josipović, I. (2018) 'Zastara u predmetima ratnog profiterstva i kriminala u pretvorbi i privatizaciji i kontroverze nakon odluke Ustavnog suda u predmetu Hypo', *Hrvatski ljetopis za kaznene znanosti i praksu*, Zagreb, Hrvatsko udruženje za kaznene znanosti i praksu, 25(2), pp. 197–259.
- Lauc, Z. (2016) 'Načelo vladavine prava u teoriji i praksi', *Pravni vjesnik*, 32 (3–4), pp. 45–67.
- Lautenbach, G. (2013) *The Concept of the Rule of Law and the European Court of Human Rights*. Oxford: Oxford University Press, https://doi.org/10.1093/acprof:oso/9780199671199.001.0001
- Lukić, S. (2023) 'Prekida se štrajk u pravosuđu: Članstvo podijeljeno, sindikat prihvatio ponudu Vlade!' *Jutarnji list* [Online]. Available at: https://www.jutarnji.hr/vijesti/hrvatska/prekida-se-strajk-u-pravosudu-clanstvo-podijeljeno-sindikat-prihvatio-ponudu-vlade-15359244 (Accessed: 28 July 2023).
- Novoselec, P. (2015) 'Nezastarijevanje kaznenih djela vezanih uz ratno profiterstvo i proces pretvorbe i privatizacije -Osvrt na odluku Ustavnog suda u "slučaju Hypo"', *Hrvatski ljetopis za kazneno pravo i praksu*, Zagreb, 22(2), pp. 437–451.
- Novoselec, P. (2016) *Opći dio kaznenog prava*. 5th edn. Osijek: Sveučilište Josipa Jurja Strossmayera u Osijeku, Pravni fakultet Osijek.
- Novoselec, P., Novosel, D. (2011) 'Nezastarijevanje kaznenih djela ratnog profiterstva i kaznenih djela iz procesa pretvorbe i privatizacije', *Hrvatski ljetopis za kazneno pravo i praksu*, Zagreb, Hrvatsko udruženje za kaznene znanosti i praksu, 18(2), pp. 603–619.
- Novoselec, P., Roksandić Vidlička, S., Maršavelski, A. (2015) 'Retroactive prosecution of transitional economic crimes in Croatia – testing the legal principles and human rights' in Van Erp, J., Huisman, W., Walle, G. V. (eds.) *The Routledge Handbook of White-Collar and Corporate Crime in Europe*. London, New York: Routledge, pp. 198–217.
- Omejec, J. (2013) 'Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava', *Strasbourški acquis.* Zagreb: Novi informator.
- Ochoa, T.T., Wistrich, A. (1997) 'The Puzzling Purposes of Statutes of Limitation', *Pacific Law Journal*, 28(3), pp. 453–514 [Online]. Available at: http://digitalcommons.law.scu.edu/facpubs/81 (Accessed: 4 September 2023).
- Radbruch, G. (1946) 'Statutory Lawlessness and Supra-Statutory law', *Oxford Journal of Legal Studies*, 26(1), translated by Paulson, B. L., 2006 [Online]. Available at: https://is.muni.cz/el/law/jaro2008/MP218Zk/um/Radbruch_-_Statutory_Lawlessness.pdf (Accessed: 29 May 2023); https://doi.org/10.1093/ojls/gqi041.

- Roksandić Vidlička, S. (2014) 'Possible Future Challenge for the ECtHR?: Importance of the Act on Exemption and the Sanader Case for Transitional Justice Jurisprudence and the Development of Transitional Justice Policies', *Zbornik Pravnog fakulteta u Zagrebu*, 64(5–6), pp. 1091–1119.
- Roksandić Vidlička, S. (2017) *Prosecuting Serious Economic Crimes as International Crimes – A New Mandate for the ICC?* Berlin: Duncker & Humblot.
- Roksandić Vidlička, S. (2019) 'Tranzicijska pravda kao metoda ostvarenja ustavnih vrednota uz analizu prakse Europskog suda za ljudska prava i odluke Ustavnog suda u predmetu Hypo' in Turković, K., Munivrana Vajda, M., Dragičević Prtenjača, M. (eds.) *Liber Amicorum Petar Novoselec- Kazneno pravo: sinergija teorije i prakse*. Zagreb: Zbornik radova u čast profesora Petra Novoselca, Pravni fakultet Sveučilišta u Zagrebu.
- Security Council (2004) 'The rule of law and transitional justice in conflict and post-conflict societies' *UNHCR The UN Refugee Agency,* 23 August [Online]. Available at: https://www.unhcr.org/media/rule-law-and-transitional-justice-conflict-and-post-conflict-societies-report-secretary (Accessed: 1 July 2023).
- Smerdel, B. (2013) *Ustavno uređenje europske Hrvatske*. Zagreb: Narodne novine.
- Stein, R. A. (2019) 'What Exactly Is the Rule of Law?', *Hous. L. Rev.*, 57(1) [Online]. Available at: https://houstonlawreview.org/article/10858-what-exactly-is-the-rule-of-law (Accessed: 5 July 2023).
- Stipišić, Lj. (2018) 'Procesni aspekti ispitivanja djece žrtava i recentna sudska praksa u svjetlu direktive 2012/29/EU', *Hrvatski ljetopis za kaznene znanosti i praksu*, Zagreb, 25(2), pp. 547–574.
- VC (no date) 'Rule of Law' *Council of Europe* [Online]. Available at: https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN (Accessed: 29 May 2023).
- VC (2009) *Amicus Curiae Brief for the Constitutional Court of Georgia on the Retroactivity of Statutes of Limitation and the Retroactive Prevention of the Application of a Conditional Sentence,* 16 March [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)012-e (Accessed: 2 July 2023).
- VC (2011) *Report On The Rule of Law,* 4 April [Online]. Available at: https://rm.coe.int/1680700a61 (Accessed: 22 October 2023).
- VC (2013) *Opinion on the Fourth Amendment to the Fundamental Law of Hungary*. 17 June [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2013)012-e (Accessed: 2 July 2023).
- Varga, Cs. (2021) *Rule of Law: Contesting and Contested*. Budapest: Ferenc Madl Institute of Comparative Law; https://doi.org/10.47079/2021.csv.rolcac.
- *Visoki kazneni sud smanjio Sanaderu kaznu za osam mjeseci* (2023) IUS-INFO, 03 May [Online]. Available at: https://www.iusinfo.hr/aktualno/dnevne-novosti/visoki-kazneni-sud-smanjio-sanaderu-kaznu-za-osam-mjeseci-54895 (Accessed: 1 July 2023).

- Decision Proposal to Amend the Constitution of Croatia 2009 (audio-visual recording, min. 19:25) [Online]. Available at: https://www.sabor.hr/hr/prijedlog-odluke-o-pristupanju-promjeni-ustava-republike-hrvatske-s-prijedlogom-nacrta-promjene (Accessed: 30 November 2023).
- Venice Commission (2011) Final State Audit Office Report on Revision of Ownership Transformation and Privatization 2004.
- *Report on the Rule of Law* (2011) European Commission for Democracy through Law (Venice Commission) 86th plenary session (Venice, 25–26 March 2011), Study 512/2009, CDL-AD(2011)003rev. Strasbourg, 4 April 2011.
- European Commission (2023) The 2023 EU Rule of Law Report, (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (2023 Rule of Law Report; COM(2023) 800 final).
- *The Report to the Croatian Parliament on constitutionally unacceptable effects of the revised texts of the Constitution of the Republic of Croatia, Constitutional laws, laws, other regulations and general acts* U-X-80/2005, OG, 37/2011 [Online]. Available at: https://www.iusinfo.hr/zakonodavstvo/izvjesce-o-ustavnopravno-neprihvatljivim-ucincima-prociscenih-tekstova-ustava-republike-hrvatske-ustavnih-zakon-zakona-drugih-propisa-i-opcih-akata-1/clanak-1 (Accessed: 10 May 2023).
- UN Security Council (2004) The UN rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General [Online]. Available at: https://www.unhcr.org/media/rule-law-and-transitional-justice-conflict-and-post-conflict-societies-report-secretary (Accessed: 1 July 2023).

TANJA KARAKAMISHEVA-JOVANOVSKA*

The Challenges of the "Ever Closer Union" Concept and the Protection of the Sovereignty and Constitutional Identity of EU Member States – The Role of National Constitutional Courts and the EU Court of Justice in the Post-Westphalian Order of the Union

'The owl of Minerva spreads its wings only with the falling of dusk.'
Georg Wilhelm Friedrich Hegel

ABSTRACT: *The concept of an "ever closer Union" has been central to the European project since the Treaty of Rome in 1957. Initially focused on unity among European peoples, subsequent treaties have nuanced this idea, emphasising open and citizen-centric decision-making. This paper explores the evolving dynamics within the European Union, especially regarding the marginalisation of the European Parliament, recurring financial crises, and challenges in freedom, security, and justice. Recent geopolitical events, such as the war in Ukraine, intensified migration, and terrorist attacks within the EU, have catalysed these conflicts, prompting a renewed emphasis on national sovereignty. Against this backdrop, the paper analyses the shifts in the EU's constitutional framework, considering the Treaty of Amsterdam's addition of transparency and proximity to citizens. The Treaty of Lisbon reaffirmed the commitment to an "ever closer Union," aligning decisions with citizen concerns. However, crises, particularly those triggered by external events, have led to a re-evaluation of these principles. The paper contends that the EU's responses to crises have revealed tensions between supranational integration and member states' desire to safeguard national interests. As the Union navigates these complexities, understanding the evolving role of institutions like the European Parliament becomes crucial. By examining the interplay*

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of sovereignty, crisis response, and institutional dynamics, this paper contributes to the broader discourse on the future trajectory of the European Union.

■ **KEYWORDS:** sovereignty, constitutional identity, constitutional court, Court of Justice of the EU, subsidiarity, democracy

1. The EU as a Post-Westphalian Order: dilemmas and controversies

Determining the character of the EU has been an ongoing challenge, presenting dilemmas as old as the EU itself. The frequent comparisons of the EU with the Westphalian order, and later with the post-Westphalian order, underscore the need for a precise definition for the practical meaning of both terms. Notably, the fall of the medieval Respublica Christiana led to the formation of the so-called Westphalian system, named after the city, where in 1648, the peace treaties that ended the Thirty- and Eighty-Years' Wars were signed.

The Westphalian system was based on a set of state powers that recognised one another as independent and different. This system was seen as a structure of de facto interdependent states that accepted some basic principles in dealing with one another. These principles were provided in the system by the mutual recognition of sovereign actors, significance of the territory where on the sovereign actors insisted, and exclusion of external factors that might influence the state authorities.[1]

The Westphalian system was not considered closed and monocentric but as one that had respect for the territories of the states and their sovereign authority. In this context, we should mention that the Westphalian sovereignty differed from the previous imperialistic concept because the centralised power was dispersed within the pre-determined concentric circles. In the Westphalian period, the sovereignty of the state was always put in the context of the territory of the state, whereas in the post-Westphalian period, the sovereignty was seen through the functional prism of the power of its ruler. Considering that international law posits that states maintain the horizontal dimension of their sovereignty, in sense of the normative position that each country has sovereignty in its territorial borders and no other country can dictate what law will be applied in another country, it is a common impression that the absolute character of the sovereignty is in constant decline at all levels. In this sense, when talking about the post-Westphalian

1 The Westphalian state-centric system was based on sovereignty, sovereign independence and equality of the nation states, territorial integrity, equal rights and obligations of the states, and non-intervention in others' domestic affairs. Power was at the centre of this system to regulate inter-state relations in the absence of any higher systemic authority. See Krasner, 1996, p. 115; Kegley and Raymond, 2002, p. 132.

international system, wherein the EU order also finds its place, we can outline three constitutive entities.

In the globalisation era, national sovereignty is losing its meaning. National states, intertwined in different regional and international organisations, transnational and subnational structures, and multidimensional corporations, are losing their capacity to act as fully independent entities. Put differently, in the words of Wallace William[2]

> The world is shifting from a territorial world to a global world. This is apparent in Europe, where with the creation of the EU, member states are continuously losing sovereignty and borders are disappearing; the EU exemplifies a post-Westphalian state.

The size and scope of international relations are constantly increasing and grow into new areas, such as the protection of human rights and freedoms, migration, environmental protection, energy policies, democracy, and other spheres, which ensue from the process of national regulation and are then transferred to higher, transnational levels.

If the post-Westphalian order is most often introduced in theory as a mixture of constitutional and authoritarian order, then the logical question would be, 'What kind of order is the EU order?' Is it a combination of these two types? Notably, the EU, same as the post-Westphalian order, is not a reflection only of the constitutional principles for human rights, democracy, and rule of law, but there are clear principles from the authoritarian and arbitrary rule.[3] In this sense, we ought to mention certain activities of the European Commission and EU Court of Justice (CJEU), which are not regulated via the legislation, but these institutions still use them to foster their authority.

In this context, we should mention the forms and methods of the judicial and legal interpretation of the CJEU as well as their concrete application which are becoming an increasingly important factor in legal science and practice. They shed new light on the process of generating national and international judicial jurisdiction, and, we might say, especially in the creation of a new law on human rights and freedoms. Judges at the international level, through the application of interpretive methods and techniques in the process of the protection of human rights and other questions are increasingly becoming creators rather than enforcers of legal norms, although they never admit this openly. Legal science speaks increasingly more about "judeocracy" and "judicial legislation," when aiming for the better protection of the EU or international law.

2 Wallace, 1999.

3 Kreuder-Sonnen and Zangl, 2015.

Moreover, with regard to the work and place of the European Commission, we can notice certain theoretical and legal irregularities. Everywhere in Europe, including the EU, the domination of the executive over the legislative power is increasingly evident. This dominance undermines the strength of parliamentary democracy, and the parliament, from a powerful representative institution, due to its direct legitimacy obtained from the electorate, is transformed into a mere voting machine and a follower of the government as 'the head of the executive power.' The European Parliament in the EU is still without the right to legislative initiative, which is a political and legal nonsense. It is unacceptable for a legislative body to lack the right to a legislative initiative, but this is somehow possible in the EU. This right in the Union still belongs to the European Commission, and this seriously violates the principle of separation of powers and undermines the essence of the rule of law as a dominant principle in the Union.

The rule of law,[4] seen as the supremacy of legal norms with regard to the execution of power, or more specifically, the execution of power which was earlier related to the law, is disrupted with this distorted division and realisation of functions of the holders of that power. The formal concept of the rule of law implies not only compliance of legal norms with certain institutional requirements (such as the principle of division of power) but also protection of constitutionalism (the human rights and freedoms).

Besides these inconsistencies, there are many others regarding, for example, issues concerning sovereignty and constitutional identity, which, although are never mentioned in any of the founding EU treaties, have a great importance in the European narrative.

The term "constitutional identity" is not part of the EU founding treaties; however, in the last few decades, it has strongly shaken the Union and has become a key issue in the dispute between the CJEU and the constitutional courts of the member states. A particularly interesting state of dilemma in this context is which agency, court, or other organ would be competent to decide on the content of the constitutional identity in every specific case and at any given moment. According to some considerations, most often from the federalist and supra-nationalist groups, this issue ought to be left entirely to the CJEU, while others believe that this interpretative competence should fall directly under the authority of the national constitutional courts, considering that constitutional identity covers the identity of the national constitution. This opinion is in line with the national law of each country aimed at securing guarantees and mechanisms for the protection of its constitutional system in the context of Article 4 of the Treaty on the Functioning of the European Union (TFEU).[5]

4 Raz, 1995, p. 354.
5 Stumpf, 2020.

2. Sovereignty of the post-Westphalian order in the EU

In the post Maastricht era, most significant changes took place in the area of EU sovereignty, that is, with regard to the context of "divided" or "extracted" EU sovereignty, or, in the words of Joseph Weiler and his phrase "European *Sonderweg*," with reference to the practice that EU member states apply when they limit their national sovereignty in the absence of pan-European sovereign that will do this by force.[6]

Put differently, in the words of Neil MacCormick

> (to) the extent that the terminology of "divided sovereignty" is found valuable either rhetorically or analytically, it can be applied here, the sovereignty of the (European) Community's member states has not been lost but subjected to a process of division and combination internally.[7]

A contemporary understanding of sovereignty has been most vividly described by Robert Cooper, according to whom sovereignty is not an absolute right of the countries but much more than their "seat at the table" at some regional or international organisation.[8] This definition of sovereignty simultaneously entails the growing understanding of the fact that the EU will not lead to the transcendence of national sovereignty, as neo-functionalists thought after WWII.[9] The followers of the concept of "divided sovereignty" had different goals in its defence.

While some believed that this concept will be an antidote for the threats associated with national sovereignty, others believed that it was a window of opportunity for overcoming the weaknesses of the sovereignty in classic sense of the word. Accordingly, some authors put the conflicts related to "divided sovereignty" and modern sovereignty in close connection. The central aspect of the modern sovereignty concept is the difference in opinions regarding the question of how to institutionalise the principle of people's rule by considering the differences that exist from one country to the other regarding this institutionalisation process. The dilemma concerning sovereignty is particularly visible today because of the different economic, health, military, migration, and other crises that EU citizens and institutions have experienced. Different terms are used to explain the EU's need for a more integrative and inclusive approach in acting efficiently to deal with these crises. The application of the concepts "European sovereignty", "strategic autonomy", "digital sovereignty", "technological sovereignty", "open strategic

6 Weiler, 2003, p. 8.
7 MacCormick, 1999, p. 133.
8 Cooper, 2004.
9 Brack, Coman and Crespy, 2021, p. 6.

autonomy", and the "geopolitical (European) Commission"[10] comes because of the EU's need to protect its values and interests in a new, more resolute manner.

In this sense, we should mention that the concept of EU strategic sovereignty is used, as the EU is capable of deciding and acting in accordance with its own rules, principles, and values. This means that there should be no real contradiction between European sovereignty and the EU's promotion of multilateralism, respect for the rule of law, democracy, human rights, and market openness. However defined, these concepts point to the fact that the EU needs to secure its values and interests in new and more determined ways. Up to this point, everything is clear. But what disturbs the water vis-à-vis this influx of terminology and concepts is the dilemma of whether this type of EU sovereignty functions to protect the national sovereignty of each EU member country, or is it in merely inclined towards protecting EU supra-nationalism? Just recently, French President Macron, while speaking openly about "European sovereignty", stressed the need of increased European "strategic autonomy", particularly in the areas of defence, security, and digital technology.[11]

However, the pressure for preserving national sovereignty as a form of obligatory relations among the people/citizens and the state, or between the rulers and the ruled within national borders, bring us back to the endemic conflicts for which we still cannot find concrete solutions. In the last few years, sovereignty-related conflicts have been viewed as clashes between the national authorities and supra-national institutions. The "new" sovereignty-related conflicts are not only multi-dimensional but also multi-layered, calling on the EU policies while they take place within the institutional specifics of EU member countries.

In addition, the new sovereignty-related conflicts that occur at the national level because of the speedy transformation in the political life at higher levels demand fast and resolute *de lege ferenda* solutions to find a way out of the sovereignty dead-end. These solutions must be sought at the national level because the problems that shape the political EU life also find their roots in everyday political life in the member countries.

We must admit that this dilemma is very complicated, and we cannot expect a simple "yes" or "no" solution. The broad frame of the sovereignty concepts engendered different perspectives regarding the relations of power among the EU member states and supra-national institutions, as well as the types of policies within the EU. There are also many considerations regarding how the sovereignty-related conflicts influence the legislative results in the EU, particularly the issues concerning the changes in the founding EU treaties. Assumedly, the main crossroads regarding sovereignty was paved by the German Constitutional Court in 1993, with its discussion on the 'no demos thesis' in the EU. According

10 Fiott (ed.), 2021.
11 Lefebvre, 2021.

to the German constitutional judges, there is no pan-European demos who would support the possibility of creating a fully democratic European community. The main problem with EU sovereignty, according to the constitutional judges, is the inability to locate the sovereignty in the Union, which will boost additional power to joint European institutions.[12]

Regarding sovereignty, we should also highlight the position of some other German legalists, who, even though were aware that the division of power among EU member countries on the one hand and EU institutions on the other hand could not be only viewed from the standpoint of the member states, still decided to defend the traditional idea of the undivided sovereignty of the member states by not only highlighting the need from changes in the sovereignty course but also introducing some specific conceptual changes. The basic idea for the changes is reflected in the fact that the sovereignty is no longer related, nor even identified only with public authorities, but with the so-called Kompetenz-Kompetenz doctrine, according to which the persons who decide on the division of competences among the central and regional/local authorities have sovereign rights. This, according to many, wise theoretical twists, is imagined when going in direction of the "protection of state sovereignty". This doctrine, as an invention of the jurisprudence of the German Constitutional Court, views EU sovereignty through the prism of EU member states who are still "Masters of the Treaties" and who have the competence of competence. According to the Court, the EU has only enforcement and secondary regulatory powers, which are not sufficient to denote the entity that holds them as sovereign.

The decision of the German Constitutional Court in the case the *Maastricht-Urteil*[13] goes in this direction. Here, the federal judges maintain their right to check whether the European institutions' acts are in line, or they cross the boundaries of the sovereign power given to them by the German state. However, a group of political theoreticians, contrary to the position of the German constitutional judges, claim that the EU should be viewed through the prism of plurality of different European demoi. In this sense, a European democracy should be defined as a union of peoples who govern together but not as one.[14]

It seems that this understanding is not in the line with the

> ever closer Union'concept, and one can even say that it is contrary to this concept, considering that the national sovereignties that

12 The specificity of the German "organic" or cultural conception of the demos which is mixed with citizenship and national belonging is different from the conception of the European demos understood in the post-national sense of belonging to a common set of political principles and institutions.

13 German Federal Constitutional Court, BVerfGE 89, 151, (Maastricht) of 12 October 1993, B/1/a.

14 Nicolaidis, 2013.

> originate from the national demoi do not need to be merged, pooled, or shared, but that they need to be exerted jointly. As Nicolaidis explains, there are two sides to the exercise of joint sovereignty in a democracy. On the one hand, the fact that the various people remain distinct implies that they preserve control (i.e., a right to veto or exit the system) over the constitutive rules of the polity. On the other hand, this also implies that the various European peoples are bound to exert their sovereignty 'only in accord with all the other members of the polity or demoi.[15]

How this would work in practice remains unclear, having in mind that the national parliaments of the member countries have been given increased capacity in the decision-making procedures to institutionalise their voice, as well as the voice of a heterogeneous European community. This leaves an impression that the concept of democracy lacks political or social support, and that the so-called common EU sovereignty cannot be put in operation as imagined, which questions the "ever closer Union" concept itself.

What is interesting at this moment regarding EU sovereignty is the testing of the frontiers of the different types of sovereignty visible in the everyday political and legal conflicts occurring on EU soil and which, in a long run, can prove to be rather destructive factors for the development of the EU order.

3. The concept of constitutional identity in the post-Westphalian order in the EU: The battle between the national constitutional courts and the CJEU

Today, the content of the "constitutional identity" of a particular EU member state is often protected through the model of active and cooperative dialogue between supranational courts and national constitutional courts. Another more unacceptable way is by demonstrating a pronounced uniqueness of the national constitutional identity content of one versus the other member states. The constitutional identity issue is a topic of great importance for modern constitutional democracy. Its legal conceptualisation from the perspective of European integration remains insufficiently analysed. There is an identification of constitutional and/or national identity through different interpretations of Article 4(2) of the EU Treaty (TEU).

Although the said article is decisive and refers to the national identity of the member states, the constitutional courts of Hungary, Germany, Spain, Poland, and Italy present a different interpretation.

15 Ibid.

As already mentioned, formally, constitutional identity is not part of Article 4(2) of the TEU. However, the national constitutions of EU member states do not contain a strict constitutional provision that defines constitutional identity.[16] This notion is often the product of the constitutional interpretation of national constitutional courts to establish precise boundaries between the national constitution, on the one hand, and the application of EU law in domestic legal systems, on the other.

The position of the CJEU is certainly important in this context. Article 4(2) of the TEU has been active since 2009, when the Treaty of Lisbon entered into force, albeit the issue of national identity has been inherent ever since the Maastricht Treaty. Although Article 4(2) of the TEU does not contain the values that constitute national identity, the range of values is not limited, and each EU member state has the right to decide which values are important to it to enter into the content of this principle. EU member states often rely on this article, especially in cases related to the protection of official national languages, or, for example, the need to abolish nobility in Austria, for which the CJEU has emphasised the need to respect "national identity."

First, the positions of the constitutional courts of Germany, Hungary, Italy, and Poland[17] on constitutional identity will be briefly addressed, whereafter the case law of the CJEU is considered.[18]

16 However, in the constitutional practice of four EU member states, arisen as a result of the constitutional courts' activism, the term "constitutional identity" is mentioned. The concept of Germany's constitutional identity was first mentioned in 1928 in the theories of Karl Schmidt and Karl Belfinger to justify the limits of the constitutional amendments to the Weimar Constitution. Under the German regime, the legal doctrine of constitutional identity was restored, which was used by the Constitutional Court versus EU law.

17 The term "constitutional identity" is not defined in the Constitution of Poland, but it was developed and upgraded by the Constitutional Court. Constitutional identity has grown normatively and descriptively into a concept of the Polish constitutional jurisprudence. The tribunal used the concept of constitutional identity to define the boundaries of competencies shared with the EU as well as to mark axiological similarities, equivalents, or convergences between the EU and the Polish legal order.

18 'According to the three countries that have already developed and applied the legal term "constitutional identity" in the EU, there are three models: the German model of confrontation with the model of EU law (Lisbon decision, BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, OMT reference decision, BVerfG, 14 January 2014, 2 BvR 2728/137), the Italian model of cooperation with the embedded model of identity (Decision No. 24/2017 of the ICC8), and the Hungarian confrontational individualist model (22/2016 (XII. 5.) Decision of the HCC, Dissenting Opinion to 23/2015 (VII. 7.) Decision of the HCC9), two positions (EU-friendly and antagonistic), three legal procedures (against EU and international human rights law and constitutional amendments), and a communication channel (preliminary procedure) where one can identify which "constitutional identity" has legal significance. The term constitutional identity refers to the "identity of the Constitution." (*BVerfG,* 2009, Judgment of the Second Senate, para. 208).' Quoted according to: Tímea Drinóczi, 2020: 'The identity of the constitution and constitutional identity Opening up a discourse between the Global South and GlobalNorth.'

The term "identity of the Constitution" was first mentioned by the Federal Constitutional Court of Germany in its decision on the Lisbon Treaty, although the Court did not offer a specific description.[19]

The "identity of the Constitution" as a term differs from the "identity of the Federal Republic of Germany", which, in turn, is practically equated with the sovereignty of the state. The German Constitutional Court (BVerfG) has ruled that the content of Germany's constitutional identity is in Article 23(1),[20] in the third sentence—the EU clause—and in Article 79(3), the article on "eternity clauses" of the German Constitution. With the creation of the EU, apart from the apparent abolition of sovereign German statehood, the German Constitutional Court has reaffirmed only a few specific powers that belong to the national sovereign government and the sovereign people. These competencies are related to the "eternity clauses" where the "identity of the Constitution of the Federal Republic of Germany" is visible.

It is interesting to note that in the preliminary reference decision of 2014 related to Outright Monetary Transactions (OMT), the German Constitutional Court has confirmed that despite the need for its compliance with EU law, the Court has the right to assess it from the aspect of respecting the identity of the Constitution. According to the Court, democracy as a constituent element of the identity of the Constitution and the national identity of Germany would be violated if Parliament renounced budgetary autonomy. The Constitutional Court recalled that the CJEU was obliged to ensure proportionate protection of national identity.

In the context of judicial consistency towards this position is its decision regarding the application of the European Arrest Warrant (EAW). It should be recalled that it was the German Constitutional Court that did not allow the application of the order with the explanation that it meant a violation of human dignity.[21] A detailed analysis of the importance of the "identity of the German Constitution" was made by the Constitutional Court in 2016 when it examined whether

19 Lisbon decision, BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE, 5. 'In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area.' Bofill, 2013.

20 Art. 23: [European Union – Protection of basic rights – Principle of subsidiarity]. Regional group(s) 1. With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paras. (2) and (3) of Art. 79 [Online]. Available at: https://www.constituteproject.org/constitution/German_Federal_Republic_2014.pdf?lang=en. (Accessed: 10 July 2023).

21 Drinóczi, 2020.

the constitutional principles contained in Article 79(3), together with those of Articles 1 and 20 of the German Constitution could be violated by the transfer of the sovereign power of the German parliament in EU institutions.

A similar analysis was made by the Hungarian Constitutional Court in 2016, which in the context of the government's policy to disapprove the refugee quota, arrived from official Brussels as a legal obligation.[22] A referendum on this issue was held in Hungary and the results were politically interpreted as the will of the majority of Hungarian citizens who opposed the admission of migrants in their country. The Hungarian authorities appropriately addressed this will in a constitutional amendment which did not get the approval of the required 2/3 majority in the Hungarian Parliament.

Immediately after the unsuccessful attempt with a constitutional amendment to prevent the acceptance of the migrant quota, the Constitutional Court of Hungary examined the possible violations of fundamental rights other than human dignity, also ruled by the German Constitutional Court. The Court included Hungary's sovereignty or Hungary's self-identification based on its historical constitution in the other fundamental rights.

The Court ruled that Hungary was obliged to respect the inviolable and inalienable fundamental rights of its citizens as a primary obligation. This obligation is mandatory not only in cases of internal legal transactions but also for all matters exercised jointly with EU institutions or other member states. The Hungarian Constitutional Court has set two precise limits in the exercise of the conferred or jointly exercised powers with the EU.

The first limit is the inviolability of Hungary's sovereignty and the second is the inviolability of the country's constitutional identity. The Constitutional Court considered that the CJEU should protect the constitutional identity of the member states on the principles of continuous cooperation, mutual respect, and equality of EU member states.

The Constitutional Court of Hungary has declared constitutional identity as a fundamental value identical to the constitutional identity of Hungary,[23] which entails a deeper concept than that of the German Constitutional Court. It is interesting to note that in Hungary, an exhaustive list of values that are included in the constitutional identity of the country has not been established, but the following are mentioned as general values: the rights and freedoms of citizens, division of powers, republican character of the state, respect for the autonomy of public law, freedom of religion, principle of legality, parliamentarism, equality of all before the law, respect for the independence of the judiciary, and respect for the

22 Council Decision 2015/1601 of September 22, 2015 [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1601&from (Accessed: 10 July 2023).

23 Varga, 2020.

rights of national minorities living in Hungary. These values are in fact universally accepted constitutional values.[24]

The Italian Constitutional Court used the term constitutional identity for the first time in Decision No. 24 of 2017 when it asked the CJEU to explain whether its action in the *Taricco* case left national courts with the power to disregard domestic legal norms even to the extent of disregarding the fundamental principle contained in the Constitution—the principle of legality.

The Italian Constitutional Court had earlier in 2014 ruled that the retroactive application of the institute of statute of limitations was prohibited, even though the statute of limitations in Italy is part of the substantive criminal law.

The Constitutional Court has held that the rule laid down in Article 325 of the TFEU is applicable only where it is in accordance with the constitutional identity of the member state where the assessment of such compliance falls within the jurisdiction of the national authority.[25]

Apart from the case of Lithuania for the protection of its official language, the case of Austria for the abolition of nobility,[26] in the context of the protection of the republican identity, the CJEU is known for other examples of cases where it has defended the national identity of member states. These are the case of Spain for the defence of the system of organisation of government at central, regional, and local levels,[27] the case of Italy for establishing rules for access to specific professions, as well as the case of Slovakia for the protection of statehood and sovereignty.

In 2004, in connection with the EU Constitutional Treaty, the Spanish Constitutional Court emphasised that the Spanish state, more specifically the Spanish nation, reserved the right to sovereignty, and that state sovereign power can be limited only if EU law is compatible with its fundamental national foundations, that being the identity of the Spanish constitution. This doctrine was later confirmed in the *Melloni* case.[28]

24 Drinóczi, 2020.

25 In the *Taricco II* judgment, the CJEU did not use the term "identity," but in accordance with EU law the more friendly language and approach of the Italian Constitutional Court which recognised that the principle *nullum crimen* and *nulla poena* is part of the common constitutional tradition of member states.

26 In the *Sayn-Wittgenstein* case, the CJEU upheld the Austrian Constitutional Court's assertion that the right to abolish the nobility was intended to protect the constitutional republican identity. The CJEU has agreed that the law on the abolition of nobility is a fundamental decision in favour of the formal equality of all citizens before the law.

27 Declaration of the Spanish Constitutional Court 1/2004. 13 December 2004. paras 37, 47, 50, 58.

28 The CJEU has ruled that Spain will not be able to extradite Mr Maloni if his conviction is open to review, as this would compromise the principle of the primacy and effectiveness of EU law.
[Online]. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=134203&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=234017 (Accessed: 26 June 2023).

An analogous line of reasoning is also followed in the practice of other Eastern European constitutional courts. Thus, emphasising the sovereignty of the Czech Republic and portraying the EU member states as "Masters of the Treaties," the Czech Constitutional Court concluded that the "material substance" of the Constitution took precedence over EU law.[29] This finding empowers constitutional courts to assess the compatibility of EU law with national/constitutional identity.

In this sense, the Polish Constitutional Tribunal, in its 2010 decision on the EAW, portrayed the EU as an international organisation of sovereign states, emphasising that the power deriving from the Polish constitutional identity could not be delegated, transferred nor alienated from the Union.[30]

It is worth mentioning that the British Supreme Court has also spoken openly about the value of the United Kingdom's constitutional identity. The position of this court was based on the concept that national sovereignty remained with the state, that is, the British Parliament.

In summary, the views of national courts formulate the doctrine of constitutional identity based on the principle of state sovereignty. However, the national identity contained in Article 4(2) of the TEU as a contrast should be seen as a gradation of the basic principles for which the EU as a multinational political community must show respect.

Despite the relatively small case law on this issue, the CJEU seems to accept the view that constitutional identity is part of the test of proportionality, or as *Werner Vandenbruwaene* puts it, 'the closer the question is to the essence of the "constitutional identity" of the member states, the greater the margin of discretion.'[31] It should be emphasised that the terms "constitutional identity" and "national identity" refer to the same obligation to EU institutions, which is an obligation to respect the core of the constitutional values of each member state separately.

However, it is a fact that the approach of the CJEU and that of national courts on this issue differs.

The term "national identity" in Article 4(2) of the TEU is used to determine whether the actions taken by EU institutions are legitimate, while the term

29 The position of the Czech Constitutional Court is more open to EU law, but still has some similarities with the German interpretation. The Court has recognized the principle of the EU conformist interpretation of constitutional law, but only in the event of a conflict between EU law and the Czech Constitution – especially in the area of its material core, when it should prevail. The identification of the "material core" of the Czech Constitution comes to the fore not only in terms of respect for EU law, but also in the part of the internal forum in declaring unconstitutionality with constitutional amendments.
[Online]. Available at: https://europeanlawblog.eu/2012/03/04/primacy-and-the-czech-constitutional-court/ (Accessed: 26 June 2023).

30 [Online]. Available at: http://www.europeanrights.eu/public/sentenze/Polonia-24novembre2010.pdf, pp. 22–23. (Accessed: 22 April 2023).

31 Vandenbruwaene and Millet, 2014, p. 503.

"constitutional identity," as defined in the jurisprudence of the highest national or constitutional courts, aims at defending the national constitution and national constitutionality. In constitutional theory, there are attempts[32] to connect the two concepts into one—national constitutional identity.

In addition to the aforementioned, in other EU member states, the issue of constitutional identity retains attention in theory and case law, and this must neither be neglected nor denied. In this regard, we would like to emphasise the thinking of François-Xavier Millet,[33] according to whom the French constitutional identity is not only based on the principles contained in the text of the Constitution but also encompasses elements related to the cultural and historical circumstances that are part of the country. Hence, national identity is considered part of constitutional identity, and vice versa.

Constitutional identity originates from the past, but at the same time, it entails obligations towards the future. The elements of constitutional identity are not established once and for all, they evolve, develop, and, in the case of France, are part of the French constitutional tradition. This term has no basis in the jurisprudence of the French Council of State, as in the previously mentioned member states, but it is part of the legal literature in which there are academic attempts to explain the principles inherent in the constitutional identity of France.

In European constitutional practice and theory, it is common for the use of the terms "national identity"[34] and "constitutional identity" to be considered interrelated. However, several advocates general[35] of the CJEU have applied the concept of constitutional identity to draw on what is protected by Article 4(2) of the TEU, albeit to be precise, the article refers to the national identity of EU member states, as inherent in their fundamental structures. Notwithstanding the identification, the connection between these two concepts is not based on any theory of legal interpretation, and it should be noted that the obligation arising from the TEU to

32 It refers to an analysis made in 2013 in which several authors, and even the editors of the text themselves, use the symbiotic concept of "national constitutional identity." According to Toniatti, constitutional identity is a "transformed use of sovereignty." According to Claes, however, the term is "closely related to the concepts of sovereignty, independence, and national democracy," while according to Bofill, the term is the primary source of political legitimacy. Retrieved from the publication: Arnaiz and Llivina (eds.), 2013, p. 25.

33 Ibid.; Vandenbruwaene and Millet, 2014.

34 Some legal authors explain "national identity" as a general principle of EU law that derives from the jurisprudence of the CJEU and is based on a clear legal position. Art. 4(2) of the TEU states that the Union shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security. The list of values covered by the principle of national identity is open and it is up to the member states to decide which values will be protected through their national identity. The CJEU assesses only the significance of national identity under EU law. Rzotkiewicz, 2016.

35 For example, Miguel Maduro [Online]. Available at: https://cadmus.eui.eu/bitstream/handle/1814/7707/EJLS_2007_1_2_8_POI_EN.pdf?sequence=1&isAllowed=y (Accessed: 20 June 2023).

respect the national identities of the member states is based on certain normative assumptions.

First, as already elaborated above, these are the claims of several national constitutional courts that EU law must be in accordance with the constitutional identity of the member state to be applied in the domestic legal order. The EU's obligation to pay attention to national identity is based on the Union's concern for the dignified treatment of member states in the multinational political community, while the preoccupation of national constitutional courts with constitutional identity is based on the specific concept of sovereignty protection. In other words, the demands for simultaneous respect for the national and constitutional identity of the EU member states stem from different theoretical narratives.

The drafters of the Treaty are considered to have had better reasons for stating the demand for respect for the national identities of the member states than for the sovereignty of the states or their constitutional identities. The Treaty focusses on national identity. In the absence of a theory of sovereignty with which both the EU and member states could agree, it is quite safe to expect that any reference in the Treaty to sovereignty would be a new source of tension or conflict within the Union.

In this respect, the EU differs from the US, where the US Constitution shares a widely accepted narrative of sovereignty. Namely, the federal constitution permanently divides the sovereignty between the nation and the federal states. It should be noted that also in the US, the agreement over the location of sovereignty between the rival theories did not come overnight.

Unfortunately, there are no signs in the EU that a common European theory of sovereignty would emerge, despite numerous valuable attempts by experts to develop such a theory. Contrary to this, as already stated above, national constitutional courts have repeatedly resorted to the rhetoric of constitutional identity based on the claim of state sovereignty, while the CJEU has not relinquished the idea that the Union also has sovereign status. In response to the conflict that exists between legal opinions in the EU and in the member states, a new approach capable of adapting/softening the rival sovereignty between the EU and the member states needs to be developed in European legal theory.

Giving a deliberate focus on EU sovereignty, the TEU focusses on national identity as an attractive alternative. In fact, Article 4(2) of the TEU prevents the attempt of the constitutional courts or the CJEU to rely not only on their own sovereignty but also on firm positions on supremacy. In other words, this article should have prevented the dominance of the losers' strategy and the development of a "zero-sum-game" which would facilitate the work of judicial bodies at both levels to accept this provision of the Treaty, and even to turn the identity clause as an instrument of judicial dialogue.

A third reason for favouring the approach of national identity over that of state sovereignty in treaties, as in the US, is the emergence of considerations that

the exclusive spheres of sovereign power that coexist at the national and state levels are gradually declining. According to Robert Schütze, the model of dual federalism was abandoned in the 20th century and replaced by the model of cooperative federalism.

In Schütze's view, cooperative federalism is also an appropriate constitutional theory for Europe. In the EU, the state's exclusive sphere of power is progressively shrinking, with the two levels of government cooperating intensively in the spheres of shared power. The principle of subsidiarity enshrined in Article 5(3) of the TEU can be considered a constitutional solution to reduce tensions and strengthen the spirit of cooperation between the Union and the member states.[36]

It is a legal fact that the principle of "national identity" is not defined in any founding treaty of the EU, neither in any regulation nor other legal act of the Union. That is why it is considered to be the result of EU jurisprudence. The CJEU has developed a relatively autonomous opinion on its essence.[37]

Article 4(2) of the TEU is cited for the first time in the *Sayn-Wittgenstein* case[38] in the context of the relationship between primary law (in the case of Article 21 of the Treaty) and national law (in the case of the Austrian Law on the Abolition of Nobility). The key question in this case was whether the decision of the Austrian authorities to change the surnames of Austrian citizens living in Germany under the Law on the Abolition of Nobility from *Fürstin von Sayn-Wittgenstein* (Princess of Sayn-Wittgenstein) to *Sayn-Wittgenstein* is contrary to Article 21 of the TEU, given that, according to the Austrian Government, these legal provisions are aimed at protecting the constitutional identity of the Republic of Austria.

According to the CJEU, measures restricting fundamental freedom can be justified at the level of public policy only if they are necessary to protect the

36 Art. 5(3) of the Treaty reads: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

37 C-473/93 *Commission v. Luxemburg*, ECLI:EU:C:1996:263, para. 36. In this case, the CJEU rejected the arguments based on the principle due to the disproportion of the national measures in question.
C-213/07 *Maduro in Michaniki*, ECLI:EU:C:2008:544, para. 31; C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, paras. 83 and 92; C-391/09 *Runevič-Vardyn*, ECLI:EU:C:2011:291, para. 86; C-51/08 *Commission v. Luxemburg*, ECLI:EU:C:2011:336, para. 124; C-393/10 *O'Brien*, ECLI:EU:C:2012:110, para. 49; C-202/11 *Las*, ECLI:EU:C:2013:239, para. 26; C-58/13 and C-59/13 *Torresi*, ECLI:EU:C:2014:2088, paras. 56–59. In the *Torresi* case, the CJEU considered that Art. 3 of Directive 98/543 referred only to the right to establish a legal practice in the member states of the Union to practice the profession of lawyer as a professional title acquired in the national system of the member state. This provision does not regulate either access to the legal profession or the practice of that profession, which is why it cannot affect the national identity of the member states.

38 C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806.

interests and only in cases where these objectives cannot be achieved via less restrictive measures. According to the Court, in the context of Austrian constitutional history, the Law on the Abolition of Nobility, as an element of national identity, can be considered when striking a balance between the legitimate interests of the country and the right of free movement of people recognised by EU law. In this regard, the CJEU has interpreted the constitutional basis of the law as an element of Austrian public policy, emphasising that 'the concept of public policy as a justification for the deviation from fundamental freedom must be interpreted strictly so that its scope cannot be determined unilaterally by each member state without any control by the EU institutions'.[39]

The CJEU has emphasised the importance of national identity in several other cases,[40] although without success for the parties invoking the principle. Despite case law, national identity remains insufficiently clear, at least in the EU context.[41]

There was an explicit mention of Article 4(2) of the TEU by the CJEU in the case of *MalgožataRunevič-Vardyn*,[42] related to a Lithuanian citizen as the first applicant belonging to the Polish minority (with the Polish name '*Małgorzata*' and surname '*Runiewicz'*), married to a Polish citizen (as second applicant) who appealed to a Lithuanian court after the Vilnius Civil Registry Office refused to change her name according to the name written on her birth certificate, that is, the name and surname *MalgožataRunevič* to be changed to *Małgorzata Runiewicz*, finding that she had been discriminated on the grounds of race, while citing Article 21 of the TFEU and Directive 2000/43.[43]

According to Lithuanian law, changes in citizenship status certificates must be made in the language of the state of Lithuania, that is, surnames, first names, and place of birth must be written in Lithuanian (Article 3, 282 of the Civil Code of Lithuania). This rule was also verified by the Constitutional Court of Lithuania, which confirmed that the personal name and surname should be entered in the passport in accordance with the rules of the official language of the country in order not to violate the constitutional status of that language. In this case, the CJEU has found that it is legitimate for each member state to ensure the protection of its national official language to defend national unity and preserve social cohesion.

39 Von Bogdandy and Schill, 2011, p. 1425.

40 C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, paras. 83 and 92; C-391/09 *Runevič-Vardyn*, ECLI:EU:C:2011:291, para. 86; C-51/08 *Commission v. Luxemburg*, ECLI:EU:C:2011:336, para. 124; C-393/10 *O'Brien*, ECLI:EU:C:2012:110, para. 49; C-202/11 *Las*, ECLI:EU:C:2013:239, para. 26; C-58/13 and C-59/1 *Torresi*, ECLI:EU:C:2014:2088, para. 56–59.

41 Cloots, 2015, pp. 127–134.

42 C-391/09 *Runevič-Vardyn and Wardyn*, ECLI:EU:C:2011:291.

43 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

The position of the Lithuanian government was also evaluated, as it considered that the Lithuanian language was a constitutional treasure of the country that protected the national identity, strengthened the integration of citizens, and ensured the expression of national sovereignty, indivisibility of the state, and proper functioning of state services of local authorities.[44]

The CJEU in this case invoked respect for Article 4(2) of the TEU, reaffirming that the EU should respect the national identity of its member states, which of course included the protection of Lithuania's official language. The Court also emphasised that, under national law, this was a

> legitimate aim capable of justifying restrictions on the rights related to the freedom of movement and residence of citizens set out in Article 21 of the TFEU and could consider when legitimate interests are "measured" against the rights set out in EU law.

Measures restricting fundamental freedom, in accordance with Article 21 of the TFEU, can be justified only if they are necessary to protect the interests with which security is to be ensured and only if those objectives cannot be secured by the application of less restrictive measures.[45]

Another interesting case concerning Article 4(2) of the TEU is the *O'Brien* case[46] in which the British Ministry of Justice refused to pay Mr. O'Brien (a former royal adviser and interim judge at the Royal Court) a pension in which the pro rata temporis, paid to all permanent judges over 65 years of age, would be calculated. In this case also, several important questions were raised, such as, who defined the concept of employees with concluded employment contracts or other types of employment, and who determined whether judges fell under this concept.

The CJEU has emphasised that member states define the concept of employees having employment contracts or having established another type of employment and each member state decides whether or not judges should be included in such a concept. The second question raised by the Court was whether under national law, judges fell under the category of workers entitled to conclude employment contract or another type of employment set out in Clause 2.1 of the Part-time Framework Agreement.

According to the CJEU, the Part-Time Framework Agreement must be interpreted in a way that would mean that to achieve the goal of securing access to the pension scheme, national law should preclude the distinction between full- and

44 Blagojević, 2017.

45 Ibid., p. 22.

46 *O'Brien (Appellant) v Ministry of Justice* (Formerly the Department for Constitutional Affairs) (Respondents), Judgment, 6 February 2013 [Online]. Available at: https://www.supremecourt.uk/cases/docs/uksc-2009-0123-judgment.pdf. (Accessed: 26 June 2023).

part-time judges paid on a daily basis, unless this difference in treatment is justified by objective reasons determined by a particular national court.[47]

The CJEU also replied to the Latvian government (which intervened in the case) that the application of EU law in the judiciary was a result of the fact that the Court had found that the national identities of the member states had not been respected, contrary to Article 4(2) of the TEU. The Court further considered that the application of part-time judges paid on a daily basis, in accordance with Directive 97/81 and the Part-time Framework Agreement, could not have any effect on national identity but further stated that the purpose of the Court's reaction was to ensure the principle of equal treatment of all judges, both full- and part-time workers, that is, to protect all part-time employees from possible discrimination against full-time employees. As can be seen in this case, Article 4(2) of the TFEU can be used by different entities, not only by the litigants but also by some external, intervening entities.

The interpretation of the identity clause is essentially the most promising path the Court is taking. When the content of the identity clause cannot be determined, the Court should read it in accordance with the principles and values contained therein. These values vary from one country to another and depend on both normative assumptions based on the doctrine of constitutional identity and on their articulation by national constitutional courts. Although Article 4(2) of the TEU does not define the national identity of EU member states, from the above, it can be concluded that its content is set out in the relevant national constitutional provisions, relevant case law of the national constitutional courts, and relevant case law of the CJEU.

From a national perspective, the constitutional identity of member states always has the constitution as its starting point, or more specifically, the specific principles, values, and rules contained in the constitutions. Special emphasis is placed on the principles of state organisation, state sovereignty and the principle of democracy, state symbols, state goals, protection of human dignity, fundamental rights, and the rule of law.[48]

Constitutional identity is not part of Article 4(2) of the TEU. However, the national constitutions of EU member states do not contain a strict constitutional provision that defines constitutional identity.[49]

How does this influence the "ever closer Union" concept?

The difference of opinions regarding the protection and respect for the constitutional identity of each EU member state by national and European institutions had a negative impact on this concept, having in mind how close or far their

47 Ibid.
48 F.M. Besselink et al., 2014.
49 Drinóczi, 2020.

constitutional identities were, directly influencing the closeness or remoteness among EU members.

In fact, this cumulus of national sovereignties and constitutional identities is what creates the "ever closer Union" concept. This, combined with democracy as a civilisational value, is what typifies the essence of the EU as a political and economic project.

4. Is the EU democratic deficit a threat to democracy in the member states of the Union?

Democracy is a civilisational value. It is not only a European, but above all a universal, foundation. Democracy is a fundamental value of all European countries who define themselves as democratic in their constitutions. National democracy is determined as a sigil of every European country.

As a universal value, democracy is shaped by the standards and principles contained in the documents of international law, judicial reviews, and decisions of the national constitutional and ordinary courts, of the Court of Human Rights in Strasbourg, of the Court of Luxembourg, and in the works of the classical political authors/philosophers of world rank.

When we say that there is a democratic deficit in a country, union of states, international organisation, and so on, that fact must turn on the red light of all members of the union or organisation to find the best ways and mechanisms to overcome such deficit.

The EU democratic deficit has been openly discussed for several decades as a lack of democracy in EU institutions and their decision-making procedures, and as a process of inaccessibility of EU institutions to the ordinary citizen due to their complexity. These shortcomings raise concerns on whether the EU's project achieves the maintenance of stability and democracy in the Union member states. By hitting the foundational idea of the Union, it pushes power away from the member states, so that European citizens' voices are excluded from European institutions, which in turn fosters a technocratic, bureaucratic, and disengaged Union.

The key features of the EU democratic deficit range from the lack of party competition and European political loopholes to the absence of a European common demos across EU nationals, as well as from the dilemma between size and participation in a representative government to the need to better listen to the voices of Europeans as a means of legitimising and empowering the European project. Furthermore, the EU has recently faced several challenges which are jeopardising its future.

Some of the widely known challenges include Brexit, the first time in history that a European member state votes to opt out of the EU project, a major

health-related COVID-19 pandemic crisis, the Ukraine war, new migration flows, an economic downturn due to sanctions, inflation, serious energy security concerns, and other crisis. These challenges seriously shook the foundations of the EU and re-actualised the problem of the democratic deficit of the EU institutions, on the one hand, and the continued distrust of national democracies that was built into the EU's structures from the very beginning on the other hand.

The fact that the EU has been facing the problem of protecting democracy and the rule of law within its own borders for a long time is notorious. The EU must end the hypocrisy of pretending that it safeguards its values when it constantly fails to do so in reality. There are generally two explanations for this failure: either the institutions refuse to enforce values or they lack sufficient powers to do so. Both hold some truth, and both can be remedied if only there is the political will to do so.

Meanwhile, each member state has the right to defend the national principle of democracy as the foundation of its own constitutional order. Each member state has the right to seek and offer solutions to overcome the democratic deficit of the EU.

5. Conclusion

In summary, the "ever closer Union" concept is intricately linked to addressing the democratic deficit in the EU and fostering a new democratic ambiance. This shift aims to strengthen national democracy in EU member states to provide better foundations for strong European democracy. The bottom-up principle is always better and more efficient than moving in the opposite direction. The "ever closer Union" concept is possible only if the 'ever closer national democracy, sovereignty, and constitutional identities of the Union member states' concepts takes precedence.

Considering that the democracy, sovereignty, and constitutional identity are principles of and for the citizens, this means that only with actively involved citizens at the national and European level can the Union come closer more efficiently and easily. This practically means that the post-Westphalian EU order will have to put civic legitimacy first instead of the functional institutional principle, and its institutions, instead of working in secrecy, technocratism, and elitism, will have to find their roots among the people and work in favour of the citizens' interests. This will be the main challenge for the EU in the years to come.

Notably, the current president of the European Commission, *Von der Leyen*, speaking about enhanced democracy in the Union, also spoke about a committed Commission to support the idea of introducing transnational lists in the 2024 election. This approach would enable candidates for the Commission's presidency in future to be elected across all member states. Research has shown that the

knowledge of candidates standing for Commission president increases voter participation, and the effect of them standing across all member states could increase the domestic focus on European issues in election campaigns.

As previously underscored, the EU currently lacks a resilient collective identity of citizens, a common public sphere, and common political organisations characteristic of a European demos. The foundations and procedures of democracy and solidarity are developed most strongly at the national level.[50]

Very often, the EU is inconsistent with its own principles and values, shows different treatment, double standards, and open hypocrisy when discussing and reacting over the same or similar legal and political issues, depending on whether it is a member state of the so-called "new democracies" or a member state from the "old democracies."

The question that any objective legal analyst should ask the EU is why there is no radical reaction to France, Germany, Spain, Italy, and other EU founding countries when their constitutional courts oppose the principle of the direct effect of EU law by introducing their own constitutional doctrines to protect their constitutional identity, on one the hand, and why there are hysterical and radical EU reactions to Hungary and Poland supplemented with severe punishment for violating the rule of law principle when their constitutional courts react in the direction of protecting the national constitutional identity, on the other hand?[51]

Will the EU continue to push the policy of hypocrisy and double standards, a policy of non-reaction towards some countries, and a policy of hysteria towards others for the same legal and political situations?

What is the difference between the Italian Constitutional Court controlimiti doctrine, the Italian Taricco judgments[52], the German Constitutional Court's Solange case law[53], the Maastricht judgment and the Kompetenz-Kompetenz doc-

50 'Any democratic political system should be understandable by its citizens. We cannot evaluate the degree of legitimacy of the EU if we only assess the rules on which it is based and the way those rules are implemented, or by measuring its capacity to consider citizens' expectations and to provide them with public good and sound policies. We need to also consider the subjective perceptions that citizens have. In this regard, the EU system obviously needs to improve its transparency, clarity, and readability: values that are key to the propensity of citizens to acknowledge that a system is legitimate'. Rodrigues (ed.), 2021.

51 Besselink, 2010.

52 Paris, 2017; Krajewski, 2017.

53 Bundesverfassungsgericht (*German Federal Constitutional Court*) Judgment of 29 May 1974, 2 BvL 52/71, *Solange I*, BVerfGE 37, 271; Bundesverfassungsgericht, Judgement of 22 October 1986, 2 BvR 197/83, *Solange II*, BVerfGE 73, 339; Bundesverfassungsgericht, Judgment of 12 October 1993, 2 BvR 2134, 2159/92, *Maastricht*, BVerfGE 89, 155; Bundesverfassungsgericht, Judgment of 30 June 2009, 2 BvE 2/08, *Lisbon*, BVerfGE 123, 267; Bundesverfassungsgericht, Judgment of 6 July 2010, 2 BvR 2661/06, *Honeywell*, BVerfGE 126, 286; Bundesverfassungsgericht, Judgment of 15 December 2015, 2 BvR 2735/14, *Mr R*, DE:BVerfG:2015:rs20151215.2bvr273514.

trine, the French Conseil Constitutionnel constitutional identity doctrine,[54] on the one hand, and the Polish and Hungarian Constitutional Court's protection of the notion of the 'historical constitutional identity' of Poland and Hungary which aims to protect the countries from European encroachment, on the other hand?

Bearing in mind all the abovementioned weaknesses, European citizens have the right to ask about what the future of the EU entails. The question of the future of the EU provokes an endless discussion. One of the key points of this discussion is that the future of the EU depends on the returning of the European principles and values that have been at its origin—guaranteeing that the rule of law, human rights and freedoms, law and justice, democracy, and sovereignty are not merely formal concepts and written principles but daily realities. Returning to the concept that the member states are the "Masters of the Treaties" will give more power to national citizens to help with the current pressing policy issues, such as migration, climate change, great power competition, and so on.

There are different approaches among scholars when answering the bitter questions regarding the future of the EU. Some prefer to upload more competencies to EU institutions, while vesting EU federative and state-like capacities including strong external borders and the capacity to protect the territory within these borders. Others rather see competencies downloaded to more legitimate national platform for action. The COVID-19 crisis and especially the current war in Ukraine have fully exposed the EU's deficiencies. The crisis demonstrates that the EU itself cannot deliver any results on solving fundamental problems, such as health and security. This situation injects a sense of urgency into the EU reform process and shows that the Union needs to be made fit for the challenges of the 21st century.[55]

The challenge for the increased democracy of EU institutions by strengthening the national sovereignties and constitutional identities of the member states will put the meaning and essence of the 'ever closer Union' concept on the right track.

If this does not happen, the "ever closer Union" concept will remain simple words on pieces of paper!

54 Conseil constitutionnel (*French Constitutional Council),* judgment of 31 July 2017, 2017–749 DC, *CETA*, ECLI:FR:CC:2017:2017:749.DC.

55 In the words of Jean Monnet, one of the EU's founding fathers, 'I have always believed that Europe would be built through crises, and that it would be the sum of their solutions. People only accept change when they are faced with necessity, and only recognise necessity when a crisis is upon them.' What is true about people is even more true about a complex, multilevel organisation with heavy decision-making procedures and all the inherent difficulties of collective action. More details, Lehne, 2022.

Bibliography

- Arnaiz, A.S., Llivina, C.A. (eds.) (2013) *National Constitutional Identity and European Integration*. 1st edn. Intersentia.
- Blagojević, A. (2017) 'Procedures Regarding National Identity Clause in the National Constitutional Court's and the CJEU's Case-Law', *EU and Comparative Law Issues and Challenges Series (ECLIC)*, 2017/1, pp. 210–237; https://doi.org/10.25234/eclic/6529.
- Bofill, H. L. (2013) 'What is not Constitutional Pluralism in the EU: National Constitutional Identity in the German Lisbon Decision' in Arnaiz, A.S., Llivina, C.A. (eds.) *National Constitutional Identity and European Integration*. 1st edn. Intersentia, pp. 221–242.
- Brack, N., Coman, R., Crespy, A. (2021) 'Sovereignty conflicts in the European Union' in Brack, N., Gürkan, S. (eds.) *Theorizing the crises of the European Union*. 1st edn. London and New York: Routledge, pp. 42–62.
- Cloots, E. (2015) *National Identity in EU Law*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780198733768.001.0001.
- Cooper, R. (2004) *The Breaking of Nations: Order and Chaos in the Twenty-First Century*. London: Atlantic.
- Drinóczi, T. (2018) 'La identidad de la Constitución y la identidad constitucional: apertura de discursos entre el Norte Global y el Sur Global', *Iuris Dictio*, 2018/21, pp. 63–80. https://doi.org/10.18272/iu.v21i21.1138.
- Drinóczi, T. (2020) 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach', *German Law Journal*, 21(2), pp. 105-130; https://doi.org/10.1017/glj.2020.1.
- Fiott, D. (ed.) (2021) *European Sovereignty. Strategy and interdependence.* Paris: EU Institute for Security Studies [Online]. Available at: https://www.iss.europa.eu/sites/default/files/EUISSFiles/CP_169.pdf (Accessed: 30 November 2023).
- F.M. Besselink, L. (2010) 'National and constitutional identity before and after Lisbon', *Utrecht Law Review*, 6(3), pp. 36–49; https://doi.org/10.18352/ulr.139.
- F.M. Besselink, L., Claes, M., Imamović, Š., Reestman, J. H. (2014) *National constitutional avenues for further EU integration* [Online]. Available at: https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET%282014%29493046_EN.pdf. (Accessed: 23 June 2023).
- Jackson, R. (1999) 'Introduction: Sovereignty at the Millennium', *Political Studies, Political Studies Association*, 47(3), pp. 423–430; https://doi.org/10.1111/1467-9248.00210.
- Kegley, Ch., W., Raymond, G. A. (2002) *Exorcising the Ghost of Westphalia Building World Order in the New Millennium*. 1stedn. New Jersey: Prentice Hall.
- Krajewski, M. (2017) 'A way out for the ECJ in *Taricco II*: Constitutional identity or a more careful proportionality analysis?', *European Law Blog* [Online]. Available at: http://europeanlawblog.eu/2017/11/23/a-way-out-for-the-ecj-in-taricco-ii-constitutional-identity-or-a-more-careful-proportionality-analysis/ (Accessed: 10 November 2023).

- Krasner, S. D. (1996) 'Compromising Westphalia', *International Security*, 20(3), pp. 115–151; https://doi.org/10.2307/2539141.
- Kreuder-Sonnen, C., Zangl, B. (2015) 'Which Post-Westphalia? International organizations between constitutionalism and authoritarianism', *European Journal of International Relations,* 21(3), pp. 568–594; https://doi.org/10.1177/1354066114548736.
- Lehne, S. (2022) *The EU and the Creative and Destructive Impact of Crises* [Online]. Available at: https://carnegieeurope.eu/2022/10/18/eu-and-creative-and-destructive-impact-of-crises-pub-88145. (Accessed: 26 June 2023).
- Lefebvre, M. (2021) *Europe as a power, European sovereignty, and strategic autonomy: a debate that is moving towards an assertive Europe*. Robert Schuman Foundation. European Issues 582.
- MacCormick, N. (1999) *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*. 1st edn. Oxford: Oxford University Press.
- Murillo-Zamora, C. (2021) 'Independent States: A Perspective from International Relations', *Relaciones Internacionales*, 94(2); pp. 141–160; https://doi.org/10.15359/ri.94-2.7.
- Nicolaidis, K. (2013) 'European Demoicracy and Its Crisis', *Journal of Common Market Studies*, 51(2), 1–19; https://doi.org/10.1111/jcms.12006.
- Paris, D. (2017) 'Carrot and stick. The Italian constitutional court's preliminary reference in the case Taricco', *Questions of International Law,* 2017/37, pp. 5–20 [Online]. Available at: http://www.qil-qdi.org/carrot-stick-italian-constitutional-courts-preliminary-reference-case-taricco/ (Accessed: 30 November 2023).
- Raz, J. (1995) 'The Politics of the Rule of Law' in Raz, J. (ed.) *Ethics in the Public Domain: Essays in the Morality of Law and Politics*. Oxford: Clarendon Press, pp. 370–378; https://doi.org/10.1093/acprof:oso/9780198260691.001.0001.
- Rodrigues, M.J. (ed.) (2021) *Our European Future. Charting a Progressive Course in The World* [Online]. Available at: https://feps-europe.eu/wp-content/uploads/downloads/publications/our_european_future_ipdf%201.pdf. (Accessed: 10 June 2023).
- Rzotkiewicz, M. (2016) 'National Identity as a General Principle of EU Law and Its Impact on the Obligation to Recover State Aid', *Yearbook of Antitrust and Regulatory Studies*, 9(13), pp. 43–60 [Online]. Available at: https://yars.wz.uw.edu.pl/images/yars2016_9_13/YARS_1016_9_13.pdf (Accessed: 20 November 2023).
- Stumpf, I. (2020) 'Sovereignty, Constitutional Identity and European Law', *Hungarian* Review, 11(3) [Online]. Available at: https://hungarianreview.com/article/20200515_sovereignty_constitutional_identity_and_european_law/ (Accessed: 27 October, 2023).
- Vandenbruwaene, W., Millet, FX. (2014) L'Union européenne et l'identité constitutionnelle des États membres. Paris: Lextenso editions et Karine Roudier.
- Varga, Zs. A. (2020) 'Role of constitutional courts in protection of national/constitutional identity', *Pázmány Law Working Papers*, 2017/20, pp. 1–6 [Online]. Available at: https://plwp.eu/files/2017-20_VargaZs.pdf. (Accessed: 30 November 2023).
- Vaughan, M. (2011) 'After Westphalia, Whither the Nation State, its People and its Governmental Institutions?' in Paper for Presentation at the International Studies

Association Asia-Pacific Regional Conference, 29 September 2011 [Online]. Available at: http://tinyurl.com/msayt9u4 (Accessed: 30 November 2023).

- Von Bogdandy, A., Schill, S. W. (2011) 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', *Common Market Law Review*, 48(5), pp. 1417–1453; https://doi.org/10.54648/cola2011057.
- Wallace, W. (1999) 'The Sharing of Sovereignty: The European Paradox', *Political Studies*, 47(3), pp. 503–521; https://doi.org/10.1111/1467-9248.00214.
- Weiler, J. H. H. (2003) 'In defence of the status quo: Europe's constitutional sonderweg' in Weiler, J.H.H., Wind, M. (eds.) *European Constitutionalism Beyond the State*. Cambridge: Cambridge University Press, pp. 7–23.

ANDREJ KARPAT*

The Relationship of the Supreme Courts of the Slovak Republic with the Court of Justice of the European Union

ABSTRACT: *The judicial authorities of the Member States of the European Union have an important duty to ensure the full effect of EU legal norms at the national level, as they are obliged to fully apply EU law and protect the individual rights conferred by that law. This article focuses on the relationship among the highest judicial bodies of the Slovak Republic, namely the Constitutional Court, the Supreme Court, and the Supreme Administrative Court, with the Court of Justice of the European Union, which ensures the uniform interpretation and application of Union law. In this context, this article examines the extent to which the Slovak Supreme Court uses the preliminary ruling procedure, as well as its decisions, to consider the requirements of Union law can be examined, resulting from the case-law of the Court of Justice in accordance with the principle of sincere cooperation enshrined in Article 4(3) of the Treaty on the European Union. It also examines the cooperation between the general courts of the Slovak Republic and the Court of Justice of the European Union in the context of the preliminary ruling procedure, and how the Slovak constitutional order meets the requirements of Union law.*

KEYWORDS: European Union law, Constitutional Court of the Slovak Republic, Supreme Court of the Slovak Republic, Supreme Administrative Court of the Slovak Republic, case-law of the Court of Justice.

1. Introduction

The practical relevance of the question of the relationship between national judicial authorities, particularly the supreme courts of the Member States of the European Union (hereinafter Union or EU), and the Court of Justice of the EU

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(hereinafter the CJEU) lies in the evaluation of the functioning of the judicial system of the EU, which the Union and national courts together constitute. All these courts are responsible for monitoring compliance with Union law, which is applied at both the Union and national levels. While the CJEU is charged with ensuring the effective and uniform application of Union law and safeguarding its autonomy, it is the task of the national courts or tribunals, in accordance with the principle of sincere cooperation enshrined in Article 4(3) Treaty on the EU (hereinafter TEU), to ensure the application of Union law in the Member States.[1] In fulfilling this responsibility, the national courts are, in fact, Union courts of general scope which, within their territorial scope, ensure the comprehensive application of Union law.[2] There is no hierarchical relationship of superiority or subordination between the CJEU and national courts but, as the Court itself emphasises, a relationship of cooperation.[3]

Although the mechanism of the Union's judicial system is primarily determined by primary EU law and supplemented by the case-law of the Court of Justice (hereinafter also the Court),[4] given the role of the national courts or tribunals, it is also intertwined with the legal systems of the Member States. In this context, Article 19(1) TEU imposes an obligation on the Member States to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law.' Thus, in the absence of Union legislation, national legal systems must designate the competent courts and establish procedural rules to be applied in actions concerning the protection of individual rights arising under Union law.[5] The procedural discretion of Member States is limited by the principles of equivalence and effectiveness, which also bind the national courts or tribunals in ensuring the effective judicial protection of Union rights.[6]

2. Relationship between EU law and the Slovak legal order

To define the relationship between the supreme courts of the Member States and the CJEU, it is necessary to draw attention not only to the EU legal order or the case-law of the Union courts, but also to the national constitutional orders, including the interpretation of their provisions by the constitutional courts of the

1 Opinion of the Court (Full Court) of 8 March 2011, ECLI:EU:C:2011:123, paras. 66–69.
2 Judgment of the Court of 13 March 2007, C-432/05 *Unibet*, ECLI:EU:C:2007:163, para. 38.
3 Judgment of the Court of 22 June 2010, joined cases C-188/10 and C-189/10 *Melki and Abdeli*, ECLI:EU:C:2010:363, para. 51.
4 According to Art. 19(1) TEU: 'The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts.' The Civil Service Tribunal was established in 2004 as the only special court, and ceased to exist in 2016.
5 Judgment of the Court of 19 November 2019, C-585/18 *A.K.*, ECLI:EU:C:2019:982, para. 115.
6 See e.g. Judgment of the Court of 15 April 2008, C-268/06 *Impact*, ECLI:EU:C:2008:223, para. 55.

Member States. Similarly, as Member States regulate the relationship between national and international laws under their constitutions, they are required to address the requirements arising from Union law. Its status is regulated by most national constitutions independent of the regulation of the relationship to international law in specific provisions adopted by states, either in connection with their accession to the Union (or even to the Communities) or through the ratification of one of the revision treaties.[7]

In this context, the question of the nature of Union law, which is characterised by specific features that distinguish it from international law, is relevant. From the perspective of its application by the national authorities of the Member States, it is closer to national law than to international law. In this regard, the CJEU highlights that 'by contrast with ordinary international treaties,' the founding treaties created 'its own legal system,' which 'became an integral part of the legal systems of the Member States' and which the courts of the Member States are bound to apply.[8] According to the CJEU, this new legal order is characterised by its independence from both international law and the national legal orders of the Member States.[9] However, based on international treaties concluded between Member States, the international legal basis of the EU's legal order cannot be denied. It also includes international agreements concluded by the Union with third countries or international organisations.[10] Therefore, some authors prioritise the international law character of Union law.[11] Others go even further, insisting that, despite certain specificities, Union law should be considered international law and not a new legal order *sui generis*.[12] In this context, the question arises of whether Union law can be considered a self-contained regime of international

7 Exceptions are e.g. the constitutions of the Netherlands or Luxembourg, whose provisions regulating the relationship between national and international law also apply to Union law. Separate constitutional provisions have been adopted e.g. by the Czech Republic, Austria, or Slovakia in connection with their accession to the Union, and by Germany or France when ratifying the Maastricht Treaty.

8 Judgment of the Court of 15 July 1964, C-6/64 *Costa v. ENEL*, ECLI:EU:C:1964:66.

9 The Court of Justice first characterised Community (now Union) law as a 'new legal order of international law' in its judgment of 5 February 1963, C-26/62 *Van Gend en Loos*, ECLI:EU:C:1963:1. Subsequently, he began to refer to it as 'own legal system' or 'new legal order', i.e. he no longer referred to its connection with international law. He first referred to it as 'own legal system' in his judgment of 15 July 1964, C-6/64 *Costa v. ENEL*, ECLI:EU:C:1964:66. He subsequently reiterated this position in e.g. his judgment of 19 November 1991, C-6 and 9/90 *Francovich and Bonifaci*, ECLI:EU:C:1991:428, para. 31; and his judgment of 20 September 2001, C-453/99 *Courage*, ECLI:EU:C:2001:465, para. 19. He referred to it as a 'new legal order' in e.g. Opinion 1/09, 8 March 2011, ECLI:EU:C:2011:123, para. 65; or in the more recent judgment of 10 December 2018, C-621/18 *Wightman and Others*, ECLI:EU:C:2018:999, para. 44.

10 See Judgment of the Court of 30 September 1987, C-12/86 *Demirel*, ECLI:EU:C:1987:400, para. 7; and Judgment of the Court of 30 April 1974, C-181/73 *Haegeman*, ECLI:EU:C:1974:41, para. 5.

11 See e.g. Schilling, 1988, pp. 677–681.

12 See e.g. Funke, 2010, p. 118.

law.[13] Such a subsystem is not completely closed to international law but shows a higher degree of independence, which is expressed in particular by the existence of special sanctioning norms.[14]

The relationship between Slovak and international law is defined by Article 1(2) of the Constitution of the Slovak Republic (hereinafter 'the SR Constitution'), according to which: 'The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations.'[15] According to some authors, the aforementioned provision can be considered a basic norm of reception; however, it is not accepted by most of the professional public.[16] Although not applicable per se, it plays an important role in the interpretation of other constitutional and legal provisions.[17] According to the Constitutional Court of the Slovak Republic, it 'applies to all international obligations of the Slovak Republic regardless of their content, and establishes the obligation to fulfil them.'[18] The Slovak Republic's obligation to comply with all international obligations is one of its most important constitutional principles.[19] The primacy of selected international treaty obligations over legal norms is established by Article 7(5) of the Slovak Constitution, according to which

> International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws.[20]

13 See e.g. Ionita, L. A., n.d., pp. 39–59.

14 Šturma, 2013, p. 314.

15 Constitution of the Slovak Republic [Online]. Available at: https://www.prezident.sk/upload-files/46422.pdf (Accessed: 20 June 2023).

16 Jankuv, 2009, p. 32. His opinion is not shared by e.g. Jánošíková, 2013, p. 253.

17 Čorba, 2002, p. 704.

18 Order of the Supreme Court of the Slovak Republic, PL. ÚS 44/03 from 21 October 2010, translated by the author.

19 Čorba, 2002, p. 705.

20 Constitution of the Slovak Republic [Online]. Available at: https://www.prezident.sk/upload-files/46422.pdf (Accessed: 20 June 2023). Moreover, within the transitional and final provisions, Art. 154c(1) of the SR Constitution mentions the precedence of certain international treaties concluded before the establishment of the Slovak Republic, according to which 'International treaties on human rights and fundamental freedoms which the Slovak Republic has ratified and were promulgated in the manner laid down by a law before taking effect of this constitutional act, shall be a part of its legal order and shall have precedence over laws if they provide a greater scope of constitutional rights and freedoms'. According to Art. 154c(2) of the SR Constitution, this includes 'Other international treaties which the Slovak Republic has ratified and were promulgated in the manner laid down by a law before taking effect of this constitutional act,... if so provided by a law.'

The Constitutional legislator considers these treaties part of the Slovak legal order and assigns them a place in the hierarchy of legal norms between the Constitution and constitutional laws, and other laws. The use of the term "law" in this case therefore means that it is a law in the literal sense, as a result of the legislative powers of the National Council of the Slovak Republic.[21] The basic prerequisite for priority under Article 7(5) of the SR Constitution is the promulgation of an international treaty in the manner laid down by law.[22] However, in light of Article 1(2) of the SR Constitution, in which the Slovak Republic declares its international law obligations, a number of questions not answered by the SR Constitution arise, such as the resolution of a possible conflict between an international and a constitutional norm or the possibility of precedence in the application of international law beyond the wording of Article 7(5) of the SR Constitution, as for example in the case of self-executing international treaties that have not been promulgated in the manner laid down by law.[23] Some authors are also critical of the fact that the SR Constitution does not regulate in detail the relationship with international law in general but focuses only on certain categories of international treaties.[24]

The relationship between the Slovak and EU legal orders is regulated by Article 7(2) of the SR Constitution, according to which

> The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Article 120(2).[25]

According to the wording of the second sentence of Article 7(2) of the SR Constitution, the primacy of Union law thus applies exclusively concerning statutory or regulatory norms, but not to constitutional provisions. This interpretation

21 Balog, 2009, p. 574.

22 Pursuant to para. 20(7) of Act No. 400/2015 Coll. on the Legislative Drafting and the Collection of Laws of the Slovak Republic, the full text of the treaty is required to be published by means of a notification of the Ministry of Foreign Affairs, which must include information on the decision of the National Council of the Slovak Republic that it is an international treaty that takes primacy over the laws.

23 Giba and Valuch, 2016, pp. 82–88.

24 Klučka, 2001, p. 1.

25 Constitution of the Slovak Republic [Online]. Available at: https://www.prezident.sk/upload-files/46422.pdf (Accessed: 20 June 2023).

is contrary to the settled case-law of the Court of Justice, according to which a Member State may not rely on its constitutional order to undermine the validity or effectiveness of EU law.[26] It is also questionable to give primacy exclusively to legally binding Union acts that are part of secondary law, because, according to the Court of Justice, all binding rules of Union law take precedence. Thus, a literal interpretation leads to the conclusion that the legal basis for the direct application of the founding treaties on the territory of the Slovak Republic is the aforementioned Article 7(5) of the SR Constitution.[27] This is also indicated by the wording of two resolutions of the National Council of the Slovak Republic referring to the Treaty of Accession between the Slovak Republic and the EU and the Lisbon Treaty as international treaties under Article 7(5) of the SR Constitution, which take precedence over the laws.[28] However, both treaties can clearly be considered international treaties 'for whose exercise a law is not necessary, and... which directly confer rights or impose duties on natural persons or legal persons.'[29]

However, the correctness of such a conclusion is undermined by the wording of Article 144(2) of the SR Constitution, according to which

> If a Court assumes that other generally binding legal regulation (i.e. any other than those referred to in Article 144(1) of the SR Constitution – author's note),[30] its part, or its individual provisions which concern a pending matter contradicts the Constitution, constitutional law, international treaty pursuant to Article 7(5) (i.e. including treaties which form part of the primary EU law? – author's question), or law, it shall suspend the proceedings and shall submit a proposal for the commence of proceedings according to Article 125(1). Legal

26 See in particular the following judgments of the Court: of 26 May 2016, C-273/15 *Ezernieki*, ECLI:EU:C:2016:364, para. 53; of 15 January 2013, C-416/10 *Križan and Others*, ECLI:EU:C:2013:8, para. 70; of 8 September 2010, C-409/06 *Winner Wetten*, ECLI:EU:C:2010:503, para. 61; of 13 December 1979, C-44/79, *Hauer*, ECLI:EU:C:1979:290, para. 14; and of 11 December 1970, C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, para. 3.

27 This opinion was originally held by e.g. Dobrovičová, 2007, p. 66; or Jánošíková, 2013, p. 253. The opposite view, according to which the primacy of Union law over the Slovak legal order follows from Art. 7(2) of the SR Constitution, was expressed by, e.g. Drgonec, 2007, p. 125; or Siman and Slašťan, 2012, pp. 394, 395.

28 See National Council Orders No. 365 of 1 July 2003 and No. 809 of 10 April 2008. In contrast, in National Council Resolution No 1596 of 11 May 2005, the Treaty establishing a Constitution for Europe is referred to as an international treaty pursuant to Art. 7(2) in conjunction with Art. 7(5) of the SR Constitution.

29 Art. 7(5) of the SR Constitution. [Online]. Available at: https://www.prezident.sk/upload-files/46422.pdf (Accessed: 20 June 2023).

30 According to Art. 144(1) of the SR Constitution, judges '...in decision making shall be bound by the Constitution, by constitutional law, by international treaty pursuant to Art. 7(2) and (5), and by law.'

> opinion of the Constitutional Court of the Slovak Republic contained in the decision shall be binding for the Court.[31]

In contrast, it is settled case-law of the Court of Justice that the national court is under an obligation of its power, within the scope of its jurisdiction, to ensure the full effectiveness of the Union provisions and to protect the rights conferred on individuals by EU law.[32] To that extent, all national judicial authorities are obliged, on their initiative, to directly apply effective Union law and interpret national law in accordance with the requirements of the EU legal order to the maximum extent possible.[33] If they conclude that an interpretation in conformity with Union law is not possible, they must not apply national provisions that are incompatible with Union law, but must, following the EU principle of loyalty, apply the provisions of Union law directly to the full extent of their scope.[34] Subordination of primary Union law to Article 7(5) of the SR Constitution, therefore, leads to the undesirable result of placing the national court in a position in which it must decide to proceed either in accordance with Article 144(2) of the SR Constitution or in a consistent manner in accordance with the settled case-law of the Court of Justice.[35]

It follows then that it is necessary to abandon the literal interpretation of the term 'legally binding acts' used in the second sentence of Article 7(2) of the SR Constitution and to interpret the provision in question in conformity with Union law in such a way that it applies to the entire legal order of the Union. Otherwise, the procedure set out in Article 144(2) of the SR Constitution would constitute an obstacle to the full effectiveness of Union law, on the grounds that it would reserve the resolution of a discrepancy between a Union provision and a national provision to an authority other than the national court that ensures the application of Union law.[36] This fact was probably considered by the Constitutional Court of the Slovak Republic when it stated that although the term 'legally binding acts' is capable of raising problems related to the determination of its precise scope, it

31 Constitution of the Slovak Republic [Online]. Available at: https://www.prezident.sk/upload-files/46422.pdf (Accessed: 20 June 2023).

32 Judgments of the Court of 19 November 1991, C-6 and 9/90 *Francovich and Bonifaci*, ECLI:EU:C:1991:428, para. 32; and of 28 June 2001, C-118/00 *Larsy*, ECLI:EU:C:2001:368, para. 52.

33 Judgments of the Court of 18 July 2007, C-119/05 *Lucchini*, ECLI:EU:C:2007:434, para. 60; and of 27 October 2009, C-115/08 *ČEZ*, ECLI:EU:C:2009:660, para. 138.

34 Judgment of the Court of 27 October 2009, C-115/08 *ČEZ*, ECLI:EU:C:2009:660, para. 138. See further in particular the judgments of the Court of 4 February 1988, C-157/86 *Murphy and Others*, ECLI:EU:C:1988:62, para. 11; and of 26 September 2000, C-262/97 *Engelbrecht*, ECLI:EU:C:2000:492, paras. 38–40.

35 See in particular Judgment of the Court of 9 March 1978, C-106/77 *Simmenthal*, ECLI:EU:C:1978:49, paras. 21–24.

36 See e.g. Judgment of the Court of 4 December 2018, C-378/17 *Minister for Justice and Equality and Commissioner of the Garda Síochána*, ECLI:EU:C:2018:979, paras. 3537.

can undoubtedly be concluded that the Treaty on the Functioning of the EU (hereinafter 'TFEU') is also a legally binding act.[37] Subsequently, it emphasised that

> through ... Article 7(2) of the Constitution, ... a specific sub-category of international treaties has been created within the national constitutional framework, the specific and distinguishing features of which include the fact that they are treaties by which the Slovak Republic has conferred the exercise of part of its powers on the European Communities and the European Union (translated by the author).[38]

It included in this sub-category The Treaty of Accession (between the Slovak Republic and the EU), and via it the TFEU and the TEU.[39] With regard to the competence of the general courts to initiate proceedings under Article 125(1) of the SR Constitution on the grounds of their doubts about the compatibility of national legal provisions with the treaties of the primary law of the Union, the Constitutional Court of the Slovak Republic, concerning the application of the principle of the primacy of EU law, referred to the judgment of the Court of Justice in the Simmenthal case.[40] Despite the wording of Article 130(1) of the SR Constitution, the general courts in such a case are not among those entitled to bring proceedings, but it is for them to assess the compatibility of the legislation to ensure the full effectiveness of Union law.[41] In this context, they may refer the matter to the preliminary ruling procedure, in which

> It is not for the Court...to rule on the compatibility of national legislation with [Union] law. On the other hand, the Court does have jurisdiction to supply the national court with a ruling on the interpretation of [Union] law so as to enable that court to rule on

37 Finding of the Constitutional Court of the Slovak Republic of 26 January 2011, Case No. PL. ÚS 3/09.

38 Ibid., pp. 76, 77.

39 Ibid., pp. 77, 78.

40 Ibid., pp. 78, 79. The Constitutional Court referred in particular to paras. 17 and 24 of the judgment of the Court of 9 March 1978, C-106/77 *Simmenthal*, ECLI:EU:C:1978:49. According to Art. 125(1) of the SR Constitution: '(1) The Constitutional Court shall decide on the conformity of a) laws .... b) government regulations, generally binding legal regulations of Ministries and other central state administration bodies ... c) generally binding regulations pursuant to Art. 68 ... d) generally binding legal regulations of the local bodies of state administration and generally binding regulations of the bodies of territorial self-administration pursuant to Art. 71 para. 2 ... with international treaties promulgated in the manner laid down by a law...'

41 Finding of the Constitutional Court of the Slovak Republic of 26 January 2011, Case No. PL. ÚS 3/09. According to Art. 130(1) SR Constitution: 'The Constitutional Court shall initiate proceedings (on the conformity of legislation – author's note) if it brings a proposal... (d) a court...'

> such compatibility,[42] as the Constitutional Court also highlighted in its judgment.[43]

In the context of delineating the relationship between EU law and the constitutional framework of the Slovak Republic, it is necessary to emphasise that the SR Constitution lacks an explicit expression of the material core that could represent Slovak constitutional identity. According to Article 4(2) TEU, the Union respects the national identity of its member states 'inherent in their fundamental structures, political, and constitutional…'. However, the SR Constitution does not make reference to terms such as constitutional or national identity. On the contrary, the Constitutional Court of the Slovak Republic has repeatedly affirmed the existence of an implicit material core of the Constitution, the basic elements of which are 'the principles of a democratic and legal state and, among them, the principle of separation of powers and the related independence of the judiciary' (translated by the author).[44] These elements can be considered components of the constitutional identity of the Slovak Republic. According to the Constitutional Court,

> the material core of the Constitution serves as constraints for the framers of the Constitution in the sense that it prevents or renders it impossible for them to dismantle the existing constitutional order and its democratic essence through formal-legalistic means, to establish an undemocratic regime, and legitimize it through the same means.[45]

Therefore, the same limitation must also apply to the revision and legislative processes within the Union.

3. Cooperation between the courts of the Slovak Republic and the CJEU

The judicial authorities of the Member States have an important duty to ensure the full effect of EU law at the national level, as they are obliged to apply Union law to the full extent of their powers and to protect the rights conferred on individuals

42 Judgment of the Court of 23 September 2004, C-414/02 *Spedition Ulustrans*, ECLI:EU:C:2004:551, para. 23. See also the judgments of the Court of 29 November 2001, C-17/00 *De Coster*, ECLI:EU:C:2001:651, para. 23; of 6 June 1984, C-97/83 *Melkunie*, ECLI:EU:C:1984:212, paras. 7; and of 17 December 1970, C-30/70 *Scheer*, ECLI:EU:C:1970:117, para. 4.

43 Finding of the Constitutional Court of the Slovak Republic of 26 January 2011, Case No. PL. ÚS 3/09.

44 Finding of the Constitutional Court of the Slovak Republic of 30 January 2019, Case No. PL. ÚS 21/2014.

45 Ibid., translated by the author.

by that law.[46] This obligation, which is not expressly mentioned in the founding Treaties, was derived by the Court of Justice from the principle of sincere cooperation.[47] As already mentioned, the national courts, together with the courts of the CJEU, constitute the judicial system of the Union, which serves both to 'ensure consistency and uniformity in the interpretation of EU law,'[48] and to ensure judicial review of compliance with the Union's legal order.[49] In this context, it is necessary to emphasise the key importance of the preliminary ruling procedure introduced by Article 267 TFEU, which is the cornerstone of the entirety of the judicial system as conceived.[50]

According to the Court of Justice, the purpose of the preliminary ruling procedure is to ensure that EU law has the same effect in all Member States under any circumstances and thus to avoid divergent interpretations.[51] The national courts are therefore entitled, and in some cases even obliged, to refer a question to the Court if, in the cases they are hearing and deciding, a question arises as to the interpretation of a provision of EU law or the validity of an act of the institutions of the Union.[52] However, a question referred for a preliminary ruling cannot concern the interpretation or validity of a provision of national law, even where it has been adopted to transpose a provision of EU directives.[53] The task of

46 Judgment of the Court of 9 March 1978, C-106/77 *Simmenthal*, ECLI:EU:C:1978:49, para. 21. See also the judgments of the Court of 13 March 2007, C-432/05 *Unibet*, ECLI:EU:C:2007:163, para. 38; of 19 June 1990, C-213/89 *Factortame and others*, ECLI:EU:C:1990:257, para. 19; and also opinion 1/09, 8 March 2011, ECLI:EU:C:2011:123, para. 68.

47 In this context, the Court has expressly referred to the principle of sincere cooperation e.g. in its judgments of 14. December 1995, C-312/93 *Peterbroeck*, ECLI:EU:C:1995:437, para. 12; of 19 June 1990, C-213/89 *Factortame and others*, ECLI:EU:C:1990:257, para. 19; of 10 July 1980, C-811/79 *Ariete*, ECLI:EU:C:1980:195, para. 12; of 10 July 1980, C-826/79 *Mireco*, ECLI:EU:C:1980:198, para. 13; or of 16 December 1976, C-45/76 *Comet*, ECLI:EU:C:1976:191, para. 12.

48 Judgment of the Court of 6 March 2018, C-284/16 *Achmea*, ECLI:EU:C2018:158, para. 35; which adopts verbatim the wording of the Court's Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 174.

49 Judgment of the Court, 3 October 2013, C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 90. See also opinion 1/09, 8 March 2011, ECLI:EU:C:2011:123, para. 66.

50 Judgment of the Court of 6 March 2018, C-284/16 *Achmea*, ECLI:EU:C2018:158, para. 35; which adopts verbatim the wording of the Court's Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 174.

51 Opinion of the Court 1/09, 8 March 2011, ECLI:EU:C:2011:123, para. 66.

52 Under Art. 267(1) TFEU, the Court of Justice has competence to assess the validity of 'acts of the institutions, bodies, offices or agencies of the Union' as well as to interpret the founding Treaties and Union acts, i.e. in general the complete EU law, with the exception of the area of the common foreign and security policy (see the last sentence of Art. 24(1) TEU, as Art. 275 TFEU).

53 See the judgments of the Court of 17 January 2013, C-23/12 *Zakaria*, ECLI:EU:C:2013:24, para. 29; of 19 September 2006, C-506/04 *Wilson*, ECLI:EU:C:2006:587, para. 34; of 20 October 2005, C-511/03 *Ten Kate Holding Musselkanaal and other*s, ECLI:EU:C:2005:625, para. 25; and of 12 October 1993, C-37/92 *Vanacker a Lesage*, ECLI:EU:C:1993:836, para. 7.

verifying the compatibility of national rules with Union law thus falls exclusively to the judicial authorities of the Member States, which are provided by the Court of Justice with the interpretative means under EU law enabling them to assess that compatibility.[54] The preliminary ruling mechanism thus provides 'to national judges a means of eliminating difficulties that may be occasioned by the requirement of giving European Union law its full effect within the framework of the judicial systems of the Member States'.[55] Furthermore, it enables the coherence, full effect and autonomy, and ultimately the specific nature of the law created by the founding treaties to be ensured.[56] Consequently, the preliminary ruling procedure thus establishes 'a dialogue between the Court of Justice and the courts... of the Member States' and is 'an instrument of cooperation' between them.[57] Thus, the Court ensures the uniform interpretation and application of Union law, while the resolution of specific disputes remains within the competence of the national courts.

Immediately after the accession of the Slovak Republic to the EU, Slovak courts made only limited use of the possibility of referring questions for a preliminary ruling to the Court of Justice. While during the first five years (i.e. from 1.5.2004 to 30.4.2009) they only initiated 2 preliminary rulings, during the next five years (i.e. from 1.5.2009 to 30.4.2014) there were already 22, and in the following period of approximately nine years (i.e. from 1.5.2014 to the present) up to 55.[58] The first preliminary ruling procedure initiated by a Slovak court, the Regional Court in Prešov, ended with a Court of Justice order on the lack of jurisdiction to rule on the questions raised.[59] The Supreme Court of the Slovak Republic was the second Slovak court to refer questions for a preliminary ruling. In this case, the Court referred in its reasoned order to its previous case-law.[60] It was not until the third preliminary ruling initiated by a Slovak court, again by the Supreme Court of the Slovak Republic, that was ended with a judgment of the Court.[61] An interesting perspective is that of the conclusions of the 'Slovak' preliminary rulings. Out

54 Judgment of the Court of 23 September 2004, C-414/02 *Spedition Ulustrans*, ECLI:EU:C:2004:551, para. 23. See also the judgments of the Court of 29 November 2001, C-17/00 *De Coster*, ECLI:EU:C:2001:651, para. 23; of 6 June 1984, C-97/83 *Melkunie*, ECLI:EU:C:1984:212, para. 7; and of 17 December 1970, C-30/70 *Scheer* ECLI:EU:C:1970:117, para. 4.

55 Opinion of the Court 1/09, 8 March 2011, ECLI:EU:C:2011:123, para. 66.

56 Judgment of the Court of 6 March 2018, C-284/16 *Achmea*, ECLI:EU:C2018:158, para. 37. See also opinions 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 176; and 1/09, 8 March 2011, ECLI:EU:C:2011:123, paras. 67, 83.

57 Judgment of the Court of 5 December 2017, C-42/17 *M.A.S. and M.B.*, ECLI:EU:C:2017:936, paras. 22, 23.

58 Data obtained through the search form on the website of the CJEU. [Online] Available at: https://curia.europa.eu/juris/recherche.jsf?language=en / (Accessed: 13 June 2023).

59 Order of the Court of 25 January 2007, C-302/06 *Kovaľský*, ECLI:EU:C:2007:64.

60 Order of the Court of 21 May 2008, C-456/07 *Mihal*, ECLI:EU:C:2008:293.

61 Judgment of the Court of 8 March 2011, C- 240/09 *Lesoochranárske zoskupenie VLK*, ECLI:EU:C:2011:125.

of a total of 71 proceedings initiated by the Slovak courts, only 38 ended with a decision on the merits, that is, with a judgment of the Court of Justice, which the national court was subsequently obliged to consider when resolving specific cases. Of the remaining 33 proceedings, 7 were terminated by a reasoned order referring to the previous case-law of the Court of Justice, another 15 proceedings were terminated on the grounds that the national court itself withdrew a question referred for a preliminary ruling, and 11 proceedings were terminated on the ground of inadmissibility. A number of the preliminary ruling proceedings were initiated by national courts which, according to the CJEU, cannot be regarded as 'judicial authorities' within the meaning of Article 267 TFEU.[62] Overall, it can thus be assessed that almost half of the 'Slovak' preliminary rulings unnecessarily prolonged the length of the proceedings before the national courts. Furthermore, it can be noted that not all courts of the Slovak Republic cooperate with the Court of Justice to the same extent. For example, while the Regional Court in Prešov has submitted 14 references for a preliminary ruling, the Regional Courts in Banská Bystrica and Nitra have not yet initiated even one such reference.

4. Relationship of the Constitutional Court of the Slovak Republic to the CJEU

The Constitutional Court of the Slovak Republic (hereinafter 'the Constitutional Court') is an independent judicial body for the protection of constitutionality. In particular, it decides on the conformity of national legislation of lower legal force with the Constitution, constitutional laws, and international treaties of the Slovak Republic. It also decides on individual constitutional complaints brought by natural and legal persons against the decisions of public authorities if they infringe their constitutional rights. It also resolves conflicts of competence between central state administrative bodies unless the law stipulates that such disputes are to be decided by another state body. Its main function is to interpret the SR Constitution and constitutional laws. Even before the accession of the Slovak Republic to the EU, the Constitutional Court had to deal with requirements arising from the rules of international law, such as the European Convention on Human Rights. From the outset, its decision-making has been based on the case-law of the European Court of Human Rights and has been characterised by an effort to apply European standards of protection. Following the accession of the Slovak Republic to the EU, the Constitutional Court had several opportunities to comment on the relationship of the Slovak legal order and Slovak public authorities with EU law.

62 Preliminary rulings have been initiated e.g. by the Council of the Public Procurement Office (C-521/22, C-520/22).

Of particular significance was the ruling of 26 January 2011, in which the Constitutional Court for the first time expressed its opinion on the alleged incompatibility of the provisions of Slovak law with EU law.[63] In this proceeding, a group of deputies from the National Council of the Slovak Republic contested the incompatibility of the provisions of Act No. 581/2004 Coll. on Health Insurance Companies and Supervision of Health Care with Articles 18, 49, 54, and 63 TFEU. The Constitutional Court first confirmed that it was entitled in proceedings on the compatibility of legislation to examine the compatibility of national law with the founding Treaties or with EU law. Subsequently, he referred to the principle of the primacy of Union law, as it follows from the settled case-law of the Court of Justice, stating that the general court, within the scope of its jurisdiction, applies the provisions of EU law and

> is obliged to ensure the full effect of those provisions and to disapply ex officio any national provision, even if it is a later provision, which is incompatible with Community (now EU – author's note) law, without first having to request or await its annulment by legislative or other constitutional procedure.[64]

Furthermore, the Constitutional Court underlined that to ensure the full effect of Union law, the general court may, if necessary, refer a question to the Court of Justice for a preliminary ruling. It also emphasized that the principle of the primacy of EU law does not bind only the general courts but all public authorities, which are therefore 'obliged ex officio not to apply national law which, in their opinion, is incompatible with European Union law' (translated by the author).

From the point of view of EU law, the Constitutional Court has an important role to perform when it supervises whether the general courts have complied with their obligation to refer a question for a preliminary ruling in the cases defined in Article 267 TFEU and in the relevant case-law of the Court of Justice.[65] It performs this review in the context of the complaints procedure under Article 127(1) of the SR Constitution. The violation of the fundamental right to effective judicial protection guaranteed by Article 46(1) of the SR Constitution and, simultaneously, of the right to a fair trial under Article 6(1) of the European Convention on Human Rights as a result of the failure to refer a question for a preliminary ruling was

63 Finding of the Constitutional Court of 26 January 2011, Case No. PL. ÚS 3/09.

64 Ibid., translated by the author.

65 The courts or tribunals of the Member States are obliged to refer a question to the Court of Justice for a preliminary ruling if there is no judicial remedy under national law against their decisions and, simultaneously, they need to obtain an interpretation of EU law to decide the dispute. In addition, that obligation arises for all courts which, in deciding a dispute have doubts as to the validity of a legal act of the Union.

first established by the Constitutional Court in its ruling of 19 October 2011.[66] It follows from that judgment that there is a breach of those rights where the failure to refer for a preliminary ruling has a fundamental impact on the decision on the substance of the case, with the result that the party to the proceedings is deprived of the right to have the Court's interpretation of EU law form part of the legal basis for the substantive decision. This means that the Constitutional Court does not regard any failure to comply with the obligation to refer a question for a preliminary ruling as a violation of fundamental rights, but only one that can be regarded as

> a fundamental and qualified failure in deciding whether (not) to refer a question for a preliminary ruling, which may consist in an arbitrary or, at first sight, completely incorrect failure to refer a question for a preliminary ruling to the Court of Justice in a case where the court itself was in doubt as to the interpretation of EU law.[67]

Another important decision of the Constitutional Court confirming its constructive relationship with the Court of Justice is the order of 6 April 2011.[68] Following the case-law of the Court, the Constitutional Court confirmed that

> 'the master' of the decision to refer a question for a preliminary ruling are not the parties to the proceedings or the court superior to the referring court, but it is the referring court and the referring court itself that has concluded that it needs the interpretative assistance of the Court of Justice in order to reach a qualified decision in conformity with the law of the European Union.[69]

This approach is in accordance with the Court's statement in its judgment in the Cartesio case that

> in a situation where a case is pending, for the second time, before a court sitting at the first instance after a judgment originally delivered by that court has been quashed by a supreme court, the court at first instance remains free to refer questions to the Court pursuant to Article 234 EC, regardless of the existence of a rule of national

66 Finding of the Constitutional Court of the Slovak Republic of 19 October 2011, Case No. IV ÚS 108/2010.
67 Ibid., translated by the author.
68 Order of the Constitutional Court of the Slovak Republic of 6 April 2011, Case No. II ÚS 128/2011.
69 Translated by the author.

> law whereby a court is bound on points of law by the rulings of a superior court.[70]

The Constitutional Court thus confirmed the autonomy of the general court in deciding whether to refer a question for a preliminary ruling to the detriment of the binding legal opinion of a superior court – that is, the Constitutional Court – as expressed in its earlier decision. However, this does not prevent the Constitutional Court from reminding other Slovak courts, including other supreme judicial authorities, that the conditions for suspending proceedings and referring questions for a preliminary ruling to the Court of Justice are fulfilled.[71]

The Constitutional Court brought its first and thus far only reference for a preliminary ruling in 2019 concerning the interpretation of Article 35(4) and (5) of Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal electricity market.[72] The reference was made in the context of proceedings initiated by the President of the Slovak Republic on the grounds of the alleged incompatibility of the national provisions relating to the nomination and dismissal of the chairperson of the Network Industries Regulatory Authority as well as the participation of representatives of national ministries in price regulation proceedings before that body with the SR Constitution, in conjunction with Union law.[73] According to the President of the Slovak Republic, the provisions of Slovak Act No. 250/2012 Coll. on the regulation of network industries, as amended by Act No. 164/2017 Coll., did not respect the obligation to ensure the independence of the regulatory authority arising from the aforementioned provisions of the Directive.[74] The Court of Justice did not accept that opinion when it declared the Slovak legislation compatible with the requirements of the Directive.

In summary, it can be concluded that from the outset the Constitutional Court accepted the specificities of membership in the EU and the requirements for national courts arising from the founding treaties, as reflected in the Court of Justice's case-law. As regards its relationship with the Court, as early as 2008 it stated that in exercising its powers, it may also find itself in a position where it would also be subject to the obligation to refer a question for a preliminary ruling.[75] This situation has so far arisen in only one case, namely in the context of proceedings initiated by the President of the Slovak Republic. The Constitutional Court also monitors whether the general courts comply with the obligation to refer questions for a preliminary ruling to the Court of Justice, where a breach

70 Judgment of the Court of 16 December 2008, C-210/06 *Cartesio*, ECLI:EU:C:2008:723, para. 94.
71 See e.g. Order of the Court of 8 October 2020, C-621/19 *Weindel Logistik Service*, ECLI:EU:C:2020:814, para. 35.
72 Judgment of the Court of 11 June 2020, C-378/19 *Prezident Slovenskej republiky*, ECLI:EU:C:2020:462.
73 Ibid., para. 2.
74 Ibid., para. 12.
75 Order of the Constitutional Court of the Slovak Republic of 3 July 2008, IV. ÚS 206/08.

of that obligation has had a fundamental impact on the decision on the merits of the case. Simultaneously, it respects their independence in deciding whether to refer for a preliminary ruling to the detriment of the binding legal opinion of the Constitutional Court itself, as expressed in its earlier decision.

5. Relationship of the Supreme Court of the Slovak Republic to the CJEU

The Supreme Court of the Slovak Republic (hereinafter 'the Supreme Court'), as the highest authority of the general judiciary, ensures uniform interpretation and application of the law within the framework of decision-making on appeals against decisions of lower courts in Slovakia. Immediately after the accession of the Slovak Republic to the EU, the Supreme Court was one of the most active Slovak courts in referring questions for a preliminary ruling. So far, it has submitted a total of 26 references for preliminary ruling, 17 of which have resulted in a decision on the merits.[76] Of the remaining nine proceedings, five were terminated by reasoned order[77] and four were suspended because the Supreme Court withdrew the reference for a preliminary ruling.[78] While in the first ten years after accession to the Union (i.e. from 1.5.2004 to 30.4.2014) the Supreme Court initiated a total of nine preliminary rulings, in the next nine years or so (i.e. from 1.5.2014 to the present day), there have been 17 preliminary rulings. Similar to the Constitutional Court, the Supreme Court also considers the obligations of the highest judicial authorities arising from Union law, which is continuously supplemented by CJEU case-law in its decision-making activity. When referring questions for a preliminary ruling, it did not hesitate to criticise the practice of the Constitutional Court, accusing it of failing to consider the relevant case-law of the Court of Justice relating to the application of EU law.[79]

76 See the judgments of the Court in cases C-186/20, *HYDINA SK*, ECLI:EU:C:2021:786; C-857/19, *Slovak Telekom*, ECLI:EU:C:2021:139; C-447/18, *UB*, ECLI:EU:C:2019:1098; C-376/18, *Slovenské elektrárne*, ECLI:EU:C:2019:1068; C-534/16, *BB construct*, ECLI:EU:C:2017:820; C-533/16, *Volkswagen*, ECLI:EU:C:2018:204; C-89/16, *Szoja*, ECLI:EU:C:2017:538; C-76/16, *INGSTEEL a Metrostav*, ECLI:EU:C:2017:549; C-73/16, *Puškár*, ECLI:EU:C:2017:725; C-243/15, *Lesoochranárske zoskupenie VLK*, ECLI:EU:C:2016:838; C-543/12, *Zeman*, ECLI:EU:C:2014:2143; C-68/12, *Slovenská sporiteľňa*, ECLI:EU:C:2013:71; C-165/11, *PROFI-TUBE*, ECLI:EU:C:2012:692; C-599/10, *SAG ELV Slovensko*, ECLI:EU:C:2012:191; C-504/10, *Tanoarch*, ECLI:EU:C:2011:707; C-416/10, *Križan*, ECLI:EU:C:2013:8; C-240/09, *Lesoochranárske zoskupenie VLK*, ECLI:EU:C:2011:125.

77 See orders of the Court in cases C-113/20, *Slovenský plynárenský priemysel*, ECLI:EU:C:2020:772; C-621/19, *Weindel Logistik Service SR*, ECLI:EU:C:2020:814; C-459/13, *Široká*, ECLI:EU:C:2014:2120; C-456/07, *Mihal*, ECLI:EU:C:2008:293; C-302/06, *Kovaľský*, ECLI:EU:C:2007:64.

78 See orders of the Court in cases C-78/20, *M.B.*, ECLI:EU:C:2021:738; C-919/19, *X.Y.*, ECLI:EU:C:2021:650; C-495/18, *YX*, ECLI:EU:C:2019:808; C-113/17, *QJ*, ECLI:EU:C:2018:731.

79 Judgment of the Court of 27 September 2017, C-73/16, *Puškár*, ECLI:EU:C:2017:725, para. 31.

From the perspective of the requirements of Union law, it is relevant, for example, the judgment of 1 August 2014, in which the Supreme Court of the Slovak Republic confirmed that in the event of a lack of compliance with national legislation, Union law has application primacy.[80] Specifically, it formulated the obligation of the Regional Court in Košice to refrain from applying the provisions of para. 79(2) of Act No. 222/2004 Coll. on value-added tax to give effect to EU law, unless that provision can be interpreted in conformity with Union law, that is to say, in accordance with Article 183 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax. In relation to the application of the principle of primacy in the present case, the Court of First Instance held that there are no subsidiary procedural legislative rules in the Slovak Republic, not only in tax proceedings but also in judicial proceedings, for reviewing the legality of a decision of the tax administrator. The tax administrator does not have the power to refer questions to the Court of Justice for a preliminary ruling. The Supreme Court of the Slovak Republic has concluded that the administrative court, in the context of a binding legal opinion, must express itself unequivocally as to whether the question is one whose legal aspect has already been resolved by the case-law of the Court of Justice (the acte éclaire doctrine) and, in such a case, determine the legal procedure to be applied by the tax authorities in subsequent proceedings. However, if this question has not yet been settled by the case-law of the Court of Justice, it is necessary for the administrative court to refer a question for a preliminary ruling or, where appropriate, to summarise the arguments to the Supreme Court of the Slovak Republic for a preliminary ruling.

As regards more recent case-law, we can point to, for example, the judgment of 30 July 2019 in which the Supreme Court, in relation to Directive 2006/112/EC on the common system of value-added tax, drew attention to the need for an interpretation of national law in conformity with Union law, in accordance with the case-law of the CJEU.[81] As further stated, the decisions of the Court of Justice constitute a legally binding interpretation of the VAT Directive and are a source of law within EU Member States. Consequently, in general terms, he inferred from Article 7(2) of the SR Constitution, as well as from the principle of the primacy of Union law per se, the obligation of public authorities to interpret all national provisions in conformity with Union law, so that their application would contribute to the fulfilment of the requirement to ensure effective judicial and administrative protection of the rights that natural and legal persons derive under the EU acquis, while expressly stressing that 'EU law prevails over national law in the event of a conflict between its legal provisions and those of a Member State.' Also noteworthy in this judgment is the express reference to the case-law of the Court of Justice as a source of Union law.

80 Order of the Supreme Court of the Slovak Republic of 1 August 2014, 3Sžf/44/2013.
81 Judgment of the Supreme Court of the Slovak Republic of 30 July 2019, 1Sžfk/24/2018.

In the same sense, in its judgment of 7 August 2019, the Supreme Court referred to the Court of Justice's order in Case C-120/15 Kovozber, stating that, in view of the principle of the primacy of Union law, the case-law of the Court of Justice takes primacy over explicit legal provisions.[82] In this context, it referred to the wording of Article 7(2) of the SR Constitution, according to which

> legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic'. He then stated that 'the decisions of the CJEU are generally binding legal acts and have the nature of a source of law with higher legal force than (national) law.[83]

The Supreme Court, therefore, refrained from a literal interpretation of the term 'legally binding acts of the Union,' which is usually used to refer to secondary law, and interpreted the provision concerned in conformity with Union law, in such a way that it encompasses the entire legal order of the Union, including the case-law of the Court of Justice. This interpretation is consistent with the approach of the Constitutional Court, which, as noted above, has also identified the Treaty on the Functioning of the EU as a legally binding act.[84]

Considering the number of references for a preliminary ruling brought by the Supreme Court and the fact that it regularly refers to the case-law of the Court of Justice, it may be stated that the Supreme Court respects the obligations imposed on it by EU law and the Court of Justice's role of ensuring the uniform interpretation and application of Union law. In its decisions, the Supreme Court has explicitly referred to the case-law of the Court of Justice as a source of Union law, repeatedly emphasised the need for an interpretation of the Slovak legal order in conformity with Union law, and confirmed the primacy of Union law in the event of a collision between its legal provisions and Slovak legal provisions.

6. Relationship of the Supreme Administrative Court of the Slovak Republic to the CJEU

The Supreme Administrative Court of the Slovak Republic (hereinafter 'the Supreme Administrative Court') was established in 2021 as part of the reform of the judiciary as the highest authority in matters of administrative justice. Its responsibility is to review the decisions of administrative courts in cassation complaint proceedings, and thus ensure the legality of the decisions of

82 Judgment of the Supreme Court of the Slovak Republic of 7 August 2019, 3Sžfk/31/2018.
83 Translated by the author.
84 Finding of the Constitutional Court of the Slovak Republic of 26 January 2011, Case No. PL. ÚS 3/09.

administrative courts in providing protection for the subjective rights and legally protected interests of natural and legal persons against the unlawful exercise of public authority by public administration bodies. The Supreme Administrative Court is also the guarantor of the lawful conduct of elections, as it decides, among other things, on proceedings concerning the registration of lists of candidates for elections to the National Council of the Slovak Republic and elections to the European Parliament, on matters concerning the constitutionality and legality of elections to local self-government bodies, and on actions for the dissolution of political parties and movements. Furthermore, it has been entrusted with the competence to decide on the disciplinary liability of judges, prosecutors, and other persons designated by law.

Although there has been insufficient time since the establishment of the Supreme Administrative Court to comprehensively assess its relationship with the CJEU, it is noteworthy that it has only recently, in 2023, referred its first three questions for a preliminary ruling.[85] More detailed information is currently available only on the questions raised in the BONUL case, which concern the interpretation of Article 47(1) and (2) and Article 51(1) and (2) of the Charter of Fundamental Rights of the EU.[86] The Court of Justice has still not had sufficient time to respond to any of the questions raised by the Supreme Administrative Court. Furthermore, it should be noted that in its previous case-law, the Supreme Administrative Court regularly referred to the case-law of the Court of Justice and considered the requirements of EU law.[87] In that connection, its judgment may be noted confirming the primacy of EU law, in which the Supreme Administrative Court held that the national legislation in the second sentence of Article 89(2) of Act No 404/2011 on the residence of foreign nationals, which does not allow for the imposition of alternatives to detention, was incompatible with the provisions of Union law.[88] Moreover, he stressed that national legislation would remain unapplied and the administrative authority would adopt an individual approach to detention in accordance with the principle of proportionality, taking into account the possibility of using the more favourable measures offered by Article 89(1) of the Act on the Residence of Aliens. Only if it concludes that other sufficiently effective and milder coercive measures cannot be applied in a concrete case and that the third-country national is at risk of absconding or is evading or otherwise hindering the preparation of his/her

85 The cases are C-151/23 *ZSE Elektrárne*, ECLI:EU:C:2023:751 reference for a preliminary ruling lodged on 14 March 2023; C-185/23 *BONUL*, reference for a preliminary ruling lodged on 22 March 2023; and the C-370/23 *City of Rimavská Sobota*, reference for a preliminary ruling lodged on 13 June 2023.

86 Order of the Supreme Administrative Court of the Slovak Republic of 28 February 2023, 25 Snr 1/2021-250.

87 See e.g. the judgment of the Supreme Administrative Court of the Slovak Republic of 26 August 2022, 5Sžfk/46/2020, paras. 40–48.

88 Judgment of the Supreme Administrative Court of the Slovak Republic of 22 July 2022, 1Sak/12/2022, para. 39.

return or the execution of his/her removal, will it decide on the detention of the third-country national as an ultima ratio measure.

7. Conclusions

According to the experience developed thus far, it can be concluded that there is a relationship of cooperation between the highest judicial authorities of the Slovak Republic and the CJEU. It is precisely this relationship that corresponds to the Court's vision and is the cornerstone of the functioning of the Union's judicial system. In their decision-making activities, the Slovak supreme judicial authorities often refer to the case-law of the Court of Justice and consider the requirements of Union law, which are constantly being shaped by that case-law. Accordingly, the Supreme Courts have repeatedly referred to the principle of the primacy of Union law and the need for an interpretation of the Slovak legal order in conformity with Union law. In this way, both the Constitutional Court and the Supreme Court have proceeded, for example, to interpret the second sentence of Article 7(2) of the Slovak Constitution, which gives primacy to legally binding acts of the Union over Slovak laws, by including other sources of Union law, namely the founding treaties and the case-law of the Court of Justice of the EU, under the concept of 'legally binding acts.' The Supreme Court has so far been the most active in referring questions for a preliminary ruling, as the Supreme Administrative Court has only recently been established and the Constitutional Court has so far referred only one question for a preliminary ruling. Although the Constitutional Court has not departed from the case-law of the Court of Justice, several questions remain unanswered regarding the relationship between the Slovak constitutional order and Union law, in particular the acceptance of the primacy of Union law over constitutional provisions. In conclusion, it can be assessed that the supreme judicial authorities have always sought to respect the case-law of the CJEU and have in no context questioned its role in providing a binding interpretation of all provisions of Union law, including those governing the competences of the Union and its institutions.

Bibliography

- Balog, B. (2009) 'Medzinárodné zmluvy v ústavnom systéme Slovenskej republiky' in Sehnálek, D., Valdhans, J., Dávid, R., Kyncl, L. (eds.) *Dny práva 2009*. 1st edn. Brno: Masarykova Univerzita v Brne, pp. 564–579.
- Čorba, J. (2002) 'Prednosť medzinárodných zmlúv pred zákonmi', *Justičná revue*, 54(6–7), pp. 704–721.
- Dobrovičová, G. (2007) 'Vplyv medzinárodného práva a európskeho práva na právny poriadok Slovenskej republiky' in Dobrovičová, G. (ed.) *Vplyv medzinárodného práva a európskeho práva na právny poriadok Slovenskej republiky*. 1st edn. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, pp. 55–69.
- Drgonec, J. (2007) *Ústava Slovenskej republiky – Komentár*. 2nd edn. Šamorín: Heuréka.
- Funke, A. (2010) *Umsetzungsrecht – Zum Verhältnis von internationaler Sekundärrechtssetzung und deutscher Gesetzgebungsgewalt*. 1st edn. Tübingen: Mohr Siebeck.
- Giba, M., Valuch, J. (2016) 'Kategorizácia medzinárodných ľudskoprávnych zmlúv v procese ratifikácie' in Pospíšil, I., Týč, V., et al. (eds.) *Mezinárodní lidskoprávní závazky postkomunistických zemí: případy České republiky a Slovenska*. 1st edn. Praha: Leges, pp. 82–88.
- Ionita, L. A. (2015) 'Is European Union law a fully self-contained regime?: a theoretical inquiry of the functional legal regimes in the context of fragmentation of international law', *Studia Politica: Romanian Political Science Review*, 15(1), pp. 39–59.
- Jankuv, J. (2009) 'Postavenie medzinárodných zmlúv v právnom poriadku Slovenskej republiky' in Lantajová, D., Jankuv, J. (eds.) *Teória aplikácie medzinárodnej zmluvy ako nástroja právnej regulácie na národnej, medzinárodnej a komunitárnej úrovni*. 1st edn. Trnava: Trnavská univerzita, pp. 25–40.
- Jánošíková, M. (2013) 'Ústava Slovenskej republiky a členstvo v Európskej únii', *Acta Universitatis Carolinae Iuridica (AUCI)*, 59(4), pp. 249–264.
- Klučka, J. (2001) 'K dvom otázkam medzinárodného práva v návrhu ústavného zákona skupiny poslancov Národnej rady Slovenskej republiky', *Justičná revue*, 53(1), pp. 1–5.
- Schilling, T. (1988) 'Zur Wirkung von EG-Richtlinien – Versuch einer völkerrechtlichen Betrachtung', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 1988/48, pp. 677–681.
- Siman, M., Slašťan, M. (2012) *Právo Európskej únie (inštitucionálny systém a právny poriadok Únie s judikatúrou)*. 1st edn. Bratislava: Euroiuris.
- Šturma, P. (2013) 'Speciální smluvní režimy odpovědnosti a donucení v mezinárodním ekonomickém právu', *Právník*, 2013/4, pp. 313–328.

MAJA LUKIĆ RADOVIĆ*

The Interaction Between the Rule of Law, Fundamental Rights, and the Supremacy of EU Law

ABSTRACT: *The rule of law constitutes the cornerstone of the European legal order and, consequently, the primary pillar of its constitutionality. Paired with the principle of the supremacy of EU law, affirmed by the Court of Justice of the European Communities in some of its earliest and most significant decisions, it facilitated the development of the European Union both in the legal-constitutional and political senses. The introduction of fundamental rights as a core value completed the legal-constitutional framework, enabling individual rights and freedoms to flourish. As these principles and values are based on moral grounds, cultural and historical forces, and traditions that led to their conceptualisation, the debate on their implementation, reinforcement, crisis, or even backsliding has always been active. The subject of this paper is the key internal and external aspects that influence the way the rule of law, fundamental rights, and the supremacy of EU law are understood, emphasising that their internal and external components are equally important for their universal implementation as legal and political concepts.*

KEYWORDS: rule of law, fundamental rights, supremacy of EU law, EU values, EU principles of law, constitutionality

1. Introductory remarks

European values, with the rule of law permeating them as a meta-value, form the constitutional basis of the European legal order, together with the protection of fundamental rights. These two legal concepts stem from the constitutional traditions and constitutional orders of Member States and have been gradually introduced into the EU legal system. The principle of the supremacy of EU law

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is a legal principle created in the early beginnings of the European integration process and developed by the European Court of Justice (now the Court of Justice of the EU) as one of the key pillars of the supranational legal order. The development of these principles and values has served as a point of leverage for European constitutional evolution. They are indeed inevitably intertwined, which can be observed by examining the judicial dialogue between the national courts on the one side and the Court of Justice on the other. This ongoing dialogue was initiated at the inception of the European Communities, shaping the development of the relationship between the two legal orders: the national law of each Member State and the European legal order. Furthermore, any political or judicial decision in the EU arena that builds upon the interconnections between the rule of law, fundamental rights, and the supremacy of EU law strengthens the narrative that nurtures the legitimisation of the European legal identity and its founding elements. Therefore, the European political and legal identity has been founded through the creation of closer and tighter political and legal relationships among Member States. This has been achieved within the framework of the treaties, the Charter of Fundamental Rights of the European Union, and specifically as a result of the case-law of the Court of Justice of the EU (CJEU). The relationship founded on a political slogan of an "Ever-closer Union"[1] included creating common European values and principles as well as balancing national and supranational interests when it comes to the application of the supremacy principle. This has not always been an easy mission, especially due to all the challenges associated with the demanding task of deepening all aspects of European integration, whether as an internal development or as part of European external policy, with enlargement being the mechanism behind EU growth. This process comprises several driving forces. First, without territorial expansion, the EU could not have developed in the way it did, or at all, whereas introducing new legal orders and integrating them into the existing system was not without its burden.

The premise is that the values of all Member States are essentially the same or are common and universally accepted. Accession negotiation is meant to allow the aspiring member to prove this hypothesis; however, the meaning attributed to those values and political forces at the time of accession make this *prima facie* clear and simple approach rather complex in practice.[2] The role of the CJEU is essential in ensuring that these various interpretations of the content of EU values and/or fundamental rights are aligned with each other and understood in the same way when it comes to the implementation of EU law. However, as these values also have aspects that fall outside the scope of law, it can sometimes be a challenging role.[3] For this reason, the Court of Justice is often regarded as slow to respond

1 European Council, 2017.
2 Claes, 2019, p. XI.
3 Vlajković, 2020, p. 242.

to development trends in a due manner, to the point that it hampers further EU integration. However, to secure proper functioning of the legal order, the CJEU needs to ensure the application of its decisions and prevent any adverse effects that may stem from the fact that the level of common understanding of EU values or the level of protection of fundamental rights is not as aligned as it needs to be.

With each enlargement, additional elements must be considered in the perception of EU values and principles. European nation-states, with their histories and traditions, although essentially similar and intertwined, have differences that need to be acknowledged. While the transfer of competencies to the EU may initially seem clear and practical due to several internal political and other factors, many states may never be able to accept the supremacy of EU law in its fullest capacity; therefore, a margin of discretion is inevitable. During these ever-changing times, it has become increasingly difficult to maintain an integrative process and ensure that the margin of discretion does not put the entire principle into question. Legal uncertainty, inconsistency, and the inability to have legitimate expectations are among the greatest threats to the stability of the EU constitutional order. Even though the rule of law, fundamental rights, and the concept of EU law supremacy are considered legal values and principles and the driving forces of the EU legal order,[4] they are not solely legal terms. They are primarily concepts related to accepted values, perceptions of right and wrong, beliefs, teachings, and understanding. Hence, political, and societal developments will undoubtedly have an impact on the way they are perceived.

Initially, the architecture of the EU legal order in relation to the rule of law, fundamental rights, and the supremacy of EU law was designed in a way that indicates the existence of a hierarchy, yet only at first glance. The core value is most certainly the rule of law, but to make this value a viable legal concept, it needs to be based on a legal order that is considered just.[5] This is the point at which fundamental rights become indispensable in recognising individual freedoms as a guarantee to properly understand the concept of the rule of law. Ideally, the supremacy of EU law in all fields would most certainly solve many problems related to the interpretation and understanding of the rule of law throughout the EU. The differences in culture, language, and traditions between Member States, however, are not just nuances; they are a formative part of national identities and should not be neglected.[6]

In this study, we aim to analyse the origins of these fundamental legal concepts and grasp their importance in the constitutionalisation of the EU legal order. By focusing on their role in the European integration process, we highlight the growing significance of the obligation of Member States and the EU to respect

4 Von Bogdandy, 2010, p. 54.
5 Raulus, 2016, pp. 25–37.
6 Von Bogdandy, 2010, pp. 54–56.

both fundamental rights and the rule of law. Consequently, they are also ensured by primary legal sources in the EU and are thus covered by the principle of supremacy. Second, these principles have a prominent place in every EU internal and external policy, especially the enlargement policy in relation to conditionality criteria. This has a significant influence on furthering European integration, which is another area worth exploring to better understand the three concepts and their co-dependency. Finally, we emphasise that the rule of law, fundamental rights, and supremacy of EU law complement and counterbalance each other in the EU's constitutional order. We will highlight the latter to find new paths in resolving the ever-lasting dilemma of the 'deepening or widening the Union'[7] and to question whether the concept of the European identity is attainable in every sense.

2. The evolution of the EU values and principles: internal aspects

■ *2.1. The European evolution of fundamental principles*

The European Union is rooted in common civilizational traits originating from a shared heritage, traditions, and common cultural, philosophical, and religious roots.[8] Throughout the centuries, Europe has been stricken by conflicts motivated by similar reasons, burdening Europe and its nations. Therefore, the shared experiences and common European history generated a balanced approach to the values that later developed into the *conditio sine qua non* of European integration. Consequently, and precisely for these reasons, the European continent has always been perceived as a unique territory with predispositions to grow into unity built on commonality. Victor Hugo presented the idea of the "United States of Europe" at the Peace Congress in 1849 as early as the nineteenth century.[9] A century later, Robert Schuman, together with other fathers of European integration, proclaimed the Declaration on the first European Community to be built with joint effort and common interests, as well as the shared goals of the six founding Member States. The Schuman formula is based on the idea that the European Community is built upon *de facto* solidarity and concrete achievements.[10]

Without this political ideology conceived by some of the greatest minds of Europe, the European Union today would not have been able to surpass the European Communities and their original goals, and would not exist in this form.[11] However, with the evolution of European construction, it has become obvious that

7 Rehn, 2008.
8 Rakić and Vlajković, 2022, pp. 235–239.
9 Košutić, Rakić and Milisavljević, 2021, pp. 10–73.
10 Schuman declaration, May 1950.
11 The same goes for the de facto solidarity that evolved into a founding principle of the European Union envisaged in the primary law of the EU. See Arts. 2, 3, 21, 24 etc. of the Treaty on the European Union (Lisbon Treaty), Official Journal of the European Union C 326/13. 26.10.2012.

the said concrete achievements, at first focused solely on economic progress, were reoriented towards creating a strong legal and political ground for the *naissance* of the new Union.[12] This goal of creating "something bigger" was obvious after the first decade of the European Communities with *Van Gen den Loos*[13] and *Costa vs E.N.E.L.*[14] decisions. In the latter, the Court established, or rather pioneered, a principle that would be one of the core principles enabling the efficient functioning of the European Communities and, subsequently, the European Union: the principle of primacy or supremacy of EU law. This principle already portrayed the great ambition of the European construction, which would continue to rely on its supranational character features for decades onwards.

The principle of supremacy of EU law went on to be reaffirmed by the ECJ, with a tendency to be understood in an absolute manner, meaning prevailing over Member States' constitutional principles and values. The ECJ confirmed its stance in 1970 in the *Internationale* decision when it first encountered a constitutional limit depicted in the protection of a Member State's fundamental rights.[15] The ECJ clearly stated that

> The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.[16]

Even though this judicial opinion would be re-examined thoroughly by the constitutional doctrines of the national courts in the following years,[17] we underline that for the first time the highest European judicial authority confirmed that respect for fundamental rights, inspired by the constitutional traditions common to Member States, formed an integral part of the general principles of the Community legal system.[18] This decision is often perceived as the 'inception of the ECJ human rights jurisprudence'.[19] Nevertheless, fundamental rights remained both

12 See more Rakić and Vlajković, 2022, pp. 227–281.

13 Judgment of the Court of 5 February 1963. – NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. – Reference for a preliminary ruling: Tariefcommissie – Pays-Bas. – Case 26-62. European Court reports 1963 00001.

14 Judgment of the Court of 15 July 1964. C-6/1964 *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66. Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy. Case 6-64. Reports of Cases 1964 01195.

15 Frontini et Pozzani, Case n 183/73, 27 Decembre 1973, Giur. Cost. I 2401.

16 Ibid., para. 3, p. 1134.

17 The leading examples in the history of the European integration would be Solange I and II doctrines created by the Bundesverfassungsgericht in 1987, or the *contralimiti* (counterlimits) doctrine created by the Italian Constitutional Court in 1973.

18 Ibid., para. 4, p. 1134.

19 Davies, 2017, pp. 157–177.

a national constitutional limit to the absolute supremacy of *droit Communautaire* and an integral part *in statu nascendi*. Moreover, the first *Solange* judgment, delivered by the German Constitutional Court (*Bundesverfassunungssgericht – BVerfG*), proved that there is indeed a national standard for the protection of fundamental rights that differs from that proclaimed in the ECJ's *Internationale*.[20] Although this judicial stance could be characterised as protectionist, considering that it was brought simultaneously as other complementary constitutional doctrines such as *contra-limiti*,[21] it actually had a positive impact on the further development of respect for fundamental rights by the European Communities. In its subsequent judgment, *Nold*,[22] the ECJ confirmed its position that fundamental rights 'form an integral part of the general principles of law,' affirming its own obligation to draw inspiration from common constitutional traditions of Member States.[23] This was politically supported by the Declaration on European Identity,[24] which clearly established the dynamics of European project development.

However, this did not prove that Member States' understanding of what constitutes EU values and principles is balanced or absolutely the same. Nevertheless, it was more than sufficient for *BverfG* to observe the fundamental rights doctrine in light of the supremacy principle in the second *Solange* decision.[25] The former position of the *BverfG* differentiated national fundamental rights protection from the European Union, confirming that the EU respect for fundamental rights was at an efficient level equivalent to the standard of the German Basic Law (*Grundgesetz*). As long as the EU provided equivalent (or higher) protection, the *BverfG* did not have to resume its jurisdiction or apply *Solange I* standards. This was the pioneering example of an efficient judicial dialogue as well as balancing diverse interests, where the issue of relativisation of the absolute supremacy principle was put aside to estimate and provide adequate protection of fundamental rights, both in Member States and in the Communities.

20 37 BVerfGE 271. English translation [1974] 2 CMLR 540 – Internationale Handelsgesellscha. fi v. Einfuhr und Vorratsstelle fur Getreide und Futtermittel.

21 *Contralimiti* doctrine was coined by the Italian Constitutional Court. It introduced the right to review, or "counter-limit" the EU measures applied in Member States, in this case Italy, when there is a possibility that it could affect fundamental rights and principles protected by the Constitution. See L'arrêt n 183/73 du 27 déc. 1973, Frontini et Pozzani, Case n° 183/73, Giur. Cost. I 2401; Fragd Judgment of Apr. 21, 1989, Corte cost., Italy, 34 Giur. Cost. 1 1001.

22 Judgment of the Court of 14 May 1974. Case 4-73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, ECLI:EU:C:1974:51 European Court Reports 1974-00491.

23 Ibid., para. 13, p. 507.

24 Declaration on European Identity. Document on The European Identity published by the Nine Foreign Ministers on 14 December 1973, in Copenhagen, Bulletin of the European Communities. December 1973, No 12. Luxembourg: Office for official publications of the European Communities, pp. 118–122.

25 German Federal Constitutional Court, judgment of 22 October 1986, 2 BvR 197/83.

Moreover, on the same wave of progressive orientation towards fundamental rights and principles, the Court took a step forward in this direction with its decision in *Les Verts v Parliament* in 1986. In this judgment the Court referred for the first time to the 'Community based on the rule of law.'[26] Besides, the Court did not miss the chance to make a liaison between respect for the rule of law on the one hand and the supremacy of the Community law on the other.[27] The low-intensity constitutionalism[28] that was dominant until the founding of the Union was reshaped as a consequence of national constitutional pressures, intergovernmental developments, and constitutional interpretation by the European Court of Justice.[29] The reliance on the fundamental principles and rights in the progressive process of constitutionalisation of the European legal order was closely followed by the consequent case-law of the Court of Justice, as well as substantive normative changes introduced by the Treaty on the European Union.[30] In its Opinion 1/91, the ECJ announced that the Treaty was to be considered 'a Constitutional charter of the Community based on the rule of law.'[31] According to in-depth doctrinal analysis provided by Joseph Weiler on the transformation of Europe,[32] the Court of Justice had to include the protection of fundamental rights to counterbalance the 'democracy deficit in the Community decision making.'[33]

■ *2.2. The role of the values and principles in creating contemporary European Constitutional Order*

Reconceptualising Communities into a *sui generis* entity, such as the European Union, was a complex process that encompassed the legal and political (re) building of a firm constitutional basis for further functioning.[34] The Treaties of Maastricht and Amsterdam introduced new structural elements understood as affirmations of fundamental rights and principles as foundations of the European project.[35] Safeguarding principles and fundamental rights were set as the primary

26 Case C/294/83, *Parti écologiste 'Les Verts' v. European Parliament*, ECR 1986-01339, para. 23.
27 Ibid., para 23: '…inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.'
28 Maduro, 2004, p. 3.
29 Lukić Radović, 2020, p. 4.
30 Treaty on European Union, OJ C 191, 29.7.1992, p. 1–112.
31 Opinion 1/91, European Court Reports 1991 I-06079, para 1.
32 Weiler, 1991, pp. 2403–2484.
33 Lukić Radović, 2020, p. 4.
34 Vlajković, 2022, p. 490.
35 Art. F (2), Treaty on European Union (92/C 191 /01), Official Journal of the European Communities No C 191 / 1, 29 July 1992: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms…and as they result from the constitutional traditions common to the Member States, as general principles of Community law'; Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, as signed in Amsterdam on 2 October 1997, amended Art. F (1) in the

goals of the EU's external and foreign policies.[36] This normative confirmation of the EU's legal system core elements manifested in two directions: the EU was undergoing a parallel process of politicization and constitutionalisation, and fundamental principles and rights permeated both the internal and external actions of the EU, thus strongly characterising its identity. It came "hand in hand" with the declaration of the Charter of Fundamental Rights in 2000, at the dawn of the greatest enlargement of the Union. Although the Charter is equivalent in effect to the founding Treaties, this document marked "another brick in the wall" of the EU constitutionality.[37] The Lisbon Treaty's unsuccessful predecessor – a Constitution for Europe – had already indicated a very prominent role of common values (once known as principles), highlighting that the Union was founded on values common to Member States. By consecrating a significant role to common constitutional traditions and national values of Member States, the Constitution for Europe intended to counter-balance another normative novelty. Namely, the principle of supremacy of EU law was envisaged in Article I-6, stating that: 'the Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States'. This was the first and only time in the history of European integration that the principle of supremacy was introduced into primary legislation. However, the attitudes of Member States' constitutional courts proved that it was in vain. Most constitutional bodies held that EU law could not have supremacy over national constitutional values and principles or Constitutions *per se*.[38] Thus, in the Constitution for Europe, fundamental values and rights are envisioned as elements of stronger constitutional cohesion but simultaneously as a reason for imposing national constitutional limits to the principle of primacy. This was still perceived as the continuation of the "defensive constitutionalism" approach adopted by national constitutional courts or, as Miguel Poiares Maduro described it,[39] the re-examination of 'how constitutional can the European Union be.'[40]

following way: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States.'

36 See for example Art. J(1) Treaty on European Union.

37 Lukić Radović, 2020, p. 3.

38 Besides aforementioned German and Italian doctrines, the French Constitutional Council was very vocal on the hierarchy of norms, stressing, in its Decision 2004-505 DC of 19 November 2004, that the Treaty establishing a Constitution for Europe would not affect the position of the national constitution as the highest norm in the domestic legal order. Three years prior, the State Council, in the case Syndicat national de l'industrie pharmaceutique, brought a Decision on 3 December 2001, where it stated that it gave precedence to all norms of the French Constitution over EU law. The Polish Constitutional Tribunal followed, and in its Decision K 18/04 underlined that 'the Constitution enjoys precedence of binding force and precedence of application within the territory of the Republic of Poland.' The same was with the Constitutional Court of Lithuania. See De Witte, 2011, p. 396.

39 Maduro, 2004, pp. 14–15.

40 Ibid.

The role of fundamental rights and values was reiterated in the Treaty of Lisbon without substantial changes from the previous Constitution. The narrative remained the same except for the contestable primacy provision. The European Union is founded and functions 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' which are common to all Member States. These values are mentioned in the 10 Articles of the Lisbon Treaty, leading to further constitutionalisation and Europeanisation.[41] Together with the Charter on Fundamental Rights, the Treaty of Lisbon proved that 'the only normatively acceptable construct is to conceive a polity as a Community of values…' where 'the commitment to human rights becomes the most ready currency.'[42]

Regarding the Charter, the issue of intertwining fundamental rights protection with the question of primacy emerged with the introduction of its Article 53. This article regulates the level of protection of fundamental rights but may pose a threat to the proper application of the supremacy principle. Although the issue of supremacy was skilfully avoided during the drafting of the Charter, this article carries a strong political message. It essentially means that Member States' demands were met by clarifying that the national constitutions and the protection of fundamental rights guaranteed by them will in no way be replaced or pre-empted by the Charter. With a simple textual analysis of this article, we may conclude that it does not normatively change the level that has already been established in the legal framework of the EU but provides a 'simple politically valuable safeguard,'[43] which would reduce the fear that the Charter could be the basis for an additional restriction of rights that were previously guaranteed by other national or international instruments. The fear of the potential abuse of Article 53 was to a certain extent justified. On the part of the EU, the reasons can be found in the tendencies already affirmed of national constitutional courts limiting the application of community law by respecting the basic rights guaranteed by the Constitution, and therefore, by their own constitutional control and assessment. However, the Member States, supported by the argumentation of the protection of their own constitutional *specificum*, could also avoid turning to standard judicial dialogue precisely in fear of the possible outcomes of Charter interpretation by the same CJEU. This is due to the Court's proven tendency to prioritise the level of protection provided by the Union to the detriment of the national one, thereby neglecting the existence of exclusive national fundamental rights and values, as well as constitutional traditions.

Evidently, the Court of Justice played a significant role in constitutionalising the European Union legal order and legitimising the European project, taking into

41 Arts. 2, 3, 7, 8, 13, 14, 21, 32, 42 and 29 of the Lisbon Treaty. Vlajković, 2022, p. 488.
42 Weiler, 1991, cited in Lukić Radović, 2020, p. 5.
43 Liisberg, 2001, p. 38.

consideration all its fundamental elements from the rule of law to fundamental rights. Judicial activity on the European side has not been neglected, especially in the post-Lisbon era. To be more precise, since the 2000s, its jurisdiction in the said matter has been 'deepening and broadening in a linear fashion.'[44] A prominent example is given in its *Kadi I* judgment.[45] As the president of the CJEU, Koen Lenaerts stated while analysing the concluding remarks of the Courts' decision, the common values on which the EU is founded are also 'the backbone of a Union based on democracy, justice and law.' They secure the autonomy to the Union's legal order, and their respect should always take precedence over other international legal actions. In this case, the UN Security Council sanctions are implemented through EU legislative measures.

3. The role of the rule of law and fundamental rights in the enlargement process: external aspects

The EU has managed to transform into the organization that it is today in greatest part due to the fact that over the course of its existence it has been dedicated to territorial expansion. This has not always been as smooth as it may appear, considering that this expansion is quite significant, achieved in a relatively short period of time, and aims to create a unique, extremely close-knit union of nation-states. Considering that every Member State must agree to each enlargement, this process has always been driven or hampered by a myriad of factors ranging from those that are political to those related to the technicalities of the process.

The EU and its Member States undoubtedly learned from each enlargement experience and eventually managed to produce a set of criteria that must be met for prospective members to accede to the EU. These criteria, now colloquially known as the Copenhagen criteria,[46] after the 1993 European Council where they were first established, and further reinforced by the 1995 Madrid European Council, present a broad set of rules to which a prospective member needs to adhere to meet the requirements stipulated in Article 6 and Article 49 TFEU.[47] The first criterion clearly indicates that EU membership is based on a value system established on strict adherence to the rule of law, democracy, and fundamental rights, whereas the third criterion sets grounds to ensure the application of the

44 Lukić Radović, 2020, p. 5.

45 Judgment of the Court (Grand Chamber) of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined cases C-402/05 P and C-415/05 P, ECR 2008 I-06351, EU: C:2008:461.

46 Copenhagen European Council, Presidency Conclusions [1993] SN 180/1/93 REV 1.

47 The values that require adherence are stipulated in Art. 2 TEU as follows: respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities.

supremacy of EU law; that is, it is supposed to be a clear indication of preparedness to assume the rights and obligations pursuant to EU membership and fit into what makes the body of EU law. Although these criteria are mutually accepted and at first glance may seem undisputable, in every case when actual countries were examined against them, it appeared that different states and cultures may attribute different meanings to them; this has inevitably led to a number of obstacles, misunderstandings, stalling of accession negotiations, frustration, and negative sentiments towards the EU and its members. Turkey's lengthy accession negotiation and pre-accession phase clearly demonstrates how, over the course of the years, if reforms adopted by the candidate country are not reciprocated with accession advancement, backsliding is inevitable. The case of the Western Balkans is an even more salient example for this statement, where all states are continuously treated identically despite their differences, which discourages them from continuing their rule of law reforms and contributes to the overall negative sentiment towards the EU and the importance of adhering to its values and principles. With the recently granted candidate status to Ukraine and the confirmation of the European perspective to Georgia and Moldova, which was clearly not based on their respective reforms in relation to the rule of law and other EU values, the external aspect of the rule of law has become even more vague and even trivialised; thus, it now appears as a policy measure that is easily bent to pragmatic political ends. In addition, as political criteria often develop into some form of political conditionality that is often criticised for its inconsistency and even regarded as counterproductive in the process of attaining the set goals,[48] it is often impossible to advocate for strict adherence to EU values and expect them to be understood and applied universally throughout the Union and within its partner states. Furthermore, if the premise is that all European states share the same European values that are reflected in the EU legal order and constitutional setup that subsequently allows for them to eventually join the EU, why is it necessary for these states to prove that they indeed adhere to these values, and why do they have to be conditioned into reforming their statehood in a way that will be indicative of the presence of these values? This approach demonstrates that all actors involved in the process are aware that these values at times appear a mere proclamation rather than an issue of substance. Taking into account the fact that the political accession criteria are simultaneously actual legal values and principles and the very basis of the legal aspects of accession with their concrete understandings and implications, the need for a uniform approach to adherence to the rule of law and fundamental rights criteria, while simultaneously acknowledging the fact that there are many inconsistencies in their implementation, has become self-evident. For EU values to be effective throughout the Union, the way they are perceived in the countries that fall under the scope of the enlargement policy is equally

48 Smith, 1998, p. 254.

important. Only with genuine adherence to these principles and values and their consistent implementation can we truly ensure the proper functioning of the EU constitutional order and EU law.

The EU initially came into existence as an economic union of like-minded nations. From that point on, it expanded in ways that could not have been foreseen as a possibility in that initial setting. Economic co-operation requires a uniform legal approach. Legal approximation paved the way for certain constitutional issues, and further economic and political development of the Union depended on enlargement. With each new territorial expansion, the importance of common values and principles for the maintenance of the established order became more palpable but, simultaneously, more fragile. Enlargement most certainly makes the Union ever stronger; however, it introduces a period of integration of a new state in which the entire Union is exposed to significant vulnerabilities. In the process of enlargement, the European Union secured the implementation of its law even outside its territory. There have been many instances of territorial expansion in the application of EU Law. First, the core of accession negotiations is based on the approximation of laws – that is, on the development of the ability to assume membership obligations.[49] States under the enlargement policy have been in the process of harmonising their laws for decades. This mechanism allowed for EU law to enter the national legal systems of several neighbouring countries, creating *de facto* territorial expansion. These practices also exist in Eastern Partnership countries.[50] This obligation was established through association agreements.[51] This obligation of prospective members has been introduced by the same treaties that insist on the promotion of fundamental rights as the connective tissue leading to further integration. Another example of this territorial expansion of EU law outside the EU in certain policy areas that are dependent on network infrastructure to function properly is the Energy Community Treaty,[52] which defines the extension of the EU *acquis* under Title II in the fields of energy, environment, competition, and renewables, and a possibility for extension to other areas, and a clear timeline, guidelines, and country-specific approach to the approximation of laws reinforced by the implementation and dispute resolution mechanism. We can

49 Vlajković and Tasev, 2021, p. 91.

50 Paivi and Petrov, 2009, pp. 655–671.

51 The EU concluded association agreements with its partners under the European neighbourhood policy where accession is a possibility. For the Western Balkan region this instrument is adapted and known as the stabilisation and association process. The said agreements, both the association agreements in Eastern Partnership countries and the Stabilisation and Association Agreements in the Western Balkans, establish the obligation of the harmonisation of laws. The idea is for the state in question to gradually align its legal system to that of the EU so that advanced cooperation can further develop regardless of eventual membership.

52 2006/500/EC: Council Decision of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty OJ L 335M, 13.12.2008, pp. 374–382 (MT), OJ L 198, 20.7.2006, p. 15–1.

conclude that EU law, or at least its fragments, is *de facto* applicable and valid in many countries outside EU territory, primarily other countries on European soil, which can certainly underpin its further development and stronger integration within the EU. However, the values of the EU legal system cannot be transposed through purely technical and legislative undertakings. Likewise, with the *de facto* territorial expansion of the validity of EU law, they also need to be uniformly understood and implemented outside the jurisdiction of the EU with the intention of securing the proper functioning of the EU legal order and its external tendencies. This is where conditionality comes into the picture as one of the most obvious mechanisms for enforcing the implementation of sophisticated and intricate concepts such as the rule of law.[53] This quintessential legal and political value, as observed by scholars, is often misconstrued by practitioners, that is, those in charge of securing the rule of law reform in a specific country.[54] The practitioners are focused on being able to transplant institutional set-ups and procedures deemed "best practice" to nations 'that lack the historical processes that gave rise to the rule of law in the modern West.'[55] This inevitably leads to the rule of law being understood as a mere institutional or procedural measure to be undertaken to attain a certain goal, be it financial aid or incentives, or political advancement in EU accession negotiations. This constant struggle between the rule of law as a value and the rule of law as an indication of political commitment leads to its trivialisation and many difficulties related to its implementation and understanding.

With the undisputed correlations of the rule of law, fundamental rights, and democracy, the remaining EU constitutional order values follow the same footsteps. So closely linked together, yet with many unanswered questions of their own, they often pose major points of disagreement and misunderstanding. Although in terms of enlargement all these difficulties may be, to a much lesser extent than in their global outreach, fundamental rights as perceived on

53 De Ridder and Kochenov explained that the conditionality criteria consist of democratic conditionality and acquis conditionality. However, they underlined that the application of conditionality criteria, especially related to political criteria, that is built upon democracy, rule of law and fundamental rights, lack(ed) 'any clarity as to what was actually expected of the candidates willing to accede.' This resulted in the absence of clear and concise demands when it comes to standards that the countries would have to comply with. Crucial issues that needed to be tackled by the EU when applying conditionality criteria are serious assessments and clear standards. See De Ridder and Kochenov, 2011, pp. 597–598.

54 Magen, 2009, p. 58. Kochenov also draws attention to the fact that it is 'possible to observe that the Copenhagen related documents give priority to the assessment of the rule of law, without concentrating on the analysis of the democratic process in the candidate countries in necessary detail.' Therefore, the mere assumption 'that the famous accession criteria and the political criteria in particular, as formulated at Copenhagen' are clear and precise enough is not enough 'in order to serve as a real measurement tool for the progress made by the candidate countries towards accession.' See Kochenov, 2004, pp. 12–23.

55 Magen, 2009, p. 59.

European soil, despite numerous similar historic factors that shaped European culture, are not without challenges. Simply put, although the major setbacks regarding fundamental rights may be of a lesser scope, sometimes pertaining mostly to the rights of a certain group, the notion that human rights as such are not accepted as normative standards everywhere in the same manner, nor are they supported on universally accepted moral grounds,[56] is present even in the case of EU enlargement. Taking into consideration numerous examples of countries being in breach of fundamental rights as stipulated by the EU Charter and the tendency of EU institutions to turn a blind eye to these issues due to certain collective or individual political aspirations or interests, this fragment of the first Copenhagen criterion is yet another indication of how the external perception of EU values can be as important as the internal.

While EU membership may appear as the end of the road from the perspective of a state involved in accession negotiations, it is essentially the beginning of a new journey. All these misunderstandings and policies based on the conditionality approach will continue to exist, even on the other side of the border. This spillover effect is the root cause of challenges related to the implementation of the rule of law as a value and legal concept within the EU. Adding the supremacy of the EU law principle to this equation, with a growing stronger sentiment of national identity, it is clear that the EU values and principles and the Union's tendency to grow in every way are intertwined. That said, the fact remains that the rule of law and fundamental rights are at the very core of the enlargement policy, not only for their legal and political aspects but also for their moral grounds and value-based systems, and consistent adherence to the first Copenhagen criteria is essential for both their external and internal components. The rule of law and fundamental rights will always remain something to strive for and will never be presumed as inherent to a certain state or culture, and any contrary conviction can lead to falling into a dangerous trap, both for the perseverance of the EU constitutional and legal order and the prosperity of individual rights and liberties.

4. Complementary and counterbalancing aspects of the rule of law, fundamental rights, and the supremacy of EU law

■ *4.1. The relationship between the rule of law, fundamental rights, and the supremacy of EU law before CJEU*

The CJEU's post-Lisbon case-law has extensively addressed the challenge of balancing the principle of EU supremacy, on the one side, with the ongoing development of the EU constitutional foundations, one the other. This was particularly the

56 Martin, 2013, p. 61.

case when it comes to fundamental rights protection. The 2013 *Melloni* judgment[57] underlined how challenging the interpretation of Article 53 of the Charter could be for balancing interests between the national and supranational legal orders. The Court of Justice underlined the importance of the Charter and the minimum standard for the protection of guaranteed fundamental rights. However, the CJEU expressed an inflexible approach that aimed at sending a message to the Member States that the uniform application of EU law, efficacy, and supremacy of EU law are crucial elements for the functioning of the EU legal order. It acted in a way that allowed for the reconfirmation of the importance of the supremacy principle and ensured that Article 53 would not be considered an exception or even a *carte-blanche* to the said principle.[58] The same formulation "(su)primacy, unity and efficacy" was used in the subsequent case before the CJEU that considered a preliminary reference from Sweden regarding the application of EU law and not contravening *ne bis in idem* rule guaranteed by both the Charter and the European Convention on Human Rights.[59] Nevertheless, the arguments from both judgments formed solid ground for the Court's narrative in Opinion 2/13, contrary to the aspirations stated in Article 6(2) TEU. There are two key paragraphs of this opinion that define the relationship between the EU legal order and others, as well as the European (constitutional) identity. As the Court of Justice highlighted in paragraph 167 of Opinion 2/13,

> These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe…'[60]

The aim was to build a stronger Union underlying the specificity of EU legal order

> based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU.[61]

57 Judgment of 26 February 2013, C-399/11 *Stefano Melloni v. Ministerio Fiscal*, ECR, EU: C:2013:107.
58 Lukić Radović, 2020, p. 6.
59 Judgment of 26 February 2013, C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, ECR, ECLI:EU:C:2013:105.
60 Opinion 2/13 of the Court (Full Court) 18 December 2014, ECLI:EU:C:2014:2454, para 167.
61 Ibid., para. 168.

As previously mentioned, the reasoning in the *Kadi* judgments, as well as the opinions delivered on the occasion of accession to the Convention, clearly show the tendency of the Court of Justice of the EU to reaffirm the specificity of the Community legal order based on EU values, which are a catalyst for linking national legal orders into a single European order with its own international identity.[62]

After the *Melloni* and *Akeberg Franson* judgments concerning the determination of an adequate level of protection of fundamental rights, the question of who or whose court had the last word was again at the centre of the judicial dialogue between legal orders. Following the CJEU's initial setback in the first *Taricco* judgment,[63] which only expanded the *Melloni* argumentation, the Italian court was ready to 'hit back' by invoking the *contralimiti* doctrine, which led to a nuancing of the supremacy principle by the Court of Justice in the *Taricco II* judgment, that is, *M.A.S, M.B*.[64] In *Taricco*, the Court highlighted the problem of articulation between the legal order of the Union and the national legal order. Conflicts arose due to the determination of different scopes of the principle of legality in the EU on the one hand and in the Italian legal order on the other. The case also highlights the longstanding issue of balancing the protection of fundamental rights that are protected by the Charter and the protection of rights that are guaranteed by the national Constitution. As Rauchegger rightly noticed in the *Taricco* case, 'the disapplication of the Italian limitation rules in question was compatible with the right enshrined in the Charter, but incompatible with the equivalent Italian constitutional right.'[65] In relation to that, these judgments also contributed to the judicial relativisation of the supremacy principle in favour of the higher level of protection of fundamental rights guaranteed in the national legal and constitutional orders. Many called this judicial solution and the new interconnection between fundamental rights protection and the supremacy principle 'a new chapter in the judicial dialogue.'[66]

In the same period, the Court found itself in a position to determine the applicability of the EU Law of Fundamental Rights to private parties' litigation.[67] The *Samira Achbita*[68] case was important, as the Court discussed the importance of the minimum harmonisation of fundamental rights protection in the EU.[69] Again, the Court turned to balancing interests, giving a wider margin of appreciation to the Member States, which was read as a compromise or concession given to the national

62 Lukić, 2015, pp. 127–137.
63 Judgment of 8 September 2015, C-105/14 *Ivo Taricco and Others*, ECR, EU: C:2015:555.
64 Judgment of the Court (Grand Chamber) of 5 December 2017 Criminal proceedings against M.A.S. and M.B.
65 Rauchegger, 2018b, p. 1521.
66 Faraguna, 2017.
67 Marín Aís, 2018, pp. 409–417.
68 Judgment of the Court (Grand Chamber) of 14 March 2017. Case C-157/17 *X v Staatssecretaris van Financiën,* ECLI: ECLI:EU:C:2017:203.
69 Čučković, 2021, pp. 263–288.

legal systems and another step towards relativisation of the EU supremacy *par rapport* constitutional principles, guarded by constitutional identity protection.[70]

Subsequently, in the case *l'Associação Sindical dos Juíes Portugueses*, the initial premise of the Court's reasoning was the importance of Article 2 as referenced in Opinion 2/13, specifically in Paragraph 168. The Court underlined that Article 19 TEU specifies the values from Article 2, namely, the rule of law, and linked Article 19(1) TEU with the foundations of the European legal order embodied in Article 2 TEU. The Court of Justice emphasised its role, as well as the role of national courts, in protecting the rule of law. Simultaneously, it paved the way for further application of this narrative in similar cases. In 2019, in the case of the European Commission v Republic of Poland, AG Tanchev precisely highlighted the role of Article 19 in giving concrete expression to the rule of law that is both protected as a value but also determined by the protection of fundamental rights guaranteed by the EU legal system on an equal basis as legal principles.[71]

Finally, adequate examples where fundamental rights protection and the principle of supremacy are interconnected are present in CJEU activity in the field of the European Arrest Warrant (EAW) and asylum policy in recent years. Regarding the former, linking the Court's narrative with the Melloni case in every subsequent decision was inevitable. The CJEU's approach to Article 53 of the Charter in the Melloni case clearly underlines the right of Member States to apply a higher standard of protection of fundamental rights as long as they respect the supremacy, unity, and effectiveness of EU law. However, in the so-called Solange III case, the German BVerfG determined that identity review (*identitätskontrolle*) and the Solange doctrine remained the main instruments for the adequate protection of fundamental rights guaranteed in the German Basic Law.[72] This somewhat defiant stance of the Karlsruhe court demonstrated the growing tendency of national courts to protect the constitutional core, despite the settled Melloni approach. It seems that the BVerfG developed a new condition for the application of the principle of EU supremacy,[73] that is, an identity review that guarantees respect for German fundamental rights in every individual case,[74] thus nuancing once again the supremacy of EU law in favour of higher national fundamental rights protection. These and similar decisions are very important *feu rouge* for the CJEU's future approach to value-based decisions.

Conversely, in one of the most recent decisions regarding asylum policy, the CJEU held that 'EU law precludes legislation under which, in the event of a

70 See Opinion of Advocate General Kokott delivered on 31 May 2016. C-157/15 *G4S Secure Solutions*, ECLI:EU:C:2017:203.

71 Opinion Of Advocate General Tanchev delivered on 20 June 2019, C-192/18 *European Commission v Republic of Poland*, ECLI:EU:C:2019:924, para 95.

72 BVerfG, 15 December 2015, 2 BvR 2735/14 Solange III.

73 Rauchegger, 2018a, p. 95.

74 Ibid., p. 113.

mass influx of third-country nationals, an asylum seeker may be detained on the sole ground that he/she is staying illegally,'[75] was in the request for a preliminary ruling by the Supreme Administrative Court in Lithuania in 2021. Here, the Court considered the standards of human rights protection guaranteed in the European Convention with special emphasis on the relevant articles of the Charter, stating that their respect, combined with the obligation to respect 'Article 8(2) and (3) of Directive 2013/33 must be interpreted as precluding legislation of a Member State'.[76] When it comes to proper interpretation of EU secondary legislation and thus adequate application of said legislation, the Court of Justice in the subsequent case considered whether the Dublin III Regulation, read in conjunction with the EU Charter, provided an unaccompanied minor right to appeal, that is, the right to judicial remedy.[77] The Court held that it could and reminded that 'it should be recalled that, in accordance with the Court's settled case-law, the rules of EU secondary legislation must be interpreted and applied in compliance with fundamental rights'.[78] This 2022 case represented a good example of the perpetual interconnection of respect for the EU rule of law and fundamental rights by taking into account the provisions of the Charter to properly apply the legislation in Member States. Moreover, it underlined that the EU legal system could function properly only if all elements of its constitutional core were considered in the judicial dialogue between legal orders.

■ *4.2. Legislative solutions of the EU to ensure respect for the rule of law in light of contemporary challenges*

In recent years, much debate has arisen concerning the effectiveness of the EU's response to the rule of law crisis,[79] with EU officials and scholars vigorously examining the rule of law backsliding.[80] It should once again be emphasised that the understanding of the rule of law, being a meta-value, is a very complex matter.[81] Dale Mineshima stresses the two dimensions of said complexity within the EU legal order: '...the discrepancy between the identification of the rule of law as very important within the Community, and, simultaneously, the lack of a uniform conception for this fundamental principle'.[82]

75 Judgment of the Court (First Chamber) of 30 June 2022 (request for a preliminary ruling from the Lietuvos vyriausiasis administracinis teismas – Lithuania), C-72/22 *PPU*, ECLI:EU:C:2022:505.

76 Ibid., para. 93.

77 Judgment of the Court (Grand Chamber) 1 August 2022. C-19/21 *I és S kontra Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2022:605.

78 Ibid.

79 Peirone, 2019, pp. 57–98.

80 Kochenov, 2019, pp. 33–50.

81 Vlajković, 2020, pp. 235–257.

82 Mineshima, 2002, pp. 73–87.

In addition, the EU has turned to various mechanisms to cope effectively with issues of respect for the rule of law throughout its territory. Therefore, the responsibility for backsliding is divided among all stakeholders, challenging the European integration project and the foundations of EU constitutionality.

Aside from the political and legal "tools" already in force,[83] in 2018 the European Commission presented its Proposal for a Regulation on the protection of the Union's budget in cases of generalised deficiencies as regards the rule of law in the Member States,[84] putting once again the institutional focus on the ongoing rule of law backsliding in the EU. According to European officials, the issue was not only whether the rule of law should be protected in the EU legal and political system but also what the most efficient way to do so is. A Europe of values had to be preserved at all costs, and that was the rationale for every tool that was envisaged or even implemented in practice, starting from the activation of Article 7(1) TEU, infringement procedures before the CJEU, and numerous Commissions' Communications.[85] It seemed that in the time of the "poly-crisis,"[86] it was not possible to find a common answer to the value crises, with special emphasis on the protection of the rule of law that is, according to Commissioner Reding, 'in many ways a prerequisite for the protection of all other fundamental rights listed in Article 2 TEU and for upholding all rights and obligations deriving from the Treaties.'[87] The first Rule of Law Report, published in September 2020, highlighted that the 'first reflection is on the rule of law culture and on the level of trust in the checks and balances in Member States.'[88] The EU Commission went on to publish the Report in the following three years, trying to underline the gaps in the protection of the rule of law in specific Member States and identify challenges to further develop the substantive understanding of the rule of law as a leading value in the EU legal system.[89]

83 Such as the EU Commission's Framework to Strengthen the Rule of Law or the 2018 Commission's Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States or finally the Rule of Law Report: The rule of law situation in the European Union, issued by the Commission in 2020.

84 Proposal for a Regulation of the European Parliament and of the COUNCIL on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final – 2018/0136 (COD).

85 One of them being Communication from the Commission (COM) 2014/0158 to the European Parliament and the Council a new EU Framework to strengthen the Rule of Law, 2014 and later on Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening the rule of law within the Union, a blueprint for Action, COM/2019/343 final.

86 Jean Claude Juncker, 2016, cited in Lukić Radović, Vlajković, 2021, p. 58.

87 Reding, 2013.

88 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Rule of Law Report The rule of law situation in the European Union, Brussels, 30.9.2020, COM (2020) 580 final, pp. 6–7.

89 European Commission, 2023.

Besides the country-specific analysis, which is undoubtedly an added value to the rule of law toolbox, the issue of the effectiveness of this Mechanism has come into question with the following reports. First, aside from shedding light on the issues and challenges and encouraging and enabling inter-institutional dialogue, it does not answer the question of enabling dialogue with States that chose not to respect the rule of law checklist provided by the said Mechanism. In addition, considering that this kind of reporting is very similar to pre-accession reporting with respect to the criteria and negotiating chapters, it does not offer a new element for the prevention system that would in some way reverse the ongoing breach. This Mechanism was reinforced by the rule-of-law conditionality mechanism proposed in 2018 and adopted during the COVID-19 pandemic in 2020. Following three weeks of blockade in Brussels, and continuous negotiations that lasted four days, final "blessing" was given to the NGEU. The central part of the conflict was precisely the implementation of the NGEU's centrepiece, the Rule of Law Conditionality Regulation (the Regulation).[90] France and the Presiding Member State, Germany, supported the rule of law conditionality envisaged by the said Regulation, with Macron describing it as 'not a perfect mechanism, but a mechanism that is able to change something fundamental.'[91] The Regulation was, however, contested before the CJEU on several grounds,[92] among which the most prominent was the argument that there was no appropriate legal basis in the TEU and TFEU for the said regulation and that the EU had breached the principle of legal certainty, having exceeded its powers.[93] However, this joint action for annulment was not successful, as the Court dismissed it, relying heavily in its argumentation on the rule of law and fundamental rights that are at the core of EU existence.

> the Court points out that compliance by the Member States with the common values on which the European Union is founded – which have been identified and are shared by the Member States and define the very identity of the European Union as a legal order common to those States – such as the rule of law and solidarity, justifies the mutual trust between those States'.[94]

90 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433 I/1.

91 Gehrke, 2020.

92 Judgments in Cases C-156/21 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97 and C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

93 Court of Justice of the European Union, 2022.

94 Case C-156/21 *Hungary v European Parliament and Council* of the European Union Judgment of the Court (Full Court), 16 February 2022 – Résumé.

However, this motivated the EU Commission to clarify several elements connecting the conditionality mechanism with the rule of law in consultation with the EU Parliament and Member States, setting guidelines for its application.[95] It remained to be seen whether every instrument envisaged to protect the fundamentals could effectively supplement the workload of the CJEU, upgrading the rule of law and fundamental rights protection, and not turning new legislative solutions into a political battlefield for 'who will have the last word', that is, into a confrontation over supremacy issues.[96]

5. Conclusion

The concepts of EU values and fundamental rights continue to intrigue scholars and practitioners. With the territorial expansion of the Union, the founding EU principles and values are put to the test through exposure to two divergent tendencies.

Primarily, there is a tendency of new Member States to introduce different outlooks on the essence of EU values, which inevitably leads to a series of difficult questions that need to be addressed in a consistent manner. Considering the struggles the EU faces to align its legal order with the national legal orders of Member States while preserving the supremacy principle, these additional interpretations make constitutional processes more complex and require adamant consistency. Second, the territorial expansion of the Union allows for its values and principles to become the norm across a larger territory, which evidently contributes to their universal quality. Therefore, to be comprehensively observed, the rule of law and fundamental rights need to be studied from the point of view of both Member States and the states developing close ties with the EU itself. It should not be disregarded that the goals and values of Member States are not only the contributing factors in the creation of the values and norms of the Union but are in fact shaped by them.[97] Each Member State has added substance to the meaning and implementation of EU values as much as it has contributed to the difficulties of their presumed universality. In light of the effects of this enlargement, even other states and their views of these concepts will have a significant impact on how they evolve. This outside perspective is where the Union needs to express firm consistency to avoid being called upon for not obeying its own rules. It is often quite difficult to fulfil this requirement, considering that EU values are

95 Communication from the Commission Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, Brussels, 2.3.2022 C(2022) 1382 final.

96 About the challenges posed by the introduction of the conditionality mechanism, see more in: Lukić Radović, Vlajković, 2021.

97 Schimmelfennig, 2005, p. 173.

not merely legal concepts but also largely political. It should not be neglected that strict adherence to the rule of law and respect for fundamental rights play key roles in fostering enlargement and further integration.

The other equally important point of view for observing the rule of law and fundamental rights and their relationship with the supremacy principle is the insider's perspective, that is, the perspective of the driving forces of integrative processes within the Union. What we indicated in this paper through the presentation of the most relevant practice of the CJEU is that, although all stakeholders within the EU are presumed to be under the auspices of the same value system, there are many issues that need to be tackled in each individual case to secure further development of the EU constitutional setup and allow for the national identities of all Member States to be preserved. The role of the CJEU in these processes is certainly the most prominent, albeit a very challenging one. The CJEU needs to recognise the moment when the climate within the Union is right for stronger integration, while taking the risk of taking a step that may steer the whole process in a completely different direction. Conversely, the CJEU is expected to be progressive and work in the best interests of the Union, which is not always understood as the best interests of all its members. Political processes that occur at any given point in time, both European and global, have often made this task even more difficult. The balancing role of the CJEU is important in determining the national margin of appreciation in cases where the national standard of fundamental rights protection collides with the EU's longstanding stance on the supremacy of EU law. This calls for effective judicial dialogue, in which the nuancing of legal and political approaches is a delicate game entrusted to the CJEU.

We can conclude that the EU is now at a point where an understanding of the rule of law and fundamental rights has been put in the spotlight for further progress in EU integration. With growing political tensions and voices against externalising integration and continuing enlargement policies in favour of deepening internal integration, there is very little leeway for further unity in advancing the constitutionalisation of the EU order. Considering the contemporary challenges and ongoing crises, the re-examination of certain aspects of the value-based EU legal order seems unavoidable. However, the EU values and principles, including the protection of fundamental rights, are legal and political concepts, ideals, and goals to be constantly pursued. They have survived numerous challenges because of their ability to adapt and be transformed and reinterpreted while simultaneously remaining pillars of just and democratic legal orders. Overall, whether they serve as a counterbalance to the principle of supremacy of EU law or an essential element of EU identity, and thus a complement to supremacy, they are and should form the basis of the EU legal order, including the application of both EU internal and external integration policies. Without them, the constitutionalisation of the EU resembles a "ship without a rudder".

Bibliography

- Claes, M. (2019) 'How Common are the Values of the European Union?', *Croatian Yearbook of European Law and Policy*, 2019/15, p. VII-XVI. [Online]. Available at: https://www.cyelp.com/index.php/cyelp/article/view/373 (Accessed: 29 July 2023).
- Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening the rule of law within the Union, a blueprint for Action, COM/2019/343 final.
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Rule of Law Report The rule of law situation in the European Union, Brussels, 30.9.2020, COM(2020) 580 final, pp. 6–7.
- Council Decision of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty OJ L 335M, 13.12.2008, pp. 374–382 (MT), OJ L 198, 20.7.2006, p. 15–1.
- Court of Justice of the European Union (2022, 01 August) 'The CJEU ruled that unaccompanied minors have the right to appeal against the refusal to take charge by a Member State in which family relatives resides.' *The European Union Agency for Asylum* [Online]. Available at: https://caselaw.euaa.europa.eu/pages/viewcaselaw.aspx?CaseLawID=2650 (Accessed: 16 July 2023).
- Court of Justice of the European Union (2022, 16 February) 'Measures for the protection of the Union budget: the Court of Justice, sitting as a full Court, dismisses the actions brought by Hungary and Poland against the conditionality mechanism which makes the receipt of financing from the Union budget subject to the respect by the Member States for the principles of the rule of law' Press Release No 28/22. [Online]. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-02/cp220028en.pdf (Accessed 20 July 2023).
- Čučković, B. (2021) 'The Principle of Mutual Trust v. the Presumption of Equivalent Protection – Balancing between the Luxembourg and Strasbourg Standards for the Benefit or to the Detriment of Human Rights Protection?' in Dimitrijevic D., Mileski T. (eds.) *International Organizations: Serbia and Contemporary World*. Institute of International Politics and Economics, Belgrade, Faculty of Philosophy of the University of St. Cyril and Methodius, Skopje, pp. 263–288.
- Davies B., Nicola F. (ed.) (2017) *EU Law Stories Contextual and Critical Histories of European Jurisprudence*. Cambridge University Press; https://doi.org/10.1017/9781316340479.
- De Ridder, E., Kochenov, D., (2011) 'Democratic Conditionality in the Eastern Enlargement: Ambitious Window Dressing', *European Foreign Affairs Review*, 2011/16, Kluwer Law International BV, pp. 589–605; https://doi.org/10.54648/EERR2011040.
- De Witte B. (2011) 'Direct Effect, Primacy and the Nature od the Legal Order in the Evolution of the EU Law' in Craig P., de Burca G. (eds.) *The Evolution of EU Law*. 2nd edn. Oxford University Press, pp. 323–362.
- Document on The European Identity published by the Nine Foreign Ministers on 14 December 1973, in Copenhagen, Bulletin of the European Communities.

December 1973, No 12. Luxembourg: Office for official publications of the European Communities, pp. 118122.

- European Commission (2023) *2023 Rule of law report* [Online]. Available at:https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2023-rule-law-report_en (Accessed 5 September 2023).
- European Council (2017, 7 April) 'Ever Closer Union: The Legacy of the Treaties of Rome for Today's Europe 1957-2017' *European Council* [Online]. Available at: https://www.consilium.europa.eu/en/documents-publications/library/library-blog/posts/ever-closer-union-the-legacy-of-the-treaties-of-rome-for-today-s-europe-1957-2017-online-exhibition/ (Accessed: 12 July 2023).
- Faraguna, P. (2017, 31 January) 'The Italian Constitutional Court in re Taricco: "Gauweiler in the Roman Campagna"' *VerfBlog*, [Online]. Available at: https://verfassungsblog.de/the-italian-constitutional-court-in-re-taricco-gauweiler-in-the-roman-campagna (Accessed: 12 July 2023).
- Gehrke, L. (2020, 21 July) 'How Europe reacted to the new EU budget and coronavirus recovery fund deal?', *Politico*, [Online]. Available at https://www.politico.eu/article/madness-and-historic-day-europe-reacts-to-the-budget-deal. (Accessed 21 July 2023).
- Kochenov, D. (2019) 'Article 7 TUE : un commentaire de la fameuse disposition "morte"', *RAE* 2019/1, pp. 33–50.
- Kochenov, D. (2004) 'Behind the Copenhagen Facade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', *European Integration Online Papers*, 2004/10, pp. 1–24 [Online]. Available at: https://ssrn.com/abstract=563743 (Accessed: 22 10 October).
- Košutić, B., Rakić, B., Milisavljević B. (2015) *Uvod u pravo evropskih integracija*. Dosije Studio Pravni fakultet Univerziteta u Beogradu.
- Liisberg, J.B. (2001) 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?', *Jean Monnet Working Paper 4/0* [Online]. Available at: https://jeanmonnetprogram.org/archive/papers/01/010401.html (Accessed: 18 July 2023).
- Lukić, M. (2015) 'How long before a Bundle of Treaties becomes Sovereign? A Legal Perspective on the Choices before the EU', in SEE|EU Cluster of Excellence in European and International Law (ed.) *South Eastern Europe and the European Union – Legal Aspects*. Verlag Alma Mater, Saarbrücken, Germany, 2015, pp. 127–137.
- Lukić Radović, M., Vlajković, M. (2021) 'How Firm are the Bonds that Tie the EU together? EU Rule of Law Conditionality Mechanism and the Next Generation EU Recovery Fund' in Duić, D., Petrašević, T., (eds.) (2021) *EU 2021 – The future of the EU in and after the pandemic, EU and Comparative Law Issues and Challenges Series (ECLIC)*. University Josip Juraj Strossmayer, Osijek, pp. 3–29; https://doi.org/10.25234/eclic/853.
- Lukić Radović, M. (2020) 'Fundamental Rights and Freedoms as Backdrop for Conceptualizing Constitutionality of the EU', *Iustinianus Primus Law Review*, 2020/11, pp. 1–10.
- Maduro, M. P. (2004) 'How Constitutional Can the European Union Be? The Tension Between Intergovernamentalism and Constitutionalism in the European

Union' in Weiler, Eisgruber (eds.) *Altneuland: The EU Constitution in a Contextual Perspective.* New York University Jean Monnet Working Paper 5/04. [Online]. Available at: http://www.jeanmonnetprogram.org/archive/papers/04/040501-18.html (Accessed 16 July 2023).

- Magen, A. (2009) 'The Rule of Law and Its Promotion Abroad: Three Problems of Scope', *Stanford Journal of International Law*, 45(1), pp. 51–116.
- Marín Aís, J.R. (2018) 'Freedom of Religion in the Workplace v. Freedom to Conduct a Business, the Islamic Veil Before the Court of Justice: Ms. Samira Achbita Case', *European Papers*, 3(1), pp. 409–417.
- Martin, R. (2013) 'Are Human Rights Universal?' in Holder, C., Reidy D. (eds.) Human Rights: The Hard Questions, Cambridge University Press, pp. 59–76, https://doi.org/10.1017/CBO9780511758553.005.
- Mineshima, D. (2002) 'The Rule of Law and EU Expansion', *Liverpool Law Review*, 24 (1–2), pp. 73–87; https://doi.org/10.1023/A:1021323428769.
- Opinion 1/91, European Court Reports 1991 I-06079.
- Opinion 2/13 Of The Court (Full Court) 18 December 2014, ECLI:EU:C:2014:2454.
- Opinion Of Advocate General Tanchev delivered on 20 June 2019, Case C-192/18 European Commission v Republic of Poland, para 95.
- Paivi, L., Petrov, R. (2009) 'Between Common Values and Competing Universals: The Promotion of the EU's Common Values through the European Neighbourhood Policy', *European Law Journal*, 5/2009, pp. 654–671; https://doi.org/10.1111/j.1468-0386.2009.00483.x.
- Peirone, F. (2019) 'The Rule of Law in the EU: Between Union and Unity', *Croatian Yearbook of European Law and Policy*, 2019/15, pp. 57–98; https://doi.org/10.3935/cyelp.15.2019.344.
- Proposal for a Regulation of the European Parliament and of the COUNCIL on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final – 2018/0136 (COD).
- Rakić, B., Vlajković, M. (2022) 'Identités Nationales et Identité Européenne' in Petit Y. (ed.) *Europe de l'Est et l'Union européenne Quelles perspectives?*, pp. 227–281.
- Rauchegger, C. (2018a) 'Chapter 5: The Bundesverfassungsgericht's human dignity review: Solange III and its application in subsequent case law' in Viollini, L., Barragia, A. (eds.) *The Fragmented Landscape of Fundamental Rights Protection in Europe*, pp. 94–113. https://doi.org/10.4337/9781786436054.00012.
- Rauchegger, C. (2018b) 'National constitutional rights and the primacy of EU law: M.A.S. Case C-42/17, M.A.S. and M.B., Judgment of the Court of Justice (Grand Chamber) of 5 December 2017', *Common Market Law Review*, 2018/55, pp. 1521–1548; https://doi.org/10.54648/COLA2018121.
- Raulus, H.S. (2015) 'The growing role of the union in protection of rule of law' in Goudappel F.A.N.J., Ballin E.M.H. Hirsch Ballin (eds.) *Democracy and Rule of Law in the European Union: Essays in Honour of Jaap W. de Zwaan*. 1st ed. Springer, T.M.C. Asser Press, pp. 25–37; https://doi.org/10.1007/978-94-6265-066-4_3.
- Reding, V (2013, 4 September) 'The EU and the Rule of Law—What Next?' *European Commissoion* [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677 (Accessed: 18 July 2023).

- Rehn, O. (2008, 8 April) 'A stronger Europe through deepening and widening' *European Commission* [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_08_184 (Accessed: 9 June 2023).
- Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433 I/1.
- Schuman declaration May 1950 [Online]. Available at: https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en (Accessed: 3 July 2023).
- Schimmelfennig, F., Sedelemeier, U. (eds.) (2005) *Liberal Community and Enlargement: An Event History Analysis, The Politics of European Union Enlargements, Theoretical Approaches*, New York: Routledge, Routledge Advances in European Politics, pp. 172–197.
- Smith, K.E. (1998) 'Use of Political Conditionality in the EU's Relations with Third Countries: How Effective', *EU Working Papers*, 97(7), pp. 1–37.
- Vlajković, M. (2022) 'The Importance of Reshaping the European Identity for the European Integration Process of Serbia', in Dimitrijevic, D., Mileski, T. (eds.) *International Organizations: Serbia and Contemporary World*. Institute of International Politics and Economics, Belgrade, Faculty of Philosophy of the University of St. Cyril and Methodius, Skopje, pp. 484–504. https://doi.org/10.18485/iipe_ioscw.2022.1.ch29.
- Vlajković, M., Tasev, J. (2021) 'The Challenges of the Approximation of National Law with The EU Acquis in the Western Balkans in Light of the New Enlargement Tendencies', *Series of Papers Vol.6 of the SEE|EU Cluster of Excellence*, 2021/6, pp. 85–100.
- Vlajković, M. (2020) 'Rule of Law – EU's Common Constitutional "Denominator" And A Crucial Membership Condition On The Changed And Evolutionary Role of The Rule of Law Value In The EU Context', *EU 2020 – lessons from the past and solutions for the futur*e, pp. 235–257. https://doi.org/10.25234/eclic/11903.
- Von Bogdandy, A. (2010) 'Founding Principles of EU Law. A Theoretical and Doctrinal Sketch', *Revus,* 2010/12, pp. 35–56; https://doi.org/10.4000/revus.131.
- Weiler, J. H. H. (1991) 'The Transformation of Europe', *The Yale Law Journal*, 100(8), pp. 2403–2483; https://doi.org/10.2307/796898.

BARTOSZ MAJCHRZAK*

The "International" Rule of Law in the Polish Administrative Court's Jurisprudence

ABSTRACT: *This study analyses the jurisprudence of Polish administrative courts, referring to the concept of the "international" rule of law, and thus, to the concept interpreted by the courts based on sources of law binding on Poland adopted at the supranational level (international agreements and law created by the European Union). The following jurisprudence issues emerge: 1) international and EU legal bases for the protection of the rule of law and the resulting meaning of this concept; 2) international versus national approach to the rule of law; 3) the rule of law – principle or value; 4) normative sources (national and supranational) of the general obligation of administrative courts to implement the international rule of law; 5) the order to implement it as an element determining the jurisdiction of administrative courts and the pattern of control exercised by these courts. In this context, it was stated, inter alia, that according to the jurisprudence of administrative courts, the 'international' rule of law primarily implies effective judicial protection of individual rights, guaranteed by independent courts, impartial and irremovable judges who have been duly appointed.*

KEYWORDS: rule of law, Polish administrative courts, control over the public administration, effective judicial protection, independence of the judiciary

1. Introduction

The "international" rule of law should first be examined through the prism of the constitutional and statutory cognition of Polish administrative courts. Pursuant to the first sentence of Article 184 of the Constitution of the Republic of Poland

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of 2 April 1997[1] (hereinafter the 'Constitution', 'Fundamental Law'), the Supreme Administrative Court (hereinafter the 'SAC') and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration. Pursuant to Article 1.2 of the Act of 25 July 2002, Law on the Organisation of Administrative Courts[2] (hereinafter the 'LOAC'), this control is exercised – in principle – in terms of compliance with the law. Simultaneously, based on the Act of 30 August 2002, Law on the Proceedings before Administrative Courts[3] (hereinafter the 'LPAC', in particular Article 3.2) and specific acts, there was a positive enumeration of categories of behaviour of public administration bodies (including types of their forms of operation), subject to appeal to the Voivodship Administrative Court[4] (hereinafter the 'VAC') as having jurisdiction in all administrative court cases, except those expressly reserved for the SAC (Article 13.1 LPAC). In the context of the provisions of these acts, it can be stated that the control of legality conducted by administrative courts considers various types of public administration activities, from acts of applying the law to acts of enacting it, from individual acts to general acts.[5]

Considering the aforementioned, the essence and purpose of proceedings before administrative courts is to formulate the "relative phrase," that is, a statement qualifying a specific behaviour of an administrative body (the challenged act or action, or inaction or protracted proceedings) as compliant or non-compliant with a given legal norm.[6] To characterise these "phrases," the reference and complementary norms are essential.[7] The provisions included in the reference norm form the basis for the operation of the administrative court as a control authority, which includes provisions on the jurisdiction and competence of the administrative court (including criteria, premises, and conditions for its judicial activity), types of judgements, and legal consequences drawn in relation to challenged acts or actions (inaction or lengthiness of proceedings). The provisions that constitute the complementary norm, usually numerous and varied, refer to actions, inactions, or protracted proceedings by public administrative bodies subject to administrative court control.[8] Among the elements of the reference norm, there are competence behaviours which are tantamount to using the competencies granted to public administration bodies.[9] Therefore, the wording of the "relative phrase" also requires determining the scope and interpreting the substantive, procedural and systemic provisions that constitute the legal basis

1 Journal of Laws No. 78, item 483, as amended.
2 Journal of Laws of 2022, item 2492, as amended.
3 Journal of Laws of 2023, item 1634, as amended.
4 Majchrzak, 2022, p. 46.
5 Drachal, Jagielski and Stankiewicz, 2015, p. 50.
6 Woś, 2004, p. 263.
7 Wróblewski, 1969, pp. 5–7.
8 Borkowski, 2020, p. 68; Kamiński, 2011a, p. 23.
9 Cf. Wróblewski, 1969, p. 6.

for the contested competence behaviour of the administrative authority. They create the complementary norm, which is a model of legal operation of public administration, used by the administrative court in its control activity.[10]

In addition, it is noteworthy that regarding the elements of the "relative phrase" the above findings require some modification and supplementation in the context of the activities of the SAC. In principle, it is empowered to hear appeals against decisions of the VACs. Only exceptionally – if a special provision so provides – it may be competent in the first instance, to directly control the activities of administrative bodies[11] (and then the mechanism of "relative phrase" will be fully adequate). When the SAC acts as a court of second instance, the "reference norm" includes provisions on its jurisdiction and competence, types of judgements and legal consequences determined in relation to the contested judgements or orders of the VAC. The "complementary norm" represents two norms: 1) a norm concerning the controlled decision of the lower court, and thus the legal grounds for its issuance; 2) a norm describing the behaviour of a public administration body subject to the control of the VAC. Such a concept of the "complementary norm" results from the fact that the condition for the SAC's assessment of the correctness of a lower court's decision is, *inter alia*, the answer to the question whether the latter court correctly assessed the legality of the conduct of the public administration body. Therefore, the patterns of control exercised by the SAC result from the legal basis of operation not only of the lower court but also of the public administration body, whose behaviour was previously challenged and verified by the VAC.

The statement regarding the "relative phrase" assumes that the elements and the meaning of the reference and complementary norms based on which the administrative court (Supreme or Voivodship) classifies the behaviour are sufficiently defined to express such assessment.[12] Potentially, in relation to both of these norms, there may be a need to reconstruct them considering the "international" rule of law. For the purposes of this study, it is assumed that the term has the "international" attribute if the administrative court determines its meaning in the context of interpreting the provisions contained in the sources of law binding on Poland but adopted at the supranational level, in particular in international agreements or law created by international organisations, in particular the European Union (EU). Simultaneously, when analysing the jurisprudence of administrative courts, terms that are synonymous with the one indicated in the title of the article and used in Polish legal language to express the concept of "rule of law" or its essential elements, that is, "a state ruled by law", "a democratic state of law", "lawfulness" or "legalism" are considered.

10 Cf. Kamiński, 2011a, p. 23
11 Cf. Art. 15.1, LPAC.
12 Wróblewski, 1969, p. 4.

The concept of the "international" rule of law appeared in several dozen judgements of administrative courts. Their objective scope included the control of: 1) resolutions of the National Council of the Judiciary concerning the submission (non-submission) to the President of the Republic of Poland of applications for appointment to the office of a Supreme Court judge;[13] 2) decisions in tax matters (tax on goods and services (VAT)[14] and real estate tax), in particular in the context of the existence of a prerequisite for the invalidity of administrative court proceedings in the form of an unlawful composition of the court (Article 183.2 Point 4 LPAC);[15] 3) the order of the President of the District Court regarding the immediate suspension of a judge in his duties;[16] 4) an act of the President of the Republic of Poland stating the date of retirement of a Supreme Court judge.[17] In addition, the aforementioned concept was referred to in dissenting opinions from the judgements of administrative courts, the authors of which raised doubts about the correctness of the composition of the court examining a given case, claiming simultaneously that steps should have been taken to remove these doubts before deciding on the merits of the case.[18]

13 Judgements of the SAC: of May 6, 2021, case ref. II GOK 2/18 (https://bit.ly/43VVOGP); of May 6, 2021, case ref. II GOK 3/18 (https://bit.ly/3N5LciD); of May 6, 2021, case ref. II GOK 5/18 (https://bit.ly/40Bh9T4); of May 6, 2021, case ref. II GOK 6/18 (https://bit.ly/40z5gwT); of May 6, 2021, case ref. II GOK 7/18 (https://bit.ly/3L0RzkI); of May 13, 2021, case ref. II GOK 4/18 (https://bit.ly/3ApBD6z); of September 21, 2021, case ref. II GOK 8/18 (https://bit.ly/3N9gKUQ); of September 21, 2021, case ref. II GOK 10/18 (https://bit.ly/3LqKw6g); of September 21, 2021, case ref. II GOK 11/18 (https://bit.ly/3LatGY2); of September 21, 2021, case ref. II GOK 12/18 (https://bit.ly/3oCGnTE); of September 21, 2021, case ref. II GOK 13/18 (https://bit.ly/3H9HuRe); of September 21, 2021, case ref. II GOK 14/18 (https://bit.ly/40tvlxi); of October 11, 2021, case ref. II GOK 9/18 (https://bit.ly/3mXQ26K); of October 11, 2021, case ref. II GOK 15/18 (https://bit.ly/41RYIKH); of October 11, 2021, case ref. II GOK 16/18 (https://bit.ly/3LpwfGG); of October 11, 2021, case ref. II GOK 17/18 (https://bit.ly/40DH24u); of October 11, 2021, case ref. II GOK 18/18 (https://bit.ly/40F6ZAB); of October 11, 2021, case ref. II GOK 19/18 (https://bit.ly/41Qgdv1); of October 11, 2021, case ref. II GOK 20/18 (https://bit.ly/3N7J4H2) (Accessed: 24 May 2023).

14 Judgements of the VAC in Wroclaw: of February 23, 2023, case ref. I SA/Wr 342/21 (https://bit.ly/3Ap43xv); of February 23, 2023, case ref. I SA/Wr 500/22 (https://bit.ly/3ApeXTT) (Accessed: 24 May 2023).

15 Judgements of the SAC: of November 4, 2021, case ref. III FSK 3626/21 (https://bit.ly/3H9kemm); of November 4, 2021, case ref. III FSK 4104/21 (https://bit.ly/41VV82c) (Accessed: 24 May 2023).

16 Judgement of the VAC in Gdansk of December 15, 2022, case ref. III SA/Gd 1173/21 (https://bit.ly/3VhSCl3) (Accessed: 24 May 2023).

17 Judgement of the VAC in Warsaw of September 29, 2020, case ref. VI SA/Wa 309/20 (https://bit.ly/3Ha4lfy) (Accessed: 24 May 2023).

18 Dissenting opinions to the Judgements of the SAC: of December 6, 2019, case ref. I GSK 172/18 (https://bit.ly/3L3zUZF); of December 6, 2019, case ref. I GSK 713/19 (https://bit.ly/3n5qJQb); of December 6, 2019, case ref. I GSK 1504/18 (https://bit.ly/3Hcodia); of December 6, 2019, case ref. I GSK 1512/18 (https://bit.ly/3ozqZr7); dissenting opinions to the Judgements of the VAC in Warsaw: of February 19, 2020, case ref. V SA/Wa 1595/19 (https://bit.ly/3oGiquV); of February 19, 2020, case ref. V SA/Wa 1481/19 (https://bit.ly/3NhJjzc); of February 19, 2020, case ref. V SA/Wa 1353/19 (https://bit.ly/43ZMfXh); of February 13, 2020, case ref. V SA/Wa 1329/19 (https://bit.ly/3n0fwR8); of January 29, 2020, case ref. V SA/Wa 1556/19 (https://bit.ly/3Hc6pDH) (Accessed: 24 May 2023).

Against the background of the above research field, the primary purpose of the considerations is to characterise the contexts in which the judicature of the administrative court refers to the concept of the "international" rule of law. Initially, the directions of analysis are assumed, covering such issues as: 1) international and EU legal bases for the protection of the rule of law and the resulting meaning of this concept; 2) international versus national approach to the rule of law; 3) the rule of law – principle or value;[19] 4) normative sources (national and supranational[20]) of the general obligation of administrative courts to implement an international value or principle of rule of law; 5) the requirement to implement the "international" rule of law as an element of the reference and complementary norm. Administrative courts have addressed all these issues in their judgements, albeit with varying degrees of intensity; some of them were referred to extensively and others only briefly. Therefore, it makes it difficult to answer the question about the formation of the concept of the "international" rule of law in the Polish administrative courts' jurisprudence.

2. Legal basis and meaning of the "international" rule of law

Administrative court jurisprudence, in particular of the SAC, primarily emphasises the importance of Article 2 of the Treaty on European Union (TEU)[21] as a source of value of the rule of law. In at least a dozen judgements, this provision is invoked in close connection with Article 19.1 of the TEU, which specifies this value, combining it with the principle of effective judicial protection of rights. According to the administrative courts referring in this respect to the views of the Court of Justice of the European Union (CJEU), the indicated general principle of EU law results from the constitutional traditions common to the Member States and was expressed in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted in Rome on 14 November 1950,[22] and further confirmed in Article 47 of the Charter of Fundamental Rights of the European Union (CFREU).[23] Against this background, the "international" rule of law is reduced to ensuring that the administration of justice in the Member States and the authorities exercising it as "courts" within the meaning of EU or ECHR law – meet the requirements of effective judicial protection. One condition is maintaining the guarantee of judicial independence and impartiality. Simultaneously, the SAC identified two aspects of independence and impartiality:

19 Cf. Sulyok, 2021, p. 213.
20 Cf. Górka and Mik, 2005, pp. 17–18; Nollkaemper, 2011, pp. 11–13.
21 Official Journal of the European Union of June 7, 2016, C 202, pp. 1–388.
22 [Online]. Available at: https://bit.ly/3N8tyuD (Accessed: 25 May 2023); Journal of Laws of 1993, No. 61, item 284.
23 Official Journal of the European Union of June 7, 2016, C 202, pp. 389–405.

external and internal. The first implies that a given body performs its judicial tasks fully autonomously without being subject to any hierarchy or subordinate to anyone, and without receiving orders or guidelines from any source. The internal aspect of independence is functionally related to impartiality and concerns the equal distance towards the parties to the dispute and their interests, requires observation of the principle of objectivity, and prohibits any subjective interest in resolving the dispute, requiring only strict application of the law. Such conditions are guaranteed by the appropriate rules, in particular regarding the composition of the judicial body, the appointment of its members, terms of office, dismissal, and the reasons for exclusion of judges from hearing the case – the rules allowing exclusion, in the opinion of legal entities (individuals), any reasonable doubt as to the independence of this body from external factors, and neutrality with regard to the interests it faces.[24]

Specifying the conditions of the "international" rule of law in the context of judicial independence, it is necessary for judges adjudicating in courts to have been duly appointed, based on national provisions consistent with the constitutional, convention and EU standard in force in a given state. However, it is noteworthy that in the opinion of the SAC, the correctness of this appointment 'is not the result of defining the concept of a judge in national law, but of the actual existence of a judge's key feature being their independence.' Therefore, although the procedure preceding the appointment of a judge could be flawed, it does not exclude the possibility that an administrative court judge or a deputy judge meets the standards of independence, impartiality and autonomy, and thus, is a European judge within the meaning of Article 2 and 19.1 of the TEU and Article 6.1 of the TEU in conjunction with Article 47 of the CFREU and Article 6.1 of the ECHR. The condition for such an assessment is conducting the Ástráðsson test[25] and addressing the following three questions: 1) whether there was a manifest breach of the domestic law; 2) whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges; 3) whether allegations were effectively reviewed and redressed by the domestic courts.[26]

With reference to the above formulation of the requirements of the "international" rule of law, the administrative court (again referring to Article 19.1 in conjunction with Article 2 of the TEU) also draws attention to the special aspect of the external independence of judges in the form of their irremovability.

24 Judgements of the SAC: case ref. II GOK 2/18; case ref. II GOK 3/18; case ref. II GOK 4/18; case ref. II GOK 5/18; case ref. II GOK 6/18; case ref. II GOK 7/18; case ref. II GOK 8/18; case ref. II GOK 9/18; case ref. II GOK 10/18; case ref. II GOK 11/18; case ref. II GOK 12/18; case ref. II GOK 13/18; case ref. II GOK 14/18; case ref. II GOK 15/18; case ref. II GOK 16/18; case ref. II GOK 17/18; case ref. II GOK 18/18; case ref. II GOK 19/18; case ref. II GOK 20/18; similarly, Judgement of the VAC in Warsaw, case ref. VI SA/Wa 309/20.

25 Judgement of the European Court of Human Rights of December 1, 2020, case ref. 26374/18 (https://bit.ly/445kxbU) (Accessed: 25 May 2023).

26 Judgements of the SAC: case ref. III FSK 3626/21; case ref. III FSK 4104/21.

It assumes holding office until reaching the mandatory retirement age or the expiry of the term of office for a given function, if it is temporary. The principle of irremovability is not absolute; it may be subject to exceptions provided that it is justified by overriding and legally justified reasons. In particular, a judge may be dismissed, subject to due process, if they are unable to continue performing their functions because of incapacity or gross misconduct. Simultaneously, the requirement of independence presupposes that the provisions governing the possibility of removal from office provide the necessary guarantees for judges to avoid the risk of such a system being used for the political control of court decisions.[27]

On similar legal grounds, Articles 2 and 19 of the TEU, Articles 6 and 13 of the ECHR, Article 47 of the CFREU, supplemented with a clear indication of Article 4.3 of the TEU, the VAC in Wroclaw derives a specific obligation of administrative courts implemented in relation to national administration bodies. Legal certainty, equality before law and the rule of law imply that an administrative body may be obliged to reconsider a case already concluded, with an administrative decision having become final because of the exhaustion of legal remedies under national law. The reason for applying this extraordinary procedure (the resumption of administrative proceedings) is to consider the interpretation of a provision of EU law relevant to the case later made by the CJEU.[28] Therefore, according to the administrative court, one of the conditions for the implementation of the "international" rule of law is that the national court or tax authority ensures the effectiveness and uniformity of the application of EU law.

In another judgement, the VAC in Wroclaw, pursuant to Article 2 of the TEU in conjunction with Articles 41 and 47 of the CFREU, referred to the procedural fairness norm, the obligation to respect thereof in all proceedings in individual cases resulting from the democratic rule of law expressed, among others, in Article 2 of the TEU. In the court's opinion, an element of procedural fairness is executed by an exhaustive justification of the decision which guarantees the individual the right to effectively challenge it and a proper instance review under the principle of two-instance proceedings and judicial review. The justification should include a clear disclosure of the reasons for the decision; provide complete information as to what elements determine the specific shape of the party's legal situation; and thus enable the verification of the administrative body's reasoning by the party, the higher-instance authority, and the administrative court. Simultaneously, defective justification of an administrative decision violates the right to defence, the right to an effective remedy, including the right to court access.[29]

27 Judgement of the VAC in Warsaw, case ref. VI SA/Wa 309/20.
28 Judgement of the VAC in Wroclaw, case ref. I SA/Wr 500/22.
29 Judgement of the VAC in Wroclaw, case ref. I SA/Wr 342/21.

3. "International" versus "national" view of the rule of law

Views relating to the relationship between "international" and "national" understanding of the rule of law are rarely expressed by administrative courts. Moreover, they do not refer to this concept in its entirety, but only to one of its elements: the right to court and effective judicial protection. The opinion of the SAC concerns the value legally protected both in the Polish national legal order (Article 45.1 of the Constitution[30]) and in the international order (Articles 6 and 13 of the ECHR) and the EU (Article 19 of the TEU and Article 47 of the CFREU). Therefore, in this respect, 'it is impossible to perceive the existence of (any) contradiction, in particular an irremovable or even hypothetical one.' Pursuant to Article 45.1 in conjunction with Article 77 of the Constitution, the right to a competent, independent, and impartial court is understood as: 1) the right of court access, that is, to begin a procedure before a court (independent and impartial); 2) the right to properly structured court proceedings, consistent with the requirements of fairness and transparency; 3) the right to a court judgement, that is, the right to obtain a binding court decision; and 4) the right to the appropriate shaping of the system and the position of the bodies examining cases. Article 78 of the Fundamental Law, which states that each party has the right to appeal against judgements and decisions issued in the first instance, is logically closely related to these elements. Therefore, such a remedy must be generally available and, above all, effective in the sense that it creates a real possibility – even a guarantee – of assessing the issued decision and its annulment (cassation) or change (revision). Furthermore, regarding the aforementioned fourth element of the right to court, the SAC stated that it included a court characterised by constitutional features, that is, independence. This implies that the executive and legislative authorities have no influence on the adjudication process, independence, or impartiality of judges in either internal or external aspects. The latter requires that the result of the assessment of adjudication conditions by an external observer and his/her (subjective) conviction of the independence and impartiality of the judge drawn therefrom be considered.[31]

In the opinion of the SAC, the right to court and effective judicial protection are shaped and understood similarly by the European Court of Human Rights pursuant to Article 6 of the ECHR and in EU law, in particular, since the

30 Pursuant to this provision: 'Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.'

31 Judgements of the SAC: case ref. II GOK 2/18; case ref. II GOK 3/18; case ref. II GOK 4/18; case ref. II GOK 5/18; case ref. II GOK 6/18; case ref. II GOK 7/18; case ref. II GOK 8/18; case ref. II GOK 9/18; case ref. II GOK 10/18; case ref. II GOK 11/18; case ref. II GOK 12/18; case ref. II GOK 13/18; case ref. II GOK 14/18; case ref. II GOK 15/18; case ref. II GOK 16/18; case ref. II GOK 17/18; case ref. II GOK 18/18; case ref. II GOK 19/18; case ref. II GOK 20/18.

principle of effective judicial protection of rights (Article 19.1 of the TEU) as a general principle of EU law results primarily from the constitutional traditions common to Member States. After all, the source of its protection is justified by the same axiological foundations which must be considered evident considering the assumptions of modern civilisation culture and the legal culture of democratic states.[32]

4. The "international" rule of law – principle or value

In the court-administrative jurisprudence, the term "rule of law," in its "international" context, is associated both with the concept of principle ("the rule of law principle,"[33] "principle of a democratic state of law"[34]), and value ("the value of the state of law,"[35] "the value of the rule of law"[36]). Therefore, a question may be asked as to which concept is appropriate from the perspective of the terminology conventions adopted by the administrative courts. In the jurisprudence to date, the "principle of law" has often been understood as a general normative directive of due conduct, qualified as a consequence of distinguishing the principles and rules. According to the SAC, principles of law are an inseparable element of every legal system and constitute a content bond in the system of legal norms; that is, they serve to organise a set of norms for which an appropriate axiological justification can be found in the system of values.[37] Moreover, the Court claims that a legal principle is a legal norm that requires or prohibits the implementation of a specific value.[38] Thus, in the opinion of the administrative courts, there is a close relationship between legal principles and values. The former contains a specific pattern of behaviour based on the implementation of a certain positive – from the legislature's perspective – state of affairs (and therefore, values). However, unlike rules (which are also referred to by administrative courts), the principles are norms commanding that something be realised to the highest degree that is actually and legally possible (optimisation commands, which can be fulfilled to different degrees).[39]

32 Ibid.
33 E.g. Judgement of the VAC in Warsaw, case ref. VI SA/Wa 309/20.
34 E.g. Judgement of the VAC in Wroclaw, case ref. I SA/Wr 342/21.
35 E.g. Judgement of the SAC, case ref. II GOK 2/18.
36 E.g. Judgement of the SAC, case ref. III FSK 4104/21.
37 E.g. Judgements of the SAC: of May 26, 2022, case ref. III OSK 1291/21 (https://bit.ly/3oNPaSH); of January 11, 2022, case ref. III OSK 929/21 (https://bit.ly/3HbG5cQ) (Accessed: 28 June 2023).
38 E.g. Judgements of the VAC in: Poznan of December 2, 2021, case ref. II SA/Po 236/21 (https://bit.ly/3Avd7Rq); Cracow of January 26, 2021, case ref. III SA/Kr 966/20 (https://bit.ly/3LaD9hF) (Accessed: 28 June 2023).
39 Cf. Alexy, 2000, p. 295.

Considering the aforementioned, the following conclusion is correct: if we reasonably assume that the rule of law in general or in its individual manifestations (e.g. independence of judges, independence of the judiciary, availability of judicial exercise of rights, legal legitimacy of actions taken) is a certain state of affairs positively qualified by the legislature (national, international, EU), it can appear both as a value in law and as an element of the legal principle. Thus, referring only to the catalogue of future, present or past "states of affairs" approved by the legislature, administrative courts should use the concept of 'the value of state of law' or 'the value of the rule of law.' If one wished to emphasise the imperative of striving for the realisation of these states, then it is appropriate to refer to "the rule of law principle" or "the principle of state of law," which – according to R. McCorquodale – does not refer to the concept of "all-or-nothing," but is relative. Its observance is measured by the degree to which its addressees comply with its individual elements, with the aim of fulfilling them all the time,[40] thus striving for a specific *optimum*.

5. General sources of the obligation of administrative courts to implement the "international" rule of law

The authorisation and obligation of administrative courts to implement the "international" rule of law results from the provisions of national law,[41] preceded by the Constitution. This circumstance was also clearly indicated in the jurisprudence of administrative courts, in particular by referring to the constitutional concept of sources of generally applicable law (which include, *inter alia* – ratified international agreements that are also binding on administrative courts). According to the SAC, by establishing the integration clause (Article 90.1 of the Constitution[42])[43] and Article 91 of the Constitution, the constitutional legislature clearly and unequivocally sought to define the relationship of national law, including its openness and favourable attitude, to the systems of international and EU law. This was done by constitutionalising the *pacta sunt servanda* principle (Article 9 of the Constitution[44]) which is imperative under international law; the principle (order) of pro-contractual and pro-EU interpretations of law; the principle of direct application and the primacy of an international agreement ratified with prior consent expressed in a statute (Articles 91.1 and 91.2 of the Constitution); and the

40 McCorquodale, 2016, p. 304.

41 Cf. Nollkaemper, 2011, p. 44.

42 Pursuant to this provision: 'The Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters.'

43 Cf. e.g. Balicki, 2022, p. 123.

44 Pursuant to this provision: 'The Republic of Poland shall respect international law binding upon it.'

principle of direct effect and priority of application of EU law (Article 91.3 of the Constitution[45]).[46]

In the opinion of the SAC, a rational constitutional legislature had to consider (and has considered) the dynamics, continuous "creating" and openness of the EU legal order, and the special position of the case law of the CJEU, which is the source of law and the validity of the fundamental principles of EU law. In this context, the Court also noted the exclusive and binding jurisdiction of the CJEU in disputes over the content and validity of EU law, justified by the need to ensure its effectiveness of EU law and uniformity of application. The constitutional legislature could not ignore the consequences of the integration processes in which Poland participated before the adoption of Fundamental Law and those related to the functions of the jurisprudence of the European Court of Human Rights. It has an *erga omnes* effect, considering its persuasive value for state members of the international community, their laws, and national practice.[47]

An important element of the analysis of administrative courts is the attitude towards the issue of supranational sources and justification of the obligation of these courts to implement the rule of law in the Polish legal order. In this regard, the beginning point may be the evident statement that Polish administrative courts are EU courts in the functional sense, applying EU law with all consequences. In particular, they are required to assume such functions based on the principle of the direct effects of this law. With this principle, the SAC combines it with the principle of primacy of EU law (granting priority in its application, also in relation to the norms of the Constitution), which in turn aims to ensure the effectiveness of this law. In particular, the principle of effectiveness found in Article 4.3 of the TEU requires ensuring the effective protection of subjective rights under EU law. Moreover, the CJEU jurisprudence cited by administrative courts demonstrates that the courts of Member States (and therefore also Polish administrative courts) are obliged to guarantee such protection. Thus, the principle of effectiveness serves to specify the obligations of national courts deciding on the case with the "European shadow," in particular the obligation to interpret national law in accordance with EU law. This obligation is a consequence of the supremacy of EU law, and for failure to comply with it, the Member States are exposed to liability for damages. Therefore, another principle that forces the necessity of the (effective) application of EU law is the principle of state liability for damage. Its implementation depends

45 Pursuant to this provision: 'If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.'

46 Judgements of the SAC: case ref. II GOK 2/18; case ref. II GOK 3/18; case ref. II GOK 4/18; case ref. II GOK 5/18; case ref. II GOK 6/18; case ref. II GOK 7/18; case ref. II GOK 8/18; case ref. II GOK 9/18; case ref. II GOK 10/18; case ref. II GOK 11/18; case ref. II GOK 12/18; case ref. II GOK 13/18; case ref. II GOK 14/18; case ref. II GOK 15/18; case ref. II GOK 16/18; case ref. II GOK 17/18; case ref. II GOK 18/18; case ref. II GOK 19/18; case ref. II GOK 20/18.

47 Ibid.

on the possibility of holding a Member State liable for a breach of EU law in a situation where the subjective rights of an individual (e.g. the right to an effective remedy before a tribunal) have been violated, causing damage.[48]

Administrative courts recognise that one of the vital foundations of the EU legal order as a supranational system is the principle of the supremacy of EU law.[49] In essence, the provisions of national law must not undermine the unity and effectiveness of EU law.[50] Consequently, in the event an infringement is found in any of this law's provisions which imposes a clear and precise obligation on Member States to produce a given result, national courts should, if necessary, refrain from applying the provisions of national law causing that infringement.[51]

Simultaneously, according to the administrative courts, the principle of primacy of EU law does not conflict with the principle of supremacy of the Constitution (Article 8.1. of the Fundamental Law[52]). The principle of primacy is implemented at the level of applying the law, not at the level of its binding force, and therefore, at the level of the horizontal, content-related, but not hierarchical, conflict of the norms of national and EU law. The competence to derogate from a norm of internal law which does not correspond to a norm of EU law is the exclusive domain of Member States' constitutional orders. In such a situation, the sovereign Polish constitutional legislature retains the right to independently decide on the method of resolving such a contradiction, considering the advisability of a possible amendment to the Constitution itself. Thus, the irremovable contradiction between constitutional and EU norms cannot be resolved in the Polish legal system by recognising the supremacy of the EU norm over the constitutional norm; nor could it lead to the loss of the binding force of a constitutional norm and its replacement by an EU norm or limit the scope of application of this norm to an area not covered by the regulation of EU law.[53]

Moreover, in the opinion of the SAC, which refers to the judgement of the Constitutional Court,[54] one can only speak of a hypothetical conflict between the EU's legal order and constitutional regulations. This is owing to the fact that considering the common assumptions of the legal culture of democratic states, these norms have essentially the same axiological grounds for their validity. The

48 Judgements of the SAC: case ref. III FSK 3626/21; case ref. III FSK 4104/21.

49 Cf. Koch, 2005, p. 201.

50 Judgement of the VAC in Wroclaw, case ref. I SA/Wr 500/22.

51 Ibid.

52 Pursuant to this provision: 'The Constitution shall be the supreme law of the Republic of Poland.'

53 Judgements of the SAC: case ref. II GOK 2/18; case ref. II GOK 3/18; case ref. II GOK 4/18; case ref. II GOK 5/18; case ref. II GOK 6/18; case ref. II GOK 7/18; case ref. II GOK 8/18; case ref. II GOK 9/18; case ref. II GOK 10/18; case ref. II GOK 11/18; case ref. II GOK 12/18; case ref. II GOK 13/18; case ref. II GOK 14/18; case ref. II GOK 15/18; case ref. II GOK 16/18; case ref. II GOK 17/18; case ref. II GOK 18/18; case ref. II GOK 19/18; case ref. II GOK 20/18.

54 Judgement of the Constitutional Court of May 11, 2005, case ref. K 18/04 (OTK ZU no 5/A/2005, item 49).

viability of this assumption should be sought in the consequences of Articles 2 and 4.3 of the TEU, and Article 9 of the Constitution.[55]

However, administrative courts do not address the issue of supranational legal grounds for implementing the rule of law derived from other sources of convention law binding upon Poland (i.e. other than the EU treaties, which apply in particular to the ECHR).[56] Therefore, they limit themselves to the aforementioned sources of obligation arising from the Constitution.

6. The requirement to implement the "international" rule of law as an element of the reference and complementary norms

It appears evident to conclude that the order to implement the "international" rule of law (as a legal principle) addressed to the administrative court may be important for reconstructing "complementary norms." This is confirmed by analysing the judgements of the administrative courts. Patterns of legal action, referred by the VAC and the SAC to the controlled legal acts of public administration bodies or judgements of a lower court, were indeed subject to determination considering the principle of the ("international") rule of law, or rather its individual elements identified in Section 2 of this paper. Therefore, the relevant "complementary norms" included the following requirements resulting from the above principle of EU and international law: 1) the composition of the VAC adjudicating on the case is in accordance with the law, including the judges participating in it are independent, unbiased and impartial (Article 183.2 Point 4 of the LPAC in conjunction with Article 6.1 of the ECHR, Articles 2, 6.1-3 and 19.1 of the TEU and Article 47 of the CFREU);[57] 2) the act of the President of the Republic of Poland stating the date of retirement of a Supreme Court judge does not interfere with the principle of irremovability of judges (Article 19.1 in conjunction with Article 2 of the TEU);[58] 3) the resolution of the National Council of the Judiciary concerning the submission (failure to submit) to the President of the Republic of an application for appointment to the office of a judge of the Supreme Court guarantees the independence of these judges (Article 19.1 in conjunction with Article 2 of the TEU and Article 47 of the CFREU);[59] 4) the order of the President of the Regional Court regarding the immediate suspension of a judge in his duties does not undermine the independence, impartiality and irremovability of the judge (Articles 19.1 and

55 See Footnote 53.
56 For more on this, see Nollkaemper, 2011, pp. 11, 35–44.
57 Judgements of the SAC: case ref. III FSK 3626/21; case ref. III FSK 4104/21.
58 Judgement of the VAC in Warsaw, case ref. VI SA/Wa 309/20.
59 Judgements of the SAC: case ref. II GOK 6/18; case ref. II GOK 7/18; case ref. II GOK 10/18; case ref. II GOK 18/18.

4.3 in conjunction with Article 2 of the TEU);[60] 5) the tax administration authority resumes the proceedings concluded with the final decision to ensure compliance of the case with the CJEU judgement (Article 240.1 Point 11 and Article 245.1 Point 1 of the Act of 29 August 1997 – Tax Code (hereinafter the TC),[61] in conjunction with Articles 4.3, 2 and 19.1 of the TEU);[62] 6) the administrative decision of the tax authority contains exhaustive factual and legal justification, guaranteeing the right to defence, the right to an effective remedy, including the right to court (Article 210.1 Point 6 and Article 210.4 TC in conjunction with Article 2 of the TEU, Articles 41 and 47 of the CFREU).[63]

The indicated cases led to the conclusion that the legal grounds for the implementation of the "international" rule of law were co-applied with national provisions. This included, first, situations of the interpretative co-application, comprising the determination of a legal norm by the administrative court, considering both national regulations and sources of international or EU law (both of these components co-created the legal norm).[64] Second, co-applicability was merely "decorative"[65] when the court referred to the source of the "international" rule of law in the justification of the judgement, although in fact the national law provided a sufficient basis for settling the case.[66] In addition, in one of its judgements, the administrative court stated that the national act was inconsistent with Article 19.1, in conjunction with Article 2 of the TEU.[67] This infringement had to result in the court's obligation to disregard the relevant national regulations, and thus, recognise the illegality of the act of the public administration body issued on their basis being inconsistent with the standard of correctness constructed based on EU regulations.[68]

In the analysed judgements of the administrative courts, the allegations regarding the violation of the "international" rule of law were considered at the request of the complainants[69] (which is clear owing to the nature of the administrative court proceedings), and *ex officio*.[70] The latter situation in the proceedings before the VAC is a consequence of the fact that this court is not bound by the allegations and requests of the complaint or the legal basis invoked (Article 134.1 of the LPAC).[71] This necessitates a full examination of the lawfulness of the

60 Judgement of the VAC in Gdansk, case ref. III SA/Gd 1173/21.
61 Journal of Laws of 2023, item 2383.
62 Judgement of the VAC in Wroclaw, case ref. I SA/Wr 500/22.
63 Judgement of the VAC in Wroclaw, case ref. I SA/Wr 342/21.
64 In particular Judgements of the SAC: case ref. III FSK 3626/21; case ref. III FSK 4104/21.
65 Cf. Działocha, 2007, p. 45.
66 E.g. Judgement of the VAC in Wroclaw, case ref. I SA/Wr 342/21.
67 Judgement of the VAC in Warsaw, case ref. VI SA/Wa 309/20.
68 Cf. Kamiński, 2011b, pp. 22–24.
69 E.g. Judgement of the SAC, case ref. II GOK 6/18.
70 E.g. Judgement of the VAC in Wroclaw, case ref. I SA/Wr 342/21; Judgements of the SAC: case ref. III FSK 3626/21; case ref. III FSK 4104/21.
71 Wróbel, 2010, p. 485.

challenged conduct of public administration bodies.[72] The SAC's competence is regulated differently. It investigates the case within the cassation appeal, however, *ex officio* considering the invalidity of the proceedings (Article 183.1 of the LPAC). Therefore, that court cannot take the place of a party and specify the pleas in the complaint or their reasons.[73] Nevertheless, in case ref. III FSK 3626/21 and case ref. III FSK 4104/21, the SAC applied an exception to this rule and *ex officio* verified the ground for invalidity specified in Article 183.2 Point 4 of the LPAC (contradiction of the composition of the adjudicating court with the law) in connection with the allegation of violation of the "international" rule of law.

The "international" rule of law was also an element determining the content of the reference norm specifying the jurisdiction of the administrative court. In one case, Articles 2 and 4.3 of the TEU, Article 47 of the CFREU, and Article 6.1 of the ECHR were invoked as arguments in favour of resolving doubts as to the inclusion of the order of the President of the Regional Court regarding the immediate suspension of a judge in his duties under judicial-administrative control[74] (this was the co-application of interpretation of national, international, and EU regulations). In another case, Article 19.1, in conjunction with Article 2 of the TEU, in the interpretation of the CJEU presented in the judgement of 2 March 2021 case ref. C-824/18,[75] became the basis for the SAC's omission of a national act inconsistent with these provisions, which excluded the admissibility of judicial review of resolutions of the National Council of the Judiciary regarding the submission to the President of the Republic of Poland of an application for appointment to the office of a judge of the Supreme Court.[76] In both cases, the administrative court *ex officio* considered the order to implement the "international" rule of law. This obligation resulted from Article 58.1 Point 1 of the LPAC, pursuant to which the court rejects the complaint if the case does not fall within the jurisdiction of the administrative court. 'This means that before examining the complaint on its merits, the administrative court *ex officio* first examines its admissibility. The court determines whether one of the grounds for rejecting the complaint, enumerated in Article 58.1 of the LPAC, is found'.[77] The equivalent of this regulation in relation to matters

72 E.g. Judgement of the SAC of February 28, 2023, case ref. III OSK 1994/22 (https://bit.ly/3AQo3ZW) (Accessed: 19 July 2023).

73 Wróbel, 2010, pp. 485–486.

74 Judgement of the VAC in Gdansk, case ref. III SA/Gd 1173/21.

75 [Online]. Available at: https://bit.ly/3HxJraa (Accessed: 19 July 2023).

76 Judgements of the SAC: case ref. II GOK 2/18; case ref. II GOK 3/18; case ref. II GOK 4/18; case ref. II GOK 5/18; case ref. II GOK 6/18; case ref. II GOK 7/18; case ref. II GOK 8/18; case ref. II GOK 9/18; case ref. II GOK 10/18; case ref. II GOK 11/18; case ref. II GOK 12/18; case ref. II GOK 13/18; case ref. II GOK 14/18; case ref. II GOK 15/18; case ref. II GOK 16/18; case ref. II GOK 17/18; case ref. II GOK 18/18; case ref. II GOK 19/18; case ref. II GOK 20/18. For a critique of this SAC's view, see Judgement of the Constitutional Court of October 7, 2021, case ref. K 3/21 (OTK ZU no A/2022, item 65).

77 E.g. Order of the SAC of November 23, 2022, case ref. I GSK 1756/22 (https://bit.ly/3HyAa1D) (Accessed: 19 July 2023).

related to resolutions of the National Council of the Judiciary was Article 398.2.[6] of the Act of 17 November 1964: Civil Procedure Code.[78]

It can be marginally mentioned that an indirect reference to the concept of the "international" rule of law in the context of reference norm also occurred in the resolution of the SAC of 3 April 2023 case ref. I FPS 3/22.[79] However, this was without explicit reference to this concept and only through the prism of one of its elements, that is, the independence and impartiality of the judge, invoked in connection with Article 19.1 of the TEU, Article 47 of the CFREU, and Article 6.1 of the ECHR. The Court merely stated that these provisions constituted the *ratio legis* of Article 5a of the LOAC (the individual test of a judge's independence) and Article 19 of the LPAC (the exclusion of a judge owing to doubts about his impartiality). The indicated element of the "international" rule of law had no interpretive significance for the said resolution, and did not affect the result of the interpretation of the aforementioned domestic provisions adopted by the Court, as there was no need for it in this situation. However, such pro-EU and pro-international interpretations of these provisions may be necessary, as indicated in the literature on this subject.[80]

7. Conclusions

In legal literature, the notion of the rule of law is often explained (at the "international" or "national" level) through the prism of constituent sub-principles, the catalogues of which differ among authors.[81] Similarly, the jurisprudence of Polish administrative courts has not adopted a comprehensive definition of the "international" rule of law, focusing on individual cases on only some of its elements. These elements were as follows: effective judicial protection,[82] correct procedure of judges' appointment, irremovability of judges, ensuring the effectiveness and uniformity of the application of EU law by the national court and tax authorities, and procedural fairness, with particular emphasis on exhaustive justification of administrative decisions. Owing to the frequency of references, the fundamental importance of those judgements is attributed to the sub-principle of effective judicial protection of the rights of the individual, guaranteed by the independence of the courts and the independence and impartiality of judges (Article 2 in conjunction with Article 19.1 of the TEU, Articles 6 and 13 of the ECHR, and Article 47 of

78 Journal of Laws of 2023, item 1550, as amended. Cf. e.g. Judgement of the SAC, case ref. II GOK 2/18.

79 I FPS 3/22 – Uchwała NSA [Online]. Available at: https://bit.ly/3PkBnOl (Accessed: 27 November 2023).

80 Roszkiewicz, 2022, pp. 80–82, 94.

81 Cf. e.g. Kmieciak, 2016, p. 25; Lord Bingham, 2007, pp. 69–82; Nollkaemper, 2011, pp. 3–6; Pech, 2010, pp. 373–374; Raz, 1979, pp. 214–218; Watts, 1993, pp. 26–36.

82 Cf. Chlebny, 2022, pp. 29–30.

the CFREU). Moreover, in the literature, this aspect of the 'international' rule of law is particularly exposed.[83]

Administrative courts in the conceptual context present an integrative, not confrontational approach, striving to agree on the content of the international and national meaning of the rule of law, emphasising the lack of even a hypothetical contradiction between the values derived from these two orders – supranational and national. Based on the jurisprudence of administrative courts, depending on the semantic context, one can speak of both "value" and "principle" of the rule of law.

The order to implement this "value" or "principle" results both from national sources – in particular the Constitution, which is open and favourable towards international and EU law systems – and from EU sources – in particular the principle of direct applicability and the principle of primacy of EU law. In particular, according to administrative courts, the latter principle does not conflict with the principle of supremacy of the Polish Constitution, and the conflict between the EU legal order and constitutional regulation is only hypothetical.

The "international" rule of law is important for determining the content of the complementary and reference norms in the mechanism of formulating by the administrative court of the "relative phrase." In such cases, the interpretations of national, international, and EU provisions often co-apply. However, sometimes, administrative courts find that the provisions of a national act are inconsistent with EU law and the rule of law derived from it, and omit conflicting national regulations. Oftentimes, in the analysed judgements, the order for the administrative court to implement the "international" rule of law was *ex officio* considered, which proves the active role of these courts in the pursuit of 'universalisation' of their jurisprudence.

For the time being, it remains difficult to discuss a coherent concept of the "international" rule of law based on the jurisprudence of Polish administrative courts. After all, we examine it based on many judgements that use this concept in specific cases for the purposes of their resolution by administrative courts' adjudicating panels of different compositions (simultaneously, with the lack of interpretative resolutions of the SAC seeking to unify jurisprudence in this regard). However, one can risk formulating a statement about the beginning of the formation of the above concept because of the absence of jurisprudence disputes at the level of individual contexts in which administrative courts have so far referred to the principle or value of the "international" rule of law.

83 Cf. Kochenov, 2018, p. 187.

Bibliography

- Alexy, R. (2000) 'On the Structure of Legal Principles', *Ratio Juris*, (13)3, pp. 294–304; https://doi.org/10.1111/1467-9337.00157.
- Balicki, R. (2022) 'Klauzula integracyjna w Konstytucji RP', *Wrocławsko-Lwowskie Zeszyty Prawnicze*, 2022/13, pp. 121–130 [Online]. Available at: https://bit.ly/3oMkgKH (Accessed: 26 May 2023).
- Borkowski, J. (2020) 'Wykonywanie wymiaru sprawiedliwości przez kontrolę działalności administracji publicznej' in Adamiak, B., Borkowski, J. (eds.) *Metodyka pracy sędziego w sprawach administracyjnych*, Warsaw: Wolters Kluwer Polska, pp. 53–71.
- Chlebny, J. (2022) 'Sądownictwo administracyjne w Polsce z perspektywy art. 47 KPP', *Europejski Przegląd Sądowy*, 2022/10, pp. 29–34.
- Drachal, J., Jagielski, J., Stankiewicz, R. (2015) 'Komentarz do art. 3' in Hauser, R., Wierzbowski, M. (eds.) *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*. Warsaw: C.H. Beck, pp. 49–80.
- Działocha, K. (2007) 'Komentarz do art. 8' in Garlicki, L. (ed.) *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom V*. Warsaw: Wydawnictwo Sejmowe, pp. 1–55.
- Górka, M., Mik, C. (2005) 'Sądy polskie jako sądy Unii Europejskiej (na tle doświadczeń przedakcesyjnych)', *Kwartalnik Prawa Publicznego*, (5)4, pp. 7–53.
- Kamiński, M. (2011a) 'Konstruowanie wzorca legalności decyzji administracyjnej na podstawie prawa UE przez polskie sądy administracyjne (cz. I)', *Europejski Przegląd Sądowy*, 2011/4, pp. 22–27.
- Kamiński, M. (2011b) 'Konstruowanie wzorca legalności decyzji administracyjnej na podstawie prawa UE przez polskie sądy administracyjne (cz. II)', *Europejski Przegląd* Sądowy. 2011/5, pp. 22–27.
- Kmieciak, Z. (2016) 'O pojęciu rządów prawa', *Państwo i Prawo*, 2016/ 9, pp. 21–35.
- Koch, C. (2005) 'The Doctrine of Supremacy of European Community Law as a Condition Precedent for the Doctrine of Direct Effect', *International Trade and Business Law Review*, 2005/9, pp. 201–219.
- Kochenov, D. (2018) 'Article 7 TEU: A Commentary on a Much Talked-About "Dead" Provision', *Polish Yearbook Of International Law*, no. 38, pp. 165–187; https://doi.org/10.24425/pyil.2019.129611.
- Lord Bingham (2007) 'The Rule of Law', *Cambridge Law Journal*, (66)1, pp. 67–85; https://doi.org/10.1017/S0008197307000037.
- Majchrzak, B. (2022) 'Poland' in Majchrzak, B. (ed.) *Elementy ustrojowo-funkcjonalne sądownictwa administracyjnego w wybranych państwach europejskich*. Warsaw: Instytut Wymiaru Sprawiedliwości, pp. 15–100.
- McCorquodale, R. (2016) 'Defining the International Rule of Law: Defying Gravity', *International and Comparative Law Quarterly*, (65)2, pp. 277–304; https://doi.org/10.1017/S0020589316000026.
- Nollkaemper, A. (2011) *National Courts and the International Rule of Law*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780199236671.001.0001.

- Pech, L. (2010) 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', *European Constitutional Law Review*, (6)3, pp. 359–396; https://doi.org/10.1017/S1574019610300034.
- Raz, J. (1979) *The Authority of Law. Essays on Law and Morality*. Oxford: Oxford University Press [Online]. Available at: https://bit.ly/3oYjc6t (Accessed: 19 July 2023); https://doi.org/10.1093/acprof:oso/9780198253457.001.0001.
- Roszkiewicz, J. (2022) 'Indywidualny test niezawisłości sędziego powołanego z naruszeniem prawa – uwagi na tle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej, Europejskiego Trybunału Praw Człowieka, Sądu Najwyższego i Naczelnego Sądu Administracyjnego', *Przegląd Sądowy*, 2022/11–12, pp. 75–98.
- Sulyok, M. (2021) 'Compromise(d)? – Perspectives of Rule of Law in the European Union', *Central European Journal of Comparative Law*, (2)1, pp. 207–227; https://doi.org/10.47078/2021.1.207-227.
- Watts, A. (1993) 'The International Rule of Law', *German Yearbook of International Law*, 1993/36, pp. 15–45.
- Woś, T. (2004) 'Mechanizm postępowania sądowoadministracyjnego (mechanizm kontroli przez sąd zaskarżonego aktu lub czynności)' in Woś, T. (ed.) *Postępowanie sądowo administracyjne*. Warsaw: LexisNexis, pp. 263–267.
- Wróbel, A. (2010) 'Sądy administracyjne jako sądy Unii Europejskiej', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2010/5–6, pp. 474–496.
- Wróblewski, J. (1969) 'Zwroty stosunkowe – wypowiedzi o zgodności z normą', *Zeszyty Naukowe Uniwersytetu Łódzkiego. Nauki Humanistyczno-Społeczne*, series I, no 62, pp. 3–17.

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Impact of the DSA Regulation on Very Large Online Platforms

ABSTRACT: *The activities of large online platforms based in third countries in the internal market pose potential risks to EU users. The EU aims to ensure a safe online environment not only for consumers, but also for all users active in this ecosystem. Increased security, legal certainty, consumer protection, transparency, and several other partial aims have led to the adoption of the Digital Services Package, which includes the so-called DSA Regulation. The present article aims to identify the key impacts of the new regulation on very large online platforms that are part of the daily routine of EU citizens and to highlight the benefits it brings to regular users. There are many changes brought about by the new legislation; therefore, we decided to focus only on those that we consider the most tangible, both from the perspective of the everyday user and for the platforms per se.*

KEYWORDS: DSA Regulation, very large online platforms, content moderation, harmful content

1. Introduction

The completion of the European Union's internal market has gradually blurred the borders between Member States, and intra-EU legal subjects have become beneficiaries of the free movement of goods, persons, services, and capital. Free movement of services refers to the passive ability of the beneficiaries to receive a service provided in the internal market.[1] Users of the various services of well-known online platforms often do not perceive not only the borders of the internal market but even the fact that the provider of their preferred service is established

1 Kalesná, Hruškovič and Ďuriš, 2011, p. 213.

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in a non-EU country. From our perspective, this often exposes users within the EU to risks that are absent from standard nonelectronic service provision. This can include the transfer of personal data to third countries, ensuring sufficient protection for minors online, the provision of truthful information about sellers, frequent encounters with harmful content and false data on social networks, and several other partial problems posed by the online environment. Many users of online services, whether natural persons or legal entities engaged in various business activities, can hardly imagine functioning today without access to the online platforms they use. The European Union is committed to ensuring above-average consumer protection in the internal market, and has adopted various instruments for this purpose. Technologies should serve the people and society in which we live, not the other way around.[2] However, increasing transparency and protection in the provision of online services is not only about consumers but also about all other users of these services.

Today's online environment requires 'more proactive involvement of intermediaries to prevent the spread of illegal content on the internet.'[3] We are currently seeing a significant focus on moderating online content in light of recent events, the ever-increasing number of banned accounts, and content posted on online platforms, whereby entrepreneurs have often lost the opportunity to promote their products for no clear reason, the failure of platforms to adapt to the requirements for increased protection of minors, the abundance of false profiles for the purpose of defrauding users, and so on. All of the foregoing point to the need for the Union to ensure sufficient protection within the internal market in an online environment, increased transparency and certainty, and to reflect the needs of protection of users of online platform services, whose providers are often entities based outside the EU. In 2022, the EU adopted a package of digital service measures consisting of the Digital Services Act[4] and the Digital Markets Act.[5] The present article is focused on the benefits brought by the Digital Services Act (hereinafter 'the DSA Regulation' or 'the DSA') in the current year from our point of view. This article aims to highlight the most significant amendments introduced by this regulation and identify potential loopholes in the new legislation that may be problematic in practice. The Act categorises providers into several subcategories. In this study, we concentrate exclusively on the most narrowly profiled group of providers, the 'very large online platforms', which we have chosen precisely

2 Vestagerová, 2023.

3 Opinion of advocate general Saugmandsgaard Øe delivered on 16 July 2020, Joined Cases C-682/18 and C-683/18, para. 253, EU:C:2020:586.

4 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ L 277, 27.10.2022, pp. 1–102).

5 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ L 265, 12.10.2022, pp. 1–66).

because of their large impact on users owing to their highly influential nature. We agree with the opinion that these platforms play an important societal role beyond their economic impact.[6]

2. Digital Services Act and large platforms

As mentioned above, consumer protection, not only in the online environment, is a key area addressed at the Union level. In the context of online services, there are a number of acts of secondary Union law in force, such as the ePrivacy Directive[7] and the well-known GDPR Regulation,[8] which are primarily oriented towards strengthening the position of the weaker party, the consumer, especially in the online environment. The new legislation introduced by the Digital Services Package is a horizontal legal framework that does not collide with or change current legislation.[9] The existing legal framework on digital services has so far been contained mainly in the Directive on Electronic Commerce,[10] and so much has undoubtedly changed in the online sphere over the last 20 years that, in our opinion, the Directive no longer reflects the most fundamental challenges of the current online ecosystem.[11] The new legislative package complements the current framework in the form of regulations, which, as acts of Union law, are of general application, binding in their entirety, and directly applicable.[12] New legislation at the Union level in the form of regulation is increasingly being adopted, especially in areas where the Union is conferred with broad competences.[13] In our opinion, regulation can better reflect the need for regulating such a sensitive area as ensuring a safer online environment, and this step was in our view necessary. What makes the DSA Regulation specific is its aim to help not only consumers but also businesses active in the online environment and, in fact, the platforms themselves, which makes it the most comprehensive measure in this area to date. The

6 Helberger et al., 2021, p. 206.
7 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on Privacy and Electronic Communications) (OJ L 201, 31.7.2002, pp. 37–47).
8 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, pp. 1–88).
9 European Commission, 2023a.
10 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1–16).
11 European Commission, 2023a.
12 Art. 288 of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390) (hereinafter 'TFEU').
13 Siman and Slašťan, 2012, p. 329.

main purpose of the new legislation is to make online spaces safer for all users, not just consumers, and to promote the innovation, growth, and competitiveness of businesses in the internal market.[14] Therefore, we cannot say that this is aimed solely at increasing consumer protection.

In this section, we consider it necessary to identify the scope of the DSA Regulation. The territorial scope is naturally limited to EU Member States; however, the extraterritorial personal scope is of interest. The extraterritorial dimension of provisions in this area is not novel. The Court of Justice declared in its Glawischnig-Piesczek judgment the possibility for national courts 'ordering a host provider to remove information covered by the injunction or to block access to that information worldwide within the framework of the relevant international law'.[15] This Regulation applies to all digital service providers that offer services to recipients within the EU, regardless of where those providers are based.[16] If they want to provide services to beneficiaries within the EU, they must respect these new rules. To do so, they must designate a legal representative in one of the Member States where they offer services.[17] The Regulation has been in force from 16 November 2022, but its provisions will not apply across the EU until 17 February 2024,[18] which is also the end of the deadline for EU Member States to designate a Digital Services Coordinator.[19] We will mention these coordinators in the second part of this article, where we will summarise the most important changes that the Regulation brings to everyday practice. The substantive scope is defined for intermediary services, which are limited to services of a digital nature. It covers almost all digital services horizontally. Digital services are synonymous with the term "information society services" and, in the context of other key sources in the area under analysis, are identically interpreted as services 'normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.'[20] Under this definition, we can include basically all providers and platforms that are mostly used by EU subjects on a daily basis. For the purposes of the Regulation, service providers are divided into categories, which are then granted certain rights and imposed obligations in direct proportion to their impact on the Union market, taking into account the size of their impact. The broadest category consists of general intermediary services, under which the

14 European Commission, 2023b.
15 Judgment of the Court of 3 October 2019, C-18/18 *Glawischnig-Piesczek*, para. 53, EU:C:2019:821.
16 Art. 2(1) of the DSA.
17 Art. 13(1) of the DSA.
18 Art. 93(2) of the DSA.
19 Art. 49(3) of the DSA.
20 Commission staff working document impact assessment accompanying the document proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020) 825 final) – (SEC(2020) 432 final) – (SWD(2020) 349 final).

sub-category of hosting services in general also falls. Hosting services include a narrower category of popular online platforms, such as online marketplaces, various B2C applications, and social media platforms. Since, as we have mentioned, the obligations are increasing along with the high influence in the online ecosystem within the internal market, the Act also defines a final sub-category of the most influential online platforms, the so-called "VLOPs and VLOSEs," which by their scale are capable of posing the greatest risks.[21] According to the Act, this most influential category includes very large online platforms and very large online search engines. The Act sets the threshold for defining this category at 10% of the Union's population. This includes platforms used by at least 10% of Europeans, and the European Commission may modify this framework as necessary through delegated acts.[22] A new obligation was adopted for all platforms to update, at least on a semi-annual basis, information on the average number of active recipients of the service in the accessible section of their interface. The Commission has produced non-legally binding guides available in all EU languages that set out the exact procedure for platforms to process information on the number of active users.[23] For the first time, this obligation had to be fulfilled by 17 February 2023.[24] Based on this obligation, the Commission identified the platforms that fall under the most stringent category. These platforms have 4 months from the notification of their status[25] to comply with all the rules imposed on them by the DSA. So far, the Commission has included well-known platforms such as Facebook, Booking, Amazon, Instagram, LinkedIn, TikTok, YouTube, Wikipedia, Zalando, and others in this category. Platforms must then identify and mitigate systemic risks and report them directly to the Commission, as the Commission has the competence to supervise and enforce the new rules through these large platforms. These risks may be linked not only to the dissemination of illegal content but also to the spread of violence in the LGBTIQ context and the lack of protection for minors in the online ecosystem.[26]

Here I would like to mention an interesting case that is before the EU Court of Justice. Following the Commission's classification of the well-known trader Zalando as one of the so-called VLOPs, Zalando brought an action on 27 June 2023 before the EU Court of Justice against the Commission based his action on a number of pleas in law. First, they refuse the scope of DSA, as they do not consider themselves an intermediary service, and consequently, neither a hosting service nor an online platform. In addition, they consider the requirements for calculating the threshold value to be imprecise and in conflict with the principle of the

21 European Commission, 2022.
22 Recital 76 of Preamble to the DSA.
23 European Commission, 2023c.
24 Art. 24(2) of the DSA.
25 Art. 33(6) of the DSA.
26 European Commission, 2023d.

certainty of the EU acquis, which in consequence results in the unequal treatment of online platform providers. In addition, the action is based on an infringement of the principle of proportionality and a breach of the obligation to state reasons laid down in Article 296 TFEU, and simultaneously Zalando states that there is no '… subsumption under the definition of hosting service according to Article 3(g)(iii) of the DSA…' As this is currently a case in progress, we look forward to a decision on this matter, which in our view will be able to subsequently set out clearer criteria for the application of the DSA to platforms.[27]

The benefits of the new legislation will be felt by all stakeholders. Naturally, they will be most noticeable for users, who will benefit from a safer environment, increased protection of rights, more relevant offers, and a lower risk of the spread of illegal content. For users of services for business purposes, the new regime brings the same benefits as well as uniform rules throughout the internal market, resulting in increased legal certainty.[28] A level playing field should be set for all subjects, and we believe that space will be freed up for those promoting their goods and services on popular platforms by gradually eliminating illegally created profiles and unauthorised sellers, and creating an environment in which platforms do not arbitrarily regulate the ability of entrepreneurs to promote their products based on internal rules. Any interference in their activities, such as marketing, should be duly justified and mechanisms should be created through which entrepreneurs can have the practices of individual platforms investigated. The platforms themselves will also benefit from the new legislation, as they will receive uniform regulation throughout the internal market and, consequently, easier expansion within the EU.[29] In the next section, we look at the most significant changes for both ordinary users and entrepreneurs.

3. The most significant changes introduced by the Digital Services Act

The changes brought about by the new legislation in the Digital Services Act lie beyond the scope of this article. We therefore decided to identify the changes which, from our point of view, will be the most tangible and relevant for users in their daily use of digital services offered by very large online platforms. We consider one of the most significant amendments to be the possibility of investigating the activities of a certain platform directly through the office in the Member State of the recipient. As previously mentioned, Member States will designate one or more competent authorities as digital service coordinators to supervise providers.[30] These coordinators will cooperate and conduct joint investigations

27 Case in progress Zalando v Commission, T-348/23.
28 European Commission, 2022.
29 Ibid.
30 Art. 49 of the DSA.

and will be assisted by a new European Board for Digital Services.[31] For the largest platforms, the Commission will be directly responsible for monitoring the implementation of the Regulation. In addition, the platforms must set up an independent Compliance Function responsible for ensuring compliance with the provisions laid down in the Regulation.[32]

Regarding communication, the platforms must identify a contact point that will allow the authorities of the Member States and the Commission to communicate with them to implement the Regulation. They must also establish a point of contact for recipients of the services, which we see as a major benefit.[33] Large platforms often moderate content, but also activities of different profiles. We have encountered information that various business profiles have been blocked or prevented from continuing to advertise their products on the grounds that they had violated some of their internal rules. Although they had the opportunity to object to the platform's decisions, they were often met with only automated responses without success. Therefore, various guides and tips have been created on the Web on how to try to unblock profiles or advertising possibilities, where the result is not guaranteed and is often unsuccessful. Today's legislation makes huge progress and changes the status quo in that it obliges platforms to allow the recipient to choose the way in which they interact with the platform and 'which shall not solely rely on automated tools'.[34] In addition, these large platforms are obliged to provide clear terms and conditions, which must be available in the language of the Member State in which they provide their services.[35] In practice, we consider the obligation to provide substantiation to be one of the most significant steps.

> Providers of hosting services shall provide a clear and specific statement of reasons to any affected recipients of the service for any of the following restrictions imposed on the ground that the information provided by the recipient of the service is illegal content or incompatible with their terms and conditions…[36]

From our standpoint, users will be protected by these possibilities, and if it happens that, for example, a trader is blocked from promoting, he should be able to discuss the problem directly with the person on the platform, not just with the automatic system, and must be given proper reasoning; a general reference to a violation of the platform's terms and conditions will not be sufficient. From our point of view, this will provide greater legal certainty and a more desirable

31 Bertuzzi, 2023.
32 Art. 41 of the DSA.
33 Arts. 11 and 12 of the DSA.
34 Art. 12 of the DSA.
35 Art. 14(5)–(6) of the DSA.
36 Art. 17 of the DSA.

environment for the modern online ecosystem of the 21st century, not only for consumers and ordinary users, but also for companies providing or promoting their goods and services through these platforms.

New ways of protection and monitoring include content moderation and the elimination of illegal and harmful content. This causes the largest platforms to block millions of pieces of content and profiles annually.[37] Similar to the suspension of profiles, when content is removed, the user has not always been provided with the opportunity to communicate directly with a person from the platform in practice, and often may not even have been given a specific reason for the removal of certain content that they have posted. The obligation to allow communication by means other than an automated system and the obligation to provide a statement of reasons also apply to content moderation. In addition, users will be able to easily report illegal content to the platforms, which will have to scrutinise these suggestions.[38] Of course, there will be the potential for repeat reporting and unjustified suggestions, so it remains to be seen how platforms deal with these reports in practice. The only way we can see is by monitoring the IP addresses from which suspicious multiple reports arise and then consulting the Commission on the approach to be adopted to tackle these suspicious activities. Platforms must assess both the aforementioned risks and proliferation of illegal and harmful content and adopt measures to mitigate these risks.[39] The reach of the large platforms has also clearly strengthened their position in the dissemination of illegal and harmful content and misinformation.[40] The Digital Services Act allows for the moderation of content to remove such content but also underlines the legal certainty in being able to enquire into the reasons and in being able to effectively investigate the platform's practices. Where we see some difficulty is in the definition of illegal and harmful content. The European Parliament has called for both terms to be clearly defined. Harmful content may be legal in nature as such. A different approach should be adopted to moderate harmful content than in the case of illegal content, which must be removed because it collides with the laws of the country in which it is published.[41] Illegal content is defined by the DSA Regulation itself as

> any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law.[42]

37 Holzberg, 2021.
38 European Commission, 2022.
39 Art. 35 of the DSA.
40 Recital 5 of Preamble to the DSA.
41 European Parliament, 2022.
42 Art. 3(h) of the DSA.

The relatively clear definition of illegal content directly in the Regulation does not raise additional questions from our point of view. The problem is the definition of what is harmful content, although possibly lawful, and what is to be considered misinformation.

The Commission dealt with the concept of harmful content as far back as 1996, and it is already taking on a completely different dimension in the online environment. What remains, however, from our perspective, is that each state can essentially come to its own conclusion in defining the boundary between what is permissible and what is not. Within the EU, however, we do not perceive such a significant disparity in the cultures of the Member States that there could be any significant divergence on this issue. First, it is necessary to consider ethical standards, to ensure that users are protected from offensive material, to ensure compliance with fundamental human rights and values, and to preserve freedom of expression.[43] Content that raises certain societal risks is inherently harmful and may undermine the effective protection of fundamental rights. Notwithstanding the foregoing, this formulation is vague, and we believe that only practice will gradually articulate the factors that determine the content to be harmful. A positive first step is to be able to be informed and receive clear reasoning for the moderation of published content. If users are dissatisfied with their reasoning, they can simply contact the relevant authority in their own language to request an investigation into the platform's practices in this area. As large platforms deal with millions of pieces of content and profiles per year, we anticipate that it will be extremely expensive for them to staff a department and an entire contact centre to which users can refer their requests.

In the case of content moderation, it is crucial to strike a balance between removing illegal content and respecting fundamental human rights and freedoms guaranteed by several human rights treaties at the international level. This is an extremely challenging process that, from our point of view, cannot yet be fully automatised. As the Court of Justice has said '…a filtering system that might not distinguish adequately between unlawful and lawful content, …would be incompatible with the right to freedom of expression and information…'[44] The new legislation will create a number of new obligations for providers. Nevertheless, under the Directive on Electronic Commerce, they do not have a general monitoring obligation and one of the exculpatory grounds for liability for illegal content is that they have no knowledge of such content.[45] Several times, the Court has declared certain obligations in the event that the provider had been notified of illegal content or had not removed the content in question after having specific

43 European Commission, 1996.

44 Judgment of the Court of 26 April 2022, C-401/19 *Poland v Parliament and Council*, para. 86, EU:C:2022:297.

45 Art. 14 of the Directive on Electronic Commerce.

knowledge of it.[46] We share the views of Advocate General G. Pitruzzella that providers are essentially information "gatekeepers." In addition to their neutral position in disseminating information, they should be active in moderating content;[47] therefore, we think that the burden brought about by the new regulation is indeed necessary to ensure a safer online environment for EU users. Similarly, national legislation often regulates these issues, which imposes an obligation to remove illegal content, at least reflecting the order of the courts.[48]

The related increased protection of minors within the online environment in the internal market will be another important change. In addition to the general novelties that apply to all users, minors are granted increased protection and a higher level of privacy and security when using online services. Targeted advertising tools based on the profiling of children will also be prohibited. Contrariwise, we see a potential problem in the fact that there is no obligation on 'providers of online platforms to process additional personal data to assess whether the recipient of the service is a minor.'[49] However, to address this issue, legislation on personal data would probably need to be amended first, and only then would it be possible to require, for example, verification via ID cards.

The new rules also bring about changes in e-commerce allocated to large platforms. First, there is the aforementioned general possibility of effectively reporting profiles and sellers suspected of illegal business or offering illegal goods. If the platform allows a user to be linked to a specific trader, that user must have all the details of the trader before entering into a contract. This includes the name, address, contact details, electronic identification, payment account information, the registration number in the relevant register where the trader is registered, and self-certification by the trader that his activities are in conformity with Union law.[50] In our opinion, this benefit will be felt most by ordinary users, as the entire online space will gradually adapt, and profiles and sellers who offer illegal goods, do not have a business licence, or operate artificial profiles will be eliminated. Of course, this step will take time in practice, and users themselves will certainly help by gradually reporting these profiles. However, it will create a safe environment for consumers and open up opportunities for entrepreneurs within the EU to promote their business online. At the moment, a large number of entrepreneurs do not make use of the online ecosystem precisely because of the excessive number of different profiles which, for example, are not officially run and which are difficult to compete with. In addition to users, all entrepreneurs should be aware of this change and complete their profiles on various platforms with all the necessary

46 E.g. Judgment of the Court of 22 June 2021, C-682/18 *YouTube a Cyando*, EU:C:2021:503.
47 Opinion of Advocate General G. Pitruzzella delivered on 7 April 2022, C-460/20, para.3, EU:C:2022:271
48 Hulkó, 2021, p. 252.
49 Art. 28 of the DSA.
50 Art. 30(1) of the DSA.

information by 17.02.2024, so that the platform does not have the possibility of suspending their activity due to missing information. The Regulation is directly applicable and therefore creates direct obligations for businesses to provide this information if they wish to remain in the new and secure online environment. Under Article 30(3) of the DSA, providers should promptly request that traders complete missing information where necessary.[51] In the context of e-commerce, platforms are still obliged at least to randomly check whether the goods or services offered by merchants are identified as illegal in the databases.[52]

The final benefit and change we mention is the customisation of ads targeting the platforms in question. First, it is also about giving them all the information about the reason they are seeing the ad, even assuming that it is profiling.[53] They should also be provided with information about the person on whose behalf the advertisement is being presented, as well as the details of the person paying for the advertisement, provided that it is different from the one on whose behalf it is being presented.[54] If we look at the settings of ads for example on Instagram, one of the biggest platforms, we see that there is an obligation to fill in the "Payer" field and also the "Beneficiary" field. The box is, for the time being, only for the name without the obligation to enter, for example, the identification number of the entity. The identification data of the advertisement payer is mandatory for invoicing, as before. It remains to be seen how the platforms will check these two new boxes and the truthfulness of the filled data.

In addition, with the new regulation, users are also protected against profiling of advertising based on race, ethnicity, political opinions, religion, sexual orientation, etc. This guarantee is not a new provision; it stems from the General Data Protection Regulation.[55] Of course, the Digital Services Act introduces a number of other amendments, but for the purpose of this article, we have chosen to focus only on those that we consider most relevant and tangible in everyday practice for ordinary users of the largest platforms.

4. Conclusion

This article focuses on the new legislation on digital services contained in the Digital Services Act, which was adopted as part of the Digital Services Package. The relatively broad objective of ensuring a safer online environment and increasing the competitiveness of businesses determines the number of new rights and obligations arising from the Regulation for both users and service providers *per se*. The

51 Art. 30(3) of the DSA.
52 Art. 31(3) of the DSA.
53 Recital 68 of Preamble to the DSA.
54 Art. 26(1) of the DSA.
55 Art. 9(1) of the General Data Protection Regulation.

Regulation categorises service providers into several groups, and for the purposes of this article, we have chosen to focus exclusively on very large online platforms. The first reason is the high relevance of this topic, as at this very moment the first identified large platforms have four months to comply with the new horizontal rules of the DSA Regulation, regardless of whether they are established in the EU. This applies to all platforms that provide services to internal market users. The second reason for selecting this subcategory is that these platforms have the greatest impact on users in the EU, as they are the platforms used by at least 10% of active EU users.

As demonstrated in this article, the DSA Regulation brings a number of changes for users and the platforms involved. Users will benefit from a more secure environment. Consumers and merchants offering their goods through these platforms have gained a wide range of protection mechanisms if their content is moderated, their profiles are banned, or their promotional activities are restricted by the platforms. Replacing purely automated tools, they have the right to communicate directly with persons designated by the platforms through established contact centres, and any intervention must always be duly reasoned. Reference to a conflict with vaguely defined rules is out of the question. Here, we advise entities that already have restricted activities to reapply to the platform to verify their necessity. In the case of dissatisfaction, users have further options to resolve the situation and even have new authorities in their Member State to which they can simply turn in a language they understand. Similarly, e-commerce through large platforms will take on a different dimension, gradually eliminating profiles that do not operate legally, that offer illegal goods and that are unwilling to disclose all their data transparently. This will also open up a space in the online ecosystem for new EU companies and ensure greater competitiveness and benefits for consumers. Even if at first sight it seems that large platforms will not benefit from the new regime but only have a number of obligations, these platforms will benefit from a single predictable set of rules across the EU internal market and the easier expansion within the EU that this will facilitate.

The aim of the present article was to identify the most significant changes brought by the new legislation in our view. For this purpose, we have summarised those that we consider most beneficial to ordinary users. Naturally, practice can obstruct the application of the DSA Regulation. Problematic may be the unclear definition of harmful content and disinformation, or the inability of platforms to disregard unjustified repeated reports from the same user. We believe that the actual application in practice will clarify some of the vague provisions, and the case law of the Court of Justice will be able to fill the legal vacuum in some areas and ensure the effective implementation of the Regulation in practice. We consider this instrument essential for the current challenges facing the online environment of the EU internal market, and we believe that it will help raise the security of the online environment to the level enjoyed by the beneficiaries of the internal market in a non-online environment.

Bibliography

- Bertuzzi, L. (2023) 'Eurokomisia už pripravuje štátne orgány na zavádzanie pravidiel o digitálnych službách' *EURACTIV.sk* [Online]. Available at: https://euractiv.sk/section/digitalizacia/news/eurokomisia-uz-pripravuje-statne-organy-na-zavadzanie-pravidiel-o-digitalnych-sluzbach/ (Accessed: 06 Jun 2023).
- European Commission (1996) *Illegal and harmful content on the Internet*. COM(96) 487 Final.
- *Commission of the European Communities* [Online]. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1996:0487:FIN:en:PDF (Accessed: 26 Jun 2023).
- European Commission (2022) 'The Digital Services Act: ensuring a safe and accountable online environment' *European Commission* [Online]. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en (Accessed: 26 Jun 2023).
- European Commission (2023a) 'Questions and Answers: Digital Services Act' *European Commission* [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348 (Accessed: 26 Jun 2023).
- European Commission (2023b) 'The Digital Services Act package' *European Commission* [Online]. Available at: https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package (Accessed: 26 Jun 2023).
- European Commission (2023c) 'DSA: Guidance on the requirement to publish user numbers' *European Commission* [Online]. Available at: https://digital-strategy.ec.europa.eu/en/library/dsa-guidance-requirement-publish-user-numbers (Accessed: 26 Jun 2023).
- European Commission (2023d) 'Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines' *European Commission* (Press release) [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2413 (Accessed: 26 Jun 2023).
- European Parliament (2022) 'Parliament's ideas for tackling harmful or illegal content online' *European Parliament News* [Online]. Available at: https://www.europarl.europa.eu/news/en/headlines/economy/20201022STO89919/meps-ideas-for-tackling-harmful-or-illegal-content-online (Accessed: 30 Jun 2023).
- Hulkó, G. (2021) 'The Impact of Digital Platforms and Social Media on the Freedom of Expression and Pluralism in Slovakia' in Wielec, M. (ed.) *The Impact of Digital Platforms and Social Media on the Freedom of Expression and Pluralism*. Budapest–Miskolc: Ferenc Mádl Institute of Comparative Law–Central European Academic Publishing, pp. 245–276; https://doi.org/10.54237/profnet.2021.mwsm_8.
- Helberger, N. et al. (2021) *EU Consumer protection 2.0 – Structural asymmetries in digital consumer markets* [Online]. Available at: https://uol.de/f/2/dept/wire/fachgebiete/arbeitsrecht/Aufsaetze/BEUC_EU_Consumer_Protection_2.0.pdf (Accessed: 11 July 2023).

- Holzberg, M. (2021) 'Facebook Banned 1.3 Billion Accounts Over Three Months To Combat 'Fake' And 'Harmful' Content' *Forbes*. [Online]. Available at: https://www.forbes.com/sites/melissaholzberg/2021/03/22/facebook-banned-13-billion-accounts-over-three-months-to-combat-fake-and-harmful-content/ (Accessed: 11 July 2023).
- Kalesná, K., Hruškovič, I., Ďuriš, M. (2012) *Európske právo.* Bratislava: Univerzita Komenského v Bratislave.
- Siman, M., Slašťan, M. (2012) *Právo Európskej únie (inštitucionálny systém a právny poriadok Únie s judikaturou)*. Bratislava: Euroiuris, 2012.
- Vestagerová, M. (2023) 'Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines' *European Commission* (Press release) [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/sk/ip_23_2413 (Accessed: 11 July 2023).

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Supremacy and Primacy: Hierarchical Relationships Between the Polish and EU Legal Systems and Their Guardians

ABSTRACT: *European Union (EU) law and Polish national law are two separate legal systems. However, they function together within the framework of the Law of the Republic of Poland, in line with the meaning of Article 8(1) of the Constitution and have legal effects within the territory of the Polish State. Also, their norms are directed at the same addresses and operate within the same Polish territory. This results in the possibility of collision, both at the levels of the binding force (dispute over the hierarchy of provisions) and the application of law (dispute over the primacy of application). Each system has instruments aimed at solving collisions. Each also has an organ (organs) guarding the system. The activity of the said organ is to guarantee internal coherence and the proper position in the event of a collision with the other system. This analysis presents relations between those systems at the normative level and among the guardians of those systems. The first case concerns the definition and explanation of the substance of legal instruments solving collisions at the level of the Constitution and EU Treaties, and the indication of existing similarities and disparities, and as a result, the indication of the spheres of potential collision. In the second context, the text discusses the legal position of the guardians of the systems, that is, in the case of national law – the position of the Constitutional Tribunal, the Supreme Court, and administrative courts, and in the case of EU law – the position of the Court of Justice of the EU (CJEU). It also indicates the field of mutual convergence and disparity, and defines the applied legal tools. The analysis embraces constitutional identity as a boundary for national concessions to the primacy of EU law.*

KEYWORDS: Constitution, legal system, guardians of system, Constitutional Tribunal, Supreme Court, administrative courts, CJEU, EU Law

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1. Introduction

European Union (EU) law and Poland's national law are two separate legal systems. However, they function together within the Law of the Republic of Poland in line with Article 8(1) of the Constitution of the Republic of Poland (Constitution) and have legal effects within Polish territory. Their norms are directed at the same addressees. This article presents the relations among these systems in the normative dimension and among the guardians of those systems, namely the Constitutional Tribunal (CT), the Supreme Court (SC), administrative courts and the Court of Justice of the EU (CJEU).

2. The relationship between national law and EU law

■ *2.1. The systemic position of the system of national law and the system of EU law*

The legal position of the Constitution is crucial for the relationship between Polish national law and EU law. It results from the Preamble to the Polish Constitution, which indicates that the Constitution is established as "the basic law for the State," and from Article 8(1), which calls it "the Supreme Law of the Republic of Poland." Legal scholars refer to the latter as the principle of the supremacy of the Constitution.[1] This principle means that all other legal acts that are binding and applied in the territory of Poland should conform to the Constitution.

The Constitution also determines the position of EU law in the Polish legal order. Treaties establishing the EU – as international agreements ratified with consent granted by statute or in a referendum – are directly included in the national system of the sources of law.[2] From a hierarchical perspective, their position in that system is specified by Article 188(1)–(2) of the Constitution, which places them below the Constitution and above statutes owing to their role in the review process. The rank of EU secondary legislation in the system of the sources of law – albeit indirectly restricted to application – is determined by Article 91(3) of the Constitution. Thus, from the perspective of the Constitution, EU law has been embraced in its entirety by the principle of supremacy.

The EU law system lacks provisions positioning its sources vis-à-vis the national law of EU Member States. Only in the functioning of the EU are its Treaties considered "acts constituting the EU," whereas the EU law system is transformed into a *quasi-federal* one by the CJEU's case law. Though it does not have the formal feature of hierarchical supremacy over national law, including the national

1 Banaszak, 2015, p. 49.
2 Art. 87(1) of the Constitution.

constitution, there is undoubtedly a growing tendency to perceive it this way. The premises that indicate such aspirations directly are as follows: 1) First, the principle of the primacy of EU law, which refers to the functional sphere, namely the primacy of application. However, the recognition that the hierarchy of the system whose norm should be applied in the event of a conflict is implicitly more important and needs to serve as a background for such primacy. 2) Second, the orientation of the formal dialogue between national courts and the CJEU. References for a preliminary ruling are addressed to the CJEU, and its response should be binding on the party making a reference. This construct unambiguously indicates the hierarchical importance of institutions and sources, thus also of the system. 3) Third, the alleged axiological domination of EU Treaties (European values), enforced by the CJEU in its case law, over the axiology of national systems.

■ *2.2. Collisions between the legal systems and methods of solving the collisions*

Norms of both legal systems are executed in the same State (Polish) territory. They regulate different contexts of the same factual situations, which often gives rise to serious functional problems manifesting in two dimensions: The binding force and application of the law. In the former, the problem pertains to the formally distinct systems of the sources of national and EU law. They are governed by their own principles. Though the integration process solidifies the coherence between EU and national law, that coherence is not perfect.[3] Thus, the question concerns the mutual relations of specific legal acts *in abstracto* (superiority–subordination). The second level of conflict concerns the application of law. It is related to the need to determine the source to be applied to and omitted in each case (primacy of the application of law). This makes it necessary to search for instruments that can eliminate possible collisions at both levels. Collisions at the level of the binding force are to be resolved *a priori* by the Treaty-based division of competences between the State and Union. The result is the independent existence of different legislators enacting separate legal acts in spheres assigned to them (the EU's exclusive competences and State's exclusive competences). In the case of shared competences, an organising rule was established, allowing for the State's activity solely under specified circumstances.[4]

In practice, it is impossible to eliminate collisions entirely. Even if they do not emerge at the level of the binding force of law, they may manifest in the process of the application of the law. Thus, each system has appropriate rules for solving mutual collisions at this level. In Polish law, in reference to EU primary law, it is Article 91(2) of the Constitution, and in reference to EU secondary legislation, it is Article 91(3) of the Constitution. The former states that 'An international agreement ratified upon prior consent granted by statute shall have precedence

3 The question concerns the role of the Treaties constituting the EU (primary law).
4 See Art. 2(2) of the TFEU.

over statutes if such an agreement cannot be reconciled with the provisions of such statutes.' *A contratio*, the primacy of such an act does not refer to collisions with the Constitution. Article 91(3) provides that the law established by an international organisation is directly applied and has primacy in case of a collision with statutes. However, this rule has limitations in that: (1) it operates if this follows from the agreement constituting such an organisation, which becomes binding on Poland by way of ratification; (2) primacy refers to statutes, so it literally concerns one of the acts contained in the catalogue of the national sources of law;[5] and (3) it may be applied solely in reference to EU provisions directly applicable in the national legal order.

In the EU system, the principle of the primacy of EU law governs the conflict of laws. It embraces the obligation of an organ to apply a norm of EU law in the event of a collision between EU law and national law. Its construction corresponds to the solution contained in Article 91(2) and (3) of the Constitution, but there is a considerable difference between the said solutions vis-à-vis their scope. Whereas constitutional norms have a restricted scope, it is commonly known today that the EU requires the attribution of primacy to EU law over national constitutions.[6] This is opposed by Article 8(2) of the Constitution. It contains the imperative to apply the Constitution directly unless it states otherwise. From the perspective of that provision read in conjunction with Article 8(1) of the Constitution, each constitutional provision that may be directly applicable should have primacy over EU law. This shows that the mere fact that conflict of law rules are different and incoherent gives rise to a problem.[7]

3. The guardians of the system of national law: Constitutional Tribunal, the Supreme Court and administrative courts

■ *3.1. The Constitutional Tribunal as the guardian of the hierarchy of law*

In accordance with Article 10(2) of the Constitution, the CT is an organ of judicial power. However, it does not administer justice, as under Article 175(1) of the Constitution, the administration of justice is implemented by '(...) the Supreme Court, common courts, administrative courts and military courts.' Thus, the CT is not a court within the constitutional meaning, and the *locus standi* to refer to it is not an element of the guarantee of the right to a court as discussed under Article 45(1) of the Constitution. The scope of the powers of the CT embraces

5 Literally. What follows from *a maiorem ad minus* reasoning is also primacy over regulations and enactments of local law.

6 More on that cf. Muszyński, 2020, pp. 118–121.

7 Muszyński, 2020, pp. 129–130.

issues concerning the hierarchical conformity of law and specified matters of a systemic nature.[8]

The first case concerns adjudication vis-à-vis the conformity of: (1) statutes and international agreements to the Constitution; (2) statutes to ratify international agreements where ratification requires prior consent granted in statute; and (3) provisions of law enacted by central State organs to the Constitution, ratified international agreements, and statutes. As for the hierarchical review of law, the CT examines questions of law referred to by courts and constitutional complaints, and at the request of the President of the Republic of Poland, it adjudicates on the conformity to the Constitution of a statute before it is signed as well as on the conformity to the Constitution of an international agreement before it is ratified.

The CT settles disputes over the authority between central constitutional organs of the State, determines the existence of an impediment to the exercise of the office by the President of the Republic of Poland, and reviews the purposes or activities of political parties for conformity to the Constitution. The tasks of the guardian of the national legal system are performed by the CT through instruments that form part of its full scope of powers. This refers to the powers related to the hierarchical review of law, which include a review of the conformity of statutes and international agreements to the Constitution, regardless of its formula (whether an *a priori* or *a posteriori* review); the review of the conformity of statutes to international agreements ratified with consent granted by statute; the review of the conformity of legal provisions enacted by central State organs to the Constitution, and ratified international agreements and statutes. This catalogue may include settling disputes over authority among central constitutional organs of the State.

The CT acts via its judgments. Their effects, the rules concerning their entry into force, and their substance are regulated by Article 190 of the Constitution. It follows from its content that the judgments of the CT have a universally binding character and *erga omnes* legal effects. Only the operative part of its decisions has a universally binding force.[9] *Erga omnes* effectiveness means that judgment concerns all addressees of a challenged norm, irrespective of whether they participated in the proceedings before the Tribunal, and organs enacting and applying the law.[10] Thus, judgments produce permanent effects in the system of the binding law. The CT's judgments are final, which means that they are not subject to review, and are thus irrebuttable and indisputable. There is no legal remedy against them. They may not be challenged, their correctness may not be examined, and procedures enabling such an action may not be established either. They may not be cancelled

8 See Art. 122(3), Art. 131(1), Art.133(2) and Arts. 189 and 193 of the Constitution (Journal of Laws No. 78, item 483, as amended).

9 See the judgment of the CT of 5 November 1986, U 5/86, OTK 1986, item 1 and the judgment of the CT of 18 April 2000, K 23/99, OTK ZU 2000, no. 3, item 89.

10 See Nita, 2000, p. 96.

or changed. This prohibition applies to the CT and other organs. The subject of a judgment acquires the authority of *res judicata*, and the judgment triggers the operation of the principle *ne bis in idem*.

The judgments of the CT, in accordance with Article 190(2) of the Constitution are subject to immediate promulgation in the proper journal of laws. Such an action is not a technical act (publishing), but it fulfils an important guaranteeing function. It makes it possible for one to familiarise oneself with an amendment of the law and to adjust to one's conduct or actions.[11] Moreover, if, under Article 190(3) of the Constitution, a judgment of the CT takes effect from the day of its promulgation, the act of promulgation is necessary for the production of legal effects, that is, for the confirmation or denial of constitutionality.[12] A derogatory effect in the case of judgements concerning unconstitutionality is the reason the CT – as the guardian of the system of the law in force – is called a negative legislator, that is, it creates by virtue of its judgments a specific situation in the system of the sources of law.

The settlement of a dispute over authority results in the determination of the jurisdiction or lack of proper power of an organ indicated by the Tribunal in its judgments. The judgments of the CT have a future-facing effect. However, they do not have an annulling effect, which means that they do not annul determinations delivered by other organs based on the provisions that were subsequently held unconstitutional, even in cases instituted through a constitutional complaint. As we read in the jurisprudence of the CT, 'the Constitutional Tribunal is not a court of facts or a court adjudicating in instance proceedings. Constitutional complaint is not an instrument of review directed against State organs applying law (...).'[13] The CT solely assesses legal norms (normative acts) based on which a final determination in the complainant's case was delivered. Thus, a judgment concerning unconstitutionality will not automatically lead to the rebuttal of a given determination. As long as, in accordance with Article 190(4) of the Constitution, an interested party does not undertake such an action based on procedures for rebutting final determinations delivered based on an unconstitutional norm, the final determination in his/her case is valid. The exercise of the rights arising from Article 190(4) of the Constitution takes place outside the CT. A mere revision of such a case does not have to lead to a satisfactory result for the complainant. Sometimes, to fully organise a legal situation, the intervention of the legislator may be necessary. The Constitution does not determine the form in which the CT delivers its rulings. In accordance with the rules adopted in the Polish legal system, the rulings of the CT may take the form of a judgement or decision, whereas the former are attributed

11 See the judgment of the CT of 9 December 2015, K 35/15, OTK ZU 2015, no. 11, series A, item 186.

12 The CT may indicate a different moment of the loss of the binding force of a normative act.

13 See, for example, the judgment of the CT of 12 November 2002, SK 40/01, OTK ZU no. 6/A/2002, item 81.

to situations in which a ruling involves an authoritative determination of the State. Thus, judgements are delivered in the name of the Republic of Poland.[14]

■ *3.2. The Supreme Court as the guardian of the application of law in the justice system*

In accordance with Article 10(2) of the Constitution, the SC is an element of the judicial power. However, as opposed to the CT, it is – within the framework of such power – one of the elements of the justice system.[15] It plays a crucial role that is confirmed by the fact that it occupies the first place in the catalogue contained in the proper provision and by the specificity of powers ascribed to it. The scope of the powers of the SC at the constitutional level is specified under Article 183 of the Constitution. In accordance with this, the SC exercises supervision over common and military courts as regards adjudication and performs other activities specified in the Constitution and statutes.

Supervision has a judicial character. It extends to the direct implementation of the administration of justice in specific cases and concerns indirect activities that involve guaranteeing the correctness and unification of jurisprudence within the State's jurisdiction.[16] The realisation of judicial supervision in the direct and indirect forms is implemented by: (1) examining judicial remedies of an extraordinary character against judicial decisions and other remedies in line with procedural law; (2) adopting resolutions containing determinations of points of law that give rise to serious doubts concerning the interpretation of provisions serving as the basis for the delivered determination; and (3) adopting resolutions aiming to settle points of law in the event of discrepancies in the jurisprudence of common and military courts and the SC vis-à-vis the interpretation of legal provisions. This supervision is initiated by extraordinary remedies to which the following actors are entitled: Common and military courts (questions of law), parties to proceedings or other subjects, such as the Commissioner for Human Rights, Minister of Justice (cassation appeal – *kasacja*, cassation complaint – *skarga kasacyjna*), or – in certain situations – by way of its own instruments enabling the clarification of legal provisions[17] whose application has led to discrepancies in the interpretation of law.

Jurisdiction has a real character, as in a situation where the substance of proceedings makes it possible, the SC may interfere with the content of final determinations. However, this activity must take into account other provisions of the Constitution referring to the organs of judicial power (autonomy of courts and

14 Art. 174 of the Constitution.
15 See Art. 175(1) of the Constitution.
16 Szmulik, 2008, p. 283.
17 Cf. the resolution of the Supreme Court of 28 January 2014, BSA-4110-4/13, unpublished.

independence of judges). The additional powers of the SC arise from the Constitution[18] and ordinary statutes.[19]

As is the case with the CT, the role of the guardian is fulfilled by parts of numerous instruments ascribed to the SC. They are the powers by which the SC guarantees legal safety and the certainty of law applied (as part of implementing the administration of justice) within the territory of the Republic of Poland. Those instruments embrace judicial supervision, and the adoption of resolutions resolving points of law and institution of extraordinary appeal (Pl. *skarga nadzwyczajna)*, introduced to the legal system through the new Supreme Court Act.[20] The purpose of that appeal is the protection of the conformity of jurisprudence to constitutional value, that is, the principle of a democratic State ruled by law implementing the principles of social justice. The direct requirements making it possible to apply extraordinary appeal embrace an infringement of the constitutional principles and the rights and freedoms of persons and citizens, a gross infringement of law, or a contradiction between the court's findings and evidence collected. This way, extraordinary appeal complements, within a certain scope, the mechanism for reviewing constitutionality (constitutional complaint) in the sphere of the application of law.[21]

Judicial supervision does not comprise the jurisprudence of administrative courts, which are subordinate to the Supreme Administrative Court. While serving as the guardian of the system, the SC adjudicates in the name of the Republic of Poland. This feature is ascribed to determinations including an authoritative imperative. This concerns the power related to implementing the administration of justice. Therefore, adjudicating in the name of the Republic of Poland concerns judgements delivered in appeal proceedings and in relation to extraordinary remedies. The judgements of the SC do not have a universally binding character, although they are final. They have an *inter partes* character. Where the SC does not end proceedings conclusively, it delivers an order in its own name.

The determination of the points of law is a unique instrument for the fulfilment of the function of the guardian of the system. Decisions delivered in the course of such proceedings take the form of resolutions of the SC. Their content does not embrace the attribute of a State act (in the name of the Republic of Poland) but constitutes an act of judicial power because of their role and character. The findings contained in them may have the rank of a legal rule. However, in the case of resolutions adopted by a full bench of the SC, by benches comprising the joined

18 Art. 101(1) and 2 of the Constitution and Art. 124(4) independently and in conjunction with Art. 235(6) of the Constitution.

19 See Art. 1 of the Supreme Court Act of 8 December 2017 (Journal of Laws 2018, item 5), Art. 244(1) in conjunction with Art. 336 of the Act of 5 January 2011 – Electoral Code, Art. 37(1) of the Code of Criminal Proceedings.

20 The Supreme Court Act of 8 December 2017.

21 More on that Syryt, 2021, pp. 36–58.

and full chambers, the decisions gain the force of a legal rule at the time of their adoption. In the case of a resolution adopted by a bench comprising seven judges, the bench may decide to attribute such a force thereto.[22]

A legal rule is binding on the different levels of the SC based on the level at which it was adopted. If any bench of the SC intends to depart from a legal rule, the legal issue is to be resolved by a bench comprising an entire chamber. A departure from a legal principle adopted by a chamber, joined chambers, or a full bench of the SC, requires a new determination in the form of a resolution adopted by the proper or joined chambers, or a full bench of the SC. If the bench of one chamber of the SC seeks to depart from a legal rule adopted by another, a determination takes the form of a resolution of both chambers. The chambers may refer a point of law to a full bench of the SC.[23]

Although a legal rule does not formally bind common and military courts, it directly affects their jurisprudence. If such a principle is ignored at that level, the judgement will be quashed in the course of appellate proceedings or at the level of the SC upon the application of extraordinary remedies. The guardian of the system will take action. Resolutions that have gained the force of legal rule are published with a statement of reasons in the Bulletin of Public Information on the SC website.[24]

■ *3.3. Administrative courts as guardians of the legality of the operation of public administration*

The next guardian of the system in Poland is the administrative judiciary.[25] It comprises the voivodship administrative courts and Supreme Administrative Court (SAC).[26] This arrangement is different from that of the common judiciary and SC. The power of the SAC is identical to that of the voivodeship administrative courts. However, there is a difference in that it is the "supreme" court within that judiciary. The administrative judiciary is separate from and independent of the common and military judiciary and SC. However, together with them, a unique part of the justice system is discussed under Article 175(1) of the Constitution.

The role of the guardian of the system in the case of the administrative judiciary was indicated through the proper formulation of tasks. At the Constitutional level, they are defined as "control over the performance of public administration."[27] This means that its function is to protect – within the context of the exercise of the right to a court – individuals' rights in the event of their

22 Art. 87(1) of the Supreme Court Act.
23 See Art. 88 of the Supreme Court Act.
24 Art. 87(2) of the Supreme Court Act.
25 The functions of the administrative judiciary are indicated by a statute (*a contrario* Art. 177 of the Constitution).
26 Art. 184 of the Constitution.
27 Art. 184 of the Constitution.

violation by public administration, and to guard the legal order. This may, but does not have to, be related to a direct infringement of individuals' rights by organs of public administration. All the more so as administrative courts are not courts of the first choice in the exercise of the constitutional right to a court. Under Article 177 of the Constitution, there is a presumption of the power of common courts vis-à-vis implementing the administration of justice. This systemic requirement results in the adequate model of the adjudication of administrative courts, that is, annulling adjudication. Administrative courts review acts of public administration organs – from the perspective of their powers, including the existence of a legal basis as well as the lack of infringement of the hierarchical order of norms in the selection of the said basis (apart from the assessment of the constitutionality of statutes) – as well as procedures for action and substantive-law issues to the proper binding legal standard. Acts constitute the subject of review and a legal standard derived from the higher-level norm. The result is the possible annulment of an act inconsistent with the law. The catalogue of acts and activities that may be the subject of an administrative appeal lodged with an administrative court is broad. Since 2002, it has embraced the classical acts of the application of law (administrative decisions).[28] In the literature, the power under discussion refers to all forms and almost all spheres of action of public administration.[29]

Additionally, administrative courts have two powers: (1) The partial possibility to adjudicate on the substance. This mainly concerns the power to indicate in the judgment how an issue is to be resolved by an organ of public administration, or the possibility to deliver a judgment stating the existence or non-existence of a right or obligation. Although an ambiguous approach is expressed in the legal scholarship in this regard, it is still considered to conform to Article 184 and, by way of exception,[30] to Article 10 of the Constitution.[31] Administrative courts rarely apply provisions allowing for reformative adjudication; and (2) "signalisation" rights.[32] When an administrative court determines a vital infringement of a right or circumstances giving rise to infringement, it may inform the proper or superior organs of those infringements through an order. An organ is obliged to examine that order and inform the court about its stance.

From the perspective of the function of the guardian of the system, the literal exposition in the Constitution – within the sentence "control over the performance of public administration" – of adjudication by administrative courts

28 The enactment of the Act of 30 August 2002 – the Law on Proceedings before Administrative Courts (Journal of Laws 2023 item 259) has broadened the scope of control exercised by administrative courts, which follows from Art. 3(2) of the said act.

29 Chlebny and Piątek, 2021, pp. 22–23.

30 Hauser and Masternak-Kubiak, 2012, p. 405.

31 Piątek, 2017, p. 31.

32 Art. 155(1) of the Act of 30 August 2002 – Law on Proceedings before Administrative Courts.

on the conformity to statutes of resolutions enacted by organs of local self-government and normative acts of territorial organs of government administration is noteworthy.[33] This is a power to conduct an abstract review of the acts of local law indicated. In the first case, this indication is specified vis-à-vis the kind of legal act concerned (resolution). It embraces all kinds of resolutions (normative ones and those that are acts of the application of law, and internal and non-legal acts).[34] Thus, it is broad in relation to the *ratione materiae* scope, because it goes beyond the review of normative acts (acts of local organs of public administration which are sources of local or internal law). The review of other kinds of authoritative acts of local organs of public administration is conducted, but derives from a general constitutional power of administrative courts to 'control the activities of public administration organs.'

The higher-level norm for review indicated in the Constitution is a statute. Legal scholarships extend to contain the Constitution, ratified international agreements, and acts enacted by an international organisation, as discussed under Article 91(3) of the Constitution.[35] The view that dominates in the jurisprudence notes that local law should conform to regulations.[36] The *ratione materiae* scope of review embraces the powers of an organ enacting a legal act, the conformity of the scope of an act to the content of authorisation, and the review of the enactment procedure. The function of the guardian of the system is fulfilled by administrative courts in an incidental manner. Based on Article 166(3) of the Constitution, they settle jurisdictional disputes between units of local self-government and government administration.

The role of administrative courts as a guardian of the system, as opposed to the CT and Supreme Court, is strengthened by the construct of the mode of proceedings. As the principle of the accusatorial procedure applies in the sphere of the administrative judiciary, those courts adjudicate within the limits of a case, but in a different way than both remaining guardians, as they are not bound by the challenges and requests contained in an appeal, or by the invoked legal basis.[37]

The SAC plays an exceptional role among administrative courts, which are the guardians of the national legal system. As the "supreme" court, it performs the task of jurisprudential supervision over voivodeship administrative courts not only as an organ settling cases in the second instance, but also in a general manner, as regards the interpretation of law (points of law).[38]

33 Art. 184 of the Constitution.
34 Dąbek, 2013, p. 76 et seq.
35 Garlicki, 2005, p. 9.
36 See, for example, the judgment of the Supreme Administrative Court of 28 May 2010, II OSK 531/10, Legalis.
37 Art. 134(1) of the Act – Law on Proceedings before Administrative Courts.
38 Art. 187 of the Act – Law on Proceedings before Administrative Courts.

Administrative courts deliver decisions in the form of judgments and decisions. Judgments refer to authoritative determinations and are delivered in the name of the Republic of Poland.[39] Decisions are delivered where the legislator did not envisage the delivery of a judgment in a given course of proceedings. Based on the character of the non-conformity to the law of an administrative act with an individual character, a judgment may quash it or declare its invalidity or infringement of law.[40] This results in the loss of the binding force of such an act. Judgments are announced by courts.

The determination of the illegality of acts of local law results in the determination of their invalidity, or their enactment in breach of law if provisions do not envisage the determination of invalidity. Such a judgment has an *ex nunc* effect. Acts of the application of law enacted based on such local law continue to be valid. They may be rebutted only in accordance with modes of procedure specified in the law. Judgments in that regard are announced in a voivodeship journal of laws.[41]A final decision is binding on the parties and the court that delivered it, and on other courts and State organs, and in cases envisaged in the statute also on other persons.[42]

As regards points of law, the SAC adjudicates through resolutions that are passed in a bench comprising seven judges, or a full bench of a chamber or of the SAC. There are two kinds of resolutions: (1) Those concerning the clarification of legal provisions whose application has led to discrepancies in jurisprudence (general, abstract resolutions); and (2) Those containing the determination of points of law giving rise to serious doubts in a specific case (specific resolutions). General resolutions are adopted at the request of organs entitled thereto by the law.[43] Specific resolutions are adopted at the request of the bench adjudicating in a specific case. All resolutions are binding on administrative courts.[44] No adjudicating bench of any administrative court may resolve an issue embraced by the scope of a resolution in breach of that resolution until the interpretation of a specific provision is changed by another resolution.[45] If a court does not share the stance adopted in a resolution, it may only refer an issue to the proper bench of the SAC.

39 Art. 174 of the Constitution.

40 See Art. 145 et seq. of the Act – Law on Proceedings before Administrative Courts.

41 Art. 13(5) of the Act of 20 July 2000 on the promulgation of normative acts and certain other legal acts (Journal of Laws 2019 item 1461).

42 Art. 170 of the Act – Law on Proceedings before Administrative Courts.

43 They include the President of the SAC, Public Prosecutor-General, General Counsel to the Republic of Poland, Commissioner for Human Rights, Commissioner for Small and Medium Enterprises, and Commissioner for Childrens' Rights. See Art. 264(2) of the Act – Law on Proceedings before Administrative Courts.

44 See Art. 269(1) of the Act – Law on Proceedings before Administrative Courts.

45 See the judgment of the Supreme Administrative Court of 11 January 2008, I OSK 1942/06.

4. The CJEU as the guardian of the EU legal system

The CJEU is an organ of the EU. Its jurisdiction is derived from the Treaties ratified by the Polish State. The competences of the CJEU are defined under Article 19(1) of the TEU (ensuring that the law is observed in the interpretation and application of the Treaties). The realisation of its competences is enabled by several procedural instruments contained in Articles 251–281 of the TFEU. The role of the guardian of the system of EU law, in the case of the CJEU, is fulfilled internally (vis-à-vis EU organs) and externally (vis-à-vis Member States). I focus on the latter, as it is relevant for the purposes of this article. The role of the guardian of the system is fulfilled from two perspectives: (1) the imperative to restore the condition of conformity to the Treaties, and (2) *ex-ante* protection against infringement.

The instruments related to the first perspective comprise the aforementioned proceedings commenced against Member States vis-à-vis an infringement of the Treaty-based obligations,[46] whereas the second perspective is concerned with proceedings instituted through a reference for a preliminary ruling.[47] The first is verbalised by referring to the CJEU as the guardian of the Treaties.

In both perspectives, the CJEU acts via judgments and decisions. These are collegial acts. They have an external character for the national legal system, and their effect vis-à-vis a Member State, that is, the scope and character of their binding force, possibly their impact on national law, procedures, and addressees, or the manner of their execution, are indicated by the EU Treaties. The judgments of the CJEU delivered in the course of proceedings envisaged in Articles 258 and 259 of the TFEU have a declaratory character. The CJEU declares that the Treaties were infringed by the State[48] regardless of whether a factual action or enacted law is concerned. This means that they are a declaratory act and do not independently have legal effects in the sphere of the State's jurisdiction. The latter is confirmed (*a contrario*) by Article 280 in conjunction with Article 299 of the TFEU, which indicate which judgments of the CJEU are directly effective in the system of the national law of the Member States.[49] Consequently, even if a national act, provision, or remedy was held to be in breach of the EU Treaties, from the point of view of national law, they are legal and binding until they are derogated from in keeping with relevant national procedures.

The judgments of the CJEU entail the obligation of their execution. It derives from the principles *pacta sunt servanda* and *bonae fidei* and from the

46 Arts. 258–259 of the TFEU.
47 Art. 267 of the TFEU.
48 Art. 260 of the TFEU.
49 Those are only judgments that impose financial obligations on subjects other than States.

content of the obligation arising from Article 260(1) of the TFEU. Failure to give effect to a judgment may result in sanctions (payment of a lumpsum amount as a penalty).

The State is obliged to give effect to a judgment through its organs. National law regulates the organs that are competent to give effect to a judgment. In Poland, it is the Constitution that divides competences within the framework of the division of powers. If the performance of Treaty-based obligations constitutes an element of foreign policy, in accordance therewith it is the competence of the executive power.[50] Thus, the government, which *nota bene* represents the State before the CJEU, initiates the execution of a judgment in the national sphere. If a judgment deals with an amendment to the law, then the government prepares a draft act and submits it with the Sejm. Until such an act is passed, the national law infringing on EU Treaties is still in force. The organs of the State, acting based on this, may only refrain from action. They may not infer any rights for themselves on their own directly from the content of a judgment of the CJEU even if it seems that the said court enforces rights on them. They may not refuse to apply a national norm held to be in breach of the Treaties and invoke the judgment of the CJEU in their action. It is not a source of law – either for EU or national law – so to treat it as the foundation for the action of a State organ would be in breach of the constitutional principle of legality.[51] Refraining from action by administrative organs and courts requires national authorisation in the binding law.[52] If there is no such basis, refraining from action is not possible and organs must proceed based on the national legal norms even if they know that these norms infringe on the Treaties and that their action deepens the infringement.

Preliminary judgments indicate the normative content of a specific provision of EU law. The CJEU, while responding to a reference for a preliminary ruling, acts as an interpreting body and delivers the interpretation of law. Courts or the proper national organs give effect to such a judgment by applying a norm of EU law, adopting its content as defined in that judgement. Such a judgement is binding *inter partes*. Yet, it refers to all courts and organs dealing with a given case. From the temporal perspective, preliminary judgments have an *ex tunc* effect in principle. Courts and other State organs are obliged to consider the interpretation provided by the CJEU vis-à-vis legal relations founded in the past, although only those that are determined in the present. In other words, a judgment does not change the existing and consolidated legal situations unless they are challenged afresh.

50 Art. 146 of the Constitution.

51 Art. 7 of the Constitution.

52 Polish practice has dealt with a situation where the First President of the SC blocked the actions of the Disciplinary Chamber of the SC vis-à-vis the judgment of the CJEU twice (order Nos. 48/2020 and 93/2021 as amended). Art. 14(1) of the Supreme Court Act of 8 December 2017 served as the basis for it.

5. Relations concerning the institutions and powers of the guardians of the systems

In accordance with the Constitution and EU Treaties, the CT, SC, and administrative courts do not remain in a hierarchical relationship vis-à-vis the CJEU. The CJEU does not remain in a hierarchical relationship vis-à-vis the CT, SC, or administrative courts. This follows from the fact that those bodies have separate legal authority to act and that different functional roles are attributed to them. Thus, in principle, those organs may not formally control their activity, and quash their decisions. Simple proceedings instituted by the CT, SC, and or administrative courts on the CJEU's decisions would constitute an infringement of their constitutional powers. If the CJEU simply (hierarchically) dealt with the jurisprudence of the CT, SC, or administrative courts, it would violate both the EU Treaties and the sovereignty of the Member States.

However, the unique nature of European integration and the scope of powers of those organs lead to the conclusion that at the level of the application of law (exercise of powers), there may arise indirect situations that depart from these premises. The most glaring example among them are the competences of the CJEU to examine an infringement of the EU Treaties by a Member State.[53] As "Member State" is understood to mean the State as a whole, that is, all organs and subjects performing State tasks, any activity or failure to act is attributed to the State. This way, the scope of the CJEU's competences theoretically embrace the activities of the CT, SC, and administrative court, as adjudication by the CJEU is based on an examination of facts. The CJEU may deliver a judgment assessing a judgment delivered by any of those organs. Nevertheless, this is an *in abstracto* assessment that does not have direct impact on the assessed judgments and does not change their content.[54] It will possibly be the State's task to take action to eliminate an infringement that emerged as a result of those judgments, which seems impossible given the constitutional guarantees related to the proceedings and decisions of the CT, SC, and administrative courts.

The CT is competent to examine the constitutionality of EU primary law. The provision concerns ratified international agreements, but a treaty is a treaty. The Constitution discusses all international agreements[55] and does not envisage procedural immunity for EU Treaties. The CT has also developed, in its jurisprudence, the conception of examining EU secondary legislation.[56] It derived this from the interpretation of the provisions regulating its powers. It also inferred the possibility to review the jurisprudential activity of the CJEU. It derived this

53 Art. 258 or Art. 259 of the TFEU.
54 Cf. case C–234/04 (Kapferer), the operative part.
55 Art. 188(1) of the Constitution.
56 For more on that, see Muszyński, 2020, pp. 117–158.

from the specificity of judgments delivered by international courts as acts that not only resolve a matter *in concreto*, but also – from the procedural perspective – attribute specific content to a provision of international law by inferring from it a specified legal norm.[57] This refers to the entire case law of the CJEU,[58] and not only to preliminary judgments, although they seem to be the most predestined for examination given their interpretative specificity.

In such a case, a decision of the CJEU is not examined directly. A provision (norm) whose content is created by such a decision is formally examined.[59] An examination may embrace two aspects: the conformity of the substantive content of a norm to the Constitution; and the examination of the CJEU's competence to shape the specific content of legal norms from the perspective of the boundaries of the conferral of competences[60] or principle of conferral.[61]

If the CT states that the content of a norm does not conform to the Constitution or was created by the CJEU's activity beyond the boundaries of conferral, it eliminates it from the legal order of the Republic of Poland by making it impossible for national organs to apply it. The principle of the primacy of EU law does not operate in this case. The Tribunal may do this because the Constitution is the Supreme Law of the Republic of Poland, and sovereign Member States are the masters of the Treaties as their creators.[62] A State organ or another subject would infringe on the Constitution if it applies an unconstitutional norm. There is less mutual convergence between the case law of the CJEU and the activity of the SC. The substantive sphere of the SC's activity (civil, criminal, and labour laws) embraces issues whose substance is regulated outside EU law, which limits the CJEU.

Administrative courts seem predestined to collaborate with the CJEU from the perspective of their competences vis-à-vis executive power. If a part of Poland's legal order is regulated by EU law and these are the spheres in which State organs act by applying EU law (environmental and competition law, common market, etc.), then, where a case related to the activity of administrative organs is examined by administrative courts, a reference for a preliminary ruling seems to be a natural part of the proceedings. This is more typical of

57 For more on that, see the judgment of the CT of 10 March 2022, K 7/21, OTK ZU A/2022, item 24.

58 See the judgment of the CT of 7 October 2021, K 3/21, OTK ZU A/2022 item 65. It relied on the norms derived by the CJEU in the judgments in accordance with the course of proceedings envisaged in Art. 258 of the TFEU (case C-619/18, *European Commission v. Republic of Poland* and case C-192/18, *European Commission v. Republic of Poland*), and in judgments delivered in accordance with the preliminary procedure (in joined cases C-585/18, C-624/18 and C-625/18, and C-558/18 and C-563/18, and in case C-824/18).

59 In the judgment in K 3/21, the CT announced the direct possibility of assessing the CJEU's judgments. However, it did not indicate the procedure this process would follow.

60 Art. 90 of the Constitution.

61 Art. 2 of the Constitution.

62 Art. 1 of the TEU.

administrative courts than of the SC. It conforms to the Treaty-based imperative directed at the State to establish effective legal protection in spheres embraced by EU law.[63]

As the dialogue with the SC and administrative courts takes place via references for a preliminary ruling, this formula excludes any possibility of a review of the case law of the CJEU. If a court makes a reference for a preliminary ruling, it is obliged by the Treaty to proceed in a case based on a norm interpreted in keeping with the content of the preliminary judgment. In the administrative judiciary, there has been no divergence in that regard; there have been disparities in the SCs concerning the assessment of the role and significance of preliminary judgments.[64]

6. Solving conflicts in jurisprudential practice

Given that the catalogue of conflict of law rules remains limited, conflicts related to the application of law are eliminated by legal instruments created to serve that purpose, allowing for a dialogue among competent organs. In keeping with the EU Treaties, the fundamental measure of dialogue with the CJEU is a reference for a preliminary ruling.[65] The court of a Member State is competent to make a reference.

The first question that may arise vis-à-vis the provision constructed this way is whether the CT of the Republic of Poland has such power. Foreign legal scholarship states that the power (obligation) to make a reference for a preliminary ruling is attributed to all constitutional courts of Member States, yet the CT is different from most constitutional courts of the EU Member States. It is not a court from national and European standpoints. Jurisprudential practice will not help find an unambiguous answer. In the history of its adjudication, the CT once made a reference for a preliminary ruling in Case K 61/13,[66] and the CJEU responded with a judgement dated 7 March 2017 (C-390/15). The CT did not have a chance to give effect to (or to refuse to give effect to) that judgement because the national applicant withdrew the application, and the case was discontinued.

63 See Art. 19(1), (2) of the TEU.

64 In a resolution by the three joined chambers, namely the Civil, Criminal, and Labour and Social Insurance Chambers, the role of the CJEU's case law was affirmed. See the resolution of the bench comprising the joined chambers: The Civil, Criminal, and Labour and Social Insurance Chambers of 23 January 2020, BSA-I-4110–1/20. The Disciplinary Chamber of the SC noticed that a judgment may not be recognised as 'being in force' if the reference was made by a court that is not entitled to do so. See Izba Dyscyplinarna SN: Wyroku TSUE z listopada 2019 nie można uznać za obowiązujący(2020), p. 4.

65 Art. 267 of the TFEU

66 See the order of the CT of 7 July 2015, K 61/13, OTK ZU no. 7/A/2015, item 103.

The CT has not made a reference for a preliminary ruling in any other case. It refrained from doing so in Case P 1/18,[67] in which it adjudicated on the non-conformity of Polish national law to EU law. It acted in line with Cases P 7/20[68] and K 3/21.[69] This restraint follows from the features of the CT's activity. The CT does not apply EU law in the common sense, that is, it does not deliver individual acts based on it. It may only adjudicate on its constitutionality or apply it as a higher-level norm for review (EU Treaties) to evaluate national law other than the Constitution. CT needs to understand a specific legal provision to recreate the content of a norm which will be subsequently examined from the perspective of the Constitution. CT uses also EU law as a higher-level norm to examine the conformity to it of the content of a provision contained in an act of a lower rank.

The situation of the SC is different. From the constructional and functional perspective, it is a court of national and EU law. It has applied the instrument of a reference for a preliminary ruling, although this practice was initially rare.[70] The number of references for a preliminary ruling has increased since 2015 as a result of the reform of the justice system. This was triggered by the fact that on 20 December 2017, the European Commission instituted proceedings against Poland under Article 7 of the TEU. The SC considered a reference for a preliminary ruling the perfect tool to shape the reforms with the help of the EU.[71] Based on the information on the Court's website, it made 60 references for preliminary rulings between 2008 and 2022.[72] However, in the case of the SC, the problem arises at a different point. In light of the Treaties, a court is entitled to make a reference for a preliminary ruling. Yet, only a court against whose decisions there is no judicial remedy under national law is obliged to do so. In Polish law, this concerns a court of last instance, and not courts that deal with extraordinary remedies.

The SC is a court of last instance within a limited scope. One may consider it a disciplinary court for judges of common courts. It provides extraordinary remedies and adjudicates upon systemic matters. This begs the question of whether it can make references for a preliminary ruling. If it were obliged to do so, it would mean that such an obligation does not apply to a court of second instance. There may not be two levels of courts obliged to make a reference as courts against whose decisions there is no judicial remedy. This leads to the conclusion that the SC is at liberty, but has no obligation, to make a reference.

67 See the judgment of the CT of 30 October 2018, OTK ZU A/2019, item 61.
68 See the judgment of the CT of 14 July 2021, OTK ZU A/2021, item 49.
69 See the judgment of the CT of 7 October 2021, OTK ZU A/2022, item 65.
70 Stępień-Załucka, 2016, p. 339.
71 Thus far, 104 references for a preliminary ruling have been made. In 2018 – only 7; in 2019 – 6; in 2020 – 12; in 2021 – 5; in 2022 – 11. The first was the order of the SC of 2 August 2018, III UZP 4/18. The case was registered in the CJEU as the case C-522/18.
72 *Biuletyny* [Online]. Available at: https://www.sn.pl/publikacje/SitePages/Biuletyny.aspx?ListName=BSiA_Pytania_prejudycjalne, Bulletins. (Accessed: 4 April 2023).

Another problem concerns the doubt around whether the SC may make a reference for a preliminary ruling in a sphere of its activity other than the application of EU law, that is, for example, while adopting resolutions on the interpretation of national law *in abstracto*. If this is not related to the application of (EU) law, the answer to this question should be negative. Otherwise, an unauthorised reference and – as a result of it – unlawful interference of the CJEU's case law with the Polish legal order ensues. The position of the SAC is different. This court is part of the two-instance administrative judiciary. As regards the realisation of administrative cassation appeal (Pl. *skarga kasacyjna*), it is a court against whose decisions there is no legal remedy within the meaning of Article 267 of the TFEU. Thus, if the subject of examination comprises the activity of organs of public administration based on EU law, then making a reference for a preliminary ruling is justified. From 2005 to January 2023, administrative courts made 103 references for a preliminary ruling to the CJEU.[73]

7. Constitutional identity as a boundary of dialogue

The Treaty-based obligation of the EU to respect the national identity of the Member States is an instrument indicating the boundaries of the federalising effects of the principle of the primacy of EU law. National identity is defined by means of "constitutional structures," that is, the substance of systemic statehood and sovereignty provided for in the highest legal act of the State. From the perspective of national law, constitutional identity is the functional counterpart of the Treaty-based construct of national identity. It has been shaped by the jurisprudence of tribunals and constitutional courts of EU Member States.[74] This way, the obligation, deriving from EU law, to respect national identity implies respect for the constitutional identity of the Member States.

The constitutional identity of each State has an individual character. To learn more, it is necessary to refer to the constitutional provisions of a given State, specified by the jurisprudence of the proper organ, which, in Poland, is the CT. It defined constitutional identity in Case K 32/09, where it reviewed the constitutionality of the Treaty of Lisbon.[75] According to the CT: a) the sovereignty of Poland implies the primacy of the Polish Nation to determine its fate. The Constitution is the normative expression of that principle, especially its Preamble and Articles 2, 4, 5, 8, 90, 104(2), and 126(1). The normative anchors[76] serve to protect the said act; b) Constitutional identity blocks the possibility of conferring on the

73 *Pytania prejudycjalne WSA i NSA*. [Online]. Available at: https://www.nsa.gov.pl/pytania-prejudycjalne-wsa-i-nsa.php (Accessed: 20 October 2023).
74 More on that Muszyński, 2023, pp. 540.
75 See the judgment of the CT of 24 November 2010, K 32/09, OTK ZU no. 9/A/2010, item 108.
76 Arts. 8, 90, and 91 of the Constitution.

EU authority over, based on Article 90 of the Constitution, matters fundamental to the political system of the State (the hard core), and protecting the collection of the fundamental principles of the Constitution (the principles of statehood, democracy, a State ruled by law, social justice, and subsidiarity) or provisions referring to the rights of the individual. It also embraces prohibitions against the conferral of power to amend the Constitution and determine competences; c) Article 90 of the Constitution guarantees the preservation of the constitutional identity of the Republic of Poland. It is applied in the event of each amendment to the Treaty provisions constituting the foundation of the EU; also, if amendments are implemented in a manner other than by virtue of an international agreement if they lead to the conferral of competences on the EU.

The rules inferred in Case K 32/09 were confirmed by the CT in Case P 7/20, which concerned Poland's obligation to give effect to the interim order of the CJEU by referring to the system and jurisdiction of and the procedure before Polish courts. The CT referred, in its statement of reasons, to the concept of constitutional identity, which, in its opinion, includes the "Polish judiciary."[77]

This way, the CT defined constitutional identity from the perspective of the preservation of sovereignty. The State was recognised as its possessor. The construction of constitutional identity, formulated this way, together with the parallel Treaty-based obligation imposed on the EU, that is, on its organs, to respect the said identity, constitutes a boundary for the dialogue between the CT, SC, and courts and the CJEU.

8. Conclusion

The Polish national and EU law systems are elements of the legal order of the Republic of Poland, where the Constitution plays a crucial role. The Constitution is at the top of the hierarchy of both sources of law, as exclusively by its power and within the scope indicated by it, the Treaties founding the EU are binding, and the EU institutions, including the CJEU, are competent to deliver acts that refer to the Polish State and nationals, as well as to other natural and legal persons staying within the territory of the Republic of Poland.

The principle of the supremacy of the Constitution formally functions at the level of the binding force. However, it also partially limits the attribution of the primacy of application to provisions stemming from the system of EU law. Only where the Constitution requires the enactment of a statute for its application, the primacy of EU law vis-à-vis such an act is unquestionable. Nonetheless, it reaches its boundaries here. Extraordinary safeguards of sovereignty operate in this dimension, such as constitutional identity or the boundary (scope) of conferred

77 See the judgment of the CT of 14 July 2021, P 7/20, OTK 2021, series A item 49, point 6.8.

competences. They indicate that EU law may not regulate certain matters. If the EU attempts to adopt such a regulation, which as a result compels a national organ to apply it in view of the principle of the primacy of EU law and conflict of law rules contained in Article 91 of the Constitution, then those extraordinary parameters make it possible to refrain from such an action. It is impossible to apply the principle of primacy of EU law in relation to constitutional provisions that are applied directly. At the level of the Constitution, this is confirmed by the systemic conflict of law rules.

The legal order of the Republic of Poland constructed this way is defended by the guardians of each system. The national legal system comprises the CT, SC, and administrative courts. Each has a relatively autonomous scope of activity. The role of the CT as a guardian of the system involves guaranteeing the hierarchical conformity of legal acts, creating the certainty of law and legal security at the legislative level and protecting constitutional values. The role of administrative courts as a guardian of the system involves guaranteeing the legality of activity of public administration. In turn, the role of the SC involves guaranteeing the uniformity of application of law vis-à-vis implementing the administration of justice, and securing the supreme role of the Constitution in this jurisprudence.

This way, the CT guards law at the level of the binding force, and the SC and administrative courts do so at the level of application. However, these organs do not act in isolation. Their roles converge at many points, depart from, overlap with, and/or complete each other. The CT shares its role of a guardian of the system of the sources of law with administrative courts vis-à-vis the review of the constitutionality of acts of local law. In turn, administrative courts not only adjudicate vis-à-vis acts of the application of law, and encroach on the field of the CT's activity with their jurisprudence by adjudicating on certain normative acts that reflect the activity of the public administration. By settling disputes over powers between central constitutional organs, the CT completes the competence of courts to settle such disputes between organs of local self-government and governmental administration. Some acts of public administration within a certain scope are subject to both the SC and common courts.[78] This way, within a highly limited scope, they act within the sphere of control of acts of public administration. The institution of extraordinary appeal complements the institution of constitutional complaint. In situations specified by the law, the SC and administrative courts and the Supreme Court take advantage of the decisions of the CT delivered in proceedings commenced by way of a question of law.[79]

78 Issues concerning the National Broadcasting Council, pertaining to the regulation of energy, electronic and, postal communications, railway transportation, and the regulation of water and sewerage market are addressed here. The Chamber of Extraordinary Control and Public Affairs of the Supreme Court deal with these issues though they are administrative in nature.

79 See Art. 193 of the Constitution. Cf. Art. 91(2) of the Supreme Court Act.

This leads to the conclusion that relations among the CT, SC, and administrative courts are not hierarchical. These organs act based on the systemic division and convergence of powers. The purpose of these overlapping functions is to guarantee the protection of all areas of State functioning, most often by two, and ultimately at least one of the guardians of the national system.

The CJEU is the guardian of the EU system. Thus, it is not entirely independent in that regard, as some powers of the CT allow a review of EU law, though from a narrow perspective of the constitutionality of that system. This follows from the fact that the constitutions of the Member States are a source of the system of EU law. This area of co-existence is particularly prone to conflict, which should be resolved with mutual respect for jurisprudence and through instruments of dialogue. Here, one may be able to defend the thesis that, in practice, it is possible to significantly eliminate some part of natural conflicts between both legal systems that arise from divergent conflict of law rules and the effects of the activity of the CJEU and the guardians of the national system.

Yet, tensions arise mainly at the level of the hierarchical relations of national and EU laws, that is, in the sphere of the activity of the CT and CJEU. The practice of the CJEU is problematic. It encroaches on national systemic dimensions through its case laws. This interference is so deep that it leads to clashes with the Constitution. This enforces the reaction of the CT, which is obliged to act in this situation. It may not simply cease to monitor constitutionality and allow a legal system that is not subject to the Constitution to operate within Polish territory.

Bibliography

- Banaszak, B. (2015) 'Zasada nadrzędności Konstytucji w polskim porządku prawnym' in Jabłoński, M., Jarosz-Żukowska, S. (eds.) *Zasada pierwszeństwa prawa Unii Europejskiej w praktyce działania organów władzy publicznej RP.* Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa, pp. 41–54.
- Chlebny, J., Piątek W. (2021) 'Ewolucja ustrojowa i kompetencyjna sądownictwa administracyjnego', *Zeszyty Naukowe Sądownictwa Administracyjnego,* 2021/1–2, pp. 13–36.
- Dąbek, D. (2013) 'Sądowa kontrola aktów prawa miejscowego. Aspekt materialnoprawny', *Zeszyty Naukowe Sądownictwa Administracyjnego,* 2013/3, pp. 76–103.
- Garlicki, L. (2005) *Konstytucja Rzeczypospolitej Polskiej, v. IV*. Warszawa: Wydawnictwo Sejmowe.
- Hauser, R., Masternak-Kubiak, M. (2012) 'Konstytucyjne podstawy kontroli działalności administracji publicznej' in Hauser, R., Niewiadomski, Z., Wróbel, A. (eds.) *System prawa administracyjnego. Konstytucyjne podstawy funkcjonowania administracji publicznej*. Volume 2012/2, Warszawa: C. H. Beck, pp. 379–413.
- Muszyński, M. (2020) 'The Review of EU Law by the Constitutional Tribunal in Poland' in Muszyński, M., Pawłowski, S. (eds.) *Prawo międzynarodowe i Unia Europejska w konstytucji*. Warszawa: Wydawnictwo Naukowe UKSW, pp. 118–121.
- Muszyński, M. (2023) 'Tożsamość konstytucyjna jako granica lojalności państwa wobec UE', *Prokuratura i Prawo*, 2023/1, pp. 5–40.
- N.N. (2020) 'Izba Dyscyplinarna SN: Wyroku TSUE z listopada 2019 nie można uznać za obowiązujący' (2020 29 September)', *Gazeta Prawna*, 190, p. 4 [Online]. Available at: Izba Dyscyplinarna SN: Wyroku TSUE z listopada 2019 r. nie można uznać za obowiązujący w Polsce – GazetaPrawna.pl (Accessed: 15 May 2023).
- Nita, B. (2020) 'Jeszcze o dopuszczalności skargi konstytucyjnej od orzeczenia wydanego w postępowaniu karnym', *Palestra*, 2020/7–8, pp. 90–101.
- Piątek, W. (2017) 'Nowe kompetencje do merytorycznego orzekania przez sądy administracyjne', *Państwo i Prawo*, 2017/1, pp. 19–33.
- Stępień-Załucka, B. (2016) *Sprawowanie wymiaru sprawiedliwości przez Sąd Najwyższy w Polsce.* Warszawa: Wydawnictwo C. H. Beck.
- Syryt, A. (2021) 'Skarga konstytucyjna a skarga nadzwyczajna: analiza porównawcza instytucji usuwania naruszeń wolności i praw człowieka i obywatela określonych w Konstytucji RP', *Prawo i Więź*, 2021/4, pp. 36–58; https://doi.org/10.36128/priw.vi38.350.
- Szmulik, B. (2008) *Pozycja ustrojowa Sądu Najwyższego*. Warszawa: Wydawnictwo C. H. Beck.
- *Biuletyny*, www.sn.pl, 'Bulletins' [Online]. Available at: https://www.sn.pl/publikacje/SitePages/Biuletyny.aspx?ListName=BSiA_Pytania_prejudycjalne (Accessed: 4 April 2023).
- *Pytania prejudycjalne WSA i NSA*. [Online]. Available at: https://www.nsa.gov.pl/pytania-prejudycjalne-wsa-i-nsa.php (Accessed: 20 October 2023).

MARKO NOVAK*

Dialogue between the Slovenian Highest Courts and the Court of Justice of the European Union**

ABSTRACT: *The relationship between European Union (EU) law and national Slovenian law progressed across three different stages starting from the beginning of this century to date, as discussed by EU and Slovenian legal theorists. The first one, just before Slovenia's entry into the EU, considered the EU an international organisation and EU law a type of public international law. It was dismissed even before Slovenia joined the EU, with an amendment to the Constitution, and was succeeded by the second, supranationalist, view that required maximum restraint by national courts while dealing with EU issues. Finally, about a decade ago, the third pluralist view of EU law vis-à-vis national law emerged, calling the particularly highest national courts to enter a more critical dialogue with the Court of Justice of the European Union (CJEU).*

Although Slovenian theorists have been actively discussing the relationship between EU and national law before and immediately after Slovenia joined the EU, it seems that practising lawyers and judges needed time to adapt to the new law. Finally, in 2009, the first reference for a preliminary ruling was made by Slovenian courts. Soon after, the Slovenian Supreme Court made its first preliminary ruling reference and, in nearly 20 years since, proved itself to be the most frequent interlocutor with the CJEU from Slovenia. It regularly cites CJEU cases in its case laws, and demands that lower courts follow them wherever appropriate. From the highest national courts in Slovenia, the Constitutional Court joined the dialogue with the CJEU last. It has made four preliminary ruling references to the CJEU and demonstrated restraint vis-à-vis reviewing legal issues touching upon EU law.

The legal culture (including public opinion) in Slovenia has predominantly been pro-EU. This applies to the internal legal culture, namely lawyers who support

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liberal democratic values such as the rule of law, human rights, and democracy. As long as the EU remains dedicated to these values, in such an environment, the highest Slovenian courts are not expected to show a bolder attitude vis-à-vis CJEU case law.

■ **KEYWORDS:** Court of Justice of the European Union, Slovenian Constitutional Court, Slovenian Supreme Court, transfer of sovereign rights, preliminary ruling reference, restrained constitutional review

1. Introduction: Historical background

With Slovenia joining the European Union (EU) in 2004, its courts became EU courts. However, in the first years following the accession, there were hardly any cases involving EU law before the Slovenian courts. Gradually, lawyers and judges became acquainted with EU law, but it took five years of Slovenia being a member of the EU before one of its courts made the first reference for a preliminary ruling to the Court of Justice of the EU (CJEU) in 2009. That first case, which had symbolic significance, has been the worst such reference made so far,[1] in which the court having made the reference followed the CJEU's opinion but all other courts that followed did not. There was a court that adjudicated a case in contrast to the CJEU decision, whose judgement became final.[2]

The EU member states' national courts can dialogue with the CJEU in informal[3] and formal ways. The latter includes: (i) the application of CJEU case

1 See, for example, CC-403/09 *Detiček* Case, ECLI:EU:C:2009:810. This was a divorce case in Rome, fought between an Italian father and Slovenian mother, in which the child's custody was awarded to the father. However, before the proceedings ended, the mother took the daughter to Slovenia. The father requested for the daughter to be sent back through enforcement based on the EU Regulation on the Mutual Recognition of Judicial Decisions. Nevertheless, the first instance court in Slovenia made a different decision awarding custody of the child to the mother based on the allegedly applicable international convention. Although the case was clear according to EU law in the sense of the supremacy of EU law even over conventional (international) law, on appeal, the higher court made a reference for a preliminary ruling by the CJEU by asking whether, based on the EU regulation on the Mutual Recognition of Judicial Decisions, a national court may make a different decision from another national court that first began the proceedings. In his commentary on that case, a Slovenian professor of civil procedure law argued that perhaps it would be better for the Slovenian Court not to have asked such an ("embarrassing") question (Galič, 2013). Yves Bot, the advocate general in the case, designated the case or reaction from the first instance court as a type of "judicial nationalism." See also Sever, 2009, p. 25.

2 Novak, 2021, p. 71. The findings originated from an EU JMM (Erasmus +) research project carried out from 2016 to 2019.

3 Judges of the Constitutional and Supreme Courts are, like their EU peers, members of the European Judicial Network. Through the e-platform, they have access to various documents including preliminary ruling references and national judgments that are

law in judicial decisions by national courts; and (ii) preliminary ruling requests submitted to the CJEU and following its decisions in subsequent proceedings. Both varieties of dialogue with the EU Court are discussed separately in this paper, in relation to the two highest Slovenian courts.[4]

After joining the EU, Slovenian courts have submitted 39 requests for preliminary rulings to the CJEU, of which 24 and 4 were lodged by the Supreme and Constitutional Courts, respectively. The Supreme Court is the most frequent dialogue companion of the CJEU when it comes to making preliminary ruling references.[5] Except the first one, all preliminary ruling references made so far by Slovenian courts seem to have been necessary and reasonable. They typically concerned pieces of unclear autonomous EU legal texts for which uniform interpretation across the EU was needed. There were two different ways in which the courts followed the decision provided by the CJEU: (i) either the requesting and all other courts dealing with the case or any other similar case followed the CJEU's opinion minutely, or (ii) that was not the case, so the Supreme Court in a subsequent proceeding corrected a too-formalist reaction by the referring court

interesting from the point of view of applying EU law. The Presidents of the Slovenian Supreme and Constitutional Courts participate in a yearly forum (i.e. *Forum des magistrats*) organized by the CJEU for the presidents of Supreme and Constitutional Courts. Judges of both courts can participate in judicial exchanges at the CJEU. They regularly visit the EU Court. According to Art. 113 of the Slovenian Courts Act, all Slovenian preliminary ruling references are sent to the Supreme Court to inform this highest court in the hierarchy of Slovenian ordinary courts, because pursuant to the Courts Act, it is responsible for the provision of uniform case law in the judicial system.

4 After the adoption of the 1991 RS Constitution, it was not clear which the highest court in Slovenia is, because both claimed to be so. This jurisdictional struggle was finally resolved by the position commonly shared in Art. 127 of the RS Constitution, which states that 'The Supreme Court is the highest court in the state.' However, the RS Constitutional Court has, according to Chapter VIII of the RS Constitution, special jurisdiction including constitutional review and the right to decide on constitutional complaints (dealing with human rights violations). Thus, it is the highest court in the state in the said area of law.

5 There have been preliminary ruling references submitted from the areas of taxation, banking, civil, family, labour, customs, and asylum law, and public procurement, state subsidies, customer protection law, and EU judicial cooperation. However, none came from among the EU criminal and competition laws – both of which are important areas of EU law. From the first-instance courts, the administrative court has made four references. From non-judicial bodies, the State Audit Commission submitted three requests for a preliminary ruling concerning public procurement procedures. The fact that lowest courts in Slovenia are not inclined to enter such a dialogue with the CJEU seems to be a Slovenian particularity within the EU (Sever, 2023). The reasons for this are probably both practical and epistemic. The practical ones perhaps lie in the fact that their dockets are the busiest in the Slovenian judicial systems. The more you go up the judicial pyramid, the less busy the courts are with cases. The Supreme Court is the only one in the state that does not have the "judicial norm" (the required number to cases to deal with on a yearly basis). The epistemic reasons for frequent references to the CJEU deals with a better knowledge and greater experience the more one climbs up the judicial ladder.

to the CJEU's opinion.[6] There was a third situation, where (iii) the Supreme Court made a reference to the CJEU, however, the CJEU decided something completely different than what was asked for, and thus the Supreme Court could not apply the decision.[7]

After introducing the subject in Section 1, I explain the position of EU law in the hierarchy of legal acts in the Slovenian legal order, and how its theoretical perception shifted from a sheer idea of the supremacy of EU law espoused by early Slovenian legal theorists to the concept of heterarchy[8] or pluralism of different legal orders defended by subsequent legal theorists, thus considering it a matter of fact that the latter idea has not (yet) been fully taken by the Slovenian highest courts. In Section 2, I discuss the special features of the dialogue of the Slovenian Constitutional and Supreme Courts with the CJEU, through which its doctrine on the position of EU law in the Slovenian legal order can be discerned, and disclose their formal relationships with the EU Court. Finally, I conclude with a short evaluation of the role of the Slovenian highest courts so far in the EU and Slovenian legal orders as the highest EU member state courts, which is important for the development of EU and Slovenian law.

2. EU law and the Slovenian legal order: From a supranational model to heterarchy

Sometime before Slovenia joined the EU, in 2004, a discussion was held among lawyers on the manner in which the supranational effect of EU law was to be determined in the Slovenian Constitution.[9][10] At the time, everyone was aware that becoming a member of the EU entailed some limitation to national sovereignty. However, it was unclear in what way that should be ordained constitutionally. At that point, the difference between international and EU law was not entirely set.

6 See, e.g. C-603/10 *Pelati* Case, ECLI:EU:C:2012:639; Sever, 2011a, pp. 25–26; Novak, 2021, pp. 85–86.

7 See Ministry of Defence Case No. C-749/19 – the opinion concerning the second question.

8 Heterarchy is a 'system of organization where the elements of the organization are unranked (non-hierarchical) or where they possess the potential to be ranked in a number of ways' (Crumbly, 1995).

9 *Zbornik Dnevi javnega prava 2003* (Proceedings of the 2003 Days on Public Law); *Zbornik Dnevi slovenskih pravnikov 2003* (Proceedings of the 2003 Days on Slovenian Lawyers).

10 In relation to "constitutional identity" (see, e.g. Jacobsohn, 2010), the word "identity" does not appear explicitly anywhere in the Slovenian Constitution. However, the Slovenian Constitutional Court that also does not use that word explicitly, has described, in many cases, the design of the Slovenian Constitution as one pertaining to constitutional democracy with the central role of human rights in it, which also follows from the Preamble of the RS Constitution.

There were two different views. The first did not find a need to amend the Constitution believing that extant Article 8 (on placing international law within the hierarchy of the constitutional system)[11] was enough.[12] As Slovenia opted for a *quasi*-monist[13] system of the placement of international law in its domestic legal system, Article 8 suggests that once a treaty is ratified by the national parliament, it becomes part of the Slovenian legal order where its provisions have direct legal effects, and it is positioned above the statutes and other national regulations while remaining below the constitution. This "international-law model" would be a rather weak manner of the EU law's implementation into the Slovene legal order. According to such a model, the EU law would be given precedence over Slovene legislation (as it is the case now) but a potential problem would be its relation with the Constitution. If an international treaty being ratified is deemed unconstitutional (on the proposal of the President of the Republic, Government, or a third of the Deputies), the Constitutional Court is empowered to issue an opinion on that and the parliament is bound by it.[14] The idea for the international law model of EU law fitting within the hierarchy of Slovenian legal acts did not bear fruit, for the following reasons among others: (i) EU law is not international law; (ii) the Constitutional Court would be left with (very) broad powers to find EU treaties unconstitutional; and (iii) there would be no legal basis in the Slovenian Constitution for the application of the principles of primacy and direct effect of EU secondary legislation (regulations and directives).

The idea presented above was an example of early thinking about the place of EU law in the hierarchy of national legal rules in Slovenia. It may sound naïve, but it can be considered a necessary path to walk before embracing the idea of the plurality of legal systems, which was created several years later. The second option, which prevailed, was the decision to amend the Constitution by adding the European Article.[15] Paragraph 1 of this article provides for the possibility of trans-

11 'Laws and other regulations must comply with generally accepted principles of international law and treaties binding on Slovenia. Ratified and published treaties shall be applied directly.'

12 That idea was supported by France Bučar, who had been a political dissident in communist times. However, at the time of political change, he was one of the leaders of the democratic opposition. After the first democratic elections, he became the first president of the National Assembly. He considered erstwhile European Communities an international organization, which was an older view espoused by other theorists, as well.

13 For treaties to apply within the domestic legal system, a special statute needs to be adopted. The mere signature of a treaty does not suffice. It needs to go through the process of ratification in the national parliament.

14 Art. 160.2 of the RS Constitution.

15 The constitutional amendment took effect on 7 March 2003. It was added by the Constitutional Act Amending Chapter I and Arts. 47 and 68 of the Constitution of the Republic of Slovenia, 27 February 2003 (Official Gazette of the Republic of Slovenia No. 24/03). It reads as follows:
'Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international

ferring a part of Slovenian sovereign rights on international organisations aligned with the values of human rights, democracy, and the rule of law, and entering into a defence alliance with countries that protect the values mentioned. This article was necessary for Slovenia to enter the EU and NATO, in 2004. Paragraph 2 requires a referendum before joining the EU and NATO. Paragraph 3 stipulates that legal acts adopted by the EU and NATO need to be applied in accordance with their legal regulation, and not according to national legal rules. The principles of primacy, autonomy, and direct effect of EU Law have special importance. Finally, Paragraph 4 is about the necessary cooperation between the Government and National Assembly (Slovenian parliament) in EU affairs.[16] Two parts of this article are especially important in understanding the continued Slovenian membership in the EU and the place of EU law in the Slovenian legal system, in the (constitutional) hierarchy of legal acts: (i) the part emphasising the transfer of partial sovereign rights on the condition of respecting the three mentioned constitutional values (here, the primacy of EU law over national law could apply); and (ii) the part underlining that EU law is to be applied in Slovenia according to its own rules (this concerns the autonomy of EU law and its direct effects).[17]

Article 3a of the Constitution is very important as it determines the position of the Republic of Slovenia, and its legal order vis-à-vis the EU. In theory and practice, there are three possible versions of understanding such a relationship:

organizations which are based on respect for human rights and 2 fundamental freedoms, democracy, and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values.
Before ratifying a treaty referred to in the preceding paragraph, the National Assembly may call a referendum. A proposal is passed in the referendum if a majority of voters who have cast valid votes vote in favour of the same. The National Assembly is bound by the result of such referendum. If such referendum has been held, a referendum regarding the law on the ratification of the treaty concerned may not be called.
Legal acts and decisions adopted within international organizations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organizations.
In procedures for the adoption of legal acts and decisions in international organizations to which Slovenia has transferred the exercise of part of its sovereign rights, the Government shall promptly inform the National Assembly of proposals for such acts and decisions as well as of its own activities. The National Assembly may adopt positions thereon, which the Government shall take into consideration in its activities. The relationship between the National Assembly and the Government arising from this paragraph shall be regulated in detail by a law adopted by a two-thirds majority vote of deputies present.'

16 Based on the constitutional provision, right after the accession, the Act on the Cooperation between the National Assembly and Government of the Republic Slovenia in the Area of EU Affairs was adopted, in which the government has several responsibilities to inform the parliament about its activities in the EU.

17 According to Avbelj, a Slovenian EU-law professor, the wording of this article is obsolete as it reflects older views, following which the EU was considered an international organisation. There was no obligation to have a special EU article in the constitution. Avbelj 2019, 71.

(a) internationalist;[18] (b) supranationalist; and (c) pluralist.[19] With respect to (a), EU is an international organisation. Thus, the relationship between national and EU laws is similar to that between national and international laws. Although the RS Constitution designates the EU as an international organisation to which the RS transferred the implementation of a part of its sovereign rights, by allocating that issue in Article 3a, distinct from Article 8 in which international law is addressed, it distinguished the position of EU law from that of international law.[20] Of the three (b) has had the strongest influence in Slovenia. According to this view, even if the Constitution mentions the transfer of the implementation of a part of sovereign rights alone, this entails the fact that Slovenia renounced its rights at the time of the transfer entirely and thus recognised the supremacy or primacy of the EU legal order.[21] Therefore, where the sovereign rights have been transferred to the EU, sovereignty in its entirety – as legal power or the power to independently make legal decisions – has been transferred to the EU.[22] Thus, the principle of primacy of EU law entails EU primacy over all rules concerning Slovenia's internal legal order. Although the RS Constitution conditions Slovenia's membership in the EU with respect for human rights, democracy, and the rule of law by the EU, these safeguards are not as intensive to offer grounds for Slovenian authorities to refuse the use of individual acts or provisions of primary or secondary EU law if they are found contrary to the Slovenian Constitution, as long as the EU in its entirety is based predominantly on the abovementioned values.[23] That seems to be a restrained approach from the perspective of a national legal order that takes EU law into account.

This position seems to be espoused by those who do not find a crucial element in distinguishing between the supremacy and primacy of EU law over members' national laws. Over a decade ago, Matej Accetto, a Slovenian EU scholar and now president of the Slovenian Constitutional Court, demonstrated in his articles that the use of the word "supremacy" was even more frequent than that of "primacy" in various professional legal texts dealing with EU law. However, he pointed to the position of the Spanish Constitutional Court while reviewing the Treaty establishing a Constitution for Europe, where primacy and supremacy were presented as different categories:

18 This version of the same relationship has been presented above. It was rejected by the framers of Art. 3a while making a distinction between international (Art. 9) and EU (Art. 3a) laws. See also Cerar, pp. 83–84.

19 Avbelj, 2012, p. 348. See also Avbelj, 2019, where the author comments on paras. 1–3 of this provision in the Commentary on the RS Constitution. On constitutional pluralism and heterarchy, see Walker, 2002; Walker 2016; Halberstam, 2012; Dunof and Trachtman, 2012; Kirsch 2012; Davis and Avbelj, 2018; Barber, 2006; Jakab and Kochenov, 2017.

20 Cerar, 2011, pp. 83–84.

21 Ibid., 79.

22 Ibid., 81.

23 Ibid., 78.

> the latter entailing a hierarchy based notion of a superior regulation that is a source of the validity of inferior regulations leading to the consequential invalidity of the second if contrary to the prescriptive provisions of the first; and primacy in which the relation is not necessarily hierarchical but the scope of application of different regulations is distinguished, all valid in principle, where one or several of such have the power to achieve a withdrawal of others by their priority or predominant application based on various reasons.[24]

By not insisting on the difference between the concepts mentioned,[25] it seems that he would rather join the Slovenian EU law theorists belonging to group (b). The supranational approach has been criticised in Slovenia in the last year, particularly by Matej Avbelj, a Slovenian EU law professor and scholar, and proponent of the pluralist approach (c). According to this view, there are three levels of regulation within the EU: sovereign countries with their autonomous constitutional order, the EU at the supranational level with its own autonomous legal order, and both national and supranational ones connected through structural principles into a whole (union). The basic structural principle is the principle of primacy, not superiority, which establishes a heterarchical horizontal relationship between the legal orders in the EU whose efficacy depends on the fulfilment of two types of conditions – national and supranational. Therefore, the relationship between national and EU law is not hierarchical. National law is not subordinate to EU law, whose entry into and effect on the national territory are not unconditional. Slovenia remains sovereign in the classical sense of the term, while the EU obtained functional sovereignty in the framework of the powers transferred.[26]

In Avbelj's opinion, the Weiss Case decided by the German Federal Constitutional Court in 2020, in which it held that a CJEU judgement was unintelligible and arbitrary, ultra vires, and not binding in Germany, only proved the theory of constitutional pluralism. According to that theory, the EU is a plural entity comprising the territorially sovereign constitutional orders of member states and the functionally sovereign autonomous legal order of the EU. The relationship between the state and supranational legal orders is regulated by structural principles, of which the principle of primacy has special importance. This shows that in the case of a conflict between EU and national laws, the former is applied.

Different than the principle of supremacy, the primacy principle following the doctrines of national constitutions and constitutional courts is effective if

24 Accetto, 2010a.
25 See also Accetto, 2010b.
26 Avbelj, 2011, p. 744.

the EU respects the principles of democracy, the rule of law and human rights and if it operates within the boundaries of transferred powers. If one of the said conditions is not fulfilled, the constitutional court, and only such a court, after a dialogue made with the CJEU, may exceptionally and by providing very good reasons decide that an EU law will not be applied in the member state. This law remains applicable since the national law cannot interfere with the autonomous EU law, however it may restrict its effect on the national territory.[27]

In Avbelj's opinion, the German Court has been building the pluralist doctrine since the 1970s. There have been other highest national courts, such as the Czech Constitutional and Danish Supreme Courts, which in the Landtova (C-399/09) and Ajos (C-441/14) cases, respectively, decided not to follow the CJEU judgements. However, in Avbelj's view that did not open Pandora's box for selective disrespect for EU law, which was allegedly taken advantage of by the abducted Polish and Hungarian Constitutional Courts. He remains optimistic by arguing that the CJEU must not act *ultra vires* and that authoritarian states cannot refer to constitutional pluralism at the EU level while persistently oppressing the same pluralism internally.[28]

3. Slovenian Highest Courts in light of EU Law and the CJEU

■ *3.1. The Constitutional Court*

Unlike some (already mentioned) robust EU members' constitutional courts that questioned the constitutionality of certain EU measures from time to time, to fit the pluralist approach to the relationship between EU and national laws, the Slovenian Constitutional Court has remained rather restrained in relation to potential issues concerning the unconstitutionality of EU law. A similar approach was taken vis-à-vis the interpretation of Article 3a of the Constitution. In a series of decisions, it gradually built its doctrine on the position of EU law within the national legal order. However, in such issues, it has not gone that far to be labelled as a bold or even "nationalistic" constitutional court. The Court supported the application of the classical idea of state sovereignty to Slovenia, and left the question of whether such an approach is too excessively restricted by the new EU treaty on a case by case basis at the time of ratification.[29] However, when it came to specific issues, it indicated its restrained review vis-à-vis EU fiscal and monetary policies as follows: 'By entering into the monetary union and the introduction of the Euro, the RS and its economy are no longer the guarantee for the money but was substituted by the Eurozone member states and their economies.'[30]

27 Avbelj, 2020a; Avbelj, 2020b.
28 Ibid.
29 Decision No. U-II-1/12, U-II-2/12, para. 41; Avbelj, 2019, p. 69.
30 Decision No. U-1-178/10, Para. 6; Avbelj, 2019, ibid.

The Court emphasised that Article 3a of the Constitution requires the application of EU law in conformity with its legal principles as developed by the ECJ.[31] It emphasised the following: 'Due to Article 3.3 of the Constitution, the fundamental principles that define the relationship between internal and EU laws are also internal constitutional principles that are binding with a constitutional effect.'[32] It held that 'it is the exclusive power of the ECJ to interpret EU law and review the validity of EU secondary law.'[33] However, the question of whether or not the principle of primacy entails the unconditional supremacy of EU law, or whether or not EU law must, in a certain example, be subordinated to the RS Constitution, remained unaddressed.[34] It stated that the principle of primacy requires the non-application of a national regulation that is in conflict with EU law.[35] The Constitutional Court emphasised other fundamental EU legal principles, such as loyal interpretation, direct application and effect of EU law, transfer of powers, subsidiarity, and proportionality in its case laws.[36] It expressed the view that it is not empowered to review the conformity of national regulations with EU secondary sources (regulations and directives). However, it noted that it is still empowered to review national regulations when they implement EU law or respect the legal effects of EU regulations.[37] From this, it follows that where the legislature implements a maximum directive (in a replicate style without adding implementing provisions) in a statute, the Constitutional Court would not review it. However, the same would not be the case when a minimum directive is implemented in a statute. In such cases, the Constitutional Court would consider itself empowered to make such a review.

When the matter concerns preliminary ruling references to the CJEU, I have already mentioned the four references from the Slovenian Constitutional Court, which demonstrates the fact that it actively began a dialogue with the European Court. It began doing so in 2014,[38] 10 years after Slovenia joined the EU.[39]

■ *3.2. The Supreme Court*

The Supreme Court of the Republic of Slovenia regularly cites CJEU cases in its judgements. The online Slovenian judicial case database presents around 500 hits

31 Decision No. Up-328/04, U-I-186/04, para. 10; Avbelj 2019, p. 70.
32 Decision No. U-I-146/12, para. 32; Avbelj, 2019, ibid.
33 Decision No. U-I-295/13, para. 68; Avbelj, 2019, ibid.
34 Decision No. U-II-1/12, U-II-2/12, para. 53; Avbelj, 2019, ibid.
35 Decision No. Up-328/04, para. 19; Avbelj, 2019, ibid.
36 Decision No. U-I-146/12, para. 33; Avbelj, 2019, ibid.
37 Ibid.
38 Case No. U-I-295/13.
39 It could the case that the beginning of the dialogue was a consequence of the first reference for a preliminary ruling that the German Constitutional Court submitted to the European Court in the case of Gauweiler. That may have encouraged the judges of the Slovenian Constitutional Court to do the same.

when searched for CJEU case laws.[40] Of the Supreme Court's five departments (civil, criminal, business, labour and social, and administrative laws), the most "active" in terms of EU legal matters seems to be the administrative law department (and the least active is the criminal law department), with the labour and social law department in the second place,[41] which is more or less expected given the areas regulated by EU law that they deal with as part of their jurisdiction.

The Supreme Court submitted 24 preliminary ruling references to the CJEU, out of 39 that came from Slovenia since 2004. The administrative department of the Supreme Court submitted the greatest number of references for a preliminary ruling (mainly from the area of value added tax and international protection), which was followed by the civil and labour and social law departments (predominantly concerning the working hours directive). The business and criminal law departments had never submitted references for a preliminary ruling to the CJEU at the time of writing. The Supreme Court and its departments had not (at the time of writing) developed a doctrine vis-à-vis EU or CJEU case law. Given that Slovenia subscribes to the European model of centralised constitutional review, it left the issue of setting potential boundaries between EU and Slovenian law to the Constitutional Court. However, it retained the power to deal with CJEU case law on a case by case basis.

It seems that the relationship between the CJEU and RS Supreme Court is considered so obvious that books or articles dealing with it cannot be found. Some articles comment on specific CJEU judgements – like that concerning our first preliminary ruling reference that was already mentioned (*Detiček* Case).[42]

4. Conclusion

In contradistinction with some "rebellious" constitutional or supreme courts in the EU, the highest courts in Slovenia seem to have remained "poster children"[43] of the EU. Although with some delay, they did enter into the dialogue with the CJEU. However, that dialogue seems to be one-sided, where one asks and the other replies without the first asking further questions.[44] Perhaps such a restrained role is not too bad because there could be a problem with being an activist but not constructive one. I guess there is also nothing bad either with a tame national judicial

40 It is not necessarily true that cases in which EU law is applied are adjudicated correctly. Nevertheless, the European Commission will not react as long as there is no systemic problem.

41 *Sodna praksa* [Online]. Available at: Iskalnik sodne prakse (sodnapraksa.si) (Accessed: 21 June 2023).

42 See, e.g. Hudej, 2014; Lubinič, 2021; Sever, 2011b; and Sever, 2015.

43 See Avbelj and Letnar Černič, 2020, p. 224.

44 There has not been a CJEU case so far (a reply to the reference for a preliminary ruling from Slovenia) that can upset either the Constitutional or Supreme Court. However, that does not ensure that a situation resembling those in Germany, the Czech Republic, or Denmark will not happen.

activism within the EU. However, if such activism becomes untamed or unbridled, that is another thing to the effect of jeopardising the uniformity of EU law.

Avbelj suggested that the Slovenian Constitutional Court, as the final defender of Slovenian constitutionality, should take a position of critical restraint vis-à-vis the EU and espouse a friendly attitude at the same time. Following the example of others, particularly the German and Spanish constitutional courts, it should call on regular courts and bind them to the correct and effective application of EU law. The Slovenian Constitutional Court should strive to align itself with other (more "courageous") national constitutional courts and make itself an equal interlocutor of the CJEU.[45]

In the case of Slovenia, the internal dialogue with regular courts on EU issues and CJEU case law has been taken up by the Supreme Court and, after some initial problems, has proceeded well. However, in relation to the RS Constitutional Court and its dialogue with the European Court, there is an impression that the Constitutional Court could be more self-confident without it causing any problem for autonomous EU law. Considering Slovenia's legal culture,[46] where there is relatively high trust in the EU and its institutions, including the CJEU,[47] the restraint exercised by the highest courts vis-à-vis CJEU case law may not be surprising. However, it is a very different issue when it comes to trusting domestic courts, in which public trust is quite low.[48]

Finally, Slovenia has predominantly been pro-EU. This applies to its internal legal culture, that is, lawyers support liberal democratic values such as the rule of law, human rights, and democracy. As long as the EU remains dedicated to these values, in such a(n) (legal) environment, it is not expected for the Slovenian highest courts to show a bolder attitude vis-à-vis following CJEU case law. Some cases (e.g. C-578/16 and C-144/23) demonstrate that the Supreme Court sought an intervention by the CJEU in its own interpretative "battle" with the Constitutional Court because the Supreme Court had not agreed with a certain case law of the Constitutional Court. Thus, it turned to the CJEU to get an appropriate interpretation of EU law.

As long as the EU and CJEU keep subscribing to the liberal idea of constitutional democracy while defending its values, the rule of law, and human rights, which also form the Slovenian conditions for the transfer of a part of its sovereign rights to the EU, and the Slovenian Constitutional Court continues to uphold this idea under the RS Constitution, some major collisions between the Slovenian Constitution and its identity vis-à-vis EU law and CJEU judgements are unlikely to occur.

45 Avbelj and Komarek, 2012, p. 351.

46 For more on the Slovenian legal culture, see Novak, 2023.

47 This could be analysed based on many domestic surveys and, for example, following the annual Eurobarometer.

48 See, for example, national surveys requested by the Supreme Court to be carried out every second year, and the annual EU Justice Scoreboard reports.

Bibliography

- Accetto, M. (2010a) 'Slovenska nadrejenost v pravu EU (1): V iskanju pravnih virov' *Ius-Info* [Online]. Available at: https://www.iusinfo.si/medijsko-sredisce/kolumne/50858 (Accessed: 26 June 2023).
- Accetto, M. (2010b) 'Slovenska nadrejenost v pravu EU (2): Sodstvo kot neprebojni jopič slovenske zakonodaje?' *Ius-Info* [Online]. Available at: https://www.insolvinfo.si/medijsko-sredisce/dnevni-izbor/51159 (Accessed: 26 June 2023).
- Avbelj, M. (2020a) 'Revolucionarno dogajanje v Evropski uniji' *Ius-Info* [Online]. Available at: https://www.iusinfo.si/medijsko-sredisce/kolumne/265026 (Accessed: 26 June 2023).
- Avbelj, M. (2020b) 'Slovenija pred Sodiščem Evropske unije' *Ius-Info* [Online]. Available at: https://www.iusinfo.si/medijsko-sredisce/kolumne/276609 (Accessed: 12 September 2023).
- Avbelj, M. (2011) 'Supremacy or Primacy of EU Law – (Why) Does it matter?', *European Law Journal,* 17(6), pp. 744–763; https://doi.org/10.1111/j.1468-0386.2011.00560.x
- Avbelj, M. (ed.) (2019) *Komentar Ustave Republike Slovenije*. Ljubljana: Nova univerza, Evropska pravna fakulteta.
- Avbelj, M., Komarek, J. (eds.) (2012) *Constitutional Pluralism in the EU and beyond.* Studies of the Oxford Institute of European and Comparative Law. Portland: Hart Enterprises.
- Avbelj, M., Letnar Černič, J. (2020) *The Impact of European Institutions on the Rule of Law and Democracy.* Oxford, Hart Publishing; https://doi.org/10.5040/9781509915071.
- Barber, N. W. (2006) 'Legal Pluralism and the European Union', *European Law Journal*, 12(3), pp. 306–329; ttps://doi.org/10.1111/j.1468-0386.2006.00319.x.
- Cerar, M. (2011) 'Komentar 3.a člena Ustave Republike Slovenije' in Šturm, L. (ed.) *Komentar Ustave Republike Slovenije*. Ljubljana: Fakulteta za državne in evropske študije, pp. 73–84.
- Crumbly, C. C. (1995) 'Heterarchy and the Analysis of Complex Societies', *Archeological Papers of the American Anthropological Association,* 6(1), pp. 1–5; https://doi.org/10.1525/ap3a.1995.6.1.1.
- Davis, G., Avbelj, M. (eds.) (2018) *Research Handbook on Legal Pluralism and EU Law.* Edward Elgar Publishing; https://doi.org/10.4337/9781786433091.
- Galič, A. (2013) *Razmerje med Uredbo Bruselj II in Haaško konvencijo o ugrabitvi otrok (e-gradivo)*. Ljubljana. Ministrstvo za pravosodje.
- Halberstam, D. (2012) 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Dunoff, J. L., Trachtman, J. P. (eds.) *Ruling the World? Constitutionalism, International Law, and Global Governance.* Cambridge: Cambridge University Press, pp. 1–34.
- Hudej, N. (2014) 'Vrhovno sodišče RS pravu EU priznalo polno učinkovitost: zadeva Pelati', *Pravna praksa,* 33(1), pp. 6–8.
- Jacobsohn, G. J. (2010) *Constitutional Identity.* Cambridge: Harvard University Press; https://doi.org/10.4159/9780674059399.

- Jakab, A., Kochenov, D. (eds.) (2017) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance.* Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780198746560.001.0001.
- Krisch, N. (2012) *Beyond Constitutionalism: The Pluralist Structure of Postnational Law.* Oxford: Oxford University Press.
- Lubinič, M. (2021) 'Odločitve Vrhovnega sodišča RS v zvezi s sodbami Sodišča EU o vprašanjih za predhodno odločanje v delovnih sporih', *Delavci in delodajalci,* 21(2/3), pp. 341–360.
- Novak, M. (2021) 'Argumentacija sodišča Evropske unije kot zgled za argumentacijo slovenskih sodišč', *Dignitas,* 2021/89–90, pp. 63–88.
- Novak, M. (2023) 'Central European with a Post-Socialist Limp: On the Slovene Legal Identity', *Public Governance, Administration and Finances Law Review,* 8(1), pp. 121–137; https://doi.org/10.53116/pgaflr.6811.
- Sever, S. (2009) 'Prva obravnava v slovenščini', *Pravna praksa* 2009/47, p. 25.
- Sever, S. (2011a) 'Predlog za predhodno odločanje: zadeva Pelati', *Pravna praksa* 2011/3, pp. 25–26.
- Sever, S. (2011b) 'Četrti slovenski predlog za predhodno odločanje', *Pravna praksa* (45), p. 27.
- Sever, S. (2015) 'Prvih pet let dialoga med slovenskimi sodišči in sodiščem EU', *Pravna praksa* 2015/2, p. 3.
- Sever, S. (2023) 'Priložnost za poglobitev dialoga med slovenskimi sodišči in Sodiščem EU', *Pravna praksa,* 2023/6–7, p. 12.
- Walker, N. (2002) 'The Idea of Constitutional Pluralism', *Modern Law Review*, 65(3), pp. 317–359; https://doi.org/10.1111/1468-2230.00383.
- Walker, N. (2016) 'Constitutional Pluralism Revisited', *European Law Journal*, 22(3) pp. 333–355; https://doi.org/10.1111/eulj.12177.
- *Zbornik Dnevi javnega prava* (2003) Ljubljana: Inštitut za javno upravo pri Pravni fakulteti, Pravna fakulteta Univerze v Ljubljani.
- *Zbornik* Dnevi slovenskih pravnikov (2003) *Podjetje in delo.* (29), pp. 6–7.

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The European Parliament Against the Background of the Rule of Law and the Standards of a Parliamentary System: Selected Issues

ABSTRACT: *The aim of this study is to show the legal status and mechanism of action of the European Parliament against the background of classical standards of the rule of law in a democratic system. This study shows the extent of the deviation of the European Parliament from these standards and highlights its special features by using historical-, theoretical-, and dogmatic-legal methods. This helps to understand what parliamentarism is built into the present concept of the rule of law, and what distinguishes it from the classically understood assumptions of a parliamentary system.*

Specifically, this study comprises three key issues: the nature of the subject that equips the Parliament with democratic legitimacy, the way it is situated in the mechanism of power or, finally, the extent to which it is bound by existing legal norms. This research perspective is, of course, limited in nature and deals with selected issues.

The crux of the study makes the reader aware that at the level of the European Union a new type of parliament and, consequently, a new type of parliamentarism has developed, and the rule of law applicable here is clearly different from the analogous principle found in traditional states.

KEYWORDS: European Parliament, rule of law, parliamentarism, parliamentary system

1. Introduction

As a constitutional institution, the European Parliament grows out of the idea of European parliamentarism and is a body whose characteristics are clearly related to the legislatures formed in the circle of European legal culture. From the

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beginning, the process of creating this body proceeded under the overwhelming influence of continental political traditions and led to the development of elements typical of the parliamentary systems of member states, especially in Germany and France. Consequently, the European Parliament became an institution stylised in Western European fashion and fit, roughly speaking, into the framework of the system of parliamentary democracy. However, in terms of legal construction, it was not indicative that it was a mere hybrid of the features of national parliaments operating within the framework of the community. On the contrary, it acquired distinct original features that distinguished it from classical legislatures. This direction was determined by the innovative tendencies marked in its individual path of development, which were associated with the specifics of the European integration process and the institutional system operating in the Union. It was these that determined the formation of the European Parliament as a body with a special systemic identity, as a conglomerate of elements of classical parliamentarism and elements of the Union's autonomously forming system of government.

The institution thus formed is interesting from a research perspective, and the study of its legal characteristics must provoke various questions. At the forefront of this study is the question of to what extent do the current legal solutions and mechanisms that define the status of the European Parliament correspond to the traditional model of the national parliament, and to what extent do they go beyond it. In this context, to what degree do they fulfil the requirements for legislatures in democratic systems in connection with the rule of law. The question is whether this body, with all its systemic and institutional peculiarities, meets the systemic minimum resulting from the rule of law and thus falls within the limits of the elementary standards set for parliamentary bodies in the democratic world. Reflection on this issue makes it possible to understand the peculiarities of the form of parliamentarism created at the European Union (EU) level. Simultaneously, it also makes it possible to determine to what extent—looking from the perspective of the assumptions of the concept of the classical parliamentary system—the EU rule of law affects the functioning of the current European Parliament. It provides an opportunity to clarify what this principle actually is in the context of the parliamentary centre of power generated at the community level and its contribution to its formation in institutional terms. This problem forms the crux of this study.

2. The importance of the rule of law in the tradition of European parliamentary systems

Parliamentarism, as a form of state power organisation, is a product of European legal culture. It was shaped by a long historical process, undergoing successive stages of development and taking root in a growing number of European states. At

present, there is no European state that is not mentioned in one version or another of the assumptions of this system. This also applies to EU member states.

The modern form of parliamentarism is embedded in the framework of the concept of a democratic state under the rule of law and—which is obvious—requires respect for the elementary standards flowing from this concept. Thus, the parliament, as the centre of democratic power in the state, must be formed in a given way and should simultaneously have the ability to act within a given scope. Legislators do not have full regulatory freedom here, and in the process of creating legal regulations governing this body they are obliged to respect a catalogue of minimum requirements. Only when these requirements are met, there is a democratic legislature that falls within the universally recognised concept of the rule of law.

It should be remembered that European parliamentarism was influenced by the rule of law only at a certain stage in its development. The confrontation of these two ideas unleashed a tendency to subordinate the institution of parliament to the regime of the principle in question and thus contributed to a change in its systemic characteristics. This was evident in different European countries with varying extents and intensities, leading to the emergence of different systemic models. The decisive factors here were the peculiarities of the parliamentary system in a given country and those of the rule of law.

The primary effect of the spread of the rule of law in European systems was the assumption that the scope of parliamentary activity should be dictated by the rules of existing law rather than political will. This manifested itself most conspicuously in Germany, from where the principle in question derives its roots, with a particularly strong emphasis on the role of the state in binding the organs of state power, including the legislative bodies, in their areas of activity. It is well-known that the law in force has a position of supremacy in the political system and determines the permissible scope of authority for governing factors. At the same time, it performs a guaranteeing role in the sphere of individual rights and freedoms, protecting the latter from the negative consequences of the arbitrariness of power. It should be remembered that the rule of law paved the way for German legal culture to develop parliamentarism as a form for state organisation. Serving initially to reject the system of absolute monarchy with its characteristic tendency to subject the individual to the rule of a highly elaborate bureaucratic apparatus[1], it created fertile ground for systemic transformations aimed at dispersing the centres of state power. Under these conditions, in view of the emergence of favourable political circumstances, there was a proclamation of the Weimar Republic in 1919, which, unlike the previous system of government, made very explicit reference to the parliamentary model of the government. In the new system, the parliament became a key part of the state's decision-making

1 Dziadzio, 2005, p. 177.

centre, and its existence was considered a necessary element of the concept of the rule of law. This involved the simultaneous adoption of the principle of a tri-partite government, democratic mechanisms for recruiting the legislature, an elaborate system of guarantees given to the individual, and a weakening of the vision of parliament as a corporation not subject to state law, typical of 19th century German legal culture.[2] After several years of decline associated with the formation of the Nazi dictatorship, the concept of *Rechtsstaat* found continuation and creative development in the postwar system of the Federal Republic of Germany. Under the conditions of the political system, parliamentarism was restored as the foundation of the organisation of state power and all elements of the architecture of the system of parliamentary democracy. As before, the organs of the legislature were democratic and operated within the structure of the tri-partite government. To an even greater extent, their activities were restrained by the axiology statuted by the adopted constitution. In this regard, the principle of respect for human dignity came to the forefront.

Another effect of the increased importance of the rule of law was the reduction or removal of the principles of parliamentary sovereignty that existed in some countries. This was the case in France, where, until the second half of the 20th century, the position of successive legislatures remained strongly determined by this principle, thus affecting the way state authorities were organised in the multi-stage French democracy that was being created. Here, we dealt with the legacy of the solutions adopted during the French Revolution, which placed parliament—as the bearer of the will of the people—on the pedestal of the system of state authority and thus tried to guarantee its independence from other bodies. Combined with the principle of tri-partition, this concept freed, at least in part, the legislature from the existing legal framework and gave it the ability to act outside the law based on the political will of the majority gathered in its forum. Consequently, the belief persisted for a long time among the French that parliamentary decisions could not be challenged by any other authority, including courts, empowered to control the legality of the actions of public authorities.[3] Whether they were in compliance or conflict with the applicable law was irrelevant.

In addition, it should also be borne in mind that the spread of the rule of law has become intertwined in the historical process of evolution with the phenomenon of democratisation of the electoral systems of European countries, resulting in the growth of the electorate entitled to vote in parliamentary elections and, as a result, strengthening the democratic legitimacy of parliament. Subjected to transformations moving in this direction, the Parliament came under the radar of a growing group of citizens. Thus, an important systemic mechanism was created to contain, or at least limit, the arbitrariness of the actions of state bodies. This fits

2 Pastuszko, 2019, p. 64.
3 Tuleja, 2003, p. 32.

perfectly with the concept of protecting individual rights, which, from the very beginning, was the essence of the rule of law in all varieties of this political and constitutional doctrine. Therefore, over time, the idea of parliamentary democracy, based on electoral involvement and broad activation of the social masses, permanently entered the catalogue of its elementary standards. This was already evident in the interwar period when it became obvious that any state aspiring to adhere to the rule of law had to adopt the principle of universal suffrage in parliamentary elections and give it the character of a fundamental rule (additionally, restrictions were allowed which sometimes went very far and discriminatory in nature – so called censitary suffrage). What is noteworthy is that, at the time, the democratisation of the system understood in this way meant linking the concept of democratic elections with the idea of self-determination and the sovereignty of the people. By definition, a parliament was to be a forum for representatives of the sovereign and to formulate the political will of the sovereign. Thus, a state operating based on the rule of law was, in essence, one that gave the nation the opportunity for such an expression. The concept of the nation's sovereignty became a sine qua non of its existence. This perception of free and democratic elections persisted even after World War II. It was perhaps even stronger as its formation took place under the conditions of tragic experiences that accumulated as a result of the activities of the criminal dictatorships of the time. In the circle of the so-called countries of the free world, it has become clear that parliamentary democracy is an enduring element of the rule of law. This concept has become permanent and remains relevant in modern times.

3. The rule of law as the context for functioning of the European Parliament

The rule of law is one of the cornerstones of the development of the EU. Initially, it was used in diplomatic activities to promote a unified Europe throughout the world, and was subsequently introduced into official community documents.[4] The path of development here was set by judicial jurisprudence, which emphasised the validity of the rule of law in the EU legal order[5] and laid the groundwork for the treaty regulations adopted later. At present, this rule is expressed in the Treaty on the EU, which mentions it in the main proclamation of Article 2 and in other provisions. It is clear from these provisions that the rule of law has the rank of legally momentous and systemically protected value, and should be respected at the EU and national levels. For obvious reasons, this includes the unions' institutional systems.

4 Magen and Pech, 2018, pp. 236–238.
5 C-294/83 "*Les Verts" v European Parliament*, ECLI:EU:C:1986:166.

The meaning of the rule of law in the context of the legal formation and functioning of the European Parliament plays a key role in our deliberations. The questions that arise here are what axiological standards are set by this principle and how the content and scope of validity are shaped. The most interesting point lies in the similarities and differences between this principle and the rule of law found in traditional nation-states. We know that against the background of the assumptions of classical parliamentarism, the European Parliament is different, and its legal characteristics are marked by a variety of singularities.

These distinctions are, of course, due to the nature of the Union, which took its start from the idea of international cooperation and was a completely new creation in terms of its system. Under such conditions, in the absence of a unified subject of sovereign power and the novel organisation of the apparatus of power (which remains in a process of constant change), the old models of parliamentary democracy could not find full application. In particular, it was not possible to apply standards such as equipping parliament with democratic legitimacy by the sovereign people, situating it in the structure of the tri-partite division of power, or a full binding of applicable laws. This constitutes a democratic parliament under the rule of law.

However, the existence of objective obstacles to the realisation of the traditional form of parliamentarism in the EU system did not mean that this form played no role in the formation of the European Parliament. There is no doubt that the authors of the solutions regulating the legal status of this body used its "axiological resource" very extensively, aiming to create a construction of a European "legislature" based on values known in nation states. It was not without reason that the integrating Europe decided at a certain stage of development to establish democratic rules of electoral law in parliamentary elections, and thus make the parliament a representative body. This step clearly shows the direction of the planned political transformation and reveals the future of the parliament. It was unquestionably calculated to incorporate the rules of representative democracy.

Despite the patterns taken, the evolutionary shaped European Parliament has become an institution with its peculiarities and is characterised by a number of original features. However, it differs in many respects from parliaments functioning in traditional countries, remaining far from the initial ideals. What draws attention to the way it is formed is its democratic legitimacy derived from the will of the multinational community, its operation within the concept of institutional balance, and its tendency to expand the scope of its power beyond the treaty. All of these elements determine the systemic identity of the European Parliament and simultaneously show that it is a body that determines a completely new form of parliamentarism.[6] Aware of this, we are forced to conclude the uniqueness of the rule of law in this aspect of its validity. This not only implies a unique and peculiar content, but also

6 Lord, 2003, p. 30.

exhibits an extremely changeable and dynamic nature (as evidenced by the long and gradual process of changes that have been made to the institution of the European Parliament). It is certainly appropriate to speak of the existence of an autonomous principle, which is an original component of the EU's autonomous legal order.

4. Legal characteristics and mechanism of functioning of the European Parliament and the requirements of the rule of law as classically understood

■ *4.1. Democratic legitimacy of the European Parliament*

As is known from earlier considerations, in regimes based on the rule of law, it is indispensable to give parliamentary bodies a democratic character. Thus, wherever we face this philosophy of governance, the legislature must adopt constitutional rules to create a model of representative democracy. Above all, it was within the sphere of its duties to introduce democratic principles and mechanisms into the electoral process. In reality, regulations in this matter, mutatis mutandis, determine the possibility of forming the composition of parliament according to the preferences of the electorate and leads to equipping it with democratic legitimacy.

Contrary to appearance, meeting the requirements of the rule of law in this regard does not mean merely adopting a formal construction. In addition to the law, even the best conceived in a democratic system, the existence of a civic community and a well-functioning party system are equally important. Both of these elements mean that a sovereign—who is, after all, the source of power— can act as a collective and, in making his choice in the ballot box, has a clear picture of the political orientation in a state. This gives comfort in expressing support all together and at the same time for preferred views and ideas and thus shapes political representation. In the absence of similar conditions, democracy—and therefore the rule of law—becomes an illusion.

This gives rise to the question as to what extent the standard of the rule of law, understood in this way, corresponds to the legal nature of the European Parliament. In particular, of interest here is whether this body can really be considered—as Article 10 of the TEU wants it to be—a representative forum for Europeans and whether it can be seen as the bearer of the political will of the human community.[7] Clarifying both these questions essentially boils down to a

7 Art. 10(1) of the TEU states that: 'The functioning of the Union is based on representative democracy.' Para. 2, in turn, provides that 'Citizens are directly represented at the Union level in the European Parliament. Member States shall be represented in the European Council by their Heads of State or Government and in the Council by their governments; Heads of State or Government and governments shall be democratically accountable either to their national parliaments or to their citizens.'

reflection on the nature of the legitimacy that the European Parliament possesses as an entity of the EU's central authority. This issue is crucial in the search for answers to the questions posed.

The problem of the legitimacy of the European Parliament must be considered against the backdrop of a broader phenomenon that has been observed for decades in the life of the EU, consisting of making key decisions at the EU level, including those of the greatest gravity, by institutions devoid of a democratic character. This phenomenon, well described in the literature[8] as the democratic deficit, is treated as one of the biggest fragilities of the EU and thus is subjected to strong criticism from scientific and political circles. Concerned scholars and politicians unanimously emphasise that the actions of the EU, which has extensive power delegated to it by the member states, otherwise permanently increased in the process of political transition, escaped the perception of Europeans and, as a result, remained outside the sphere of any social control.[9] In this way, the broad powers granted to EU decision-makers in the transfer made with the consent of the member states, but often also the powers "appropriated" by them as a result of informal actions, are exercised without the approval of voters, at best with the consent or acquiescence of national authorities. Under such conditions, it is difficult to exert democratic pressure on the political decision-making process and its associated influence on the shape of the decisions taken. The lack of appropriate legal mechanisms precludes the achievement of a similar goal, and this justifies the accusation that the EU, which refers to the principle of democratism in numerous documents including treaties, has a problem with its realisation in the constitutional sphere.

In search of solutions to reduce the deficit in question, several legal and political demands have been made in the past and specific reforms have been implemented. One remedy was to transform the European Parliament into a representative institution, thereby creating a democratic forum within the central government system. The originators of this concept expressed unanimous hopes of changing the perception of the integrating community in public opinion while aiming to set in motion a new dynamic in the process of building a federal state.[10] Their aspirations yielded positive results, although they did not resolve the problem completely. Despite the democratic transformation of the European Parliament, this problem, as is well known, has remained relevant to the present day.[11] It should be recalled here that in its original phase of existence, the European Parliament, called the National Assembly, was recruited from among the delegates of the member states and played a role typical of multimember decision-making bodies functioning in international organisations. However, it began to evolve

8 See Majone, 1998; Mizera, 2014; Mrozowska, 2007; Potorski, 2011; Schiatti, 2016.
9 Grosse, 2008, pp. 75–76; Grosse, 2017, pp. 12–13.
10 Grosse, 2017, pp. 12–13.
11 McCormick, 2020, p. 302.

quickly into a body with the characteristics of a national legislature, which incidentally distinguished it from analogous institutions that had previously existed in the international space.[12] During the long process of systemic evolution, the watershed moment was undoubtedly the adoption of legislation that established a mechanism for universal and direct elections. This momentous change took place in 1976 and was accomplished through a Council decision and an accompanying law on the election of Assembly representatives by direct popular vote.[13] This led to the formation of the European Parliament as a body elected during the process of democratic procedures. It was also equipped with a type of legitimacy that was different from the previous one. Interestingly, however, the norms introduced within its framework rejected the concept of a uniform electoral system for the entire electoral territory of member states and allowed for individual regulation of this system in elections to the European Parliament by the national authorities. The result was not only a plurality of legal mechanisms manifested at the national level, but also a clear emphasis on the national origin of elected parliamentarians. Such an approach illustrated the sense of realism of European decision-makers, who were aware of the national divisions that existed in the unifying Europe, although it remained far from the vision of the Parliament as a political representation of the European community, which was already being promoted at the time. It was thus an acceptance of the shaping of Parliament's representation as a forum for European nations.[14]

Endowing the European Parliament with legitimacy obtained through a democratic electoral process was not only a step toward a major overhaul of the EU's institutional architecture but also a clear signal that this body is beginning to act with due regard for the rules placed on legislatures under the rule of law. For this was the fulfilment of the minimum standard inherent in this principle, which is that a properly constructed representative system must ensure democratic and universal elections in at least one of the houses of parliament.[15] Thus, the establishment of formal procedures has changed the perception of Parliament in this regard.

However, the democratic legitimacy thus formed did not result in the European Parliament becoming, based on the model of parliaments functioning in nation-states, the disposer of power delegated by the sovereign people. On the contrary, because of the participation in the elections held by citizens of various states, who are also members of many nations, it was necessary to speak of equipping it with power by a group of sovereign peoples while recognising a very clear difference in the way the subject was represented in the parliamentary forum. Unlike classical democracy operating at the level of member states, in this

12 Menon and Peet, 2010, p. 2.
13 Jacobs, Corbett and Shackleton, 1996, pp. 40–44.
14 Grosse, 2008, pp. 81–84.
15 Pelc, 2000, p. 77.

case there was no forging of political representation of one particular national community, but there was a delegation of the representation of many such communities. Consequently, a hybrid collective was created, which—being a subject with a certain scope of power and simultaneously having the authority to transfer it to representatives—in the process of expressing political will and thus deciding on the composition of the European Parliament remained more exposed to being guided by the criterion of particularistic national interests rather than the interest of the community as a whole. This was possible because elections to the European Parliament have never, until the present day, become programmatic elections[16] in which citizens would advocate the programmatic vision of the existing parliamentary factions (and since the 1950s) in this body. This factor undoubtedly fostered the development of the concept of national representation, shaped on the basis of sympathies and preferences shown to national groupings rather than those with a pan-European profile. Of course, this could not remain indifferent to the functioning of the representatives themselves, who were often incapable of acting in the logic of the common good of all Europeans and revealed a tendency to place national interests above those of the community and its people. This behaviour, which is otherwise consistent with the European cultural code and the political tradition of the Old Continent, contributed to the formation of a new model of political representation, characterised by tensions generated not only against the background of clashing programmatic ideas about Europe as a whole, but also against the background of striving to realise the raison d'état of the member states. Therefore, making use of Jan Zielonka terms, this model should be called the post-Westphalian representation model.[17]

The problem with the above-described nature of the European Parliament's democratic legitimacy persists even today. Subjected to the process of integration, Europe remains divided into individual nations and is unable to produce demos. This was aptly stated by Raymond Aron in his famous statement that in mental terms, 'there is no such animal as a European citizen. There are only French, German, or Italian citizens.'[18] This state of affairs cannot be changed by the current Treaty of the European Union, which, in Article 114(2), stipulates that the European Parliament is composed of representatives of Union citizens.[19] The wording of this provision suggests that there is a community of European citizens with the characteristics of sovereign power. However, such a stance is counterfactual and is an expression of reality conjuring by the creators of the treaties, as well as a manifestation of the voices present in the European debate about the need to create a new cosmopolitan society;[20] it is impossible to conclude that it

16 Moravcsik, 2002, p. 613.
17 Zielonka, 2000, p. 2.
18 Cited by Siedentop, 2000, p. 10.
19 Kowalik-Bańczyk, 2020, p. 432.
20 See Habermas, 1992, pp. 8–10.

derives from a reliable view of the situation. So far, no data have confirmed that Europeans have a sense of communal ties that gives reason to believe that they are indeed functioning as a collective sovereign. No statistics prove the trust shown in Parliament as an institution acting on behalf of the European civic community. Rather, from those available to us at present, it appears that this body is treated with great distrust by Europeans.[21]

In light of these observations, it is difficult to consider the legitimacy of the European Parliament as fully matching the standards reserved for traditional legislatures in the Western world. While this legitimacy is democratic in nature and, thus, distinguished from the legitimacy of other EU bodies due to the non-existence of a unified entity that conveys it through elections, it is impossible to speak of fulfilling the rule of law requirement of basing a political system on the concept of sovereignty of the people. From this perspective, their constructions contradict these requirements. Besides, this should also be borne in mind. Legitimacy shaped in a similar way, unlike in a classical democratic state, does not legitimise all the key central authorities (in a parliamentary system, the parliament elects the government responsible for it and sometimes also the head of state, thus becoming a source of legitimacy for the state's governance mechanism), but legitimacy is limited to selected bodies (the European Parliament and the European Commission). With such limits, its scope of social authorisation is mainly due to the fact that the centre of gravity of power lies in large part on the side of bodies legitimised at the level of national political systems (the European Council, the Council, and the Court of Justice of the European Union), by no means corresponding to the concept of parliamentary democracy in the traditional edition. Thus, it is a generic legitimacy different from that we are familiar with in member states, which is clearly incompatible with the classically understood assumptions of the traditional rule of law.

■ *4.2. The legal status and political activity of the European Parliament in the structure of the EU authorities*

Under the conditions of a standard understanding of the rule of law, it is assumed that a democratically elected parliament is structurally and functionally related to legislative power, while its place in the system of the organisation of power is determined by the principle of tri-partition. This results in the separation of the three segments of power in the state system–legislative, executive, and judiciary–and connecting them–differently constructed in each case–by a mechanism of mutual dependence. In such a structure, authorities carry out the tasks and the competencies assigned to them by the system. By definition, they operate within the functional boundaries of each of the aforementioned segments so that the constitutional mission they carry out fits the logic of the Triad. However, this rule

21 Menon and Peet, 2010, p. 2.

does not always apply, and a body belonging to a given authority often has powers that go beyond the scope of its function. In addition to such bodies in a government system based on tri-partition, there are also bodies that do not qualify for any branch of government. The fact that they remain outside this structure is mostly because of the characteristics of the functions they perform (located at the interface of the activities of either of the authorities or located completely outside them). Obviously, in this regard is the assignment of the parliament. Wherever there is a tri-partition, this body, in terms of competence and organisation, is a member of the legislature.

However, this is certainly not the case in the European Parliament. The legal positioning of this institution presents itself in a completely different way and is unrelated to the concept of tri-partition. In seeking to regulate the organisational structure of the central authorities, the treaties introduced the principle of institutional balance, which positions the European Parliament in a way that is unknown to traditional parliamentary democracies. Nonetheless, this structure should be regarded as a substitute of the tri-partition.

It is worth recalling that the indicated principle has been accompanied by the development of community structures since the European integration in the 1950s. Having its source in judicial decisions, it became one of the key principles shaping the institutional order of the Union and thus determined the further direction of the legal and organisational competence transformations of this organisation. Its essence lies in the assumption that no EU institution can be assigned exclusive legislative or executive competencies and simultaneously the exercise of competencies by individual institutions must respect the competencies of other institutions and member states.[22] Thus, from the point of view of the functioning of the European Parliament, this means that, first, this body does not have purely legislative powers (its legislative power is severely curtailed), and second, it cannot implement practices that result in taking away prerogatives reserved for other bodies,[23] nor can it itself be deprived of these prerogatives.

As noted earlier, the principle in question does not follow the Montesquieu concept of the separation of powers between parliament, the head of state, and the courts, thus creating a fundamental construction different from that to which modern democracies are accustomed.[24] The solutions resulting from this assume that in the constitutional system of the EU, there are three separate authorities assigned to separate institutions: the legislative power is the Council and the Parliament, the executive power is the Commission (in the current process of political action) and the European Council (as an institution that takes action of a strategic nature), and the judicial power is the Court of Justice of the European Union.[25] At

22 Kowalik-Bańczyk, 2020, p. 418.
23 Ibid.
24 Dubowski, 2010, p. 137.
25 Poboży, 2015, p. 1.

the same time, they define a specific form of relation between these authorities, which, while giving individual institutions a strong position in the performance of their functions, abandons, especially in the area of action of legislative and executive powers, the establishment of effective mechanisms of inhibition and balancing of authorities. As Monika Poboży (2015) notes,

> In the EU system, these authorities are practically unconstrained. The braking and balancing mechanisms available in this regard are either few or politically ineffective. Thus, in the institutional system of the European Union, we are dealing with a strong executive power (only partially, with limited or little useful control), and a strong legislative power uncontrolled and unbalanced by the executive, and a very influential, legislatively active judiciary. Thus, in the institutional system of the EU, there are three separate, but arbitrary, because uncontrolled, and unbalanced authorities.[26]

With the above remarks in mind, however, it should be borne in mind that the lack of mechanisms typical of tri-partition does not mean that the Brussels bureaucracy acts in a completely arbitrary manner and that the process of exercising its treaty powers does not encounter any form of control. On the contrary, certain forms of control exist in this regard, which provides the possibility of blocking, to a certain extent, the extra-legal activity of EU institutions. One can speak here of the peculiar surrogates of the mechanism of inhibition and the balancing of powers. This type of control activity was mentioned by Moravcsik (2002). In other words, the author writes:

> (...) the EU's ability to act, even in those areas where it enjoys clear competence, is constrained by institutional checks and balances, notably the separation of powers, a multi-level structure of decision-making, and a plural executive. This makes arbitrary actions (indeed, any action) difficult and tends to empower veto groups that can capture a subset of national governments. Such institutional procedures are the conventional tool for protecting the interests of vital minorities – a design feature generally thought to be most appropriate to polities like the EU, which must accommodate heterogeneous cultural and substantive interests.[27]

These observations leave no doubt that the European Parliament functions outside of the scheme of the classically understood rule of law. Clearly, the creators of the

26 Poboży, 2015, p. 1.
27 Moravcsik, 2002, p. 609.

treaties rejected the patterns that existed in parliamentary democracy and broke with the concept of parliament as a legislative body that was generally accepted at the nation-state level. Their aim was to adopt solutions that arranged the Parliament's relations with other institutions in a different way and defined its systemic role differently. However, the new construction does not mean that the Parliament (as well as other central bodies) remains organised in contradiction to the idea of the rule of law, and the legal status given to it contradicts its basic assumptions. In the literature, the existence of this construction is treated as a form of compensation in the tri-partite relationship and serves as an argument in defence of the position that, under such conditions, despite the differences, the rule of law is preserved.[28] After all, as if not looking at it, there is a deconcentration of the power characteristic of the tri-partition, and mechanisms emerge to effectively stop the abuses associated with its exercise. The institutional system of the EU, although organised differently, is therefore not free from safeguards that flow from the concept of the rule of law.

■ *4.3. The competence creep as a part of the political activity of the European Parliament*

The basic assumption that flows from the principle of the rule of law is that public authorities are bound by the applicable law and that their activities are limited exclusively to the sphere of granted competencies. Under such conditions, the law becomes the only factor shaping the form of activity of the said entities, and it can only provide them with the necessary legitimacy. In the event of an action resulting in its violation, the body in question exposes itself to the charge of misappropriation of the rule of law.

It is beyond dispute that the primacy of law signalled here also applies to the European Parliament. Like any body of public authority, the European Parliament is obliged to comply with the law that binds it, including its obligation to comply with treaty norms that define its powers. In this respect, its legal position is no different from that of member states' national parliaments. Thus, one can confidently say exactly the same standard as the rule of law applies to parliamentarism at the EU and national levels.

Additionally, in political practice, the realisation of this momentous value of the European Parliament's respect for the rules of competence established by the treaties is sometimes very different. Numerous experiences clearly show that the Parliament happens to take actions that are not directly supported by treaty norms, or even those that are reserved exclusively for member states (among others, by taking resolutions which are out of the competence sphere of this institution). These situations arise in the exercise of various treaty prerogatives and have to do with the phenomenon, which has been occurring in the EU for years, of

28 Schweitzer and Hummer, 1996, p. 498.

the EU institutions "strutting" within the scope of authority granted to them. This phenomenon, which is well recognised but inconsistently defined by doctrine,[29] is referred to as competence creep. It covers several spheres of institutional activity in the EU and is shared by most organisations. European literature points to six basic forms of competence creep and thus exposes the scale of the problem. These include indirect legislation, negative integration through case law, international (trade) agreements, economic governance, soft laws, and parallel integration.[30]

The most characteristic and visible cases when the European Parliament acts in this way concern interference in the area of member states' authority. Such situations involve going beyond the scope of so-called "conferred competences" (competences that member states have voluntarily transferred to the Union and thus violating one of the key treaty principles of Article 4(2) TEU). The form of this type of extra treaty can vary, and its scope is determined by the political agenda of the institution in question. First and foremost, it is necessary to point here to activities related to the enactment of legal acts beyond the area of competence of the EU, the conclusion of international agreements (in all these procedures, the European Parliament participates under certain conditions together with other institutions), and the issuance of the so-called soft law (resolutions adopted on matters that do not fall within the competence of either the European Parliament or the EU in general).

It is worth noting that the competence creep of the European Parliament is relatively limited and certainly much less impressive than the activity of institutions in this area, such as the European Commission or the Court of Justice of the European Union. This does not change the fact that as a phenomenon taking place in the sphere of political reality and not in the sphere of legal regulations, it must be evaluated as controversial from the point of view of the idea of the rule of law. Neither the sometimes-accompanying difficulties in the decision-making process in interpreting flexible treaty norms (this flexibility is in many situations necessary to achieve the integration effect, aimed at the introduction of provisions relating to the various legal orders of individual states), nor the analogous tendencies observed in some democratic systems to unconstitutional expansion of their authority by the legislative bodies, are an explanation here. Generally, this should not occur in a regime subject to the rule of law.

5. Conclusion

It follows from the above analysis that the rule of law in force at the level of the EU, in the part in which it relates to the functioning of the Parliament's institutions, has clear original content, and the scope of the resulting standards differs

29 See Barnard, 2008, p. 267; Prechal, 2010, p. 5; Weatherill, 2004, p. 2.
30 Garben, 2019, p. 207.

from that found in parliamentary systems in traditional states. The reason for this is the peculiar path of development that the European Parliament has taken, transforming itself from a body typical of the assemblies of international organisations into a parliamentary body similar to the legislatures functioning in parliamentary democracies. This process meant that politicians deciding on their shape, inspired by the political system models found in nation-states, were forced to seek their own paths and solutions. This resulted in deviations from the rules of the parliamentary system and consequently led to autonomous features of the European rule of law.

In principle, we can distinguish a few of the most prominent features of parliamentarism in Europe.

The first involves shaping an entity that equips the European Parliament with democratic legitimacy. This subject is the multinational community of citizens of the Union who have the full right to participate in elections and elect their representatives. This solution, enforced by the multinationalism of the Old Continent, contradicts the classical principle of the nation's sovereignty, thus breaking certain patterns of thinking about parliamentarism. Here, we are undoubtedly dealing with new qualities in political construction.

The second feature is the positioning of the Parliament in a system of institutional balance rather than a tri-partite division of power. The Parliament here acts as a body exercising legislative powers to a limited extent and simultaneously remains limited by the sphere of competence of other EU institutions. Its actions are verified within the framework of a mechanism of bureaucratic and institutional control, which is different from the mechanism of balancing and inhibiting powers that operate under tri-partite conditions. This case clearly shows the extent to which the European legislature has departed from the fundamental assumptions of the parliamentary system.

Finally, the third feature is the tendency observed in the Parliament's actions to go beyond the scope of the powers granted to it in the process of exercising power, known as competence creep. This tendency manifests on several levels and strengthens the Parliament's constitutional position. However, this is not as strong as in the case of institutions such as the European Commission or the Court of Justice of the EU. This does not change the fact that from the perspective of the requirements of the rule of law, especially the requirement that public authorities be bound by law, it must appear controversial.

Bibliography

- Barnard, C. (2008) 'The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in Griller, S., Ziller, J. (eds.) *The Lisbon Treaty: EU, Constitutionalism without a Constitutional Treaty?* New York: Springer, pp. 257–283; https://doi.org/10.1007/978-3-211-09429-7_11.
- Dubowski, T. (2010) *Równowaga instytucjonalna w Unii Europejskiej – wybrane zagadnienia w świetle postanwień Traktatu z Lizbony*. Warsaw: Temida 2.
- Dziadzio, A. (2005) 'Koncepcja państwa prawa w XIX wieku – idea i rzeczywistość', *Czasopismo Historyczno-Prawne*, 17(1), pp. 177–201.
- Garben, S. (2019) 'Competence Creep Revisited', *Journal of Common Market Studies*, 57(2), pp. 205–222; https://doi.org/10.1111/jcms.12643.
- Grosse, T.G. (2008) 'Deficyt demokratyczny w Unii Europejskiej i metody jego przezwyciężania' in Kurczewska, U. (ed.) *Deficyt demokracji w Unii Europejskiej a europejskie grupy interesu*. Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, pp. 75–96.
- Grosse, T.G. (2017) 'Is Europe Moving Towards a Democratic Federation', *Yearbook of Polish European Studies*, 2017/20, pp. 11–30.
- Habermas, J.H. (1992) 'Citizenship and National Identity: Some Reflections on the Future of Europe', *Praxis International*, 12(1), pp. 1–19.
- Jacobs, F., Corbett, R., Shackleton, M. (1996) *Parlament Europejski*. Rzeszów: Wydaw. Wyższej Szkoły Pedagogicznej.
- Kowalik-Bańczyk, K. (2020) 'Instytucje Unii Europejskiej' in Biernat, S. (ed.) *System Prawa Unii Europejskiej. Podstawy i źródła prawa Unii Europejskiej*. Vol. I. Warsaw: Beck, p. 418.
- Lord, Ch. (2003) 'The European Parliament, Not a Very European Parliament?', *Politique Européenne*, 1(9), pp. 30–48; https://doi.org/10.3917/poeu.009.0030.
- Magen, A., Pech, L. (2018) 'The rule of law and the European Union' in May Ch., Winchester, A. (eds.) *Handbook on the Rule of Law*. Northhampton: Edward Elgar Publishing, pp. 235–256; https://doi.org/10.4337/9781786432445.00022.
- Majone, G. (1998) 'Europe's „Democratic Deficit": The Question of Standards', *European Law Journal*, 4(1), pp 5–28; https://doi.org/10.1111/1468-0386.00040.
- McCormick, J. (2020) *European Union Politics*. London: Palgrave Macmillan.
- Menon, A., Peet, J. (2010) *Beyond the European Parliament: Rethinking the EU's democratic legitimacy*, Center for European Essays [Online]. Available at: https://www.cer.eu/sites/default/files/publications/attachments/pdf/2011/essay_parliament_peet_menon_dec10-179.pdf (Accessed: 25 July 2023).
- Mizera, K. (2014) 'Deficyt demokratyczny w Unii Europejskiej', *Folia Iuridica Wratislaviensis,* 3/1, pp. 87–138.
- Moravcsik, A. (2002) 'In Defence of the Democratic Deficit': Reassessing Legitimacy in the European Union', *Journal of Common Market Studies*, 40(4), pp. 603–624; https://doi.org/10.1111/1468-5965.00390.

- Mrozowska, S. (2007) 'Konstytucja europejska wobec deficytu demokratycznego', *Środkowoeuropejskie Studia Polityczne*, 2007/2, pp. 155–164; https://doi.org/10.14746/ssp.2007.2.11.
- Pastuszko, G. (2019) *Zasada autonomii regulaminowej Sejmu, Senatu i Zgromadzenia Narodowego w polskim prawie parlamentarnym. Rozważania na tle Konstytucji RP z 2 kwietnia 1997 roku*. Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego.
- Pelc, R. (2000) 'Obywatelstwo Unii Europejskiej a obywatelstwo państw członkowskich i państw trzecich' in Biernat, S. (ed.) *Studia z prawa europejskiego w piątą rocznicę utworzenia Katedry Prawa Europejskiego UJ*. Cracow: Wydawnictwo Uniwersytetu Jagiellońskiego, p. 77.
- Poboży, M. (2015) 'Ustrój instytucjonalny Unii Europejskiej w czasach kryzysu – horyzontalny podział władzy i funkcji', *Przegląd Europejski*, 2015/4, pp. 54–66.
- Potorski, R. (2011) 'Zjawisko deficytu demokratyczności w Unii Europejskiej a reformy Traktatu z Lizbony', *Historia i Polityka*, 5(12), pp. 140–155; https://doi.org/10.12775/HiP.2011.010.
- Prechal, S. (2010) 'Competence Creep and General Principles of Law', *Review of European and Administrative Law*, 3(1), pp. 5–22; https://doi.org/10.7590/REAL_2010_01_02.
- Schiatti, E. (2016) *The democratic legitimacy of the European Parliament Citizens' representation within an ever closer Union*, Strasbourg: Global Campus Europe [Online]. Available at: https://repository.gchumanrights.org/server/api/core/bitstreams/e891400a-9526-4885-b6b9-9888cdbeb321/content. (Accessed: 25 July 2023).
- Schweitzer, M., Hummer, W. (1996) *Europarecht*. Neuwied: C. F. Muller.
- Siedentop, L. (2000) *Democracy in Europe*. London: Penguin.
- Tuleja, P. (2003) *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy)*. Cracow: Wydawnictwo Uniwersytetu Jagiellońskiego.
- Weatherill, S. (2004) 'Competence Creep and Competence Control', *Yearbook of European Law*, 23(1), pp. 1–55; https://doi.org/10.1093/yel/23.1.1.
- Zielonka, J. (2000) 'Enlargement and the Finality of European Integration, Harvard Jean Monnet Working Paper (Symposium)', *Contribution to the Jean Monnet Working Paper. Symposium: Responses to Joschka Fischer*, 2000/7 [Online]. Available at: https://jeanmonnetprogram.org/archive/papers/00/00f0801.html (Accessed: 25 July 2023).

VLADAN PETROV*

Judicial Reform in Serbia in Light of "the Venetian Concept" of the Rule of Law

ABSTRACT: *This paper analyses the influence of the standards of the Venice Commission in the area of the rule of law in the course of Serbian judicial reforms. The author first "sketches" the constitutional "path" of the idea of judicial independence and the rule of law in Serbia. He derives an "extract" from the "jurisprudence" of the Venice Commission in the area of the rule of law, which refers to the standards of an independent judiciary summarised in a document called the Rule of Law Checklist. The normative framework, which has been set by the constitutional amendments from 2022 and judicial laws from 2023, is a positive step on the way to building a national rule of law that will be compatible with international standards. In the coming period, Serbia will face numerous external and internal challenges. The Commission points to the relatively weak material position of judges, the lack of interest of young lawyers in applying for judicial positions, the large gap between retiring judges and young people. The Commission particularly emphasises the importance of building a legal culture. The author considers that segment essential for the success of the process that has begun.*

The author underlines that the international standards of the rule of law must not have absolute supremacy vis-à-vis the real needs of their adaptation to the national political, legal and social environment of the country in question. It is necessary to strive for a dynamic balance that will, in the long term, provide the conditions for the rule of law of national content that confirms the generally accepted civilisational values and achievements of the international legal community. Every step in that process must be carefully thought out and undertaken.

KEYWORDS: judicial independence, rule of law, Venice Commission, judicial council, prominent lawyers, legal culture

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1. Introduction: Traces of judicial independence in Serbian constitutional history and a recent failed attempt at judicial reforms

If we ignore the "traces" of the independence of the judiciary from Serbia's medieval past that can be found in Dušan's Code from 1349 and 1354, the principle is first clearly mentioned in the Sretenje Constitution from 1835, the first modern Serbian Constitution. It stated that the judge does not depend on anyone in Serbia in pronouncing his judgement, except the Serbian code of law, and that no major or minor authority has the right to dissuade him from doing so or to command him to judge differently than the laws prescribe. A classic determination of the independence of the judiciary in the constitutional monarchy contained the Constitution of the Kingdom of Serbia from 1888 (Article 147): 'Courts are independent. In the administration of justice, they do not stand under any authority, but judge and decide only according to the law. No state power, neither legislative nor administrative, can exercise judicial functions; courts cannot exercise legislative or administrative power, either. Justice is pronounced in the name of the King.' It is rightly said that

> ... with the Constitutions of 1888 and 1903, Serbia unexpectedly soared above the highest European models, adopting, in addition to the usual corpus of guarantees of functional and personal independence, solutions regarding the manner of acquiring and terminating judicial office, which in Western Europe they begin to spread after the Second World War, and are found in the East only after the fall of the Berlin Wall.[1]

In truth, the gap between what was proclaimed and what was real was huge.

> Nevertheless, when presenting such *grosso modo* high evaluations of the guarantees of judicial independence in the Constitutions of the Principality and the Kingdom of Serbia, one should not lose sight of the fact that judicial independence is measured not by the scope and content of formal guarantees, but by the degree its implementation in practice. Constitutional guarantees are a necessary step in that direction (at least when it comes to continental European experience), but certainly not sufficient. For its realisation, favourable political and social conditions are needed, and above all, a developed social awareness of judges about their duties towards the state and society, as well as their ever-vigilant conscience. In accordance with that, just

1 Marinković, 2009, p. 161.

> as the Constitutions of nineteenth-century Serbia were houses made of sand that were blown down by the first strong political wind, so the judicial independence was relatively solid on paper, but extremely fragile in real life.[2]

The first Yugoslav Constitution, the Vidovdan Constitution of 1921, also contained strong formal guarantees of judicial independence. Although judges were appointed by the King, they held office until they reached the age of retirement. Before that, a judge could only be dismissed by written request or when he became physically or mentally so weak that he could not perform his duty, which was decided by the Court of Cassation. Unlike the principle of the independence of the judiciary, which had its formal foundation in the old Serbian Constitutions and in the first Constitution of the Kingdom of Yugoslavia, the concept of the rule of law in the modern sense is linked to the recent constitutional history of Serbia and the Constitution of Serbia from 1990. It was the first constitutional act of Serbia that unequivocally proclaimed the rule of law. In the same year, the Venice Commission was founded with a primary task to help former real socialist countries bring in new constitutions that were to rest on three "pillars" – the rule of law, democracy, and human rights.

The Constitution of Serbia of September 28, 1990 was adopted by the socialist, one-party Assembly, when the Socialist Federal Republic of Yugoslavia was already on the verge of disintegration. This Constitution defined Serbia in a modern way. According to Article 1, Serbia was

> a (1) democratic, (2) civil state („of all citizens who live in it') (3) based on the rule of law (4) and social justice. Article 9 of the Constitution proclaimed the division of power into legislative, executive and judicial powers. „Constitutional and legislative power belongs to the National Assembly'. – The Republic of Serbia is represented and its national unity is expressed by the President of the Republic. – Executive power belongs to the Government. – Judicial power belongs to the courts. – The protection of constitutionality, as well as the protection of legality in accordance with the Constitution, belongs to the Constitutional Court.

Therefore, according to the Constitution, Serbia became a parliamentary democracy. The Constitution opted for the concept of civil sovereignty. The catalogue of human rights included internationally recognised standard personal and political rights, and basic economic and social rights. The Constitution proclaimed a free economy. Article 95 proclaimed the independence and autonomy of the judiciary.

2 Marinković, 2009, pp. 161–162.

The Constitution defined the role of the courts in a material sense: 'Courts protect the freedoms and rights of citizens, the rights and interests of legal entities established by law and ensure constitutionality and legality.' It proclaimed the permanence of the judge's office. Judges were elected by the National Assembly. The 1990 Constitution transferred the Constitutional Court from the system of unity of power, to which it did not naturally belong, to the system of separation of powers. Constitutional judges were elected to a permanent position.

The 1990 Constitution, for all 16 years of its validity, was condemned as a "chimera." There were no conditions for political pluralism that would eventually create a stable political system. The standard of living was low because of internal (unsuccessful property transformation and the absence of a real free market for goods, labour, and capital) and external factors (economic and political international sanctions, and NATO aggression on FRY in 1999). The judiciary and constitutional judiciary were burdened by the real socialist legacy. Consequently, rudimentary democratic forms (multi-party system and elections) without substance were developed. There were certainly no socioeconomic and political conditions for the establishment of the independent judiciary. Therefore, the rule of law remained an abstract concept without any real basis. The expression 'the rule of law' was used very often in public discourse, but its true meaning had not penetrated the consciousness of politicians, judges, and other legal practitioners.

The Constitution of Serbia from 2006 was adopted under duress,[3] without any serious public discussion and without consulting the Venice Commission (although cooperation with this body formally began in 2001).[4] The Constitution from 2006 can be roughly described as a "corrected" one from 1990 – partly for the better, and much more for the worse. This particularly applies to the provisions on the judiciary. Although a formally independent body – the High Judicial Council (the HJC) – was established, the National Assembly continued to elect judges; these judges were being elected to office for the first time. The permanence of the judge's function was curtailed by "the probationary mandate" of judges who were elected for the first time for a period of three years, but also by the deconstitutionalisation of the grounds and reasons for the termination of judicial office – instead of being in the Constitution, they were found in the law on judges. Therefore, the constitutional guarantees of judicial independence was significantly weakened compared to the previous Constitution. Judicial reforms that took place in 2008-2010 was a logical consequence of bad constitutional solutions. Until then, Serbia had not known such a "reform" of the judiciary, with such disastrous consequences, although some sporadic "reforms" that had often included the removal

3 Montenegro had previously decided to withdraw from the state union in a referendum in May 2006.

4 On the beginning of the cooperation of Serbia with the Venice Commission, see Petrov and Prelić, 2020, pp. 548–553.

of politically unsuitable judges had also occurred during the period of validity of the Constitution from 1990.

In the process, all the highest state organs – the Ministry of Justice and Government, HJC, National Assembly, President of the Republic, and Constitutional Court participated. The process, called the general re-election of judges, was *de facto* the lustration of judges, that is, the unconstitutional political 'cleansing' of the judiciary.[5] The result was a "disoriented" judiciary with most judges being convinced that the permanence of the judicial function as a constitutional principle in Serbia meant nothing. In the Serbia Progress Report for 2010, the European Commission stated:

> Serbia made little progress towards further bringing its judicial system into line with European standards, which is a key priority of the European Partnership... The reappointment procedure for judges and prosecutors was carried out in a non-transparent way, putting at risk the principle of the independence of the judiciary. The bodies responsible for this exercise, the High Judicial Council and the State Prosecutorial Council, acted in a transitory composition, which neglected adequate representation of the profession and created a high risk of political influence ... There are serious concerns over the way recent reforms were implemented, in particular the reappointment of judges and prosecutors.[6]

An urgent reaction of the Serbian authorities followed in the form of a change in the law on judges. The main change was the conversion of appeals submitted by unappointed judges to the Constitutional Court (837 in all) into objections that were to be decided upon by the HJC, a body that had, at the first instance, decided on the re(appointment) of judges. In May 2012, the HJC concluded the review of objections and 837 constitutional appeals to the Constitutional Court were filed against its decision. At the time, presidential and parliamentary elections were held, which led to the removal of political stakeholders who were responsible for the unprecedented unconstitutional reform of the judiciary. The Serbian Progressive Party, SNS, came to power in a coalition with the Socialists. Until October 2012, the Constitutional Court approved all appeals of the judges who were not re-appointed. Based on the decisions of the Constitutional Court (CC) that found procedural shortcomings vis-à-vis the HJC decision, all judges whose appointments had ceased were returned to function.[7] The "benefit" of the disastrous judicial reform was reflected in the fact that Serbia's European path was most strictly

5 Petrov, 2015, p. 5.

6 European Commission, 2010, pp. 10–11.

7 On the general reappointment procedure of the judges and its consequences, see Petrov, 2015, pp. 5–10.

linked to the complete depoliticisation of the judiciary. On the way to achieving that goal, the first step was the implementation of constitutional reforms in the judiciary. Active cooperation with the Venice Commission (VC) became a *conditio sine qua non* for the success of the judicial reforms.

2. The independence of the judiciary in the VC Rule of Law Checklist

Rule of Law Checklist[8] can be freely called an "identity card" and constitutional document of the VC in the sphere of the rule of law. This document represents a synthesis of the multi-decade contribution of the Commission to the definition and implementation of the modern concept of the rule of law.[9] According to the VC, "the benchmarks" of the rule of law are: Legality; Legal certainty; The prevention of abuse (misuse) of powers; Equality before law and non-discrimination; and Access to justice. In this paper, access to justice, especially its first component – independence and impartiality of the judiciary, will be analysed in detail. Access to justice comprises three core elements: independence and impartiality (of judiciary and judges); fair trial; and constitutional justice (if applicable).[10]

All terms in the Checklist are defined through a set of questions. After the questions, the key elements of the defined principle are explained in brief. The Commission defines the independence of the judiciary in a classic manner as "free form external pressure," and 'not subject to political influence or manipulation, in particular by the executive branch.'[11] One of "the pillars" of the independence of judiciary is definitely the permanence of judicial tenure, because 'limited or renewable terms in office may make judges dependent on the authority which appointed them or has the power to re-appoint them.'[12] The second "pillar" is the discplinary responsibility of judges, which means that 'offences leading to discplinary sanctions and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s).' The third "pillar" is an appropriate method of selecting judges. The VC recommends "an independent judicial council" with

8 VC, 2016.

9 In the Introductive part of the document, the Commission explains the purpose and scope of the report. After that, it developes the interrelations between the rule of law, on the one side, and democracy and human rights, on the other side. The second part concerns the "benchmark" of the rule of law, that is, various aspects of the rule of law. The third part of the Checklist disuces the standards, i.e. the most important instruments of hard and soft law addressing the concept of the rule of law.

10 Fair trials need a separate discussion. Constitutional justice is not analyzed in this paper because it is not a part of the judiciary in the Republic of Serbia even though the VC in its 2021 Opinion on Draft Constitutional Amendments gave some recommendations about the election of constitutional judges in the National Assembly.

11 VC, 2016, p. 20.

12 VC, 2016, p. 21.

'decisive influence on decisions on the appointment and career of judges.' The standard in terms of the composition of this body is. '...a pluralistic composition with a substantial part, if not the majority, of members being judges.' The goal is to find "an appropriate balance" between judges and lay members, because 'both politicisation and corporatism must be avoided.' The fourth "pillar" is the integrity and the efficency of judiciary, which can not be realised without sufficient resources, that is financial authonomy (relative authonomy of the judiciary's budget, fair and sufficient salaries...).[13] Citing the relevant practice of the ECHR, the VC points to another important aspect, which is the impression on the public that the judiciary is independent and impartial.[14] That may be the crucial element of the legal culture facilitated by the rule of law. Without it, the independence of the judiciary and the rule of law exist only on paper and are not binding.

The independence of individual judges represents 'the other side of the same coin.' The most important element is appealing against a judgement before a higher court as 'the only mode of review by judges while applying the law.' There must not be any supervision by their colleague-judges, court presidents, or the executive. In order to ensure that it is important to answer adequately to related questions as following: constitutionaly quaranteed the right to a competent judge; the competence of court clearly defined by the law; the objective and transparent allocation of cases.[15]

Although impartiality can hardly be separated from independence, the VC talks about objective (judiciary) and subjective (judges) impartiality by relating it to the public perception of impartiality (see above) and corruption, as well as other specific measures against it in the judiciary.[16] The VC emphasises the autonomy of public prosecution as one of the "cornerstones" of the access to justice. There are two important qualitative differences between the judiciary and public prosecution: The first refers to independence, which does not feature for the prosecution. The VC demands "sufficient autonomy" to 'shield prosecutorial authorities from undue political influence.' The prosecutorial office must act based on and in accordance with the law. However, it does not mean independence. The second difference is that 'there is no common standard on the organisation of the prosecution service.' This is especially true for the mode of appointment of public prosecutors and the internal organisation of public prosecution. The public prosecution office is organised on the principle of hierarchy, which, however, is not strict. It means that 'prosecutors must not be submitted to strict hierarchical instructions without any discretion and should be in a position not to apply instructions contradicting the law.'[17]

13 VC, 2016, pp. 21–22.
14 VC, 2016, p. 23.
15 VC, 2016, p. 22.
16 VC, 2016, pp. 22–23.
17 VC, 2016, pp. 23–24.

In conclusion, the Rule of Law Checklist provides a comprehensive definition of the rule of law today. However, it lacks a pure and prevailing academic and doctrinal character. It is not the way the Commission thinks and functions. The Checklist, available to all stakeholders – international organisations, national authorities, and civil society, is constantly evolving.[18] Therefore, monitoring defined standards in the practice of national states is the primary task of the Commission, as demonstrated by the example of Serbian constitutional reforms in the judiciary.

3. Judicial reforms in Serbia in the VC "mirror"

■ *3.1. Serbia "on the Rialto Bridge"*

From St. Mark's Square (Piazza San Marco), the most popular tourist location in Venice, to the Scuola Grande San Giovanni Evangelista, where the sessions of the VC take place, you have to cross the famous Rialto Bridge (Ponte di Rialto). Serbia somehow got lost in the "Venetian labyrinths." It took her almost two decades – from establishing formal cooperation with VC in 2003 – to "find" and finally "cross" the Rialto bridge. Until 2021, when it became certain that the change of the Constitution in the part on the judiciary would be carried out to the end (with the potentially always uncertain outcome of the constitutional referendum), the influence of the VC was very limited. The VC first addressed provisions concerning judiciary in its Opinion on a draft of the Constitution of Serbia in 2005. The Commission expressed concerns regarding the initial election of judges for five years (probationary mandate of judges), and the controversial election of judges and court presidents by the National Assembly.[19]

The main objection in the Opinion on the Constitution of Serbia from 2006[20] concerned the potential politicisation of the judiciary owing to the significant competences of the Parliament. The VC expressed dissatisfaction with the fact that the Assembly plays a dual role in electing judges – it elects members of the HJC and judges for permanent office. The next important document for the Commission was the Analysis of the Constitutional Framework for the Judiciary in the Republic of Serbia, which it adopted as part of the National Strategy of Judicial Reform in 2014.[21] The document corresponded to the VC standards, codified in its reports on the judiciary and public prosecution adopted a few years earlier.[22] Although the

18 See Suchocka, 2020, pp. 641–652.
19 See Petrov and Prelić, 2020, pp. 550–553.
20 VC, 2007.
21 Petrov et al., 2014.
22 VC CDL-JD(2007)001rev, VC CDL-AD(2010)004 etc.

VC never made an official statement on this document, it was highly rated in the Commission.[23]

The work on changing the Constitution in the judiciary continued during 2018, when the Ministry of Justice prepared the Draft Act on the Amendment of the Constitution in the part on the judiciary and sent it to the VC. The Opinion was adopted in June 2018.[24] The Commission made numerous recommendations to improve the proposed solutions. The Ministry of Justice acted on some of them. However, the new version of the text did not satisfy leading non-governmental organisations (for example, the Association of Judges of Serbia). The draft was sent to the Commission for evaluation. On 22 October 2018, the Commission published the Memorandum of the Secretariat on the Compatibility of the Draft Amendments to the Constitutional Provisions on the Judiciary.[25] The changes in the final draft followed recommendations formulated by the Commission in its opinion. The Government of Serbia submitted a proposal to amend the Constitution to the Parliament. However, until the end of the mandate of that parliamentary convocation, the proposal was not considered. Thus, the attempt to change the Constitution failed.

The Government submitted the same proposal again in December 2020. In April 2021, the Parliamentary Committee for Constitutional Issues and Legislation (Committee) adopted a decision on the initiation of activities to amend the Constitution. Seven public hearings were organised on the proposal to amend the Constitution, to which the Committee invited representatives of the profession, scientists, professors, civil society, and other interested subjects. At the beginning of June 2023, the Assembly adopted a proposal to amend the Constitution. The Committee formed a Working Group to draft the act on amending the Constitution. It predominantly comprised representatives of the profession (main professional associations) and academia (professors of law, research associates), in which there were only two professional politicians (the President of the Committee and Deputy Secretary of the National Assembly). The Working Group adopted the Draft Act on the Amendment of the Constitution at the beginning of September 2021. A second round of public hearings was also held in September. The public discussion was organised so that everyone's voice could be heard and taken into account.[26] Even before the draft of the constitutional amendments was sent to the VC for its opinion, it was certain that the standards of this body regarding the revision procedure were met to the greatest extent. The procedure was transparent and inclusive, and 'the

23 The author of this text was convinced of this when he was in the VC for the first time as a member of the Commission for Serbia in July 2021.

24 VC, 2018.

25 VC Secretariat, 2018.

26 At the last public hearing on 17 September in the National Assembly of the Republic of Serbia, representatives of CEPRIS participated and presented their "alternative" model of constitutional amendments.

widest consensus possible within society' was reached around the text of the constitutional amendments.[27] The text determined by the Committee was submitted to the Commission for its opinion, so that it could be adopted at the plenary session in October.[28] The Commission was an active consultant in the process of changing the Constitution, while drafting constitutional amendments and preparing the opinion for the plenary session,[29] and after the adoption of the opinion, when the Committee followed a number of key recommendations from the opinion.[30]

In the course of amending the Constitution in 2021, two standards were reached, and it was established that no deviation from them would be permitted in future revisions of the Constitution. The first is a public hearing that included a wide range of interested subjects and the formation of a representative working group for the drafting of constitutional amendments. The second is a qualitative shift in cooperation with the VC. In 2021, Serbia definitely "crossed the Rialto Bridge". The constitutional change in the judiciary, in the part that is of the greatest importance for the rule of law, almost unthinkable a few years earlier, was carried out procedurally in such a way that, from the point of view of the standards of the VC, no serious objection could be found to it.[31]

Complaints, predominantly politically coloured, came, as is usually the case, from within – specifically, from the non-parliamentary opposition, which had previously refused to participate in the process on several occasions,[32] and from certain non-governmental organisations (CEPRIS), which from the beginning had objections to the procedure and content of most new constitutional solutions.[33] Nevertheless, the key political figures, President of the Republic Aleksandar Vučić and President of the Assembly Ivica Dačić, supported the constitutional

27 See on standards of the VC concerning constitutional provisions for amending the constitution, VC, 2023.

28 VC CDL-AD(2021)032.

29 On 28 and 29 September 2021, online meetings of the rapporteurs of the VC were held with all relevant stakeholders in the process of changing the Constitution.

30 See VC CDL-AD(2021)048.

31 'The Commission considered the process of public consultations for the draft amendments as being sufficiently inclusive and transparent; it stressed nonetheless that in the context of the current Serbian political landscape it is important for the Serbian authorities to actively seek the participation and involvement of the opposition. In this context it should be noted that the Venice Commission is pleased to learn from Mr Dačić, Speaker of the National Assembly, that a meeting with numerous representatives of the non-parliamentary opposition took place on 22 October 2021.' VC CDL-AD(2021)048, p. 4.

32 The VC stated that the institutional framework for changing the Constitution was provided by a politically monolithic assembly and that until the end of the process, it is necessary to actively seek the participation and inclusion of the opposition to achieve the widest possible legitimacy for constitutional reforms. Critics of the change in the Constitution took these words out of context, mostly, not stating that the Commission demands the opposition's responsibility and participation in the process. See VC, CDL-AD(2021)032, p. 5.

33 The representatives of various opposition currents generally agreed on two things – that this is not the moment to change the Constitution and that the referendum is only a 'testing ground' for measuring forces before the general elections in April 2022.

amendments and contributed to their approval by the citizens in a referendum dated 16 January 2022 after their adoption by the National Assembly on 30 November 2021. The revision of the Constitution, the first since its entry into force and in general in the modern constitutional history of Serbia (as the Constitution had never been revised since 1990), was proclaimed on February 9, 2022.

■ *3.2. Serbian judicial reforms: "Year zero"*

After the adoption of the constitutional amendments, judicial laws were adopted a year later (February 2023). In the main contours, the normative framework was established. The normative framework is a necessary but not sufficient condition for the success of judicial reforms. Its operationalisation is another condition and will take place in two directions. The first is the adoption of by-laws and general acts.[34] The second is the constitution of new bodies, namely the HJC and High Prosecutorial Council (HPC), which happened at the beginning of May 2023.

The constitutional amendments from 2022 completely replaced the part of the Constitution from 2006 concerning the judiciary. They seek to find a balance between political and judicial authorities. It concerns the old aspiration to find a balance between partocracy and sudocracy, without damaging the system of constitutional democracy. Politics is withdrawn from the election of judges. However, the withdrawal is not absolute as judges judge operate in the name of the people, and every power, including the judiciary, has its source in the people. Every power is also political. The judiciary is, however, special, because it is or should be least political. It, however, does not mean that its performance does not entail responsibility, even if indirect, before society and citizens. This is the reason why the formulation of the relationship between the three branches of power remained: 'The relationship between the three branches of power is based on mutual checks and balances' (marked by *V.P.*).[35] Therefore, the judiciary, which is independent,[36] cannot entirely spring from or respond to itself. Absolute independence, without mechanisms of mutual influence negates responsibility. A constitutional democracy is unthinkable without a clearly established and constitutionally achievable principle of responsibility. These were the reasons presented by the VC when it positively assessed a similar constitutional solution back in 2018.[37]

The constitutional amendments determined that judicial power belongs to independent courts.[38] The establishment, abolition, types, jurisdiction, areas of functioning, headquarters, and composition of and proceedings before courts are regulated by law. The establishment of immediate, temporary, and extraordinary

34 For example, court rules of procedure, rules of procedure for the work of the HJC and the HPC, etc.

35 Amendment I to the Constitution of Serbia ('Official Gazette of the RS', No. 16/2022).

36 Amendment I to the Constitution of Serbia.

37 See VC, 2018, pp. 4–5.

38 Amendment IV to the Constitution of Serbia.

courts is prohibited. The highest court in the Republic of Serbia is the Supreme Court (SC).[39] Therefore, the constitutional amendments respect the rule according to which judicial organisational law is a legal and not constitutional matter. An exception to this rule refers to the constitutional provisions on the election and mandate of the presidents of the SC and courts. The conditions for the selection of judges and the selection and mandate of lay judges are regulated by law.[40] By leaving the legislature to fully regulate judicial organisational law, two purposes were achieved: relief for the Constitution from a matter that is not *materia constitutionis*,[41] and the constitutional identification of issues that must be regulated by the Constitution, which raised the dignity of the judiciary to the appropriate level. The independence of the judiciary is an explicitly proclaimed constitutional principle. 'Judicial power belongs to courts that are independent.'[42] The previous wording, according to which the courts are autonomous and independent, has been abandoned.[43] Independence is a higher quality than autonomy. A state body can be autonomous, but not independent, which, in a certain sense, is still the case with the public prosecutor's office. The reverse, however, is not possible.

The personal independence of judges is defined thus: 'A judge is independent and judges on the basis of the Constitution, confirmed international treaties, laws, generally accepted rules of international law and other general acts adopted in accordance with the law.' Any undue influence on a judge in the performance of his judicial function is prohibited.'[44] Somewhat new formulations of this principle achieved a double benefit. First, all sources of law that a judge is obliged to interpret and apply while performing judicial functions are consistently listed. Judges in Serbia are no longer unfamiliar with the ECHR and refer to it more frequently in their court decisions. However, the direct application of the Constitution remains an abstract category that is considered the *domaine réservé* of the CC. Second, it is important that the term 'improper influence on the judge' remained, because not every influence is inappropriate and thus prohibited. There are influences on the judge that are not only permissible, but also legitimate. For example, the influence of a university professor's lecture or a judge's presentation at an expert meeting, and a scientific article or an opinion expressed in a professional journal on an issue of importance for making a specific court decision, among others, is allowed, and even desirable.

39 Amendment V to the Constitution of Serbia.

40 Amendment VII to the Constitution of Serbia.

41 Although not completely successful, the situation is better than it was in the original text of the 2006 Constitution.

42 Amendment IV to the Constitution of Serbia.

43 This wording is also credited to the informal communication conducted during the preparation of the draft of the Act amending the Constitution with the director of the Venice Commission Simona Granatha Menghini and the rapporteurs who wrote the opinion on the constitutional amendments.

44 Amendment VI to the Constitution of Serbia ('Official Gazette of the RS', No. 16/2022).

The amendments define the binding nature of court decisions so that 'a court decision can only be reviewed by a competent court in a procedure prescribed by law, and by the CC in a procedure based on a constitutional appeal.'[45] Therefore, no body other than the competent court can review the legality of the court decision. The CC does not examine the legality of the court decision in the procedure of the constitutional appeal, but whether or not the disputed decision violated the human right guaranteed by the constitution. Therefore, this supervision of the CC over the court's decision cannot be considered a deviation from the principle of the obligation of court decisions. This new wording, where the CC is expressly authorised to review court decisions, will not be approved by the judges of ordinary courts who believe that the CC is not a court and that any intervention by it in a court decision can be considered an attack on the independence of the judiciary. This is a constitutional solution that was welcomed by the VC in its opinion from 2018.

Another constitutional principle on the judiciary has been corrected so that it can no longer be questioned. It concerns the permanence of the judicial tenure: 'The judicial office shall be permanent.'[46] It shall last from the election of a judge until the judge reaches the retirement age. The probationary mandate of those elected to the position of judge for the first time is excluded, which is also in line with the long-expressed views of the VC.[47] The grounds for the termination of a judicial office before the end of the working life are determined in the Constitution, as mentioned in the 1990 Constitution. The permanent tenure of a judge will be terminated only in case of (a) retirement, (b) a personal request by the judge, (c) permanent loss of ability to exercise the judicial function, (d) loss of Serbian citizenship, and (e) dismissal in case of a criminal conviction to at least six months imprisonment or a disciplinary sanction, if the HJC considers the disciplinary offence seriously damaging to the reputation of judicial office or public confidence in the judiciary. The return of the permanence of the judicial office as an absolute constitutional principle and the constitutionalisation of the grounds for termination of the judicial office is the first systemic change in the judiciary made by the amendments in 2022.

A component of the permanency of the judicial function is the immovability of the judge, which implies that the judge performs the judicial function in the court to which he was elected. Only with his consent can he/she be permanently transferred or temporarily referred to another court. The Constitution foresees cases where transfer or referral is allowed without the consent of the judge, which is in line with the position of the VC.[48] First, in case of the dissolution of a court,

45 Amendment IV to the Constitution of Serbia ('Official Gazette of the RS', No. 16/2022).
46 Amendment VIII to the Constitution of Serbia ('Official Gazette of RS', No. 16/2022).
47 See on probationary mandate of judges, VC CDL(2010)006 *, p. 9.
48 'Though the non-consensual transfer of judges to another court may in some cases be lawfully applied as a sanction, it can also be used as a kind of a politically motivated tool under the disguise of a sanction. Such transfer is justified in principle in cases of legitimate institutional reorganisation.' VC, 2016, p. 35.

the judge is transferred to the court that takes over the jurisdiction of the dissolved court. Second, in the event of the abolition of the majority of the court's jurisdiction, the judge may exceptionally, without his consent, be permanently transferred or temporarily sent to another court of the same level that has taken over the majority of the jurisdiction. A judge can appeal to the CC against a decision on permanent transfer or temporary assignment, made by the HJC, and it excludes the right to a constitutional appeal.[49] The second systemic change in the constitutional amendments is the method of electing judges. According to the original text of the Constitution, those who were first elected to the position of judge for a period of three years were elected by the National Assembly on the proposal of the HJC. Judges for permanent positions were elected by the HJC. According to the 2022 Constitution, judges are elected to a permanent position by the HJC.[50] Not only were the representatives of the executive and legislative authorities excluded from the composition, but the HJC, at least on paper, has become a constitutionally potent body. This is the third systemic change, without which the second one, on the method of selecting judges, would have been merely cosmetic.

'The High Council of the Judiciary is an independent state body that ensures and guarantees the independence of courts, judges, presidents of courts, and lay judges.'[51] The HJC does not have judicial power. It does not handle judicial self-government either, because it neither exclusively comprises judges, nor are all its members elected by judges. The affairs of the judicial administration are divided between that body and the Ministry of Justice. The HJC belongs to a category of independent state bodies. This fulfils another standard of the VC – the independence of the body responsible for the status of judges and related issues. The powers of the HJC are not exclusively constitutional in nature. In principle, the competences related to deciding on the positions of judges, presidents of courts, and lay judges are specified in the Constitution [52] Other competences of the HJC are prescribed by the law.[53]

49 Amendment IX to the Constitution of Serbia.

50 Amendments VIII, XII to the Constitution of Serbia.

51 Amendment XII to the Constitution of Serbia.

52 Amendment XII to the Constitution of Serbia. 'The High Council of the Judiciary elects judges and lay judges and decides on the termination of judicial office, elects the president of the Supreme Court and the presidents of other courts and decides on upon the termination of their office, decides on the transfer and assignment of judges, determines the required number of judges and lay judges, decides on other issues of the position of judges, presidents of courts and lay judges and exercises other competences determined by the Constitution and the law.'

53 The Law on HJC from 2023 lists 29 competences of the Council, including those prescribed by the Constitution, and leaves room for the law to determine other competencies and tasks of this body (Art. 17 of the Law on HJC).

The HJC has 11 members: 6 judges elected by judges, 4 prominent lawyers elected by the National Assembly, and the President of the SC.[54] The Constitution leaves to the law the regulation of the method of selection of HJC members from the ranks of judges, but mandates that during their election to the HJC, the broadest representation of judges is taken into account. Any judge can be a candidate for a member of the HJC from among the existing judges. The President and acting President of the court cannot be candidates for members of the HJC.

Members of the HJC from among prominent lawyers are elected by the National Assembly from among eight candidates proposed by a competent committee, after a public competition, with the votes of two-thirds of all deputies, in accordance with the law. The goal of such a solution is to at least partially maintain a connection with the Assembly, which embodies popular sovereignty, but to prevent the politicisation of the election of these members and ensure their maximum independence and impartiality. The term prominent lawyer is a legal standard, which means that its content is determined in each case. The Constitution adds that a prominent lawyer must have at least 10 years of experience in the legal profession, must be worthy of that position, and cannot be a member of a political party. The Constitution provides that 'other conditions for election and incompatibility with the function of a member of the High Council of the Judiciary elected by the National Assembly shall be regulated by law.'[55]

The standard of the VC on the balanced composition of the judicial council, which will not comprise judges alone, but in which 'judges and lawyers and the public will be adequately represented,'[56] is completely fulfilled. In theory, it is difficult to seriously object to a judicial council constituted this way. In practice, as we will show below, this concept has not been fully understood and, in the short term, does not remove all dangers from judicialisation and politicisation.

If the National Assembly does not elect all four members within the deadline specified by law, after the expiry of the deadline specified by law, the "anti-deadlock mechanism" of the election will be applied, where the remaining members will be selected by the Commission from among all other candidates who meet the conditions for election. That Commission comprises the Presidents of the National Assembly, CC, and SC, the Supreme Public Prosecutor, and the Protector of Citizens (Ombudsman), by majority vote. The anti-deadlock mechanism does not represent the defined standard of the VC, because there is no mention of it in the earlier reference documents and in the Checklist of the Rule of Law. Nevertheless, the Commission insisted on this mechanism, bearing in mind a qualified majority for the election of prominent lawyers in the Assembly, which, on regular occasions, in a pluralist Parliament, is extremely difficult to achieve without making a

54 Amendment XIII to the Constitution of Serbia.
55 Amendment XIII to the Constitution of Serbia and the Art. 44 of the Law on the HJC.
56 VC, 2016, pp. 34, 36.

compromise. If that compromise, which would imply that the elected prominent lawyers have almost unanimous support in the Parliament, cannot be achieved, the principle of efficiency and expediency gains primacy, according to which it is important that a body is constituted in its full composition, and not that its constitution be prevented by the impossibility of electing prominent lawyers in the Assembly.[57] Bearing in mind that this Commission comprises only five members and decides by simple majority (three "yes" votes are enough for election), and its democratic legitimacy is not even similar to that of the Parliament, the application of the anti-deadlock mechanism should be exceptional. The National Assembly should not relinquish its constitutional competence to elect prominent lawyers as members of the HJC.[58] Members are elected to the HJC for five years, and re-elections are not allowed. The HJC issues a decision on the termination of the office of an elected member, against which a member of the Council can lodge an appeal with the CC, which excludes the right to submit a constitutional complaint. This appeal can be submitted within 15 days from the date of delivery of the decision. The CC makes a decision on the appeal within 30 days from the date of receipt of the appeal in the Court, and this appeal postpones the execution of the decision on the termination of the position of a member of the Council. The HJC has a President and Vice President. The President is elected by the HJC from among members who are judges, and the Vice President from among members elected by the National Assembly, for five years. The Constitution expressly prohibits the President of the SC from being elected as the President of the HJC.[59]

The HJC makes decisions by majority vote, provided that at least eight members of the Council are present. This means that no decision can be made without the participation of at least one member of the Council elected by the Assembly.[60] Exceptionally, the decisions on the election of the President and Vice

57 The VC, in its Opinion on Constitutional Amendments of Serbia in 2021, was not particularly "happy" with the solution proposed by the makers of the Serbian constitution vis-à-vis the five-member Commission. However, it did not recommend a concrete and adequate solution, either.

58 The establishment of an 'anti-deadlock' mechanism for the selection of prominent lawyers in the HJC was criticised by many in the domestic professional public, but it was one of the areas of "consensus" in the VC, which insists on the existence of such a mechanism. The Commission was not overly satisfied with the composition of the five-member Commission, but it did not propose a different solution. VC CDL-PI(2021)019 rev.

59 The VC recommended that the President of the SC be omitted from the composition of the HJC as an official, so that there would be six judges and five prominent lawyers. The solution adopted by the Serbian constitution makers was not acceptable for the Commission. The argument of the Serbian authorities was that the President of the SC traditionally personifies the judicial power in Serbia and that it is difficult to imagine the HJC without him composition. A concession was made in that the President of the Supreme Court will not be the President of the HJC, which is the standard of the VC.

60 This means that, as a rule, no prominent lawyer's consent is necessary for making a decision, which is a strong argument in favour of supporters of the thesis of judicialisation, that is, sudocracy, to which such a legal solution paves the way.

President of the Council and SC and President of other courts, the dismissal of the President of the SC and of other courts, and the dismissal of a judge are made by a majority of eight votes. The Constitution offers protection against the decisions of the HJC. An appeal to the CC is allowed against the decision of the HJC in cases prescribed by the Constitution and the law. A declared appeal excludes the right to file a constitutional appeal. The VC Checklist allows judges to appeal against the decisions of the judicial council to protect their independence, which is ensured, in principle, by this decision. In practice, however, the question concerns the urgency of such an appellate procedure and the suitability of the CC, in the short term,[61] to decide on the appeal. The fourth systemic change brought about by the constitutional amendments refers to the public prosecution: The provision of stronger guarantees of independence and internal independence of the public prosecution, abolition of the category of deputy public prosecutors ('assistant public prosecutors' who in practice handled cases, but was not responsible for them), and a certain relaxation of the hierarchical principle as the basic principle of the organisation and functioning of the public prosecutor's office. However, the presentation of the public prosecutor's office requires special attention and is not the focus of this paper.

■ *3.3. The life of new judicial laws – "If a day is known by its morning…"*

In its opinion on the draft judicial laws from October 2022, the VC underlined the importance of an adequate normative framework for the judiciary:

> As stressed in the November 2021 opinion on the constitutional reform in Serbia, the recent constitutional amendments have the potential to bring about significant positive change in the Serbian judiciary. The VC observes that the Serbian authorities invested considerable effort in preparing the legislative package: the draft laws are generally well-structured, clearly written, and cover all essential points which need to be covered. However, the VC wishes to underline that a successful judicial reform does not only depend on these legislative amendments: in order to secure an independent and future-oriented judiciary of good reputation, it is crucial that a solid legal framework should be accompanied by the non-legislative measures….[62]

The Commission identified four key problems that must be addressed systematically if visible and lasting effects of the judicial reforms are really desired. The

61 The deadline is determined by the Law on HCJ, and the procedure for the action of the CC is regulated by the Law on the Constitutional Court, and to be respected, the deadline of 30 days must be exceeded, which is a consequence of the inconsistency of two related laws.

62 VC CDL-AD(2022)030, pp. 4–5.

first problem is related to the 'generation gap' between judges. Serbia has many vacant judicial positions, and in the next short period, there will be a significant outflow of judges owing to retirement. Law graduates are not motivated to apply for the position of a judge. The Commission noted that 'this generation gap may be difficult to fill, and may become the endemic problem of the Serbian judiciary for years to come.'[63] Another problem concerns the material conditions for performing the function of a judge:

> Attracting young judges to the system may require allocating sufficient budgetary means to the judiciary to solve the problem of relatively modest judicial salaries, as well as regulating judicial salaries and pensions in the law itself in order to ensure their appropriate level and regular indexation.[64]

The third problem, 'which cannot be solved by the legislative amendments alone, is the strictly hierarchical organisation of the judiciary, with a strong notion of supervision, hierarchy between higher courts and lower courts, and multiple forms of evaluations and controls.'[65]

The fourth problem, which we can call a challenge of substantial importance for the rule of law in Serbia, is the change created, namely the building of a legal culture.[66] Creating a legal culture as a necessary condition for the rule of law is complex and requires a stable political framework that does not depend exclusively or even predominantly on internal political conditions in a small country like Serbia, but on relevant European and global political and legal factors. Legal principles and the content of law have become a relative category at the global level. Value landmarks of the international legal order founded immediately after World War II are disappearing. There are no new ones in sight. In such circumstances, building the rule of law from within seems almost impossible. One important, formal step was taken by complying with the legal deadlines for the constitution of new judicial bodies – the HJC and HPC. The very way in which prominent lawyers were elected,[67] the dubious "prominence" of many candidates who applied for competition, the discussions that took place in the competent parliamentary committee, and discussions in the National Assembly, which were not about specific candidates, but about general or current political issues, confirmed that normative solutions without an appropriate democratic legal and political culture are of little value and can be completely meaningless. We will refer only to two questions.

63 VC CDL-AD(2022)030, p. 5.
64 VC CDL-AD(2022)030, p. 5.
65 VC CDL-AD(2022)030, p. 5.
66 VC CDL-AD(2022)030, p. 5.
67 This is because judges, in accordance with constitutional law, remain in the Council until the end of their mandate.

First, the identity of the prominent lawyers remains an open question. In constitutional law, there are two views on the identity of a prominent lawyer. According to one, a prominent lawyer is a top legal expert who is distinguished by professional achievements from other lawyers. He is not an ordinary legal "technician" or "paragraphist," but a lawyer with the highest abilities to interpret and apply the law. It is neither only years of life, seniority, and experience, nor formally high qualifications (e.g. full professor, scientific adviser), but also material evidence of the highest expertise of the candidate – scientifically and professionally recognised papers and reports, public appearances in accordance with the highest standards of the profession, international contacts and cooperation in the field of the rule of law, and proven engagement in the protection of human rights, among other things. According to another understanding, a prominent lawyer is a top legal expert who must also possess qualities such as moral integrity, autonomy of thought, intellectual courage, tolerance, creativity, and awareness of responsibility. He must enjoy a good reputation in society. This reputation is constitutionally confirmed by election in the National Assembly, with a strengthened two-thirds majority of all deputies. The goal of this solution is to maintain the connection with the Parliament, which embodies national sovereignty – for a candidate to receive the support of both the ruling majority and a relevant number of opposition MPs. Therefore, the chosen candidate should be a prominent lawyer with a certain democratic legitimacy. He does not represent himself in the judicial council, but the citizens, just as the judges in this council represent the judiciary.[68] None of that could be heard in the parliamentary debate. The above-mentioned mechanisms for the election of prominent lawyers have been tested in Parliament and before Commission and implemented for the first time in April and May 2023. Whereas the opposition MPs generally qualified as candidates for HJC membership as people close to the government, the MPs of the ruling majority did not deal with the personal and professional qualities of the candidates at all. The concept of a prominent lawyer in the judicial council as one of the key segments of the newly established legal framework of the judicial system was thus devalued from the very start.

Second, it was shown that the two-thirds majority for the election of prominent lawyers in the Assembly, which was insisted on by the VC, and is required in the Constitution of Serbia only in two other cases[69] represents the "threshold" which, in the conditions of Serbian parliamentarianism, cannot be "jumped over."[70] The Assembly lightly relinquished its competence to elect prominent

68 See on prominent lawyers in judicial councils and on judicial councils in general, VC CDL-PI(2022)005. See also in Serbian Petrov, 2022, pp. 37–53.

69 While dismissing the President of the Republic owing to a violation of the Constitution, and while deciding to revise the Constitution.

70 The selection of one of eight candidates for both judicial councils represents a symbolic excess, which does not call into question our conclusion, but rather strengthens it.

lawyers. As far as the anti-deadlock mechanism is concerned, the five-member Commission did its job in an instant.[71] The exception according to the Constitution, has become the rule. The good side of this mechanism is that it achieved its primary purpose – it prevented a "deadlock" in the selection of prominent lawyers. The potential problem that this mode of selecting prominent lawyers will produce in practice is reflected in the fact that these lawyers were chosen in the procedure "by the rest," that they will not have the necessary democratic legitimacy, and that their presumed professional legitimacy will not be sufficient to achieve adequate balance in decision-making in these bodies, among other things. At the same time, officials who are influential members of the new judicial councils – the President of the SC and Supreme Public Prosecutor – took part in the election of prominent lawyers. Distortions in practice are sometimes such that even the most careful lawmaker, and even a body such as the VC, can neither foresee nor avoid them. The Commission is aware of the practical imperfections of anti-deadlock mechanisms, but did not give up on them at the time of writing.[72] It recommended the exclusion of *ex officio* members (President of the SC from the HJC, Minister of Justice, and Supreme Public Prosecutor from the HPC), but for the Serbian authorities, this was an unacceptable "liberation" of the judiciary from any potential (President of the SC) or both formal and real links with politics (Minister of Justice and SPP).

The HJC is neither a judicial body, nor should it become a "miniature court." It is a body in which, in the exchange of views, attitudes, and ideas, two different qualities, namely judicial and "non-judicial" ones, should achieve unity that will ensure the conditions for the independent, efficient, and responsible work of the judiciary. That, *mutatis mutandis,* applies to the HPC. Nevertheless, "if the day is known by the morning" (an old Serbian traditional proverb), it will take time to develop judicial councils that will be ready to create a legal and environment for a more independent, efficient and responsible judiciary.

4. Conclusion

After over three decades since the formal introduction of parliamentary democracy and political pluralism in the course of judicial reforms, Serbia managed to "cross the Rialto Bridge" and "find a way" to the Scuola Grande San Giovanni Evangelista. Apart from "critics by profession" and the diffusely oriented political

71 The seven other candidates, four for the HCJ, and three for the HPC, were elected after a meeting of the Commission, in front of the cameras, which lasted 49 minutes with an invitation to view the complete material submitted to the Commission from the previous election procedure.

72 The author had the opportunity, formally and informally, to verify the persistence of this position of the VC and its readiness to deal with the improvement of anti-deadlock mechanisms.

opposition, no one in Serbia can dispute that the normative framework of the modern judiciary is well set in the "mirror" of the VC. A far more demanding part of the road follows. Now we should think about the experience of European countries that entered the EU significantly before Serbia. All of them, just in different ways, constantly face the challenges emanating from the independence, efficiency, and responsibility of the judiciary and the rule of law as a fundamental principle and value standard of the functioning of a constitutional democracy. The rule of law poses challenges to the VC, which must change and adapt to justify its existence and preserve respect in the international world at the crossroads of law and politics. This applies to all supranational bodies and organisations, including the OUN.

In an era that many perhaps lightly call a somewhat pathetic 'crisis of democracy and the rule of law' in the world, Serbia, a country with an especially rich constitutional and political history, has achieved positive developments through the legal organisation of its state and society. Certain politicians, whose contribution to the constitutional and legal reforms of the judiciary should not be disputed, declare that the first effects of the reform will be felt in a year or two at the most. Two normative steps were taken almost perfectly in the "Venetian mirror." However, we should be aware that "Venetian magic" creates miracles that can be an illusion and disappear in an instant. These "miracles" will only survive if they are based on true and timeless values. When it comes to judicial reforms, it means a sincere commitment to building a society in which current politics will be at a sufficient distance from the judiciary, where law students will want to become judges to protect the rights of their fellow citizens; where judges, prominent lawyers, and politicians will strive for institutional dialogue and not a media cauldron; where the citizens themselves will be interested in a more independent judiciary; and where the public perception of judicial independence and impartiality will be at an enviable cultural level. For any of that to happen, based on the current normative framework, at least a third of the total period (counting only from 1990) that has passed in the "barren transition" is needed – that is, at least 10 years (two mandates of judicial councils). Time is, however, an important, but not sufficient factor.

The second is dedicated work in which all stakeholders will be involved. The judiciary and the rule of law do not and will never exist because of international standards and organisations, but because of citizens, society, and the state. The third factor is the responsibility of everyone, but first of all the highest state authorities, and among them the judicial councils. They have the responsibility to solve problems, and not "photoshop" them.

Finally, international standards of the rule of law, in whose definition the VC undoubtedly has a special place, must not have absolute supremacy vis-à-vis the real needs of their adaptation to the national political, legal, and social environment of the country in question. It is necessary to strive for a dynamic

balance, that, in the long term will ensure the conditions for the rule of law of national content, which naturally incorporates generally accepted civilisational values and achievements of international law. Every step in the process, especially in light of the extremely delicate conditions at present, must be carefully thought out and undertaken with a clear and just vision that respects the international realm for the preservation and development of real (national) identity law. It is neither about state and national egoism, nor about a policy of self-isolation. It is about building state and national self-respect, which is a prerequisite for rational respect, not irrational fear of other states and international institutions. No matter how important, the reform of the judiciary in the "Venetian mirror" will remain like the "vain queen" from the fairytale *Snow White and the Seven Dwarfs* if its bearers "do not take a good look" at the "Serbian political and legal mirror," at its reality, and even more in the vision of universal justice, which is nothing but the only and true rule of law.

Bibliography

- Marinković, T. (2010) 'Jemstva sudijske nezavisnosti u ustavima Kneževine i Kraljevine Srbije', *Anali Pravnog fakulteta u Beogradu*, 58(2), pp. 134–162.
- Petrov, V., Pejić, I., Simović, D., Orlović, S. (2014) *The Legal analysis of the constitutional framework for the judiciary of the Republic of Serbia* [Online]. Available at: https://www.mpravde.gov.rs/tekst/22785/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php (Accessed: 21 July 2023).
- Petrov, V. (2015) *Report.* CDL-PI(2015)030. *Past and present-day lustration: similarities, differences, applicable standards.* Prague [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2015)030-e (Accessed: 21 July 2023).
- Petrov, V., Prelić, M. (2020) 'Contribution of the Venice Commission to the Constitutional Reform in Serbia with special reference to the Judiciary' in Granata-Menghini, S., Caga Tanyar, Z. (ed.) *Venice Commission thirty-year quest for democracy through law 1990 – 2020*. Lund: Juristförlaget i Lund, pp. 547–568.
- Petrov, V. (2022) 'Kako do istaknutih pravnika u pravosudnom savetu?', *Arhiv za pravne i društvene nauke*, 2022/2, pp. 37–53.
- Suchocka, H. (2020) 'Are Venice Commission's standard on the Rule of Law still valid?' in Granata-Menghini, S., Caga Tanyar, Z. (ed.) *Venice Commission thirty-year quest for democracy through law 1990 – 2020*. Lund: Juristförlaget i Lund, pp. 641–652.
- Amendments to the Constitution of Serbia [Online]. Available at: https://www.mpravde.gov.rs/files/Draft%20Amendments%20to%20the%20Constitution%20of%20Republic%20of%20Serbia.pdf (Accessed: 21 July 2023).
- 2006 Constitution of the Republic of Serbia [Online]. Available at: https://www.paragraf.rs/propisi/constitution-of-the-republic-of-serbia.html (Accessed: 21 July 2023)
- European Commission Serbia 2010 Progress report (2010) [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2018-12/sr_rapport_2010_en.pdf (Accessed: 21 July 2023).
- The Law on the Constitutional Court. *Sl. Glasnik RS*, Nos. 109/07 of 28 November 2007, 99/11 of 27 December 2011, 18/13 (CC) of 26 February 2013, 40/15 of 7 May 2015, 103/15 of 14 December 2015 and 10/2023 of 9 February 2023 [Online]. Available at: http://www.ustavni.sud.rs/page/view/en-GB/237-100030/law-on-the-constitutional-court (Accessed: 21 July 2023).
- 2023 The Law on HJC (Zakon o Visokom savetu sudstva). „*Sl. Glasnik RS*"br. 10/2023 [Online]. Available at: https://www.paragraf.rs/propisi/zakon_o_visokom_savetu_sudstva.html. (Accessed: 21 July 2023).
- 1990 Ustav Republike Srbije. „*Službeni list RS*"br. 1/1990 [Online]. Available at: https://sr.wikisource.org/wiki/%D0%A3%D1%81%D1%82%D0%B0%D0%B2_%D0%A0%D0%B5%D0%BF%D1%83%D0%B1%D0%BB%D0%B8%D0%BA%D0%B5_%D0%A1%D1%80%D0%B1%D0%B8%D1%98%D0%B5_(1990) (Accessed: 21 July 2023).

- VC (2207) Opinion of the Constitution of Serbia CDL-AD(2007)004 [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)004-e (Accessed: 21 July 2023).
- VC (2007) Judicial appointments CDL-JD(2007)001rev [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-JD(2007)001-e (Accessed: 21 July 2023)
- VC (2010) Report on the independence of the judicial system Part I: The independence of judges CDL-AD(2010)004 [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e (Accessed: 21 July 2023).
- VC (2011) Report on the Rule of Law CDL-AD(2011)003rev [Online]. Available at: https://rm.coe.int/1680700a61 (Accessed: 21 July 2023).
- VC (2016) Rule of Law Checklist CDL-AD(2016)007 [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e (Accessed: 21 July 2023).
- VC (2018) Serbia Opinion on the Draft amendments to the constitutional provision on the judiciary [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)011-e (Accessed: 21 July 2023).
- VC (2018) Secretariat Memorandum on the compatibility of the draft Amendments to the Constitutional Provision on the Judiciary as submitted by the Ministry of Justice of Serbia on October 2018 (CDL-REF(2018)053) with the Venice Commission's Opinion on the draft Amendments to the Constitutional Provisions on the Judiciary (CDL-AD(2018)011) [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)023-e (Accessed: 21 July 2023).
- VC (2021) Serbia Opinion on the Draft constitutional amendments on the judiciary and on the Draft constitutional law for the implementation of the constitutional amendments CDL-AD(2021)032 [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)032-e (Accessed: 21 July 2023).
- VC (2021) Serbia Urgent opinion on the revised Draft constitutional amendments on the judiciary, CDL-PI(2021)019 rev [Online]. Available at. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2021)019-e (Accessed: 21 July 2023).VC (2021) Serbia Urgent opinion on the revised Draft constitutional amendments on the judiciary CDL-AD(2021)048 [Online]. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)048-e# (Accessed: 21 July 2023).
- VC (2022) Serbia Opinion on three draft laws implementing the constitutional amendments on the CDL-AD(2022)030 [Online]. Available at: https://venice.coe.int/webforms/documents/?pdf=CDL-AD%282022%29030-e (Accessed: 21 July 2023).
- VC (2022) General conclusions "Shaping judicial councils to meet contemproray challenge" CDL-PI(2022)005 [Online]. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2022)005-e (Accessed: 21 July 2023).
- VC (2023) Updated compilation of opinions and report concerning constitutional provisions for amending theconstitution CDL-PI(2023)012* [Online]. Available at: https://venice.coe.int/webforms/documents/?pdf=CDL-PI%282023%29012-e (Accessed: 21 July 2023).

- 1990 Ustav Republike Srbije. „*Službeni list RS*" br. 1/1990 [Online]. Available at: https://sr.wikisource.org/wiki/%D0%A3%D1%81%D1%82%D0%B0%D0%B2_%D0%A0%D0%B5%D0%BF%D1%83%D0%B1%D0%BB%D0%B8%D0%BA%D0%B5_%D0%A1%D1%80%D0%B1%D0%B8%D1%98%D0%B5_(1990) (Accessed: 21 July 2023).

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The Rule of Law and Academic Freedom Between Personal Liberty and Public Order

ABSTRACT: *In this study, the author discusses the fundamental questions of academic freedom in terms of personal and institutional liberty and the developments that have led to the current position of academic freedom in the body of constitutional law. Academic honesty, integrity, and curiosity are at the core of this concept, which has to be protected by the state by all means possible and regulations. Simultaneously, the author outs academic freedom in the broader framework of the rule of law and explains that, as with every right, these liberties require certain responsibilities. This study also analyses situations in which academic freedom may conflict with other prevailing basic human rights, emphasising the necessity to have dialogues when academic freedom and public order collide. In such cases, balancing and proportionality are possible solutions to resolve the issue. However, this study is not a case law study and instead provides theoretical guidelines to those who seek to find ground orientation in the huge field of academic work.*

KEYWORDS: academic freedom, rule of law, personal liberty, public order

1. Introduction

Academic freedom is defined as the scope of allowances that entitle academic workers, which include students, professors, or instructors that teach, examine, analyse, and conclude facts to subsequently provide their opinions in form of research and findings. They also have the right to associate with scientific research and university-based activities that are in line with academic standards and honesty. Simultaneously, academic freedom requires a specific amount of organizational autonomy by universities and other academic institutions and a

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free environment in which they can perform their duties, and this is obviously something that should be provided by the state. Therefore, academic freedom is only possible in an adequate Free State environment that respects academic work. The keyword here is honesty. We live in a severely polarised society in which liberal and conservative tendencies deeply penetrate every aspect of public life, and academia is no exception. On one hand, there is a need for accurate and precise research and results delivered properly and clearly; on the other hand, there are demands that may, in some cases, jeopardise the accuracy of research. Of course, the essence of every honest research in academia has to be humanity and the desire for the greater good of humankind, and if that were missing, all research would be invalid. *Quod ab initio vitiousum set non potest tractu temporis convalescere*. Furthermore, if elementary democratic principles are fulfilled and universities operate within a specific legal system, these institutions are required to follow the rule of law and respect the public order in society. Thus, universities should be open to criticism from the government but should not be deliberately hostile towards foundations of the state and public order. It is not always easy to differentiate between the two; however, this study shows that, if we apply the same standards to all academic activities and secure the state protection of academic work, including its criticism of it, there could be a solution. This study examines the core of academic freedom, historical development of these values, and interconnection between the two concepts of academic freedom and integrity and the rule of law. This study focuses on the more theoretical foundations that could be used as a litmus paper for further research in the field. Academic freedom, as a concept of European academic tradition, should not be changed to cater to the needs of any particular group or ideology; instead, it should be used to secure fair and independent research overseen by constitutional provisions of a system that is based on the democratic and moral traditions of European countries. This means that everyone can publish and talk without the desire to harm or offend (because the foundational *quod ab initio* principle has to inculcated into the very foundations of the work). However, this does not mean that everyone should be happy with the outcome of the research and that research should be polished to fit all. This is not science. Free academic work should be available to all on the ideological spectrum but only if they respect the basic constitutional principles and legal framework of the country that follows specific morals.

2. A brief history of academic freedom

Academic work has always been considered important for society, from the Roman and especially Greek Ages[1] to the present day. Universities have been

1 Fuchs, 1963, A.

a part of public life and were the centres of intellectual life, which was closely related to politics. As found in the literature, in the period just after the 10th century, universities from the Middle East and North Africa had lively scholarly activity.[2] While academic freedom is deeply rooted in history, most scholars agree that contemporary academic freedoms were planted during the era of Alexander Von Humboldt through two freedoms which were then considered above other subordinate freedoms and values.[3] As Ralph F. Fuchs has described, academic freedom enables faculty and students to have economic security and freedom that allows them to express their opinions and secure the safety of their positions that resemble those of judges in office.[4] Although Fuchs wrote from an American perspective, their ideas can be easily implemented in the various legal cultures of the Western civilisation.

The concept of academic freedom that is dominant across colleges and universities in the United States mainly rests on the following three foundations: 1) The philosophy of intellectual freedom, which originated in Greece, rose to popularity in Europe during Renaissance, and matured in the Age of Reason, 2) The idea of autonomy among scholarly communities existing in the universities of Europe, and 3) The freedoms guaranteed by the Bill of Rights in the federal constitution as elaborated by the courts.[5]

Interestingly, in discussions on academic procedural problems, academic freedom and tenure are considered closely connected with the legal due process of law,[6] which allows academics to be free in their expression and not expelled for their ideas and scientific results. This is directly connected with the rule of law and safeguards that academics and students enjoy in their academic lives. It is important to say that these rights belong to academics and students and not the institutions themselves, and while institutions have restrictions, academics do not. Therefore, institutions must follow the general laws of the state in which they operate. Although universities enjoy specific privileges, they are primarily reserves for academics. It is also important to stress that both academics and students must comply with university regulations and that universities and colleges operate within the framework of the general law of the state. This is valid only if we examine these relationships in a democratic society. The development of academic freedom has not been smooth by any means; it started to evolve in Medieval Europe, notably at universities across Germany and England. Many current scholars would complain that religious constraints used to be major obstacles to

2 Fuchs, 1963; Dea, 2018.

3 Ibid.: 'Academic freedom re-emerged in early 19th century Germany with the Prussian reform and the so-called Humboldtian university. Wilhelm von Humboldt's educational reforms enshrined the twin concepts of *Lehrfreiheit* (freedom to teach) and *Lernfreiheit* (freedom to learn) under the rubric of *Akademische Freiheit* (academic freedom).'

4 Fuchs, 1963, At 2., also available at: Fuchs, 1993. Articles by Maurer Society.

5 Ibid.

6 Byse and Joughin, 1959.

fair, honest, and rigorous academic work, which was true in many ways. However, the pre-modern era is more influenced by political regimes and influences that contribute to the majority of problem today. The problem mainly goes (or could go) in two directions, namely, from university to students and faculty and vice versa. This study aims to show that, depending on the circumstances, academic freedom may be infringed upon from both the inside and outside, by the left and the right, and could be overused or misused for political purposes. Therefore, it is important to find common ground by striking a balance between rights while simultaneously maintaining the values that are embodied in public morals and the social public order.

3. Academic life

What is academic life? We could say that academic life is the interaction between students, professors, and all those who participate in the educational process, both as a part of formal education (classroom, lectures, grading, etc.) and the informal system that involves socialising, out-of-classroom discussions, and even lunches, dinners, and coffees on campus. However, all of these actions are associated with education as the cornerstone of the interaction. The question here is which part of academic life is covered by academic freedom and legal protection. To clarify, legal protection in academic life is primarily connected to academic freedom, but in some cases, legal protections concern broader catchments of academic life, such as discussions that are part of symposia and informal talk outside the principal place of instruction. In the latter case, the issue is that such interactions are covered by freedom of expression and stricter legislation, which covers hate speech, damages, and media law.

New York University's pages contain valuable definitions that almost solely cover the first portion of academic freedom and discuss the positions of teaching and learning, even though we know that learning is a lifelong process that could take place anytime, anywhere, and that there is an obvious connection between academic freedom and tenure positions.[7]

7 Section II. The Case for Academic Freedom.
'Academic freedom is essential to the free search for truth and its free expression. Freedom in research is fundamental to the advancement of truth. Freedom in teaching is fundamental for the protection of the rights of the teacher in teaching and of the student in learning. Academic freedom imposes distinct obligations on the teacher such as those mentioned hereinafter.'
Section IV. Academic Freedom
'Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties, but outside occupations and research for pecuniary gain, except in the case of sporadic and wholly unrelated

4. Limitations of academic freedom

Academic freedom goes beyond the ordinary classification defined by the framework rules that have to be taken seriously and the views from the rule of law aspect. The catchments of academic liberties also deal with varieties of human rights. This includes the right to education, which is usually, at least in the European context, included in the constitutional law; however, the decision regarding who will be allowed to take part in particular education lies in the institution that enrols students and chooses professors (lecturers).[8] Obvious restrictions are there on entering specific places of higher education, such as Catholic or Protestant universities, or institutions that teach religious subjects.[9] However, in the secular world of many European countries, these requirements have become increasingly vague. The major requirements include equality and due process, which are generally guaranteed by most constitutions, especially by the European Convention on Human Rights.[10] The right to education has public dimensions, first of which is connected to the right of citizens to educate themselves and their children

engagements should be based upon an understanding with the administration of the University.
Teachers are entitled to freedom in the classroom in discussing their subject, but they should not introduce into their teaching controversial matter that has no relation to their subject.
Teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but this special position in the community imposes special obligations. As men and women of learning and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they at all times should be accurate, should exercise appropriate restraint, should show respect for the opinions of others and for the established policy of their institution, and while properly identifying themselves to outside audiences as associated with the University should clearly indicate that they are not institutional spokespeople unless specifically commissioned to serve in such a capacity.'
Tenured/tenure track faculty members also are entitled to other protections related to tenure and academic freedom, discussed in more detail in 'Faculty Policies Applicable to Tenured/Tenure Track Faculty.'

8 'Choice of who shall participate in higher education (which must be an institutional choice) is, along with determination of curricula and of areas of research, among the elements of that academic autonomy which is one of the bases of academic freedom and may be looked upon as its essence.' Fuchs, 1963, p. 5, according to Lennard, 1948, p. 21.

9 To teach religious subjects' teacher often have to have approval from the religious body who can issue decrees that entitle specific teachers to perform their duties even in the public school system. See, Savić. The problem arises is that if the teacher loses their right to teach in the public school system because their position is bivalent, that is, civilian and canonical. This is usually covered by the Law or by International Treaties if the state has any. This is the case with Croatia and Poland, who have both have stipulated agreements with the Holy See. In the hierarchy of norms, such agreements are above the Law and under the Constitution.

10 European Convention on Human Rights.

through compulsory and free education; second. they have the right to compete to be educated within the private sector. Both of these rights require the exercise of the equality principle.

It is impossible to discuss academic freedom, the rule of law, and equality without the general premise that the right to education in the contemporary world belongs to everyone, under equal circumstances and opportunities. A prerequisite that must be fulfilled is general equality regardless of race,[11] religion, sex, and national and social origins. A major case related to this concept is Brown v. Board of Education, 347 US 483 (1954), where the Supreme Court decided that segregation was against the American Constitution. The case was led by Thurgood Marshall, a famous civil rights advocate and associate justice of the US Supreme Court.[12] The conclusion is that for academic freedom, it is essential that all people are free to receive quality education under the same circumstances in which they could, but do not have to, exercise their rights. This is an explanation of the basic narrative of the 14th Amendment of the US Constitution, which essentially states that the State shall secure the same rights to all citizens under the same jurisdiction. This includes the same people, same place, same law, same rights, and same responsibilities.[13]

As early as the late 18th and 19th centuries, some concerns were raised in connection with the influence of governing authorities on the independence of universities and colleges, especially those that were formally public and funded by the state.[14] Around the world, there were examples of the political control of academia. This was especially observed during times of crisis that culminated in the 20th century with the emergence of destructive regimes in Germany and Italy, and to various extents, throughout Europe during the Second World War. Therefore, in these times, there was no academic freedom without the rule of law. When all freedoms are jeopardised, academic freedom falls as well. However, this is somehow paradoxical because many academics were actively defending the basic principles of truth and humanity in those turbulent times. All those who lived and worked in Eastern Europe after WWII experienced what it meant to be an academic in postwar Europe under the communist rule. Most academics were under surveillance, and any behaviour that was considered (this does not mean that it was contrary to socialist ideology) against communist or socialist ideology was heavily punished and often persecuted and prosecuted. In some countries, membership of the Communist Party was forced, and only a few remained out of the net

11 See more in Lenard, 1948, pp. 704–710.

12 Thurgood Marshall (July 2, 1908–January 24, 1993).

13 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,' from Constitution Annotated, Analysis and Interpretation of the U.S. Constitution.

14 See Fuchs, 1963.

thrown onto academia as a whole. Children of intellectuals could not be enrolled in universities and were forced to do lower-paid jobs and educate themselves in schools of lower quality and not pursue university diplomas or degrees.

Academic freedom in repressive societies was present in Europe through the 20th century but was not equally 'distributed' across places and times. In all these situations, many academic staff maintained their integrity, which sometimes was paid for by their jobs, and other times in their freedom or even life. Today, we live in a world of paradoxes and oxymorons. On one hand, there is the notion that freedom is a norm and a must, and that everyone should be free in thoughts and actions; on the other hand, the limits of freedom are put aside, including responsibility for actions, even in scientific research. Locke has described that, 'government should be limited to securing the life and property of its citizens. It is only necessary because, in an ideal, anarchic state of nature, various problems arise that would make life more insecure than under the protection of a minimal state.' Locke is also renowned for his writings on toleration in which he espoused the right to freedom of conscience and religion (except when religion was deemed intolerant!) and for his cogent criticism of hereditary monarchy and patriarchalism.[15]

Adam Smith believed that the three pillars of modern (democratic) society are justice, prudence, and benevolence.[16] Edmund Burke often argued that to possess freedom, one has to be limited. Of course, this has to be balanced in a way that cannot be used to limit political or academic life for the purpose of daily politics.

> It is not solitary, unconnected, individual, selfish liberty, as if every man was to regulate the whole of his conduct by his own will. The liberty I mean is social freedom. It is that state of things in which liberty is secured by the equality of restraint. A constitution of things in which the liberty of no one man, and no body of men, and no number of men, can find means to trespass on the liberty of any person, or any description of persons, in the society. This kind of liberty is, indeed, but another name for justice; ascertained by wise laws, and secured by well-constructed institutions.[17]

These are ideals and not tools for eliminating enemies. All of the following philosophers were relying on the notions of natural law: Burke on ethical norms, Locke on the belief that the state should protect life, liberty, and property, and Smith supposing that self-interest provides greater benefit to society. All have acknowledged the importance of the existence of a state.

15 Moseley, no date.
16 Smith, 1982.
17 Burke, 1789.

However, the essential question here is whether academic freedom and the quest for truth has limitations. The answers are complex. Obviously, academic freedom include expressions like 'We live in a free and democratic state,' but this is true only in principle. If academic freedom includes basic honesty and accuracy, it should not be limited to give way to the truth; however, the key is to have honesty and respect for the public order which has the same freedoms and foundations of existence. Therefore, if academic freedom cohabitates with the political framework of the (democratic) state, it does not have any limitations except one. This limitation disallows endangering the coexistence and cohabitation within society which has its rules shaped by public order and morals. Thus, we need honest academics and states with minimal influence over academic work and a safeguard to protect the basic foundation of state and public order. The state must secure the maximum possible space for academic exercise, but it does not have to allow academic activities that could implode its own existence. This means that academic freedom in the rule of law is absolute, but democratic states can impose restrictions, not on the content of research but on the use of findings that can be politically driven (or used for political purposes) and help oppress the constitutional order. If we have a democratic society and honest academia, academic freedom is indisputable.

In the same world, we face various incidences where academic freedom is increasingly used for political purposes; in some societies, specific values of the state are targeted, and values of the state and its majority (connected with the foundational principles) are targeted and in others minority feels it is left behind and its interests and view are in danger. How to avoid this and find a common ground? Using the rule of law. As stated, if the state is democratic and provides secure and safe place for academia, science should manoeuvre its way of speaking, but with basic respect for the society that provides the academic freedom. It is a hard task. However, there is a huge difference between repressive regimes and regimes of order that require academic freedom to remain within the legal framework of the constitutional order. If we do not discuss the lack of the basic elements of humanity and freedom argued by German philosopher Gustav Radbruch,[18] we

18 Savić, 2023: 'Radbruch argued that when laws do not contain an elementary desire for justice or when, most importantly, equality, which should be the heart of justice, is renounced in the process of legislating, then the law is not just flawed (erroneous), it is illegal in nature because law needs to serve justice.' p. 5, according to: Radbruch, 1946, p. 107: '*Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als "unrichtiges Recht" der Gerechtigkeit zu weichen hat. Es ist unmöglich, eine schärfere Linie zu ziehen zwischen den Fällen des gesetzlichen Unrechts und den trotz unrichtigen Inhalts dennoch geltenden Gesetzen; eine andere Grenzziehung aber kann mit aller Schärfe vorgenommen werden: wo Gerechtigkeit nicht einmal erstrebt wird, wo die Gleichheit, die den Kern der Gerechtigkeit ausmacht, bei der Setzung positiven Rechts bewußt verleugnet wurde, da ist das Gesetz nicht etwa nur 'unrichtiges' Recht,*

would require fight against the law, because unjust law is not a law. This was also accepted by Hans Kelsen.[19] Thus, state order has to prevail and should be protected and respected. Every person has their own values and pursues specific goals and academics are not an exception; however, if the honesty principle is respected, then the rule of law will not be endangered.

Various constitutions guarantee free speech and freedom of academic work but within the limitations described above. These limitations are always more or less connected with the protection of the basic fibre of states' laws, particularly constitutions, which shape legal and public order.[20] When we elaborate on the rule of law and academic freedom, we also discuss the constitutional order of democratic states and free expression.

5. Responsibilities

When we discuss academic freedom, as with other freedoms, we must consider that there are obligations arising from each specific right. As discussed before, honesty is a prerequisite for academic integrity. This section concentrates on this important issue. In Germany, it is believed that universities should be places where academic freedom must be developed and preserved.[21] This is the root of the constitutional provisions of the integrity and autonomy of universities in the modern European constitutional landscape. Universities should be places where 'freed interplay of ideas'[22] takes place without honesty being stripped out. Fuchs has quoted German professor Friedrich Paulsen in suggesting that there is some level of classification – for instance, while philosophy professors are free, professors of theology have the right to maintain a positive attitude towards religion and religious institutions, like the church. The professors of political science would suggest that the law should have a reason to protect itself and the state of the country.[23] Here, we see that professors have certain responsibility towards the authority they are teaching about. This does not mean that some professionals are exempt from freedom of research or from asking questions. However, some professions, by the nature of the scope of their science and expertise, have a framework for their research because they possess specific truths and beliefs. Additionally, if universities are founded and supported in a particular country and, it is expected that they possess minimal standards of respect and understanding despite their

vielmehr entbehrt es überhaupt der Rechtsnatur. Denn man kann Recht, auch positives Recht, gar nicht anders definieren als eine Ordnung und Satzung, die ihrem Sinne nach bestimmt ist, der Gerechtigkeit zu dienen.'

19 Ibid., p. 4.

20 See more in Milić Vujinović, 2021, pp. 967–988.

21 Fuchs, 1963, p. 435.

22 Ibid.

23 Ibid.

right to criticise. Universities are also subject to the constitutional framework of the country, and no two countries are not the same. Even in the European Union, laws in Malta are different from those in Finland, Poland, Sweden et cetera. What is common are the standards, some shared values, and the rule of law.

The following is an excellent example provided by Paulsen and elaborated on by Fuchs:

> The professor who can find absolutely no reason in the state and law, who, as a theoretical anarchist, denies the necessity of a state and legal order…may try to prove his theory by means of as many good arguments as he can, but he has no call to teach political science at the state institution.[24]

Furthermore, it is stated that 'German universities dwell in their own world, outside of politics, and their highest achievements are in science'…and that professors 'representatives of science should not engage in politics, but should reflect upon state and law.'[25] This does not mean that professors or students should not be involved in political processes but that their work should not use the classroom for political fights. However, there have been times in history when this has been necessary. These examples belong to extreme social appearances when fighting on all fronts is necessary. It is also possible to predict situations in which some academic freedoms are restricted or frozen for the sake of urgency, but that should happen only in extremely rare circumstances, with a valid test of proportionality. It is always a matter of balance. For instance, a religious institution of higher education funded and owned by a specific religious organisation or community can have the right to request a minimal standard for academic behaviour; however, the question is in which way does this limitation develop. Academic institutions should always bear in mind the characteristics of free thought and rigorous and honest research. This suggests that even religiously affiliated institutions of higher education remain bodies which seek truth and transparent results.

Public speech is a basic human right and, as such, a part of the broader scope of rights that guarantee that all citizens have the right to openly express their views. Academics are more prone to such activities, and their roles are often positioned outside the walls of universities or colleges. Therefore, for integrity, honesty, and expertise, academics are trusted and wanted even beyond their classrooms. The direction of their activity is from primary school to the street and not from the street to the school, all in accordance with the lines mentioned above. This is why there are many university professors (or former university professors) across all branches of social activity, including politics.

24 Ibid. See Rockwell, 1950; Metzger, 1955.
25 Fuchs, 1963, p. 436.

Free speech belongs to all citizens and is not specifically an academic right;[26] however, academics often practice it openly and more often. In this context, Moshman has made the following statement:

> I agree with the AAUP about the importance of protecting the right of faculty to public ('extramural') speech but disagree with its long-standing classification of this right as part of the academic freedom od professors, which seems to construe it as a special right of higher education faculty rather than a matter of basic human rights.[27]

6. Public order vs academic freedom

As mentioned before, academic freedom within the scope of law falls under constitutional protection and is a part of the system of law in a particular country. On this basis, we can examine two scopes of activities related to academic freedom. The first is described as internal, and the other is not necessarily connected to work in a university setting, but instead considered more external. Accordingly, teachers must teach what is determined as the curriculum or program of study while simultaneously being individuals with their own views. Therefore, the character of teachers is bivalent. On one hand, they are obliged to teach exactly what is expected from them, and on the other hand, they have the freedom to criticise and express their own (scientific) views. Therefore, they play both collective and personal roles as teachers and people of integrity.[28] Moshman has said that,

> with regard to schools and colleges, it is the purpose of an academic institution to do academic work. Therefore, it is important to respect the intellectual autonomy of schools and educational systems at all educational levels. However, this does not mean that schools are free to censor their faculty or indoctrinate their students.[29]

26 Moshman, 2017, pp. 9–10.

27 Ibid., p. 10.

28 Ibid., p. 12. 'The tradition of collective faculty responsibility for academic matters is much stronger in higher education than at elementary or secondary levels, but it is relevant at all levels. Members of the faculty are generally more expert and less politically motivated than are external powers and interests, but individual faculty members have biases of their own. With respect to the overall curriculum of an academic department or unit, the collective faculty is the best source of genuine academic judgements. Students are entitled to a curriculum determined on academic grounds by those qualified to make the relevant academic judgements. Individual faculty must teach the properly approved curriculum but should be free to criticize or supplement it. Thus, the academic freedom of faculty is both individual and collective.'

29 Ibid., pp. 12–13.

Overall, as individuals, have the collective duty to respect the integrity of students and general faculty. Without the respect for others, there is no responsibility. Responsibility also means that the integrity of schools should be protected along with that of the state and its institutions, providing a secure and democratic framework governed by the constitution and law in general. Universities should not be used for political clashes or as platforms for practising behaviour that is contrary to public order and morals. In this section, I address the basic question of balancing the rights of specific groups. In this study, I have insisted on dialogue between the majority and minority groups, and as a proper method of doing so, I have suggested balancing.[30]

Without any doubt, the justification of academic freedom lies in a free democratic state where free academic debate exists; however, this does not mean that academia should not respect the democratic order of the state because there are no two identical constitutions that are grounded in years, decades, and sometimes centuries of national and legal history and developments, and there are no two identical sets of values completely the same across the two jurisdictions. Although these are similar, they are not the same. Each state has the right to protect its basic foundations that are its pillars. Of course, this critique is allowed, but political activism should be excluded because politics may jeopardise the quest for truth and endanger basic honesty.[31]

However, there are many analyses on particular countries in which, according to different preferences, legal standpoints, and political ideas, we can find critical approaches to academic freedom and the rule of law, for example, Poland, Hungary, and Germany.[32] In their work on the defensive rights of academic freedom, authors have correctly stated that 'ensuring the proper implementation of academic freedom can be difficult both for policymakers and university authorities.'[33] Academic freedom is guaranteed in Article 13 of the EU Charter [34]

30 See Savić, 2023, pp. 47–75; Savić, 2015, pp. 679–726.

31 Badamchi, 2022, pp. 619–630. In their work, she had described academic freedom as a very broad concept without talking about responsibilities towards public order and basic fundaments of the constitutional framework. However, even in their remarks, they have talked about democratic debate; however, democratic debate has its limits that are shaped by particular democratic order. Democracy does not exist if there is not demos, people, because people govern by living according to a particular set of values shaped by the democratic process. In this sense, cohabitation is necessary to protect stability of values and free and critical science. 'On a very last note, I added, the justification of equal autonomy of academia as a realm of free democratic debate complement each other. This is to say, I concluded, academics can only participate in the free democratic debate by exercising their free speech rights. In other words, democratic debate assumes the presence of and depends on equal autonomy of individuals, and of course, academics.'

32 Bard, 2020, pp. 87–96. Also, see Stachowiak, et al. 2023.

33 Ibid., Stachowiak, et al., 2023, pp. 1, 3.

34 Charter of Fundamental Rights of the European Union. Art. 13 of the Charter: 'The arts and scientific research shall be free of constraint. Academic freedom shall be respected.'

and the constitutional texts of EU countries.[35] Interestingly, the EU charter uses the word "constraint" for scientific research and word "respect" for academic freedom. Let us deeply analyse these two words. According to the Oxford dictionary, the word "constraint"[36] describes a very strict and sharp limitation of the ability to perform some activity, while "respect"[37] shapes an environment of recognition, protection, and understanding where there is a special relationship between two parties, the one that respects and one that is respected. This etymological distinction can help us understand academic freedom in the rule of law. Scientific research should not be interrupted; academics have the right to perform honest and dedicated work in their field of study while being respected for the work they perform such that that there is a (at least minimal) mutual level of understanding. I believe this is the key to solving the problem of potential excesses and clashes between engaged academics, the legal system, and public order. A universal magical formula for each case and country does not exist; however, on a theoretical level, when scientists are free to work, talk, be respected in the constitutional framework of the (democratic) environment, they solve issues that should be resolved. If we discuss democratic countries, solutions must be found within the framework of the system.[38] As previously mentioned, "academic freedom" has many definitions. Its meaning is based in history and culture, and it

35 Ibid. Footnote 34., p. 3.

36 Oxford Learner's Dictionaries, available at Oxford University Press's website [Online]. Available at: https://www.oxfordlearnersdictionaries.com/definition/academic/constraint (Accessed: 24 July 2023).

37 Oxford Learner's Dictionaries, Oxford University Press's website [Online]. Available at: https://www.oxfordlearnersdictionaries.com/definition/english/respect_1 (Accessed: 24 July 2023).

38 Here, I have to mention Gustav Radbruch's theory in which he has advocated (in his positivistic approach to law) that law is separated from morals. Laws are to be followed except in exceptional cases when it becomes unjust and ceases to become a law. When discussing positivism, he has argued that norms are detached from both morals and facts. The only important thing is that the norm is attached to another norm from which it draws its legitimacy. Together with his colleagues, Radbruch was a supporter of pure positivism. According to this school of thought, every norm belongs to the same tree; taken together, all the norms make a logical system that resembles a living creature with a complete body. Before World War II, his support of this idea was unconditional. After the war and his experience with Nazi Germany, Radbruch wrote the essay '*Gesetzliches Unrecht und übergesetzliches Recht*,8' in which he described his amended theory. Radbruch always felt that the conflict between justice and positive law should be resolved in favor of positive law. This was because of the stability or certainty of the legal system itself. The predictability of positive law was very important to Radbruch. This was so even in cases where legal solutions were unjust in the sense of content and purpose. However, Radbruch allowed for the following exception: when the difference between positive law and justice is so great that the law itself becomes non-law, or law with errors that invalidate it. Based on this exception, Radbruch argued that when laws do not contain an elementary desire for justice or when, most importantly, equality, which should be the heart of justice, it is renounced in the process of legislating. Thus, the law is not just flawed (erroneous), it is illegal in nature because the law needs to serve justice. See in Savić, 2023, ibid., footnote 19.

can change across time and regions. An[39] interesting example is Germany, where the constitutional rights of universities and autonomy do not exist and the constitutional courts derive this right from the right to teach.[40] It is also said that

> the fact that the holder of academic freedom is a different entity than a university's right to autonomy can be seen in the case of collision of rights. According to Robert Alexy's theory, fundamental rights and freedoms, including academic freedom are principles that may collide with other rights. Constitutional courts and international tribunals settle conflicts between two or more rights by applying the principle of proportionality.[41]

On another occasion, the German Constitutional Court has said that the defensive right to academic freedom is connected to its relation to states and includes protection from interference by university or faculty authorities.[42] Here, we must be careful about private universities, especially those with religious affiliations, because applying this standard would mean that religious freedom may be in jeopardy. Again, we need a balanced and careful approach.[43] After the Court of Justice of the European Union ruled that there is a limitation protecting academic freedom in Article 13 of the EU Charter, it was said that academic freedom spreads equally. The Hungarian Constitutional Court ruled that when the funding body deprives university bodies from organizational and economic authority, it is unconstitutional and leads to the erosion of university autonomy; subsequently, this would mean endangering academic liberties.[44] 'However, the uniqueness of academic freedom lies within the fact that the obligation to create conditions

39 Stachowiak, et al., 2023, p. 1.

40 Ibid., p. 19.

41 Ibid. There is also an example that constitutional courts in Germany and Spain came to a conclusion that university autonomy is a separate right and not another aspect of academic freedom.

42 Ibid., p. 22.

43 See Art. 9 of the European Convention on Human Rights, Art. 9, Freedom of thought, conscience and religion, [Online]. Available at: https://www.echr.coe.int/documents/d/echr/guide_art_9_eng, (Accessed: on 25 July 2023). '1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.' 'Religious freedom in respect of this article should be understood as both personal and institutional religious freedom; you can't have one without another. Since religious people are the most often members of particular religious organizations, you cannot have personal religious freedom if organization also does not have one.'

44 Ibid., pp. 27–28.

for implementation of this right rests primarily not with the state, but with universities."[45] This shows the complexity of this matter, which may be resolved by the principles of balancing and proportionality.

Many articles have provided dozens of examples of critiques towards the legal system of particular countries, many of which are ideologically driven; however, this study aims not to elaborate or criticise any particular legal system, but instead to go to the roots of academic freedom and the rule of law as concepts that promote both freedom of research and the concept of public order. From the viewpoint of legal theory, every right has its own responsibility. Rights and obligations are two sides of the same coin. There are multiple ways to advocate rights and responsibilities; the right to exercise a free academic life is closely connected with scientific and social responsibility but not in the ideological agenda. It is not fair to use academic freedom as a platform for political agenda, and this is valid for all subjects of the academic process – academics, students, and the state that is the social guarantor of the entire scope of law.

7. Conclusion

When we discuss academic freedom and the rule of law, we first address the core questions of the development of academic freedom in Western legal thought and try to understand the chronology of the development of the very important right that is characteristic of the free and democratic world we want to live in. Honest and free research, free from state intervention and interference, is necessary for academics, teachers, and students entitled to seek the truth and present it to the wider public. Academic liberties have been, especially in times of repressive regimes, a beacon for the word. Even if they were not freely practiced, remarkable people of the world have kept humanity and free minds alive, even in the darkest hours of our history. Scientists, researchers, professors, and students have always sought light in the world. Today, we live in a democratic Europe, where academic freedom and free speech are covered by constitutional frameworks and international agreements, meaning that contemporary states underline the importance of this right of free people, primarily those working in an academic environment. Simultaneously, the notion of academic freedom could be used for purposes contrary to the basic requirements required by academic freedom (honesty, hard work, and seeking the truth) and be replaced by the political and ideological agenda of particular groups. The constitutional laws of each (democratic) county usually set limits on any activity contrary to the basic functioning of the state, the legal order, and public morals. In such cases, the state has the right to set some limits on such behaviour, ensuring that human rights are always protected. Academic

45 Ibid., pp. 28–29.

freedom can conflict with some other rights also secured by the constitution or international treaties, in which case, the balancing and proportionality principle is to be used to secure the application of law that is coherent with the legal system as a whole. Through true and honest dialogue, potentially conflicting rights can be found in coherent systems of legal norms.

Bibliography

- *Academic Freedom* (no date) New York University [Online]. Available at: https://www.nyu.edu/faculty/governance-policies-and-procedures/faculty-handbook/the-faculty/other-faculty-policies/academic-freedom.html (Accessed: 22 May 2023).
- Badamchi, D. K. (2022) 'Academic Freedom; How to conceptualize and justify it? Philosophy and Social criticism', *Philosophy and Social Criticism, SAGE Journal*, 48(4), pp. 619–630. https://doi.org/10.1177/01914537211072888.
- Bard, P. (2020) 'The rule of law and academic freedom or the lack of it in Hungary', *European Political Science*, 19(1), pp. 87–96 [Online]. Available at: https://www.researchgate.net/publication/325368065_The_rule_of_law_and_academic_freedom_or_the_lack_of_it_in_Hungary (Accessed: 22 July 2023); https://doi.org/10.1057/s41304-018-0171-x.
- Byse, C., Joughin, L. (1959) *Tenure in American Higher Education*. 1st edn. New York: Cornell University.
- Dea, S. (2023) 'A brief history of academic freedom' *University Affairs* [Online]. Available at: https://www.universityaffairs.ca/opinion/dispatches-academic-freedom/a-brief-history-of-academic-freedom/ (Accessed: 24 April 2023).
- Fuchs, R. F. (1963) 'Academic Freedom – It's Basic Philosophy, Function, And History, Law and Contemporary Problems', *Law and Contemporary Problems*, 28(3), pp. 431–446 [Online]. Available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2963&context=lcp (Accessed: 24 April 2023).
- Fuchs, R. (1993) 'Academic Freedom – Its Basic Philosophy, Function and History', *Articles by Maurer Society* [Online]. Available at: https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2638&context=facpub (Accessed: 24 April 2023).
- Lenard, R. (1948) 'The Threat to Academic Freedom, Bulletin of the American Association of University Professors (1915-1955)', *American Association of University Professors*, 34(4), pp. 704–710; https://doi.org/10.1057/s41304-018-0171-x.
- Moseley, A. (no date) 'John Locke: Political Philosophy', *Internet Encyclopedia of Philosophy* [Online]. Available at: https://iep.utm.edu/locke-po/ (Accessed: 26 June 2023),
- Online Library of Liberty (no date) *Edmund Burke on liberty as "social" not "individual" liberty (1789)* [Online]. Available at: https://oll.libertyfund.org/quote/edmund-burke-on-liberty-as-social-not-individual-liberty-1789 (Accessed: 26 June 2023).
- Vujinović, M., I. (2021) 'Ograničenja slobode izražavanja u republici Hrvatskoj u odnosu na međunarodno pravo, s posebnim osvrtom na presude Europskog suda', *Zbornik radova Pravnog fakulteta u Splitu*, 58(3), pp. 967–988; https://doi.org/10.31141/zrpfs.2021.58.141.967.
- Moshman, D. (2017) 'Academic Freedom as the Freedom to do Academic Work', *AAUP Journal of Academic Freedom*, *University of Nebraska, Lincoln,* 2017/8, pp. 9–10 [Online]. Available at: https://digitalcommons.uni.edu/psychfacpub/1038 (Accessed: 20 June 2023).

- Radbruch, G. (1946) 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristen-Zeitung*, 1(5), pp. 105–108.
- Savić, V. I. (2023) 'Radbruch's formula and the conscience of a Saint: Cardinal Alojzije V. Stepinac', *Studia z Prawa Wyznaniowego*, 2023/26 [Online]. Available at: https://czasopisma.kul.pl/index.php/spw (Accessed: 20 June 2023).
- Savić, V. I. (2023) 'The Right to Privacy in the European Context: Insight into Fundamental Issues' in Marcin, W. (eds.) *The Right to Privacy in the Digital Age*. Miskolc: Central European Academic Publishing, pp. 47–75; https://doi.org/10.54237/profnet.2023.mwrtpida_2.
- Savić, V. I. (2015) 'Still Fighting God in the Public Arena: Does Europe Pursue the Separation of Religion and State Too Devoutly or Is It Saying It Does Without Really Meaning It?', *Brigham Young University Law Review*, 2015/3, pp. 679–726.
- Smith, A. (1982) 'Economics of Freedom' *Foundation for Economic Education* [Online]. Available at: https://fee.org/articles/adam-smiths-economics-of-freedom/ (Accessed: 26 June 2023).
- Stachowiak-Kudła, M., Sina, W., Botelho, C. S., Bartha, I. (2023) 'Academic Freedom as a Defensive Right', *Hague Journal on the Rule of Law*, 2023/15, pp. 161–190; https://doi.org/10.1007/s40803-022-00188-4.
- *Oxford Learner's Dictionaries* [Online]. Available at: https://www.oxfordlearnersdictionaries.com/definition/english/respect_1 (Accessed: 24 July 2023).
- *Articles on Adam Smith* (no date) [Online]. Available at: https://fee.org/articles/adam-smiths-economics-of-freedom/ (Accessed:26 June 2023), John Montgomery, 1982.
- *Articles on Edmund Burke on liberty as "social" not "individual" liberty* (1789) [Online]. Available at: https://oll.libertyfund.org/quote/edmund-burke-on-liberty-as-social-not-individual-liberty-1789 (Accessed: 26 June 2023).

KATARÍNA ŠMIGOVÁ*

Human Rights Committees Recommendations and their Position Within Slovak Legal Order

ABSTRACT: *This chapter presents and analyses the position of the Slovak Republic in relation to the decisions of various human rights committees established at the universal level and their processing within the Slovak legal framework. It explains relevant clauses of the Slovak Constitution and compares several different attitudes of selected countries and their particular views on the committees, namely, decisions of the Spanish Supreme Court and the Slovak Supreme and Constitutional Courts.*

KEYWORDS: human rights committees' recommendations, legally binding acts, Slovak constitution, CEDAW, individual complaints

1. Introduction

The concept of human rights in the area of protection by states differs when compared to the concepts of natural law and positive law; the difference lies in the need for recognition or consent provided by states. In this context, it is appropriate to distinguish between the right to life, which is a natural part of every individual because of their existence as a human being and the related human dignity, and the legal claim that arises from such a right under certain conditions, which is also applicable at the level of international law.[1] Therefore, it is important to understand the institutional background created during the development of the legal field of international human rights protection, which is related to several international treaties adopted by states at both universal and regional levels.

1 See e. g. Donnelly, 2003, p. 7 et seq.

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By acceding to various international treaties, various states have started recognising and ensuring the protection of human rights and fundamental freedoms at different levels and through different means.

The establishment of the United Nations (UN) in 1945 was an important milestone in international human rights protection even though it was not the first step in protecting individual rights. Before World War II, international law understood the concepts of diplomatic protection, protection of minorities, protection of foreigners, and protection of victims of armed conflict. For example, the Declaration of the Rights of the Child was adopted in 1924.[2] However, the status of nationals was understood to be a matter of the domestic jurisdiction of sovereign states.[3] The importance of naming and developing international human rights protection after the founding of the UN integrated the previous *ad hoc* response of the international community to the status of foreigners, slave trade, workers, and other groups or individuals into a universal system that concerned every individual. However, the internationalisation of the protection system did not change the fact that the essential actor in the field of human rights protection – whether at the international, regional, or national level – has always been the state. National authorities bear the primary responsibility for the protection of human rights. The role of the UN and other organisations is secondary and subsidiary.

According to the Preamble of the UN Charter, the protection of human rights is both a goal of the UN and a means of achieving other goals. Simultaneously, the new concept of human rights introduced after World War II emphasised the belief that respect for human rights is closely connected with maintaining and ensuring international peace and security.[4]

Each of the principal UN bodies (the General Assembly, Security Council, Economic and Social Council, Secretariat, Trusteeship Council, and International Court of Justice) plays an irreplaceable role in the UN's goal of promoting respect for human rights.

In addition to the principal UN bodies, the UN Human Rights Council (hereinafter, the Council) operates in the human rights protection system at the UN, which, according to the year of its establishment (2010), is a relatively young body in the UN system for the support and protection of human rights; however, it was *de facto* replaced by the Commission for Human Rights established in 1946. It began to address situations of gross and systematic violations of human rights (as part of a public investigation) and complaints from individuals or groups against systematic and mass violations of human rights (through non-public and confidential proceedings that took place in written form). Apart from these UN

2 See e. g. Vandenhole, Lembrechts and Turkelli, 2019, p. 2.
3 Harris, 2004, p. 654.
4 Potočný and Ondřej, 2003, p. 78.

charter-based human rights bodies, a treaty-based system was created step-by-step under the umbrella of the UN.

This article aims to present and analyse the position of the Slovak Republic in relation to the decisions of various human rights committees established at the universal level and their processing within the Slovak legal framework. The remainder of this article is divided into three sections. The first concerns the status of human rights committees under international law. The second chapter focuses on the interpretation of international treaties and relationship between international and Slovak law as regulated by the Constitution of the Slovak Republic. Finally, the third chapter analyses a human rights committee recommendation for the Slovak Republic and examines recommendations for individual petitions only.[5] This section first analyses a decision adopted by the Supreme Court of the Kingdom of Spain, because it is also mentioned in the legal submission of an individual to a Slovak court and compares it to the Slovak position of understanding international human rights committees and their recommendations. The difference between the two is influenced by the interpretation of an international treaty and the relationship between international and national law regulated in the supreme legal act of a state, namely, its constitution. Finally, the issue of considering international human rights committees and their recommendations as legally binding is taken into account from the viewpoint of General Recommendation No. 33, drafted by the Committee on the Elimination of All Forms of Discrimination against Women. This recommendation originally included legal obligations of the states to respect the views of this Committee.

2. Human Rights UN Committees and international law

When analysing human rights committee recommendations, it is important to explain what these committees are. As for the international human rights law, these committees are bodies that have been established through the adoption of specific international treaties governing interstate relations in human rights protection.

Before legally binding treaties were adopted under the auspices of the UN, which dealt with the protection of human rights and established an institutional framework for their protection, the Universal Declaration of Human Rights (UDHR) was adopted on 10 December 1948. Although this document is not legally binding, it must be considered a 'general standard to be achieved for all individuals

5 Apart from recommendations in individual communications, these human rights bodies adopt general recommendations as well. See e. g. general recommendation no. 36 (2017) on the right of girls and women to education.

and nations."[6] The UDHR was adopted as one of the first documents of the UN General Assembly.

The UDHR contains a list of civil, political, economic, social, and cultural rights, but no implementation or control mechanisms are specified. Despite its non-legally binding nature, it influenced the content of later legally binding documents. Together with the Covenants of 1966, it created the International Charter of Human Rights (ICHR). Additionally, some of its provisions can be considered norms of customary law.[7]

The nature of the UDHR and international community's focus on creating a real system of human rights protection presupposes the adoption of legally binding norms. However, because of growing tensions between the Eastern and Western blocs, this was only realised in 1966, even though the Human Rights Commission had already fulfilled its role in 1954, when it submitted the texts of the proposed Covenants to the UN General Assembly.

Although the area of human rights protection might be detected within various types of international treaties, for example, within the Convention on the Prevention and Punishment of the Crime of Genocide (1948, in force since 1951) or Convention on the Suppression and Punishment of the Crime of Apartheid (1973, in force since 1976), the following list of international treaties is specific because of the institutional system established to support the effective protection and promotion of human rights at the universal level.

In addition to the International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social, and Cultural Rights (1966), which entered into force in 1976, the following international treaties formed the basis of the treaty system for the protection of human rights under the UN's umbrella: Convention on the Elimination of All Forms of Racial Discrimination (CERD, adopted in 1965 and in force since 1969); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, adopted in 1984, in force since 1987); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, adopted in 1979 and in force since 1981); The Convention on the Rights of the Child (CRC, adopted in 1989, in force since 1990); The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW, adopted in 1990 and in force since 2003); The Convention on the Rights of Persons with Disabilities (hereinafter referred to as CRPD, adopted in 2006, in force since 2008); The Convention for the Protection of All Persons from Enforced Disappearance (CED, adopted in 2006 and in force since 2010).

6 Para. 8 of the Preamble of the Vienna Declaration and Program of Action adopted at the World Conference on Human Rights, 25 June 1993.

7 For more details see Shaw, 2008, p. 260.

Although the first list of conventions is specific in that they regulate *jus cogens* norms[8] and represent a special form of human rights protection that requires states to prosecute persons suspected of committing genocide or apartheid; however, the selection of the second list of international treaties is justified by the existence of the committees established by them, which supervise the implementation of the obligations arising from these treaties for the individual contracting parties. The number of members in these committees varies from 10 to 23 experts nominated and elected by contracting parties but are supposed to perform their functions as independent experts.[9]

These expert bodies are authorised to adopt the following three types of recommendations: general recommendations, recommendations after receiving and discussing monitoring reports from the requested individual states, and recommendations after an individual complaint has been submitted and heard.

This mechanism is available to the committees because the possibility of filing complaints by individuals has been established either by the original treaty itself or, in some cases, by an additional protocol. As of 2023, there are only eight committees that are authorised to deal with a complaint under certain circumstances. They are the Committee on the Protection of the Rights of All Migrant Workers and their Families and it has this competence foreseen in Article 77 of the Convention; however, this mechanism will become operative when 10 state parties have made the necessary declaration under Article 77. Finally, in terms of terminology, within the language used at the UN, the term communication is preferred over complaint because it is a more acceptable term for states. However, the term complaint is used in this article because it provides a clearer understanding of the entire process.

The possibility of individuals to file a complaint in the field of human rights protection has usually been considered as a fundamental turning point in the effectiveness of the activities of international bodies and has a major impact on the actual protection of human rights at the national level. Although the decisions of committees as quasi-judicial bodies are generally not considered legally binding,[10] even as recommendations, they represent considerable political pressure on the actions of states. Additionally, most states try to reach an amicable settlement with the complainant as a precaution so that a possible decision is not made at all, and the case can be deleted from the list of cases dealt with by an international body.

8 *Ius cogens* aspect of prohibition of genocide was declared e. g. by International Court of Justice in its Advisory Opinion Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide from 28 May 1951, ICJ Reports 1951, p. 15 et seq.

9 Committee on Human Rights, Committee against Torture, Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination against Women, Committee on the Rights of the Child, Committee on Persons with Disabilities, Committee on the Protection of the Rights of Migrant Workers and Members of Their Families, Committee on Enforced Disappearances.

10 See the analysis in the third chapter of this article.

Individual committees determine whether a complaint is acceptable. The complaint can be submitted by individuals or groups of individuals who object to the violation of their rights protected by the relevant convention, that is, victims of human rights violations (CCPR, CERD, CAT, CEDAW, CRPD, and CED allow the filing of a report not by the victim themselves but by a person close to them on their behalf). Controlling authorities reject the complaint if it is clearly unfounded or insufficiently justified (CEDAW and OP-CRPD state this explicitly, along with other committees, in their rules of procedure). Another question that the committees examine regarding the admissibility of the complaint is the question of litipendency or *res iudicata*. Most committees reject the complaint if the same matter has already been decided upon by another judicial or quasi-judicial international body or is pending in such a forum. This approach reflects the efforts of states not to overload the UN's human rights protection system and prevent one committee from becoming an appealing body for another.[11]

A fundamental question in the decision regarding the admissibility of a complaint is the exhaustion of national remedies.[12] The rationale for this condition is obvious; states have the option before they act, otherwise, failure to act will be evaluated on an international forum to correct violations of their international obligations by themselves. However, the committees do not insist on the requirement that national remedies have been exhausted unless the proceedings based on them are too long or there is no real possibility of securing a relevant remedy for the injured party. Therefore, national remedies must be effective and accessible to victims of human rights violations.

In the UN system, individual complaints reach committees through the UN Office of the High Commissioner for Human Rights, which invites complainants to complete their reports. When the Committee decides that the complaint is acceptable, it asks for a statement from the concerned state. Proceedings occur exclusively in written form and are not available to the public. Therefore, they do not include witnesses or experts.

3. Interpretation of international conventions and relationship between international and Slovak law

When analysing human rights committees and their recommendations, apart from the relationship between international and Slovak national law, it is also important to understand the interpretation rules applied by international law

11 Cf. Tomuschat, 2003, p. 213.

12 For more comprehensive summary of admissibility requirements see [Online]. Available at: https://www.ohchr.org/en/treaty-bodies/individual-communications#theadmissibility (Accessed: 31 July 2023).

because they might influence the decision-making procedure within the human rights protection system.

According to the general rule of interpretation of Article 31 of the Vienna Convention on the Law of Treaties,[13] a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in its context and in light of its object and purpose. Moreover, the Vienna Convention has specified that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, its preamble, and annexes, any agreement relating to the treaty made between all parties in connection with the conclusion of the treaty and any instrument related to one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Furthermore, along with the context, any subsequential agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any subsequential practice in the application of the treaty that also establishes the agreement of the parties regarding its interpretation, and any relevant rules of international law applicable to the relations between the parties shall be considered. This is particularly the subsequential practice that is relevant to this issue.

The Vienna Convention also determines supplementary means of interpretation, including the preparatory work of the treaty[14] and the circumstances of its conclusion, to confirm the meaning resulting from the application of Article 31, determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.[15]

Finally, the Vienna Convention allows a special meaning to be given to a term if it is established that the parties intend to. It is important to interpret the term recommendation because it is the subject of the research in this article. Nevertheless, it is submitted that the state parties do not intend to give special meaning to this term and vice versa. Both the state parties and committees understand this term in its ordinary meaning.

To clarify, the aforementioned UN human rights conventions that authorise established committees to make decisions upon accepted complaints adopt these decisions in the form of recommendations. A recommendation is submitted as a suggestion that something is good or suitable for a particular purpose or job; it may also be advice.[16] There is no specific understanding of the term recommendation in relation to any legal framework. If one refers to the Vienna Convention on

13 For more details see e. g. Aust, 2007, p. 234.

14 Travaux préparatoires were important in *Johnston and others v. Ireland*, 18 December 1986, No. 9697/82, para. 52.

15 Art. 32 of the Vienna Convention on the Law of Treaties.

16 Compare Cambridge Dictionary [Online]. Available at: https://dictionary.cambridge.org/dictionary/english/recommendation (Accessed: 31 July 2023).

the Law of Treaties, the general rule of interpretation and term recommendation are interpreted in good faith in accordance with its ordinary meaning; there is no other ordinary meaning of this term even if interpreted in the context and in light of the object and purpose of such a committee recommendation or of a concerned treaty. However, the situation may differ for individual states, as explained in the following subsection.

All the aforementioned conventions have also been ratified by the Slovak Republic and not by the International Convention on the Protection of the Rights of All Migrant Workers and their Families. In this article, it is important to understand the relationship between Slovak national and international law. If there is a sharp division among the three theories,[17] namely, the monistic one with international law taking priority, the monistic one with national law taking priority, and the dualistic one in which Slovakia would take the priority as the first one.

As for the general rule, originating from the Constitution of the Slovak Republic (the Constitution), the Slovak Republic acknowledges and adheres to the general rules of international law, the international treaties by which it is bound, and its other international obligations.[18] However, this Constitution article is simply a statement specifying the position and orientation of Slovakia within the international community. To be more precise regarding international treaties, one must reflect on Article 7 of the Constitution, which regulates the precedence of international treaties over laws.[19] Nevertheless, such a position is provided for only under certain conditions and for certain types of international treaties. Precedence over laws is possible only for international treaties on human rights and fundamental freedoms, international treaties that do not necessitate exercising a law, and international treaties that directly confer rights or impose duties on natural or legal persons. Moreover, all of these must be ratified and promulgated in a manner laid down by law. Obviously, Slovakia must be a contracting party to such treaties.[20]

This article has been included in the Constitution based on the great amendment of the Constitution, which was essential in relation to Slovakia's EU membership.[21] It changed the position of international treaties within the Slovak

17 See e. g. Čepelka and Šturma, 2008, p. 194.

18 Art. 1(2) of the Constitution of the Slovak Republic.

19 However, this precedence does not include precedence over the Constitution.

20 Moreover, according to Art. 7(4) of the Convention, the validity of international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which a membership of the Slovak Republic in international organizations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary and international treaties which directly confer rights or impose duties on natural persons or legal persons, require the approval of the National Council of the Slovak Republic before ratification.

21 Constitutional Act No. 90/2001 Coll.

legal order, which was especially important for international treaties ratified by Slovakia before the great amendment of the Constitution. Therefore, transitory Article 154 c of the Constitution is the most important one in relation to the Convention and other international treaties ratified by Slovakia before 1 July 2001. According to this article, international treaties on human rights and fundamental freedoms that the Slovak Republic has ratified and promulgated in the manner laid down by law shall be part of its legal order and shave precedence over laws before taking effect of this constitutional act. This is only if they provide a greater scope of constitutional rights and freedoms.[22] Other international treaties that the Slovakia has ratified and promulgated in accordance with law before taking effect of this constitutional act are part of its legal order, if specified in accordance with law.[23]

Some of the aforementioned international treaties were ratified by the Slovak Republic before and after 1 July 2001. Nevertheless, all of them have precedence over national legal acts, either because they provide a greater scope of fundamental rights or freedoms or because they confer rights to natural or legal persons. However, the issue of this article is more specific, concerning, the status of recommendations adopted by bodies established by relevant international treaties and not the status of international treaties that only partially influence research submission. Nevertheless, it is a very important pre-step in the status of UN human rights committees' recommendations.

4. Committees recommendations and their position in the Slovak legal framework

Before examining the position of committee recommendations within the Slovak legal framework, it is important to address a decision of the Supreme Tribunal of the Kingdom of Spain because it has also been referred to in the Slovak legal environment. More precisely, this Spanish case has been presented as a turning point for the enforceability of the UN treaty body recommendation because it was ruled that, once an international human rights treaty is ratified by the state, there should be a mechanism within the state for the enforcement of a result adopted by the body established by that treaty.[24] Nevertheless, as will be emphasised later, this decision largely depends on the Spanish Constitution.

To summarise the facts, in April 2003, a seven-year-old girl called Andrea was murdered by her father, who subsequently committed suicide. This happened during a court-approved parental visit even though Andrea's mother, Ms.

22 Constitution, Art. 154c(1).
23 Ibid., para 2.
24 Contentious-Administrative Chamber, Spanish Supreme Court's Judgment of 17 July 2018 (STS 1263/2018).

González Garreño, reported many instances of physical abuse to the police and sought restraining orders to protect herself and her daughter. Nevertheless, the court finally allowed unsupervised visits, which led to Andrea's murder. After the murder, Ms. Gonzalez Garreño initiated several legal cases against the Spanish authorities in national courts for 'abnormal functioning of the Administration of Justice' especially by their failure to take into account the history of domestic violence when determining a right of the father to visit. After the exhaustion of domestic remedies (including the Spanish Supreme Court, which confirmed state acts, and the Spanish Constitutional Court, which declared the case inadmissible), Ms. Gonzalez Garreño filed a complaint with the CEDAW Committee. The Committee held in favour of Ms. Gonzalez Garreño and ruled against the Spanish authorities for their failure to exercise the necessary steps to prevent violation of the CEDAW.[25] Moreover, the Committee recommended that Spain grant Ms. Gonzalez Garreño comprehensive compensation and conduct an exhaustive and impartial investigation.[26]

Since February 2015, Ms. Gonzalez Garreño has filed several administrative and legal submissions requesting that the Ministry of Justice or relevant courts comply with orders within the CEDAW recommendations. There were several issues at stake, such as *res judicata*, that is, the abnormal functioning of the Administration of Justice; however, all these claims were dismissed. Finally, the Supreme Court upheld that Spanish authorities were required to act in accordance with the CEDAW recommendations that had been adopted in the form of so-called views. The Supreme Court pointed out Article 24 of the CEDAW Convention, according to which, all ratifying states must adopt the necessary means of protecting fundamental rights outlined in the Convention. According to the Supreme Court, the views of the CEDAW Committee are obligatory for the state party to ratify in accordance with the Convention and Protocol. Moreover, consideration must also be given to Article 7(4) of the Optional Protocol, which states that the state party shall give due consideration to the views of the Committee, together with its recommendations, and that the state party shall submit to the Committee a written response within six months after the recommendations are received. Furthermore, according to the Supreme Court, the state party should expressly recognise the Committee's competence under Article 1 of the Protocol.[27]

Finally, moving on to domestic law, the Supreme Court explained that the international treaty that provides the basis for the CEDAW Committee and its views forms part of the Spanish legal order under Article 96 of the Spanish Constitution. Moreover, under Article 10(2) of the Spanish Constitution, fundamental rights

25 CEDAW, case no. 47/2012.
26 Ibid., para. 11 a).
27 STS 1263/2018, p. 11.

ought to be interpreted in accordance with the UDHR[28] and international human rights treaties ratified by Spain. Furthermore, Article 9(3) of the Spanish Constitution provides with the principle of legality and normative hierarchy. Therefore, according to the Spanish Supreme Court, international obligations relating to the execution of the decisions of the CEDAW Committee are a part of the Spanish legal order and enjoy a hierarchical position over ordinary domestic law.[29]

The Supreme Court ordered the state to pay EUR 600, 000 for moral damages to Ms. Gonzalez Garreño, which might have influenced several opinions. According to them, the Spanish Supreme Court's decision overestimated the legal value of the CEDAW's decision.[30]

Nevertheless, the crucial point is not whether Spain violated the international legal obligations derived from the CEDAW Convention. Spain ratified the CEDAW Convention and recognised the competence of the CEDAW Committee to adopt its views on individual communication. Furthermore, for the international responsibility of a state to be established, only two requirements must be met. The first is the violation of an international legal obligation, and the second is the attributability of this violation to a particular state. Both these conditions have been fulfilled in the present case, which means that Spain has been under the obligation to make full reparations for the injury caused by its internationally wrongful act[31] in a form that is possible and acceptable.[32] However, the issue conflicts with the status of the recommendations of the UN human rights committees, whether they are legally binding or not, and consequently, whether not fulfilling these recommendations has established another international responsibility of a state for an internationally wrongful act. Nevertheless, as already mentioned, the CEDAW drafted its General Recommendation Number 33 in such a way that it included the obligation of the State Parties to CEDAW to respect the CEDAW Committees' views, that is, to consider them legally binding and several State Parties clearly disagreed with such a draft.[33]

Knowing the original draft of the CEDAW and the Spanish case, the author of this article has made an appointment to discuss the UN human rights committees and their recommendations or views at the Ministry of Foreign and European Affairs of the Slovak Republic, namely, at the Department of Human Rights, which is in charge of administering communication with the examined UN human rights committees.[34] The visit confirmed that there are no special internal instructions or

28 Understanding of the UDHR is completely different in Slovakia if compared to its character as a tool to interpret fundamental rights. See e. g. Jaichand and Suksi, 2009.
29 See e. g. Kanetake, 2019.
30 Pineda, 2019, p. 133.
31 Art. 31 of the Articles on Responsibility of States for Internationally Wrongful Acts.
32 Ibid., Art. 34 et seq.
33 See e. g. Report of the International Law Commission, UN GAOR, 73rd Sess., Supp. No. 10, at 110–12, paras. 9–15, UN Doc. A/73/10 (2018).
34 The meeting at the Ministry of Foreign and European Affairs of the Slovak Republic took place on April 25, 2023.

special formal procedures when communication from the UN human rights committees reaches the Slovak state body, and that the Slovak state authorities consider recommendations adopted by these UN human rights committees as non-legally binding. Moreover, even though no decision had yet been adopted that ruled upon the CEDAW views within the Slovak legal order, there have already been some submissions at a court for the Ministry to provide its legal viewpoint.

The following set of facts and laws has been discussed at the Ministry. The relevant case has concerned a lawsuit that has not yet been decided upon at the national level, within which the complainant has asserted her rights and claims based on the opinion adopted by the CEDAW.[35] According to the CEDAW recommendations, the complainant is provided with financial compensation for lost wages, non-pecuniary damage, and legal representation costs related to legal proceedings for violations of her rights under the CEDAW Convention.[36]

As for the facts, the complainant has argued in the original submission that the state-run company had violated the principle of equal treatment because the decision to declare her redundant was taken by her employer, who respectively had informed her that she was nobody's *protégé* and that she would be at home with sick children all the time. The author has also argued that, after the termination of her employment, the employer engaged two other persons to perform tasks that had previously been performed by her. She alleged that the main reason for her dismissal was the fact that she was the mother of two small children who had just returned from maternity and parental leave.[37]

Leaving aside those aspects that are similar to the Spanish case in that there are no legal grounds for a formal procedure to implement committee recommendations within the Slovak legal order, it is important to point out that, according to the information provided, the CEDAW positively evaluated all the general measures that the Slovak Republic adopted in connection with the recommendation on the violation of the CEDAW Convention. However, dissatisfaction has remained with the non-payment of compensation to the complainant. This fact has allegedly prevented the CEDAW from ending its follow-up. The members of the working group for communication have expressly emphasised that there was no specific form of compensation and that it could also be non-monetary compensation.

Nevertheless, the Ministry of Foreign Affairs has interpreted this recommendation as not legally binding. The basis for such an interpretation is the assessment that the CEDAW Committee was established by an international treaty. Its authority to assess the notifications of individuals who complained that they have become victims of a violation of one of the rights of the Convention was established by another international treaty, the Optional Protocol to the Convention,

35 CEDAW, complaint no. 66/2014, 7 November 2016.
36 Ibid.
37 Ibid., paras. 2, 11.

both of which were ratified by the Slovak Republic. Nevertheless, there is no provision in the CEDAW regarding the Optional Protocol regulating the legally binding nature of the output, which ends the process of assessing notifications received from individuals.

On one hand, there is the expressly stated obligation of the CEDAW Committee to inform the affected state of the receipt of a notification directed against that state; the right of the state to be informed is followed by the obligation of the state to provide information or the cooperation of the CEDAW in processing this notification. In addition to Articles 1 and 2, Article 6 of the Optional Protocol to the Convention is also categorically formulated and directly and unambiguously states the obligation of the contracting state.

Consequently, Article 7(1) of the Optional Protocol to the Convention stipulates that the CEDAW shall consider all information available to it submitted by individuals or groups or on their behalf and the relevant state and shall forward its opinion on it together with recommendations, if any, to the parties concerned.

Giving ordinary meaning to the terms of the treaty in their context and in light of the object and purpose of the CEDAW n, Article 7(3) of the Optional Protocol to the Convention has established that the process before CEDAW does not end with a legally binding act. This conclusion is also confirmed by a comparison with the aforementioned articles on the Optional Protocol to the Convention,[38] clearly formulating the obligations of the contracting state and corresponding with relevant articles by other international treaties that have established mechanisms to resolve individual complaints completed by a legally binding act. For example, the Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), to which the Slovak Republic is a contracting party in connection with its membership in the Council of Europe, and pursuant to which the European Court of Human Rights was established to ensure the fulfilment of the obligations assumed by the ECHR. Article 46 of the ECHR expressly provides for 'Binding force and execution of judgments.' Its wording clearly states that 'the High contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties.'

Moreover, as for the Slovak national judiciary, the Constitutional Court of the Slovak Republic has already openly dealt with[39] the nature of the opinions of UN committees in its resolution, in which it has referred to the Czech jurisprudence[40] and identified the UN Human Rights Committee (analogously applicable

38 Arts. 1, 2 and Art. 6.

39 Nevertheless, it is true that the Spanish Supreme Court has already also analysed the status of the UN human rights committees' recommendations and came to a conclusion that they are not legally binding. The 2018 decision has been chosen because it was a turning point in general practice and second, it has been referred to in various submission (not only in Slovakia).

40 Judgment of the Supreme Administrative Court of the Czech Republic, file no.: III. ÚS 296/14.

also to the CEDAW Committee) as an example of the 'quasi-judicial international body."[41] According to the Constitutional Court of the Slovak Republic, these bodies differ from judicial bodies in presenting their opinions in the form of legally non-binding albeit factually respected opinions.[42]

Furthermore, it is important to emphasise that even though the decisions of other states´ supreme courts might influence the decisions of the Slovak Supreme Court (especially the Czech courts), the Slovak Supreme Court has clearly stated that the term of the established decision-making practice of the appellate court includes decisions of the Constitutional Court of the Slovak Republic, European Court of Human Rights, and Court of Justice of the European Union.[43] Nevertheless, the decisions of the courts of other states, not even those of the Constitutional Court of the Czech Republic and Supreme Court of the Czech Republic, do not fall under this term.[44] Therefore, it is clear that, under the term established decision-making practice of the court of appeal, only decisions of the Supreme Court of the Slovak Republic and the Constitutional Court of the Slovak Republic can be considered by the courts of the Slovak Republic.

Moreover, there has been a consistent understanding of the non-legally binding character of UN human rights committees in academic publications, both in international[45] and national.[46]

In addition to substantive legal differences and absence of a legal basis for binding decisions, procedural differences must also be considered. This is because the members of the CEDAW Committee are 23 experts from the world in the field of women's rights; that is, a condition for their election is not complete legal education, which is the case for judges of the European Court of Human Rights, where legal experience is also required. Moreover, the opinions of the UN Human Rights Committees do not contain a provision on the possibility of an appeal that is part of fair trial rules.[47]

5. Conclusion

Based on the text of the relevant international treaties, court jurisprudence, and established international and domestic legal doctrines, the opinions of the CEDAW (another UN human rights quasi-judicial bodies) are not legally binding to the parties to the Convention. This also reflects the position of the Slovak Republic.

41 III. ÚS 319/2018 from 30 of 7 August 2018.
42 Ibid.
43 Resolution of the Supreme Court of the Slovak Republic of October 31, 2017, 6 Cdo 129/2017.
44 Ibid.
45 See e. g. Shaw, 2008, p. 320.
46 See e. g. Jankuv et al., 2016.
47 For further information upon the right to appeal see e. g. Marshall, 2011, p. 2.

Although the international responsibility of a state can arise by not fulfilling the obligations set forth by an international treaty, the non-implementation of the recommendations stated in the opinion cannot establish another responsibility for a state to violate an international obligation. However, it is true that by adopting these special procedures within the UN, the contracting states have also accepted the obligation to respect their conclusions. Therefore, the unfulfilled recommendations remain part of the political, but not legal, dialogue between the UN committees and the individual contracting states of the Convention.

States, including Slovakia, usually respect the positions of UN human rights committees and reflect on their recommendations to prevent future situations that individual complainants draw attention to. In a broader context, although the given context and considerations do not change the legal nature of the CEDAW's conclusions, competent authorities and representatives of the state consider them when considering whether and what measures the state will take in response to a certain opinion of the CEDAW in the foreign policy context.

In one of the cases examined in this article, the Spanish court decided on the basis of Spain's national legislation. This entailed going beyond the international obligations of the contracting parties to the Convention and international customs, the common practice of states resulting from control mechanisms, and the nature of opinions issued by UN committees, which remain legally non-binding. considering the absence of the same or similar national regulations in the Slovak Republic, which would allow or attribute effects to the opinions of the CEDAW beyond the scope of international legal obligations, the decision of the Supreme Court of the Kingdom of Spain cannot be considered as a supporting or binding source for deriving obligations for the Slovak Republic in the case of any complainant relating to the obligations of Slovakia as a state party to the Convention on the Elimination of All Forms of Discrimination Against Women.

Additionally, the imperative wording used in the *draft* version of CEDAW General Comment Number 33 on women's access to justice received criticism from several states.[48] The final version of General Comment Number 33 omitted the phrase concerning the 'obligation to respect the views' and limited itself to reminding states of their duty to cooperate with the Committee based on the basic obligation to observe treaty provisions in good faith.[49] The states' behaviour behind the adoption of CEDAW General Comment Number 33 illustrated that other states' parties may also not be open to the position adopted by the Spanish Supreme Court.[50] Finally, in the 2018 ruling, the Spanish Supreme Court emphasised the

48 See Report of the International Law Commission, UN GAOR, 73rd Sess., Supp. No. 10, at 110–12, paras. 9–15, UN Doc. A/73/10 (2018).

49 Cf. Art. 26 of the Vienna Convention on the Law of Treaties.

50 See Kanetake, 2019.

special aspects of a particular violation and suggested the limited applicability of the Court's reasoning to this specific case.[51]

Overall, one must be cautious not to generalise the Supreme Court rule. It remains to be seen whether and to what extent Spanish courts will continue to acknowledge the obligatory characteristics of the recommendations of the CEDAW and other human rights treaty monitoring bodies. This decision was based on the relationship between Spanish national law and the international law. This formal aspect is one of the factors that must be considered, even though the material aspects are from several areas.

The first is the composition of the committees that are created by different types of professionals, belonging to neither legal education nor profession. Second, fair trial matters include the issue of appeal.

Finally, even if the committees themselves do not consider their recommendations to be legally binding, the term constructive dialogue is used; thus, it is effective not just in the case of providing recommendations upon monitoring reports. The entire procedure is not supposed to be adverse; the committee does not aim to pass a judgment on the state party in a judicial sense. Instead, the aim is to engage with the state party in a constructive dialogue to assist the state in its efforts to implement the treaty as fully and effectively as possible. The notion of constructive dialogue underpins the view that treaty bodies are not judicial bodies (even if some of their functions are quasi-judicial) but instead bodies created to monitor the implementation of the treaties.[52]

Finally, the impact of the Spanish Supreme Court has also been considered in other national judiciaries, such as the UK courts. Nevertheless, even the Spanish Supreme Court, in its later 2020 Banesto decision, has pointed out a distinction between the legal character of the European Court of Human Rights' decisions and those of the United Nations Human Rights committees. It has emphasised that only the former could be the basis for the revision of earlier domestic judicial rulings.[53] Therefore, it might be submitted that, even though some cases have occasionally given rise to the issue of a legally binding character of UN Human Rights committee's recommendations based on and reasoned by specific features of national law, especially its constitution, most states, including Slovakia, consider the recommendations of these bodies to be political rather than legal in character.

51 STS 1263/2018, pp. 13–14.

52 For further information see the website of the Office of the High Commissioner of Human Rights [Online]. Available at: https://www2.ohchr.org/english/bodies/treaty/glossary.htm (Accessed: 31 July 2023).

53 Supreme Tribunal: STS 1263/2018, 17 July 2018, quoted from [Online]. Available at: https://www.escr-net.org/caselaw/2021/sts-12632018-17-july-2018 (Accessed: 31 July 2023).

Bibliography

- Aust, A. (2007) *Modern Treaty Law and Practice*. 2nd ed. Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9780511811517.
- Čepelka, Č., Šturma, P. (2008) *Mezinárodní právo veřejní*. Praha: C. H. Beck
- Donnelly, J. (2003) *Universal Human Rights in Theory & Practice*. 2nd edn. Ithaca and London: Cornell University Press.
- Harris, D. J. (2004) *Cases and Materials on International Law*. 6th edn. London: Sweet & Maxwell.
- Jaichand, V., Suksi, M. (eds.) (2009) *60 Years of the Universal Declaration of Human Rights in Europe*. Mortset: Intersentia.
- Jankuv, J., Lantajová, D., Blaškovič, K., Buchta, T., Arbet, D. (2016) *Medzinárodné právo verejné. 2nd Part.* 1st edn. Plzeň: Aleš Čeněk.
- Kanetake, M. (2019) 'María de los Ángeles González Carreño v. Ministry of Justice', *American Journal of International Law*, 113(3), pp. 586–592; https://doi.org/10.1017/ajil.2019.31.
- Marshall, P. D. (2011) 'A Comparative Analysis of the Right to Appeal', *Duke Journal of Comparative and International Law*, 22(1), pp. 1–46.
- Pineda, E. J. (2019) 'A commentary on the Supreme Court's Judgment of 17 July 2018 (STS 1263/2018) and its supposed impact for a legally binding value of the decisions adopted by the Committee on the Elimination of Discrimination against Women (CEDAW)', *Spanish Yearbook of International Law*, 2019/23, pp. 129–145; https://doi.org/10.17103/sybil.23.6.
- Potočný, M., Ondřej, J. (2003) *Mezinárodní právo veřejní – zvláštní část*. Prague: C.H. Beck.
- Shaw, M. N. (2008) *International Law*. 6th edn. Cambridge: Cambridge University Press.
- Tomuschat, Ch. (2003) *Human Rights. Between Idealism and Realism*. Oxford: Oxford University Press.
- Vandenhole, W., Lembrechts, S., Turkelli, G. E. (2019) *Legal Commentary on the Convention on the Rights of the Child and its Protocols*. Cheltenham: Edward Elgar Publishing; https://doi.org/10.4337/9781786433138.00022.

LUCIJA SOKANOVIĆ*

The Relationship of the Croatian Constitutional Court and Supreme Court to the Court of Justice of the European Union in National Case Law

ABSTRACT: *After a short introduction to Croatia's accession to the EU, this paper deals with the obligations for national courts arising from EU membership in a historical overview and the current state. Furthermore, the relationship between the Croatian Constitutional Court, the Croatian Supreme Court, and the Court of Justice of the European Union in national case law is analysed. In addition, the hierarchy of national and EU laws is questioned, as is the notion of constitutional identity. The relationship between the national constitutional courts of the EU member states, the national Supreme Court, and the CJEU is not conceived as a relation of subordination, but of communication and dialogue, the ultimate goal of which is the harmonisation of the acquis of the EU member states and legal security for all its citizens, while at the same time respecting the specificities of each member state.*

KEYWORDS: Constitutional Court of the Republic of Croatia, Supreme Court, CJEU, preliminary questions, ultra vires

1. Introduction

Croatia's journey to European Union accession formally started at the Zagreb Summit in November 2000, which brought together the presidents of the state and government of 15 European Union member states, as well as the leaders of Croatia, Bosnia and Herzegovina, Macedonia, Albania, and the Federal Republic of Yugoslavia, when the negotiations for the Stabilization and Association Agreement were opened. On 1st December 2011 the European Parliament approved Croatia's accession to the European Union. Just a few days later, on 9th December, Croatia signed

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the Agreement on the Accession of the Republic of Croatia to the European Union. A referendum on Croatia's accession was conducted in January 2012 In March the Croatian Parliament ratified the Treaty on the Accession of the Republic of Croatia to the European Union. Finally, on 1st July 2013 the Treaty on the Accession of the Republic of Croatia to the European Union came into force. One of the many steps in this journey was the amendment to the Constitution of the Republic of Croatia in 2010, which regulated the legal status of the European Union in the national legal order.[1] Based on Article 152 of the Constitution, amendments in Chapter VIII, titled *European Union* entered into force on the date of Croatia's accession to the European Union. The new chapter regulates the legal basis of membership in the EU, the transfer of constitutional powers to its institutions[2], the participation of Croatian citizens and EU institutions[3], the relationship between national law and EU law[4], and the rights of EU citizens.[5] The aforementioned constitutional provisions were designed and accepted to provide a constitutional basis for Croatia's legal and EU law-compliant participation in international organisations.[6] According to Article 145, the exercise of rights arising from the *acquis* of the European Union is equated with the exercise of rights guaranteed by the Croatian legal order. Legal acts and decisions accepted by the Republic of Croatia in the institutions of the European Union are applied in the Republic of Croatia in accordance with the *acquis* of the European Union. The Croatian courts protect subjective rights based on the *acquis* of the European Union. State bodies, bodies of local and regional self-government units, and legal entities with public power directly apply EU law. Article 145 has now been renumerated as Article 141.c. and titled 'European Union Law.'[7] It was evaluated in the Croatian scientific literature as declaratory and not constitutive in nature, since its essential content crystallises through dialogue between national courts and the European Court, and its main function is to create constitutional prerequisites for the participation of ordinary Croatian courts and the Constitutional Court in the European legal discourse.[8]

The aim of this paper is to analyse the relationship between the Croatian Constitutional Court, the Croatian Supreme Court, and the Court of Justice of the

1 Until 1991 Croatia was part of Socialist Federal Republic of Yugoslavia. On 25th June 1991 the Croatian Parliament adopted Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia, and the Declaration on the Establishment of the Sovereign and Independent Republic of Croatia. The Constitution of the Republic of Croatia was adopted in December 1990 wherefore it is known as 'the Christmas Constitution.'

2 Art. 143.

3 Art. 144.

4 Art. 145.

5 Art. 146; Rodin, 2011a, p. 88.

6 Ibid.

7 Constitution of the Republic of Croatia, OG 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 (consolidated text).

8 Ibid., p. 89.

European Union in national case law.[9] In addition, the hierarchy of national and EU laws is questioned, as is the notion of constitutional identity.

2. Obligations for national courts

■ *2.1. Once upon a time*

Obligations for national courts arising from membership in the European Union were formulated in the practice of the Court of the European Union in the sixties and seventies of the 20th century, especially in the cases of *Van Gend en Loos* and *Costa v. ENEL*,[10] as well as *Simmenthal 2*.[11] While in *Van Gend en Loos* the European Court established the doctrine of the direct effect, in *Costa v. ENEL* it formulated the doctrine of the supremacy of EU Law over national law, expressing the view that EU Law cannot be overridden by later adopted national regulations but framed, and in *Simmenthal 2*, gave an answer to the question of the legal consequences of the fact that individuals can refer to legal rules of EU Law against the state, bearing in mind the fact that these legal rules have supremacy over national law.[12] Taken together, these judgments form the core of supranational constitutionalism in Europe.[13]

The obligation of the national court to exclude the application of the national law norm that stands in the way of legal protection of subjective rights based on an objective legal rule of the European Union without prior evaluation of constitutionality before the constitutional court fundamentally changed the national systems of judicial supervision of constitutionality and legality.[14] Instead of requesting the decision of the national constitutional court, the judge of the regular court, who decides on the main case, acquired the authority to independently solve the problem of the conflict of norms of national law with the norm of EU law, possibly with the interpretive assistance of the CJEU in the procedure of the preliminary ruling based on Article 267 of the TFEU.[15]

■ *2.2. What about reality?*

While the doctrine of supremacy has not changed significantly since the 1960s, the obligation arising from *Simmenthal 2* has evolved significantly, according to

9 Further in the text: CJEU.

10 Case 26/62 *N.V. Algemeine Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administratio*n, Judgment of the Court of 5 February 1963, E.C.R. 1, ECLI:EU:C:1963:1; Case 6/1964 *Flaminio Costa v E.N.E.L.*, Judgment of the Court of 15 July 1964, ECLI:EU:C:1964:66.

11 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Judgment of the Court of 9 March 1978, ECLI:EU:C:1978:49. Rodin, 2011a, p. 92.

12 Ibid.

13 Ibid.

14 Rodin, 2011a, p. 93.

15 Ibid.

Rodin.[16] Today, it can no longer be understood only as the procedural side of the doctrine of supremacy of EU Law over national law, but as a complex tissue of reflexive cooperation of national courts with the EU Court.[17] Namely, the doctrines of indirect effect and margins of discretion limited the scope of application of *Simmenthal* in the way that their effect reduced the number of situations in which exclusion of national law was necessary due to conflict with EU law.[18] On the other hand, national judges were given new tasks, particularly to interpret national law in light of EU law and supervise the national margin of judgment in accordance with the practice of the European Court. Finally, it should be noted that *Simmenthal* influenced European interjudicial dialogue and initiated the revival of judicial supervision of constitutionality at the national level.[19]

It is fair to mention here that, in December 2022, the CJEU published a proposal on the reform of the preliminary ruling procedure, according to which the General Court would take on answering preliminary references from national courts in several specific areas of EU law.[20] The reform of the preliminary ruling procedure would likely redefine the roles of the CJEU and the General Court and push them towards their ideal types: the former towards an EU constitutional court and the latter towards an EU supreme court/council of the state.[21] The CJEU would thus come closer to a proper Kelsenian constitutional court, which is tasked with the authoritative determination of the meaning of EU Law, particularly concerning the questions of abstract interpretation, and is concerned primarily with the uniformity and coherence of that law at the general level.[22]

3. Constitutional Court of the Republic of Croatia

The 1963 Constitution established the Croatian Constitutional Court, and Croatia was still a part of the former Socialist Federal Republic of Yugoslavia.[23] It was primarily competent in abstract norm control but also examined the constitutionality and legality of self-governing general acts.[24] Due to the socialist ideology of the supremacy of the elected assembly, in cases where it found a law to be

16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.
20 CJEU, Request submitted by the Court of Justice pursuant to the second paragraph of Art. 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union [Online]. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf. (Accessed: 26 October 2023).
21 Woude, 2021, cited in Petrić, 2023, p. 42.
22 Petrić, 2023, p. 42.
23 Bačić, 2012, p. 81.
24 Ibid.

contrary to the Constitution, the Court could not repeal the law.[25] It would only declare its nonconformity, and the assembly would have six months to enact the new legislation. It was not sufficient to decide on the constitutionality and legality of individual acts.[26]

The Constitutional Court of the Republic of Croatia was constituted on 5th December 1991. In the scientific literature, it has been stated that the constitutional position of the Constitutional Court follows the Kelsenian, continental European tradition, since it is designed as an intermediate branch which controls all three branches of government: legislative, executive, and judicial.[27] It is neither placed above them in the hierarchy nor a part of them in either an organizational or functional way.[28]

According to Article 125 of the Croatian Constitution, the Croatian Constitutional Court: decides on the conformity of laws with the Constitution; decides on the conformity of other regulations with the Constitution and laws; may decide on constitutionality of laws and constitutionality of laws and other regulations which have lost their legal force, provided that from the moment of losing the legal force until the submission of a request or a proposal to institute the proceedings not more than one year has passed; decides on constitutional complaints against the individual decisions of governmental bodies, bodies of local and regional self-government and legal entities with public authority, when these decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia; observes the realization of constitutionality and legality and notifies the Croatian Parliament on the instances of unconstitutionality and illegality observed thereto; decides on jurisdictional disputes between the legislative, executive and judicial branches; decides, in the conformity with the Constitution, on the impeachment of the President of the Republic; supervises the constitutionality of the programs and activities of political parties and may, in conformity with the Constitution, ban their work; supervises the constitutionality and legality of elections and national referenda, and decides on the electoral disputes which are not within the jurisdiction of courts; performs other duties specified by the Constitution.

■ *3.1. The hierarchy of national and EU law*

Croatian Constitution prescribes in Article 141.c(2) the obligation of national courts to apply the law in a manner consistent with European Union law: all the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union *acquis communautaire*. This provision is described in Croatian

25 Ibid.
26 Barić and Bačić, 2010, p. 407.
27 Bačić, 2012, p. 82.
28 Barić and Bačić, 2010, p. 407.

scientific literature as circular, whereby its circular manner conceals the integral range of the prescribed obligations, which includes not only the self-referential obligation to apply European Union law but also the obligation to apply national law in accordance with EU law.[29] While it is self-evident that the norms of EU law are applied in the way they prescribe them themselves, the obligation to apply national law in accordance with EU law derives from principles originating from EU law, such as supremacy and direct effect, and, in a broader sense, from the general principle of international law *pacta sunt servanda*.[30] Rodin explains this as follows:

> In short, the norm of EU Law will have a direct effect on Croatian Law when it is derived from the norm of EU Law itself; it will be superior to Croatian Law because this is its general feature. Therefore, Article 145(2)[31] of the Constitution of the Republic of Croatia can be understood as a norm that implicitly prescribes the direct effect and supremacy of EU Law over Croatian Law. These principles are embedded in the foundations of EU law and constitute their original and autonomous legal order. Therefore, Article 145(2), should not be understood in a banal way as a mere conflict rule but as a constitutional declaration of the fundamental principles on which EU law is based. These principles permeate the national legal systems of member states, and without their acceptance, EU membership is not possible.[32]

■ *3.2. Case-law*

Three recent decisions of the Croatian Constitutional Court are presented in this subchapter with the aim of reviewing the substance of applications submitted as well as reasoning dynamics.

3.2.1. Violation of the applicant's right to fair trial in terms of prohibition of arbitrariness and the right to reasoned judicial decisions

In this case, the Constitutional Court violated the applicant's right to fair trial guaranteed by Article 29(1) of the Constitution of the Republic of Croatia, and Article 6, Part 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms in connection with Articles 141.c and 141. d of the Constitution of the Republic of Croatia, in the aspect of the prohibition of arbitrariness and

29 Rodin, 2011a, p. 89. See also Omejec, 2016, pp. 14–28.
30 Ibid.
31 Now it is Art. 141.c(2).
32 Rodin, 2011a, p. 90.

the right to reasoned judicial the decision.[33] The applicant filed a constitutional complaint regarding the judgment of the Supreme Court which rejected his appeal against the decision of the Administrative Board of the Croatian Bar Association, in which the applicant was deleted from the Directory of Lawyers of the Croatian Bar Association. The contested judgment of the Supreme Court confirmed the positions of the competent bodies of the Croatian Bar Association, according to which the applicant, based on then valid Article 56, point 8 of the Law on the Legal Profession, ceased to have the right to practice law because he entered into employment with a German trading company in the position of legal advisor. It follows from the explanation of the contested judgment that the Supreme Court did not express itself on the request of the applicant for a preliminary ruling to the CJEU (regarding the interpretation of Directive 98/5, that is, the interpretation of whether the provision of then-valid Article 56, point 8 is contrary to Article 8 of Directive 98/5) and did not explain the reasons for possible disagreement with reference to the CJEU.[34]

In its Decision, the Constitutional Court noted that the Supreme Court was not obliged to accept all the proposals of the parties, including those related to referring a request to the CJEU for a preliminary ruling on the interpretation of EU Law. The decision on whether to refer to such a request is a matter of the competence of the Supreme Court and not the parties' disposition. However, as the "national court of last instance," the Supreme Court was obliged to express its opinion on the motion to refer a request in order to make a decision on the previous issue, i.e. to explain the reasons why it considers that in the specific case it was not obliged to refer the request to the CJEU for the preliminary ruling on the interpretation of EU law in the sense of Article 267(3) of the TFEU. Otherwise, the question could be raised whether, in the opinion of the Supreme Court, it is unnecessary to review the application of EU Law because the requested question is irrelevant for the resolution of the specific case or whether it has judged that the correct application of EU Law in the specific case is so obvious that it leaves no room for reasonable doubt (doctrine *acte clair*).[35] This was sufficient for the Constitutional Court to establish that there was a violation of the applicant's right to a fair trial from Article 29(1) of the Constitution in connection with Articles 141c and 141d.

In this decision, the Constitutional Court reminded that it follows from Article 267(3) of the TFEU that a national court against whose decision there is no legal remedy ("court of last instance") is obliged to refer a preliminary question to the Court of the EU. According to the established practice of the CJEU summarised

33 Constitutional Court of the Republic of Croatia, Decision U-III/356/2019, 12 April 2022 [Online]. Available at: https://www.iusinfo.hr/sudska-praksa/USRH2019B356AIII. (Accessed: 26 October 2023).

34 Ibid., para. 17.

35 Ibid., para. 22.1.

in the case *Cilfit*,[36] which was accepted by the Constitutional Court in Para. 12 of the decision number U-III-1966/2016 of 6 December 2016 the court of the last instance may refrain from the obligation to refer a request for the interpretation of EU law to the Court of the EU in the following cases:

> The question raised is irrelevant, the Community provision in question has already been interpreted by the Court, or the correct application of Community Law is so obvious that it leaves no scope for any reasonable doubt. The existence of such a possibility must be assessed in light of the specific characteristics of community law, the particular difficulties with which its interpretation arises, and the risk of divergence in judicial decisions within the community.[37]

In relation to the application of the *acte clair* doctrine, the CJEU in the *Cilfit* judgment set strict criteria according to which an individual national court of "last instance" can conclude that the question of interpretation of EU law is clear:

> Finally, the correct application of community law may be so obvious that there is no scope for any reasonable doubt about the manner in which the question raised is to be resolved. Before concluding that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of other Member States and to the Court of Justice. Only if these conditions are satisfied will the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it. However, the existence of such a possibility must be assessed based on the characteristic features of community law and the difficulties in its interpretation. First, it must be borne in mind that community legislation is drafted in several languages and that the different language versions are all equally authentic. Thus, an interpretation of the provisions of community law involves a comparison of different language versions. It must also be borne in mind that even where the different language versions are entirely in accordance with one another, community law uses terminology peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in community law or in the laws of various Member States. Finally, every provision of

36 Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Judgment of the Court of 6 October 1982, ECLI:EU:C:1982:335.

37 Ibid., para. 21.

> community law must be placed in its context and interpreted in light of the provisions of community law as a whole, with regard to the objectives thereof and its state of evolution on the date on which the provision in question is to be applied.[38]

3.2.2. Demand from the Constitutional Court to refer to the request for a preliminary ruling from the CJEU

The second case concerned the rejection of the applicant's constitutional complaint submitted for a violation of the right to a fair trial. Based on the misdemeanour decision, the applicant was declared guilty of not preventing damage to the means of identification of the goods as the driver of the means of transport because the tarpaulin on the trailer, which was wrapped around the sides of the trailer and through which the customs cable was passed and on which the customs mark was placed, was cut on the roof of the trailer in the form of letter I, which was determined by the control of customs officials, where three foreign persons were found in the cargo area. It was established that applicants acted contrary to the provisions of Article 31 of the Act on the Implementation of Customs Legislation of the European Union and did not prevent damage to the means for identifying goods placed in accordance with Article 192 of Regulation (EU) No. 952/2013, thus committing a misdemeanour from Article 61(1), Item 11 of the Act on the Implementation of Customs Legislation of the European Union. The applicant is fined HRK 42,000.00.[39]

The applicant submitted to the Constitutional Court and demanded that the request be referred for a preliminary ruling.

The Constitutional Court noted in its decision that the applicant submitted the demand to refer the request for a preliminary ruling to the CJEU for the first time in a constitutional complaint and that this demand should have been presented before the High Misdemeanour Court, which decided on his misdemeanour liability. In addition, the questions raised by the applicant referred to correctly established facts and the proper application of substantive law to determine his misdemeanour liability in the proceedings before the competent misdemeanour court. Finally, the Constitutional Court noted that, in a specific case, the High Misdemeanour Court did not apply a positive law in an obviously wrong way. Bearing in mind the reasons presented in the explanation of the contested judgment, in this case, referring to the preliminary questions to the CJEU did not appear to be justified.[40]

38 Ibid., paras. 16–20.

39 Constitutional Court of the Republic of Croatia, Decision U-III/573/2020, 7 April 2022 [Online]. Available at: https://www.iusinfo.hr/sudska-praksa/USRH2020B573AIII. (Accessed: 26 October 2023).

40 Ibid., para. 14.

3.2.3. Demand from the Constitutional Court to refer to the request for a preliminary ruling by the CJEU

The third case involved the rejection of the constitutional complaint against the judgment of the Supreme Court of the Republic of Croatia No: Rev-x 153/2018–8 of 2nd October 2018.[41] The object of the civil proceedings that preceded the constitutional court proceedings was the payment of foreign currency amounts deposited by natural persons as foreign currency deposits with the applicant, Ljubljanska banka d.d. Ljubljana, in the main branch in Zagreb and other organizational units/branches that the applicant had in the Republic of Croatia. The applicant filed a review of the second-instance verdict[42] and decision[43] due to a significant violation of the provisions of the civil procedure and incorrect application of substantive law. The Supreme Court found the applicant's review to be founded only in relation to the decision on interest. In the remaining part, it considered the review to be unfounded while rejecting the review submitted to the decision as inadmissible.

Besides the violations of constitutional rights[44],[45] the applicant formulated two preliminary questions that she believed Croatian courts had to refer to the CJEU, proposing that the Constitutional Court should do so. Alternatively, if the Constitutional Court did not consider the court of last instance that the questions should be referred to, the applicant proposed to the Constitutional Court to vacate the contested judgment of the Supreme Court and order the same court to refer the mentioned questions to the CJEU, after which the Supreme Court would issue a new judgment. The applicant did not demand proceedings before the regular court's preliminary questions.[46]

The Constitutional Court assessed that in the considered case, apart from the fact that the existing stable and consistent jurisprudence of domestic Croatian courts does not open the possibility of questioning the validity of the legal positions stated therein, a specific dispute is entirely on the merits examined before the competent regular courts and does not fall within the scope of the application of any legal sources of the European Union.[47] In the revision submitted to the Supreme Court, the Constitutional Court noted that the applicant did not request a preliminary question to be raised or the case was forwarded to the CJEU. In addition, the Court quoted the case of *Samorjai v. Hungary*,[48] where the ECtHR

41 Constitutional Court of the Republic of Croatia, Decision U-III/970/2019, 24 June 2020 [Online]. Available at: https://www.iusinfo.hr/sudska-praksa/USRH2019B970AIII. (Accessed 26 October 2023).
42 Gž-1026/15-2 of 26 September 2017.
43 Gž-1026/15-3 of 26 September 2017.
44 Arts. 14(2), 18(1), 29(1), 115(3), 141.c and 141.d.
45 Ibid., para. 3.
46 Ibid., para. 3.2.
47 Ibid., para. 17.
48 ECtHR *Samorjai v. Hungary* (Application no. 60934/13), Judgment, 28 August 2018.

found that the jurisdiction of the Supreme Court was limited to the analysis of the questions submitted in the revision and that the applicant did not state the reasons why, according to his opinion, the contested judgment violated Article 234 of the Treaty establishing the European Community, in which circumstances the lack of explanation by the Supreme Court on these aspects was in accordance with domestic procedural rules. Respecting the practice of the ECtHR, the alternative proposal of the applicant of the constitutional complaint that the Constitutional Court should vacate the contested judgment and send it back to the Supreme Court so that the Supreme Court could refer preliminary questions to the CJEU was not founded and was constitutionally acceptable.[49] The Constitutional Court found that the applicant's objections related to Articles 14(2), 18(1), 115(3), 141.c and 141. d of the Constitution, in the way they were raised in the constitutional complaint and to the extent which, in the circumstances of the specific case, the contested judgments could affect the realisation of the content of those constitutional norms, do not point to the possibility of violation of human rights and fundamental freedoms guaranteed by the Constitution.[50]

4. Croatian Supreme Court

As the highest court of law, the Supreme Court ensures the uniform application of laws and equality before the law, as provided by Article 116 of the Croatian Constitution. Article 20 of the Law on Courts prescribes the competencies of the Supreme Court.[51] The Supreme Court of the Republic of Croatia ensures uniform application of law and equality of all in its application, decides on regular legal remedies when prescribed by a special law, decides on extraordinary legal remedies against final decisions of courts in the Republic of Croatia, decides on a conflict of jurisdiction when it is prescribed by a special law, considers current issues of judicial practice, suggests areas for professional training of judges, court advisors, and trainee judges to increase the efficiency and quality of the judiciary as a whole, and finally performs other tasks specified by law.

■ *4.1. Case Perković*

Very soon after Croatia's accession to EU the case *Perković* alarmed national and European expert and general public. Factual and legal background of the case originated from the request of the German court, through a European arrest warrant, of the surrender of Mr. Perković in order to conduct criminal proceedings for aggravated murder.[52] The Framework Decision on the European Arrest

49 Ibid., para. 18.
50 Ibid., para. 19.
51 Law on Courts, OG 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20, 21/22, 60/22, 16/23.
52 The factual and legal background of the case was cited from: Ćapeta, 2015, p. 50.

Warrant was transposed into Croatian Law on Judicial Cooperation in Criminal Matters with EU Member States.[53] Mr. Perković opposed the surrender. The main complaint was that in a specific case, according to Croatian law, the statute of limitations for criminal prosecution had expired. According to German law, however, prosecution for this crime has not become obsolete. Mr. Perković claimed that the onset of the statute of limitations under Croatian law is a reason for refusing surrender. Rather, it was a mandatory reason for refusing surrender because of the way Croatia chose to implement the Framework Decision on European Arrest Warrants. The County Court in Zagreb held that the statute of limitations is not a reason for refusing surrender when surrender is requested due to the conduct of proceedings for criminal offences, for which, based on Article 10 of the Law on Judicial Cooperation in Criminal Matters with EU Member States, the verification of double criminality is excluded.[54] The Supreme Court of the Republic of Croatia later confirmed this decision in its appeal procedures. According to these two courts, the statute of limitations is an integral part of the double criminality check and, therefore, cannot be checked for the aforementioned crime.

In addition to disputes among practitioners and scientists on the issue of the statute of limitation,[55] as many as three courts in Croatia refused to request a preliminary ruling on the interpretation of the Framework Decision on the European Arrest Warrant from the CJEU. The reasoning was based on the view that the CJEU cannot have any role in ruling because the interpretation of the Law on Judicial Cooperation in Criminal Matters with EU Member States as a national law is the competence of Croatian courts.[56] In that sense, the County Court in Zagreb did not accept the lawyer's demand to refer to the CJEU through the Supreme Court of Justice, the question of whether the statute of limitations is assessed for the criminal offence in question according to the provisions of Article 20(2) Items 7 and 10 of the Law on Judicial Cooperation in Criminal Matters with EU Member States, because it did not find it disputable whether the statute of limitations applies to offences from the List.[57] The Court added that there is a strict division of the role of the European Court and national courts as prescribed by Article 220 of the TFEU, on the basis of which the CJEU is competent for the interpretation of Community and Union law and, *a contrario* the highest national courts for the interpretation of national law, which in this case is the Law on Judicial Cooperation in Criminal Matters with EU Member States.[58]

53 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18 July 2002.

54 Law on Judicial Cooperation in Criminal Matters with EU Member States, OG 91/10, 81/13, 124/13, 26/15, 102/17, 68/18, 70/19, 141/20.

55 See Derenčinović, 2014, pp. 247–270.

56 Ćapeta, 2015, p. 51.

57 County Court in Zagreb, Decision KV-EUN-2/14, 8 January 2014.

58 Ibid.

The Supreme Court confirmed the previous position of the County Court and noted that the Law on Judicial Cooperation in Criminal Matters with EU Member States is national law; therefore, the interpretation of that law is in the exclusive competence of Croatian courts.[59] The Constitutional Court briefly noted that the demand for the preliminary ruling of the CJEU was not considered at all because the same demand was submitted to the first instance and appeal courts, and both courts explained the reasons why they considered such an unfounded demand which could be summed up as the position that interpretation when applying national law is the exclusive competence of Croatian courts.[60]

■ *4.2. The recent case-law*

4.2.1. No preliminary questions in the high-profile corruption case

The Supreme Court of the Republic of Croatia rejected the appeals of the Office for Suppression of Corruption and Organized Crime and accused persons, and confirmed the first instance verdict in the case where three university professors were convicted of accepting a bribe and the parents of the students gave a bribe.[61] Besides other appeal reasons, accused S. J. claimed that the trial court unreasonably refused to remove the judgments based on plea bargaining for Ž. K., D. Z., and A. Z. from the criminal file as illegal evidence. In other words, the contested judgment is based on this evidence. He also suggested that the Supreme Court of the Republic of Croatia refer to the CJEU as a request for a preliminary ruling on those judgments.

Since the first instance court explained in detail why the motion of the accused S. J. was unfounded, the Supreme Court accepted these reasons in its entirety and referred the accused S. J. to them to avoid unnecessary repetition. The Court pointed out that the accused S. J. was also wrong when he claimed that the judgment based on plea bargaining for A.Z. was illegal evidence because it was rendered by Judge R.V. as a single judge instead of a panel. Namely, unlike the judgment based on the plea bargaining for Ž. K., and D. Z., which were rendered at the session of the indictment panel (consisting of three judges), the judgment based on plea bargaining for A. Z. was rendered at the preliminary hearing, which, according to Article 371 of the Criminal Procedure Code, was carried out before the president of the (trial) panel. Therefore, as the president of the (trial) Panel, Judge R. V. was authorised to render a judgment based on plea bargaining for A. Z., because the authority of the president of the Panel clearly derives from the provisions of Article 374(2) of the Criminal Procedure Code.[62]

59 The Supreme Court of the Republic of Croatia, Decision Kž-eun 2/14, 17 January 2014.
60 The Constitutional Court of the Republic of Croatia, Decision U-III-351/2014, 24 January 2014.
61 The Supreme Court of the Republic of Croatia, Judgment I Kž Us 51/2020-12, 20. April 2022.
62 Ibid., para. 15.1.

Regarding the application of the accused S. J. for the proceedings of the Supreme Court in terms of Article 18 of the Criminal Procedure Code and Article 267 of the TFEU, the Court reminded that a court against whose decision there is no legal remedy, if it is necessary to refer the request for the preliminary ruling to the CJEU, by the fact that in such a situation, it is exclusively and only the national court that completely and independently decides whether the need for an appropriate interpretation of European Union law has arisen in the specific case and whether, in this sense, it will refer to the competent court. Therefore, the request of the parties for a preliminary ruling is not binding but, above all, represents the important and decisive position of the national court. Since it was a question of legality of evidence in a particular criminal case (reading of final judgments based on plea bargaining for Ž. K., D. Z., and A. Z.), an issue which, as the first-instance court correctly concluded, was resolved exclusively in the domain of national legislation, that is, the national court. Therefore, the Supreme Court concluded that there was no need to refer the request for a preliminary ruling to the CJEU. [63]

4.2.2. Preliminary question concerning illegal evidences

The Supreme Court of the Republic of Croatia rejected the appeals of the accused M. B. and Z. A. on the decision to reject the application of the accused for the removal of judgments based on the plea bargaining of A.D. and D. K from the criminal file as illegal evidence.[64]

The Court held that the issue of the legality of the evidence raised in this specific criminal case (reading of the judgments based on plea bargaining of A. D. and D. K) or the admissibility of using this evidence in criminal cases conducted against the accused M. B., Z. A., and others is the issue that is resolved exclusively in the domain of national legislation, that is, by the national court, and it is not a matter which is regulated by the directive itself. So, it was the correct conclusion of the court of first instance that it was not necessary in the specific legal situation to refer the request for preliminary ruling in relation to the issue of compliance with the provisions of Article 363(1) in connection with Article 455 of the Criminal Procedure Code with Article 4(1) of the Directive, given that this conclusion is also in line with the position of the CJEU taken in the *Cilfft* judgment, where it is expressly stated that the national court is not obliged to refer the request for preliminary ruling if, among others, it determines that the question is not essential for the particular criminal case.[65] For this reason, the Supreme Court of the Republic of Croatia, as a court of second instance–that is, as a court against whose decisions there is no legal remedy for completely identical reasons–did not comply with the request of the accused. According to Article 18: a of the Criminal Procedure Code

63 Ibid., para. 15.2.
64 The Supreme Court of the Republic of Croatia, Decision I Kž Us 26/2020-11, 12 June 2020.
65 Ibid.

and Article 267 of the TFEU, before the adoption of the second-instance decision, it did not refer to the request to the CJEU for a preliminary ruling, considering that the issue was not relevant and important for this particular criminal case: the issue of legality or admissibility of using evidence.[66]

4.2.3. Preliminary question concerning extradition

The Supreme Court of the Republic of Croatia has confirmed the decision of the County Court in Zagreb of 13 November 2020, Kv II-575/2020-7 (Kir-996/2019) which determined that there were no legal prerequisites for the extradition I. N. to the Russian Federation for the purpose of conducting criminal proceedings, and which rejected the request of the General Prosecutor's Office of the Russian Federation No. 81/3-478-13 of 25 September 2019 for the extradition to the Russian Federation I. N. for committing the nine criminal offences of accepting a bribe from Article 290(3) of the Criminal Code of the Russian Federation and five criminal offences of accepting a bribe from Article 290(5).[67]

Considering *ex officio* the decision of the first instance court, the Supreme Court of the Republic of Croatia found that the County Court in Zagreb rejected the request for the extradition of the I. N. to the Russian Federation, for conducting criminal proceedings for criminal offences of accepting bribes, since in this case, during the procedure, doubts were expressed about the choice of the country for extradition, because according to the information in the file, it was clear that the extradited person was granted refugee status. For the above reasons the Supreme Court of the Republic of Croatia, with its previous decision Kž-528/2019-7, 26 November 2019 terminated the decision-making procedure on the extradited person's appeal against first-instance decision of the County Court in Zagreb, Kv II-1054/2019-3, 5 September 2019 by which the legal conditions for the extradition of I. N. to the Russian Federation were granted, until the decision on the preliminary question is issued at the CJEU. On the request for a preliminary ruling from the Supreme Court, the CJEU rendered a judgment in case C-897/19 PPU, *Ruska Federacija v I.N.* on 2 April 2020 answering the preliminary question, with the explanation that the extradition procedure falls within the scope of Union law.[68] It further stated a privileged relationship between Iceland and the EU, referring to the Agreement between the Council of the European Union, Iceland, and the Kingdom of Norway from 1 November 2019 on the extradition procedure.[69]

The cited judgment also stated that the court of first instance, only in a situation where the Republic of Iceland did not request the extradition of its citizens for criminal prosecution (which the extradited person has become in the

66 Ibid.

67 The Supreme Court of the Republic of Croatia, Decision II 8 Kr 5/2020-4, 7 December 2020.

68 Case C-897/19 PPU, *Ruska Federacija v I.N.*, Judgment of the Court (Grand Chamber) of 2 April 2020, ECLI:EU:C:2020:262.

69 Ibid.

meantime), evaluated and determined the existence of legal presumptions related to the request of the Russian Federation for extradition. At the same time, the Court's position was that the arrest warrant of the Republic of Iceland, equivalent to the European arrest warrant, would have priority over a request for the extradition of a third country, in this case, the Russian Federation. Considering this legal situation, the Supreme Court of the Republic of Croatia vacated the first-instance decision of the County Court in Zagreb on 5 September 2019 Kv II-1054/2019-3, with instructions that resulted from the CJEU judgment.

5. Ultra vires and constitutional identity

■ *5.1. First decisions in EU*

The first constitutional court of a member state to declare a decision of the EU Court *ultra vires* was the Czech Republic. Czech citizens who were employees of Slovak employers received lower pensions and were entitled to payment-specific benefits based on the pension insurance. The High Administrative Court initiated preliminary ruling proceedings before the CJEU,[70] which, among others, answered that it was contrary to the prohibition of the principle of discrimination to pay specific compensation exclusively to Czech citizens living in the territory of the Czech Republic.[71] In the first similar case, the Czech Constitutional Court declared a specific judgment of the EU Court *ultra vires* based on the EU Court's misunderstanding of the legal relations created by the dissolution of Czechoslovakia, referring to the authorities established in its earlier practice.[72] In this judgment, the Constitutional Court concluded that the CJEU had overlooked important facts when deciding on the *Landtová* case. According to the Constitutional Court, EU Law is not even applicable to facts; therefore, the decision of the CJEU, which had proceeded to apply EU Law to the situation, was an excess of an EU institution and an *ultra vires* decision.[73] The conflict between the judgments of the Czech Constitutional Court in the case of the so-called *Slovak pensions* and the decision of the CJEU in the case of *Landtová* is described in the literature as a

> Result of the non-cooperative attitude of the actors responsible at the national level and an expression of the misunderstanding of the relationship between the national judicial system and EU courts, as well as an effort to establish a hierarchy in this relationship.[74]

70 Case C-399/09 *Marie Landtová v Česká správa socialního zabezpečení*, Judgment, 22 June 2011, ECLI:EU:C:2011:415.
71 Petschko and Capik, 2014, pp. 61–76.
72 Novak, 2022, p. 39.
73 Pítrová, 2013, pp. 86–101.
74 Ibid., p. 101.

The Danish Supreme Court referred a preliminary question to the Court of Justice of the EU regarding Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupations.[75] The CJEU found that particular provisions are contrary to the general principle of the prohibition of discrimination, so the national court may not apply them if they cannot be interpreted in accordance with the principle, that is, the directive.[76] In addition, the CJEU concluded that

> a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for a private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation.[77]

The Danish Supreme Court concluded that the national regulations could not be interpreted in accordance with Directive 2000/78/EC. Furthermore, nothing in the Danish accession agreements foresees that the unwritten principle of non-discrimination could prevail over Danish legislation in the dispute between natural and legal persons, considering that, as well as the provisions of the EU Charter on fundamental rights, it lacks a direct effect in Denmark.

The ruling of the German Constitutional Court in the *PPSP* presented a continuation of the conflict between the court and the CJEU that began a few years earlier, when the German Constitutional Court referred to the request for a preliminary ruling to the CJEU on the validity of the program of the European Central Bank *OTP* with the announcement that if the CJEU supported the program, it would initiate its own identity control from the Lisbon judgment.[78] After the judgment of the CJEU in Case C-62/14,[79] the German Constitutional Court temporarily

75 Novak, 2022, p. 39.
76 Case C-441/14 *Dansk Industri*, Judgment of the Court (Grand Chamber) of 19 April 2016, ECLI:EU:C:2016:278.
77 Ibid., para. 43.
78 Novak, 2022, p. 40.
79 Case 62/14 *Peter Gauweiler and Others v Deutscher Bundestag,* Judgment of the Court (Grand Chamber) of 16 June 2015, ECLI:EU:C:2015:400.

withdrew and noted that it would continuously supervise the programme.[80] Five years later, the German Constitutional Court referred to the CJEU about the validity of the European Central Bank's *PSPP* program and the European Central Bank's decision in this regard, in connection with the constitutional lawsuits of German citizens. The CJEU gave support to the European Central Bank and the German Constitutional Court, after offering the CJEU the possibility to comment, conducted *ultra vires* control, and declared the acts of the European Central Bank *ultra vires*.[81] The German Constitutional Court held that the CJEU *Weiss* judgment did not consider the principle of proportionality from Article 5 of the TFEU,[82] so it represented an excess of the authorities transferred to the CJEU by Article 19 of the TFEU, and is therefore *ultra vires* without binding legal effects in Germany.[83] Considering the relevance of the above decisions to Croatian constitutional law, it should be noted that they have provoked lively scientific discussion.[84] In addition, it is acknowledged that decisions of the highest national courts, which declare the decisions of the CJEU *ultra vires* are, and obviously will be, the reality of the European constitutional discourse that should be accepted by the CJEU, that is, the Union.[85]

■ *5.2. What about Croatia?*

As noted by Novak, the Croatian Constitutional Court could, in accordance with Article 129 of the Constitution of the Republic of Croatia and Article 104 of the Constitutional Act on the Constitutional Court,[86] declare a CJEU judgment *ultra vires* in a hypothetical case in which the human rights and fundamental freedoms guaranteed by the Constitution of the Republic of Croatia would be violated by the CJEU judgment.[87] Articles 129 and 104 provide for the competence of the Croatian Constitutional Court to monitor the implementation of constitutionality and legality, and to report to the Croatian Parliament on observed instances of unconstitutionality and illegality. The same applies to violations of the constitutional identity of the Republic of Croatia, or exceeding the authorities delegated to the CJEU. Such a decision should result in the submission of

80 Novak, 2022, p. 40.
81 Ibid.
82 Case C-493/17 *Weiss and Others,* Judgment of the Court (Grand Chamber) of 11 December 2018, ECLI:EU:C:2018:1000.
83 Novak, 2022, p. 40.
84 Besides already quoted, see Horvat Vuković, 2019a, pp. 77–94; Horvat Vuković, 2019b, pp. 249–276; Bačić and Sarić, 2014, pp. 27–44; Blagojević, 2017, pp. 210–237; Burazin and Gardašević, 2021, pp. 221–254; Kostadinov, 2011; Rodin, 2009, pp. 247–277; Rodin, 2011b, pp. 11–41.
85 Novak, 2022, p. 45.
86 The Constitutional Act on the Constitutional Court of the Republic of Croatia, OG 99/99, 29/02, 49/02 (consolidated text).
87 Novak, 2022, p. 48.

reports to the Croatian Parliament on perceived unconstitutionality or legality.[88] However, the Croatian Constitutional Court should initiate a procedure from Article 267 of the TFEU.

Croatian constitutional identity has only recently been discussed in the case law of the Constitutional Court. The Court has defined the following parts of the Croatian constitutional identity: first, Articles 1 and 3 of the Constitution: the highest values of the constitutional order of the Republic of Croatia; second, constitutionally guaranteed fundamental rights, including respect for minority languages and entrepreneurial and market freedom; and third, the Historical Foundation of the Constitution, especially Para. 2, on the equality of national minorities with citizens of Croatian nationality.[89] The first reference of the Croatian Constitutional Court to constitutional identity can be found in its Decision U-I-3597/2010 *et al.*, from July 2011,[90] where the principle of equality of members of national minorities with citizens of Croatian nationality was recognised as a part of Croatian constitutional identity.[91]

> A second important step was made two years later in the framework of the Constitutional Court Communication on Citizens' Constitutional Referendum on the Definition of Marriage.[92] This Communication was issued on the occasion of the citizens' initiative "In the name of the Family" (U ime obitelji) of mid 2013 requesting the calling of a national referendum to amend the Constitution of the Republic of Croatia whereby the definition of marriage as a living union between a man and a woman would be introduced into the Constitution.[93]

Blagojević finds it interesting that other Constitutional Court's reflections on constitutional identity can be found in some other cases connected with the citizen – Initiated referendum.[94]

88 Ibid.
89 Blagojević, 2017, p. 227.
90 Decision of the Constitutional Court of the Republic of Croatia, Nos. U-I-3597/2010, U-I-3847/2010, U-I-692/2011, U-I-898/2011, U-I-994/2011, Zagreb, 29 July 2011 [Online]. Available at: http://sljeme.usud.hr/usud/praksWen.nsf/e540ceb6cd1e4ec-0c1257de1004aa1f3/477e6dbf66aeaa69c1257e5f003d81f8/$FILE/U-I-3597-2010.pdf. (Accessed: 26 October 2023).
91 Blagojević, 2017, p. 224.
92 Constitutional Court, Communication on the citizens's constitutional referendum on the definition of marriage, No. SuS-1/2013, Zagreb, 14 November 2013 [Online]. Available at: http://sljeme.usud.hr/usud/prakswen.nsf/.../$FILE/SuS-1-2013.doc. (Accessed: 26 October 2023).
93 Cit. Blagojević, 2017, p. 225.
94 Remain three cases are analyzed in Blagojević, 2017, pp. 226–227.

6. Conclusion

Croatia's accession to the EU brought about significant changes in all aspects of the rule of law and, in a particular manner, for national courts and judges. National judges were expected to interpret domestic legislation in a way that enabled the full effects of the applicable European provisions on the issue. If such an interpretation were not possible without acting *contra legem*, they could exclude the application of national provisions and directly apply European norms. The obligation of national courts to exclude any provision of national law contrary to EU law still exists regardless of whether it is adopted before or after EU law. Nevertheless, the original doctrine underwent a significant evolution which was partly a result of the CJEU's efforts to preserve equal application and strengthen the effectiveness of EU law and partly as a response to the national practice that challenged the supremacy of EU law over national constitutional law and values.[95] We can follow the transformation of the original doctrine through three evolutionary lines: the evolution of the doctrine of the indirect effect, the acceptance of the doctrine of the margin of judgment, and the expansion of the preclusive effects of EU law.[96] At the same time, the national reaction to the described development is marked by the dualistic approach of national constitutional courts and their persistence in protecting national systems of constitutionality control.[97] The relationship between the national constitutional courts of the EU member states, the national Supreme Court, and the CJEU is not conceived as a relation of subordination, but of communication and dialogue, the ultimate goal of which is the harmonisation of the *acquis* of the EU member states and legal security for all its citizens, while at the same time respecting the specificities of each member state.

95 Rodin, 2011b, p. 27.
96 Ibid.
97 Ibid.

Bibliography

- Bačić, P. (2012) 'On the Rule of Law in Croatia and the Role of the Constitutional Court' in Heintze, H. J. (ed.) *Summer Academy "Rule of Law, Human Rights and European Union" – Book of Proceedings*. Skopje, Macedónia: Centre for South East European Law School Network (SEELS), pp. 67–95.
- Bačić, P., Sarić, I. (2014) 'Short Study of Activism through the European Court of Justice Cases on Freedom of Movement for Workers', *Collected Papers of Split Law Faculty,* 51(1), pp. 27–44. [Online]. Available at: https://hrcak.srce.hr/en/file/171973 (Accessed: 30 June 2023).
- Barić, S., Bačić, P. (2010) 'Croatia: Constitutional Courts as Positive Legislators' in Brewer-Carías, A. R. (ed.) *Constitutional Courts as Positive Legislators: A Comparative Law Study*. New York: Cambridge University Press, pp. 407–444; https://doi.org/10.1017/CBO9780511994760.018.
- Blagojević, A. (2017) 'Procedures Regarding National Identity Clause in the National Constitutional Court's and the CJEU's Case-law' in Duić, D., Petrašević, T. (eds.) *Procedural Aspects of EU Law, EU and Comparative Law Issues and Challenges Series (ECLIC)*. Faculty of Law, Josip Juraj Strossmayer University of Osijek, pp. 210–237. https://doi.org/10.25234/eclic/6529.
- Burazin, L., Gardašević, Đ. (2021) 'Constitutionalization of the Croatian Legal Order', *Collected Papers of Zagreb Law Faculty,* 71(2), pp. 221–254; https://doi.org/10.3935/zpfz.71.2.04.
- Ćapeta, T. (2015) 'Criminal Courts and Cooperation with the EU Court of Justice in preliminary Ruling Procedures', *Croatian Annual for Criminal Law and Practice,* 22(1), pp. 49–66 [Online]. Available at: https://hrcak.srce.hr/155516 (Accessed: 20 June 2023).
- Derenčinović, D. (2014) 'The Scope of Verification of Double Criminality Referred to in the Act on Judicial Cooperation in Criminal Matters with EU Member States', *Croatian Annual for Criminal Law and Practice,* 21(2), pp. 247–270 [Online]. Available at: https://hrcak.srce.hr/143580 (Accessed: 20 June 2023).
- Horvat Vuković, A. (2019a) '"Master of One's Own Body": The European Compound Republic and Scrutiny of ultra vires Activities of EU Bodies', *Zagreb Law Review,* 8(2), pp. 77–94 [Online]. Available at: https://hrcak.srce.hr/240718 (Accessed: 20 June 2023).
- Horvat Vuković, A. (2019b) 'The Constitutional Court of the Republic of Croatia as a 'European' Court and the Preservation of National Standards of Fundamental Rights Protection', *Collected Papers of Zagreb Law Faculty,* 69(2), pp. 249–276; https://doi.org/10.3935/zpfz.69.2.04.
- Kostadinov, B. (2011) 'Ustavni identitet i materijalna kontrola ustavnosti ustavnih promjena: Austrija, Češka, Indija, Italija i Republika Hrvatska', *Informator,* 59 [Online]. Available at: https://informator.hr/strucni-clanci/ustavni-identitet-i-materijalna-kontrola-ustavnosti-ustavnih-promjena?hls= (Accessed: 20 June 2023).
- Novak, S. (2020) 'Dijalozi između ustavnih sudova država članica Europske unije i Suda Europske unije', *Pravni vjesnik,* 36 (3–4), pp. 113–136; https://doi.org/10.25234/pv/10408.

- Novak, S. (2022) 'The ultra vires decisions of the EU court – The beginning of judicial conflict or cooperation', *Pravni vjesnik*, 38(2), pp. 37–54; https://doi.org/10.25234/pv/20189.
- Omejec, J. (2016) *Study on European Constitutional Courts as the Courts of Human Rights: Assessment, Challenges, Perspectives* [Online]. Available at: https://bib.irb.hr/datoteka/796420.OMEJEC_-_European_Constitutional_Courts_as_the_Courts_of_Human_Rights.pdf. (Accessed: 5 July 2023).
- Petrić, D. (2023) 'The Preliminary Ruling Procedure 2.0', *European Papers*, 8(1), pp. 25–42.
- Petschko, M., Capik, A. B. (2014) 'One Says the Things Which One Feels the Need to Say, and Which the Other Will Not Understand: Slovak Pension Cases Before the CJEU and Czech Courts', *Croatian Yearbook of European Law and Policy*, 2014/9, pp. 61–76; https://doi.org/10.3935/cyelp.09.2013.170.
- Pítrová, L. (2013) 'The Judgment of the Czech Constitutional Court in the "Slovak Pensions" Case and its Possible Consequences (In Light of the Fortiter in Re Suaviter in Modo Principle)', *The Lawyer Quarterly*, 3(2), pp. 86–101 [Online]. Available at: https://tlq.ilaw.cas.cz/index.php/tlq/article/viewFile/70/57 (Accessed: 5 July 2023).
- Rodin, S. (2009) 'The relationship between the Constitutional Court of the Republic of Croatia and the Court of Justice of the European Communities in Luxembourg after accession Republic of Croatia to full membership in the European Union' in Barbić, J. (ed.) *Croatian Constitutional Judging*. Zagreb: Croatian Academy of Sciences and Arts, pp. 247–277.
- Rodin, S. (2011a) 'Pravo Europske unije i pravni poredak Republike Hrvatske nakon 20 godina hrvatskog Ustava' in Bačić, A. (ed.) *Dvadeseta obljetnica Ustava Republike Hrvatske*. Zagreb: HAZU, pp. 87–118 [Online]. Available at: https://www.bib.irb.hr/513098 (Accessed: 30 June 2023).
- Rodin, S. (2011b) 'National Identity and Market Freedoms After the Treaty of Lisbon', *Croatian Yearbook of European Law and Policy*, 7(1), pp. 11–41; https://doi.org/10.3935/cyelp.07.2011.130.

EMŐD VERESS*

Reform of the Romanian Judiciary and the Cooperation and Verification Mechanism – Considering the Practice of the Romanian Constitutional Court

ABSTRACT: *Romania, an EU Member State since 1 January 2007 was subject to a Mechanism for Cooperation and Verification following the rules set forth by the European Commission's Decision 2006/928/EC. This specific rule of law mechanism covered the functioning of the judiciary and the fight against corruption. Any method by which a Member State is monitored based on vague, subjective, and imprecisely measurable criteria is likely to cause political friction and scientific disputes. In the case of Romanian justice reform, there were more than simply disputes. The Court of Justice of the European Union (CJEU) and Romanian Constitutional Court interpreted the situation differently. Beginning from an element of justice reform in Romania – the establishment of a special prosecutorial section to investigate crimes committed by judges and prosecutors – this study proposes to analyse these differences from a strictly scientific viewpoint, while raising some fundamental issues of European integration: the transfer of sovereignty, the concept of the rule of law, constitutional identity, and the competition of the Union's regulatory power with that of Member States, as reflected by this fundamental disagreement between the CJEU and the Constitutional Court of Romania.*

KEYWORDS: rule of law, judicial independence, trust in the judiciary, Commission Decision 2006/928/EC establishing a Mechanism for Cooperation and Verification, Constitutional Court of Romania

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1. The Mechanism for Cooperation and Verification – a brief overview

The 'Mechanism for Cooperation and Verification' (CVM) was a specific rule of law instrument designed for Romania and Bulgaria, which was repealed in 2023. Though no longer applicable, legal basis is still present in the primary legislation of the EU: the Treaty of Accession of the Republic of Bulgaria and Romania[1] (signed on 31 March 2005). In a general and vague formulation, the Treaty states in Article 37:

> If Bulgaria or Romania fail to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach, the Commission may, until the end of a period of up to three years after accession, upon the motivated request of a Member State or on its own initiative, adopt European regulations or decisions establishing appropriate measures.

Article 37 also still contains some criteria for the measures which could be instituted under the CVM: a) proportionality; b) measures which least disturb the functioning of the internal market shall be prioritised; c) such safeguard measures shall not be invoked as a means of arbitrary discrimination or disguised restrictions on trade between Member States; d) the measures shall be maintained no longer than strictly necessary and, in any case, shall be lifted when the relevant commitment is implemented; e) the Commission may adapt the measures as appropriate in response to the progress made by the new Member State concerned in fulfilling its commitments.[2]

A fundamental question has been raised about the temporary nature of such measures. Primary EU law states that the Commission could, 'until the end of a period of up to three years after accession,' adopt the appropriate measures. Did this mean that the Commission had a three-year period to introduce the measure?

1 Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union. OJ L 157, 21.6.2005, p. 11–395.

2 Moreover, the Commission had to inform the Council in good time before revoking the European regulations and decisions establishing the safeguard measures, and it had to duly consider any observations of the Council in this respect.

Or, was the maximum duration of the measure (also) three years from the date of accession (1 January 2007)? The answer is provided by Article 37, which states that the measures 'may however be applied beyond the period specified' – that of the initial three years – 'as long as the relevant commitments have not been fulfilled.' Consequently, the Commission had three years to implement the measure, however, this could be maintained beyond the three-year period. This explains why the CVM remained active and in use until 8 October 2023[3] for a "mere" 16 years after accession. However, this also means that the Commission considered for a long time that Romania had yet to fulfil the commitments it had undertaken one and a half decades ago. Finally, it also most certainly means that at the moment of accession Romania and Bulgaria 'did not entirely fulfil the accession criteria.'[4]

Based on the analysed general legal text and on the commitments undertaken by Romania in the Annex IX to the Accession Treaty (related to the problems "not solved" during the negotiations),[5] the CVM was introduced by means of Decision 2006/928/EC[6] to address specific benchmarks in the areas of judicial reform and the fight against corruption.[7] Therefore, the two interconnected fields where the Commission considered that further supervision was required were the judiciary and corruption. That this was a rule of law instrument, is clear from the preamble, which stated that 'the European Union is founded on the rule of law.' The area of freedom, security and justice and the internal market requires mutual confidence 'that the administrative and judicial decisions and practices of all Member States fully respect the rule of law.'[8] The primary rule of law criterion is the existence of an impartial, independent, and effective judicial and administrative system properly equipped, *inter alia*, to combat corruption.

The content of the former CVM may be summarised as follows: 1) Romania was to submit reports by 31 March each year and for the first time by 31 March 2007 to the Commission on the progress made in addressing each of the benchmarks provided in the Annex of Decision 2006/929/EC. 2) The Commission could,

3 See Commission Decision (EU) 2023/1786 of 15 September 2023 repealing Decision 2006/928/EC establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption C/2023/5653. OJ L 229, 18.9.2023, p. 94–96. In force from 8 October 2023.

4 Vassileva, 2020, p. 742 and also Carp, 2014, p. 6.

5 Further, Art. 39(2) of the 'Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union' provided that the date of accession can be postponed by one year until January 1, 2008, in the case of Romania (separately from Bulgaria), if Romania does not comply with the requirements of Annex IX.

6 Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (notified under document number C(2006) 6569). OJ L 354, 14.12.2006, p. 56–57. See also the Commission Decision (EU) 2023/1786 of 15 September 2023 repealing Decision 2006/928/EC.

7 For Bulgaria, Decision 2006/929/EC.

8 Recital 1 and 2 of the Decision 2006/928/EC.

at any time, provide technical assistance through different activities, or gather and exchange information on the benchmarks. The Commission could, at any time, organise expert missions to Romania. Romanian authorities would provide the necessary support in this context.[9] 3) The Commission would communicate to the European Parliament and the Council, its own comments and findings on Romania's report for the first time in June 2007. Thereafter, the Commission would report again, as and when required, at least every six months.[10]

Beginning in 2007, the Commission drafted two types of reports: a progress report and a technical report. For Romania, the last CVM report was published in 2022.[11]

The articles of the CVM decisions did not contain a sanction mechanism, but the recitals of the preamble did.

> If Romania should fail to address the benchmarks adequately, the Commission may apply safeguard measures based on Articles 37 and 38 of the Act of Accession, including the suspension of Member States' obligation to recognise and execute, under the conditions laid down in Community law, Romanian judgements, and judicial decisions, such as European arrest warrants.[12]

Moreover, the decision would not preclude the adoption of safeguard measures, 'at any time.'[13] The duration of the measures could be indefinite: these would only be repealed when all benchmarks had been satisfactorily fulfilled,[14] therefore, it was up to the Commission to decide when to end the CVM, which it finally committed to doing on 15 September 2023.

Thus, a rule of law instrument, a mandatory tool of oversight and control, was enacted specifically for Romania and Bulgaria, with a targeted, focused scope of investigation. From a policy viewpoint, the CVM was 'a tool to maintain the reform momentum in the two countries and prevent reversal of the rule of law reforms enacted during the EU accession negotiations.'[15] It can be perceived as an instrument of anticipated trust,[16] essentially implying a favour that made accession to the EU possible for Romania and Bulgaria. Alternatively, it can be interpreted as undisguised mistrust (which continues even today in the form of non-admittance into the Schengen area of these two countries). The states which had acceded to

9 Art. 1.
10 Art. 2.
11 COM(2022) 664 final.
12 Recital 7.
13 Recital 8, in a formulation contrary to the primary EU law (see above the analysis of Art. 37 from the Accession Treaty).
14 Recital 9.
15 Vachudova and Spendzharova, 2012, p. 2.
16 The favour went both ways: Romania and Bulgaria opened their markets.

the EU in 2004 were not subjected to such a mechanism; unlike the 2004 accession states, Romania and Bulgaria were fast-tracked into the EU at the cost of having their sovereignty restricted by the intensive monitoring through the CVM.

Regarding its content, the CVM practically overlapped with the current Rule of Law reports introduced in 2020; the alignment of the two instruments appeared increasingly necessary. The solution was discontinuing the CVM and applying a new, less-discriminatory system for all Member States, which later occurred. Věra Jourová, Vice-President of the European Commission announced in July 2023 that the Commission intended to discontinue the CVM for Romania and Bulgaria in the autumn of 2023, however, the monitoring of progress in the field of justice would continue, now exclusively through the EU's Rule of Law Mechanism. Thus, the CVM, only apparently relegated to legal history lives on. Moreover, that the CVM is repealed (in name at least) does not also mean that the expectations it was meant to uphold have been met.[17] Rather, this means that the Commission considers it unjustified to maintain a tool parallel to the new Rule of Law Mechanism. The transformation of the process itself does not preclude an assessment of the reform and state of the Romanian justice system under the new mechanism.

Decision 2006/928/EC contained the requirements raised in relation to Romania and provided a framework for monitoring: 1. Ensuring a more transparent and efficient judicial process, notably by enhancing the capacity and accountability of the Superior Council of Magistracy (SCM); reporting on and monitoring the impact of the new codes of civil and penal procedure. 2. Establishing, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities, and potential conflicts of interest and issuing mandatory decisions based on which dissuasive sanctions can be applied. 3. Building on progress already made, continuing to conduct professional, non-partisan investigations into allegations of high-level corruption. 4. Adopting further measures to prevent and fight against corruption, in particular within the local government.[18] These benchmarks were interconnected. In its first 2007 CVM report, the Commission stated:[19]

17 See Recital (10) of Commission Decision (EU) 2023/1786: 'The evolution of the Union's rule of law landscape has given a new context for the Commission's cooperation with Romania. In particular, the annual Rule of Law cycle, launched by the Commission Communication of July 2019 on "Strengthening the rule of law within the Union" (10) and in the "Political Guidelines of President von der Leyen," provides an ongoing framework with a long-term perspective to accompany sustainable reform, with Romania as with other Member States. As part of that cycle, the Commission's annual Rule of Law Report, which since 2022 also includes recommendations to the Member States, stimulates a positive direction on rule of law issues, deepening dialogue and joint awareness and preventing challenges from emerging or deepening. It will enable the monitoring of the implementation of Romania's agreed reforms.'

18 The benchmarks for Bulgaria are different, adapted to the specificity of the country.

19 Key findings of the progress report on the Cooperation and Verification Mechanism with Bulgaria, MEMO/07/261, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_07_261.

> [I]t is important to see these benchmarks as representing more than a checklist of individual actions that can be ticked off one by one. They are all interlinked. Progress on one has an impact on others. Each benchmark is a building block in the construction of an independent, impartial judicial and administrative system. Creating and sustaining such a system is a long term process. It involves fundamental changes of a systemic dimension. The benchmarks cannot therefore be taken in isolation. They need to be seen together as part of a broad reform of the judicial system and fight against corruption for which a long term political commitment is needed. Greater evidence of implementation on the ground is needed in order to demonstrate that change is irreversible.

The Romanian Government (Cabinet) issued its own Decision No. 1346/2007 on the approval of the Action Plan for the fulfilment of conditions set forth under the CVM, for progress made by Romania in the area of judicial reform and the fight against corruption.[20] This Action Plan included the Romanian side's commitment to programmatically reforming the judiciary. To achieve the objectives set out in the European Commission's monitoring reports and in the reports of the peer review missions conducted by experts from the Member States, areas where these reports indicated shortcomings were considered when drawing up the plan. Thus, the primary lines of action for the fulfilment of the first benchmark were the adoption of new codes of civil and criminal procedures, unification of case law, strengthening the institutional capacity of the SCM and making its members more accountable, increasing the transparency of the judicial process, improving human resources policy, and increasing the efficiency of the judicial system by improving infrastructure and court management. Romania took the CVM seriously; this was emphasised by the fact that a former Prosecutor General of the Anti-Corruption Prosecutor's Office, in his memoirs, stated, that the secret services had requested the wiretapping of certain individuals be authorised, 'on the grounds that the persons proposed to be monitored were making negative statements about Romania in the context of the EU verification mechanism, which would have had European repercussions.'[21]

Beginning in 2007, the CVM constituted an indicator of Romania's incessantly disputed judiciary reforms. In the following section, I specifically focus on how the CVM was interpreted in the practice of the Constitutional Court of Romania, as such an interpretation is paramount in predicting future outcomes in the context of the Rule of Law Mechanism.

20 Published in the Official Journal of Romania no. 765 of 12 November 2007.
21 Morar, 2022, p. 611.

2. The CVM tested by the Romanian Constitutional Court

The Constitutional Court dealt several times with the CVM in the context of Romanian judicial reform. Unfortunately, the analysis of the Romanian Constitutional Court's position is largely absent from academic discourse, although the problems raised are fundamental to European integration. A sharp scientific picture is not possible without a contrasting argument, therefore, I examined the problem by adopting a somewhat unorthodox approach, not from the perspective of the CJEU but from that of the Romanian Constitutional Court. I concentrated on specific cases involving both the CJEU and the Constitutional Court of Romania. The issue at hand is the establishment of the Section for Investigating Criminal Offences within the Judiciary (SIIJ as abbreviated in Romanian) in 2019, however, the analysis will be broader, tackling the essence of the CVM, transfer of sovereignty, and the rule of law as a concept. Many attempts to reform the judiciary have been assessed along political fault lines as being in accordance with or in violation of the rule of law principle.[22]

The Constitutional Court was called upon to decide on the objection of the unconstitutionality of Articles 88^1–88^9 of Act No. 304/2004 on judicial organisation (introduced by Act No. 207/2018, amending and supplementing Act No. 304/2004), and of Government Emergency Ordinance No. 90/2018 on some measures for the operationalisation of the SIIJ.[23] The case before a Court of Appeal, which led to the objection of unconstitutionality, concerned the annulment of Order No. 252/2018 on the organisation and operation of the SIIJ within the structure of the Public Prosecutor's Office of the High Court of Cassation and Justice (PÎCCJ), the suspension of the implementation of this administrative instrument until the final resolution of the case, and the referral to the Constitutional Court of the objection of unconstitutionality invoked. The SIIJ had been granted exclusive jurisdiction to prosecute offences committed by judges and prosecutors, including military judges and prosecutors, and members of the SCM. Government Emergency Ordinance No. 90/2018 was adopted in reaction to the fact that the competent authority – the SCM – had not finalised the procedure for the operationalisation of the SIIJ, and the Government (the Cabinet) had instituted a procedure derogating from the rules in force, on a provisional basis, aimed at the temporary appointment of the Chief Prosecutor, the Deputy Chief Prosecutor, and at least one-third of the SIIJ's prosecutors. The adoption of these measures aimed to make the SIIJ operational within the time limit set by the norms that established this separate prosecution body.

22 Tănăsescu, 2019, pp. 177–191; Moraru and Bercea, 2022, pp. 85–91; Dumbrava, 2021, pp. 437–452; Rizcallah and Leloup, 2021, pp. 389–395. For the fuzzy concept of the rule of law, see Himma, 2013, pp. 153–173; Fallon, 1997, pp. 1–56; Müller, 2015, pp. 141–160.

23 CC decision No. 390/2021.

Based on the objection of unconstitutionality, the authors referred to Opinion No. 934 of 13 July 2018 CPL-PI(2018)007, confirmed on 20 October 2018 in which the European Commission for Democracy through the Law of the Council of Europe (the Venice Commission) suggested reconsidering the establishment of a special section for the investigation of magistrates (judges and prosecutors are both included in this category under Romanian law). As an alternative, the simultaneous use of specialised prosecutors with effective procedural safeguards was proposed. The authors of the objection of unconstitutionality argued that the establishment of the SIIJ within the PÎCCJ may allow the redirection of dozens of cases of grand corruption, pending before the National Anticorruption Directorate. The creation of this section could also undermine the use of specialised prosecutors (for corruption, money laundering, influence peddling) and would not be proportionate to any possible aim.[24]

The authors of the objection of unconstitutionality indicated that thousands of complaints against magistrates are registered every year in which a minimum investigation must be conducted. The only fifteen prosecutors in the new section would be overwhelmed by the workload. The jurisdiction of the SIIJ was proposed to be determined according to the persons under investigation, covering both magistrates and anyone else investigated along with them in these cases. In addition, prosecutors in this section would have to deal with any type of crime as long as it was committed by a person over whom the SIIJ had jurisdiction. The single body in Bucharest, where the prosecutors would work, would have meant that the magistrates under investigation would have to make a much greater effort than other categories of persons: travelling long distances for hearings during working hours, to another locality, and incurring excessive expenses, which could even impact the proper organisation of the defence of any magistrate being investigated. Moreover, the method of appointing the Chief Prosecutor and 14 other prosecutors, for whom the interview accounted for 60% of the total grades which could be awarded, would not provide sufficient guarantees for an impartial selection process, which is also likely to be reflected in the work of this section.

Further, the authors of the objection of unconstitutionality indicated that according to Article 11 of the Constitution, the performance of international obligations resulting from a treaty in force for the Romanian State is incumbent on all state authorities, including the Constitutional Court. In this respect, it was considered that the recommendations made by the Venice Commission are useful to the legislature in the parliamentary procedure for drafting or amending the legislative

24 However, in addition to the spectacular results of Romania's fight against corruption, this has raised several rule of law concerns. See, for example, Clark, 2016, pp. 3–27. It is noteworthy that the SIIJ was established to end the abusive criminal prosecutions, abusive interceptions and the blatant blackmail demonstrated by the National Anticorruption Directorate towards the judges who had to solve cases in which the Directorate was "interested."

framework and the Constitutional Court in conducting a review of the conformity of the legislative act adopted by the Parliament with the fundamental law.

It is interesting that based on the grounds of their criticisms of unconstitutionality, the authors of the objection cited several paragraphs from the 2017 and 2018 CVM progress reports on Romania, and invoked the reasons of Constitutional Court Decision No. 2 of 11 January 2012 according to which 'membership of the European Union imposes on the Romanian State the obligation to apply this mechanism and to follow up the recommendations established in this framework.'

The Court of Appeal of Pitesti – Second Civil, Administrative and Fiscal Chamber stated that, with regard to the establishment, by the legal provisions which are the subject of the criticisms of unconstitutionality, of the SIIJ, the CVM reports identified several vulnerabilities, and thus, several recommendations were made to remedy the shortcomings identified, including the immediate suspension of the implementation of the laws on the judiciary as modified, and the subsequent emergency ordinances, and the review of these regulations, considering the recommendations made under the CVM. Therefore, in the court's view, the adoption of these legislative amendments was contrary to those recommendations considering the purpose of the CVM: to comply with the benchmarks guaranteeing the rule of law and accession to the European legal order. Consequently, this approach was considered an infringement of the constitutional provisions.

A fundamental criticism was that the establishment of the SIIJ affected the jurisdiction of the National Anticorruption Directorate in the sense of reducing its jurisdiction to investigate acts of corruption, and offences related to, or in connection with acts of corruption committed by judges, prosecutors, and members of the SCM, as well as those committed by other persons together with magistrates, a reduction of jurisdiction which, in the opinion of the authors of the objection of unconstitutionality, violated the recommendations of the European Commission contained in the CVM reports and, implicitly, the constitutional provisions on the primacy of European law. However, this complaint was already considered by the Constitutional Court in Decision No. 33/2018 (in the framework of *a priori* control before the promulgation of the new norms) and was established as unfounded. The Constitutional Court stated that 'the legislator's choice to establish a new prosecutorial structure – a section within the Public Prosecutor's Office – corresponds to its constitutional power to legislate in the field of the organisation of the judicial system.' The Court also found that the constitutional rules which provide for the priority of application of the provisions of the European Union's founding treaties, as well as of other binding Community legislation, over contrary provisions of domestic law, do not have any bearing on the matter under review, 'since no binding European act has been found to support the criticisms made.'

The Constitutional Court was previously called upon to rule separately on Government Emergency Ordinance No. 90/2018, which was criticised before the Constitutional Court (Decision No. 137/2019) during the adoption of the approving

act by Parliament. In this procedural framework, a request for a preliminary ruling was submitted, seeking recognition of the binding nature of the recommendations contained in the CVM Report of 13 November 2018, the immediate suspension of the implementation of the laws on the judiciary and the subsequent emergency ordinances, and the revision of the laws that established the SIIJ. Interestingly, the Constitutional Court dismissed this request as inadmissible, as the arguments proposed by the authors of the request for preliminary questions to the CJEU concerned the establishment of the SIIJ and were not related to the subject matter of the case in which the application was made, which concerned the review of the constitutionality of certain legal provisions relating to the operationalisation of this prosecutorial body and not to its establishment.

On this occasion, the Constitutional Court considered it necessary to determine the nature of the recommendations contained in the CVM reports drawn up pursuant to European Commission Decision 2006/928/EC of 13 December 2006. Analysing the content of the decision, the Court found that the instrument of European law contains a series of reference objectives (benchmarks) listed in its annex, outlining a series of general obligations for the Romanian State. However, the Court found that although binding on the Romanian State, Decision 2006/928/EC has no constitutional relevance since it neither bridges a gap in the national fundamental law nor develops a constitutional rule. Even less, could the constitutional relevance of the reports issued under the CVM be accepted. In this case, the documents did not fulfil the condition laid down in Article 148(2) of the Constitution, according to which only 'the provisions of the Treaties establishing the European Union, as well as the other binding Community regulations have priority over contrary provisions in domestic laws, subject to the provisions of the Act of Accession.' Thus, although they are documents adopted based on a decision, the reports contain mere recommendations, and it is well known that, by means of a recommendation, institutions make their views known and suggest courses of action without imposing any legal obligations on the addressee.

The Constitutional Court found that it is within the exclusive competence of the Member State to determine the organisation, functioning, and delimitation of powers between the various bodies of the prosecution authorities, since the fundamental law of the State – the Constitution – is the expression of the will of the people, which means that it cannot lose its binding force merely because of a discrepancy between its provisions and those of the EU norms, and accession to the EU cannot affect the supremacy of the Constitution over the entire domestic legal order.

Returning to Decision No. 390/2021, the primary subject of our analysis, in this frame it was also requested that the CJEU be asked to render a preliminary ruling on the following questions:

> 1. Must the [CVM] established by [Decision 2006/928] be regarded as an act of an institution of the Union, within the meaning of Article 267 TFEU, which is amenable to interpretation by the [Court]?
> 2. Do the terms, nature and duration of the [CVM] established by [Decision 2006/928] fall within the scope of the [Treaty of Accession]? Are the requirements set out in the reports drawn up in the context of that mechanism binding on the Romanian State?
> 3. Must Article 2 [TEU] be interpreted as meaning that the Member States are obliged to comply with the criteria of the rule of law, also requested in the reports drawn up in the context of the [CVM] established by [Decision 2006/928], in the event of the creation, as a matter of urgency, of a section of the prosecutor's office charged with the exclusive investigation of offences committed by members of the judiciary, which gives rise to particular concerns as regards the fight against corruption and may be used as an additional means of intimidating members of the judiciary and putting pressure on them?
> 4. Must the second subparagraph of Article 19(1) [TEU] be interpreted as meaning that the Member States are obliged to adopt the necessary measures to ensure effective legal protection in the fields covered by EU law through the removal of any risk of political influence on criminal proceedings before certain judges, [in] the event of the creation, as a matter of urgency, of a section of the prosecutor's office charged with the exclusive investigation of offences committed by members of the judiciary, which gives rise to particular concerns as regards the fight against corruption and may be used as an additional means of intimidating members of the judiciary and putting pressure on them?

The Court of Appeal of Pitesti referred the case to the Constitutional Court and also to the CJEU, which registered it under case number C-355/19. On 18 May 2021 the CJEU (Grand Chamber) delivered its judgement in Case C-355/19, joined with Cases C-83/19, C-127/19, C-195/19, C-291/19 and C-397/19[25] and stated the following:[26]

> 1. Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, and the reports drawn up by the Commission on the basis of that decision, constitute acts of an EU

25 Judgement of 18 May 2021, *Asociația 'Forumul Judecătorilor din România'* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19) ECLI:EU:C:2021:393.

26 For a general analysis of the CJEU decision see Moraru and Bercea, 2022, pp. 82–113.

institution, which are amenable to interpretation by the Court under Article 267 TFEU.
2. Articles 2, 37 and 38 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, read in conjunction with Articles 2 and 49 TEU, must be interpreted as meaning that as regards its legal nature, content and temporal effects, Decision 2006/928 falls within the scope of the Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union. That decision is binding in its entirety on Romania, as long as it has not been repealed. The benchmarks in the Annex to Decision 2006/928 are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, in the sense that Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports.
3. The legislation governing the organisation of justice in Romania, such as that relating to the [...] establishment of a section of the Public Prosecutor's Office for the investigation of offences committed within the judicial system, falls within the scope of Decision 2006/928, with the result that it must comply with the requirements arising from EU law and, in particular, from the value of the rule of law, set out in Article 2 TEU.
[...]
5. Article 2 and the second subparagraph of Article 19(1) TEU and Decision 2006/928 must be interpreted as precluding national legislation providing for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors, where the creation of such a section
– is not justified by objective and verifiable requirements relating to the sound administration of justice, and
– is not accompanied by specific guarantees such as, first, to prevent any risk of that section being used as an instrument of political control over the activity of those judges and prosecutors likely to undermine their independence and, secondly, to ensure that that exclusive competence may be exercised in respect of those judges and prosecutors in full compliance with the requirements arising

> from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.
> [...]
> 7. The principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU.

During the proceedings before the Constitutional Court, the representative of the Public Prosecutor's Office requested that the Constitutional Court consider the decision of the CJEU, which was seen as an element that could lead to a change in case law in terms of a finding that Decision 2006/928/EC had an impact on the review of constitutionality, and therefore, a violation of Article 148 of the Constitution.

However, the Constitutional Court, regarding the incidence of Decision 2006/928/EC, established that

> [...] the Member States of the European Union have understood to place the *acquis communautaire* – the constituent treaties of the European Union and the regulations derived from them – in an intermediate position between the Constitution and other laws, when it comes to binding European legislative acts.[27]

Analysing Decision 2006/928 of the European Commission considering Article 148(2) of the Fundamental Law, the Romanian Constitutional Court held that, 'by acceding to the legal order of the European Union, Romania accepted that, in the areas in which exclusive competence belongs to the European Union, [...] the implementation of the obligations arising therefrom is subject to the rules of the Union [...]' and that, 'by virtue of the compliance clause contained in the very text of Article 148 of the Constitution, Romania may not adopt a legislative act contrary to the obligations to which it has committed itself as a Member State.'

Simultaneously, the Court noted that 'all of the above certainly knows a constitutional limit, expressed in what the Court has called national constitutional identity.'[28] The Constitutional Court ruled that Decision 2006/928/EC, an act of European law binding on the Romanian State, is also devoid of constitutional

27 See CC Decisions No. 148/2003 and 80/2014.
28 CC Decision No. 104/2018.

relevance. The Court concluded that even if these acts and documents (Decision 2006/928/EC and the CVM reports) complied with the conditions of clarity, precision, and unequivocalness, they could not constitute rules which were within the level of constitutional relevance required for a constitutionality review to be conducted by reference to them. Since the cumulative conditions laid down in the settled case law of the Constitutional Court have not been met, the Court held that they could not provide a basis for possible infringement by the national law of the Constitution as the sole direct rule of reference in the context of constitutionality review.[29]

The CJEU has ruled as follows: 'Decision 2006/928 is addressed to all Member States, which includes Romania as from its accession. That decision is, therefore, binding in its entirety on that Member State as from its accession to the European Union.' The Court also stated that the decision 'imposes on Romania the obligation to address the benchmarks set out in its Annex and to report each year to the Commission, pursuant to the first paragraph of Article 1 thereof, on the progress made in that regard.' In particular, the benchmarks, the CJEU considered:

> [...] that they were defined, [...] on the basis of the deficiencies established by the Commission before Romania's accession to the European Union in the areas of, inter alia, judicial reforms and the fight against corruption, and that they seek to ensure that that Member State complies with the value of the rule of law set out in Article 2 TEU, which is condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State.

The Court concluded in consequence:

> Thus, as the Commission noted in particular, and as is apparent from recitals 4 and 6 of Decision 2006/928, the purpose of establishing the CVM and setting the benchmarks was to complete Romania's accession to the European Union, in order to remedy the deficiencies identified by the Commission in those areas prior to that accession. It follows that the benchmarks are binding on Romania, with the result that it is subject to the specific obligation to address those benchmarks and to take appropriate measures to meet them as soon as possible. Similarly, Romania is required to refrain from implementing any measure which could jeopardise those benchmarks being met."[30] In this light, according to the Court, Decision 2006/928 (its legal nature, content and temporal effects) falls within the scope of the Treaty

29 CC Decision No. 137/2019.
30 Paras. 171, 172.

> of Accession. The decision is binding in its entirety on Romania, as long as it has not been repealed. „The benchmarks in the Annex to Decision 2006/928 are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, in the sense that Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports.[31]

However, this does not solve the problem posed by the legal nature of reports. The CJEU also interpreted the effects of the reports issued by the commission and considered the following:

> [...] true that the reports drawn up on the basis of Decision 2006/928 are, in accordance with the first paragraph of Article 2 of that decision, not addressed to Romania but to the Parliament and the Council. Furthermore, although those reports include an analysis of the situation in Romania and formulate requirements with regard to that Member State, the conclusions set out therein address 'recommendations' to Romania on the basis of those requirements. [...] The reports are intended to analyse and evaluate Romania's progress in the light of the benchmarks which Romania must address. As regards, in particular, the recommendations in those reports, they are, as the Commission also observed, formulated with a view to those benchmarks being met and in order to guide that Member State's reforms in that connection.[32]

Consequently,

> [...] in order to comply with the benchmarks set out in the Annex to Decision 2006/928, Romania must take due account of the requirements and recommendations formulated in the reports drawn up by the Commission under that decision. In particular, Romania cannot adopt or maintain measures in the areas covered by the benchmarks which could jeopardise the result prescribed by those requirements and recommendations. Where the Commission expresses doubts, in such a report, as to whether a national measure is compatible

31 Para. 178.
32 Paras. 174, 175.

> with one of the benchmarks, it is for Romania to cooperate in good faith with the Commission with a view to overcoming the difficulties encountered with regard to meeting the benchmarks, while at the same time fully complying with those benchmarks and the provisions of the Treaties.[33]

Therefore, according to the Constitutional Court of Romania, the CJEU found that these are acts of the European Commission addressed to the European Parliament and the European Council and not to Romania; they formulate requirements with regard to Romania, the conclusions contained in them addressing "recommendations," which the State will consider by virtue of the principle of loyal cooperation.

These recommendations arise from doubts expressed by the European Commission regarding the compatibility of a national measure with one of the benchmarks,[34] and the report provides an obligation to cooperate. Thus, the Constitutional Court considered that the CJEU did not deem the reports drawn up by the Commission pursuant to Decision 2006/928 to be binding.

The fact that Romania,

> [...] is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports

provided for in Point 2 of the operative part of the Decision of 18 May 2021 means that the Romanian State, through its competent authorities, is obliged to cooperate institutionally with the European Commission and adopt measures compatible with the objectives referred to in Decision 2006/928. The Constitutional Court also held that the CJEU did not find that the general obligation for loyal cooperation had not been fulfilled.

From the perspective of constitutional review, the Constitutional Court found that the CJEU's judgement did not introduce any new elements with regard to the legal effects of Decision 2006/928 and the CVM reports drawn up by the Commission on its basis, establishing, as the Romanian Constitutional Court had previously done, the binding nature of Decision 2006/928 and the nature of a recommendation for the CVM reports.

Therefore, the Constitutional Court upheld its previous case law and found that the only act which, by virtue of its binding nature, could have constituted

33 Para. 177.
34 Para. 177.

a norm subject to review of constitutionality by reference to Article 148 of the Constitution – Decision 2006/928 – by virtue of the provisions and objectives it imposes, has no constitutional relevance, since it neither bridges a gap in the Fundamental Law nor develops its rules by establishing a higher standard of protection (only human rights protection may derogate 'upwards' from the standards of the Romanian Constitution).[35]

3. The rule of law "test"

■ *3.1. Overview*

The regulation governing the organisation of justice in Romania, such as those relating to the establishment of a section of the Public Prosecutor's Office for the investigation of offences committed within the judicial system, 'falls within the scope of Decision 2006/928, with the result that it must comply with the requirements arising from EU law and, in particular, from the value of the rule of law, set out in Article 2 of the TEU.'[36]

Explaining these requirements, the CJEU ruled that Decision 2006/928 must be interpreted as meaning that it is

> [...] precluding national legislation providing for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors, where the creation of such a section is not justified by objective and verifiable requirements relating to the sound administration of justice, and is not accompanied by specific guarantees such as, first, to prevent any risk of that section being used as an instrument of political control over the activity of those judges and prosecutors likely to undermine their independence and, secondly, to ensure that that exclusive competence may be exercised in respect of those judges and prosecutors in full compliance with the requirements arising from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.[37]

Thus, to comply with the general requirements arising from EU law, the judgement of the CJEU found that the regulations governing the establishment of the SIIJ must: (*i*) be justified by objective and verifiable imperatives relating to the proper administration of justice, (*ii*) be accompanied by specific safeguards to eliminate

35 According to Art. 20(2) of the Fundamental Law.
36 Para. 3 of the operative part of the ruling.
37 Para. 5 of the operative part of the ruling.

any risk to the independence of judges and prosecutors, and (*iii*) in the investigation procedure, judges and prosecutors must enjoy the right to an effective remedy and to a fair trial, the presumption of innocence and the rights of defence. The three issues on which the CJEU has ruled derive from EU law and, in particular, from the value of the rule of law as stated in Article 2 of the TEU. The focus of the following analysis is to compare the conflicting arguments proposed by the CJEU and the Constitutional Court.

■ *3.2. The measure must be justified by objective and verifiable requirements relating to the proper administration of justice*

According to the CJEU,

> In the present case, first, although the Supreme Council of the Judiciary argued before the Court that the creation of the SIIJ was justified by the need to protect judges and prosecutors from arbitrary criminal complaints, it is clear from the file that the explanatory memorandum to the law in question does not reveal any justification in terms of requirements relating to the sound administration of justice, which it is, however, for the referring courts to ascertain taking into account all the relevant factors.[38]

However, the Constitutional Court ascertained that the establishment of the SIIJ at the level of the highest national prosecutor's office was aimed at creating a specialised body with a specific object of investigation and constituted a legal guarantee of the principle of independence of the judiciary. It cannot be held that the regulation is not based on an objective and rational criterion and represents a discriminatory measure, since the establishment of specialised prosecutorial bodies in areas of jurisdiction *ratione materiae* (the National Anticorruption Directorate or the Directorate for the Investigation of Organised Crime and Terrorism) or *ratione personae* (personal) jurisdiction (SIIJ) is an expression of the legislature's choice, which, depending on the need to prevent and combat certain criminal phenomena, determines whether it is appropriate to regulate them. Therefore, although the explanatory memorandum accompanying the law establishing the SIIJ did not mention the 'objective and verifiable imperatives' which required the adoption of this legislation, the Constitutional Court found that the law's normative content reveals aspects relating to the 'proper administration of justice': the creation of a specialised investigative body to ensure a uniform practice with regard to the prosecution of offences committed by magistrates, and the regulation of an appropriate form of protection for magistrates against pressure exerted on them by arbitrary complaints/denunciations.

38 Para. 215.

■ ***3.3. The measure should be accompanied by specific safeguards to remove any risk to the independence of judges and prosecutors***

On this second point, the CJEU held that an autonomous body within the Public Prosecutor's Office such as the SIIJ

> is capable of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire individuals', since it could 'be perceived as seeking to establish an instrument of pressure and intimidation with regard to those judges, and thus lead to an appearance of a lack of independence or impartiality on their part.[39]

The conclusion was based on the four points made in paragraph 217 and 218 of the judgement.

1. 'The fact that a criminal complaint has been lodged with the SIIJ against a judge or prosecutor is sufficient for the SIIJ to institute proceedings', therefore 'according to the information provided by the referring courts, the system thus established allows complaints to be lodged unreasonably, inter alia, for the purposes of interfering in ongoing sensitive cases, in particular, complex and high-profile cases linked to high-level corruption or organised crime, since if such a complaint were lodged, the matter would automatically fall within the competence of the SIIJ.'

2. If 'the complaint is lodged in the context of an ongoing criminal investigation concerning a person other than a judge or prosecutor, with that investigation then being transferred to the SIIJ irrespective of the nature of the offence of which the judge or prosecutor is accused and the evidence relied on against him or her.'

3. 'If the ongoing investigation relates to an offence falling within the competence of another specialised section of the Public Prosecutor's Office, such as the National Anticorruption Directorate, the case is also transferred to the SIIJ when a judge or prosecutor is implicated.'

4. 'Finally, the SIIJ may appeal against decisions adopted before it was created or withdraw an appeal brought by the National Anticorruption Directorate, the Directorate for the Investigation of Organized Crime and Terrorism or the Prosecutor General before the higher courts.'

What the Constitutional Court criticised in essence is that, without analysing the aspects listed, the CJEU limited itself to noting that 'practical examples taken from the activities of the SIIJ', resulting from 'evidence submitted to the Court' (which is not mentioned in the judgement),

39 Para. 216.

> [...] confirm that the risk [...] that that section is akin to an instrument of political pressure and exercises its powers to alter the course of certain criminal investigations or judicial proceedings concerning, inter alia, acts of high-level corruption in a manner which raises doubts as to its objectivity – has materialised, which it is for the referring courts to assess.[40]

The CJEU further states that:

> it is also for those [referring] courts to ascertain that the rules on the organisation and operation of the SIIJ and the rules on the appointment and withdrawal of prosecutors assigned to it are not such as to make the SIIJ open to external influences, having regard in particular to the amendments made to those rules by emergency ordinances derogating from the ordinary procedure provided for by national law.[41]

The CJEU held that the SIIJ could be perceived as an instrument of pressure and intimidation of judges, which could lead to an apparent lack of independence or impartiality of these judges.

The Constitutional Court analysed all the four aspects on which the conclusion of the CJEU was based and ascertained the following:

1. Regarding the fact that lodging a criminal complaint against a judge or prosecutor with the SIIJ is sufficient for it to open proceedings, the Court held that according to the provisions of Article 305(1) of the Romanian Code of Criminal Procedure, which is a general rule governing the initiation of criminal proceedings in Romania,

When the instrument of referral fulfils the conditions laid down by law, the criminal prosecution body shall order the initiation of criminal proceedings in respect of the act committed or the preparation of which was conducted, even if the perpetrator is indicated or known.

With regard to these legal provisions, the regulation of the *in rem* stage of the criminal proceedings is a guarantee of the fairness of the conduct of the criminal proceedings by ensuring that any criminal investigation is conducted in a procedural framework and that no person is charged in the absence of reasonable indications that he/she has committed an offence provided for by criminal law, as indicated by data or evidence adduced by judicial authorities. The Constitutional Court observed that the rule of criminal procedure provides that the public prosecutor is obliged, where the act of referral fulfils the conditions laid down by law,

40 Para. 219.
41 Para. 220.

to order the commencement of criminal proceedings so that the rule cannot be interpreted as leaving it to the discretion of the public prosecutor to initiate the investigation procedure, which is generally applicable irrespective of the status of the person against whom a criminal referral is made, irrespective of which prosecution body conducts the investigation.

2. The Constitutional Court held that the investigation of different categories of persons in the same SIIJ file could not in itself confirm the risk of political pressure. For example, the Romanian Code of Criminal Procedure provides the prosecution of persons without any special status by public prosecutors' offices or their trial by courts higher in rank than those which would have jurisdiction by subject matter when the same case also involves persons whose special status entails a particular jurisdiction. The rules which exceptionally extend the jurisdiction of certain judicial bodies are based on reasons for the proper administration of justice and consider the fact that prosecution by the same public prosecutor's office of all the participants is likely to ensure continuity, efficiency, and celerity of prosecution, thus avoiding the contradictory solutions which may arise if jurisdiction was divided between different prosecution bodies and thus ensuring that justice is done within a reasonable time and in a fair manner.

3. On the effects that the establishment of this section has on the jurisdiction of other prosecutorial bodies, in terms of reducing their jurisdiction to investigate offences committed by judges, prosecutors, and members of the SCM, and those committed by other persons alongside magistrates, the Court considered that the legislature's choice corresponds to its constitutional power to legislate in the field of the organisation of the judicial system. The fact that a pre-existing prosecution body loses part of its powers does not constitute a question of constitutionality, as long as the jurisdiction of that prosecution body is not constitutionally enshrined.[42]

4. Concerning the possibility for the SIIJ to appeal against decisions taken prior to its establishment or to withdraw an appeal lodged by the National Anticorruption Directorate, the Directorate for the Investigation of Organized Crime and Terrorism or the general public prosecutor before the higher courts, which would result in the risk that the section may become an instrument of political pressure and intervene to change the course of certain criminal investigations or judicial proceedings, the Constitutional Court held that such a possibility was removed following a finding that Article 88^{1}(2) and Article 88^{8}(1) (d) of Act No. 304/2004 breached the Constitution, by Decision No. 547 of 7 July 2020, a decision which the CJEU failed to observe. The legal provisions establishing the jurisdiction of the SIIJ prosecutors to exercise and withdraw appeals in cases falling within the jurisdiction of the section, including cases pending before the courts or definitively settled prior to its operationalisation, have ceased to apply, so that at the date of delivery

42 See CC decisions 33/2018 and 547/2020.

of the CJEU judgement of 18 May 2021 they were no longer apt to produce legal effects; therefore, the argument of the CJEU appears to be without factual and legal support.

■ *3.4. In investigative proceedings, judges and prosecutors should benefit from the right to an effective remedy and a fair trial, the presumption of innocence and the right of defence*

On the latter point, the CJEU held that

> [...] the rules governing the organisation and operation of a specialised section of the Public Prosecutor's Office, such as the SIIJ, should be designed so as not to prevent the case of the judges and prosecutors concerned from being heard within a reasonable time. Subject to verification by the referring courts, it appears from the information provided by them that that might not be the case with the SIIJ, in particular due to the combined effect of (i) the apparently significantly reduced number of prosecutors assigned to that section, who, moreover, have neither the necessary means nor expertise to conduct investigations into complex corruption cases and (ii) the excessive workload for those prosecutors resulting from the transfer of such cases from the sections competent to deal with them.[43]

The Constitutional Court previously held in relation to the establishment of rules of jurisdiction according to the status of the person that such a rule

> [...] does not restrict the right of persons to apply to the courts and to benefit from the procedural rights and guarantees established by law in a public trial conducted by an independent, impartial and legally established court within a reasonable time, conditions which are also ensured when cases are heard at first instance by the courts of appeal.[44]

This solution is also applicable to the present situation.

With regard to the 'reasonable time', enshrined as a guarantee of the right to a fair trial in Article 21(2) of the Romanian Constitution, the Constitutional Court held that the new regulation does not provide for any derogation from the rules of ordinary law established by the Code of Criminal Procedure with regard to the procedure for conducting criminal proceedings, and therefore also with

43 Paras. 221, 222.
44 CC decision Nos. 33/2018 and 547/2020.

regard to procedural time limits, so that it cannot be argued that this would constitute the premise of a possible violation of the reasonable time for the resolution of cases.

As '[...] the combined effect of the apparently significantly reduced number of prosecutors assigned to that section, who, moreover, have neither the necessary means nor expertise to conduct investigations into complex corruption cases and the excessive workload',[45] the Constitutional Court held that, to operationalise the SIIJ, the legislator provided in Article II(10) of Government Emergency Ordinance No. 90/2018 that,

> [...] within 5 calendar days of the entry into force of this Emergency Ordinance, the Prosecutor General of the High Court of Cassation and Justice shall provide the human and material resources necessary for its operation, including specialized auxiliary staff, officers and agents of the judicial police, specialists and other categories of personnel.

With regard to the number of prosecutors assigned to the section, Article 88^2(3) of Act No. 304/2004 stated that 'the Section for the Investigation of Criminal Offences within the Judiciary shall operate with a number of 15 prosecutor posts' and Article 88^2(4) provides for the possibility that the number of posts may be modified,

> [...] depending on the volume of activity, by order of the Prosecutor General of the Prosecutor's Office of the High Court of Cassation and Justice at the request of the Chief Prosecutor with the assent of the Plenary of the Superior Council of Magistracy.

With regard to the experience required to conduct investigations in complex cases, the Court notes that the provisions of Article 88^5 (3) of Act No. 304/2004 establish that among the conditions for participation in the competition for appointment to the SIIJ, prosecutors must have at least the rank of prosecutors of the Court of Appeal and at least 18 years of effective seniority in the position of prosecutor. Therefore, the Court found that the legal provisions governing the establishment of the SIIJ cannot constitute prerequisites for a breach of the constitutional guarantee laid down in Article 21(1) of the Romanian Constitution relating to the resolution of cases within a reasonable time.

For all the above reasons, the Constitutional Court found that the regulation providing for the establishment of the SIIJ is an option for the national legislature in accordance with the constitutional provisions.

45 Para. 222.

4. Critique of the CJEU by the Constitutional Court

The Constitutional Court observed that, although Article 267 of the TFEU does not empower the CJEU to apply the rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions, it being for the referring court to rule on these matters after it has made the necessary assessments (a point made, moreover, in Paragraph 201 of the judgement of 18 May 2021), the CJEU does not confine itself to 'provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions,' as it has established in its own case law (also referred to in Paragraph 201 of the judgement).[46]

Thus, the CJEU notes that the '[...] explanatory memorandum to the law in question does not reveal any justification in terms of requirements relating to the sound administration of justice' (Paragraph 215) and '[...] from the evidence submitted to the Court [...] that practical examples taken from the activities of the SIIJ confirm that the risk [...] that section is akin to an instrument of political pressure and exercises its powers to alter the course of certain criminal investigations or judicial proceedings' (Paragraph 219), or establishes that it is clear from the information provided by the referring court that the regulations were not designed in such a way as to prevent the judges and prosecutors concerned from examining the case within a reasonable time (Paragraphs 221 and 222). However, according to the Constitutional Court, none of these findings constitute elements of interpretation of EU law, which may be of assistance in assessing the effects of one or other of its provisions, but of the application of the rules of EU law to a particular case.

The Constitutional Court also found that the CJEU, in declaring Decision 2006/928 binding, limited its effects from a twofold perspective: first, it established that the obligations arising from the decision are incumbent on the Romanian authorities competent to cooperate institutionally with the European Commission (Paragraph 177 of the judgement), and thus on the political institutions, Parliament, and the Romanian Government; and, second, that the obligations are exercised by virtue of the principle of loyal cooperation laid down in Article 4 of the TEU. From both perspectives, the obligations cannot be incumbent on the courts, bodies of the State which are not empowered to cooperate directly with a political institution of the EU (the European Commission).

Therefore, the Constitutional Court held that the application of Paragraph 7 of the operative part of the judgement of the CJEU, according to which a Romanian court is practically

46 Judgements of 19 November 2019, *A. K. and Others* (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, para.132, and of 2 March 2021, *A. B. and Others* (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, para. 96.

> [...] permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgement of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) of the TEU,

has no basis in the Romanian Constitution. Article 148 of the Constitution prioritises the application of European law over the contrary provisions of domestic law. However, the CVM reports, drawn up based on Decision 2006/928 by virtue of their content and effects, as laid down by the judgement of the CJEU on 18 May 2021 do not constitute rules of European law which the court must apply with priority, overriding a national rule. Therefore, a national court cannot be placed in the position of deciding to apply recommendations with priority to national law.

Finally, the Constitutional Court noted that the principle of the rule of law presupposes legal certainty, that is, the legitimate expectation of the addressees regarding the effects of the legal provisions in force and in the way they are applied, so that any subject of law can predictably determine its conduct. However, if some courts leave national provisions which they consider contrary to European law unapplied in their own motion, whereas others apply the same national rules and consider them to be in conformity with European law, the standard of foreseeability of the rule would be seriously undermined, which would lead to serious legal uncertainty and, implicitly, a breach of the principle of the rule of law.

Consequently, the Constitutional Court of Romania established the constitutionality of the special section to investigate criminal offences committed by judges and prosecutors.

5. The dissenting opinion (and divergent constitutional interpretation)

Two judges of the Constitutional Court considered that the establishment of the SIIJ infringed on Romania's Fundamental Law.[47] Practically, according to the dissenting opinion, the way in which the provisions allowing the establishment of a prosecutorial body exclusively for the investigation of offences committed by magistrates were adopted violated the constitutional provisions on the rule of law,[48] respect for the law and the supremacy of the Constitution,[49] on Romania's obligations as a Member State of the EU,[50] on equality before the law.[51]

47 Livia Doina Stanciu and Elena-Simina Tănăsescu. This dissenting opinion continues two similar opinions issued before, attached to CC decisions Nos. 33/2018 and 547/2020.
48 Art. 1(3) of the Constitution.
49 Art. 1(5) of the Constitution.
50 Art. 148(2) and (4) of the Constitution.
51 Art. 16(1) of the Constitution.

This dissenting opinion is also based on the CJEU's aforementioned decision. In the opinion of its authors, the question arises as to conformity with the European Union law of the regulations on the establishment and operation of the SIIJ which has exclusive jurisdiction to investigate offences committed by magistrates.

The CJEU held that Decision 2006/928/EC is binding in its entirety, including the annexes setting out benchmarks for the Romanian State. Moreover, as it is formulated in clear and precise terms and is not accompanied by any conditions, Decision 2006/928/EC has a direct effect. In addition, it is subject to the legal regime specific to EU law; that is, it has priority of application over the national law of the Member States and must have full effect; that is, it must prevent the adoption or application of national legislation which would be contrary to it. However, regarding the CVM reports, it is submitted that, based on the principle of loyal cooperation, Romania is obliged to adopt appropriate measures to achieve the benchmarks set out in the annexes to Decision 2006/928/EC and refrain from adopting or applying any measures which may jeopardise the achievement of those benchmarks. Although, under Article 5 of the TEU, the judicial organisation of the Member States is a matter for them to decide, under Article 4 of the TEU, the exercise of the Member States' own competences must be conducted in such a way as not to impede the achievement of the EU's competences and not to infringe on the values laid down in Article 2 of the TEU, on which the EU is founded, and among which the rule of law and the independence of the judiciary play a central role. Not only can Romania ignore the values laid down in Article 2 of the TEU, but it must also support the EU in fulfilling its objectives.

In the opinion of the authors of the dissenting opinion, the CJEU judgement of 18 May 2021 could have become an additional argument for Romanian constitutional jurisdiction to achieve a revival of its case law. Article 148 of the Romanian Constitution requires respect for the priority of EU law over contrary provisions of national law and obliges all public authorities in Romania, listing *expressis verbis* 'the Parliament, the President of Romania, the Government and the judicial authority' to guarantee the fulfilment of the obligations resulting from the Act of Accession and the priority of EU law over national law. The determination of the Romanian Constitution imposes on all public authorities in Romania the systematic priority of applying EU law over the contrary provisions of domestic law as a legal obligation at the national level. Priority of application means interpreting, as far as possible, national law in conformity with EU law and, as an alternative, removing national laws that are contrary to EU law. Removal from application may be conducted, *ex officio*, by both the courts and the administrative authorities when they have to apply national and European law simultaneously and find contradictions between the two. Contrarily, it does not have the effect of repealing or invalidating national law, since the public administration or courts do not adopt or repeal legal rules, but merely limit themselves to comparing the normative content of different legal systems and selecting the one which will apply

in the specific case. The repeal of national rules contrary to EU law can only be performed by the legislature; the invalidation of national rules contrary to EU law can be performed by a constitutional court. However, where the national legislator or constitutional judge cannot or does not act, Article 148 of the Constitution obliges national public authorities (including – or, more rather, *particularly* – the courts) to invariably prioritise the application of EU law.

Thus, the two dissenting judges considered that the legal rules establishing the special body of prosecution are unconstitutional, also because they are contrary to the relevant EU law, Decision 2006/928/EC, as a binding legal act in all its elements, which has priority over domestic law and has a direct effect and produces full effects in the Romanian legal system.

6. Assessment of the CVM and fundamental legal problems raised

The Romanian Parliament adopted Act No. 49/2022 on the abolition of the SIIJ and amended Act No. 135/2010 on the Code of Criminal Procedure. On 14 March 2022 this special body ceased to exist.[52]

Nevertheless, the entire process is extremely instructive, raising questions about the functioning of the CVM, however, also highlighting the most fundamental and unresolved problems of European integration. The CVM was an instrument for Romania and Bulgaria; however, these core problems may arise in any other member state. For example, the relationship between EU law and constitutions or the relationship between the CJEU and Constitutional Courts. Therefore, the lessons go far beyond the problems at hand. As it was stated, '[...] despite this clearly phrased message, the effective application of the principles laid out in the AFJR judgement has been undermined by the Romanian Constitutional Court's defiant jurisprudence.'[53]

We must consider the convincing elements of the Constitutional Court's position as well to have a broader picture. The transfer of sovereignty from a member state to the EU cannot occur through extensive interpretation of the European Court of Justice, and its framework must be defined with surgical precision. The Constitutional Court has reaffirmed that the determination of the organisation, functioning, and delimitation of jurisdiction between the different bodies of the prosecution authorities is a matter of the exclusive competence of the Member State. Moreover, it reiterated that the fundamental law of the State – the Constitution – is the expression of the will of the people, which means that it cannot lose its binding force merely because of a discrepancy between its provisions and those of EU law (or instruments, such as the CVM reports never

52 See also CC decisions Nos. 88/2022 and 89/2022.

53 Moraru and Bercea, 2022, p. 83.

explicitly regulated as being binding), since the State's membership of the European Union cannot affect the supremacy of the national Constitution over the entire legal order.[54] Furthermore, by Decision No. 683/2012, the Constitutional Court indicated that '[...] the essence of the Union is the attribution by the Member States of competences – more and more in number – for the achievement of their common objectives, without prejudice, of course, to the national constitutional identity [...]' and that,

> [...] in this line of thought, Member States retain the competences which are inherent to preserve their constitutional identity, and the transfer of competences and the rethinking, emphasis, or establishment of new guidelines within the framework of competences already transferred are within the constitutional margin of appreciation of the Member States.[55]

In a recent decision by the CJEU, delivered on 7 September 2023 in case *C-216/21, Asociația 'Forumul Judecătorilor din România', YN v. Consiliul Superior al Magistraturii*[56] the CJEU has reaffirmed[57] its case law developed in the previous cases, discussed earlier. This reaffirmation occurred with full knowledge of the Romanian Constitutional Court's case law, which the reasons for this most recent decision continue to ignore.

An interesting aspect is the ideological conflict between the Constitutional Court and the CJEU. It is rather strange that the position of the Romanian Constitutional Court is not part of international academic discourse, or that it is summarised critically in a few sentences without examining it in-depth. However, as the CJEU's decision suggests, the situation is far from clear-cut in

54 There is a clear tension with the alternative interpretation, that the effectiveness of EU law cannot be weakened by unilateral acts such as a constitution in the EU which was created by multilateral agreement of states. The public international law argument can be used in defence of this argument, however, it cannot put aside the contrary argument. In their own logical order, both arguments are valid, so that opposing principles compete. We have to mention that the Romanian legal journal "Curierul Judiciar" devoted an entire issue to the problem of the relationship between EU law and national constitutions. On supremacy and sovereignty in the EU, see Ispas, 2022, pp. 377–382; on the principle of primacy of European Union law and the idea of constitutional identity promoted by the Constitutional Court of Romania, see Fábián, 2022, pp. 383–389; on the supremacy of EU law and the relationship of this principle with the jurisprudence of the national courts of constitutional control, see Carp, 2022, pp. 397–400; on the developments of judicial control at the confluence of constitutional justice with the traditional courts of law system, see Safta, 2022, pp. 401–407.

55 The doctrine of constitutional identity is developed in Romania by Constitutional Court decisions 683/2012, 64/2015 or 104/2018.

56 Case C-216/21 *Asociația 'Forumul Judecătorilor din România', YN v. Consiliul Superior al Magistraturii* [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62021CJ0216.

57 Paras. 54–56.

terms of European law, constitutional law, and (criminal or civil) procedural law. In some cases, the depth to which the CJEU wants to direct national courts or the organisation of the judicial branch of power appears excessive. In this sense, the Constitutional Court held that a court is empowered to examine the conformity of a provision 'of domestic law', that is, of national law, with the provisions of European law considering Article 148 of the Constitution and, if it finds that there is a contradiction, it has jurisdiction to apply the provisions of EU law in disputes concerning the subjective rights of citizens. In all cases, the Court finds that, by the concepts of 'internal laws' and 'domestic law', the Constitution refers exclusively to infra-constitutional legislation, the Fundamental Law preserving its hierarchically superior position by virtue of Article 11(1) of the Constitution. Accordingly, when it states that 'the provisions of the Treaties establishing the European Union and other binding Community legislation shall take precedence over contrary provisions of domestic law', Article 148 of the Constitution does not prioritise application of EU law over the Romanian Constitution, so that a national court is not empowered to examine the conformity of a provision of domestic law found to be constitutional under Article 148 of the Constitution with provisions of European law. The system of Romanian law constitutes all the legal rules adopted by the Romanian State which must be consistent with the principle of the supremacy of the Constitution and the principle of legality, which are at the heart of the requirements of the rule of law, principles enshrined in the Constitution, according to which '[i]n Romania, respect for the Constitution, its supremacy and the laws is mandatory […]', the only legislative authority of the country being the Parliament, considering that the state is organised according to the principle of separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy.[58]

We cannot underestimate the CVM in the Romanian judiciary's reform.[59] Romania's history clearly demonstrates the role of external factors in promoting reforms. The CVM can be analysed in this broader context. When local reform forces are not sufficiently strong, the role of external factors becomes even more important. Certainly, this has its disadvantages; such a process can be considered as a type of forced trajectory far from organic development. Alternatively, one can criticise the lack of depth in the local knowledge of external reform factors. Such processes are not positive by themselves; however, in the case of Romanian judicial reform, they should be assessed as positive. The CVM provided the impetus, information, accountability, and confrontation with failures to meet local reform demands.

58 These constitutional statements must be analysed in context, because there are areas in which – owing to the sovereignty transfer – the EU acquired exclusive powers through the Treaty of Lisbon, there are areas in which, based on the principle of subsidiarity, it does exercise shared powers.

59 For a broader analysis, see Tanasoiu and Racovita, 2012, pp. 243–263.

Moreover, it is interesting because, in my perspective, this is a perspective of expediency. I did not agree with the creation of the special section. Several elements of this reform are truly object to critique: the status of the SIIJ prosecutors, who appear to have enjoyed genuine immunity, was not clear; hierarchical control and judicial oversight were not functional and well designed; the exclusive material and territorial jurisdiction and the small number of prosecutors caused operational problems; the powers of appointment of the Chief Prosecutor of the SIIJ in relation to agents and judicial police officers was not permissible considering that the section did not have its own legal personality. However, the arguments proposed by the Constitutional Court are legitimate. The reasoning of the Constitutional Court should not be interpreted as defending this special section but as clarifying the limits of national legislative autonomy and constitutional identity.

It is not tolerable to leave national law at the mercy of the general principles of EU law because the rule of law requires legal certainty. When we continuously derive the content of specific norms from a norm with a limited level of precision (or imprecision), this sooner or later leads to conflicting interpretations. Under the pretext of enforcing EU law, the question is how far one can go about influencing solutions that are otherwise within the scope of non-transferred sovereignty (the judicial organisation of a member state) and are perceived to be in accordance with the rule of law concept. This problem is not limited to Romania or to the CVM.

Moreover, the concept of the rule of law can cover a wide range of realities, and standardisation is not necessarily appropriate. Clearly, there must be criteria for the rule of law. However, these criteria are not uniform. Moreover, what is not considered consistent with the rule of law in one state in a given legal and cultural context may be a perfectly functional norm in another Member State, leading to totally different practical effects.

The Constitutional Court has invoked the fact that Article 4(2) of the TEU itself expressly states that the Union shall respect 'the equality of the Member States in relation to the Treaties', 'their national identities' and 'the essential functions of the State'. European law uses the concept of "national identity," which is 'inherent in the fundamental political and constitutional structures' of the Member States, meaning that the process of constitutional integration within the EU is limited precisely by the fundamental political and constitutional structures of the Member States. The rule of law, which describes many different realities and cannot be reduced to definitions, does not lend itself to the setting of European standards. In individual cases, the existence or absence of the rule of law can be better grasped, however, the question of the conflict between the constitutional identity of a Member State and European law, whether real or created in a political context, will remain a crucial issue for a long time to come which requires complex scientific analysis.

Bibliography

- Carp, R. (2014) 'The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism', *Utrecht Law Review*, 10(1), pp. 1–16; https://doi.org/10.18352/ulr.252.
- Carp, R. (2022) 'Supremația dreptului UE și relația acestui principiu cu jurisprudența instanțelor naționale de control constitutional', *Curierul Judiciar*, 21(7), pp. 397–400.
- Clark, D. (2016) *Fighting Corruption with Con Tricks: Romania's Assault on the Rule of Law*. London: The Henry Jackson Society.
- Dumbrava, H. (2021) 'The rule of law and the EU's response mechanisms in case of violation: a Romanian Case Study', *ERA Forum 22*, pp. 437–452; https://doi.org/10.1007/s12027-021-00682-6.
- Fábián, Gy. (2022) 'Principiul primordialității dreptului Uniunii Europene și ideea identității constituționale promovată de Curtea Constituțională a României', *Curierul Judiciar*, 21(7), pp. 383–389.
- Fallon, R. H. (1997) 'The Rule of Law as a Concept in Constitutional Discourse', *Columbia Law Review*, 97(1), pp. 1–56; https://doi.org/10.2307/1123446.
- Himma, K. E. (2013) 'The Rule of Law, Validity Criteria, and Judicial Supremacy' in Flores, I., Himma, K. (eds.) *Law, Liberty, and the Rule of Law*. Ius Gentium: Comparative Perspectives on Law and Justice, Vol. 18. Dordrecht: Springer, pp. 153–173; https://doi.org/10.1007/978-94-007-4743-2_10.
- Ispas, G.-L. (2022) 'Valorile fundamentale – temei al supremației dreptului Uniunii Europen', *Curierul Judiciar*, 21(7), pp. 377–382.
- Morar, D. (2022) *Putea să fie altcumva. O istorie subiectivă a justiției după 1990*. București: Humanitas.
- Moraru, M., Bercea, R. (2022) 'The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația 'Forumul Judecătorilor din România, and their follow-up at the national level', *European Constitutional Law Review,* 18(1), pp. 82–113; https://doi.org/10.1017/S1574019622000074.
- Müller, J.-W. (2015) 'Should the EU Protect Democracy and the Rule of Law inside Member States?', *European Law Journal*, 21(2), pp. 141–160; https://doi.org/10.1111/eulj.12124.
- Rizcallah, C., Leloup, M. (2021) 'Le mécanisme de coopération et de vérification: une source supplémentaire de protection de l'État de droit en Roumanie, au cœur d'un bras de fer relatif à la primauté du droit de l'Union', *Revue des affaires européennes*, 2, pp. 389–395.
- Safta, M. (2022) 'Evoluții ale controlului judecătoresc la confluența justiției constituționale cu sistemul tradițional de justiție', *Curierul Judiciar*, 21(7), pp. 401–407.
- Tanasoiu, C., Racovita, M. (2012) 'Post-Accession (Anti-)Corruption Record in Romania and Bulgaria', *L'Europe en Formation*, 2(364), 243–263; https://doi.org/10.3917/eufor.364.0243.

- Tănăsescu, E.S. (2019) 'Romania: From Constitutional Democracy to Constitutional Decay?' in Besirevic, V. (ed.) *New Politics of Decisionism*. The Hague: Eleven International Publishing, pp. 177–191.
- Vachudova, M.A., Spendzharova, A. (2012) 'The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession', *SIEPS – European Policy Analysis*, 2012/1, pp. 1–20.
- Vassileva, R. (2020) 'Threats to the Rule of Law: The Pitfalls of the Cooperation and Verification Mechanism', *European Public Law*, 26(3), pp. 741–768; https://doi.org/10.54648/EURO2020062.

REVIEWS

NÓRA BÉRES*

Book Review: An Encyclopaedia of Diplomacy. A Hungarian Handbook of International Relations

ABSTRACT: *The latest edition of the Lexicon of Diplomacy, An Encyclopaedia of Diplomacy. A Hungarian Handbook of International Relations has been published in English for the first time this year (2023) with the support of the Ministry of Foreign Affairs and Trade of Hungary. It is a unique collection of a wide range of basic concepts on diplomatic relations compiled by renowned Hungarian diplomats. This review offers a glimpse into the creation of the book and the audiences it can benefit.*

KEYWORDS: diplomacy, foreign affairs, Hungary, international law, international relations

It is always a great pleasure when a new handbook written by experienced legal practitioners with scientific devotion is released. The publication of Bába, I., Sáringer, J. (eds.) (2023) An Encyclopaedia of Diplomacy. A Hungarian Handbook of International Relations 1st Budapest: Kairosz Publishing, p. 996) is no different. This book was recently published for the first time in English. After two former editions in Hungarian,[1] the publication of this comprehensive handbook in English marks a major milestone.

The first Hungarian edition,[2] issued in 2018, was a more modest version of the handbook with one volume and fewer articles. Many substantial and

1 Lexicon of Diplomacy. A Handbook of International Relations. (Bába and Sáringer, 2018, p. 722.) New Lexicon of Diplomacy. A Handbook of International Relations (Bába and Sáringer, 2021, p. 978.)

2 Bába and Sáringer, 2018, p. 722. See also Bucsi, 2021, pp. 249–254.

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technical changes were made to the New Lexicon of Diplomacy in 2021, where some of the editors changed, the scope was expanded, and new chapters emerged; most importantly, the number of editors[3] (66 to 104) and articles (approximately 1,500 to over 2,000) increased considerably. As for the latest edition: 'This Encyclopaedia of Diplomacy is a Hungarian handbook of international relations, so it is dealing with the most important areas of international relations in Hungarian and international contexts alike. The original – Hungarian – version of the book was written and edited for the Hungarian reader. This English language version has been modified for the non-Hungarian readers; however, the core of the Encyclopaedia has not changed and follows both of the main goals, to review the common legal basis and practice of international relations and to present the relevant Hungarian legislative and law enforcement solutions as well. We were using the standard English expressions of international relations and diplomacy in the translation. As for the Hungarian chapters, we were trying to use simple and easily understandable terms.'[4] Taking into account the non-Hungarian audiences for the English version of the book, another special feature of the Encyclopaedia of Diplomacy is its reflection on the history of Hungarian diplomatic relations: 'With the publication of the Encyclopaedia of Diplomacy, we are also endeavouring to recount the rich history of Hungarian foreign affairs and diplomacy besides presenting the international relations. [...] We also pay tribute to the representatives and the foreign ministers of modern Hungarian diplomacy, as well as to the outstanding Hungarian diplomats.'

The authors of the handbook, numbering over 100, include the most highly qualified diplomats of Hungary. The Encyclopaedia of Diplomacy is faithful to its subtitle, and is about the most significant aspects of international relations, including topics such as diplomatic relations (theme leader: János Sáringer), international law and organisations (theme leader: Barbara Baller), foreign affairs (theme leader: Ella Lemák) and consular administration (theme leader: Gábor F. Tóth), minority protection and kin-state politics (theme leader: Iván Gyurcsík), protocol (theme leader: Iván Bába), security policy (theme leader: István Balogh), the European Union (theme leader: Balázs Ferkelt), international economic relations (theme leader: Zsolt Becsey), cultural and science diplomacy (theme leader: Sándor Csernus), international sport relations (theme leader: János Janzsó), diplomatic relations of Hungary (theme leader: János Sáringer), ministers of foreign affairs of Hungary (theme leader: Viktor Attila Soós), and Hungarian diplomats

3 The members of the editorial board of the first edition in 2018 were: János Martonyi (president), Endre Marinovich (vice-president), Csaba Balogh, István Bérczi, Sándor Csernus, Balázs Ferkelt, István Íjgyártyó, Géza Jeszenszky, Levente Magyar, József Zsigmond Nagy. Members of the editorial board of the second edition of 2021: Zsolt Németh (president), Endre Marinovich (vice president), Csaba Balogh, Ferenc Gazdag, József Zsigmond Nagy, Péter Sztáray.

4 Bába and Sáringer, 2023, p. 9.

(theme leader: Viktor Attila Soós). The chapters are accompanied by brief biographies of former Hungarian ministers of foreign affairs and diplomats of great renown as well as descriptions of countries that Hungary has diplomatic relations with (193 states). These are new additions to the volume. The Encyclopaedia of Diplomacy comprises 1 volume and 14 chapters.

Working in the foreign affairs administration is a striking example of the most complex activities one can pursue, and thanks to the support of the Ministry of Foreign Affairs and Trade of Hungary, now we can have a glimpse into the everyday workings and duties and tasks of diplomats.[5] The Encyclopaedia of Diplomacy is designed for lawyers, international relations professionals, students, and non-professionals who aspire to understand how the 'mysterious' world of diplomacy works. As the editors-in-chief note:

> This volume is for everyone who is interested in international relations and diplomacy. An average secondary school graduate will understand most of the articles. At the same time, the volume is bound to be useful for students in secondary schools or colleges who study subjects related to international relations, who prepare for a diplomatic career, or who wish to be occupied with the international relations of public administration.[6]

As it is stated in the forewords of the New Lexicon of Diplomacy and the Encyclopaedia of Diplomacy, in comparison with the first edition, the most substantial change was made to the approach. The first edition was meant to be a handbook for professionals engaged in foreign affairs. The second and third editions targeted laymen and students. Therefore, the language in the handbook does not deploy technical terms, which makes it easy to follow and consume for readers irrespective of their background.[7]

This handbook can also be used for educational purposes at law schools and international studies programmes. As a detailed collection enriched with clear-cut definitions of key concepts in international law, the Encyclopaedia of Diplomacy is ideal for students encountering public international law for the first time. Students may encounter difficulties understanding the unique nature of this field. As international lawmaking is far more vague and general when compared to lawmaking at the domestic level, there is no room for drafting accurate and detailed definitions under treaties. The dominance of custom in international law favours neither exact nor precise terms. However, many international legal definitions are rooted in customary law,[8] so jurisprudence and case law play leading roles in

5 Domaniczky, 2022, pp. 284–289.
6 Bába and Sáringer, 2023, p. 9.
7 Bucsi, 2022, pp. 260–264.
8 See Blutman, 2015; Blutman, 2018.

interpretation. The New Lexicon of Diplomacy can serve as a compass for students navigating the maze of international law. Thanks to its transparent structure, this handbook can help students and professors prepare for their international law and international relations classes: Several basic definitions are all available in one place and help illuminate and illustrate new educational materials.

Finally, this book can benefit legal professionals. The Encyclopaedia of Diplomacy can be used at ministries, courts, and law offices among other places, as it can help those involved seek 'quick aid' in matters relating to international law and international relations. The logical and detailed structure of the handbook and rich collection of resources in it offer guidance on basic concepts that may be inevitable to understand in everyday legal practice.

The extent and scale of experience and work invested in creating the Encyclopaedia of Diplomacy is significant. From a Hungarian and Central-European perspective, we must be proud to have such an excellent edition in hand, especially given that it fills major gaps in the literature. Sincere congratulations to the editors and authors of the Encyclopaedia of Diplomacy and I wish them many new editions and translations to come.

Bibliography

- Bába, I., Láringer, J. (eds.) (2018) *Diplomáciai Lexikon. A nemzetközi kapcsolatok kézikönyve*. 1st edn. Budapest: Éghajlat Publishing.
- Bába, I., Láringer, J. (eds.) (2021) *Új Diplomáciai Lexikon. A nemzetközi kapcsolatok kézikönyve*. 2nd edn. Budapest: Kairosz Publishing.
- Bába, I., Láringer, J. (eds.) (2023) *An Encyclopaedia of Diplomacy. A Hungarian Handbook of International Relations*. 1st edn. Budapest: Kairosz Publishing.
- Blutman, L. (2015) *A nemzetközi jog érvényesülése a Magyar jogban: fogalmi keretek*. MTA doktori értekezés, Szeged [Online]. Available at: http://real-d.mtak.hu/835/7/dc_1052_15_doktori_mu.pdf (Accessed: 22 October 2023).
- Blutman, L. (2018) 'Nemzetközi szokásjog' in Jakab, A., Fekete, B. (eds.) *Internetes Jogtudományi Enciklopédia* (International Law section, edited by Sulyok, G.) [Online]. Available at: http://ijoten.hu/szocikk/nemzetkozi-szokasjog (Accessed: 22 September 2023).
- Bucsi, A. (2021) 'A Diplomáciai Lexikon 2018-as (első) kiadásáról', *Külügyi Műhely*, 3(2), pp. 249–254.
- Bucsi, A. (2022) 'Megjelent az Új Diplomáciai Lexikon – A Diplomáciai Lexikon második (2021-es) kiadásáról', *Külügyi Műhely*, 4(1), pp. 260–264.
- Domaniczky, E. (2022) 'A külügyes munka színe és fonákja', *Külügyi Szemle*, 21(1), pp. 284–289; https://doi.org/10.47707/Kulugyi_Szemle.2022.1.13.