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LAW, IDENTITY AND VALUES

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ARTICLES

THE ACCOMMODATION OF RELIGION OR BELIEF IN THE CONTEXT OF EU INTEGRATION: THE LEGAL STATUS OF RELIGIOUS ORGANISATIONS IN CENTRAL AND EASTERN EUROPEAN COUNTRIES

Dalibor Đukić¹

ABSTRACT

This article examines the evolution of the protection of freedom of religion or belief (FoRB) and the accommodation of religious minorities within Central and Eastern European (CEE) States before and after their integration into the EU. EU integration has impacted the religious landscape of Member States, with the common labour market, increased legal and illegal migrations, and enhanced the protection of religious freedom, contributing to greater religious pluralism and necessitating appropriate accommodations for religious minorities. Since the collapse of the Soviet Union, the level of religious freedom protection in CEE countries has fluctuated. The legislation and constitutional provisions safeguarding religious freedom have undergone several changes and have been stabilised in the post-EU accession era. This paper argues that even if the European Union respects the legal status of Churches and religious communities as it is established by the national legislation of its Member States, simultaneously with the process of European integration, the development of a cooperationist model of State-religion relations occurred in Central European countries. This transformation was largely motivated by the need to assist Churches and religious communities in overcoming the impacts of decades of persecution and marginalisation under the previous regime. However, even those countries that were among the first to join the EU and have achieved a high level of religious freedom protection, still face challenges in accommodating certain religious minorities.

KEYWORDS

*European integration
European Union
freedom of religion
religious minorities
Central and Eastern European countries*

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1. Introduction

This paper aims to explore the influence of European integration on the legal status of Churches and religious communities in Central and Eastern European (CEE) countries, with particular attention to religious minorities. Rather than addressing traditional State-Church relations, the focus will be on how European integration and European Union (EU) membership shape the legal status of religious organisations. This study does not provide an in-depth analysis of the constitutional and legal frameworks that govern State-church relations in CEE countries. Instead, it seeks to identify the key challenges encountered by these countries in protecting the rights and legal status of religious organisations and to explore how European integration influences these issues.

In relevant American scholarship, the term ‘church’ is used as a generic label encompassing not only Churches but also religious communities and, more broadly, faith-based organisations. Although this paper focuses on CEE countries, the term ‘church’ will be employed in a similar manner. Three main reasons justify this choice. First, the term ‘church’ is recognised as a legal concept in most, if not all, European countries. Second, it holds historical significance across Europe, especially in the CEE region. Finally, it is consistently used by the European Court of Human Rights (ECtHR) and other national and supranational courts.

The process of European integration and EU membership has generally enhanced the protection of freedom of thought, conscience, and religion across the European continent. During accession negotiations with candidate countries, the European Commission annually publishes progress reports that assess the level of protection afforded to the freedom of religion or belief (FoRB), the implementation of this right, and the alignment of domestic laws with international legal standards. In addition, the European Court of Human Rights (ECtHR) functions as a court of final instance for most legal disputes concerning the freedom of religion in Council of Europe Member States. Following accession to the EU, the rulings of the Court of Justice of the European Union (CJEU) become binding on Member States, as the CJEU enforces the EU Charter of Fundamental Rights, which guarantees freedom of religion in Article 10. The CJEU has, therefore, been described as ‘the most powerful supranational court in world history’.² Prior to 2017, the CJEU had not issued significant rulings related to religion or religious freedom. However, since then, the court has delivered several landmark judgments that define the limits of the manifestation of religion or belief. Given the binding nature of its decisions, which automatically become part of the domestic legal framework of EU Member States, European integration can substantially enhance the protection of religious freedom.

For the purposes of this paper, the region of Central Europe is defined broadly, encompassing the area between Italy, Germany, Scandinavia, Russia, and the Black and Mediterranean Seas. Despite its relatively small geographical size, this region includes a surprisingly large number of States. While this multitude of States reflects the unique diversity of the region’s ethnic groups, two common features unite them: a broadly similar historical trajectory and the religious diversity of their societies. Although Christianity is the dominant religion in the region, various Christian denominations are present in all of its countries. Muslims and Jews constitute minority groups throughout the region, with

the exception of Albania and Bosnia and Herzegovina, where Muslims form significant portions of the population. Across the region, similar issues arise regarding religious freedom, and the process of EU integration has played a significant role in State-building and in shaping the regulation of the legal status of Churches and religious communities.

This paper argues that while the European Union respects the legal status of Churches and religious communities as defined by the national laws of Member States, the process of European integration in Central European countries has fostered the adoption of a cooperationist or hybrid model of State-religion relations. This shift was driven by the need to support Churches and religious communities in their recovery from several decades of persecution and marginalisation.

The paper begins with a historical overview of State-religion relations in Central Europe, focusing on the region's early steps toward European integration (2). This is followed by an analysis of the European Commission's opinions on EU membership applications, particularly their way of addressing religious freedom (3). In the next section, the paper focuses on European Commission's reports on candidate countries and their handling of religious freedom (4). The study concludes by assessing how European integration has influenced the legal status of Churches and the development of European law on religion (5), with findings summarised in Section 6.

2. Historical context

In the 19th century, the countries of the CEE region were incorporated into three major empires: the Ottoman Empire, the Austro-Hungarian Empire, and the Russian Empire. In each of these empires, religion played a significant role,³ and in some cases, it was a more important marker of identity than language or ethnicity.⁴ As a result, religion continued to play a significant role in the Central European States that emerged from the collapse of these empires during the first half of the 20th century, with the exception of regions under the Soviet rule.

A radical shift in State-church relations occurred following the end of the Second World War, with the establishment of Soviet-style dictatorships across nearly all CEE countries. Some of them, like the Baltic States, were incorporated into the Soviet Union, while others formally kept their sovereignty and experienced intense anti-religious repression driven by ideological motivations and fears of counter-revolutionary elements within society.⁵ This process of politically enforced militant secularisation has been described in relevant literature as effective,⁶ and resulted in several decades of persecution and decline for Churches and other religious organisations in CEE countries. An extreme example was Enver Hoxha's Albania, where the 1976 Constitution imposed a

3 | Between 1780 and 1848, under the system introduced by Joseph II, the Austrian Monarchy upheld religious toleration. However, following the events of 1848, a Catholic revival emerged victorious under the new regime that replaced Josephinism. Berg, 2015, p. 2. The Ottoman Empire remained Islamic during the whole period of its existence. Çevik, 2024, p. 600. For multiconfessional establishment in Imperial Russia, see: Werth, 2014, pp. 258 et seq.

4 | Çevik, 2024, p. 600.

5 | Toron and Durham, 2015, p. 16.

6 | Meulemann, 2004, p. 49; Stan, 2009, p. 90; Müller and Neundorff, 2012, p. 560.

complete prohibition on the establishment of religious communities, marking Albania as the world's first officially atheist country.⁷ Although there were notable differences in the legal frameworks governing the status of Churches in various Central European countries under communist rule, the general stance of these regimes towards religion was uniformly negative. Religion was perceived as a competing source of societal legitimacy that either needed to be marginalised or tightly controlled.

Following the collapse of the socialist system in 1989, multi-party democracy was established in CEE countries, paving the way for necessary legal reforms. In the early 1990s, many of these countries adopted new laws on religious freedom, generally embracing a liberal approach. In Czechoslovakia, the Law on Freedom of Religious Belief and the Status of Churches and Religious Societies was enacted by the Parliament on 4 July 1991.⁸ This Law improved the relationship between the State and Churches and is still valid in Slovakia.⁹ In Estonia, after the restoration of its independence, a new Constitution was adopted in 1992, followed by the Churches and Congregations Act of 1993.¹⁰ Hungary's Act IV of 1990 on the Right to Freedom of Conscience and Religion occupies a distinct position in the country's legal history, as it was the only law passed as an 'act with the force of the constitution'.¹¹ This legislative category was created in 1989 and then repealed after the 1990 elections, making the 1990 Church Act the only statute enacted under this classification.¹² In Poland, as in Hungary, religious freedom was protected through legislation enacted by the final communist parliament. The Act on the Relation of the State to the Catholic Church in the People's Republic of Poland and the Act on Guarantees of Freedom of Conscience and Religion were passed on 17 May 1989.¹³ These were first legal steps towards the protection of religious freedoms during the political transition, and they indicated a shift in State-Church relations.

After the adoption of the Declaration on the Restoration of Independence of the Republic of Latvia by the Supreme Council of the Latvian Soviet Socialist Republic on 4 May 1990, the Law on Religious Organisations was enacted. This piece of legislation was one of the few legal instruments in place to safeguard human rights during the early phase of Latvia's re-established independence.¹⁴ In 1995, this initial law was superseded by a Law on Religious Organisations, reflecting the evolving framework for religious freedom in post-Soviet Latvia.¹⁵ Lithuania is the most Catholic among Baltic States and it maintains special relations with the Roman Catholic Church which has been perceived as State or national Church. The Law on Religious Communities and Associations, passed in 1995, is still in force and recognises 9 traditional Churches which 'comprise a part of Lithuania's historical, spiritual and social heritage'.¹⁶ Bulgaria presents a unique case, as the 1949 Denominations Act remained in effect until 2002. Although some provisions were declared unconstitutional by the Constitutional Court, the Act continued to be enforced

7 | Durham and Schrarffs, 2019, p. 172.

8 | Horák, 2015, p. 240.

9 | Vladár, 2021, p. 179.

10 | Kiviorg, 2015, p. 254.

11 | Csink, 2021, p. 76.

12 | Csink, 2021, p. 76.

13 | Hanna, 2011, p. 637.

14 | Rodiņa and Kārklīņa, 2023, p. 20.

15 | Balodis, 2015, p. 491.

16 | Račius, 2020, p. 63.

by Bulgarian authorities until the new Law on Religion entered into force in 2002.¹⁷ The Ukrainian Law on Freedom of Conscience and Religious Organisations was enacted in April 1991, approximately six months prior to the country's declaration of independence.¹⁸ Despite undergoing several amendments, this law still remains in effect.

This wave of reforms of legislation that regulates the legal status of religious organisations in the late 20th century did not affect the post-Yugoslav States, where new laws on religious freedom were adopted in the first decade of the 21st century due to the conflicts following the dissolution of Yugoslavia. Among these countries, only the Former Yugoslav Republic of Macedonia enacted specific legislation by adopting the Law on Religion and Religious Groups in 1997.¹⁹ Thus, the legal frameworks governing religious freedom in Central European countries at the onset of their European integration processes were shaped by the democratic transformations and aspirations for effective human rights protection.

Before the policy shifts introduced by Gorbachev, economic and political ties between Central European and Western European countries were limited. CEE States were integrated primarily within the Soviet Union's common market, without direct relationships with the European Communities.²⁰ In 1989, however, the EU launched the PHARE program (Poland and Hungary Assistance for Restructuring the Economies) and the European Bank for Reconstruction and Development (EBRD) to stimulate economic growth across Central and Eastern Europe.²¹ The subsequent stage in building closer EU-Central European relations came through Europe Agreements, which were bilateral mixed agreements between the EU and CEE States and were aimed at expanding market access.²² While these programs and agreements were primarily intended to bolster economic ties, rather than to enhance fundamental human rights protection – including religious freedom – both parties nonetheless affirmed their commitment to core democratic principles. Specifically, they emphasised pluralist democracy grounded in the rule of law, respect for human rights and fundamental freedoms, a multiparty system with free and democratic elections, market economy principles, and social justice as the foundation for association.²³ As part of their efforts to establish closer ties with Western Europe, the CEE States have joined the Council of Europe.²⁴ Although relations between the EU and Central European countries were progressively strengthening, there was initially no clear prospect of full EU membership for these States.

17 | Petkoff, 2010, p. 148.

18 | Druzenko, 2015, p. 767.

19 | Law on religion and religious groups, Official Gazette of Macedonia, No. 35/1997.

20 | Emmert and Petrovic, 2014, p. 1374.

21 | Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic, OJ L 375, 23.12.1989, pp. 11–12.

22 | Tatham, 2009, p. 78.

23 | See for example: Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, Document 21993A1231(13)OJ L 347, 31/12/1993, pp. 2–266.

24 | Djerić, 2000, p. 605.

3. Religious freedom and EU enlargement

A pivotal moment came with the 1993 European Council meeting in Copenhagen, where the so-called Copenhagen criteria were established. These first Copenhagen criteria required associated countries in Central and Eastern Europe to meet several key conditions, including, among others, achieving 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.²⁵ Respect for human rights, including freedom of religion, became a prerequisite for accession and played a prominent role in the enlargement process. Establishing explicitly political criteria reflected the Member States' recognition that, even if a country met the economic qualifications for membership, it would not be allowed to join the Community without demonstrating a commitment to core ideals – such as democracy and the protection of human rights – that were considered essential for the effective functioning of the Union. The criteria do not explicitly require any specific model of relationship between State and religious organisations. The European Commission is tasked with assessing whether candidate countries meet the established conditions.

Following the Copenhagen Council meeting, Central European States began formally applying for full EU membership. EU enlargement was a primary catalyst for the launch of the Agenda 2000 reforms. In 1997, the Commission issued its opinions on various accession applications within its Agenda 2000 communication.²⁶

Hungary submitted its application on 31 March 1994. The European Commission's 1997 Opinion on Hungary's application noted that freedom of religion was guaranteed and that the Church was separate from the State. However, the Commission also made a somewhat critical observation that the State provided financial support to recognised religious denominations.²⁷

Poland presented its application for EU membership in 1994, and the Commission, in its 1997 Opinion, acknowledged that freedom of education and religion were protected rights in Poland. However, it highlighted concerns about anti-Semitism, particularly during election campaigns, where candidates of actual or perceived Jewish heritage were subject to disparagement. In response, Polish authorities demonstrated a commitment to addressing anti-Semitism by pursuing legal action against offenders. Additionally, the Opinion commends the 1997 Polish Constitution for affirming freedom of conscience and upholding the principle of State neutrality towards various religions.²⁸

25 | European Council in Copenhagen 21-22 June 1993 Conclusions of the Presidency. [Online]. Available at: <https://www.consilium.europa.eu/media/21225/72921.pdf> (Accessed: 19 September 2024).

26 | Agenda 2000: for a stronger and wider Union. [Online]. Available at: <https://eur-lex.europa.eu/EN/legal-content/summary/agenda-2000-for-a-stronger-and-wider-union.html#document1> (Accessed: 19 September 2024).

27 | European Commission (1997) 'Commission Opinion on Hungary's Application for Membership of the European Union'. [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/doc_97_13 (Accessed: 19 August 2024).

28 | European Commission (1997) 'Agenda 2000 – Commission Opinion on Poland's Application for Membership of the European Union'. [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/doc_97_16 (Accessed: 19 August 2024).

The Czech Republic presented its application for EU membership on 17 January 1996, and the European Commission issued its Opinion as part of Agenda 2000. The Opinion notes that religious freedom is a guaranteed right and that 21 religious denominations are registered in the country. It also addresses State aid granted to religious groups, which is conditional on a minimum membership threshold of 10,000. Furthermore, the Opinion highlights that the Jewish community had previously received State aid before the introduction of this new threshold.²⁹

Slovakia presented its application for EU membership in 1995, and the European Commission issued its Opinion in 1997. The Commission noted that freedom of religion was guaranteed by the Constitution and that fifteen religious organisations were recognised by the State and receive financial support. The Opinion then addresses anti-Semitic broadcasts on public television, which justified the deportation of Jews from Slovakia on the grounds that they 'enriched themselves at the expense of the Slovak people'. It also mentions an incident involving a school textbook that glorified and idealized the pro-Nazi Slovak regime; this textbook was subsequently withdrawn by the Slovak authorities.³⁰

Lithuania, Latvia, Estonia and Romania submitted their applications for EU membership in 1995. In its 1997 opinions on Lithuania's, Estonia's and Romania's applications, the European Commission briefly confirmed that freedom of religion was guaranteed in those countries, without providing a more detailed analysis of their legislation.³¹ By contrast, the Opinion on Latvia's application provides a more detailed assessment, noting that freedom of religion is guaranteed by the 1995 Law on Religious Organizations, which establishes the separation of Church and State. Under this Law, only registered denominations are eligible for certain benefits and rights, and the Opinion records that 800 religious organizations have registered with the Ministry of Justice. Additionally, the Opinion specifically mentions the denial of registration for Jehovah's Witnesses due to their religious rules regarding healthcare, as well as the legal challenges to this decision in Latvian courts.³²

Bulgaria submitted its application for EU membership in 1995, and the Commission issued its Opinion in 1997. Although the 1949 Denominations Act was still in force at the time, the Commission concluded that religious freedom was guaranteed in Bulgaria. It also noted that the Constitution under Article 13 designates Eastern Orthodox Christianity as

29 | European Commission (1997) 'Agenda 2000 – Commission Opinion on the Czech Republic's Application for Membership of the European Union'. [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/doc_97_17 (Accessed: 19 August 2024).

30 | European Commission (1997) 'Agenda 2000 – Commission Opinion on Slovakia's Application for Membership of the European Union'. [Online]. Available at: https://www.esiweb.org/pdf/slovakia_EC%20Opinion%20on%20SK%201997_en.pdf (Accessed: 19 August 2024).

31 | European Commission (1997) 'Commission Opinion on Lithuania's application for Membership of the European Union'. [Online]. Available at: <https://op.europa.eu/en/publication-detail/-/publication/f39fe9c5-7e96-497c-b415-2b10c5f0e4cf> (Accessed: 19 August 2024); European Commission (1997) 'Commission Opinion on Estonia's application for Membership of the European Union'. [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/doc_97_12 (Accessed: 19 August 2024); European Commission (1997) 'Commission Opinion on Romania's application for Membership of the European Union'. [Online]. Available at: <http://aei.pitt.edu/43460/1/Romania.pdf> (Accessed: 19 August 2024).

32 | European Commission (1997) 'Agenda 2000 - Commission Opinion on Latvia's Application for Membership of the European Union'. [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/doc_97_14 (Accessed: 19 August 2024).

the country's traditional religion, while affirming the separation of Church and State. As in its opinions on other Central European States' applications, the Commission referenced the financial support provided by the State to Churches and religious communities.³³

Slovenia submitted its application for EU membership in 1996, and the Commission issued its Opinion the following year. Although the 1976 Religious Communities Act remained in effect until 2007, with one provision still currently in force,³⁴ the Commission's Opinion only noted that religious freedom was guaranteed. Additionally, it mentioned ongoing disputes between the State and the Roman Catholic Church concerning the restitution of property nationalised during the communist era.³⁵

Croatia presented its application for EU membership in 2003, and in its 2004 Opinion, the Commission affirmed that religious freedom was guaranteed, and that the Church and the State were separate. The Commission noted that 'an agreement between Croatia and the Holy See establishes a favourable framework regarding the work and activity of the Catholic Church within society'. The Commission also recognised that similar agreements had been signed with other major religious groups in Croatia, although no such agreement existed with the Jewish community due to an ongoing dispute over property restitution. Additionally, the Opinion highlighted that optional religious instruction was offered within the educational system.³⁶

The Commission's opinions on the applications of Montenegro, Serbia, Albania, North Macedonia, and Ukraine contain no references to religious freedom, reflecting significant structural changes in these opinions. The Commission continues to monitor the level of legal protection of FoRB in EU candidate countries, publishing its findings in annual reports. The content of these reports will be analysed in the following section of this paper.

4. The impact of EU integration on religious freedom protection in EU candidate countries

Each year, the European Commission issues its 'Enlargement Package', a set of documents detailing its policies and annual assessments of EU enlargement. This package contains an Enlargement Communication and country reports that provide annual assessments of each candidate's reform status and include recommendations for future

33 | European Commission (1997) 'Agenda 2000 – Commission Opinion on Bulgaria's Application for Membership of the European Union'. [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/doc_97_11 (Accessed: 19 August 2024).

34 | Flere, 2014, p. 86.

35 | European Commission (1997) 'Commission Opinion on Slovenia's application for Membership of the European Union'. [Online]. Available at: <https://op.europa.eu/cs/publication-detail/-/publication/73208bd9-732e-44c8-ab7c-914f822a1aa0/language-en> (Accessed: 19 August 2024).

36 | European Commission (2004) 'Communication from the Commission – Opinion on Croatia's Application for Membership of the European Union'. [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004DC0257> (Accessed: 19 August 2024).

reforms. The key findings of 2024 reports regarding the protection of the freedom of thought, conscience and religion will be presented below.³⁷

In contrast to the 2023 Report on Albania, which provided a more detailed overview on religious freedom,³⁸ the 2024 Report only briefly mentions that freedom of religion is generally respected.³⁹ Notably, concerns regarding increasing attempts by foreign entities to exert influence on Churches and religious communities in Albania persist, though these are addressed within the Report's section on the fight against terrorism.⁴⁰

Similarly, the 2024 Report on Bosnia and Herzegovina provides less information on religious freedom protection compared to the 2023 Report.⁴¹ It addresses issues such as discrimination based on religious affiliation, hate speech and hate crimes based on religion, and incidents targeting minority returnees.⁴² The Report omits mention of the uncompleted agreement between Bosnia and Herzegovina and the Islamic Community, despite the country's prior agreements with the Holy See and the Serbian Orthodox Church.⁴³ Prolonged negotiations, reluctance from State authorities, and concerns from other religious groups that the draft agreement seems to prioritise the Islamic Community,⁴⁴ remain the main obstacles to its adoption.

The 2023 Report on Montenegro offered a comprehensive account of the activities of State authorities, Churches, and religious communities affecting the protection of religious freedom. It detailed State financial support to Churches, instances where the Serbian Orthodox Church breached COVID-19 measures, and religious ceremonies promoting traditional values.⁴⁵ By contrast, the 2024 Report briefly confirms that freedom of religion is broadly respected.⁴⁶ It highlights that Montenegro's Constitutional Court dismissed challenges to the constitutionality of amendments to the Religious Freedom Law and the Fundamental Agreement with the Serbian Orthodox Church, adopted after the 2020 democratic shift, in response to previous legislation aimed at nationalising religious assets obtained by religious organisations before 1918.⁴⁷

The 2023 Report on North Macedonia stresses the delay in accrediting religious secondary schools, affecting students' access to higher education from both Orthodox and Muslim schools.⁴⁸ Although a draft law on religious secondary education institutions was proposed, it has not advanced through Parliament.⁴⁹ In contrast, the 2024 Report is

37 | European Commission (2024) '2024 Enlargement Package'. [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/strategy-and-reports_en (Accessed: 19 August 2024).

38 | European Commission: Albania 2023 Report, p. 31.

39 | European Commission: Albania 2024 Report, p. 36.

40 | European Commission: Albania 2024 Report, p. 45.

41 | European Commission: Bosnia and Herzegovina 2023 Report, p. 39.

42 | European Commission: Bosnia and Herzegovina 2024 Report, p. 38.

43 | Official Gazette of Bosnia and Herzegovina International Treaties, Nos. 10/07 and 6/08.

44 | Išerić, 2016, pp. 71–74.

45 | European Commission: Montenegro 2023 Report, p. 42.

46 | European Commission: Montenegro 2024 Report, p. 37.

47 | Robbers, 2021, pp. 80–83.

48 | European Commission: North Macedonia 2023 Report, p. 29.

49 | Предлог на закон за установите за средно образование на верските заедници (Draft Law on Institutions for Secondary Education of Religious Communities). [Online]. Available at: <https://www.sobranie.mk/detali-na-materijal.aspx?param=f737e10f-fdb1-4184-93fc-8d67e918646b> (Accessed: 20 September 2024).

concise, stating briefly that freedom of religion or belief remains constitutionally guaranteed and is upheld in practice.⁵⁰

Both the 2023 and 2024 Reports on Serbia identify two priority areas for improving religious freedom protection. The main concern is the alignment of the 2006 Law on Churches and Religious Communities with Council of Europe standards. The 2023 Report provides more details, and focuses on the recommendations from the Advisory Committee on the Framework Convention for the Protection of National Minorities (AC/FCNM).⁵¹ The AC/FCNM has periodically reviewed Serbian legislation and emphasised that non-traditional Churches face differential treatment, especially concerning the acquisition of legal personality.⁵² Serbian Law on Churches and Religious communities indeed distinguishes between traditional Churches and religious communities, confessional communities, and other religious organisations.⁵³ However, the Law does not prescribe any exclusive privileges solely for traditional Churches and religious communities. The only notable distinction is in the registration procedure. Traditional Churches are recognised *ex lege*, whereas all other Churches must fulfill specific legal requirements and complete a registration procedure. Beyond this procedural distinction, the Law does not provide for any additional preferential treatment for traditional Churches or religious communities. This differentiation was necessary due to the introduction of a centralized register for Churches and religious communities, which previously did not exist. To enable State authorities to collect necessary data on registered religious organisations, the legislator stipulated that the registration procedure must include certain documentation by which religious organisations prove their identity.⁵⁴ This requirement did not apply to traditional Churches and religious communities, as they had already been recognised through specific State laws. Overall, Serbia's registration procedure for Churches is comparatively less stringent than in other European nations, including some in the Western Balkans, which enforce more rigorous requirements for the registration of religious organisations.

The second issue highlighted by the European Commission and the Council of Europe concerns ensuring access to religious worship in minority languages across Serbia.⁵⁵ This measure aims to enhance the inclusivity and cultural recognition of religious practices for minority communities throughout the country. The AC/FCNM has addressed the challenges faced by the Vlach community in Serbia regarding access to religious worship in their own language.⁵⁶ The Committee noted ongoing dialogue between the Vlach community and the Serbian Orthodox Church. As a result, the Serbian Orthodox Church, in cooperation with the National Council of Vlachs in Serbia, has approved the gradual introduction of the Vlach language into certain parts of worship in areas with predominantly Vlach population.⁵⁷ The AC/FCNM also highlighted that the Romanian Orthodox

50 | European Commission: North Macedonia 2024 Report, p. 35.

51 | European Commission: Serbia 2023 Report, p. 41.

52 | Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Serbia adopted on 26 June 2019, ACFC/OP/IV(2019)001, paras. 67–68.

53 | Law on Churches and Religious Communities, Official Gazette of the Republic of Serbia, No. 36/06.

54 | Đukić, 2021, p. 27.

55 | European Commission: Serbia 2024 Report, p. 43.

56 | Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Serbia adopted on 26 June 2019, ACFC/OP/IV(2019)001, para. 69.

57 | Serbian Orthodox Diocese of Timoc, 2021.

Church publicly denies the Vlach community's right to self-determine their national and religious affiliation. This issue is tied to efforts by the Romanian Orthodox Church to conduct worship and sermons in the Romanian language in Vlach-populated villages in eastern Serbia.⁵⁸ These activities have sparked tensions related to the recognition of minority, linguistic, and religious rights of the Vlach community. Additionally, members of the Egyptian minority in Serbia face challenges in accessing places of worship.⁵⁹ The use of specific languages in worship is not solely a State responsibility but falls under the autonomy of Churches and religious communities. The State cannot mandate the use of minority languages in worship without violating religious autonomy. However, the State can play a facilitative role by encouraging constructive dialogue between religious organisations and ethnic minorities. This approach squares the protection of minority rights to access religious worship in their native languages with the protection of autonomy of religious organizations.

5. EU membership and the legal status of Churches

The EU is a Treaty-based multinational organisation comprising States with diverse religious traditions and complex Church-State histories. Hans-Martien ten Napel observes that the EU has limited authority over Church-State relations within its Member States.⁶⁰ This principle is formalized in the 1997 Treaty of Amsterdam's Declaration on the Status of Churches and Non-confessional Organisations, which proclaims that 'The European Union respects and does not prejudice the status under national law of Churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations'.⁶¹ This formulation became Article 17 of the Treaty on the Functioning of the European Union (TFEU).⁶² Furthermore, the Charter of Fundamental Rights of the European Union (CFR) enshrines freedom of thought, conscience and religion, while prescribing that 'the Union shall respect cultural, religious and linguistic diversity' (Article 22).⁶³ Thomas Schirrmacher and Jonathan Chaplin argue that the EU's ability to influence the relationship between Member States and Churches is shaped by two primary factors: the historical traditions of each State and the legal framework established by the European Convention on Human Rights (ECHR), along with the principles developed through the jurisprudence

58 | Raduški, 2022, p. 156.

59 | Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Serbia adopted on 26 June 2019, ACFC/OP/IV(2019)001, para. 69.

60 | Napel, 2018, p. 224.

61 | Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Declarations adopted by the Conference – Declaration on the status of churches and non-confessional organisations, Official Journal C 340, 10/11/1997 P. 0133.

62 | Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 P. 0001 – 0390.

63 | Charter of Fundamental Rights of the European Union, Official Journal of the European Communities 2000/C 364/01.

of the European Court of Human Rights (ECtHR).⁶⁴ The substantive body of EU community law concerning religion has been steadily growing since 1975 and is expected to continue expanding. With the Court of Justice of the European Union (CJEU) increasingly addressing complex issues related to religious freedom,⁶⁵ the traditional perception of the EU as being indifferent to the legal status of religious organisations in its Member States needs to be reconsidered. This shift reflects the evolving intersection between EU law and the regulation of the legal status of religions, emphasising the EU's more active role in this area over time.

European law on religion has gradually and silently developed in the past five decades. Robbers argue that basic features of European law on Religion are regionality, neutrality and equality.⁶⁶ Doe goes further and identifies seven fundamental principles that characterize the posture of the EU towards religion: the value of religion, subsidiarity, religious freedom, religious equality (and non-discrimination), the autonomy of religious associations, cooperation with religion, and the special protection of religion by means of privileges and exemptions.⁶⁷ These principles are widely adopted by Central European States and have been reinforced through the process of European integration.

New legislation adopted in Central European States regulates the legal status of religious organisations in diverse ways, though certain patterns emerge. Most States in the region have implemented a hybrid or cooperationist approach to religion,⁶⁸ which is characterised by constitutional separation of State and Church, that allows for cooperation in different areas, such as religious instruction in public schools and religious services in public institutions.⁶⁹ This model is perceived as adequate in CEE States to help revitalize Churches and religious communities that suffered decades of persecution under authoritarian regimes.⁷⁰ By enabling cooperation between the State and religion, these countries create opportunities for religious organisations to regain the social and spiritual status that they historically had.

Typically, cooperation between the State and religious organizations is formalized in agreements addressing specific mutual interests. In Central Europe, most countries have concluded such agreements, especially with the Holy See. Notably, Czechia was among the last countries in Europe to sign an agreement with the Holy See on 24 October 2024. However, this agreement has not yet been ratified and, therefore, has not entered into force.⁷¹ The agreements signed with other religious organisations equalized their status with that of the Roman Catholic Church. However, a tendency persists for the Catholic Church to receive preferential treatment, particularly in countries with Catholic majority.⁷² Smaller religious groups sometimes face difficulties in negotiating agreements with the State. A landmark ECtHR case involved the Union of three Reformist Churches, which sought an agreement with the Croatian government. Their request was denied on grounds that they were outside 'the European cultural circle', a distinction deemed discriminatory

64 | Schirmacher and Chaplin, 2016, p. 141.

65 | See for more: Pin and Witte, 2019, p. 224.

66 | Robbers, 2004, p. 312.

67 | Doe, 2011, p. 237.

68 | Slovenia is an exception to this rule.

69 | Doe, 2011, p. 35.

70 | Toron and Durham, 2015, p. 16.

71 | Holy See Press Office, 2024.

72 | Toron and Durham, 2015, p. 20.

by the Court.⁷³ The ECtHR's rulings have encouraged States to provide similar opportunities for agreements to all religious groups and organisations.

European integration has promoted equality among religions in EU Member States. Nevertheless, there are instances where EU accession has coincided with reductions in rights previously guaranteed to Churches and religious communities. E.g. in Romania, the restitution of Church property to minority religious organisations significantly decreased after the country joined the EU.⁷⁴ This situation should be distinguished from States' efforts to modernise outdated communist-era legislation on religious organisations. As it has been already mentioned, before and after EU accession, some CEE States adopted new laws imposing stricter registration requirements for different religious groups and organisations. These laws often established multi-tiered systems of Church registration. Typically, the highest tier grants the most privileges, the middle tier provides fewer benefits but is less restrictive, and the lowest tier provides basic legal recognition with minimal requirements. Although the ECtHR has found that in certain cases the implementation of multi-tiered registration systems violate the ECHR,⁷⁵ it has never ruled that such systems inherently contravene the Convention.⁷⁶ European integration in Central Europe has not resulted in laws granting identical status to all Churches and religious communities. Instead, it fostered the introduction of multi-tiered registration systems closely tied to cooperationist models of Church-State relations.

Through European integration, CEE countries have advanced human rights protection, including freedom of religion. In the region of Central Europe, no instances of serious and systematic violations of religious freedom can be observed in general. For proving this statement, it should be mentioned that the ECtHR has found a relatively small number of violations of Article 9 of the ECHR. However, concerns have arisen about the securitisation of religion that potentially could lead to infringements on religious freedom. For example, Estonia denied to renew the residence permit of the spiritual leader of the Estonian Orthodox Church under the Moscow Patriarchate, for security reasons.⁷⁷ In Latvia, the Parliament amended the Law on the Latvian Orthodox Church to grant it the status of a fully independent (autocephalous) Church.⁷⁸ Lithuanian Prime Minister Ingrida Šimonytė has addressed Bartholomew I, the Ecumenical Patriarch of Constantinople, expressing support for an appeal made by several Lithuanian Orthodox Christians seeking to leave Moscow's jurisdiction.⁷⁹ In August 2024, the Ukrainian Parliament passed the Law on the Protection of the Constitutional Order in the Sphere of

73 | ECtHR, *Savez crkava "Riječ života" and Others v. Croatia*, Application No. 7798/08, Judgment of 9 December 2010, para. 92.

74 | Huszka, 2023, p. 1461.

75 | E.g. ECtHR, *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, Applications Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, Judgment of 8 April 2014.

76 | Coleman, 2020, p. 142.

77 | Reuters, 2024.

78 | Cimbalo, 2022, p. 2.

79 | LRT, 2022.

Activities of Religious Organisations.⁸⁰ This piece of legislation prohibits religious organisations affiliated with the Russian Orthodox Church, on the ground of national security concerns. These actions underscore the growing trend of using security concerns to interfere with FoRB, potentially undermining the principle of State neutrality in religious matters, the autonomy of religious organisations, and the separation of Church and State. Moreover, these examples showcase that there remains a risk of backsliding and regressing in fundamental rights protection even in States which have achieved high levels of human rights protection and have been integrated into the EU.

6. Concluding remarks

The CEE countries share a common history of religious pluralism and anti-religious dictatorships in the second half of the 20th century. After 1989, democratisation prompted legislative reforms on religious freedom protection, reflecting liberal principles and aligning with democratic standards. Most CEE countries had adopted legislation on the legal status of Churches and religious communities at the end of the communist rule. The process of European integration in the first years after the fall of communism did not affect CEE countries' national legislation that regulated religious freedom protection. In some of those countries the laws and other regulations on FoRB inherited by the communist regime remained in force even after their accession to the EU.

The Copenhagen criteria established in 1993 linked EU membership to democratic values, including human rights and subsequently freedom of religion. Candidate countries from Central and Eastern Europe had to demonstrate compliance through constitutional guarantees and legal reforms, as assessed by the European Commission. While progress varied, challenges such as State-Church relations, anti-Semitism, and minority registration emerged. Financial support to religious organisations, restitution of Church property, and the status of traditional religions were also addressed. It is worth noting that certain laws on religious freedom inherited from the socialist regime were often positively evaluated, while some legislation enacted after EU accession was later deemed by the ECtHR to violate freedom of religion or belief.

The 2024 European Commission reports on candidate countries reveal a general affirmation of religious freedom and less detailed analyses of religious freedom issues in candidate countries compared to previous years. Those issues include the prohibition of discrimination based on religious affiliation, hate speech, minority rights in worship, and legal frameworks regulating the legal status of religious organisations. The 2024 reports indicate that the focus of the European Commission has shifted away from religious freedom issues. This could be explained, on one hand, by the lack of significant infringements of religious freedom in EU candidate countries in recent years. On the other hand, the 2024 reports aimed to reinvigorate the accession process and inject dynamism into

80 | Закон України про захист конституційного ладу у сфері діяльності релігійних організацій (Law of Ukraine on the Protection of the Constitutional Order in the Field of Activities of Religious Organisations). [Online]. Available at: <https://zakon.rada.gov.ua/laws/show/3894-IX#Text> (Accessed: 30 October 2024).

the European integration of Western Balkan countries, and therefore they omit the assessment of specific issues like religious freedom.

The process of European integration influences religious freedom protection primarily through the Council of Europe's human rights standards. During and after their accession to the EU, many Central European countries adopted new regulations on the legal status of religious organisations. Even though those changes do not only ensue from EU integration, there is undoubtedly an interplay between European integration and domestic legal adjustments in the sphere of religious freedom. The ECtHR and the Venice Commission have significantly contributed to reviewing new legislation related to religious freedom and their assessments have indicated breaches of Council of Europe standards, guiding States to align their laws with established human rights protection standards.

European law on religion continues to evolve but does not mandate a specific model of State-Church relations for EU Member States. While the process of European integration does not explicitly favour any existing model, most CEE countries have adopted a cooperationist approach. Cooperation, by way of agreements with laws regulating the legal status of Churches remain a key characteristic of State-Church relations in CEE countries. However, challenges remain, including the preferential treatment of dominant religions, stricter registration requirements for smaller groups, and increasing concerns about the securitisation of religion.

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ONCE UPON A TIME IN THE BALKANS: CENTRALISATION, DECENTRALISATION, AND THE PRINCIPLE OF EQUALITY AMONG REPUBLICS IN THE FEDERAL SYSTEM OF YUGOSLAVIA

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ABSTRACT

Yugoslavia was once a conglomeration of diverse nations, marked by significant socio-economic disparities and a unique, ever-evolving state structure. It transitioned from a pre-Second World War unitary state, often criticised as one nation's claimed hegemony over others, to a federation of six nominally equal republics and two regions with an autonomous status designed to prevent such dominance. This article provides an overview of the federal system of post-war socialist Yugoslavia, examining the processes of centralisation and decentralisation and assessing how the principle of equality among the republics was applied throughout different phases of Yugoslav federalism. As this article shows, after a period of decentralisation and the strengthening of the republics' sovereignty and independence in the late 1970s, renewed tendencies towards centralisation, the dominance of one republic over others, and the erosion of equality among the federal units contributed to intensifying conflicts between nations, ultimately leading to Yugoslavia's disintegration. The article concludes with a comparison of Yugoslav and European (con)federalism, focusing on centralisation, decentralisation, and the principle of equality among their constituent parts.

KEYWORDS

*Yugoslavia
federalism
federal system
republics
centralisation
decentralisation
equality*

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1. Introduction

Yugoslavia, ‘the Land of the South Slavs’, was a federation throughout its existence (1929–2003). Succeeding the State of Slovenes, Croats, and Serbs (1918) and Kingdom of Serbs, Croats, and Slovenes (1918–1929), the Kingdom of Yugoslavia (Serb. *Kraljevina Jugoslavija*) was officially proclaimed in 1929 and lasted until the Second World War. During the war, the Democratic Federal Yugoslavia (Serb. *Demokratska federativna Jugoslavija*) was established in the liberated territory, whereafter it became the Federative People’s Republic of Yugoslavia (Serb. *Federativna ljudska republika Jugoslavija*) on 29 November 1945. On 7 April 1963, the so-called ‘second Yugoslavia’ was renamed the Socialist Federal Republic of Yugoslavia (Serb. *Socijalistička Federativna Republika Jugoslavija*), which lasted until 1991. At the time of its dissolution, it had a population of about 24 million. In addition to Serbia and Montenegro, it included four other socialist republics now recognised as independent states: Bosnia and Herzegovina, Croatia, (North) Macedonia, and Slovenia. From 1946 to 1991, Serbia also included two autonomous regions, Vojvodina and Kosovo, which had a special status on the federal level. Inaugurated on 27 April 1992, the ‘third Yugoslavia’, consisted of only two republics, Serbia and Montenegro. It comprised roughly 45 percent of the population and 40 percent of the area of its predecessor. In 2003, the two constituent members agreed to abandon the name Yugoslavia and rename the country Serbia and Montenegro. In 2006, the union was disbanded and two independent countries were formed.

Among scholars from the Balkans, pre-war Yugoslavia has received little attention in discussions of federalism.² For instance, in his extensive review of the development of Yugoslav federalism prior to 1946, Miroslav Djordjević dedicated only a single paragraph to the Kingdom of Yugoslavia.³ Most works by regional authors in the field of constitutional law exclusively focus on the development of federalism in socialist Yugoslavia. For example, Makso Šnuderl, a prominent Slovenian constitutional lawyer, argued that pre-war Yugoslavia failed to resolve the national question, a key weakness in his view.⁴ According to Šnuderl, the national liberation struggle against the Nazis during the Second World War was also a fight for a ‘people’s and democratic federation of equal nations in Yugoslavia.’ He believed that only this state form could express the unity of diverse nations desiring to live together as equals.⁵

However, federalism in socialist Yugoslavia did not begin with the adoption of the 1946 constitution, but with the second session of the AVNOJ on 29 November 1943,

2 | See Accetto, 2007, p. 29.

3 | Djordjević, 1997, p. 121.

4 | Šnuderl, 1956, p. 245. Edvard Kardelj, a Slovene who was one of the principal ideologues and architects of Yugoslavia’s constitutional arrangements, believed that the resistance of the Croatian, Slovenian, and Macedonian masses against Great Serbian hegemony and centralism, as well as the friction between the bourgeois elites, increasingly complicated the ‘knot of contradictions’ arising from the national question. According to Kardelj, the underlying issue among the nations of then-Yugoslavia was the concept of ‘integral Yugoslavia’. However, he considered such a unitary-Yugoslav construct outdated. The unification of nations is only possible for undifferentiated, closely related peoples in the early stages of national awakening, and impossible for developed nations. See Kardelj, 1957, cited in Accetto, 2007, p. 122.

5 | Šnuderl, 1956, p. 245.

which adopted the decree on the construction of Yugoslavia according to the federal principle.⁶ Key milestones in the development of Yugoslav federalism included the adoption of the Constitutional Act of 1953, the Constitution of 1963, and the Constitution of 1974. Compared to other existing federal systems, post-war Yugoslav federalism had some specific characteristics, of which at least three are worth highlighting. In contrast to 'unifying federalism', which reflects the effort to forge a closer connection between constituent parts (e.g. the federal system in the United States), Yugoslavia followed the path of 'containment federalism', gradually transforming from a predominantly centralised formation into a loose federation. Matej Accetto argues that this was not only because post-war federal Yugoslavia developed from a pre-war monarchy, which was a *de facto* unitary state, but also due to the subsequent constitutional development up to the 1974 federal constitution, whereby the centre of power was transferred from the federal level to the constituent units. Like their America counterparts, the founders of Yugoslav federalism were looking for an arrangement that would harmonise the need for the sufficient autonomy and sovereignty of individual members with the desire for unity in the form of a single federation. Nonetheless, Yugoslavia gradually moved towards decentralisation, shifting from a pre-war unitary state to a centralised federation under the Constitution of 1946, Constitutional Act of 1953, and Constitution of 1963, and then to a decentralised federation with the passing of constitutional amendments and adoption of the new Constitution of 1974. Towards the end of the 1980s, when socialist Yugoslavia was approaching disintegration, proposals for the creation of an even looser 'asymmetric federation' appeared, but were unacceptable in the political climate at the time. Indeed, with amendments to their republican constitutions, Slovenia and Croatia had begun paving the way for independence.⁷

Another peculiarity of Yugoslav federalism is that it was founded on a rigid principle of unity of power, the opposite to the separation of powers, a cornerstone of the liberal legal and constitutional tradition associated with democratic rule of law. The judiciary played a minimal role in maintaining the federal balance, despite the introduction of constitutional courts at both the federal and republican levels in 1963.⁸ The limited role of the (constitutional) judiciary was closely tied to another key characteristic that set Yugoslav federalism apart from other federal systems, such as those in the United States and Canada. Unlike these systems, Yugoslavia adopted a new constitution nearly every decade after the Second World War, both at the federal level and within the individual federal units.

The frequent adoption of constitutional amendments and new constitutions was a consequence of the absence of constitutional review, which would have enabled the ongoing adaptation of the constitutional system to the changing social conditions. As Accetto notes, this phenomenon of 'planned constitutionalism' was not unique to former socialist countries, with the European Union (EU) having repeatedly amended and

6 | Accetto, 2007, p 115. The Anti-Fascist Council for the National Liberation of Yugoslavia, typically abbreviated as the AVNOJ, was a deliberative political and legislative body during the Second World War.

7 | Accetto, 2007, pp. 115, 117. The author refers to Kušej, 1972, pp. 157–179.

8 | Djordjević, 1970, cited in Accetto, 2007, p. 117, footnote 364. Other former socialist countries, such as Czechoslovakia and Romania, established constitutional courts much later, with meaningful constitutional review procedures emerging only after the end of communism.

replaced its founding treaties over time. While Accetto does not equate the Yugoslav and European experiences entirely, he argues that they are more similar than they might initially appear. Both faced the challenge of balancing the push for unification with the desire for independence and equality among their members, a balance they sought to achieve through gradual constitutional reforms.⁹ Although the Yugoslav constitutional project ultimately ended in the (bloody) disintegration of the country, erasing any remnants of the apparent stability of its federal structure, this does not diminish the significance of the post-war Yugoslav federal experience for the theory and practice of federalism. On the contrary, this tragic outcome makes studying it all the more important.¹⁰

This article provides an overview of the federal system of post-war socialist Yugoslavia, examining the processes of centralisation and decentralisation and assessing how the principle of equality among the republics was applied throughout different phases of Yugoslav federalism. This article shows that the inclination towards a centralised federal system, dominance of one republic over others, and weakening of equality of federal units, among other things, intensified conflicts among nations and republics and contributed to the final disintegration of Yugoslavia. The article concludes with a comparison of Yugoslav and European federalism by focusing on centralisation, decentralisation, and the principle of equality among their constituent parts.

2. Development of federalism in post-war Yugoslavia: Centralisation, decentralisation, and the principle of equality among nations and federal units

| 2.1. *Federal Yugoslavia under the Constitution of 1946*

The Democratic Federative Yugoslavia (DFY), established during the Second World War, was renamed the People's Republic of Yugoslavia (FPRY) after the war ended. The FPRY existed from 29 November 1945, to 7 April 1963, and primarily comprised South Slavic nations within the territory of what are now several independent states. The country consisted of six constituent units known as the 'people's republics': Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Montenegro, and Macedonia. Within Serbia,

9 | The EU is 'planned' to be built with ever-new foundational structures, gradually progressing towards a closer union. This approach is evident in both its foundational principles, as outlined in the Schuman Declaration, and the relatively frequent amendments to its founding treaties. Ultimately, there is little distinction between the socialist slogans and the programs and directives established by the 'leaders' of the EU. See Accetto, 2007, pp. 118–119.

10 | *Ibid.*, p. 220.

the autonomous region of Vojvodina¹¹ and the autonomous authority of Kosovo and Metohija¹² were also established.

In January 1946, the Constitution of the Federal People's Republic of Yugoslavia (hereinafter, the 1946 Constitution) was promulgated, introducing a political system modelled after the Soviet Union – a system of 'people's democracy' based on the dictatorship of the proletariat. The state was organised according to the principle of unity of power. Formally, the highest body of state power with legislative authority on matters within the jurisdiction of the federation was the Federal Assembly. In practice, the Federal Assembly's functions were carried out by its Presidium, which also served as the country's collective presidency. However, the real power did not lie with the Federal Assembly, but with the federal government, which, *inter alia*, issued decrees with the force of laws.¹³

In regulating relations within the federation, the 1946 Constitution introduced the principles of sovereignty and equality among nations. The FPRY was declared 'a community of equal nations' that, exercising their right to self-determination, including the right to secede, 'expressed their will to live together in a federal state'.¹⁴ In the chapter on 'Fundamental Rights of Nations and People's Republics', the 1946 Constitution stated that 'any act contrary to the sovereignty and equality among the nations of the FPRY and its people's republics is in violation of the federal constitution'.¹⁵

The position of the highest bodies of state power in the FPRY were regulated in Chapter VII of the Second Part of the 1946 Constitution. The Federal Assembly consisted of two equal chambers: the Federal Council, in which all citizens were represented (one deputy was elected for every 50,000 inhabitants), and the Council of Nations, where, according to the principle of parity, the republics, autonomous region, and autonomous authority were represented as constituent parts of the federation.¹⁶ The republics elected thirty deputies, the autonomous region twenty, and the autonomous authority fifteen.¹⁷

Federal laws were applicable throughout the territory of the FPRY. No bill at the federal level could become law without a majority vote in both chambers.¹⁸ Both chambers also had the right to delay additions and amendments to the statutory provisions. If consensus on a proposal was not reached, the matter was referred to the co-ordination committee of the Federal Assembly, where both chambers were equally represented.¹⁹ In

11 | Vojvodina is a province in northern Serbia with a majority Serbian population and a significant Hungarian minority. It comprises nearly a quarter of Serbia's territory. Under the 1946 Constitution, it was established as an autonomous region within the People's Republic of Serbia. Its powers within the framework of limited autonomy were defined by the 1947 Constitution of the People's Republic of Serbia.

12 | According to the 1946 Constitution, Kosovo and Metohija was designated as an autonomous authority within the territory of the People's Republic of Serbia. It has a predominantly Albanian population. Its powers within the framework of limited autonomy were defined by the 1947 Constitution of the People's Republic of Serbia.

13 | See Kaučič and Grad, 2007, p. 53.

14 | Constitution of the FPRY, First Part, Chapter I, Article 1.

15 | Constitution of the FPRY, Chapter III, Article 10.

16 | Constitution of the FPRY, Second Part, Chapter VII, Articles 47–53.

17 | Constitution of the FPRY, Second Part, Chapter VII, Article 54.

18 | Constitution of the FPRY, Second Part, Chapter VII, Article 63, paragraph 3.

19 | Constitution of the FPRY, Second Part, Chapter VII, Article 64.

cases of conflict between federal laws and the laws of the federal units, federal laws took precedence.²⁰

The federal units enjoyed a relatively high degree of autonomy, with their own constitutions, legislative authority, and legislative and executive bodies. The 1946 Constitution explicitly stipulated that 'the federal units independently adopt their constitutions so that they reflect the particularities of each individual republic while remaining in accordance with the federal constitution'.²¹ In principle, the federation only held powers delegated to it by the republics through the federal constitution. In practice, however, the country functioned in a distinctly centralist manner, both politically and economically, as key positions in the federal bodies and federal units were occupied by representatives of the Communist Party of Yugoslavia as the only political force.²² The Communist Party controlled all levers of power at the federal level, as well as within the republics and lower political-territorial units. Therefore, the state organisation largely resembled the organisation of the Communist Party, and the decisions of the Communist Party dictated those of the state government.²³ This unique form of Yugoslav statism significantly diminished the rights, political autonomy, and *de facto* equality of individual republics, as there were frequent estimates by most federal units that one republic – namely, Serbia – had hegemony over others.

| 2.2. Constitutional Act of 1953

Following the Tito–Stalin split and Yugoslavia's break from Soviet influence in 1948,²⁴ comprehensive constitutional reform was implemented in 1953. This reform was carried out at both the federal and republic levels, not through the adoption of a new constitution but through the enactment of a constitutional act. This period marked the beginning of a system of 'worker's self-government', leading to the emergence of a new type of socialism that differed significantly from the Soviet model. The Constitutional Act of 1953 introduced social ownership, workers' self-management of enterprises, and people's councils.²⁵

20 | Constitution of the FPRY, Second Part, Chapter VII, Article 46.

21 | Constitution of the FPRY, Chapter I, Article 11.

22 | Kaučič and Grad, 2007, pp. 53–54. From the end of the Second World War until the mid-1980s, there was no organised political opposition in Yugoslavia. Nevertheless, a critical attitude towards Communist Party politics persisted throughout the post-war period, especially among the intelligentsia and cultural circles. The so-called 'quiet pluralism' in culture, the arts, philosophy, and even in journalism was quietly supported by the authorities, although it was limited by the prohibition of political assembly and the tolerance 'boundary' set at various times by the Communist Party. See Repe, 1994, pp. 49–58.

23 | Hacin et al., 2022, p. 333.

24 | In the aftermath of 1948, Yugoslav socialism forged its own path, one characterised by broader personal and economic freedoms than those in other countries of the Eastern Bloc. It also differed from the other socialist countries in terms of the openness of its borders to the West and the state-supported labour emigration to Western European countries. See Flander et al., 2022, p. 3.

25 | This so-called 'Third Way' of Yugoslav socialism was premised on the proclamation of workers' self-management, which drew upon ideas that went beyond the bureaucratised 'state socialism' and social democracy of the West. Also inseparably tied to the 'Yugoslav experiment' were the local people's councils, that is, revolutionary administrative bodies intended to form the basis of a socialist model of direct democracy, both in the political system and economy. See Kanzleiter, 2011, cited in Flander et al., 2022, p. 3.

The structure of the federal government was also altered. The previous Presidium (i.e. the collective presidency of the state) was replaced with the individual President of the FLRY, and the Government was replaced by the Executive Council, which no longer directly managed state administrative bodies but coordinated their work as the executive body of the Federal Assembly.²⁶ These changes further strengthened the trend towards the centralisation of state power within the federal system of the former Yugoslavia, a trend that was already prominent under the 1946 Constitution.

In terms of relations within the federation, this development significantly weakened the republics' position vis-à-vis the federal power. The Constitutional Act of 1953 abolished the Council of Nations within the Federal Assembly. Under the new arrangement, some members of the Federal Assembly were still elected from the federal units, but they convened as a 'half-chamber' only on rare occasions. The body representing the federal units was replaced by the Council of Producers. Alongside the Federal Council, which represented all citizens, the Council of Producers was intended to represent the specific social interests of the so-called 'direct producers' (i.e. workers). Similar representative bodies were also established at lower levels of the state apparatus. The introduction of these assemblies meant that the principle of general political representation began to intertwine with the principle of representing specific social interests, a trend that became even more pronounced in subsequent periods.²⁷

In the late 1950s, new developments led to a gradual departure from 'iron communism' and a shift towards political liberalisation, a greater reliance on market mechanisms, and so-called 'welfare socialism'. Although economic progress was achieved under this system, it was more intense in some federal units than in others.²⁸

2.3. Constitution of 1963: Towards a decentralised Yugoslav federal system

With the adoption of the Constitution of the Socialist Federal Republic of Yugoslavia on 7 April 1963 (hereinafter, the 1963 Constitution), the country was renamed the Socialist Federal Republic of Yugoslavia (hereinafter, SFRY) and its federal units became 'socialist republics'. The 1963 Constitution, along with the new constitutions of the republics, consolidated, expanded, and deepened the system of workers' self-management. This system was closely tied to 'social property', which became the fundamental form of property in the country. The federal organisation of the country remained almost the same as it had

26 | Kaučič and Grad, 2007, p. 54.

27 | Ibid.

28 | The northern, more developed areas of Slovenia and Croatia, which were transitioning from an agrarian to industrial structure, provided the necessary basic conditions for industrialisation. In contrast, the rest of the country was predominantly agricultural, with little industry. Economically, Slovenia was the most developed. After the Second World War, Slovenia's gross domestic product per capita was more than double that of any other Yugoslav republic. It also had a significantly lower unemployment rate and high levels of egalitarianism and social security. Contrary to the previous orientation towards heavy industry, the development of more dynamic branches (e.g. trade, banking, transport, tourism, services, consulting, engineering, and in the long run, computer sciences) took place. By combining socially owned property and market laws, Slovenia became a unique bridge between eastern and western countries. Borak, 2002; Repe, 1994, cited in Flander et al., 2022, p. 3. See also Hacin et al., 2022, p. 334.

under the Constitutional Act of 1953, with one significant exception: the composition of the Federal Assembly became multi-chambered. In addition to the Federal Council, which represented all citizens, the Federal Assembly now consisted of four working community councils – namely, the Economic Council, Social-Health Council, Cultural-Educational Council, and Organisational-Political Council – each representing the specific self-governing interests of employees in these areas of ‘social work’. Another important innovation in the context of the country’s federal structure was the introduction of constitutional courts, both at the federal level and within the republics.²⁹

In 1971, constitutional amendments were adopted that deeply impacted the structure of the Yugoslav Federation and significantly influenced the further development of federalism in post-war period. Some legislative and other powers were transferred from federal bodies to those of the federal units, generally strengthening the position of the republics in relation to the federation. The influence of the federal units on decision-making at the federal level was also increased within the structure of the federal government. The individual Presidency of the federal state was replaced by a collective body, the Presidency of the SFRY, in which the republics and autonomous regions were equally represented based on the principle of parity.³⁰ However, despite these steps towards the gradual decentralisation of the Yugoslav federal system, in practice, so-called ‘democratic centralism’ endured. This development reflected the position and role of President Josip Broz Tito, and the Communist Party of Yugoslavia in particular, as the holders of political monopoly.³¹

In the 1960s, the economic growth that began in the 1950s slowed. The subsequent stagnation prompted economic reforms and raised questions about the relationship between the developed and underdeveloped republics. In Slovenia, the Communist Party leadership viewed economic reform as an opportunity for development and progress. With the exception of Croatia, the other republics did not approve efforts to promote economic reforms. In the specific political, economic, social, and institutional conditions of the late 1960s, Slovenia developed its own version of socialist welfarism, which guaranteed lifelong employment and social security for most of the working class. Similarly, political liberalisation, which emerged among the intelligentsia, civil society, and some politicians, was much stronger in Slovenia and Croatia than in other republics. Liberal communists advocated for a clearer separation between the Communist Party and the state, as well as for more democracy within the Communist Party itself. Lasting for about five years, the liberal swing ended with the removal of liberals in Slovenia, Croatia, and Serbia in the early 1970s.³²

| 2.4. Constitution of 1974

On 21 February 1974, the Federal Assembly adopted a new constitution, the last of the Socialist Federal Republic of Yugoslavia (hereinafter, the 1974 Constitution). The 1974 Constitution brought significant changes to the organisation of the state and the structure of state power bodies at both the federal and lower levels. On the one hand, these changes continued the process, at least formally, of decentralising state power and shifting of the

29 | Kaučič and Grad, 2007, p. 55.

30 | Ibid., p. 56.

31 | See Žagar, 2010, p. 251.

32 | Borak, 2002; Repe, 1994, cited in Hacin et al., 2022, p. 334.

centre of decision-making from the federal level to the bodies of the republics. On the other hand, the new constitution introduced the 'delegate system', which almost entirely abolished the direct election of state power bodies.³³

With the 1974 Constitution, Yugoslavia was defined as a federal state, that is, a community of voluntarily united nations, including their socialist republics and the socialist autonomous regions of Kosovo and Vojvodina within the Socialist Republic of Serbia.³⁴ Compared to previous constitutions and other federations at the time, the 1974 Constitution strengthened the independence and position of the republics and, to some extent, the autonomous regions. It defined a socialist republic as 'a state based on national sovereignty, and the power and self-governance of the working class, and all working people'.³⁵ The 1974 Constitution established a rule of enumerative definition of federal powers and the principle of presumption of power in favour of the republics.³⁶

Like the 1946 and 1963 Constitutions, the 1974 Constitution acknowledged the multi-ethnic and multi-national character of the federation and emphasised that the state was founded on each nation's right to self-determination, including the right to secede. As with the 1963 Constitution, however, this right was not included in the normative part but mentioned in the section on fundamental principles.³⁷ According to the 1974 Constitution, nations and nationalities of the SFRY were to adopt decisions based on principles of communication, solidarity, reciprocity, and equality among republics and autonomous regions.³⁸ The latter included equal and proportional representation of federal units in federal bodies and decision-making by consensus on matters crucial to the equality among nations and nationalities, republics, and autonomous regions. A bicameral Federal Assembly was re-introduced, consisting of the Federal Council and the Council of the Republics and Regions.³⁹ Both chambers were composed on a parity basis, ensuring equal representation of republics and regions. Decisions made in the Council of the Republics and Regions could only be altered with the consent of all republics and regions, and even the federal Constitution could not be amended without the agreement of all federal units.⁴⁰ Parity was established not only in the legislative bodies, which is common in federal systems, but also in the Presidency of the SFRY (i.e. the collective leadership of the country), as well as in the executive and judicial branches. Parity was also applied to the organisation and functioning of the Union of Communists of Yugoslavia.⁴¹

Evidently, after the 1974 Constitution came into effect, decentralisation and the autonomy and independence of the republics, as well as regions, were significantly

33 | Kaučič and Grad, 2007, p. 56.

34 | 1963 Constitution, First Part, Article 1.

35 | 1963 Constitution, Basic Principles, Section I, Article 4. The 1974 Constitution did not define the socialist autonomous regions as (national) states, but rather as autonomous socialist self-managing democratic socio-political communities, intended to ensure ethnic equality and preserve the ethnic plurality of these communities.

36 | See Žagar, 2010, p. 251.

37 | 1974 Constitution, Basic Principles, Section I. See also Žagar, 2010, p. 252.

38 | 1974 Constitution, Article 1. See also Article 245.

39 | Žagar, 2010, p. 250. Žagar (ibid.) argues that the establishment of ethnic pluralism demonstrates that the Yugoslav constitutional system permitted and facilitated a certain degree of social pluralism, even within the political system. However, it is important to note that political pluralism in the form of a multi-party system was prohibited.

40 | Kaučič and Grad, 2007, p. 56.

41 | Žagar, 2010, p. 251.

strengthened in practice, not just in the constitutional provisions. At the same time, it is important to note that the increased autonomy and independence of the republics led to growing disparities in their economic development and varying speeds at which political space opened to democratisation and the establishment of political and party pluralism. Decentralisation further encouraged the clearer articulation and expression of the specific interests of individual republics, which led to increasing conflicts between them, especially after the death of Josip Broz Tito in 1980.⁴²

While officially strengthening federalisation, the 1974 Constitution confirmed the victory of the conservative forces in Yugoslavia and Communist Party leadership. Although the political police registered various groups supposedly critical of the regime, organised opposition did not exist. In fact, the number of people convicted of political offences in Yugoslavia was relatively low due to the policy of 'an iron fist in a velvet glove'.⁴³

| 2.5. Constitutional amendments of 1988 and 1989

In the 1980s, decentralisation and the increased independence of the republics led to proposals for reforming the federal system. Where some called for further decentralisation, others proposed centralisation and the strengthening of the federation's authority. Among the reform proposals that failed to secure the necessary agreement from the federal units in the prevailing political climate, it is worth noting the Slovenian proposals for the creation of an asymmetrical federation, subsequently followed by Slovenian and Croatian proposals for the establishment of a confederation.⁴⁴

In the second half of the 1980s, there were increasing calls to establish an independent status, particularly in Slovenia, with some even advocating for leaving the federation and declaring independence. In sharp contrast, representatives of the federal government, along with Serbia, criticised the 1974 Constitution for promoting excessive decentralisation and called for amendments that would strengthen federal authority.⁴⁵ In 1988, amid escalating tensions between the federal government and some republics, as well as between the republics themselves, the Assembly of the SFRY adopted amendments to the 1974 Constitution, attempting to reassert centralism within the Yugoslav Federation. Through unpopular decrees, the Federal Executive Council also adopted measures that strengthened centralism in the field of economy and banking. However, these and other measures of the federal authorities intended to centralise state power were resisted by the republics, which did not want to lose the acquired autonomy and powers. At the same time, criticism of the one-party political system grew, as did demands for the democratisation of political life.

42 | Ibid.

43 | Pirjevec, 1995, cited in Hacin et al., 2022, p. 335.

44 | Žagar, 2010, pp. 251–252. See also Žagar, 1990, pp. 325–437.

45 | Kaučič and Grad, 2007, p. 57. See also Grad et al., 2018, p. 86.

| 2.6. Dissolution of Yugoslavia

Together, the process of decentralisation and the system of workers' self-management⁴⁶ significantly weakened the state's federal structure. The SFRY eventually became a chaotic state, where it was unclear which powers remained with the federal authorities. The conflict between the advocates of 'democratic centralism' and those unwilling to relinquish the autonomy gained by the federal units under the 1974 Constitution led to a gridlock that paralysed decision-making at the federal level, hindering the continued existence and functioning of the federation.⁴⁷

Towards the end of the 1980s, political and economic disagreements and conflicts between the federation and some republics, as well as between certain republics themselves, intensified. Citing the position that Serbs living in Kosovo were under threat, the political leadership of Serbia at the time began to emphasise nationalism and the right of the Serbian nation to resist subjugation by other nations. These slogans were underpinned by aspirations for establishing 'the Great Serbia' and the idea of a Yugoslavia led by Serbia as the most populous nation.⁴⁸

The first concrete consequence of these aspirations was that, through amendments to the republican constitution, Serbian authorities effectively assumed full political control over the two autonomous regions. The fact that the influence of the Serbian political leadership had also extended to the federal army (i.e. the Yugoslav People's Army) provoked a strong reaction, particularly in the northern republics of Slovenia and Croatia, which sought to avoid a similar fate.

To 'save' Yugoslavia, Slovenia and Croatia proposed transforming the federation into a confederation, but this was rejected by the bodies of the federation and other republics. In stark contrast, the Federation and Serbia continued to push for an even more centralised federation. When it became clear that an amicable dissolution of the Yugoslav Federation was not possible, the two republics decided to take unilateral steps that would eventually lead to the declaration of independence.⁴⁹ For example, despite fierce opposition and threats from the federal authorities, between 1989 and 1991, Serbia carried out far-reaching reforms of the republican constitution. These reforms led this Yugoslav republic in the direction of gradual democratisation, while paving the way for leaving the

46 | Workers' self-management transformed into a specific form of 'economic nationalism' of republics and regions, where local elites supported their own economy. The same can be said about the delegate system. See Juri, 2006, pp. 54–62.

47 | Ibid. Monetary policy remained in the hands of the central federal government. In this respect, while the dinar was still the only official currency, the German mark began to replace it in private transactions. Although foreign policy also remained the responsibility of the central federal government, in practice, the republics had already been given the opportunity to implement foreign policy. The Yugoslav People's army was also no longer the only military force because territorial defence units were being strengthened in some of the republics.

48 | Pirjevec, 1995, cited in Juri, 2006, p. 57.

49 | Arguably, the disintegration of the federation was greatly supported by the 1974 constitutional arrangement, which enabled the republics to strengthen their own statehood within the federal system. An important contributing factor to the separation of the nations and republics, which had been united in the Yugoslav Federation for almost half a century, was the death of Josip Broz Tito and the prevailing sense that the Yugoslav nations had lost their common 'father'. See Čepič, 2016, p. 167. Interestingly, following Tito's death, a process of liberalisation began in Slovenia and to a lesser extent Croatia, while in Serbia and other republics, the restriction of fundamental rights and freedoms gained momentum. See Juri, 2006, p. 55.

federation and the establishment of an independent state.⁵⁰ Slovenia and Croatia declared their independence on 25 June 1991. It was on that day that the second Yugoslavia formally disintegrated, triggering several wars in the territory. While the armed conflict between the Serb-dominated Yugoslav army and the Slovenian Territorial Defence Forces was short-lived, Croatia and Bosnia and Herzegovina suffered long-lasting consequences of a violent war, which lasted almost four years and left each country completely devastated. Although no direct military action took place in Serbia and Montenegro, they were confronted with other problems, namely, an authoritarian political system that persisted until the fall of Milošević with NATO's imposition of sanctions and bombing of Serbian territory.⁵¹

3. Decentralisation and the principle of equality: Yugoslav vis-à-vis European (con)federalism

| 3.1. (Con)federalism and decentralisation

From the overview above, it is clear that, under the 1974 Constitution, the Yugoslav Federation exhibited several elements of a confederal arrangement. For example: (a) both chambers of the SFRY Assembly were composed according to the principle of parity (i.e. the federal units were equally represented); (b) any changes to the federal constitution required the consent of all federal units (the same applied to the adoption of laws in the

50 | The constitutional amendments emphasised the permanent and inalienable right of the Slovenian nation to self-determination. The Assembly of the Republic of Slovenia was obliged to protect the constitutional position of the Republic if federal authorities interfered with this position through decisions that exceeded their competences as defined in the federal constitution. An amendment stipulated that a state of emergency could no longer be declared in Slovenia without the consent of the Republic's Assembly. These constitutional amendments established a confederal relationship between Slovenia and the Yugoslav Federation and were not formally in accordance with the federal constitution, resulting in the federal Constitutional Court swiftly annulling them. However, the Slovenian authorities disregarded the Court's decisions. A new set of constitutional changes soon followed, leading Slovenia even more decisively towards independence. Among other things, the word 'socialist' was removed from Slovenia's name as a federal unit. This change was in direct conflict with the federal constitution, which still mandated a socialist social order. In line with this shift, the Assembly of the Republic of Slovenia adopted a package of amendments that laid the groundwork for the development of a free market economy, entrepreneurship, political pluralism, and multi-party elections, thus allowing the formation of political parties that were alternatives to the Communist Party. In 1990, before the formal disintegration of the SFRY, Slovenia held its first multi-party parliamentary elections, in which political forces advocating for an independent Slovenia came to power. The new constitutional amendments stipulated, among other things, that the provisions of the 1974 Federal Constitution that conflicted with the republican constitution would no longer apply in Slovenia. From that point on, only federal laws approved by the Republic's Assembly were in effect in Slovenia. These changes, while not yet severing ties with the federation, placed the relationship on a confederal basis and initiated the process of building an independent Slovenian state and its own legal order. See Grad et al., 2018, pp. 88–89.

51 | See Šelih, 2012, cited in Hacin, 2022, p. 335.

Assembly of Republics and Regions); and (c) the composition of the Presidency of the SFRY and other key federal bodies was also based on parity.⁵² Additionally, towards the end of the SFRY's existence, the principle of the supremacy of federal law over the constitutions and laws of the republics was inconsistently applied in practice.

The fundamental relationship between the republics, as federal units, and the federation was structured in such a way that, at least in principle, the republics were the primary holders of state power. The Federation held state power only in areas where the federal constitution explicitly transferred powers to it. Furthermore, as mentioned earlier, the 1974 Constitution emphasised that the Yugoslav Federation was founded on the voluntary and consensual union of the nations of Yugoslavia, based on the right of each nation to self-determination and secession.

In the three years before the disintegration of the SFRY, the confederal nature of the country escalated to the point where irreconcilable differences between some nations and republics, as well as between the federation and certain republics, along with the ambitions of one federal unit to secure a dominant position over the others, created an unequal status. Consequently, neither the federal nor the confederal system could be maintained, leading to the country's eventual collapse.

Comparison of the Yugoslav Federation with the EU elicits obvious differences and entirely incompatible features, as well as some similarities. The EU is a supranational association of countries with a unique structure.⁵³ It exists in a space between federalism and confederalism, incorporating elements of both. Skillen argues that the EU has effectively developed a written constitution through a series of overlapping treaties. Although the 'European Constitution' (e.g. the Treaty establishing a Constitution for Europe) failed to gain ratification, the Treaty of Lisbon incorporates most of its key provisions and functions as a *de facto* constitution. This treaty framework emphasises the non-centralisation of power, clearly delineating competencies between the EU and its Member States. The Court of Justice of the European Union (CJEU) plays a crucial role in interpreting these powers, thus maintaining the balance of non-centralisation. The 'federal principle' is also reflected in the aspiration for an 'ever-closer union'.⁵⁴

However, the federal principle within the EU is not particularly strong. According to Elazar, for instance, it is more confederal than federal, as the primary expression of its constituent parts is at the national, Member State level, rather than through the EU's institutions.⁵⁵ The confederal principle is also reflected in the EU's foundation on international treaties and in the absence of clear and real division of powers. Nonetheless, the EU's structure does not fit the definition of a confederation, as it possesses supranational elements and has directly elected representatives of its constituents. With the enhanced role of the European Parliament following the Treaty of Lisbon, it is evident that the EU's institutions are not merely composed of delegates from the governments of Member States and that they wield certain supranational powers rather than being purely

52 | Grad et al., 2018, p. 87.

53 | Debating the structure of the EU, scholars have aligned it with federalism or confederalism, viewing it as a hybrid integration – that is, as combining elements of both a federation and a confederation – or arguing that it is neither a federation nor a confederation, but as a *sui generis* supranational formation.

54 | Skillen, 2017, p. 4.

55 | *Ibid.*

intergovernmental.⁵⁶ Finally, a confederal principle can be observed in EU decision-making processes. For instance, the European Parliament employs various forms of majority voting in its legislative procedures, and while consensus is generally sought in the Council of the European Union, qualified majority voting is also utilised.

| 3.2. *The principle of equality*

Formally speaking, the constitutional arrangement of post-war socialist Yugoslavia placed great emphasis on the principle of equality among nations and federal units. The SFRY was established on fundamentally different principles compared to the pre-war Kingdom of Yugoslavia, which had a centralised, pro-Serbian structure with little regard for equality among its nations. In contrast, the 1974 Constitution, the last of the three constitutions of the second Yugoslavia, consistently emphasised the unity of Yugoslavia's nations, reiterating that these nations 'united on a freely expressed will into a federal republic of free and equal nations and nationalities'.⁵⁷

The Basic Principles of the 1974 Constitution further asserted that the SFRY, in the interest of each individual nation and nationality, as well as their collective interests, sought to establish 'a system of socio-economic relations and a unified political foundation that ensures the common interests of the working class and all working people, along with the equality of nations and nationalities'. The Basic Principles also underscored the equal participation of the republics and autonomous regions within the Federation's governing bodies, promoting communication, solidarity, and reciprocity among the republics and regions.⁵⁸

Employing typical socialist terminology, the Basic Principles of the 1974 Constitution stressed the importance of upholding the principle of equality among nations and republics in the context of the socialist economy. It stipulated that, in order to establish a material foundation for the equality of Yugoslavia's nations and nationalities, and level the material conditions of social life and work for all working people, special attention must be given to the accelerated development of productive forces in the economically less developed republics and autonomous regions. Additionally, the 1974 Constitution highlighted the importance of ensuring equality among nations and nationalities, and in republics and autonomous regions, in areas such as workers' self-management, education, and international co-operation.⁵⁹

The normative part of the 1974 Constitution established that the SFRY was a federal state founded, among other principles, on the equality of nations and nationalities. Article 178 of the 1974 Constitution stipulated that any propagation or implementation of national inequality was unconstitutional and criminal. The 1974 Constitution included the following explicit references to the principle of equality among nations and republics:

- The republics are sovereign states based on the equality of the nations of Yugoslavia.⁶⁰
- The common interests of nations and nationalities are addressed through federal bodies, with equal participation and responsibility of the republics and

56 | *Ibid.*, p. 7.

57 | 1974 Constitution, Basic Principles, Section I.

58 | 1974 Constitution, Basic Principles, Section I.

59 | 1974 Constitution, Basic Principles, Sections II–VIII.

60 | 1974 Constitution, First Part, Articles 1–3.

autonomous regions in these bodies for determining and implementing the federation's policies.⁶¹

- The languages and scripts of the nations and nationalities within Yugoslavia, as well as in international communication, have equal status.⁶²
- Laws, regulations, or actions that place organisations of united labour or working people from other republics and autonomous regions, and consequently those republics and autonomous regions, in an unequal position, are inconsistent with the constitution.⁶³
- If the equality of republics and autonomous regions in the unified Yugoslav market is affected by acts of federal bodies that determine or implement common economic policy, compensation must be provided while the common economic policy and its measures are determined, making it an integral part of the policy's implementation.⁶⁴
- The contributions of the republics and autonomous regions, which form part of the Federation's income, must be determined in accordance with the principle of equality and the shared responsibility of the republics and autonomous regions for financing the functions of the Federation.⁶⁵

The composition of the bicameral Federal Assembly and other federal bodies was outlined in the Fourth Part of the 1974 Constitution. The Federal Council was made up of delegates from self-governing communities and socio-political organisations within the republics and autonomous regions, and the Council of Republics and Regions comprised delegations from the assemblies of the republics and autonomous regions. While the Federal Council included thirty delegates from each republic and twenty delegates from each autonomous region, the Council of Republics and Regions consisted of twelve delegates from each republic's assembly and eight delegates from each autonomous region's assembly. Members of the working bodies of the Council of Republics and Regions were elected from among the delegates, following the principle of equal representation of the republics and appropriate representation of the autonomous regions.⁶⁶

For passing laws and exercising the other powers of the Council of Republics and Regions, the consent of the assemblies of all republics and autonomous regions was required, whereby the assembly of a federal unit could authorise its delegation in the Council of Republics and Regions to grant such consent.⁶⁷ If the assemblies of the republics and autonomous regions failed to reach consensus on a draft law, the Federal Assembly could, under special conditions, on the proposal of the Federal Executive Council, enact a law on temporary measures without the consent of the assemblies of the republics and autonomous regions.⁶⁸

According to the 1974 Constitution, the Yugoslav Federation had a collective Presidency, which comprised one member from each republic and autonomous region elected

61 | 1974 Constitution, Third Part, Chapter 1, Article 244.

62 | 1974 Constitution, Articles 245 and 271.

63 | 1974 Constitution, Article 254.

64 | 1974 Constitution, Article 256.

65 | 1974 Constitution, Article 279.

66 | 1974 Constitution, Fourth Part, Chapter 1, Articles 291–292 and 297.

67 | 1974 Constitution, Articles 297–298.

68 | 1974 Constitution, Article 301.

by the assembly of that republic or autonomous region.⁶⁹ The Presidency made decisions based on 'the co-ordinated positions of its members'.⁷⁰

The Federal Executive Council, the executive body, was elected according to the principle of equal representation of the republics and with 'adequate representation' of the autonomous regions. The same applied to the appointment of federal secretaries and other officials who headed federal administrative bodies and organisations and were members of the Federal Executive Council. The Federal Executive Council made decisions by the majority vote of the members present at the meeting. It also issued regulations for the implementation of laws and other general acts adopted by the Council of Republics and Regions with the consent of the competent republican and regional bodies, provided that these laws and acts required the harmonisation of the positions of the federal units.⁷¹

The 1974 Constitution addressed the situation should the Federal Executive Council failed to reach a consensus with the competent republican and regional authorities on a proposed regulation for the enforcement of the law. In such cases, the Federal Executive Council could adopt a special regulation on temporary measures, provided the Presidency of the SFRY agreed that such a regulation was necessary. The Federal Executive Council adopted the regulation on temporary measures by a majority vote of all its members.⁷²

The federal judicial system comprised the Constitutional Court and the Federal Court of the SFRY. The Constitutional Court consisted of a President and thirteen judges elected by the Federal Assembly. Two members from each republic and one member from each autonomous region were elected to the Constitutional Court. Decisions and resolutions were adopted by a majority vote of all members of the Constitutional Court. The principle of equal representation of all republics and adequate representation of autonomous regions was also considered in the composition of the Federal Court.⁷³

Before assuming their duties, the highest officials of the federal authorities took an oath to uphold the sovereignty and independence of the country, defend socialist values, and ensure the equality of nations and nationalities.⁷⁴

In the EU system, the principle of equality among Member States is set out in paragraph 2 of Article 4 of the Treaty on European Union (TEU) which states, *inter alia*, that '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.' This provision also contains the principle requiring the EU to respect Member States' national identities. This principle is coupled with that of sincere co-operation, set forth in paragraph 4(3) of the TEU, regarded as the true cornerstone of European integration.

It was only under the Treaty of Lisbon that the principle of equality with explicit reference to the Member States made its way into EU primary law. In this way, it distinguishes itself from the many statements of equality as a principle concerned with the individual

69 | 1974 Constitution, Article 321.

70 | 1974 Constitution, Article 330. While Article 333 of the 1974 Constitution made the election of the President of the Republic optional rather than obligatory, in recognition of his historical role in the National Liberation War and the socialist revolution, Josip Broz Tito was elected as President of the Republic without a term limit in 1953.

71 | 1974 Constitution, Article 355.

72 | 1974 Constitution, Article 356.

73 | 1974 Constitution, Article 370.

74 | 1974 Constitution, Chapter 8, Article 397.

rights contained in the preamble and in Articles 2, 9, and 29 of the TEU. Nevertheless, manifestations of the principle within the EU system can be seen in several treaty provisions including those concerning the representation of Member States in EU institutions and decision-making processes (e.g. in the voting rules). Legal provisions on both have evolved throughout the European integration process, with each EU Charter introducing its own regimes. The Treaty of Lisbon redefined the composition and representation of Member States in EU institutions, such that in the European Parliament, the seats are allocated proportionally to the population of each Member State. A principle of degressive proportionality is applied, meaning larger states have more Members of the European Parliament (MEPs), but smaller states have more MEPs per capita. No Member State can have fewer than six seats or more than ninety-six seats. In the European Council, each Member State is represented by its Head of State or Government. Decisions are typically made by consensus, but some decisions are subject to qualified majority voting, which reflects both the population size and the number of Member States. The Council of the EU consists of government ministers from each Member State, with each Member State sending one minister for the relevant policy area. The Treaty of Lisbon introduced a reformed qualified-majority voting system, also known as the 'double majority system', which requires 55 per cent of the Member States (at least fifteen states out of twenty-seven) voting in favour, thus representing at least 65 per cent of the total EU population. A blocking minority requires at least four Member States representing more than 35 per cent of the EU population. The European Commission comprises one Commissioner from each Member State. Although the Treaty of Lisbon initially intended to reduce the number of Commissioners to two-thirds of the number of Member States, a political agreement maintained the rule of one Commissioner per Member State. Finally, the appointment of judges to the CJEU and the General Court is now based on the rule of one or two seats per Member State. An exception to the rule in favour of larger Member States is only made in appointing advocates general. These institutional arrangements reflect efforts to maintain a balance between ensuring equality among Member States while recognising differences in population size.

Before finding its place in EU Treaties, the principle had already been expressed by the CJEU in its early rulings through the principle prohibiting discrimination by reason of nationality enshrined in the Treaty Establishing the European Economic Community.⁷⁵ Overall, the CJEU has had a significant influence on the interpretation and enforcement of the principle of equality among Member States. According to the CJEU, the principle should be regarded as the duty of EU institutions not to treat similar situations in different ways and different situations in the same way when addressing Member States. The Court has used the principle as a basis for not admitting exceptions to common rules, especially regarding transitional periods granted to new Member States, or justifying the differentiated treatment of newer and older States on the grounds that they find themselves in a different situation. The CJEU further notes that the principle sets some prohibitions for Member States, such as the prohibition of seeking positions of advantage to the detriment of other States.⁷⁶

However, it can be argued that, within the EU system, the principle of equality among Member States is somewhat overshadowed by the idea of differentiated integration. The

75 | See Rossi, 2017, pp. 23–24.

76 | Ibid., pp. 24–25.

EU treaties provide different forms of differentiated integration for specific cases and are freely accepted by the Member States. More specifically, if all members agree, differentiated statuses among them can be introduced under the protocols added to the founding Treaties. In such cases, a differentiated status in favour of the requesting State will be set up by relieving it of obligations it would otherwise have under the relevant treaty (e.g. Protocol No. 30 on the application of the EU Charter of the Fundamental Rights to Poland and the United Kingdom). In addition to the modification of the founding Treaties, another form of differentiated integration is the possibility of States resorting to the classic instrument of international law by forming agreements among themselves. According to Rossi, one of the duties of the CJEU is assessing the extent to which the individual examples of differentiated integration accord with the principle of equality among Member states and offering a coherent and homogeneous reading of the fundamental principles and objectives of the founding treaties.⁷⁷

4. Conclusion

In the constitutional law of the post-war Yugoslav Federation, especially according to the 1974 Constitution, the principle of equality of nations and republics played an important role. The principle of the equality of nations and/or republics is repeatedly highlighted in various contexts, both in the Basic Principles and in the normative part of the 1974 Constitution. Any actions that would promote inequality between the nations of Yugoslavia were considered not only unconstitutional but also criminal. The composition of state bodies at the federal level was primarily based on the principle of parity, ensuring equal representation of nations and republics. Parity was established not only in the legislative bodies, which is common in federal systems, but also in the Presidency and the executive and judicial branches. In principle, the Council of Republics and Regions made decisions by consensus among the Assemblies of the Republics or their representatives, however, if it could not be achieved, decision-making was transferred to the hands of the Federal Executive Council. The Federal Executive Council itself issued regulations for the implementation of laws and other general acts adopted by the Council of Republics and Regions with the consent of the competent republican bodies.

While the Yugoslav and European approaches to ensuring equality among constituent parts and nations cannot be equated entirely, they seem more similar than they might initially appear. In terms of their differences, where the 1974 Yugoslav Constitution contains more than sixty direct references to the principle of equality among either nations or republics or both, the Treaty of Lisbon only makes one reference related to the equality of Member States. Furthermore, in contrast to the Yugoslav model, EU law tends to enforce non-symmetrical (i.e. proportional) equality among constituent units. The CJEU explicitly pointed out that, when treating new and old Member States, the principle should be regarded as a duty of the EU institutions 'not to treat similar situations differently and different situations in the same way when addressing Member States'. Therefore, an important difference between the two models lies in their distinct approaches to implementing the principle of equality among constituent parts and in the fact that in EU law, judicial

77 | See *ibid.*, p. 20.

practice played an important role in the creation and definition of the principle, which is not the case for the Yugoslav federal model. Interestingly, in the Yugoslav federal model, actions that would promote inequality between the nations were prohibited and even considered criminal by the constitution; whereas, in the EU, the rule that the principle of equality among Member States sets the prohibition of seeking positions of advantage of some Member States to the detriment of others was established by the CJEU.

The emphasis on the proportional enforcement of the principle of equality within the EU system is evident in Member States' representation in the EU institutions and in decision-making processes. In the European Parliament, for instance, the seats are allocated according to principle of degressive proportionality, resulting in larger states having more MEPs, but smaller states having more MEPs per capita. While each Member State is represented in the European Council and Council of the EU according to the principle of parity (i.e. symmetrically), in the European Council, some decisions are subject to qualified majority voting, which reflects both the population size and the number of Member States. For the Council of the EU, the Treaty of Lisbon introduced the double majority system, which requires 55 per cent of the Member States (at least fifteen states out of twenty-seven) voting in favour, thereby representing at least 65 per cent of the total EU population. The desire to strike a balance between ensuring (symmetric) equality among Member States while recognising differences in population size can also be seen in the composition of the EU courts, where an exception in favour of larger Member States is made in appointing advocates general.

What can be concluded, as far as the voting and representation systems of the Yugoslav Federation and the EU are concerned, is that the latter seeks to reconcile the rules of formal equality with considerations of substantive equality, accounting for the weight carried by larger Member States while trying to protect smaller Member States from being locked into minority positions. In contrast to the dynamic and differentiated enforcement of the principle of equality of Member States within the EU system, the Yugoslav federal system was far more rigid in its enforcement of the principle of equality between the republics as the formal equality of the federal units. While representation of the republics in the bodies of the federation rested on the application of the principle of parity (i.e. numerical equality with no consideration of the republic's size and number of inhabitants), decision-making in matters related to the position and rights of the Federation's members was based on the consensus of all federal units. This rigid system insensitive to differentiated integration of federal units fuelled the centralist tendencies of both the federal authorities and Serbia, the largest republic, producing a counter-effect: in the northern, more developed republics, it stimulated efforts towards decentralisation, a confederal state structure, greater autonomy, and eventually, their independence.

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IPA III, A KEY INSTRUMENT FOR PRE-ACCESSION SUPPORT TO EU CANDIDATE COUNTRIES, AND RULE OF LAW REFORMS: THE EXAMPLE OF NORTH MACEDONIA

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ABSTRACT

The European Union (EU) and its enlargement process is a difficult, complicated, and sensitive issue. This article focuses on one of the most important EU instruments for pre-accession assistance for candidate countries: the Instrument for Pre-Accession Assistance III (IPA III). Candidate countries have to fulfil a number of conditions and criteria to become an EU Member State. This often requires the implementation of several reforms in many areas of the life of the society and the state. One of the key values of the EU and its member countries is respect for and deepening of the rule of law. Therefore, candidate countries are also subject to strict requirements in this area, including the independence of the judiciary and prosecution, anti-corruption policy, and the functioning of other democratic institutions within the system of checks and balances (e.g. the Ombudsman and civil society organisations). Therefore, in addition to outlining the essence and functions of IPA III, this article looks at how IPA III is being used in practice by candidate countries and whether this instrument is aiding their progress in meeting the accession criteria. To this end, this article focuses on the candidate country of North Macedonia, examining whether and to what extent this country has made progress in rule of law building and the degree to which this has benefited from the support provided through IPA III.

KEYWORDS

*enlargement of the European Union
pre-accession assistance
Instrument for Pre-Accession Assistance III (IPA III)
candidate country
North Macedonia
reforms
rule of law*

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1. Introduction

The accession of new countries to the European Union (EU) is very difficult and long process. Candidate countries have to fulfil a number of conditions, with Article 49 of the Treaty on European Union (TEU) emphasising that the country 'must respect and commit itself to upholding the common values of the EU Member States'. The EU has long emphasised respect for the rule of law, the protection of human rights, and functioning of democratic institutions. These values are enshrined in Article 2 of the TEU² and represent fundamental pillars that all Member States and candidate countries must uphold.³

Respect for the rule of law is also one of the key elements of the Copenhagen Criteria, which define the conditions for new members to join the EU.⁴ The Copenhagen Criteria include political, economic, and legislative requirements that a candidate country must meet.⁵ In the political sphere, this means ensuring the stability of institutions that guarantee democracy, the rule of law, respect for human rights, and the protection of minorities. In the EU context, the rule of law encompasses several aspects, including the independence and impartiality of the judiciary, the predictability and enforceability of legal norms, the accountability of public administration, transparency, and the protection of fundamental rights.⁶

During the accession process, a candidate country must demonstrate that it meets the accession criteria and that it is able to assume the rights and obligations of EU membership.⁷ Depending on the specific situation, a candidate country will often undergo significant reforms to reflect EU law (i.e. the *acquis*) in its legal system and practice.⁸ To meet the conditions for membership, candidates need to focus on fundamental reforms in the rule of law, the economy, and the functioning of democratic institutions and public administration. For candidate countries, meeting these requirements often involves significant institutional and legislative changes.⁹

Throughout the accession process, the European Commission is the primary body responsible for monitoring and guiding the reform process of the potential candidates, and provides or facilitates financial and technical assistance in their preparation for EU

2 | According to Article 2 of the TEU: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

3 | De Munter, 2024.

4 | Veebel, 2011, p. 3.

5 | As these criteria are not contained in a legislative act, but only in the conclusions of the European Council, they are not judicially reviewable (e.g. Tichý, 2011, p. 67). Moreover, a decision on the access (admission) of a new (applicant) Member State cannot be reviewed by the CJEU (see Judgment of the CJEU of 22 November 1978, Case 93/78 – Lothar Mattheus vs Doego Fruchtimport und Tiefkühlkost eG).

6 | European Council, 2025.

7 | Wakelin, 2013.

8 | Grabbe, 2002, pp. 249–268.

9 | Schimmelfennig and Sedelmeier define enlargement as 'a process of gradual and formal horizontal institutionalization of organizational rules and norms'. See Schimmelfennig and Sedelmeier, 2002, p. 503.

membership.¹⁰ The preparatory stage of accession negotiations involves screening, that is, the analytical examination of the EU's *acquis*, the body of EU law applicable in the EU. This process is crucial, as it forms the basis for the bilateral negotiations between the EU and the various candidate countries.¹¹ Screening is a formal and technical exercise conducted by the European Commission in order to prepare for the accession negotiations. The exercise allows candidate countries to familiarise themselves with the *acquis* and the obligations they entail, as they will have to implement the *acquis*, thereby contributing to their preparations for accession.

Respect for the rule of law is essential for the functioning of the EU, including the effective application of EU law, proper functioning of the internal market, maintaining of an investment-friendly environment, and mutual trust. The EU has developed a variety of instruments to promote and respect the rule of law. The EU's policy approach to the rule of law rests on three pillars:

- Promoting a culture of the rule of law in the EU, which includes deepening co-operation and collaboration to promote the understanding of the rule of law in Europe.
- Addressing rule of law issues when they emerge in a Member State, having the capacity to intervene at an early stage and avoiding the risk of escalation, primarily through the annual Rule of Law Report.
- Reacting effectively upon identifying a serious problem in a Member State, including recourse to the procedure outlined by Article 7 of the TEU.¹²

This article elucidates one of the most important instruments of pre-accession assistance for candidate countries, namely, the Instrument for Pre-Accession Assistance III (hereinafter, IPA III). In this context, the article traces and evaluates how the structure and distribution of IPA III have changed, and whether and how candidate countries are drawing on and using this instrument. Given the limited scope of the article, North Macedonia and rule of law building, one of the key areas of support, was selected as an illustrative case. In doing so, this article addresses the following questions: As a candidate country, does North Macedonia benefit from IPA III support? Are the programmes implemented and supported by IPA III directed towards achieving the foregoing objective? What progress has North Macedonia made in the area of rule of law building and reform?

2. EU candidate country support: IPA, a key instrument for pre-accession assistance

As can be seen from the above, the EU accession process is highly complex and often requires candidate countries to implement a number of reforms. Therefore, the provision of consistent support is crucial for a candidate country to implement the necessary reforms and make the expected progress in the process. The EU provides this support

10 | De Munter, 2024.

11 | European Union, 2024.

12 | European Commission, 2014.

through specific programmes,¹³ notably the Instrument for Pre-Accession Assistance (IPA). IPA is a key financial and technical instrument for supporting candidate and potential candidate countries.¹⁴

IPA III¹⁵ was adopted by Regulation of the European Parliament and of the Council on 15 September 2021,¹⁶ and applies retroactively from 1 January 2021 to 2027. It is a key financial instrument of the EU and its Member States to support third countries at different stages of the EU accession process. As such, its main objective is to support beneficiaries in implementing the political, institutional, legal, administrative, social, and economic reforms necessary to align with EU values, rules, standards, policies, and practices with a view to future membership. Compared to previous programmes, this structure has a significantly different structure and its budget increased.¹⁷ Indeed, the current IPA III has been designated more than EUR 14 billion for the 2021–2027 period. The current beneficiaries of IPA III are Albania, Bosnia and Herzegovina, Montenegro, Kosovo, North Macedonia, Serbia, and Turkey.¹⁸ IPA III successfully builds on its predecessors, IPA and IPA II.¹⁹

Shifting away from the previous geographic approach, IPA III introduced a new strategic approach by defining thematic programmes according to key priorities in five thematic windows, with funds allocated according to these windows rather than by country. The instrument also combines a performance-based and ‘fair share’ approach and, unlike IPA II, only an indicative amount is set annually for each beneficiary.²⁰ Real support depends on the scope and quality of the projects implemented by the beneficiaries in each of the five windows. Projects are assessed on the basis of political relevance, technical maturity, and whether and how potential beneficiaries implement the reforms under the enlargement process. At the same time, the specific needs and capacities of beneficiaries

13 | For further detail, see Börzel, 2016, pp. 76–112.

14 | European Commission, no date.

15 | Regulation (EU) 2021/1529 of the European Parliament and of the Council of 15 September 2021 Establishing the Instrument for Pre-Accession assistance (IPA III).

16 | IPA III Regulation was adopted on 15 September 2021, came into force on 20 September 2021, and is applicable retroactively from 1 January 2021. IPA III Regulation is complemented by the Commission Delegated Regulation, which was adopted on 1 October 2021, and came into force on 3 December 2021. It sets out specific objectives and thematic priorities for IPA III assistance. IPA III Implementing Regulation was adopted by the Commission on 15 December 2021, and entered into force on 16 December 2021. Furthermore, the NDICI-GE Regulation, which was adopted on 9 June 2021, entered into force on 14 June 2021, and applies retroactively from 1 January 2021, sets out certain horizontal provisions also applicable for IPA III assistance. The Commission adopted a model for a Financial Framework Partnership Agreement (FFPA) between the Commission and the governments of IPA III beneficiaries on 31 March 2022.

17 | MZV ČR: Implementační Manuál IPA III, 2022. [Online]. Available at: https://mzv.gov.cz/public/f/65/f1/4705628_2881865_Implementacni_manual_IPA_III_cerven_2022.pdf (Accessed: 3 November 2024).

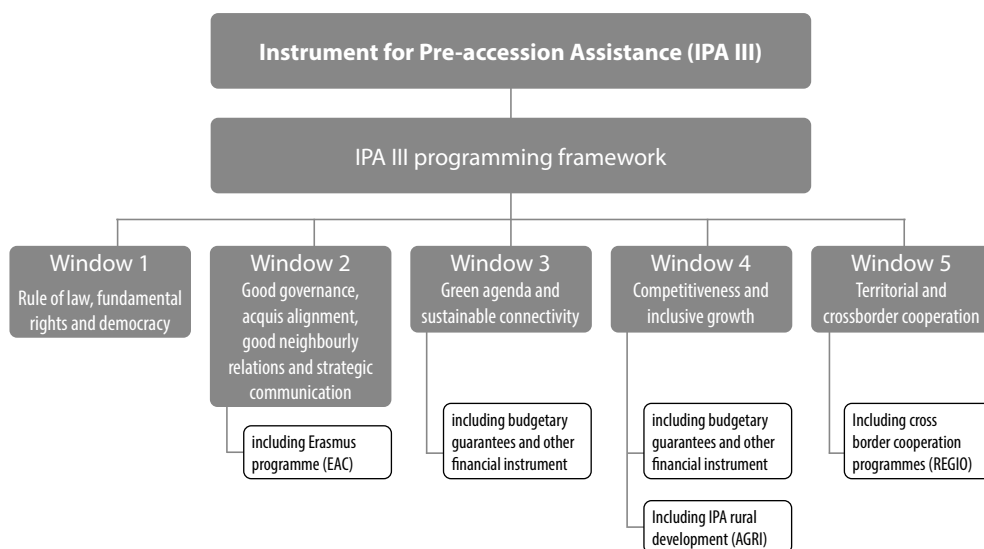
18 | IPA III is clearly aligned with the flagships and priorities of the ‘Economic and Investment Plan for the Western Balkans’ (October 2020); the Strategy for the Western Balkans, ‘A credible enlargement perspective for and enhanced EU engagement with the Western Balkans’ (February 2018); and the Commission Communication, ‘Enhancing the accession process – a credible EU perspective for the Western Balkans (February 2020).

19 | IPA has been operating in seven-year cycles since 2007.

20 | MZV ČR: Implementační Manuál IPA III, 2022.

are considered in order to avoid imbalances in the level of assistance. The scope and intensity of support may be modified in the event of a major regression or persistent lack of progress by the beneficiary in fundamental areas, namely, strengthening the rule of law, respect for fundamental rights and values, strengthening democratic institutions, reforming public administration, promoting economic governance, economic growth, and strengthening competitiveness.²¹

Figure 1: IPA III thematic windows.²²



The geographical distribution of funding was replaced by the following five thematic windows: (1) rule of law, fundamental rights, and democracy; (2) good governance, convergence with EU law, good neighbourly relations, and strategic communication; (3) green agenda and sustainable connectivity; (4) competitiveness and inclusive growth; and (5) territorial and cross-border co-operation.²³ These windows reflect the clusters of negotiating chapters as defined in the revised February 2020 Enlargement Methodology. The following table shows the indicative allocation of IPA III funds for each window for the 2021–2027 period.

21 | Ibid.

22 | European Commission, 2024b.

23 | European Commission, 2024b.

Table 1: Indicative allocation of IPA III funds by thematic window (EUR million)

Thematic Windows	%	2021	2022	2023	2024	2025	2026	2027	Total
Window 1: Rule of law, fundamental rights, and de-mocracy	15,13	281	287	292	298	304	310	317	2,089
Window 2: Good govern-ance, convergence with EU law, good neighbourly rela-tions, and strategic commu-nication	16,59	308	314	321	327	333	340	347	2,291
Window 3: Green agenda and sustainable connectivity	42,25	788	804	820	837	853	870	888	5,860
Window 4: Competitiveness and inclusive growth	22,31	414	422	431	440	448	457	467	3,080
Window 5: Territorial and cross-border co-operation	3,51	65	66	68	69	71	72	73	485
Total Budget	100,00%	1,855	1,894	1,932	1,971	2,010	2,051	2,093	13,804
Administrative items	n/a	49	49	50	51	52	53	54	357
Celkem	100,00%	1,904	1,943	1,982	2,022	2,062	2,104	2,147	14,162

As we can see, IPA III can finance a wide range of projects, following the thematic priorities of the strategic documents (mainly multi-annual and annual action plans) approved for the partner country. In addition to the five thematic windows of the instrument, significant priority is given to horizontal themes, such as environmental protection, the fight against climate change, support for administrative reforms, anti-corruption measures, and support for the rule of law, civil society, and gender equality. Funding is managed by the European Commission together with Member States, IPA III beneficiary partner countries, or other implementing partners. While the instrument covers a wide range of areas, one of its priorities is supporting reforms in the rule of law and the protection of human rights (Window 1).

Evidently, IPA III is a key means of support and assistance provided by the EU to candidate countries. There is no doubt that without this financial assistance, reforms in these countries would be implemented much more slowly or not at all. In this respect, I welcome the structural changes that have been made in the provision of this support. I do not consider the mechanical allocation of aid according to geographical indicators to be a viable or effective approach. The current situation, whereby the 'priority windows of support' are clearly defined, is a welcome and necessary change. I also consider the formulation of the five thematic windows to be appropriate. Indeed, these are key aspects that need to be supported and developed in order for a candidate country to become a full member of the EU. The rule of law, good governance, environmental protection, and mutual co-operation are values on which the EU is built and which every acceding country must fulfil. The aforementioned changes to the rules for allocating financial support are clearly a step in the right direction. Targeted aid, which is based on the quality of the supported project

and respects the specifics and individuality of the applicant, is clearly the appropriate distribution mechanism.

3. IPA III in practice: The example of North Macedonia and its rule of law reforms

Among the wide range of areas it covers, IPA III prioritises support for reforms in the rule of law and the protection of human rights (Window 1). Accordingly, this section analyses whether North Macedonia is using IPA III to implement reforms and make progress in this key area. To this end, this section examines whether the projects submitted to and supported by IPA III have led to improvements in the situation regarding the level of the rule of law and its attributes in North Macedonia. The subsequent section highlights how the reforms implemented have changed the level of rule of law in the country, demonstrating the impact of EU support as having meaningful and tangible outcomes.

One of the beneficiaries of the current IPA III is the candidate country of North Macedonia.²⁴ Since its adoption in 2021, several Commission Decisions have been issued to fund Action Plans in favour of North Macedonia. These plans focus on the different priorities and windows mentioned above, and several have a direct impact on Window 1, that is, support for reforms related to rule of law building in North Macedonia.

In 2021, the ‘Commission Implementing Decision of 16.12.2021 on the Financing of the Annual Action Plan in Favour of the Republic of North Macedonia for 2021’ was issued. This document included six annexes detailing support plans.²⁵ Of these, Annex 1, ‘Action Document for ‘EU for Rule of Law and Anti-corruption’, is particularly relevant.²⁶ Regarding the objectives and purpose of this programme and EU support, this document states:

The Action will improve the efficiency of the judicial system and anti-corruption policy. It will advance the digitalisation of the justice sector, enhance collection and use of data for management and governance purposes, improve management and transparency of business processes and allow public’s access to information on case law and general operation of key state institutions. The Action will support the State Commission for Prevention of Corruption (SCPC) in improving the control of assets and potential conflicts of interests by ensuring interoperability between the Commission’s IT system and the databases and registers of various state bodies. As a result, the Commission will be able to analyse rich data while performing the control on assets declarations. The upgrade of the Anti-Corruption Statistic (AKstat) System will improve the collection and processing of statistical data on corruption and money laundering. The Action will also mobilise the civil society and business sector for building zero tolerance attitude towards corruption in the country. The advisory support for the Constitutional

24 | Anastasakis, 2008, p. 369.

25 | European Commission, 2024c.

26 | Ibid.

Court will improve the assessment of the constitutionality and legality of adopted normative acts and will strengthen the protection of the fundamental rights in the country.²⁷

Per the above, several actions were taken to help achieve the aforementioned objectives. First, the digitalisation of state institutions in the judiciary and anti-corruption areas was enhanced. Second, the capacities of the Constitutional Court to assess the constitutionality and legality of the adopted normative acts and protect fundamental rights were strengthened. This included capacity building activities involving advisory services, coaching, and training to strengthen the managerial, professional, and administrative capacities as well as the administrative autonomy, independence, and efficiency of the Constitutional Court. Third, construction of new buildings, for example for the Academy for Judges and Public Prosecutors. Finally, actions were taken to enhance public intolerance of corruption, including activities in the form of grants for civil society, NGOs, and other entities engaged in anti-corruption activities.²⁸

In 2022, the 'Commission Implementing Decision of 5.12.2022 on the Financing of the Annual Action Plan in Favour of the Republic of North Macedonia for 2022' was adopted.²⁹ In this respect, it is worth noting Annex 2, 'Action Document for EU for Modern Public Administration',³⁰ particularly insofar as it supports the reform of the public administration and the economic governance, which are part of the 'fundamentals' of the EU enlargement policy. The overall objective was to improve the effectiveness and efficiency of the public administration of North Macedonia in line with the reform priorities of the Public Administration Reform (PAR) Strategy 2018–2022 and the new PAR Strategy for 2023–2030. In this respect, the EU has provided support to North Macedonia to reorganise, modernise, and digitalise its public administration. In line with SIGMA principles for good governance, the PAR Strategy comprises four priority areas: (1) policy-making and co-ordination; (2) public service and human resource management; (3) responsibility, accountability, and transparency; and (4) service delivery and ICT support to the administration. Building a modern, digitised, and accountable public administration is vital for the proper functioning of state institutions, the administration of the state, and the realisation of citizens' rights, in accordance with the rule of law and good governance. Therefore, the implementation of the support under this Action Plan has a significant impact in relation to Window 1 (rule of law).

The strengthening of the rule of law in North Macedonia is also covered by the 'Commission Implementing Decision of 28.4.2024 on the Financing of the Annual Action Plan

27 | Annex I to Commission Implementing Decision on the Financing of the Annual Action Plan in Favour of the Republic of North Macedonia for 2021 Action Document for 'EU for Rule of Law and Anti-corruption'. [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/e11eeba-1975-4b1e-86e1-6a7857666dca_en (Accessed: 3 November 2024).

28 | Ibid.

29 | European Commission, 2024c.

30 | Annex II of the Commission Implementing Decision on the IPA III Annual Action Plan in Favour of the Republic of North Macedonia for 2022 Action Document for EU for Modern Public Administration. [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/5e03498b-4e57-4518-b373-949b97068e41_en?filename=C_2022_9166_F1_ANNEX_EN_V3_P1_2342951.PDF (Accessed: 3 November 2024).

in Favour of the Republic of North Macedonia for 2024’.³¹ Here, Annex I, ‘Action Document for EU for Rights and Security’, is especially important.³² The overall objective of the this Action is to improve the respect for human rights and strengthen security. Specifically, this Action aims to combat discrimination and promote the social integration of vulnerable groups, including children, women, LGBTI individuals, persons with disabilities, and minorities. The EU assistance is intended to support North Macedonia in addressing gender-based and domestic violence and reducing the housing disparities faced by the Roma community. The Action also seeks to enhance North Macedonia’s security architecture by strengthening the country’s response to various security threats and risks, such as cybercrime, organised crime, terrorism, radicalisation, and violent extremism.

Finally, it is necessary to mention the ‘Commission Implementing Decision of 22.7.2024 on the Financing of the Multiannual Action Plan for an Operational Programme on Human Capital in Favour of the Republic of North Macedonia for 2024–2027’, specifically, ‘Annex: Multiannual Operational Programme on Human Capital in favour of the Republic of North Macedonia for 2024–2027’.³³ This document constitutes the multiannual work programme aligning with Article 110(2) of the Financial Regulation, and multiannual action plan corresponding to Article 9 of IPA III Regulation and Article 23 of NDICI-Global Europe Regulation. ‘The Multiannual Operational Programme (OP) on Human Capital in Favour of North Macedonia for 2024–2027’ (hereinafter, the OP on Human Capital) is a policy document delineating the implementation of national and European strategic priorities prepared in line with the IPA III Regulation and NDICI- Global Europe Regulation. It coheres to the objectives identified under IPA III Programming Framework, Window 4, Thematic Priority 1: education, employment, social protection and inclusion policies, and health. Significantly, its sub-objectives may contribute significantly to the development of the rule of law (Window 1).

North Macedonia faces notable employment and social protection challenges. The COVID-19 pandemic and recent energy and price shocks have resulted in an economic crisis, which has pushed more individuals and families into poverty and is expected to create further vulnerability. The OP on Human Capital aims to promote equal opportunities, expand employment access, fight against poverty, and improve quality social protection for all. The specific objectives are: (1) to enhance employment and the employability of the labour force focusing on youth, women, and vulnerable groups; (2) to improve social inclusion and the quality of social services, focusing on vulnerable groups; and (3) to increase the readiness of North Macedonia for EU accession negotiations under Chapter 22. The OP on Human Capital budget amounts to EUR 49,668,041 for the 2024–2027.³⁴ The

31 | European Commission, 2024c.

32 | Annex I to the Commission Implementing Decision on the Annual Action Plan in Favour of the Republic of North Macedonia for 2024 Action Document for EU for Rights and Security. [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/463efc22-6f96-494a-9fd2-715159699f07_en?filename=C_2024_2899_F1_ANNEX_EN_V2_P1_3381389.PDF&prefLang=cs (Accessed: 3 November 2024).

33 | Annex of the Commission Implementing Decision on the Financing of the Multiannual Operational Programme on Human Capital in Favour of the Republic of North Macedonia for 2024–2027. [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/ca74b0e6-2900-4cb2-80bc-f558cf47f29d_en?filename=C_2024_5327_F1_ANNEX_EN_V2_P1_3538915.PDF (Accessed: 3 February 2025).

34 | Ibid.

OP on Human Capital has been prepared in conjunction with the country's Economic Reform Programme (ERP) 2023–2025, and it is fully aligned with the EU Pillar of Social Rights, EU policy on fundamental rights, and the Gender Action Plan (GAP) III. The national sectoral strategies are well developed and address the EU enlargement policy requirements, particularly the Strategy for the Western Balkans, namely, the Economic and Investment Plan for the Western Balkans (2021–2027), which aims to support human capital development and promote employment opportunities for the youth.

Looking at the action plans above, it is clear that significant EU support is directed towards supporting reforms and building the rule of law. The programmes focus on supporting key elements and institutions of the rule of law, such as an effective and independent judiciary and prosecution, anti-corruption measures, protection of the rights of vulnerable groups and minorities (e.g. the Roma), social stability, and protection of social rights, as well as building a modern public administration. The fact that this is 'continuous support', allowing for the gradual and targeted implementation of reforms, is also positive.

4. EU Rule of Law Annual Report 2024: Macedonia's progress as a candidate country

The importance of the progress in the area of rule of law for the whole EU, including candidate countries, is evident in the European Commission's fifth annual Rule of Law Report, published on 24 July 2024, which systematically and objectively analyses the development of the rule of law in all Member States.³⁵ According to a special Eurobarometer survey, more than seven out of ten EU citizens agree that the EU plays an important role in promoting the rule of law in their country. Almost nine out of ten EU citizens consider it important that all EU Member States respect the EU's fundamental values, a view that has been stable since 2019. Moreover, the awareness of EU core values has improved significantly in many countries. Overall, 51 per cent of EU citizens reported feeling well-informed about EU core values and the rule of law, compared to 43 per cent in 2019. Since its first publication in 2020, this report has become a driver for positive reforms. Indeed, two thirds (68 per cent) of the recommendations issued in 2023 have been fully or partially taken into account.³⁶

As in previous years, this year's report comprises a Communication that examines the situation in the EU as a whole and 27 country chapters that look at important developments in each Member State. The report also includes an assessment of last year's recommendations, based on which it makes further specific recommendations to all Member

35 | European Commission, 2024d.

36 | Ibid.

States. The report covers four pillars: national justice systems, anti-corruption frameworks, media freedom and pluralism, and other institutional checks and balances.³⁷

However, it is crucial to note that this year's report is the first to contain individual chapters on developments in Albania, Montenegro, North Macedonia, and Serbia. The inclusion of these countries, which have made the most progress in the enlargement process, in the Rule of Law Report is intended to support their reform efforts and help their respective authorities progress in the accession process and continue their rule of law work as future Member States. At the same time, their progress can be considered a reflection of the support provided by the EU, typically through IPA III, but also via other pre-accession assistance instruments. There are no recommendations for these countries in the report, as the recommendations for these countries are issued exclusively in the framework of the annual enlargement package. Other candidate countries should be included in the Rule of Law Report as soon as they are ready.³⁸

4.1. North Macedonia and rule of law reforms

Building a truly functioning rule of law requires the implementation of a number of reforms in North Macedonia. These reforms concern both the organisation and the functioning of a number of institutions and bodies. Significant changes to both the current legislation and established practices are necessary. As mentioned above, significant EU financial assistance is being channelled to North Macedonia through IPA III to support these reform steps. This section outlines several areas that are key indicators of the maturity of the 'rule of law'. Particular focus is placed on the judiciary, the fight against corruption, and other institutions that play an important role in the system of checks and balances in democratic states governed by the rule of law.

This section highlights the positive changes and progress North Macedonia has achieved in this area (i.e. Thematic Window 1), through the generous support of the EU and IPA III programme.

4.1.1. Judiciary

North Macedonia has a three-tiered ordinary court system, comprising twenty-seven First-Instance Courts, four Appeal Courts, and the Supreme Court. The latter is the highest instance in the judicial system, with competences to ensure the uniform application of laws by all courts, decide on legal remedies against decisions of the appeal courts, and for the protection of trial in reasonable time. One Administrative Court and one Higher Administrative Court exercise the highest instance control over the legality of measures by public administration. The Prosecution is organised around the Public Prosecutor of North Macedonia, four Higher Public Prosecutor's Offices, and twenty-two Basic Public Prosecutor's Offices (PPOs). The Constitutional Court is not part of the judiciary and is responsible for reviewing the constitutionality of laws, among other

37 | Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2024 Rule of Law Report, The Rule of Law Situation in the European Union. [Online]. Available at: https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_cs (Accessed: 3 November 2024).

38 | M. Kmezić analyses the 'real rule of law' in the Balkan countries in greater detail, see Kmezić, 2020.

things. The Constitution of North Macedonia enshrines the independence of the courts and the autonomy of the prosecution service.³⁹ The Judicial Council and the Council of Public Prosecutors are management bodies tasked with guaranteeing judicial independence and prosecutorial autonomy, respectively, and make decisions on the recruitment, career management, and disciplinary procedures of judges and prosecutors. Working arrangements with the European Public Prosecutor's Office (EPPO) are in place.⁴⁰ The Bar Association is an independent and impartial public service that provides legal assistance and exercises public powers.⁴¹

However, the judiciary in North Macedonia faces a number of problems. The first of which is the low level of independence. This is perceived both by the judges themselves and by the public. Judges face pressure from the government, politicians, and superiors, as do prosecutors. Another issue is that the highest bodies – the Judicial Council and the Council for Public Prosecutors – are not very functional. The lack of state funding for the judiciary, including low salaries, is also a problem.⁴² Compounding matters, there is a lack of human resources, notably, the shortage of judges⁴³ and prosecutors, as well as of administrative staff. Finally, the functionality of the judicial system is weakened by the low level of digitisation.⁴⁴ As discussed below, all of these problems have been addressed by reforms, with varying degrees of success.

A fundamental challenge in North Macedonia is the establishment and respect of the principle of judicial independence. The independence of the judiciary and the institutional capacity to protect it from undue influence remain serious concerns. Overall, in 2024, only 25 per cent of the general public and 20 per cent of companies perceived the level of independence of courts and judges as 'fairly or very good'.⁴⁵ The main reason for the lack of independence of courts and judges is the perception of interference or pressure from government and politicians. Unfortunately, judges and prosecutors also have a negative perception of the current situation, as they face various pressures from both outside and inside the system. More than a third of the surveyed judges reported experiencing attempts of external influence, either from the executive or from representatives of political parties.⁴⁶ Almost 46 per cent of judges surveyed in 2023 claimed to have experienced some form of pressure or attempted influence from their colleagues, while 42 per cent said they had experienced similar pressure or influence from higher-level judges, such as court presidents or judges of higher courts.⁴⁷ Several high-level representatives within the judiciary made public statements criticising the environment of undue

39 | Articles 98 and 106 of the Constitution of the Republic of North Macedonia.

40 | A contact point has been appointed since October 2022.

41 | European Commission, 2024a.

42 | A judge's average salary is MKD 1,271,212 (EUR 21,000) per year. See: Average Salary of the Judges. [Online]. Available at: <https://web.archive.org/web/20240602140508/https://www.averagesalarysurvey.com/mk-mk/salary/judge/macedonia> (Accessed: 2 June 2024).

43 | The number of judges is insufficient, with only 409 of 639 positions filled, equating to just 64 per cent of the required judges. See: Taseva and Suncevska, 2023.

44 | Ibid.

45 | European Commission, 2024a.

46 | OSCE Mission to Skopje, 2023, pp. 14–16.

47 | Ibid.

influence, including the President of the Supreme Court.⁴⁸ Meanwhile, about one third of prosecutors have faced attempts of influence, either by the executive or by political parties.⁴⁹ An equal number faced internal pressure, especially from senior prosecutors or colleagues.⁵⁰ A high percentage of judges (59 per cent) and prosecutors (49 per cent) believe that the existing mechanisms intended to protect the judicial and prosecutorial function from external pressures or attempts to influence are ineffective.⁵¹

North Macedonia has already implemented a number of judicial reforms, in line with the recommendations of the Venice Commission.⁵² Reforms include changes to the Law on Courts and the Law on the Judicial Council,⁵³ which led to some approximation to European standards in the field of justice. In December 2023, the government adopted a new justice strategy aimed at improving the independence, efficiency and professionalism of the judiciary.⁵⁴ Although adopted with significant delays, the strategy has advanced the reform process. Alongside measures still to be implemented under the previous strategy, the new strategy includes additional measures aimed to advance the alignment of the judicial system with European and international standards.⁵⁵ The strategy's objectives include strengthening the independence and accountability of the judiciary and its resistance to internal and external influences, increasing the quality of justice and the uniform application of the law, improving efficiency (including via the reorganisation of the judicial and public prosecutors' network and application of digital tools), and improving access to justice for marginalised groups and those living in poverty. It notably includes measures to strengthen transparency and public outreach to increase public trust. The strategy is accompanied by an Action Plan that sets out the envisaged timeline

48 | Supreme Court of North Macedonia news: Press release 06.11.2023, Announcement (Соопштение). [Online]. Available at: http://sud.mk/wps/portal/vsrm/sud/!ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfljo8zizdxNTAwsvA18LIKDnAwcXQ3MLUIsHQ3c3Qz0wwkpiAJKG-AAjiD9UYSUFORGKQ7KioCAPtT4qw!/dz/d5/L2dBISEvZ0FBIS9nQSEh/ (Accessed: 3 November 2023).

49 | OSCE Mission to Skopje, 2023, p. 31. Some 36 and 29 per cent of public prosecutors reported experiencing attempts of influence from members of the executive branch of power and representatives of political parties, respectively.

50 | Ibid. Specifically, 41 per cent of prosecutors reported having experienced attempts from attorneys, while 36 and 35 per cent experienced similar pressure from senior public prosecutors and fellow colleagues, respectively.

51 | Ibid.

52 | Venice Commission opinion (CDL-AD(2018)022, CDL-AD(2018)033, CDL-AD(2019)008).

53 | Law on the Judicial Council of the Republic of North Macedonia, Official Gazette no. 102/2019. Law on Courts, Official Gazette no. 58/2006, 62/2006, 35/2008, 150/2010, 83/2018, and 198/2018.

54 | Ministry of Justice of North Macedonia (2023), The New Development Sector Strategy for the Judiciary 2024–2028 (Министерство за правда, РАЗВОЈНА СЕКТОРСКА СТРАТЕГИЈА ЗА ПРАВОСУДСТВО (2024–2028) [Online]. Available at: <https://pravda.gov.mk/> (Accessed: 3 November 2024).

55 | The Strategy identifies five priority areas: Judiciary and Public Prosecution in Line with EU Standards, Institutions of the Justice System, Independent Professions and Public Services, Reform of the Constitutional Court of the Republic of North Macedonia, Reforms in Special Legal Areas (Criminal and Civil).

for implementation. In March 2024, the Government established a Council to monitor the implementation of the new strategy.⁵⁶

The negative perception of the Macedonian judiciary as lacking independence is not helped by the problems concerning the functioning of the Judicial Council. The Judicial Council faced major problems in 2023, when its President was removed from her post. She was subsequently reinstated after the Administrative Court ruled that her removal was illegal.⁵⁷ In June 2023, two members of the Judicial Council, as well as the previous President of the Council, resigned due to disagreement with the demotion of the President, citing reasons of undue influence in the judiciary. These developments have raised serious concerns regarding the legitimacy and functionality of the Council.⁵⁸ Another significant criticism is directed at the lack of transparency of Judicial Council activities, including restrictions on public access to several key Council meetings.⁵⁹ The Council's decision to suspend appointment and disciplinary procedures during the parliamentary and presidential elections has also been criticised. The majority of judges do not believe that the Judicial Council can effectively safeguard their independence.⁶⁰ To improve the Council's functioning and strengthen its independence, a TAIEX peer review mission, conducted in September 2023,⁶¹ made several recommendations. Recommended focal areas included clarifying the status, terms of office, and qualification requirements of Judicial Council members; increasing the Council's transparency; and clarifying provisions concerning the appointment and disciplinary procedures of judges and Judicial Council members.

56 | The Council will be chaired by the Minister of Justice. Other members are: the Minister of Internal Affairs, Minister of Information Society and Administration, Minister of Finance, Deputy President of the Government in Charge of European Affairs, Deputy of the President of the Government in Charge of Policies for Good Governance, Public Prosecutor, President of the Supreme Court, President of the Judicial Council, Chairman of the Council of Public Prosecutors, as well as distinguished professors, experts, and representatives of civil society. At the technical level, a working group was established within the Ministry of Justice in March 2024, which should meet monthly to monitor progress in the implementation of the Action Plan of the Strategy.

57 | In November 2022, the former Council president resigned, alleging undue influence from within the judiciary and business communities. His elected successor was dismissed from the role in April 2023, after only a few months in office, in a controversial voting process not in line with the rules of procedure. In June 2023, two Judicial Council members resigned in protest. See: VOA News, 2024.

58 | European Commission, 2024a.

59 | Citizen Association Institute for Human Rights, Skopje 2023, Monitoring Report on the Work of the Judicial Council January – July 2023, pp. 5–6. [Online]. Available: https://www.ihr.org.mk/storage/app/media/E%D0%9D-%D0%98%D0%B7%D0%B2%D0%B5%D1%88%D1%82%D0%B0%D1%98_%D0%A1%D1%83%D0%B4%D1%81%D0%BA%D0%B8-%D0%A1%D0%BE%D0%B2%D0%B5%D1%82_%D0%B0%D0%B2%D0%B3-%D0%B4%D0%B5%D0%BA-2023.pdf (Accessed: 3 November 2024). The Judicial Council held sessions without announcing them beforehand, which meant that the public, lacking the necessary information, did not have the opportunity to attend them. Several actions were taken at these sessions, which, according to the law, should have been public. Moreover, the electronic sounds recovering and voting system was not in operation for a period of time following the unlawful dismissal of the former president.

60 | OSCE Mission to Skopje, 2023. Some 72 per cent of the judges interviewed either fully disagreed (27 per cent) or partially disagreed (45 per cent) that the Judicial Council effectively safeguards judicial independence, with only 26 per cent agreeing.

61 | European Commission, 2024a.

Measures to improve transparency have been undertaken, notably under the auspices of the President of the Supreme Court and the Judicial Council. The Council for Open Judiciary was established in March 2022 and gathers under the auspices of the President of the Supreme Court.⁶² In February 2024, an Action Plan for Open Judiciary (2024–2026) was adopted. The Action Plan aims to improve public relations between courts and the public, unify the structure of court reports, increase the quality and availability of data and information, and strengthen the supervisory function of the Judicial Council on the transparency of courts. Most courts are following guidance provided by the Supreme Court in publishing their rulings, whether they are final or not, on their respective websites. Notably, in June 2024, the Judicial Council adopted its Communication Strategy (2024–2028).⁶³

A factor that significantly weakens the independence of the judiciary is the lack of funding and the dependence on the executive for funding. Indeed, financial autonomy can be considered an important guarantee of the independence of the judiciary from other types of public authority. In the State Budget of North Macedonia for 2024, 0.29 per cent of the GDP was allocated to the judiciary, while the legal framework assumes and provides for 0.8 per cent of the GDP. The obligation to seek formal approval from the Ministry of Finance for the internal allocation of the courts' budget, including decisions on resources and staffing, should also be viewed critically. The February 2024 amendment to the law on judges' and prosecutors' salaries, which reduced previous increases in their remuneration, has also had a negative impact. The amendment was even challenged before the Constitutional Court, which rejected the challenge in May.⁶⁴

The lack of financial resources is intertwined with the lack of human resources. The current rate of appointment of new judges and prosecutors is insufficient to cover current needs and fill vacancies. Although A Strategy for Human Resources in the Courts and Prosecutor's Office was adopted in 2020, its implementation remains delayed and the target and timetable set in the action plans have not been met. The administration of the courts is working with only 40 per cent of the estimated human resources needed. In 2023, the Judicial Council assessed two thirds of all courts in the country as 'inefficient'. In December 2023, the Council of Prosecutors estimated that at the current count of 179 prosecutors, the country was short of 82 prosecutors. These statistics clearly show that the judicial system is facing a shortage of qualified personnel at all levels of the system. In an effort to address this situation, the Academy for Judges and Prosecutors announced the selection of 130 students for 2024, the largest number of students to date.

Reforms are also underway in the area of the digitisation of the judicial system in North Macedonia. Although progress is being made in the development of digital tools

62 | The Council for Open Judiciary was established as part of the Open Government Partnership programme and is intended to encourage the openness of the work of the courts and judicial institutions and promote the participation of civil society in the implementation and monitoring of the Open Judiciary initiative. It is composed of representatives from all judicial institutions across the country, namely, the Judicial Council, Academy of Judges and Public Prosecutors, five CSOs, and members of relevant professional associations.

63 | Judicial Council: Communication Strategy of the Judicial Council and the Courts of the Republic of North Macedonia (2024–2028). [Online]. Available: http://www.vsrn.mk/wps/portal/ssrm/sud/legislativa/podzakonski-akti/!ut/p/z1/04_Sj9CPykssy0xPLmNz0vMAfj08zizdxNTAwsvA183A39LQwcQ_1DzSw93Ixc3M31C7IdFQFv5Gko/ (Accessed: 3 November 2024).

64 | European Commission, 2024a.

for case management, court statistics, and online accessibility of court decisions, gaps remain. The process of the digitisation of the judiciary is being carried out through the Council for Digitisation in the Judiciary established under the Ministry of Justice.⁶⁵

4.1.2. *Fighting corruption*

The issue of corruption is also a serious problem for North Macedonia. In Transparency International's Corruption Perceptions Index for 2023, North Macedonia scored 42/100 and ranked seventy-sixth globally.⁶⁶ Although a comprehensive national anti-corruption strategy has been developed, its implementation is lagging behind. The National Corruption Prevention Strategy 2021–2025⁶⁷ is based on a corruption risk analysis and a consultation process with representatives of the public and private sectors, media, civil society associations and foundations, experts, and representatives of relevant international organisations. In its annual report for 2024, the SCPC stated that out of 166 activities planned for 2023, only 22 activities (13 per cent) had been fully implemented, while 55 (33 per cent) were in the process of implementation, and 89 (54 per cent) had yet to be implemented.

Recent amendments to the Criminal Code appear to be another challenge in the fight against corruption. North Macedonia has ratified the UN Convention Against Corruption (UNCAC),⁶⁸ but is not a signatory to the OECD Anti-Bribery Convention. A working group within the Ministry of Justice has been preparing amendments to the Criminal Code since 2020. However, completely outside of this working group, in 2023, another proposal was prepared and adopted by Parliament in an accelerated procedure and without prior consultation with stakeholders. Some of these amendments, which relate to corruption-related offences, are concerning as they reduce the maximum penalties for specific corruption-related offences (e.g. criminal conspiracy and abuse of official authority), impact the statute of limitations, and remove a category of offences from the Criminal Code, namely, the abuse of power in public procurement. These are very serious moves that will significantly weaken anti-corruption policy and may imply a status of 'impunity' for senior officials.⁶⁹

In 2021, the country adopted the Law on Lobbying.⁷⁰ This law regulates the conditions for obtaining the status of a lobbyist and lobbying organisation, registration, and the processes for drafting, adopting, and amending public policies. It also expanded the competences of the SCPC and added the obligation to maintain a register of lobbyists and lobbying organisations. However, the fundamental problem is its implementation in practice: no lobbyists are registered as yet.

65 | In December 2023, the Minister of Justice adopted the new rulebook on the composition and the working method of the Council for co-ordinating information and communication technology in judicial authorities.

66 | Transparency International, 2024.

67 | State Commission for Prevention of Corruption, 2020.

68 | Law on Ratification of the UN Convention against Corruption (Official Gazette no. 37/2007); Law on Ratification of the Additional Protocol to the Criminal Law Convention on Corruption (Official Gazette no. 83/2005); Law on Ratification of the Criminal Law Convention on Corruption of the Council of Europe (Official Gazette no. 32/1999).

69 | European Commission, 2024a.

70 | OG 122/2021 from 03.06.2021.

The Rule of Law Report on the situation in the candidate country of North Macedonia states that a high risk of corruption persists in many areas, particularly public procurement and public sector employment.⁷¹ There is a lack of a systematic approach in the fight against corruption to address the common denominators of risk factors. These denominators include strong political influence in the public sector; low levels of sanctioning of corrupt behaviour; inconsistent regulations; low levels of enforcement of integrity measures; and lack of transparency, oversight, and control mechanisms in the public sector. Lack of compliance with public sector labour laws enables various forms of influence, such as political party influence, nepotism, cronyism, and clientelism.⁷² Civil society organisations also report that party and family ties often influence appointments to public sector positions.⁷³

4.1.3. Other institutions in the system of 'checks and balances' and their function in the rule of law

North Macedonia is a parliamentary representative democratic republic, as established by the constitution,⁷⁴ the highest piece of legislation in the country. The country operates on a multi-party system, with the prime minister serving as the head of government. The system is composed of executive, legislative, and judicial powers. The country's executive body is the government, composed of the prime minister, four deputy prime ministers, and sixteen ministers. The government is elected by the majority vote of all Assembly members. Ministers cannot be representatives in the Assembly. The president represents the republic and is the commander in chief of its armed forces. The president is elected at general and free elections using a modified two-round system for a term of five years. The president appoints the prime minister, whose appointment is subject to approval by the Assembly. Legislative power is vested in the Assembly, which is composed of 120 members of parliament elected in general and free elections with a mandate of four years. According to the Law of Courts,⁷⁵ the judiciary's power is distributed among several courts, including the basic courts, the courts of appeal, the administrative court, the higher administrative court, and the Supreme Court. Additionally, the constitutional court protects the constitutionality and legality of the republic.⁷⁶ The Ombudsman, who is elected by Parliament, is tasked with promoting and protecting human rights and fundamental freedoms and takes over the role of the national human rights institution. Other independent and regulatory bodies in the field of human rights include the Commission for Prevention and Protection Against Discrimination and the Data Protection Agency.

71 | See: Taseva and Suncevska, 2023.

72 | Ibid.

73 | Freedom House Report, 2024.

74 | Constitution of the Republic of North Macedonia [Online]. Available at: https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nsp (Accessed: 3 November 2024).

75 | Law on Courts, Official Gazette of the RM, Nos. 58/2006, 62/2006, 35/2008, 150/2010, 83/2018, and 198/2018 [Online]. Available at: https://vlada.mk/sites/default/files/dokumenti/zakoni/law_on_courts.pdf (Accessed: 3 November 2024).

76 | Constitution of the Republic of North Macedonia, Article 108.

The Assembly of the Republic of North Macedonia is struggling due to strong political polarisation.⁷⁷ These problems are particularly overt in legislative activity, with the lack of dialogue leading to delays in legislative agenda and important appointments, including the appointment of Constitutional Court judges. However, the biggest problem is the significant increase in the use of fast-track parliamentary procedures, especially the so-called 'EU flag' procedure. Although the 'EU flag' procedure should only apply to legislative amendments whose primary purpose is to align Macedonian law with the EU *acquis*, it has also been applied to legislative initiatives that do not meet this criterion. Consequently, a large number of legislative amendments without a link to EU law were adopted within days of being tabled in Parliament and without public consultation or impact assessment, limiting public and parliamentary scrutiny and undermining the quality and legitimacy of the legislation.⁷⁸ The revised Parliament's Rules of Procedure, which came into force after the May 2024 general elections, together with the constituent session of the new Parliament, are intended to address this situation.

The Office of the Ombudsman is also struggling, lacking the financial and human resources necessary to operate independently and effectively. The budget of the Ombudsman Office is approved by the executive, which was indicated by the Office as having a negative impact on its independence. Only four out of the ten foreseen Deputies are in office. The responses and replies to challenges from the Office of the Ombudsman have also been very lax. For example, in 2022, the Office dealt with 3,482 complaints, of which it referred 120 cases to the judicial authorities. The Office is still awaiting a response for about half of these cases.⁷⁹

While civil society organisations operate in a largely supportive environment, challenges remain in respect to ensuring sustainable civil society engagement in policymaking. Civil society is recognised by state institutions as a key component of the democratic system, and a Government Strategy for Cooperation with and Development of the Civil Society and its accompanying Action Plan for 2022–2024 were adopted to strengthen the sector and provide means to support the involvement of civil society organisations in policy making. However, shortcomings remain with regard to their implementation. The Council for Co-operation between the Government and Civil Society, which is the primary structural channel for consulting and involving civil society in policy dialogue and decision-making, met four times in 2022, but its composition is still incomplete, as CSOs have been boycotting the Council's work since March 2022. Their refusal to participate stems from the government's decision to transfer authority over the allocation of funds for CSOs from the General Secretariat to the Ministry of Political System and Relations among the Communities, resulting in a reduction of funding to CSOs outside the mandate of this Ministry. CSOs have criticised the lack of transparency in the government's decision, deeming it out of line with the strategy's objective to increase support and provide a clear and objective mechanism to award public funds to CSOs.⁸⁰

77 | The parliament consists of 120 MPs from 23 political parties. See: Parliamentary Composition 2020–2024. [Online]. Available at: <https://www.sobranie.mk/politicki-partii.nspix> (Accessed: 3 November 2024).

78 | Of the 165 laws adopted between January 2022 and 15 June 2023, 51 were adopted by regular procedure, 86 under shortened procedure, and 28 concerned ratification. See: Taseva and Suncevska, 2023.

79 | European Commission, 2024a.

80 | Ibid.

5. Conclusion

Support for reforms in the rule of law and the protection of human rights is a key element of the EU enlargement policy. Through IPA III and other specific programmes and instruments, the EU provides candidate countries with financial resources and technical assistance to build independent institutions, modernise the judiciary, and strengthen the protection of human rights. This process is closely monitored and conditional on the fulfilment of set criteria, ensuring that reforms are implemented and sustained. The conditionality of pre-accession assistance is a key mechanism by which the EU ensures the implementation of reforms in candidate countries. The European Commission monitors progress through Regular Assessment Reports, which focus on the fulfilment of the rule of law, judicial reform, and human rights criteria. These reports contain recommendations for further reforms and, where appropriate, warnings should a candidate country fails to meet its commitments. If a country fails to carry out the necessary reforms or violates the basic principles of the rule of law, the EU may reduce or suspend pre-accession assistance.

IPA III can be considered a functional and successful instrument for pre-accession assistance to candidate countries. IPA III introduces welcome changes compared to its predecessors. In particular, where previous iterations employed a geographical approach, IPA III emphasises a strategic approach and defines thematic programmes according to key priorities in five thematic windows, with funding allocated according to these windows rather than by country. Unlike IPA II, the instrument operates on a ‘fair share’ principle and performance-based approach, with only an indicative amount set annually for each beneficiary. Actual support depends on the scope and quality of the project generated by the beneficiaries in each of the five windows. These measures should help to ensure that projects are assessed on the basis of political relevance, technical maturity, and whether and how potential beneficiaries are implementing the reforms under the enlargement process.

The following conclusions can be drawn from the case of North Macedonia and its reforms in the area of the rule of law. North Macedonia has regularly benefited from EU financial support for the implementation of reforms in this area. The country’s progress in this area is reflected in the fact that, for the first time, four candidate countries, including North Macedonia, have been included in the recent Annual Rule of Law Report. These countries have made the most progress in the enlargement process, with their inclusion intended to further support their reform efforts and early EU membership. The analysis above shows that North Macedonia has made progress in a number of areas related to the rule of law and has implemented many reforms. However, as noted, there are still problems and shortcomings that need to be addressed, particularly those concerning the independence of the judiciary and prosecution, and the fight against corruption, among others.

The adoption of appropriate legislation is not really a problem, although this article did note issues concerning the abuse of the ‘fast-track’ legislative process and the significant polarisation of forces in parliament, which weakens its effectiveness. Rather, the biggest problem seems to be the implementation of the adopted legislation and principles in practice, including the control of its execution, and, if necessary, the enforcement of the rules or the punishment of those who violate them. The extent to which legislation

and the rule of law are implemented in practice always depends on people – on politicians, judges, prosecutors, and civil servants, among many others. This is where the greatest weakness of the reforms lies, as these people are often subjected to negative or even illegal pressures, corruption,⁸¹ and coercion.

The EU's pre-accession assistance is undoubtedly fulfilling its objectives and helping candidate countries make progress in terms of the implementation of reforms and fulfilment of the entry conditions. However, this is evidently a difficult and complicated process, one that cannot be completed by the formal adoption of the relevant legislation and establishment of the required institutions. The principles of the rule of law also need to operate in the daily practice of a given country. Support for free media, non-profit NGOs, as well as the cultivation of awareness among the citizens of the country can contribute to this. Therefore, it is paramount that pre-accession assistance also be channelled in this direction, including through IPA III.

81 | Dedič, 2015, p. 72. The author points out that corruption is one of the biggest obstacles to the possible integration of the countries of the Western Balkans into the EU.

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CHALLENGES IN INTRA-EU LABOUR MIGRATION: FREEDOM OF MOVEMENT AND COMBATING DISCRIMINATION WITH A FOCUS ON CEE WORKERS' TREATMENT*

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ABSTRACT

The legal and contextual framework of the European Union that regulates workers' freedom of movement is thoroughly examined in this article, with a particular focus on concerns of discrimination – both direct and indirect – that arise in the EU labour market. The free movement of labour is the cornerstone of the EU, but putting this principle into practice has presented a number of complex issues. Therefore, to provide a thorough understanding of the complexities surrounding worker mobility in the Union, the article begins with a thorough analysis of the legal and contextual framework of the principle of free movement of workers within the European Union. The main focus, meanwhile, continues to be on the complications brought about by (un)equal treatment based on nationality. This involves carefully examining direct discrimination, which means differences and obstacles that affect workers from certain countries, leading to unequal treatment. The cases decided by the CJEU help illustrate this concept. Moreover, the paper scrutinises the concept of indirect discrimination, whereby ostensibly impartial policies or transitional arrangements disproportionately impact specific worker cohorts, particularly those from Central-East European countries. These arrangements entailed intricate application protocols, encompassing prerequisites such as work permits, quotas, suitability assessments, and assorted national regulations, thereby adding complexity to the exercise of freedom of movement for CEE workers. Finally, the author critically examines the transitional arrangements in the context of (in)direct discrimination of CEE countries' mobile workers. In summary, this paper illuminates the complexities surrounding the freedom of movement for workers within the EU, dissecting issues of discrimination and (un)equal treatment based on nationality while critically assessing the impact of transitional arrangements for the CEE workers in that context.

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free movement
nationality discrimination
CEE workers
transitional arrangements
EU labour law

1. Introduction

The history of migration within Europe is extensive, and substantial population shifts have occurred. Since World War II, intra-European migration has increased; however, this long-term trend is marked by abrupt variations. Behind this tendency, there is a great deal of differentiations, and it conceals patterns that vary greatly depending on the destination country and the type of migration, such as family, labour, and humanitarian migration.² One of the variations happened after the Second World War when the dynamic of intra-European migration changed, and Western Europe gradually became a destination for immigration due to political or economic reasons.³ The establishment of the European Economic Community in 1957 and its tendency to create a common market, allowing for the free movement of people, goods and capital, significantly impacted migration patterns.⁴ Nevertheless, only two original Member States, Italy and Belgium, supported workers' freedom of movement as a necessary condition for creating a common market during the first negotiations for the Treaty of Rome⁵. The freedom of movement of capital, products, and services was accepted by the Netherlands, Germany, France, and Luxembourg simultaneously. In contrast, the final acceptance of freedom for workers triumphed and was incorporated into the 1957 Treaty of Rome due to the significant unemployment rate in the Italian territory and the likelihood of the Communist Party's victory.⁶ Consequently, Article 3(c) of the Treaty of Rome aimed to eliminate hindrances to the unrestricted movement of persons. However, it did not establish a broad entitlement to the free movement of all individuals. Instead, it pertained exclusively to those citizens of Member States engaged in economic activities, such as workers, self-employed individuals or service providers. Consequently, the concept of free movement of persons was predominantly seen from an economic perspective, specifically concerning the rights of entry and residence for economically active citizens of Member States.⁷ However, the Treaty of Rome included clauses that established the foundation for a vast body of legislation and legal precedents concerning equal treatment in employment. These provisions notably prohibited discrimination based on nationality against workers from other Member States,⁸ Furthermore, the economic prosperity experienced in northwestern countries in 1960 heightened the motivation for individuals to seek

2 | Jorens, 2022, p. 56.

3 | Dustmann and Frattini, 2011, p. 6.

4 | Roberts, 2009, p. 9.

5 | Treaty establishing the European Economic Community (The Treaty of Rome, or EEC Treaty), signed on 25 March 1957.

6 | Toader and Florea, 2012, pp. 68–69.

7 | Barnard, 2000, pp. 111–112.

8 | Muir, 2015, p. 921.

higher-paying employment opportunities, thereby creating a demand for affordable unskilled labour.⁹ Consequently, the Western powers used labour migrations to fulfil the lack of workforce after their economic recovery due to their inability to satisfy domestic needs. Most countries, such as Germany, first looked for southern European workers, believing they would assimilate into their labour market more easily. Also, the German government negotiated the 'guest-workers' with eight other countries, including Italy, Greece, Spain, Turkey, Morocco, Portugal, Tunisia and Yugoslavia, and that scheme has been taken by several other wealthier European countries, too. The idea behind that scheme was simple: to keep the foreign workers while there were jobs and return them when their country's economy was soured. By the beginning of the 1970s, the economy was slowing in northwestern European countries, resulting in reduced migration to those countries, including Germany, whose government stopped migration in 1973 and 'locked in' foreigners within the country who eventually secured for themselves the legal right to remain there, including the right to family reunification.¹⁰ Therefore, as explained, the variations in intra-Europe labour migration were a constant phenomenon after the Second World War, which followed the economic situation in Western Europe as the leading destination for mobile workers, from the rapid growth in the 1950s and 1960s to the economic downturn in the 1970s. Furthermore, one of the bigger migration variations happened after the new accessions. After additional Member States joined, the founding Member States worried about future labour migration. This fear persisted during the accessions of Denmark, Ireland, the United Kingdom, Greece, Spain and Portugal. Still, it became more intense with the entry of Central and Eastern EU countries, resulting in the introduction of transitional arrangements.¹¹ The intra-EU migration from East to West became one of the biggest migration fluctuations within Europe, which remained the permanent consequence of the EU labour market.¹² For example, between 2004 and 2007, more than 2.2 million Polish citizens joined the labour migration propensity.¹³

In tandem with the shifts in labour migration within Europe, the right to free movement, initially designed for workers, has evolved due to legislative amendments. This evolution started when the Maastricht Treaty was signed in 1992, which established the European Union and introduced the notion of shared European citizenship. It also gave EU citizens and their family members the right to move and reside within the other Member States.¹⁴ Additionally, the Court of Justice of the European Union (hereinafter: CJEU) has contributed significantly to this evolution through its teleological interpretations, often playing a more substantial role than legislative endeavours.¹⁵ To ensure the full realisation of the right to mobility, the legislative body and the judiciary took steps to prioritise the treatment of workers as individuals rather than just instruments of integration. Consequently, when interpreted generously by the Court, the legislature's framework guaranteed fair treatment for mobile workers.¹⁶ In order to question it, in this paper, the analysis will centre around the extent to which fair treatment was implemented, with a specific

9 | Roberts, 2009, p. 9.

10 | Hansen, 2003, pp. 25–26.

11 | Tudor, 2017, p. 41.

12 | Scholten and Ostaijen, 2018, p. 1.

13 | See more in: Grabowska-Lusinska et. al., 2010.

14 | Grabbe, 2023, p. 23.

15 | Jorens, 2022, p. 58.

16 | Spaventa, 2015, p. 457.

emphasis on the persisting challenge of nationality-based discrimination. Henceforth, in the following, the author delves into the EU legal framework concerning the freedom of movement for workers and scrutinises the issue of (in)equality in the treatment of workers from different Member States, focusing on CEE countries' workers.

2. Legal framework of the EU's pillar: Free movement of workers

The fundamental Treaty provisions regarding free movement rights and the allowable exceptions have seen minimal alternations since the original Treaty of Rome.¹⁷ The most notable changes were introduced by the Maastricht Treaty¹⁸ that entered into force in 1993, establishing EU citizenship rights and restructuring the regulations on capital movements. Nevertheless, despite the enduring stability of this Treaty foundation, questions regarding the extent and scope of free movement law continued to give rise to many unresolved matters.¹⁹ Therefore, the Lisbon Treaty²⁰, also known as the Reform Treaty, which entered into force on 1st of December 2009, aimed to modernise the EU into a more democratic, effective and transparent Union. Also, it was a moment of renaming the Treaty establishing the European Community in the Treaty on the Functioning of the European Union²¹ (hereinafter: TFEU).²² The Treaty, together with the Treaty of the European Union,²³ was a crucial legal pillar for additionally determining freedoms for EU citizens: the freedom to provide services and freedom of movement of goods, capital and persons. Within the last-mentioned freedom, there is also a freedom of movement of workers, which is one of the crucial aspects for a functional internal market, increasing employment rates and economic development.²⁴

Accordingly, natural persons who possess the nationality of an EU Member State enjoy the autonomous protection of the right to move and reside freely within the territory of the Member States²⁵ as a fundamental aspect of EU citizenship, as outlined in the relevant EU Treaty provisions. The Charter of Fundamental Rights further supports this provision in Article 45(1).²⁶ Additionally, the Treaties include provisions that specify the allowable exceptions to the free movement rights established in the Treaty.²⁷ In the

17 | Treaty establishing the European Economic Community (The Treaty of Rome, or EEC Treaty), signed on 25 March 1957.

18 | Treaty on European Union, 29/07/1992, Official Journal C 191.

19 | Nic Shuibhne, 2013, p. 22.

20 | Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 17/12/2007, Official Journal C 306.

21 | Consolidated Version of the Treaty on the Functioning of the European Union, 26/10/2012, Official Journal C 326 (hereinafter: TFEU).

22 | Goldner, 2007, p. 12.

23 | Consolidated version of the Treaty on European Union, Official Journal of the European Union, 26/10/2012, C 326 (hereinafter: TEU).

24 | Kapural, 2003, p. 45.

25 | Article 20 of the TFEU.

26 | Charter of Fundamental Rights of the European Union, OJ C 326, 26/10/2012; Article 45(1).

27 | Nic Shuibhne, 2013, p. 21.

Treaty's context, the Court emphasised the necessity for an autonomous Community definition of worker and employed person, which delineates the scope of application of this fundamental freedom²⁸. The Court was adamant that this definition should not be overly restrictive. The rules governing the free movement of workers encompass the pursuit of effective and genuine activities, excluding activities of such a limited scale that they are deemed purely peripheral and ancillary.²⁹ Provided that the work undertaken is authentic and effective, even part-time workers³⁰ and individuals receiving financial assistance from the public funds of the host Member State³¹ to supplement their income³² should not be excluded from the personal scope of the free movement provisions.³³

Finally, the whole concept of the freedom of movement for workers intended to prevent imbalanced unemployment in the Member States and to increase wages in the EU since more people would be employed and prosperity would be higher.³⁴ Article 45 of the TFEU guarantees the right to move, reside and work in another Member State while being treated equally as the nationals of the other Member State, just as the right for their family members to enter and reside in that State.³⁵ Additionally, the secondary legislation is more detailed, regulating the position and rights of mobile EU workers, with a special emphasis on Directive 2004/38/EC³⁶, Regulation (EU) No 492/2011³⁷ and Regulation (EU) 2019/1149.^{38,39} Although mobile workers and their families enjoy comprehensive rights, the practical implementation of these rights remains a formidable task. To bridge

28 | See more in: Judgment of the Court of 19 March 1964, *Mrs M. K. H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* (Administration of the Industrial Board for Retail Trades and Businesses), Case 75/63, ECLI:EU:C:1964:19; Judgment of the Court of 23 March 1982, *D.M. r v Staatssecretaris van Justitie*, Case 53/81, ECLI:EU:C:1982:105.

29 | Judgment of the Court of 23 March 1982, *D.M. Levin v Staatssecretaris van Justitie*, Case 53/81, ECLI:EU:C:1982:105, p. 1050.

30 | Judgment of the Court of 14 December 1995, *Inge Nolte v Landesversicherungsanstalt Hannover*, Case 317/93, ECLI:EU:C:1995:438, p. 4656.

31 | Judgment of the Court of 31 May 1989, *I. Bettray v Staatssecretaris van Justitie*, Case 344/87, ECLI:EU:C:1989:226, p. 1645.

32 | Judgment of the Court of 3 June 1986, *R. H. Kempf v Staatssecretaris van Justitie*, Case 139/85, ECLI:EU:C:1986:223, p. 1750.

33 | O'Leary, 2009, p. 169.

34 | Davies, 2012, p. 71.

35 | Article 45 of the TFEU.

36 | Consolidated text: Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 16/06/2011, Official Journal L 158.

37 | Consolidated text: Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, 01/08/2021, Official Journal L 141.

38 | Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, 11/07/2019, Official Journal L 186.

39 | Peročević, 2017, p. 321.

the divide between the legal framework and its enforcement, Directive 2014/54⁴⁰ was endorsed by both the Parliament and the Council. This Directive's primary objective is to streamline the realisation of rights for mobile workers.⁴¹ Also, it is important to notice that equal social rights to mobile workers have been guaranteed by Regulation 883/2004⁴² and Regulation 987/2009⁴³; however that matter will not be the subject of this paper.

In the subsequent sections, the author analyses and, subject to critical examination, the primary challenges related to the freedom of movement concerning the equal treatment of workers.

3. Challenges in workers' freedom of movement: Analysing direct and indirect discrimination

Among its various objectives, the internal market law's primary and essential task is eliminating discriminatory obstacles to cross-border movement. The eradication of discrimination can also be readily justified as a fundamental normative goal in creating a borderless economic zone.⁴⁴ Therefore, the equality or non-discrimination principle is essential to the European integration process, and the endeavour of equality among both individuals and European states is a primary objective which has been widely recognised as a prerequisite for advancing toward the vision of 'an ever closer union among the peoples of Europe'.⁴⁵ The union's foundation is rooted in the core value of equality, articulated as a commitment to non-discrimination based on nationality, with the ultimate goal of gradually eliminating barriers among Member States for economic entities.⁴⁶ Workers are entitled to extensive rights ensuring equal treatment, granting them equal opportunities in terms of employment, benefits, social welfare and tax benefits. In addition to being protected against discrimination, workers have the right to access job markets in different Member States without encountering unjust obstacles. The definition of barriers is quite expansive, encompassing any regulation that hinders the free movement of workers, particularly when it directly obstructs their entry into the labour market, as outlined in the Treaty.⁴⁷ Article 45(2) of the TFEU regulates that

40 | Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ L 128, 30/04/2014.

41 | Spaventa, 2015, pp. 467–468.

42 | Consolidated text: Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, 31/07/2019, Official Journal L 166.

43 | Consolidated text: Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, 01/01/2018, Official Journal L 284.

44 | Nic Shuibhne, 2013, p. 194.

45 | Article 1(2) of the TEU.

46 | Muir, 2015, pp. 919–920.

47 | Spaventa, 2015, p. 467.

such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.⁴⁸

This provision forbids discrimination based on nationality, referring to the citizenship distinct from the state's nationality involved in discrimination.⁴⁹ However, the TFEU only addresses direct discrimination and does not explicitly cover other forms based on criteria other than nationality.⁵⁰ Nevertheless, free movement law was never limited to addressing discrimination alone. The key cases, *Dassonville*⁵¹ and *van Binsbergen*⁵² defined free movement rights broadly as dealing with restrictions or hindrances rather than just discrimination.⁵³

Furthermore, established legal precedent now affirms that the prohibition of discrimination encompasses treating similar situations differently and applying the same rule to dissimilar situations. The Court commonly uses the terms 'direct' and 'indirect' discrimination to address such distinctions,⁵⁴ and it initially dealt with directly discriminatory measures, but over time, the focus of case law evolved.⁵⁵ An example of direct discrimination would be denying individuals access to a specific professional activity solely based on their non-national status in the host State.⁵⁶ In such instances, the Member State has no legal justifications unless the prohibition falls within the boundaries of the exceptions outlined in the Treaty provisions.⁵⁷ Direct discrimination was significantly addressed in the *Bosman* case⁵⁸, in which the other state's national was treated less favourably compared to a worker who was a citizen of that state. The Court confirmed that in that case, the guarantees of freedom of movement and the prohibition of discrimination from the mentioned Article were violated, and the contested provisions were discriminatory. Furthermore, as mentioned, the Court has previously focused on direct, open-nationality discrimination, but it began addressing indirect discrimination in the *Giovanni Maria Stogiu vs Deutsche Bundespost* case,⁵⁹ highlighting that equal treatment rules prohibit open and concealed discrimination with similar effects.⁶⁰ Indirect discrimination occurs

48 | Article 45(2) of the TFEU.

49 | Bačić and Sarić, 2014, p. 38.

50 | Toth, 2022, p. 6.

51 | Judgment of the Court of 11 July 1974, Procureur du Roi v Benoît and Gustave Dassonville, Case 8-74.

52 | Judgment of the Court of 3 December 1974, Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, Case 33-74.

53 | Nic Shuibhne, 2013, p. 195.

54 | White, 2004, p. 51.

55 | Nic Shuibhne, 2013, p. 195.

56 | See as an example: Judgment of the Court of 21 June 1974, Jean Reyners v Belgian State, Case 2-74.

57 | White, 2004, pp. 51-52.

58 | Judgment of the Court of 15 December 1995, Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman, Case C-415/93.

59 | Judgment of the Court of 12 February 1974, Giovanni Maria Stogiu v Deutsche Bundespost, Case 152-73.

60 | Toth, 2022, p. 6.

when a condition or requirement disproportionately affects nationals or other Member States compared to their nationals. If there is a case of indirect discrimination⁶¹, it can be deemed acceptable if it can be demonstrated that the condition or requirement is objectively justified. Objective justification requires the party imposing the condition or requirement to prove that it is grounded on objective, non-nationality-biased criteria and is proportionate, indicating that there is no alternative, less discriminatory means to achieve the valid objective.⁶² Incorporating indirectly discriminatory measures into the scope of the Treaty represented a pivotal move in guaranteeing substantial influence. This also had favourable, politically soothing implications, as it disassociated potential violations of EU law from discussions involving blame and intent.⁶³ Also, since the *Martínez Sala* case, the CJEU has expanded the equal treatment rights of mobile citizens, even when they don't engage in a genuine economic activity.⁶⁴ Nowadays, Directive 2004/38/EC⁶⁵ outlines and defines exceptions to the prohibition of nationality discrimination. However, it is important to note that the prohibition of discrimination based on nationality can only be applied in cases where EU nationals and their family members are the subjects of the cross-border movement.⁶⁶

Over the years, the EU has confronted numerous challenges related to nationality-based discrimination within the EU labour market. As a case in point, the enlargement of the EU into Central-Eastern Europe (hereinafter: CEE) represents one of the most contentious subjects in the EU's history. This expansion will be examined in more detail in the following section, with a specific emphasis on critically assessing whether the limitations toward CEE workers constituted (in)direct discrimination by the EU itself.

Besides the enlargement, another relevant example was the economic turmoil of 2008, which saw a revival of protectionist discourse, particularly in certain Member States, with the United Kingdom being the most prominent example. In the UK, the anti-migration rhetoric found a receptive audience deeply rooted in the country's Eurosceptic sentiments, ultimately contributing to its exit from the EU.⁶⁷ Brexit was also a subject of numerous questions regarding the equal treatment of EU workers in a now ex-EU country. The convergence of these elements, including restrictions during enlargements and economic crises, has wielded a substantial impact on discussions and implementation regarding the free movement of workers. This suggests that a fundamental pillar of EU integration has become ensnared in controversy to the extent that it has become a viable subject for political manoeuvring.⁶⁸

61 | See as an example: Judgment of the Court of 20 October 1993, *Maria Chiara Spotti v Freistaat Bayern*, Case C-272/92.

62 | White, 2004, p. 54.

63 | Nic Shuibhne, 2013, p. 195.

64 | Judgment of the Court of 12 May 1998, *María Martínez Sala v Freistaat Bayern*, Case C-85/96.

65 | Consolidated text: Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 16/16/2011.

66 | Muir, 2015, pp. 925–926.

67 | Spaventa, 2015, p. 459.

68 | Spaventa, 2015, p. 459.

4. Challenging the attainment of equality for CEE mobile workers

Though still partially relevant, the European aim to establish the free movement of workers had significant implications. It eliminated immigration restrictions among member states and relinquished direct control over labour market fluctuations, preventing protectionist policies favouring EU mobile workers. This shift reduced the attractiveness of effective tools for job creation during economic downturns. On the other hand, while migration was not a central EU debate topic until the 2004 enlargement,⁶⁹ it impacted the discourse on migration.⁷⁰ The entrance of the CEE countries to the EU was referred to as a 'return to Europe' because their freedom of movement undoubtedly contrasted the intra- and interstate mobility constraints they had to deal with under the communist system.⁷¹ In 2004, the European Union witnessed the accession of 12 new Member States. However, the Treaties of Accession were exclusively detailed for 10 CEE new Member States. Consequently, most individuals from the new States working in the territories of the 15 existing Member States before 1st May 2004, were there due to the application of national immigration regulations or bilateral agreements between the respective countries. This was the case if the 'old Member State' implemented transitional arrangements.⁷² The concept of 'fundamental freedom' faced challenges due to transitional arrangements, allowing member states to delay workers' movement from specific acceding countries without the need for factual justification. This derogation aimed to prevent labour market disruptions in existing member states, especially considering the substantial economic disparities among acceding countries. This restriction applied only to workers, as self-employed and non-economically active individuals could move freely. Similar arrangements were implemented for the accession of Romania and Bulgaria in 2007⁷³ and Croatia in 2013⁷⁴, albeit on a smaller scale.⁷⁵ As a result, transitional arrangements curtailed the freedom of movement for workers, effectively enabling the possibility for Central-East EU citizens to be employed for a period of up to seven years. These limitations encompassed intricate application processes involving work permits, quotas, demonstrating suitability, and various national regulations.⁷⁶ Hence, to facilitate the gradual alignment of the labour market between existing and new Member States, transnational arrangements were devised through a sequential procedure known as the 2+3+2 formula. This approach allowed the old Member States to implement transnational measures for an initial two-year period, with the option to extend them for an additional three years if necessary. The possibility of an extra two-year extension was granted only in exceptional cases, contingent upon providing evidence of significant labour market

69 | Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, OJ L 236, 23/09/2003.

70 | Spaventa, 2015, pp. 458–459.

71 | Petev, 1998, p. 83.

72 | White, 2004, pp. 18–19.

73 | Treaty of Accession of the Republic of Bulgaria and Romania, OJ L 157, 21/06/2005.

74 | Treaty of Accession of the Republic of Croatia, OJ L 112, 24/04/2012.

75 | Spaventa, 2015, pp. 458–459.

76 | Ulceluse and Bender, 2022, p. 452.

disturbances resulting from the accession of new Member States.⁷⁷ These transitional limitations have diminished the status of nationals from CEE countries and strained the development of a shared political, geographical, social and civil identity among EU citizens, but they also effectively allowed discrimination based on nationality within the realm of employment.⁷⁸ Consequently, whether the massive fear before the enlargement was justified is questionable and can be analysed through several post-enlargement reports.⁷⁹ Moreover, the evidence stemming from the 2004 enlargement indicates that the transitional arrangements have adverse consequences on some labour markets. This is primarily because these restrictions only pertain to the free movement of workers and do not extend to the free movement of self-employed individuals. Consequently, these arrangements pushed the labour activities into the informal sector, resulting in the unlawful employment of accession workers. This, in turn, exposed them to exploitation due to the absence of legal safeguards regarding wages and working conditions while also undercutting the lawful labour market. As such, the country-specific decision-making process regarding transitional arrangements, made without knowledge of other Member States' actions, may not be entirely logical, particularly if the primary intention behind these arrangements was to protect the domestic labour market rather than simply making enlargement more politically acceptable.⁸⁰

If this phenomenon is put into the context of the previous analysis of the discrimination types and if such transitional arrangements are properly evaluated, the treatment of the CEE workers during their first entry into the EU labour market may be viewed as an instance of indirect discrimination based on nationality. This discrimination originates in the temporary arrangement that allowed Member States to postpone workers' movement from particular adhering nations without providing a rationale. Workers from CEE nations were the main target of the restrictions; self-employed people and those who were not engaged in the economy were exempt. Individuals from these particular accession nations were treated differently depending on their nationality since they encountered challenges that citizens of other EU Member States did not, with the exception of the 'Southern countries', which are not analogous to this situation. Keeping in mind the differences in wealth between the acceding nations, these agreements aimed to avoid upsetting the labour markets in the 'old' Member States. Although this goal is justifiable, the fact that workers from particular CEE EU nations were disproportionately affected highlights the indirect discriminatory aspect of these agreements. Finally, the author agrees with certain scholars' points of view⁸¹ that the (mis)treatment of CEE mobile workers throughout the transitional era revealed the existence of dual-tier EU citizenship since the accession of the CEE countries, which exists even nowadays.⁸² Nevertheless, despite the fact that the transitional arrangements have deepened economic divides in the EU, it is still likely that it will be applied to less affluent candidate states, too. To address confusion and criticism, the EU must provide clear legal information and consider alternative labour market protections, such as immigration quotas, to prevent

77 | See more in: Holland et al., 2011.

78 | Currie, 2016, p. 162.

79 | For example: Holland et al., 2011.

80 | Spaventa, 2015, pp. 472–473.

81 | See more in: Ulceluse and Bender, 2022.

82 | Konjević, 2023, p. 134.

perceptions of unequal treatment among nationalities. In conclusion, it can be affirmed that these transitional arrangements exacerbated the longstanding disparities between Western and Eastern Europe rather than achieving the ultimate objective of fostering equal EU citizenship.

5. Conclusion

The migration history within Europe has witnessed extensive population shifts, with significant variations since World War II. The establishment of the European Economic Community in 1957 and the subsequent growth of a common market played a pivotal role in shaping intra-European migration patterns, focusing on the freedom of movement of workers. The legal framework initially emphasised the economic aspect of free movement, targeting economically active citizens of Member States. Over time, EU law has evolved, extending the rights of free movement to EU citizens and their family members, with a broader emphasis on individual rights rather than mere economic integration. The Court of Justice of the European Union has played a crucial role in interpreting and expanding these rights, ensuring fair treatment for mobile workers.

However, challenges related to direct and indirect discrimination have persisted. The enlargement of the EU, including the accession of CEE countries, brought about significant variations in managing these migrations, limiting the freedom of movement for CEE workers and indirectly discriminating against them. Therefore, even though the concept of free movement of workers has transformed over the years, emphasising the rights and equality of mobile individuals, and despite legal advancements, challenges remain, particularly in addressing discrimination based on nationality. The best example of it was the treatment of CEE mobile workers during the transitional period, which exemplified indirect discrimination and highlighted the existence of dual-tier EU citizenship. The question arises as to whether the same treatment of workers will be applied in future accessions since candidate countries also belong to the economically less wealthy part of Europe.

Besides that, economic crises and protectionist sentiments have added complexity to discussions surrounding the free movement of workers. Brexit, for instance, raised questions about the equal treatment of EU workers in the UK. Nevertheless, the circumstances brought about by the Covid-19 pandemic have served as a wake-up call for Western countries, highlighting the significance of intra-EU labour migration for the sustenance of their national labour markets.

In summary, the journey of labour migration within the EU has been marked by evolving legal frameworks, persisting challenges, and the ongoing pursuit of equal treatment for all EU citizens, regardless of their nationality. The freedom of movement for workers remains a multifaceted and dynamic component of European integration, necessitating innovative solutions in the face of future accessions and emerging challenges.

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A COMMENTARY ON A CONCEPT OF A NEW PUNITIVE MECHANISM 'OUTSIDE EUROPEAN UNION LAW' ESTABLISHED TO BETTER DISCIPLINE COUNTRIES ACCUSED OF VIOLATING THE RULE OF LAW*

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ABSTRACT

Attempts to resolve the crisis of values that the European Union (EU) has faced for years have involved developing the Union's institutional structure and creating new bodies. The principle of the rule of law, which is a pillar of modern democracy, is one of the values most readily cited by both EU representatives and authors when criticising state legislation in areas such as freedom of the press, the administration of justice or principles of the electoral system. To prevent shortfalls in this principle both in the Member States and in the EU itself, it has been proposed that a new body be established to oversee Member States' ongoing efforts to fully implement the rule of law.

The purpose of this article is to critically analyse the proposal to establish a new body, called for simplicity the Rule of Law Commission. The path that led to the idea of creating such a Commission is also briefly outlined.

KEYWORDS

*Court of Justice of the European Union
democratic control
Rule of Law Commission
rule of law supervisory authority
EU values*

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1. Introduction

As a rule, international law does not interfere with a nation's choice of political, social, economic and cultural systems, leaving it free to develop the principles underlying the state's political system. However, the development of internationalisation and integration processes has led many regional integration organisations to develop a catalogue of principles and values embodied in the course of integration processes. The most distinctive, and the most advanced in this respect, is the European Union (EU). The existing treaties underpinning the EU provide, in Article 4(2) of the Treaty on European Union (TEU), an obligation to respect the national identities of the Member States. inherent in their basic political and constitutional structures. On the other hand, EU law has formulated a catalogue of values that both the EU and its Member States are supposed to develop. Article 2 of the TEU lists among these values the principle of the rule of law and emphasises that it is – together with other values – the foundation of the EU. The rule of law, both in the treaties and in the jurisprudence of the EU courts, is regarded as a value common to all Member States, derived from the common constitutional traditions of the EU Member States.²

A natural consequence of the codification in EU law of values is the establishment of mechanisms to protect common values against their violation by EU Member States. The EU's mechanism for the protection of common values, although unique in the world and an expression of the consensus of its 27 Member States, is criticised both by the EU institutions (e.g. the European Parliament),³ and in the doctrine of European law.⁴ In particular, critics call for the creation of a new 'rule of law overseer' that would be able to compel states to incorporate a common or communitarian understanding of the principle, oversee strict compliance with the rule of law so understood, and impose severe sanctions on states failing to comply with this imposed understanding of the rule of law. These ideas materialised into the concept of a Rule of Law Commission. Interestingly, the latest ideas emerging in the doctrine for the creation of a 'Rule of Law Supervisory Authority' suggest detaching the functioning of this body from the EU structures and opening it up to other European or so-called 'Western World' states as well.

The objective of this article is to critically examine proposals for establishing such a body, through the prism of international law, and, above all, EU law. First, however, I will briefly characterise the concept of the rule of law, which is still in the stage of conceptualisation, and the existing mechanisms its protection operating within EU law.

2 | Ziller, 2023.

3 | European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), OJ C 75, 26.2.2016, pp. 52–78.

4 | Magen and Pech, 2018; Martins, 2024.

2. The concept of the rule of law

The idea of the rule of law remains largely undefined, belonging to a group of legal terms that are highly controversial.⁵ The controversy encompasses both the entrenchment of this principle into various constitutional systems worldwide, and the differing interpretations of its meaning and scope. The rule of law is not universally accepted as a systemic principle of modern states,⁶ but mainly characterises European states or, more broadly, states belonging to the so-called West. However, even in the state legal orders that have adopted it as the foundation of their political and social systems, there is no uniform understanding of the rule of law, let alone a legal definition of this principle (for example German concept of *Rechtsstaat*⁷ or the French *État de Droit*⁸). Nor has legal doctrine developed a uniform understanding of the rule of law. While the absence of a legal definition of the rule of law is not surprising, given its nature as one of the so-called general clauses, not even uniform criteria for determining its scope have been developed.⁹ The only consensus in the understanding that this principle recognises that the rule of law means that all activities of the state and its organs must be grounded in law.¹⁰ The principle therefore regulates the way in which public authority is exercised and its relationship to the individual, but that is where clarity on the subject ends. Nevertheless, the rule of law has proved very attractive to many legal orders, which first adopted it as the basis of their political and social systems and then began to fill it with content. Hence, the principle is understood differently in different, national legal orders.

Since its inception in the nineteenth century, the rule of law has governed the relationship between the individual and the state and defined the rules for the creation and application of laws within the state. The rule of law can therefore be understood in both formal and substantive terms.¹¹ A formal understanding pertains to the manner in which the law was promulgated, the clarity of the ensuing norms and the temporal dimension of the enacted norm.¹² In contrast, a substantive understanding focuses on the principles (rights) which are derived from the rule of law as a foundational and general concept.¹³ These principles (rights) are helpful in establishing whether the laws are 'good' or 'bad'.

It was not until the 1990s that the rule of law began to be transposed into international law permeating integration processes and regulating the foundations of the international legal order.¹⁴ In 1993, the UN General Assembly adopted its first resolution on the rule of law, entitled Strengthening the Rule of Law.¹⁵ However, the principle of the rule of law has taken on particular importance in Europe. In 1990, the Council of Europe established the European Commission for Democracy through Law (known as the Venice Commission)

5 | Varga, 2021, p. 249.

6 | Zolo, 2007, p. 3.

7 | Gozzi, 2007.

8 | Laquière, 2007.

9 | Lautenbach, 2014, p. 19.

10 | Mik, 2022, p. 50; Sellers, 2016, p. 5.

11 | Craig, 2005.

12 | Ibid.

13 | Ibid.

14 | Majchrzak, 2023.

15 | A/Res/48/132.

to promote the three objectives of the Council of Europe, including the rule of law.¹⁶ Furthermore, the EU adopted the rule of law during its formation, as one of its founding principles.¹⁷

The internationalisation of the rule of law and the development of integration processes – particularly in Europe – have accelerated the process of defining its content. In 2012, the UN General Assembly adopted the ‘Declaration of the High-Level Meeting on the Rule of Law at the National and International Level’.¹⁸ The resolution emphasised that the rule of law applies equally to all states, and international organisations, including the United Nations and its principal organs. It further stated that respect for and the promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. The resolution is general in nature, but demonstrates the multi-faceted and broad way in which the General Assembly understands the rule of law. First, the General Assembly noted the close relationship between the rule of law, human rights and democracy. It also emphasised the link between the rule of law and inclusive, sustainable and equitable development, as well as economic growth and employment. The General Assembly stressed that there are common features of the rule of law, based on international norms and standards, which are reflected in the wide diversity of national experiences with the rule of law. These are:

- a) The existence of an independent, impartial and fair judicial system, together with the right to equal access to justice for all;
- b) Ensuring that women fully enjoy the benefits of the rule of law;
- c) Protection of children’s rights, including against discrimination, violence, abuse and exploitation;
- d) Conflict prevention, peacekeeping, conflict resolution and peacebuilding;
- e) Respect for international humanitarian law in all circumstances;
- f) Preventing impunity for genocide, war crimes, crimes against humanity, violations of international humanitarian law and gross violations of human rights;
- g) Strengthening international cooperation to combat drug problems and transnational organised crime;
- h) Combating and preventing corruption;
- i) Condemnation of terrorism.

Thus, the General Assembly linked the rule of law to essentially every aspect of UN activities. Perhaps this has to do with the fact that the declaration addressed the rule of

16 | Resolution (90)6 on a Partial Agreement Establishing the European Commission for Democracy through Law, adopted by the Committee of Ministers on 10 May 1990 at its 86th Session.

According to Article 1(1): The Commission shall give priority to work concerning:

- a. the constitutional, legislative and administrative principles and techniques which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law.
- b. the public rights and freedoms, notably those that involve the participation of citizens in the life of the institutions.
- c. the contribution of local and regional self-government to the development of democracy.

17 | Sulyok, 2021, pp. 208–209.

18 | Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, 24 September 2012, A/Res/67/1.

law at both the national level and international legal order levels, although the declaration itself does not rigidly distinguish between the two levels to which the rule of law refers.

The Venice Commission's interpretation of the rule of law is much narrower. In 2016, it adopted a document fundamental to the European understanding, entitled the Rule of Law Checklist.¹⁹ The document reflects the Venice Commission's belief that the rule of law cannot be defined and that instead of seeking a theoretical definition, an operational approach, focused on identifying the core elements of the rule of law, should be adopted. The checklist identifies five fundamental elements of the rule of law: legality, legal certainty, prevention of abuse of power, equality before the law and non-discrimination, and access to justice.

Compared to the UN General Assembly resolution, this document significantly narrows the concept of the rule of law, although a full reading of it leads to the conclusion that the rule of law is a dynamic concept and its scope is constantly evolving. Indeed, the Venice Commission stressed that adherence to the rule of law is a complex process and that the rule of law is achieved through successive stages and never in full. It is also worth noting that, in the Venice Commission's view, both the rule of law itself and its content derive from common constitutional traditions of different national legal orders. This impacts understanding of the rule of law, which differs among the Member States of the Council of Europe.

The EU understands the rule of law in a similar way. In the EU (or earlier in the European Communities), the concept of the rule of law has been mainly shaped by the case law of the Court of Justice of the European Union (CJEU). The CJEU first made reference to the rule of law in the *Les Verts* judgement, in which it stated:

the European Economic Community is a community based on the rule of law, 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.²⁰

Since then, the CJEU has built an extensive body of case law interpreting the rule of law. Although the CJEU has repeatedly emphasised that the precise content of the principles and norms implicit in the rule of law may vary at the national level depending on the constitutional system of each Member State, its case law has formulated an incomplete list of the principles constituting the rule of law. These principles include: legality,²¹ legal certainty,²² prohibition of arbitrariness in executive actions,²³ independent and impartial courts,²⁴ effective judicial review, including respect for fundamental rights²⁵ and equal-

19 | Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD(2016)007-e.

20 | Case 294/83, *Le Verts v. European Parliament*, [1986] ECR I1139, para. 23.

21 | Case C-496/99, *Commission v CAS Succhi di Frutta* [2004] ECR I-03801, para. 63.

22 | Joined Cases 212 to 217/80, *Amministrazione delle Finanze v Salumi*, Rec. p. 2735, para. 10.

23 | Joined Cases 46/87 and 227/88, *Hoechst v Commission* [1989] ECR 02859, para. 19.

24 | Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, para. 91; Case C-550/09 E and F [2010] ECR I-06213, para. 44; Case C-50/00 P, *Unión de Pequeños Agricultores* [2002] ECR I-06677, paras. 38–39.

25 | Joined Cases C-174/98 P and C-189/98 P, *Netherlands and van der Wal v Commission* [2000] ECR I-00001, para. 17.

ity before the law.²⁶ In defining the rule of law, the CJEU refers to other general clauses, which it has elaborated on in subsequent judgments. However, this framing of the rule of law creates significant uncertainty regarding the precise meaning and content of the principle. The rule of law is *de facto* a 'rhetorical balloon' that can be inflated ever further and made almost unlimited.²⁷

The current criteria defining the scope of the rule of law as developed by the CJEU have been adopted by the European Commission,²⁸ and have subsequently permeated into secondary law. The 2020 Regulation on the General Regime of Conditionality for the Protection of the Union's budget²⁹ is the first legally binding EU act to introduce a legal definition of the rule of law. Article 2(a) of the regulation defines the rule of law using criteria derived from CJEU case law and includes:

- a) The principle of legality, which requires a transparent, accountable, democratic and pluralistic law-making process;
- b) The principle of legal certainty;
- c) The prohibition of arbitrariness in executive actions;
- d) The principle of effective judicial protection, including access to justice, provided by independent and impartial courts, particularly in relation to fundamental rights;
- e) The principle of separation of powers;
- f) Non-discrimination and equality before the law.

The regulation stipulates that the rule of law must be understood in a way that takes into account the other values and principles of the Union enshrined in Article 2 of the TEU. Although this definition was created for this piece of legislation only, it is likely to affect all other areas covered by European integration. Indeed, it establishes a mechanism to safeguard the entire EU budget and all financial interests of the Union.

3. Protection of the rule of law by EU law

The positivisation of the rule of law has led the EU to start creating mechanisms to protect this value from infringement by Member States. These mechanisms may have a treaty basis or stem from non-binding acts of the institutions.³⁰

26 | Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010] ECR I-8301, para. 54.

27 | Varga, 2021, p. 250.

28 | European Commission, Communication from the Commission to the European Parliament and the Council. A New EU framework to Strengthen the Rule of Law, 1COM (2014) 158 final, 1 March 2014.

29 | Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on the general regime of conditionality to protect the Union budget, OJ. 2020, L 433I, p. 1.

30 | Sulyok, 2021.

3.1. Treaty provisions safeguarding the rule of law

The mechanism to protect the rule of law is explained in Article 7 of the TEU. It can be triggered against a state that violates the rule of law (or other EU values listed in Article 2 of the TEU) at the reasoned request of 1/3 of Member States, the European Parliament or the European Commission. While the request can be made by supranational bodies, the procedure itself is strictly triggered and conducted by intergovernmental bodies such as the European Council or the Council. The Council may find that there is a clear risk of a serious breach of Union values by a Member State, or by the European Council with a recognition of a serious and persistent breach of such values. Both decisions are essentially political in nature, although the treaties attach certain legal effects to their adoption. First, the Council may direct a recommendation to the state 'guilty' of the breach. Second, the consequence of the decision of the European Council may be the suspension of the state guilty of an infringement of certain rights under the treaties, in particular the right to vote in the Council. The decision to suspend is taken by the Council.

Since the decisions outlined in Article 7 of the TEU can only be taken with the consent of a majority of Member States (4/5 or unanimity, excluding the state concerned), this gives Member States guarantees that the mechanism would only be triggered as a last resort and would cover the most serious violations of EU values. After all, the decision-making process was entrusted to intergovernmental bodies composed of representatives of states or governments. Above all, it would not be used by EU supranational bodies for political purposes – for example to interfere in the electoral processes of Member States.

A 4/5 majority is needed for the Council to determine that there is a clear risk of a serious breach of the rule of law by a Member State, meaning that currently 22 out of the 27 Member States must agree on such a decision. It is worth noting, that to date, neither the Council nor the European Council has exercised its powers enumerated in Article 7 of the TEU against any Member State.

It became apparent fairly quickly that the mechanism for the protection of the rule of law described in Article 7 of the TEU is not exclusive, and that the European Council is not the only body with the power to determine whether a Member State is in breach of the rule of law. However, the Union legislature cannot, without infringing the treaties, establish a parallel procedure to that provided for in Article 7 of the TEU, pursuing the same objectives and allowing for the adoption of identical measures, while involving different institutions or grounds other than those provided for in that provision. However, the Union legislature may, on the basis of the provisions of the treaties, adopt an act of secondary legislation establishing other procedures relating to the rule of law, provided that the procedures differ in both their aim and subject matter from the procedure provided for in Article 7 of the TEU. In December 2020, the Member States unanimously agreed to establish another Rule of Law mechanism, which was adopted on 16 December 2020 in the form of a regulation on a general system of conditionality to protect the Union budget.³¹ The legality of this mechanism was confirmed by the CJEU in two rulings³² and shortly thereafter the mechanism was triggered for the first time against Hungary.

31 | European Parliament and Council Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L4331/1.

32 | Case C-156/21, *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97; Case C-157/21, *Republic of Poland v European Parliament and Council of the European Union*, ECLI:EU:C:2022:98.

Under Article 258 of the Treaty on the Functioning of the European Union (TFEU), complaints before the CJEU are also a treaty tool for the protection of the rule of law. This procedure can be initiated by the European Commission against any Member State believed to be in breach of an obligation under the treaties. The European Commission has initiated proceedings under this article on several occasions, against both Hungary and Poland.³³

| **3.2. Extra-treaty mechanisms to safeguard the rule of law**

Initially, it seemed that Article 7 of the TEU would be the only mechanism to discipline states found to be violating EU values. Following the entry into force of the 2007 Lisbon Treaty, supranational bodies decided to expand their field of activity and build their own mechanisms to protect EU values, including above all, the rule of law.

The European Commission was the first to develop and implement its own mechanism. From mid-2013 to early 2014, the European Commission held two thematic debates dedicated to the development of a new tool to prevent violations of the rule of law.³⁴ These debates served as the rationale for building a new mechanism to protect the rule of law, which was placed entirely in the hands of the Commission. In March 2014, the European Commission published *A New EU Framework for Strengthening the Rule of Law*,³⁵ in which it sets out its understanding of the rule of law and proposed a three-stage mechanism that was intended to prevent the occurrence or escalation of systemic threats to the rule of law and to seek solutions to such situations.³⁶ This mechanism does not, however, presuppose the participation of EU intergovernmental bodies and is conducted entirely within the European Commission itself. The European Commission became the only body with the power to initiate the procedure and determine how it should be applied. In the European Commission's view, the rationale for its exclusive competence to initiate a procedure and determine its course lay in its power to initiate a procedure under Article 7 of the TEU. The new mechanism is intended to complement Article 7 of the TEU and prevent the need to resort to its tools.

According to the EC, the mechanism will only apply if Member States adopt measures or tolerate situations that may have a negative systematic impact on the integrity, stability or proper functioning of institutions and protection mechanisms established at national level to ensure compliance with the rule of law. However, isolated breaches of fundamental rights or miscarriages of justice will not trigger the application of the new EU rule of law framework.

Interestingly, the mechanism described by the European Commission in the 2014 communication has no grounding in the EU treaties and goes against the principle of conferral of EU competence. It can, however, lead to recommendations being made to a Member State and – in the event of non-implementation or implementation not in line with the European Commission's proposals – to sanctions being imposed on the state

33 | Bence, 2021, p. 23.

34 | Coman, 2022, p. 114.

35 | European Commission, Communication from the Commission to the European Parliament and the Council. A new EU framework to strengthen the rule of law, 11 March 2014, COM (2014) 158 final.

36 | Sulyok, 2021.

deemed to have breached the rule of law. In May 2014, the Council Legal Service concluded that the mechanism described in the 2014 communication was contrary to the principle of conferral expressed in Article 5 of the TEU, and that the only mechanism for the protection of EU values was that provided for in Article 7 of the TEU.³⁷

According to the Legal Service of the Council of the EU, Article 2 of the TEU does not confer substantive competence on the EU, meaning that ‘an infringement of the values of the Union, including the rule of law, may be invoked against a Member State only if it acts in an area in which the Union has competence under specific provisions of the treaty establishing competence’.³⁸ The Council Legal Service proposed that Member States agree on a system of review allowing for EC involvement. Such a review mechanism could be established in an intergovernmental agreement aimed at complementing EU law and ensuring respect for the values of the Union without conferring on the Union any competences not provided for in the treaties.³⁹

In response to the Commission’s actions, the Council developed its own mechanism to protect the rule of law.⁴⁰ This mechanism was developed based on a dialogue between all Member States in the Council and aims to promote and protect the rule of law. The dialogue is based on the principles of objectivity, non-discrimination and equal treatment of all Member States and is conducted impartially, based on evidence. According to the Council, this mechanism respects the principle of conferred powers and ensures regard for the national identities of Member States inherent in their basic political and constitutional structures and core state functions, including territorial integrity, and maintenance of law and order and guarantees of national security. The dialogue takes place once a year in as part of the General Affairs Council.

4. Concepts of a non-EU ‘rule of law supervisor’

As can be seen from the brief review above, the EU has several different mechanisms at its disposal to protect the rule of law. These mechanisms have varying legal bases, nature and legal effects. Undoubtedly, the mechanisms that operate on the basis of ‘soft’ EU acts should be considered the least effective. Nevertheless, the implementation of the mechanism described in the 2014 communication shows that it pre-empted the European Commission’s application to the CJEU with a complaint under Article 258 of the TFEU. A CJEU decision issued on this basis, particularly if a Member State fails to implement it, has very significant financial consequences for that state.

In 2020, the European Commission acquired a second very important leverage tool against Member States alleged to have committed a breach of the rule of law: the Regulation on a General Regime of Conditionality for the Protection of the Union Budget. Thus,

37 | Opinion of the Legal Service of the Council of the EU, Communication from the Commission on a new EU framework for strengthening the rule of law. Compliance with the Treaties, 27 May 2014 [Online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0158> (Accessed: 6 August 2024).

38 | *Ibid.*, p. 5.

39 | *Ibid.*, para. 27.

40 | Conclusions of the Council of the European Union and the Member States, meeting within the Council, on ensuring respect for the rule of law (17014/14).

under the current legal framework, the supranational EU institutions have acquired effective tools to compel Member States to implement the rule of law arising from the extensive jurisprudence of the CJEU. Despite this, the doctrine of European law continues to highlight alleged threats to the rule of law, which are often used to justify the creation of further mechanisms aimed at safeguarding the values enshrined in Article 2 of the TEU.⁴¹ Criticism of the rule of law in the Member States has led to proposals for establishing a new body tasked with monitoring the state of implementation of rule of law by Member States.

One of the first proponents of establishing a rule of law supervisory body was the European Parliament. In 2013, it called for the regular assessment of Member States regarding their continued adherence to the Union's fundamental values, including the rule of law. The assessment would avoid any double standards and would be based on a commonly accepted understanding of European constitutional and legal standards.⁴² The European Parliament also called on the EU and its Member States to create a new mechanism to ensure that all Member States respect the common values referred to in Article 2 of the TEU and uphold the 'Copenhagen criteria'. This mechanism could take the form of a 'Copenhagen commission' or high-level group, a 'group of wise men' or an evaluation under Article 70 of the TEU, and could take the form of a reform and strengthening of the mandate of the EU Agency for Fundamental Rights and a process of enhanced dialogue between the European Commission, the Council, the European Parliament and the Member States. This mechanism should operate within the EU's institutional structure. The European Parliament has identified the characteristics of such a body, stating that it should be:

- a) Independent of political influence,
- b) Fast and effective,
- c) Cooperative with other international institutions,
- d) Regularly monitoring respect for fundamental rights, democracy and the rule of law across all Member States, while respecting national constitutional traditions,
- e) Conducting inspections uniformly across all Member States to avoid the risk of double standards.

The main task of such a body would be to alert the EU at an early stage to any risk of a breach of the values referred to in Article 2 of the TEU. The new body would also have the power to make recommendations to EU institutions and Member States on how to respond to any undermining of the values referred to in Article 2 of the TEU and to take corrective action.

The idea of the European Parliament was quickly taken up in the doctrine of European law, in 2017, Jan-Werner Müller proposed the creation of a new institution to address the EU's democratic protection deficit, tentatively naming it the 'Copenhagen Commission'.⁴³ Müller's idea was to create a body within the EU structure tasked with overseeing

41 | Magen and Pech, 2018.

42 | European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), OJ C 75, 26.2.2016, pp. 52–78.

43 | Müller, 2017.

democracy and the rule of law, modelled after the Venice Commission of the Council of Europe.

A distinctive feature of both concepts was that the new rule of law monitoring body would be part of the EU's institutional structure. However, in 2024, a new proposal emerged to create a Rule of Law Commission through a multilateral international treaty, which would be located outside the EU's institutional structure.⁴⁴ This proposal is therefore broader than the EU itself and could involve non-EU countries, including EU candidate countries and so-called 'politically willing governments' supportive of tougher rule of law sanctions.

The Rule of Law Commission would be composed of non-partisan, independent and ideologically diverse legal experts and diplomats who would develop policy proposals for the promotion of democratic values. It would act upon requests from national governments or other unspecified actors.⁴⁵

The Rule of Law Commission would have the authority to identify persistent deviations from democratic values in specific countries and make diplomatic and economic recommendations. The implementation of these recommendations would be mandatory for European governments (i.e. members of the so-called penal coalition) that have signed an international treaty.⁴⁶

The tasks of the new body would be as follows:

- 1) Identify and analyse the links between the objectives of the rule of law and EU values;
- 2) Identify and examine systemic, long-standing rule of law problems in a given country;
- 3) Develop economic and diplomatic responses (specifically, penalties and sanctions) for national governments of countries failing to comply with the multilateral treaty;
- 4) Publish the content of criminal reactions in the form.⁴⁷

The Rule of Law Commission would be established outside the EU structures and its costs would be borne by the governments participating in the new mechanism.⁴⁸

5. Critical assessment of the new non-EU 'legal state regulator'

Is a new mechanism implemented by a non-EU 'rule of law supervisory body' (called the Rule of Law Commission in the article for the sake of simplicity) necessary and feasible in a Europe that continues to expand the frontiers of integration? An assessment of the establishment of the Rule of Law Commission should start with the observation that states, possessing an essentially unlimited treaty-making capacity, can conclude a treaty

44 | Barrett, 2024.

45 | Ibid.

46 | Ibid.

47 | Ibid.

48 | Ibid.

on any issue.⁴⁹ However, while it is easy to conclude a treaty and on its basis to establish a body to uphold an undefined idea such as the rule of law, it is more difficult to create a framework for the operation of this body in which states parties retain control of the international obligations arising from such a treaty and shaped through the Rule of Law Commission.

For a treaty to be enforceable in good faith, in accordance with the principle of *pacta sunt servanda*, it should contain obligations that are foreseeable to the states parties. This is particularly relevant for treaties that, like the treaty establishing a Rule of Law Commission, impose obligations primarily concerning domestic law. In such cases, a state party is required to align its domestic law with the treaty's obligations at the time of ratification. If it fails to do so, it is in breach of such a treaty.⁵⁰

However, states that binding themselves to a treaty establishing a Rule of Law Commission would, in effect be giving a 'blank cheque' to such a body – ceding unlimited power to decide both the substantive meaning of the rule of law and the consequences imposed on a state 'guilty' of violating it. This would thus deprive the state of the ability to decide on its obligations under the treaty and would cease to be its host. As a result, state-parties would be at risk of remaining in a state of permanent uncertainty as to whether they were implementing such a treaty in good faith.

The concept of the rule of law, while providing a guarantee against unrestricted and unwarranted action by state organs, remains undefined.⁵¹ As discussed in Chapter 2, there is, in principle, only a general agreement on its meaning. Furthermore, the precise content of the principles and norms derived from the rule of law remain unclear.

To a large extent, these principles are derived through the jurisprudence of courts and various international bodies and are therefore unknown to states at the time a state binds itself to the treaty establishing the Rule of Law Commission. These principles may also vary depending on the constitutional system of each state. The idea of the rule of law applies to every area of law and, in principle, to every legally regulated aspect of social life. The Rule of Law Commission would be granted *de facto* super-competence, whereby it would have an unlimited influence over all areas of national law. Thus, the legislative competence of the state would be significantly reduced. By becoming a party to the treaty establishing the Rule of Law Commission, a state would cede to an international body one of its fundamental attributes, namely the competence to define the principles governing the foundations of its political, economic, social or cultural system. The constitutional orders of many European states, including Poland and Hungary, do not allow for the transfer to an international body of the competence to decide the constitutional identity of the state.⁵²

Why would states cede such competence to an international body? The rule of law defines the rules for the creation and application of law within a given community, which is generally constituted by states or – in exceptional cases – by regional international organisations. In the case of states, the rule of law is closely linked to the democratic system and guarantee for individual rights. International organisations adopt the rule of law either as an objective of their activities (e.g. the Council of Europe) or, as in the case of

49 | Frankowska, 2007, p. 53.

50 | Kolb, 2023, p. 171.

51 | Lautenbach, 2014, p. 3.

52 | Wojtyczek, 2007, p. 284.

the EU, as a value that permeates all the legislation it produces, establishing a high level of trust between Member States.⁵³ This is accompanied (or at least should be accompanied) by a common definition of the scope of this principle and an interpretation of its content.

Would the Rule of Law Commission be building a community of states? If so, the states recognising the competence of the Rule of Law Commission would be limited to European states only. The development of the rule of law is primarily the domain of European states, however, the emerging understanding of this value in Europe does not go hand in hand with the universal understanding of its development. The Rule of Law Commission would therefore function within the institutional structures protecting 'European' values. It is doubtful whether states from other geographical regions would want to incorporate a European understanding of values into their legal frameworks, especially since the Rule of Law Commission would impose this understanding.

This discussion of the Rule of Law Commission ignores the nature and extent of the consequences imposed on a state deemed 'guilty' of a violation. If the Rule of Law Commission identified deviations from democratic values, it would result in the formulation of a recommendation to the guilty state, which would *de facto* take the form of a criminal sanction. The criminal nature of such a sanction would require, in accordance with the principle of *nullum crimen, nulla poena sine lege*, that the types of criminal sanctions, their nature, duration and the rules for their imposition be precisely defined. Is this requirement fulfilled by indicating that the sanctions would be economic and diplomatic in nature and would be imposed according to the capacities of the Member States? If criminal sanctions imposed on individuals for the commission of a crime were to be defined in national law on this basis, this would be met with a justified, harsh reaction from all human rights groups. Yet it is being proposed that the Rule of Law Commission be granted undefined power to punish states for committing violations they could not have foreseen.

Two further doubts arise against this background. First, the nature of the Rule of Law Commission's ruling is unclear. As a rule, rulings of an international body bind only the state to which they are addressed and only to the specific case in question. However, such a ruling would indirectly bind all other states parties to the treaty establishing the Rule of Law Commission, as the Commission's view on a given case, once expressed, would be replicated in other cases. This, of course, is nothing new in modern international law, and the European Court of Human Rights issues its rulings on a similar basis.⁵⁴ Second, states participating in the treaty establishing the Rule of Law Commission would be obliged to apply sanctions on the 'guilty' state – for example by suspending or breaking diplomatic relations with such a state, or to restricting or terminating economic relations with it. In this context, it would be interesting to see financial penalties that would both compel the 'guilty' state to implement the recommendations of the Rule of Law Commission and deter it from similar violations in the future, and also deter other states from emulating the 'guilty' state. Since no state can know in advance exactly what recommendations the Rule of Law Commission will make and how it will assess its 'capabilities', the Commission would enjoy enormous discretionary power.

The new mechanism to combat deviations from democratic values would also operate outside any democratic control. It is intended to be a non-EU body of non-partisan,

53 | Magen and Pech, 2018, p. 245.

54 | Lautenbach, 2014, p. 13.

independent, ideologically diverse legal experts and diplomats'. However, these individuals would not be democratically elected, nor would their selection be influenced by the citizens of the states parties who would be directly affected by the sanctions imposed by the Rule of Law Commission. Thus, the Rule of Law Commission, which is supposed to uphold democracy, would itself lack democratic legitimacy derived from the peoples. Even if its members were nominated by the states parties to the treaty, they should represent values aligned with liberal democracy, given that the Commission is supposed to analyse violations of the rule of law within liberal democratic states. In practice, the requirement for independence and ideological diversity of the Commission's members may turn out to be an empty slogan, and the Commission could be the promoter of only one systemic model.

There is also no provision for any by any democratically elected body, such as national parliaments, to influence the way the Commission is set up, its functioning or the implementation of the criminal sanctions it recommends. Moreover, there are no procedural guarantees for a state subject to evaluation by the Rule of Law Commission, nor any procedure for subjecting recommendations made by the Commission to judicial review, which could be invoked by a state found 'guilty'.

The new rule of law protection mechanism also raises the question of its relation to EU law in both the substantive and institutional spheres. The scope of the Rule of Law Commission's powers may undermine the effectiveness of EU law,⁵⁵ by replacing the mechanisms for the protection of the rule of law provided for in EU law, and making them redundant. Since the Rule of Law Commission will be able to analyse legislative activities of states, including those arising from the implementation of EU laws and directly applicable EU norms (e.g. norms contained in regulations), it will therefore assess whether EU Member States, when applying EU law, comply with the treaty on which the Rule of Law Commission is based and with the recommendations issued by that body. Because the Rule of Law Commission is intended to be located outside the institutional structure of the EU, given the scope of the integration processes, its powers will undoubtedly overlap with those reserved for EU institutions, in particular the CJEU.

The CJEU is the only judicial body with the power to finally settle disputes concerning the interpretation and application of EU law, particularly through the preliminary reference procedure provided for in Article 267 of the TFEU.⁵⁶ There is no doubt in the jurisprudence of the Union courts that an international agreement providing for the establishment of a judicial body to interpret its provisions and whose decisions would be binding on the Union is in principle compatible with Union law.⁵⁷ Indeed, the Union's competence in the field of international relations and its capacity to conclude international agreements inherently include the power to be bound by judgements of a court created or designated by such agreements, in the interpretation and application of their provisions.⁵⁸ An international agreement concluded by the Union may affect the competences of the institutions of the Union provided that the basic conditions for preserving the essence of the said competences are fulfilled and that the autonomy of the legal order of the Union

55 | Grousot and Zemskova, 2021, p. 271.

56 | Opinion 1/17, 30 April 2019, ECLI:EU:C:2019:341.

57 | Opinion 2/13, 18 December 2014, EU:C:2014:2454, para. 182.

58 | *Ibid.*

is not thereby affected.⁵⁹ An agreement providing for the creation of a Rule of Law Commission can only be compatible with Union law on condition that the autonomy of the EU legal order is not infringed and that the mechanism of evaluation of the states parties aligns with the constitutional framework. This framework consists of: the values set out in Article 2 of the TEU, the general principles of Union law, the provisions of the EU and TFEU treaties, which include, *inter alia*, principles for the allocation and division of competences, rules for the functioning of the Union's institutions and judicial system, and the fundamental principles applicable in specific areas, structured to contribute to the integration process.⁶⁰ The process of the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms has shown the legal problems that can arise when subjecting EU law to the jurisprudence of other international bodies, even one as well-established in Europe as the European Court of Human Rights.

6. Completion

The creation of a new authority to uphold the rule of law should be preceded by a thorough and comprehensive analysis of both the legitimacy of creating a new authority, and the legality of its creation from the perspective of EU law. The mechanisms currently in place in the EU to protect the rule of law are sufficient to prevent systemic and serious violations of this value in Member States. In a situation where international bodies are unable to define clearly the content of the rule of law and even express the view that it is impossible to fully implement this principle, states should avoid being bound by an international agreement which they will know in advance they will be unable to implement. Instead of creating a new body, there should be a calm and substantive debate within the EU itself or in the Council of Europe on the content of the rule of law, mutual respect for constitutional traditions and how to implement this principle between European states. As the EU aims to deepen mutual trust in the judiciaries of the Member States, such a discussion is essential.

59 | Opinion 1/00, 18 April 2002, EU:C:2002:231, paras. 20, 21.

60 | Opinion 2/13, 18 December 2014, EU:C:2014:2454, para. 158.

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MOTOR VEHICLES TAXATION IN THE EUROPEAN UNION – COOPERATION OR COMPETITION?

Michal Radvan¹

ABSTRACT

This study focuses on registration taxes and regularly paid taxes in conjunction with motor vehicles. It analyses time and performance charging for the use of road infrastructure only to a certain and necessary extent. This study follows the IMRaD structure. The text demonstrates that the level of motor vehicle taxation in individual EU Member States differs not only in the number and type of taxes imposed on motor vehicles, but also in the legal construction of individual structural components. The level of harmonisation in motor vehicle taxation is currently extremely low. European cooperation regarding motor vehicle taxation is limited, and the competition between the EU Member States prevails. The EU rules concerning car taxation are adequate with regard to single market principles. However, the EU rules in this area are not acceptable in terms of economic circumstances. De lege ferenda, several motivational factors should be considered to improve the regulation. Registration taxes on motor vehicles should be abolished entirely. The tax base should be green-based, determined by the amount of CO₂ emissions, to follow sustainable and polluter-pays principles. Circular taxes on motor vehicles should remain under the responsibility of each EU Member State, and the EU should refrain from taking steps to harmonise this area of taxation. Nevertheless, the principles of sustainability should be strengthened in national regulations. Taxes on motor vehicles are an ideal example of reflecting environmental elements.

KEYWORDS

tax on motor vehicle
registration tax on motor vehicle
circular tax on motor vehicle
sustainability

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1. Introduction

In some parts of the world, owning a car is essential for everyday life: it is necessary to make journeys, whether professional (for work or business) or private (for shopping or pleasure). Such a situation is caused primarily owing to the low level of public transport, lifestyle, and historical development. Therefore, there is no property tax on cars in the United States. However, in Europe and Japan, vehicle ownership is one of the indicators of the owner's wealth. As Láchová points out, owning more than one car in a household often indicates taxpayers' wealth and social situation more than owning a standard family home or apartment.²

Motor vehicles are subject to many types of taxation in the European Union (EU) countries. Many countries apply various tax instruments to secure significant budgetary revenues from both private car users and commercial vehicles.

In principle, two basic types of taxes on motor vehicles can be distinguished:

- Taxes payable at the time of acquiring the car or when it is first put into service. In some countries, this tax is called a registration tax.
- Taxes paid periodically (circulation taxes) in relation to the ownership or possession of the vehicle. The advantage of this system of taxation is, above all, a more stable source of revenue, since vehicles are subject to the tax for their entire lifetime. Unlike registration taxes, taxes paid regularly are not sensitive to the economic cycle.

In addition to these basic types, taxes affecting motor vehicles include value-added tax (VAT), fuel taxes, and various fees and other charges for using the motorway and road network. Typical examples are vignettes and various toll systems. Some authors also add administrative charges connected with vehicle registration, insurance tax, and parafiscal charges on insurance premiums.³

Owing to different historical developments and social backgrounds, the level of motor vehicle taxation in individual EU Member States differs. This study aims to examine how and to what extent the EU can influence motor vehicle taxation, that is, whether there is any European cooperation in this area or competition between EU Member States prevails. As the EU clarified some rules that Member States must respect when car registration and circulation taxes are applied, the hypothesis to be confirmed or disproved is: The EU rules concerning car taxation are adequate with regard to single market principles and economic circumstances.

The following text examines registration taxes and regularly paid taxes in conjunction with motor vehicles. It analyses time and performance charging for the use of road infrastructure only to a certain and necessary extent. VAT, fuel taxation, and other possible taxes connected to motor vehicles (e.g. charges for issuing a registration plate) remain outside the scope of this text.

2 | Láchová, 2004, p. 153.

3 | Kunert and Kuhfelt, 2007, p. 307.

2. Methodology

This study follows the IMRaD (introduction, methodology, research, and discussion) structure. In the Research section, it is necessary to describe the existing policy of the EU regarding motor vehicle taxation. As there were several changes in the political approaches, it is also helpful to compare historical consequences and developments. Moreover, the descriptive and comparative approaches are used when evaluating national regulations with one another and with EU regulations. The analytical method allows to assess both the current harmonisation within the EU regarding legal regulation of motor vehicle taxation and the implementation of European law into the national legal systems.

The research question of how and to what extent the EU can influence motor vehicle taxation can be answered by synthesising acquired knowledge. The Discussion and Conclusion sections compare the structural components of motor vehicle taxes. This enables to evaluate the level of European cooperation in the field of motor vehicle taxation and the tendencies of individual EU Member States to maintain their own tax policy instruments in this sector. As non-harmonisation causes competition between EU Member States, assessing whether national policies interfere with the free movement of people, goods, and services is necessary. The Conclusion section confirms or disproves the hypothesis whether EU rules concerning car taxation are adequate with regard to single market principles and economic circumstances.

3. Research

3.1. General EU approaches and principles

The European Commission Press release from 2012 states that:

Car taxation accounted for around 1.9% of all tax revenue across Member States in 2010.⁴ Each year, more than 13 million new passenger cars are registered in the EU, while over 3 million cars are moved to another Member State. Registration and circulation taxes are not harmonized in the EU, risking double taxation for citizens and businesses and the fragmentation of the Single Market.⁵

Regarding charges for using the motorway and road network, it is usual practice that a carrier is *de facto* taxed in each country it passes through (in the form of various taxes or charges for the use of motorways and roads). However, this is not inherently double taxation. In fact, the charge is always levied only on the use of the transport infrastructure of that State. Double taxation would perhaps only arise in the case of a regular tax

4 | Kunert and Kuhfelt (2007, p. 306), having a broader list of taxes on motor vehicles, including petroleum tax and VAT, state that the generated taxes in EU Member States compare to up to 5% of the gross national product.

5 | European Commission, 2012c.

on motor vehicles. However, even this situation does not need to be dealt with by double taxation treaties, as the practice throughout the EU is to tax vehicles only in the State of registration. Such a practice is also incorporated into the Eurovignette Directive, and it was confirmed by the judgement of the European Court of Justice in joined cases C-151/04 and C-152/04 (Nadin and others) in 2005:

It is contrary to Article 43 EC for the domestic legislation of one Member State, such as the legislation at issue in the cases in the main proceedings, to require a self-employed worker residing in that Member State to register there a company vehicle made available to him by the company for which he works, established in another Member State, when it is not intended that that vehicle should be used essentially in the first Member State on a permanent basis and it is not, in fact, used in that manner.

For several decades, the European Commission has attempted to solve problematic issues in vehicle taxation, that is, in cross-border situations (high registration taxes on cars transferred between Member States in the context of the transfer of permanent residence, the multitude of different and uncoordinated thresholds, and technical triggers for different levels of taxation such as engine size, fuel used or CO₂ emissions⁶). The type, structure, and level of taxation of motor vehicles are influenced not only by the different tax bases and rates, but also by the location of the country, social background of the citizens, state of infrastructure, country's transport policy, structure of the industry, environmental protection level and so on. It is these factors that are also reflected in the tax area and consequently affect not only the freedom to decide in which of the EU Member States to purchase a vehicle, where to register it, and where to pay taxes when changing residence or company headquarters, but ultimately also the competitiveness of entrepreneurs in individual Member States.

Three initiatives of the European Commission should be mentioned regarding circular and registration taxes. In 1983, the Council Directive that restricts the rights of Member States to apply consumption taxes to vehicles⁷ was adopted. In 1998, the proposal introducing a mandatory exemption when private motor vehicles were permanently brought into a Member State from another Member State in connection with the transfer of normal residence of a private individual was presented. The most substantial proposal was introduced in 2005.⁸ The Commission aimed to abolish registration taxes altogether (over a transitional period of five to ten years) and replace them with annual ('green') circulation taxes. The lost revenue from registration taxes would be offset by higher rates of motor vehicle taxes paid annually. The EU has also developed a possible scenario (although it has been withdrawn from the EU website⁹). The sustainability was expressed by the demand to restructure the tax base to include elements directly related to carbon dioxide emissions of (passenger) cars. The 2005 proposal aimed only to establish an EU structure for passenger car taxes and not to harmonise tax rates or oblige Member States to introduce new taxes. The following negotiations between the EU Member States

6 | European Commission, 2012a, p. 2.

7 | Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another.

8 | European Commission, 2005.

9 | European Commission, 2008.

in the Council were unsuccessful, and the Commission withdrew the proposal in 2015. Moreover, the 1998 proposal never received the required unanimous support of the Member States.

To summarise, the level of harmonisation of national fiscal provisions applied by the Member States in motor vehicle taxation is currently extremely low. Only the Council Directive 83/182/EEC restricts the rights of Member States to apply consumption taxes to vehicles. In all other aspects, each EU Member State has almost full discretion to regulate car taxation. The only limitations are set in the Treaties (TEU and TFEU) containing general principles such as national provisions should not give rise to border-crossing formalities in trade between Member States and must respect the non-discrimination principle.¹⁰

| 3.2. Several notes on time and performance charges for the use of road infrastructure

In the road and motorway use taxation sector, the primary objective of European legislation is to prevent discrimination between road and motorway users from different countries and strengthen competition. The first step towards achieving these aims was Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures. The Directive became the European framework for methods of taxation of motorway and road use, such as tolls and vignettes. However, owing to the lack of consultation of the Directive with the European Parliament after the Council made some changes to the proposal, the Directive was declared invalid by a judgement of the Court of Justice on 5 July 1995. However, its effects, which were reasonable for achieving the goals, were maintained in the national regulations.

It was not until 1999 that a new directive was adopted. However, in practice, the Directive is referred to as the 'Eurovignette Directive' rather than by its official title, Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures. The Directive applies only to vehicles weighing more than 12 tonnes. It regulates a somewhat broader area than simply tolls (performance charges) and user (time) charges; it also regulates regular (circular) vehicle taxes in a framework. For example, this Directive includes the requirement to collect the tax only in the Member State where the vehicle is registered. Owing to the possibility of circumventing this provision (low or even zero rates in a Member State), minimum rates are also prescribed. Tolls and time charges are generally stipulated to be levied only for the use of motorways or multi-lane roads for motor vehicles and for the use of bridges, tunnels, and mountain passes. Unlike circular vehicle taxes, tolls and time charges are subject to maximum rates, however, for the same anti-discriminatory reasons and to ensure the free movement of services.

The Eurovignette Directive was amended several times. Since 2006,¹¹ the range of vehicles covered by the provisions of the Eurovignette Directive was extended to include

10 | European Commission, 2012b.

11 | Directive 2006/38/EC of the European Parliament and of the Council of 17 May 2006 amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures.

vehicles weighing between 3.5 and 12 tonnes, with effect from 2012. In 2011,¹² the scope of the Directive was extended to cover the Member States' motorways network, which is not part of the TEN-T. Moreover, the amendment states that the Member States shall impose either tolls or user charges; only for the use of bridges, tunnels, and mountain passes, tolls may be imposed in either case. User charges shall be proportionate to the duration for which the infrastructure is used, not exceeding a certain percentage for a day, week, month, or year. New sustainability aspects occurred: the external-cost charge may be related to the cost of traffic-based air pollution, and if road sections are crossing areas with a population exposed to road traffic-based noise pollution, the charge may also include the cost of this pollution. Member States have to determine the use of revenues received under the Directive, and they should invest the proceeds in a manner that makes transport more sustainable.¹³

The latest important amendment was adopted in 2022.¹⁴ The ecological and sustainable aspects are crucial as the amendment aims to phase out the time-based charging model across the core trans-European transport network by 2030 and replace it with distance-based charges (tolls). Member States have the option of establishing a combined charging system for (all or some types of) heavy-duty vehicles, which would bring together distance and time-based elements and integrate the two variation tools (the new one based on CO₂ emissions and the existing one based on EURO classes). The new system means fully implementing the 'user/polluter pays' principle. However, individual Member States have the flexibility to design their road charging systems; they can apply different tolls and user charges for different categories of vehicles.¹⁵

| 3.3. National regulations

As aforementioned, this study examines two basic types of taxes on motor vehicles. The registration tax is payable at the time of acquiring the vehicle or, in some cases, when it is first put into service. For the purposes of this study, the term 'registration tax' covers all types of taxes currently linked to the registration of a vehicle, not considering the title of such a public payment. In practice, this term includes taxes, charges, fees, excise duties, different types of environmental bonus-malus schemes and so on. However, it does not include VAT, administrative fees connected with the registration of a vehicle, or technical inspection costs. The registration tax as a one-time tax is sensitive to the economic cycle owing to the downturns in economic activities during the recessions.

The circulation tax on motor vehicles is paid periodically (usually yearly). The term 'circulation tax' does not cover tolls, vignettes, and excise taxes on fuels. The circulation tax is generally connected with the possession of the vehicle. As it is a property tax, one would expect the connection with the ownership. However, owing to the high number of cars on lease owned by leasing companies, the possession and usage of the vehicle is more appropriate when setting the taxpayer. The circulation tax is more common in the

12 | Directive 2011/76/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures.

13 | Weismann, 2013, pp. 11–13.

14 | Directive (EU) 2022/362 of the European Parliament and of the Council of 24 February 2022 amending Directives 1999/62/EC, 1999/37/EC and (EU) 2019/520, regarding the charging of vehicles for the use of certain infrastructures.

15 | Croner-i, 2022.

EU Member States compared with the registration tax. Double taxation is impossible as the circulation tax is levied only in the State in which a car is registered. Generally, the circulation tax is a stable revenue source for public budgets since vehicles are liable for the tax for their entire lifetime, therefore, the tax is not sensitive to the economic cycle. In addition to the fiscal function, the circulation tax has some regulative (ecological) effects: it may be differentiated according to the type of car, type of engine, engine size or engine power, the fuel used, or the environmental performance of the vehicle.

3.3.1. Registration tax

In 2012, I published a table summarising motor vehicle taxes in the EU Member States that was valid in 2012¹⁶ (according to the Taxes in Europe Database¹⁷). Concerning the registration tax, 19 countries were collecting any registration tax. In the same year, the European Commission published a Commission staff working document¹⁸ mentioning 18 EU Member States collecting registration taxes. Comparing both materials, I did not mention France, while the European Commission omitted Bulgaria and Latvia. Table 1 combines both sources.

Table 1: Registration taxes in the EU Member States in 2012

State	Tax	Tax base
Austria	Standard consumption tax	Price, fuel consumption, CO ₂ emissions
Belgium	a. Vehicle registration tax b. Eco-Malus (Région Wallonne)	Engine power
Bulgaria	Vehicle registration tax	Engine power or weight and number of axles (depending on the type of vehicle)
Cyprus	Registration tax	Engine power, CO ₂ emissions
Denmark	Registration tax	Price, fuel efficiency
Finland	Car tax	CO ₂ emissions
France	a. Tax on vehicle registration certificates b. Additional tax on registration certificates – Malus applicable to polluting passenger cars	a. Horsepower b. CO ₂ emissions
Greece	a. Registration tax b. Luxury tax	Price
Hungary	Registration tax	Engine power, year of manufacture, fuel type
Ireland	Vehicle registration tax	CO ₂ emissions
Italy	a. Provincial registration tax b. Stamp duty and tax on value-added tax	Engine type and power
Latvia	Vehicle registration tax	CO ₂ emissions, year of manufacture
Luxembourg	Motor vehicle tax	CO ₂ emissions
Malta	Motor vehicle registration tax	CO ₂ emissions, vehicle value
The Netherlands	Tax on passenger cars and motorcycles	Price, fuel type, CO ₂ emissions
Poland	Excise duty levied on vehicles before first registration in the territory of Poland	Price
Portugal	Tax on motor vehicles	Engine power, CO ₂ emissions

16 | Radvan, 2012, pp. 138–141.

17 | European Commission, 2012d.

18 | European Commission, 2012.

Romania	Registration tax	Engine power, CO ₂ emissions, vehicle type
Slovenia	Motor vehicle tax	Price, CO ₂ emissions, fuel type
Spain	Excise tax on certain means of transport	Price

As aforementioned, in 2005, the European Commission proposed abolishing registration taxes altogether in a horizon of five to ten years. The Commission was aware that the registration tax created a significant part of the budget revenues for some countries and prepared a possible scenario for replacing the lost revenue from registration taxes with higher rates of circular motor vehicle taxes.

Table 2: Impact of shifting registration taxes to circular taxes in EU Member States¹⁹

	Registration tax 2005 (EUR)	Registration tax 2015 (EUR)	Circular tax 2005 (EUR)	Circular tax 2015 (EUR)	Difference in circular tax 2005 – 2015
Austria	1,556	0	180	321	78 %
Belgium	307	0	303	335	11 %
Denmark	14,400	0	370	1,347	264 %
Finland	11,108	0	239	587	146 %
France	0	0	49	49	0 %
Germany	0	0	130	130	0 %
Greece	1,887	0	119	198	66 %
Ireland	3,737	0	292	585	100 %
Italy	181	0	147	160	9 %
Luxembourg	12	0	79	81	3 %
The Netherlands	4,438	0	494	811	64 %
Portugal	4,520	0	40	568	1,314 %
Spain	1,341	0	57	144	152 %
Sweden	0	0	170	170	0 %
Great Britain	0	0	230	230	0 %

In addition to replacing registration tax revenue with circular tax revenue, the second theme of the Commission's proposal was sustainability. The 'green taxation' principle was expressed by the demand to restructure the tax base to include elements directly related to the carbon dioxide emissions of cars.

However, the following negotiations concerning the 2005 Commission proposal on passenger car-related taxes between the EU Member States in the Council were unsuccessful. It was impossible to receive the required unanimous support of the Member States. In 2015, the Commission completely withdrew the proposal.

Proceeding to 2024, according to the Taxes in Europe Database,²⁰ the motor vehicle registration tax is collected in the following countries:

19 | European Commission, 2008. All numbers are the average taxes in each country.

20 | European Commission, 2024.

Table 3: Registration taxes in EU Member States in 2024

State	Tax	Tax base
Austria	Standard consumption tax	Price, CO ₂ emissions (no tax on electric cars)
Belgium	Vehicle registration tax	Engine power, CO ₂ emissions
Bulgaria	a. Vehicle registration tax b. Environmental fee	Price Vehicle type
Croatia	Special tax on motor vehicles	Price, CO ₂ emissions
Denmark	Registration tax	Price, CO ₂ emissions
Finland	Car tax	CO ₂ emissions
France	a. Tax on vehicle registration certificates b. Additional tax on registration certificates - Malus applicable to polluting passenger cars	a. Horsepower b. CO ₂ emissions
Greece	a. Registration tax	Price, CO ₂ emissions
Hungary	Registration tax	Engine power, year of manufacture, fuel type
Ireland	Vehicle registration tax	Price, CO ₂ emissions
Italy	a. Public motor vehicle register tax b. Stamp duty and tax on value-added tax	Engine type and power, EURO limits
Lithuania	Motor vehicle registration fee	CO ₂ emissions
Latvia	Vehicle registration tax	CO ₂ emissions
Malta	Motor vehicle registration tax	CO ₂ emissions, length
The Netherlands	Tax on passenger cars and motorcycles	Price (only motorcycles), fuel type, CO ₂ emissions
Poland	Excise duty levied on vehicles before first registration in the territory of Poland	Price
Portugal	Tax on motor vehicles	Engine power, CO ₂ emissions
Romania	Environmental stamp duty	Engine power, CO ₂ emissions, vehicle type
Slovakia	Registration tax	Engine power
Slovenia	Motor vehicle tax	CO ₂ emissions, fuel type
Spain	Special tax on certain means of transport	Price

Comparing Tables 1 and 3 demonstrates that only a few countries changed their tax base towards sustainability. However, in several states, CO₂ emissions play a more significant role (e.g. in Denmark). It is insufficient to refer only to environmental aspects in the title but to leave the tax base as the type of the vehicle (Bulgarian Environmental fee).

3.3.2. Circular tax

The overview of motor vehicle circulation tax in EU Member States in 2012 was published in my previous study²¹ (according to the Taxes in Europe Database²²). These data, improved by a Commission staff working document²³ published in the same year, serve as a source for the following Table 4. Interestingly, there was no circular tax on motor vehicles in Estonia. Moreover, the Commission materials stated that no circular tax was collected in France, Poland, and Lithuania.

21 | Radvan, 2012, pp. 138–141.

22 | European Commission, 2012d.

23 | European Commission, 2012.

Table 4: Circular taxes in EU Member States in 2012

State	Tax	Tax base
Austria	Motor vehicle tax	Weight, engine power
Belgium	Motor vehicles tax - Tax on traffic circulation	Engine power
Bulgaria	Transport vehicles tax	Engine power, year of manufacture
Cyprus	Motor vehicle tax	Engine power, CO ₂ emissions
The Czech Republic	Road tax	Engine power (personal cars), combination of weight and number of axles (other vehicles)
Denmark	a. Motor vehicle weight tax b. Green tax on personal motor vehicles	a. Weight b. Fuel consumption
Finland	Vehicle tax	Weight, CO ₂ emissions
France	Business vehicle tax	Engine power, CO ₂ emissions
Germany	Motor vehicle tax	Engine power, weight, CO ₂ emissions
Greece	Road tax on motor vehicles	Engine power, weight, number of seats, CO ₂ emissions
Hungary	Motor vehicle tax	Engine power, weight
Ireland	Motor vehicle duty	CO ₂ emissions
Italy	Motor vehicle tax	Engine power, weight
Latvia	Vehicle operation tax	CO ₂ emissions, weight
Lithuania	Business motor vehicle tax	Weight
Luxembourg	Motor vehicle tax	CO ₂ emissions, fuel type
Malta	License fee on motor vehicles	Engine power, fuel type, year of manufacture
The Netherlands	Motor vehicle tax	Weight, fuel type, regional surcharge
Poland	Motor vehicle tax	Weight
Portugal	Motor vehicle tax	Engine power, weight, number of axles, CO ₂ emissions
Romania	Motor vehicle tax	Engine power, weight, number of axles
Slovakia	Motor vehicle tax	Engine power, weight, number of axles
Slovenia	Motor vehicle usage charge	Engine power, weight, number of seats
Spain	Motor vehicle tax	Engine power
Sweden	Motor vehicle tax	CO ₂ emissions, fuel type
The United Kingdom	Motor vehicle tax	CO ₂ emissions

Circular taxes on motor vehicles in EU Member States appeared less modern and more conservative than the registration taxes. The aspects of weight and engine power prevail when setting the tax base. However, as early as 2012, there were sustainable aspects of CO₂ emissions in several countries, specifically in Benelux, Scandinavia, and also in the United Kingdom. Over the last 12 years, legislative developments have been characterised by a greater inclination towards the green aspects of motor vehicle taxation in EU Member States, as evident from the Taxes in Europe Database.²⁴

Table 5: Circular taxes in EU Member States in 2024

State	Tax	Tax base
Austria	Motor vehicle tax	CO ₂ emissions
Belgium	Motor vehicles tax - Tax on traffic circulation	Engine power
Bulgaria	Transport vehicles tax	Engine power, year of manufacture
Croatia	Tax on road motor vehicles	Engine power, year of manufacture
Cyprus	Motor vehicle tax	CO ₂ emissions
The Czech Republic	Road tax	Combination of weight and number of axles
Denmark	a. Motor vehicle weight tax b. Green tax on personal motor vehicles	a. Weight b. Fuel consumption
Finland	Vehicle tax	CO ₂ emissions, weight
France	a. Annual tax on CO ₂ emissions b. Annual tax on air pollution	a. CO ₂ emissions b. Pollutions levels
Germany	Motor vehicle tax	CO ₂ emissions, engine power, weight
Greece	Road tax on motor vehicles	CO ₂ emissions, weight, number of seats
Hungary	a. Motor vehicle tax b. Company car tax	a. Engine power, weight b. Engine power, environmental protection class
Ireland	Motor vehicle duty	CO ₂ emissions
Italy	Motor vehicle tax	Engine power, weight
Latvia	Vehicle operation tax	CO ₂ emissions, weight
Lithuania	Motor vehicle tax	Vehicle emission class
Luxembourg	Motor vehicle tax	CO ₂ emissions
Malta	License fee on motor vehicles	CO ₂ emissions
The Netherlands	Motor vehicle tax	Weight, fuel type, CO ₂ emissions, regional surcharge
Poland	Motor vehicle tax	Weight
Portugal	Motor vehicle tax	Engine power, weight, number of axles, CO ₂ emissions
Romania	Motor vehicle tax	Engine power, weight, number of axles
Slovakia	Motor vehicle tax	Engine power, weight, number of axles
Slovenia	Motor vehicle usage charge	CO ₂ emissions, Euro emission standards, fuel type
Spain	Motor vehicle tax	Engine power
Sweden	Motor vehicle tax	CO ₂ emissions, fuel type
The United Kingdom	Motor vehicle tax	CO ₂ emissions

Comparing regulations between 2012 and 2024, several states began using CO₂ emissions or other ecological tools as the tax base (e.g. Austria, France, Slovenia, Lithuania) or increased the importance of CO₂ emissions in determining the tax base (e.g. Malta, the Netherlands, Sweden).

4. Discussion

The first important issue to be clarified is the characteristics of taxes and charges/fees (or other public payments, such as levies and duties) connected with motor vehicles. The systematics of these taxes have been conducted in the Introduction section. In

addition to VAT and fuel taxes, three types of taxes on motor vehicles can be identified. In principle, two basic types of taxes on motor vehicles can be distinguished: registration tax, circular tax, and various fees and other charges for using the motorway and road network (vignettes and tolls). The registration tax is payable at the time of acquiring the vehicle or when it is first put into service. From these perspectives, the registration tax is similar to an (indirect) excise tax. Similar to alcohol or tobacco excise taxes, the sum of the price of a motor vehicle and the registration tax is the tax base for the value-added tax. Altogether, these public payments create the final price to be paid by the customer. From this perspective, the tax is sensitive to the economic cycle.

The circulation tax is a periodical tax related to the ownership or possession of the vehicle. It is a typical property tax to a certain limit, similar to an immovable property tax. As a tax on property, it should be identified as a direct tax (being paid directly by the taxpayer to the tax office, calculated by a taxpayer, and based on a tax return). However, according to the Taxes in Europe Database,²⁵ some countries classified it as an indirect tax. As a tax paid regularly for the entire lifetime of the vehicle, it is not sensitive to the economic cycle and creates a stable source of public revenues.

| 4.1. *Selected structural components of motor vehicle taxes*

The research on registration and circulation taxes on motor vehicles in the EU Member States indicated that the system of taxes on motor vehicles is extremely different. Regardless of the fact that the titles of taxes are often similar, the structural components differ. For example, the circulation tax should be connected with the vehicle's possession (or usage) as the high number of cars on lease are owned by leasing companies. Although possession and/or usage of the vehicle is more appropriate and preferable when setting the taxpayer, many countries continue to indicate the owner as a taxpayer (e.g. leasing companies contractually pass on the tax costs to the car user).

The other problematic issue is the definition of the object of taxation. Thus, which motor vehicles should be liable to taxation? As the Eurovignette Directive sets minimum circular tax rates for all vehicles with a weight over 12 tonnes, it can be stated that all trucks exceeding this limit are to be taxed. However, in the case of vehicles below this limit, the EU Member States are free to tax or not tax them. The Czech Republic can serve as an excellent example where private (non-business) personal cars were never liable to tax. In the middle of 2022 (and with a retroactive effect from 1 January 2022), the amendment to the Road Tax Act²⁶ was published. According to the existing valid legal regulation, the objects of taxation are no longer all vehicles with a weight lower than 3.5 tonnes, that is, all personal cars. With respect to the Eurovignette Directive, other vehicles continue to be liable to tax. Nevertheless, the effective motor vehicle tax (non-zero tax rate) is levied on a vehicle of a certain number of axles only from a certain specified tonnage of its maximum permissible weight (for example, for single vehicles with two axles up to 12 tonnes, for vehicles with three axles up to 16 tonnes).²⁷ Similar discussions can be held about which vehicles should be liable for registration tax.

Other interesting differences can be found in the construction of the tax base. The price is highly expected to be selected as the criteria for the registration tax as an excise

25 | European Commission, 2024.

26 | Act no. 16/1993 Sb., as amended.

27 | Radvan, 2023, p. 234.

tax. However, the registration tax can also be considered as a type of surcharge to the price of the vehicle. Such a surcharge can be influenced by engine power, fuel type, fuel consumption and so on. As a registration tax is increasingly considered as a green (ecological) tax, CO₂ emissions play a more crucial role in the tax base construction. Interestingly, in some countries (Hungary and Latvia), the age of a motor vehicle can influence the registration tax.

Some of these findings concerning the tax base are also valid for the circular tax. However, CO₂ emissions are becoming even more relevant compared with the registration tax. In practice, splitting the EU Member States into two groups is possible. In the first group, the circular tax is a type of ecological tax where primarily CO₂ emissions (Euro emission standards, environmental protection classes, pollution levels, etc.) are the tax base. The second group is created by countries with the more traditional concept of determining the tax base, usually by the engine capacity. However, some countries, following the principle of load and road damage, use the combination of the weight of the vehicle and the number of its axles to set the tax base. As the circular motor vehicle tax is a typical property tax, the interesting fact is some countries continue to consider the year of manufacture: if the tax rate is increasing with the age of the vehicle, it is not related to the basic idea of property tax being imposed on the value of the property.

Comparing the tax rates of both registration and circular motor vehicle taxes is irrelevant, as the constructions of tax bases differ significantly. Moreover, the degree of legislative discretion to invent various corrective elements in the form of tax reliefs, exemptions, and other reductions is infinite. It could be generalized that many of the corrective elements are linked to the public utility of motor vehicles and environmental aspects. For example, an interesting question arises about electric cars, which are exempt in some countries (e.g. Austria²⁸).

| 4.2. *EU harmonisation tendencies*

As evident from the text above, the level of motor vehicle taxation in individual EU Member States differs. The reasons are primarily historical developments and social background. The EU Member States have a broad level of freedom in determining taxes on motor vehicles because this field of taxation is not harmonised at the EU level. To be fair and transparent, any harmonisation is almost impossible owing to the unanimity requirement for harmonisation in the field of indirect taxes under Article 113 of the Treaty on the Functioning of the European Union (TFEU). The freedom of EU Member States in determining taxes on motor vehicles is limited to certain limits according to Article 110 of the TFEU. This article comprises some general principles, primarily the prohibition of tax disadvantages for imported products.²⁹

As some taxes on motor vehicles are considered direct taxes, it is also necessary to distinguish between the usage of Article 113 and Article 115 of the TFEU; the Court of Justice of the European Union does not accept European legislation that is passed based

28 | European Commission, 2024.

29 | No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products'.

on bad regulations.³⁰ While Article 113 of the TFEU allows harmonisation ‘necessary to ensure the establishment and functioning of the internal market and to avoid distortion of competition’, Article 115 of the TFEU allows approximation directly affecting ‘the establishment or functioning of the internal market’. The differences between Articles 113 and 115 of the TFEU are essential for establishing the basis of regulations for direct and indirect taxes. Therefore, specific and extremely detailed definitions of direct and indirect taxes is important.

The research revealed that double taxation in motor vehicle taxation within the EU is highly improbable. While charges for the use of motorways and roads are levied only on the use of the transport infrastructure of individual EU Member States, a single circulation tax is guaranteed by both case law and the Eurovignette Directive. In the case of registration taxes, double taxation is possible only if the second State applies a registration tax on second-hand vehicles. Such a situation was solved by the case law. The Court of Justice of the EU decided (in the context of Article. 110 of the TFEU) that:

when a registration tax is imposed only once in the lifetime of a vehicle, the amount of that tax is incorporated in the value of the vehicle. A second-hand vehicle, which was first registered and on which registration tax was paid as new, incorporates in its value a ‘residual tax’ that diminishes proportionally with the depreciation of the vehicle. The Court considered that a system of taxation should be capable of guaranteeing that the tax due on a second-hand vehicle transferred from another Member State does not exceed, even if only in certain cases, the amount of the ‘residual tax’ incorporated in the value of similar vehicles already registered in the national territory.³¹

Although double taxation is not an extremely problematic issue connected to motor vehicle taxation in the EU, some others should be discussed, as evidenced in this study. The most concerning issue appears to be the registration tax. Table 3 presents the differences among individual EU Member States not only in terms of whether the registration tax is applied, but also in the construction of the tax base. Moreover, if the price is the tax base and the tax rate is extremely high, the registration tax creates an obstacle to the free movement of goods. The most notable example is Denmark, where the basic tax rate was 105% of the vehicle price. The increased rate of 180% was applied for the remainder of the price exceeding DKK 62,700.³²

If the registration tax in one country is collected, and specifically if it is highly above average, the price for the consumer significantly increases. In some cases, such a high price influences the decision of the consumer, who eventually decides to buy a car in another country where the registration tax is not imposed or is lower, which means a lower final price. Car manufacturers and distributors are aware of this situation and attempt to incorporate the differences in vehicle registration taxation into the final prices for customers, usually by setting the lower prices of the vehicle, excluding taxes. Shehaj

30 | Judgement of the Court of 11 June 1991. *Commission v Council*. Case 300/89. See also Barents, 1993, and Dougan, 2000.

31 | European Commission, 2012, p. 10. Bases on case C-47/88 *Commission v Denmark*, paragraph 20, and Judgement of 9 March 1995, case C-345/93 *Fazenda Pública and Ministério Público v Américo João Nunes Tadeu*, paragraph 13. See also Costas, 2007.

32 | European Commission, 2012, p. 25.

and Zagler³³ confirmed that firms tend to offer lower motor vehicle pre-tax prices to compensate for the higher tax effect. Consequently, in countries where registration taxes are applied to purchased cars, it is usually possible to buy a car cheaper. Thus, customers from countries where a registration tax is adopted are purchasing and registering cars not in their home country, while customers from countries where no registration tax is collected, buy vehicles in countries where a registration tax is adopted and they register them in their home country. The described situation does not violate Article 28 of the TFEU, guaranteeing the free movement of goods, as the registration tax is not a customs duty on imports and exports or a charge having an equivalent effect. Moreover, no TFEU tax provision (Article 110 – 113, Article 115) has been breached. However, according to Article 26 of the TFEU, the EU ‘shall adopt measures with the aim of establishing or ensuring the functioning of the internal market.’ The internal market is defined as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured’. I believe that the ‘Danish case’ described above can be considered to a certain limit as the ‘internal frontier’ and that the EU should adopt mechanisms to ensure the functioning of the internal market, specifically to adopt rules regulating registration taxes on motor vehicles.

In contrast, the regular circulation tax on motor vehicles generally does not have such an intensive tendency to influence the economic decisions of the taxpayers. It does not interfere with the free movement of goods between the EU Member States. Circulation taxes on motor vehicles do not have any influence on the internal market: taxes are paid in the country where the taxpayer lives, and it is improbable that any taxpayer shifts to another country because of a circular tax on motor vehicles. The internal market principle could possibly be violated only if some countries have extremely high tax rates.

5. Conclusion

The preceding text has clearly demonstrated that the level of motor vehicle taxation in individual EU Member States differs not only in the number and type of taxes imposed on motor vehicles, but also in the legal construction of individual structural components such as the taxpayer, object of taxation, tax base, and tax rate, corrective elements. The level of harmonisation in motor vehicle taxation is currently extremely low. Only the Council Directive 83/182/EEC restricts the rights of Member States to apply consumption taxes to vehicles. In all other aspects, each EU Member State has almost full discretion to regulate car taxation. The only limitations are set in the Treaties (TEU and TFEU) containing general principles such as national provisions should not give rise to border-crossing formalities in trade between Member States and must respect the non-discrimination principle.³⁴ European cooperation regarding motor vehicle taxation is limited, and the competition between the EU Member States prevails. This conclusion is also owing to the fact that any harmonisation is almost impossible owing to the unanimity requirement for harmonisation in the field of indirect taxes under Article 113 of the TFEU.

33 | Shehaj and Zagler, 2023, p. 181.

34 | European Commission, 2012b.

However, extremely high registration taxes on motor vehicles in some EU Member States are causing significant differences in final prices for consumers and influencing their decision about where to buy and in what country to register the motor vehicle. Yanatma presented many examples of car prices before and after different taxes on motor vehicles.³⁵ Moreover, they influence the pricing of manufacturers and distributors in terms of motor vehicle pre-tax prices. Although the free movement of goods principles and general tax principles, as mentioned in TFEU, are not violated, the internal market principle could possibly be breached. As the regular circulation taxes on motor vehicles generally do not have such an intensive tendency to influence the economic decisions of the taxpayers, the internal market principle could possibly be violated only if some countries have extremely high tax rates.

The hypothesis stated in the Introduction was confirmed only partially. The EU rules concerning car taxation are adequate with regard to single market principles. However, the EU rules in this area are not acceptable in terms of economic circumstances. The European Commission, being aware of this statement, focused primarily on registration taxes and proposed the Directive on passenger car related taxes³⁶ in 2005. The chief aim was, among other things, to abolish registration taxes altogether over a transitional period of five to ten years. However, the following negotiations with the EU Member States were not successful; the proposal never received the required unanimous support, and the Commission withdrew the proposal in 2015. In the period from 2012 to 2024, the registration tax was really abolished only in Cyprus and Luxembourg; however, it newly occurred in the tax systems of Bulgaria, Croatia, Lithuania, and Slovakia.³⁷

After 2015, there are no longer any attempts by the European Commission to regulate or harmonise registration taxes on motor vehicles. It should also be recalled that in the case of circular taxes on motor vehicles, such attempts have never been made in history. However, harmonisation failures do not mean that the legal regulation regarding car taxation at the European and national levels could be better. *De lege ferenda*, several motivational factors should be considered to improve the regulation.

Primarily, existing legal rules concerning registration taxes, together with extremely high tax rates in several EU Member States, constitute an economic barrier: not only companies and entrepreneurs, but also non-business individuals adapt their behaviour to the tax law regulation and buy in such countries where they achieve the best final price of the motor vehicle. Often, it is an uncomfortable, time-consuming solution with multiple costs. Therefore, the registration taxes on motor vehicles should be entirely abolished. Considering that such a solution does not have political support, another solution may be setting maximum registration tax rates at the European level, ideally in combination with harmonising the tax base. The tax base should be green-based, determined by the amount of CO₂ emissions, to follow sustainable and polluter-pays principles. In practice, the trend to change the tax towards greening is not apparent; only a few countries changed their tax base towards sustainability between 2012 and 2024. However, in several states (e.g. Denmark), CO₂ emissions began to play a more significant role.

Circular taxes on motor vehicles should remain under the responsibility of each EU Member State, and the EU should refrain from taking steps to harmonise this area of

35 | Yanatma, 2023.

36 | European Commission, 2005.

37 | European Commission, 2024.

taxation. Any harmonisation considerations would only be permissible if the tax rates in a particular country were exceptionally high. Nevertheless, the principles of sustainability should be strengthened in national regulations. Taxes on motor vehicles are an ideal example of reflecting environmental elements. Comparing regulations between 2012 and 2024, several states began using CO₂ emissions as the tax base (e.g. Austria, France, Slovenia) or increased the importance of CO₂ emissions in determining the tax base (e.g. Malta, the Netherlands, Sweden). Other countries use different ecological values to determine the tax base (e.g. emission classes in Lithuania and pollution levels in France concerning the annual tax on air pollution). The most common is the use of ecological instruments in constructing corrective elements, typically tax exemptions and tax reliefs. Some countries (e.g. Austria) have no circular tax on electric cars.

To summarise, CO₂ emissions appear to be the best (although not the only) tool to be used as the circular motor vehicle tax rate. Kunert and Kuhfelt highlighted the need to begin using more CO₂ emissions as early as 2007.³⁸ Moreover, David prefers CO₂ emissions, arguing that the taxation of motor vehicles should be an essential tool to fulfil the obligations of the Kyoto Protocol.³⁹ Moreover, he highlights the fiscal function of motor vehicle taxes in the sense of the selection of means for the renewal of environmental and other damage caused by the operation of motor vehicles.

38 | Kunert and Kuhfelt, 2007, p. 315.

39 | David, 2012, p. 490; David, 2024, pp. 121–136.

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THE EUROPEAN UNION PERSPECTIVE IN CIVIL LAW MATTERS: FROM DIRECTIVES TO REGULATIONS

Sanja Savčić¹

ABSTRACT

This study focuses on the extent to which traditional legal systems have been changed within the EU, considering that issues of civil law were initially regulated by directives and later by regulations. The study discusses a few points of private law to understand its position within the EU. First, there is a basic division of law into public and private law. Second, it is necessary to outline the importance of a long legal tradition among Member States of the EU. This helps to understand the EU competence in private law. Finally, this study examines the trend of adopting regulations in civil law matters, which is uncommon in this area and assesses whether there is a genuine need for the removal of legislative attention. The study concludes with proposals and conclusions about the issue.

KEYWORDS

legal tradition
civil law codes
unification
harmonisation
directive
regulation

1. Public and private law

Among lawyers on the European continent, division of law into public and private law followed their professional development from the very beginning of legal education and later, in legal practice. Principally, there is no normative ground to formally distinguish between these two antipodes of law. Distinguishing between public and private has its roots in legal history on the European continent. Modern European private laws are primarily based on Roman legal heritage. According to available historical literature, only one source of Roman law supplied clear definition of the two concepts. Justinian's Digests, provides a quotation by Ulpian explaining public and private law, in a manner

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that public law refers to the position of the Roman state, and private law refers to individuals.² This approach was not further developed until the second half of 19th century, when legal scholars offered several theories on criteria for distinction, which aimed to clearly explain these two confronted legal categories. Naturally, expressed opinions led to a new field for legal discussion, and each attempt to examine all attitudes and opposing views, could be considered too ambitious.³ For the purpose of this research, crucial and common specifics of both will be presented.

Public law, roughly determined, protects interests of the public, community, or more precisely, state. Contrarily, private law supplies the legal framework to protect (or support) interests of individuals, natural or juridical persons, about their private sphere, part of life not perceptibly relevant for functioning of the state.

Vodinelić denied term of interest, as the most flexible, expandable, and therefore the least reliable, among almost forty that he observed.⁴ As this study does not examine in detail all of them, for practical purpose, this theory would be a framework for our discussion on private law in EU, primarily because of its weak point: its flexibility. To understand reasoning, the object of protection, which means interest of state, or community, does not appear to vanish simply because that interest could be reshaped over and over, during the long history, whatsoever. Thus, it is comfortable to describe crucial differences, or rather principles that distinguish between the two categories of law.

Although norms on matters of public relevance, or state interest are imperative (*ius strictum*), in private law, dispositive nature of provisions (*ius dispositivum*) dominates. Therefore, scholars prefer to remark the principle of subrogation in public law affairs, and principle of coordination in private law relationships.⁵ This is a natural consequence of the focus of law makers. At the first case, authorities attempt to set legal ground and institutional instruments for establishing a state, and society, functional and protective for all citizens. On the other side, authorities do not interfere into relationships between citizens on their own interests. These relations are created by their own, free will. Consequently, provisions in laws on private law matters primarily tend to eliminate potential gaps, to preserve voluntarily formed legal relationship. Expectedly, this distinction causes further difference, such as measures to achieve and maintain the goal, remedies, procedure *ex officio* or *ex privato*. However, the distinction between public and private is not absolute, rather fluid. Impact of the need to preserve public interest in private law regulations is visible (and necessary) in specific points, however, it could be implemented into the strict framework of imperative norms, or public order. It is common that there are boundaries to freedom to contract, parental issues are at certain point under the state control, civil procedure is strict, formal, and hence imperative.

The EU documents exceptionally mention private/public distinction, however, when it is the case, private law considers horizontal relationships between private parties (citizens, companies) or between the state, acting in its private-law capacity, and citizens,

2 | Padjen, 2007, p. 445.

3 | Detailed presentation of the theories about the distinction between public and private law see in Vodinelić, 1982, pp. 657–709.

4 | Vodinelić, 1982, pp. 672–673.

5 | Padjen, 2007, p. 449.

while public law regulates vertical relationships, in which the state exercises its subordination over citizens and companies.⁶

Legal system could not be functional, dependable, and efficient if it was divided sharply into two parts: public and private law. However, this approach lies in historical development of law on the European continent. Considering the need to preserve integrity of each legal system, we would like to point out that such division has already been made in national legal traditions in Europe.

2. Is there any legal system in the EU?

The EU law could not consider legal system in the traditional meaning. Instead, the EU law comprises thousands of legal documents, adopted following sectoral approach, or aiming to achieve specific gain. Therefore, it is difficult to discuss legal area, as it is usual in national legal traditions. In the absence of full normative competence, and in addition, with a different legal binding power of the EU acts, institutions of traditional private law could be analysed through the legal rules. Moreover, in some official reports of the European Union *acquis communautaire* was determined as extremely complex, untidy, unsystematic, and disorganised. Moreover, numerous acts are out of date and hence inapplicable.⁷ Considering this, it is not exaggerated to claim that EU law is extremely complex and difficult to apply or even understand. Therefore, to work in his own profession, a lawyer must be acknowledged of various sectoral legal act. If we add complexity of primary and secondary EU law, fear of possible weak functionality leads us to discussion on measures to achieve the chief goal of the EU.

3. Treaty on the Functioning of the European Union and private law

From the very beginning, the EU as well as its predecessors, did not distinguish between public and private law. Creators decided to adopt a functional approach, which appears to be in a course of gaining the purpose of common entity. Member States, by acceding to the EU, legally bound themselves to transfer one part of their sovereignty to the Union, to achieve economic and social progress of their States by common action to eliminate the barriers which divide Europe.⁸ The essential objective of their efforts was to constantly improve the living and working conditions of their people, strengthen the unity of their economies, and ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions.⁹ In accordance to Article 2/1 of the Treaty on the Functioning of the European

6 | Study Group on Social Justice in European Contract Law, 2004, p. 654.

7 | Nikolic, 2004, p. 107.

8 | TFEU, Preamble, para. 3.

9 | TFEU, Preamble, paras. 4, 6.

Union (TFEU), when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts; the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.¹⁰ When the competence is shared in a specific area, both the Union and the Member States may legislate and adopt legally binding acts in that area, however, the Member States shall exercise their competence to the extent that the Union has not exercised its competence, and to the extent that the Union has decided to cease exercising its competence.¹¹

Hence, distinction between private and public law is not of importance in the EU law, but the function of the legislature. Thus, the EU legislature is not bound by traditional approach of the law of the Member States. Instead, a criterion for distinguishing is whether the matter of regulation is of common relevance. Consequently, there is no general competence of the EU regarding the private law in its entirety. Certain relevant aspects that naturally belong to private law should be and they are regulated within the EU, following relevant articles of the TFEU.

With respect to this, several provisions provide grounds for legislative authorities. The most important are provisions of Articles 114, 115, and 352 of the TFEU. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.¹² The Council, in addition, shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment of the internal market.

From the very beginning, the private law issues that were considered of common interest for internal market were those that regulated freedom of establishment (and therefore, company law), consumer protection, product liability, employment contracts, doorstep selling, credit contract and, recently, intellectual property. With this regulation, the EU tends to eliminate obstacles in internal trade, obtain equality in common market, and provide equal protection of citizens (and their rights) over the EU.

Measures adopted in general private law were in the legal form of directives. This implies that the EU provides a goal that Member States must achieve, however, each country needs to adopt its own law, to accomplish the objective. During this process, states create concrete provisions that are in accordance with their legal system, legal tradition, and hence familiar to their citizens and their own trade interests. Using such an approach makes laws more convenient, which makes integration of national law into the EU more spontaneous, and therefore, easier. This is in accordance with principle of subsidiarity, provided in Article 5/3 of the TEC, that is, 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

10 | TFEU, Article 2/1.

11 | TFEU, Article 2/2.

12 | TFEU, Article 114/1.

reason of the scale or effects of the proposed action, be better achieved at Union level. In addition, when the Union act with regards to issues not governed by Union, under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the goals of the Treaties (Article 5/5).

To ensure proper application, protocol annexed to the Treaty establishing the European Community by the Treaty of Amsterdam (No 30)¹³ described subsidiarity in a simple manner. Thus, community action has been reduced to the extent necessary for achievement of the desired object of the measurement, aimed to provide effective enforcement. The form of action shall be as simple as possible, which supposed that directives are preferred legal form of measure. Binding power of directives consumes itself with results that shall be reached, and national authorities have the choice of form and methods of achieving the result. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures (Par. 6 of Protocol No. 30/1997), because of their direct applicability to the institution of the EU, and Member States.

The Lisbon Treaty's provisions made significant changes to subsidiarity considerations. Article 5 of the TFEU states that the Union shall act only if and insofar the goals of the proposed action cannot be sufficiently achieved by the Member States, at central or regional and local level, but can rather, by reason of the scale or effects of the proposed action be better achieved at the Union level. Although the Lisbon Treaty introduced regional and local level in addition to national parliament, a mechanism of ensuring principle of subsidiarity intact, makes the very principle more exposed, particularly considering the provision of Article 352, which is flexible on the competence of the EU perspective (flexible clause). This provision empowers the EU to regulate issues of private law that are not under the specific competence rules. Sincerely, special conditions are stated, however, it does not change the expandable nature of the provision. That is, action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to reach one of the aims set out in the Treaties, and the Treaties have not provided the necessary powers. Under these circumstances, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the proper measures. Same is the case where the measures in question are adopted by the Council following a special legislative procedure: the Council shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament. Usually, legal basis provided in Article 352 is possible in occasions when EU legislation seeks to create new legal phenomena, instead of replacing or harmonising existing laws in Member States.¹⁴

Considering a functional approach of the EU legislative, the very purpose of protecting single market within the EU members, and furthermore the close correlation between trade and matters of private law nature, it is legally understandable why the EU selected legal form of regulation, instead of traditional form of directives. This is considering the matters previously regulated by directives, however, recently replaced by regulations.¹⁵ The question is whether this tendency decreases or increases interrelationships in the

13 | Official Journal of the European Communities (OJEC). 10.11.1997, No C 340. [s.l.]. ISSN 0378-6986.

14 | Maňko, 2015, p. 12.

15 | For instance, General Data Protection Regulation (2016/679) has replaced Data Protection Directive (95/46/EC).

EU. Further, from the perspective of private law, more important question is whether this legislative contributes to the principle of equality, or whether it is the sign of incapacity to achieve equality.

4. Protection of the principle of subsidiarity – indirect protection of national legislative interests

As aforementioned, accompanied protocols¹⁶ to Lisbon Treaty introduced added steps in legislative procedure, to improve and reinforce monitoring of the principle of subsidiarity. Accordingly, in the earliest stage of proposing legislative acts, the European Commission must access extensively, since this engagement allows consulting not only national, but also regional and local institutions and civil society. However, legislative proposal of the Commission must be accompanied with detailed explanation of compliance with the principle of subsidiarity and proportionality.

Protocol on the role of national parliaments (No. 1) provides that national parliaments are associated with the monitoring of the principle of subsidiarity that could be exercised in two ways. First, national parliament has a right of objection, owing to a lack of proper consideration of the principle of subsidiarity, which could result in dismissing a legislative proposal before the Commission. At a later stage of legislative procedure, national parliament has a right to submit a disposal application before the Court of Justice of the European Union, which discusses whether the principle of subsidiarity has been observed.

Case law on this matter is valuable, not only for discussion, but also for the fact that court made relevant interpretation of the principle of subsidiarity, essential for further legislative initiatives.

For illustration, ECJ considered the validity of Article 7 of Directive 2014/40 considering the principle of subsidiarity. *Phillip Morris Brands and British American Tobacco* requested for a preliminary ruling in a proceeding against the Secretary of State for Health (United Kingdom),¹⁷ which concerned the interpretation and validity of numerous provisions of Directive 2014/40/EU on the approximation of the laws, regulations, and

16 | Protocol 1 and Protocol 2. In 2022, the European Parliament formally received 250 submissions from national Parliaments under Protocol No. 2 on the application of the principles of subsidiarity and proportionality. Of these 250 submissions, 34 (14%) were reasoned opinions and 216 (86%) were contributions (submissions not raising concerns about subsidiarity). By comparison, in 2021 there had been 227 submissions, of which 24 were reasoned opinions and 203 were contributions. In 2022, 13 out of 39 Parliaments/Chambers submitted reasoned opinions and 18 submitted contributions. Annual Report 2022 – Relations between the European Parliament and the EU National Parliament and the EU National Parliaments, p. 49.

17 | C-547/14, Judgement of the Court (Second Chamber), 4th May 2016 [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0547> (Accessed: 2 September 2024).

administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.¹⁸

Among other relevant questions, applicants asked for considering the validity of Article 7/1, 7/7, Article 8/3, 10/1, and 14, claiming that it is not in accordance with principle of subsidiarity and proportionality.

Article 7 regulates issues of ingredients of tobacco, proposing that Member States shall prohibit the placing on the market of tobacco products with a characterising flavour (Article 7/1) and placing on the market of tobacco products containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity. Additionally, filters, papers and capsules shall not contain tobacco or nicotine (Article 7/7).

Article 8(3), 9(3), 10(1)(g), and 14, impose various pack standardisation requirements, and provisions of Article 10(1)(a) and (c) require health warnings to cover 65% of the external front and back surface of the unit packaging and any outside packaging.

Discussing principles of subsidiarity and proportionality, ECJ highlights that under Article 5 of Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, annexed to the EU Treaty and to the TFEU, draft legislative acts must consider the need for any burden falling upon economic operators to be minimised and commensurate with the objective to be achieved. However, the Court concluded that the EU legislature ensure that the negative economic and social consequences of the prohibition on the placing on the market of tobacco products with a characterising flavour were limited.¹⁹ As applicants stated, using a standard formula, the EU legislature asserted that Article 7 is in compliance with principle of subsidiarity, however, disregarded clear demonstration that the internal market benefits derived from that prohibition are sufficient to justify action on the EU level, instead to leave public health protection at the level of Member States, where it is supposed to be sufficiently achieved.²⁰ Reminding that evaluation of the subsidiarity could not be limited to the wording of the contested act, but to its context and circumstances of the individual case, the Court concluded that there is no factor that could affect the validity of Article 7, with respect to principle of subsidiarity, in particular because the Commission's proposal for a directive and its impact assessment includes sufficient information demonstrating the advantages of taking action at EU level rather than at the level of Member States.²¹

18 | Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations, and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC p. 1 [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOL_2014_127_R_TOC (Accessed: 2 September 2024).

19 | *Judgement of the Court (Second Chamber) of 4 May 2016. Philip Morris Brands SARL and Others v Secretary of State for Health*. C-547/14, paras. 186–187 [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0547> (Accessed: 10 September 2024).

20 | *Judgement of the Court (Second Chamber) of 4 May 2016. Philip Morris Brands SARL and Others v Secretary of State for Health*. C-547/14, para. 214.

21 | *Judgement of the Court (Second Chamber) of 4 May 2016. Philip Morris Brands SARL and Others v Secretary of State for Health*. C-547/14.

In another case, the Court discussed on designation of Sunday as the weekly rest day. The second sentence of Article 5 of the Council, Directive 93/104/EC concerning certain aspects of the organization of working time, raises significant questions regarding the designation of Sunday as the designated weekly rest day, allowing Member States the autonomy to make this decision based on their unique cultural, ethnic, and religious contexts. However, the lack of clarity from the Council on why Sunday was specifically preferred over any other day of the week needs accepting the applicant's alternative claim. This leads to the annulment of the second sentence of Article 5, as it stands apart from the other provisions of the directive.

The primary objective of the directive is to safeguard workers' health and safety by establishing minimum standards for gradual implementation. In this context, Articles 100 and 100a were not suitable legal bases for its adoption. The applicant contends that the Community legislature failed to evaluate whether there were transnational issues that national measures could not effectively address, or whether existing national measures could potentially conflict with the EC Treaty or undermine the interests of Member States. Furthermore, the applicant argues that Article 118a should be interpreted considering the principle of subsidiarity. This interpretation suggests that such a broad directive may be unnecessary, considering the diverse national regulations governing working time.

While these arguments are compelling, they have not been framed as separate issues. Regarding the principle of proportionality, the Court concluded that the measures outlined in the directive, aside from the contested sentence of Article 5, are proper for promoting worker health and safety. Judicial review, in this case, is constrained to assessing whether the Council's discretion was exercised without clear errors or misuse of power. The Court decided that the directive's measures, except for the disputed sentence, align with its overarching goals.

Finally, the applicant's assertion that the contested directive is redundant owing to the existence of Directive 89/391, which addresses similar areas, is addressed. While Directive 89/391 establishes general principles and guidelines for enhancing worker health and safety, it does not specifically harmonise aspects such as rest periods, breaks, and maximum working hours, which the contested directive explicitly aims to regulate. Thus, the directive serves a distinct purpose by presenting more detailed and targeted provisions in these crucial areas.²²

5. Harmonisation of private law

The establishment of the internal market within the EU is grounded in four key supporting pillars: the prohibition of discrimination, the creation of a customs union along with fundamental economic freedoms, a system for fair market competition, and various private law frameworks. Each of these pillars plays a crucial role in helping

22 | *Judgement of the Court of 12 November 1996. – United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, C-84/94, paras. 225, 226, 228 [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61994CJ0084> (Accessed: 10 September 2024).

seamless economic interactions among Member States and fostering a cohesive market environment.

Private law plays an essential role in achieving the goals of a unified internal market. It upholds the principles of private autonomy and freedom of contract, allowing individuals and businesses to negotiate agreements that best serve their interests. Additionally, private law regulates the interactions between market participants, supplying clarity on mutual rights and obligations during legal transactions. Moreover, it serves to protect both property rights and non-property rights for individuals and legal entities.

From the very beginning of the EU, the issue of the harmonisation of private law has been one of the substantial legal challenges during the process of establishment, and later of maintaining internal market. On the European continent, private law has reflected national legal tradition and national identity, as it is the part of legal culture of each country. It is not only about regulations, but also the way of living since private law recognises a legally binding power of a will of individual in majority relations. That is one of the reasons why certain authors state that private law, and hence civil law, is considered protective bulwark against globalisation, and Brussels will not be able or even allowed to cross that border.²³

However, significant variations in private law across Member States pose serious challenges to the internal market's establishment and functionality. These differences can lead to legal uncertainties and complications in cross-border transactions, which may hinder economic cooperation and integration.

5.1. Approaches to addressing legal differences

To tackle the challenges presented by these discrepancies in private law, the EU employs two primary approaches: negative and positive harmonisation. Negative harmonisation focuses on removing barriers to trade and ensuring compliance with fundamental economic freedoms. It is relieved through primary and secondary EU law, as well as the case law of the Court of Justice of the European Union (CJEU). Negative harmonisation seeks to prevent Member States from enacting regulations that would infringe upon these freedoms, thereby promoting a more integrated internal market. In contrast, positive harmonisation involves proactive measures adopted by EU legislators to align the legal frameworks of Member States. This is achieved through the development of the EU secondary legislation, which mandates Member States to harmonise specific legal provisions. By creating a more uniform legal landscape, positive harmonisation reduces legal discrepancies and enhances certainty for businesses and consumers engaged in cross-border transactions.²⁴

The establishment of the internal market is supported by a robust framework comprising four pillars that collectively promote economic integration within the EU. While the private law frameworks are primarily ascertained by individual Member States, they play a critical role in easing relationships between market participants. The ongoing efforts to harmonise these frameworks through both negative and positive approaches are vital for overcoming the obstacles posed by legal diversity. These measures aim to

23 | Caruso, 2002, p. 2.

24 | As European private law deals extensively with the question whether harmonisation of law within Europe is required and, if so, how it should be achieved, some scholars highlight the role of comparative method. See: Smits, 2010, p. 34.

create a cohesive, efficient internal market that benefits all EU citizens and fosters sustainable economic growth throughout the region.²⁵

The process of integrating into the EU legal framework, with respect to private law, even at early stage, has been described by certain authors as a process of denationalisation.²⁶ Integration means harmonised or unified rules within the EU Member States, as a final result or rather purpose of the EU establishment. For the Old World, this process is utterly sensitive task, owing to centuries of legal tradition. From the other side, harmonisation of laws, and on certain legal concerns, unification, is a ground for achievement of the gain. Therefore, the chief discussion among lawyers and politicians was and continues to be the proper method of achieving the harmonised or unified law.

Two such methods have manifested in theory and practice: the 'top-down' method of harmonisation and unification of private law, that is, by the adoption of regulations by the authorities of the European Union through the competences they have based on the founding treaties, and the 'bottom-up' method, which is based on the voluntary interventions of the Member States within their own legal systems, aimed at harmonisation and unification of private law.²⁷

The 'top-down' method in the European Union framework is fundamentally about proving foundational principles and legislative models that promote uniformity across Member States. This approach emphasises the adoption of unified rules that fall within the EU's competencies.²⁸ At its core, this method relies heavily on regulations, which are binding legal acts that are directly applicable in all Member States without the need for further national legislation.

The efficiency of this method is clear in that how regulations ease the creation of common rules across diverse legal systems. As they do not require implementation into national laws, regulations ensure a rapid and consistent application of the EU laws, promoting legal uniformity. This is particularly crucial for areas where discrepancies among national laws could impede the functioning of the single market or hinder cooperation among Member States. Thus, regulations serve as vital instruments for achieving harmonisation, addressing challenges that arise from the complexities of a multi-jurisdictional legal landscape.

However, some scholars critique the 'top-down' approach as being overly centralistic and invasive.²⁹ They argue that the significant interference in national legislative processes can lead to tensions between EU authority and national sovereignty. This perspective raises concerns about the balance of power within the EU, suggesting that such a centralised method may undermine the autonomy of Member States and diminish their legislative authority.

In contrast, the 'bottom-up' method offers an alternative that is characterised by its non-invasive and non-centralistic nature. This approach respects the legislative competencies of individual Member States and emphasises the importance of local contexts in shaping legal frameworks. Under this method, directives play a predominant role. Directives set out goals that Member States must achieve, but allow flexibility in how those

25 | Mišćenić, 2012, p. 697.

26 | Nikolić, 2004, p. 113.

27 | Novković, 2010, p. 270.

28 | Smith, 2006, p. 67.

29 | Nikolić, 2004, p. 115.

goals are implemented. This flexibility enables national authorities to adapt EU objectives to their specific legal, social, and cultural contexts, fostering a sense of ownership and commitment to the legislative process.

By promoting a more collaborative and participatory approach to law-making, the 'bottom-up' method encourages Member States to engage with EU policies in a manner that is more reflective of their unique circumstances. This can lead to a richer and more diverse legal landscape within the EU, where national identities and legal traditions are respected while continuing to work towards common goals.

In summary, the 'top-down' method, while effective in establishing uniformity through regulations, raises important questions about the centralisation of power and the potential erosion of national legislative authority. Conversely, the 'bottom-up' method, with its emphasis on directives, allows for greater flexibility and respect for national contexts, thereby fostering a more inclusive and balanced approach to the EU law-making. Each method has its merits and challenges, and the ongoing dialogue between these approaches is essential for the evolution of a cohesive yet diverse legal framework within the EU.

| 5.2. Harmonisation of private law – weakness of functional approach

Regarding the general principles of private law, the effort to harmonise, and thus, Europeanise national legal systems has faced significant challenges.³⁰ The process of achieving uniformity in legislation has not been straightforward. As new issues emerged, such as artificial intelligence, the EU's choice of regulation was seen to ensure consistency across Member States. This approach is understandable for two primary reasons. First, it is crucial for preserving the coherence of the internal market, ensuring that there is a level playing field for businesses and individuals across the EU. Second, regulation is often more effective in addressing new and complex legal issues, such as those related to the expanding use of artificial intelligence and machine learning technologies.

Despite this, there are concerns about the legal issues that have already been addressed through directives. The adaptation of legal forms has raised questions about whether the alignment of these forms has been effectively managed. This leads to a broader question about whether the principle of 'united in diversity' is being upheld. At the national level, there is ongoing debate about whether national laws on specific issues should be adjusted to align with EU-wide goals and the overarching EU framework, even when the proposed legislation may follow different rationales.³¹

This situation is complex because it involves balancing the need to support national legal traditions and specificities with the imperative to conform to the EU standards. When national legal systems and their underlying rationales differ from those at the EU level, it can lead to tensions and questions about the effectiveness of harmonisation efforts. The challenge is to achieve a balance that supports effective legal regulation across the EU while also respecting and accommodating national legal differences. This ensures that the legal framework remains cohesive and functional across all Member States without undermining the diversity of national legal traditions.

30 | Under the notion of Europeanisation, we may understand a shift of competences from the intrastate to the European level. Červenková, 2008, p. 5.

31 | Semmelmann, 2012, p. 10.

Considering the imperative of achieving an efficient single market, the concept of 'united in diversity' is much more challenged in private law area than it appears to be, in respect to nature of interests that private law regulates and protects.

| 5.3. Harmonisation of private law – from directives to regulations

In a recent EU legislative activity, referring to the goal of strengthening single market, directives were replaced by regulations. Scholars and practitioners have debated whether that is a proper approach, since the complexity of private law could be observed both on the EU level, as well as the national level. In addition, direct application of regulations, particularly regarding the issues that are part of traditional and well functional civil law, could endanger not only the concept of 'united in diversity', but also legal certainty.³² For illustration, the European Union has established regulations that address various issues, including those related to general private law, such as the rules governing payment systems. One significant legislation is Regulation 1103/97,³³ which pertains to the introduction of the euro as the new official currency. This regulation includes specific provisions that outline how existing contracts should be converted from the former currency to the euro.

According to the rulings of the European Court of Justice in the cases of *Verbraucher-Zentrale Hamburg*³⁴ and *Estager*,³⁵ this regulation embodies two fundamental legal principles. The first principle is the necessity of ensuring legal certainty for citizens during transition to euro. This is vital because individuals and businesses need to have confidence that their legal rights and obligations will be intact despite the currency change. The second principle emphasises the importance of maintaining the continuity of contracts and other legal instruments. Thus, the introduction of a new currency should not disrupt existing agreements or create ambiguity about their enforcement.

Considering these principles, a notable case involved a mobile telecommunications provider that sought permission to round up the per-minute calling rate to the nearest euro cent when converting prices from German Deutsche Marks to euros. The ECJ ruled against this practice, stating that such rounding up would lead to a significant increase in costs for consumers. This decision reinforces the idea that any changes resulting from the currency conversion must not place an undue financial burden on individuals, thereby upholding the core principles of legal certainty and contractual continuity.³⁶

32 | As Twigg-Flesner explains, where a Regulation is applied, the particular area of private law will be visibly European, because instead of a national provision that gives effect to a European rule, it is the European rule that will be applied directly. Thus, a Regulation has the effect of overriding and displacing national law within its scope, whereas directives are categorised into, and become part of, national law. Twigg-Flesner, 2009, p. 5.

33 | Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro, Official Journal No. L 162, 19/06/1997.

34 | *Judgement of the Court (Grand Chamber), C-19/03, 14 September 2004* [Online]. Available at: <https://www.bailii.org/eu/cases/EUECJ/2004/C1903.html> (Accessed: 20 September 2024).

35 | *Judgement of the Court (Second Chamber) of 18 January 2007, C-359/05* [Online]. Available at: <https://curia.europa.eu/juris/showPdf.jsf?jsessionid=66B41C536B13A2CBC415E8668325598C?text=8&docid=651268&pageIndex=0&doclang=en&mode=lst&dir=8occ=first&part=1&cid=2701853> (Accessed: 20 September 2024).

36 | Hartkamp, 2016.

Legal certainty is fundamentally intertwined with traditional civil law practices across Member States. When the European Union opts for regulations rather than directives, it raises important questions about the potential counterproductive nature of such legislative actions.³⁷ Regulations, by their nature, have direct application in all Member States, which could inadvertently impose constraints on established legal principles that are vital for the functioning of private law.

In many jurisdictions, private law is primarily governed by dispositive provisions, which allow parties the freedom to contract according to their own needs and circumstances. This autonomy is essential for fostering innovation, flexibility, and individual rights within the marketplace. However, the adoption of rigid regulations could create undue burdens on the principle of freedom to contract and the autonomous will of the parties involved. Such restrictions may not be necessary for achieving the intended legislative goals, particularly since some of these goals have already been effectively addressed through existing legal frameworks.

Considering these concerns, it is crucial to reevaluate the legal measures proposed by the EU. Before implementing new regulations, it is essential to identify the actual weaknesses within the current legal systems that these measures aim to address. A careful analysis of the specific shortcomings will allow for a more targeted and effective legislative approach, ensuring that any new regulations enhance rather than hinder the principles of legal certainty and freedom in private law. This thoughtful reconsideration will not only uphold the integrity of Member States' legal traditions, but also contribute to a more harmonious and functional legal landscape within the EU.

In conclusion, while the transition from directives to regulations aims to foster greater integration and consistency within the EU, it is imperative to navigate this transition thoughtfully. By addressing the inherent challenges and limitations of regulations, the EU can work towards a legal framework that not only meets its objectives, but also upholds the fundamental principles of legal certainty and freedom in private law.

6. Conclusions on the EU perspective in private law

National systems of private law, particularly in continental countries, are marked by a cohesive and systematic approach. This means that there exists a consistent set of overarching principles that governs private law as a whole. These principles guide the interpretation of laws and assist in bridging gaps through judicial decisions, ensuring a degree of predictability and stability in legal outcomes.

Simultaneously, the European legislator did not adopt a preformed or comprehensive strategy for harmonisation. Instead, the process has been unsystematic, driven by the immediate need for legal regulation in specific areas where issues have arisen. This reactive approach means that harmonisation measures have often been implemented in response to challenges or concerns that affect the functioning of the internal market.

However, the involvement of the European Union in these areas, shaped by a functionalist perspective, has introduced a more fragmented structure. This fragmentation is particularly clear in that how EU competences are defined at the Treaty level, resulting

37 | Some scholars explain this process as more creative than destructive. See: Micklitz, 2008, p. 27.

in a series of specific and isolated areas of the EU jurisdiction. Consequently, in a legal landscape, the EU and the rulings of the Court of Justice of the European Union (CJEU) are only a shadow of unified EU private law. Diverse national private laws, each with its own unique characteristics and rules, continue to prevail.

This fragmentation raises significant concerns among legal scholars and practitioners. Some of them argue that it undermines vital values such as coherence and the systematic nature of legal frameworks. When laws are not uniformly applied or interpreted across Member States, it can lead to confusion and uncertainty. Additionally, this lack of coherence can diminish legal certainty and transparency within the overall legal system.

For individuals and businesses working in this environment, navigating their rights and obligations becomes increasingly complex. They may find it challenging to understand which laws apply in cross-border situations or how to comply with varying regulations across different jurisdictions. This uncertainty can hinder economic activity and discourage investment, affecting the goal of achieving a well-functioning internal market within the EU.

In summary, while the integration of the EU law aims to create a more unified legal framework, the resulting fragmentation can have significant implications for the coherence and predictability of private law across Member States. This situation underscores the need for ongoing dialogue and efforts to bridge the gaps between the EU legislation and national legal systems, fostering a more harmonious legal landscape for all stakeholders involved.³⁸

The harmonisation efforts have primarily focused on key private law institutes that are significant for the internal market and are commonly recognised across Member States. These institutes include essential legal concepts and frameworks that ease economic interactions and ensure consistency in legal practices. However, the process has also involved introducing entirely new regulations and legal provisions designed to address emerging needs and complexities in the market.

By selectively harmonising existing private law institutes and creating new ones, the EU aims to enhance legal certainty and reduce barriers to trade and investment. This approach will ensure that legal frameworks are not only coherent and aligned with the internal market's goals, but also responsive to the evolving economic landscape.

While the lack of a systematic harmonisation strategy presents challenges, the EU's targeted efforts to address specific legal issues are crucial for fostering a more integrated internal market. This ongoing process highlights the need for adaptability and responsiveness in the face of new legal and economic realities, ensuring that the legal framework continues to serve the interests of both individuals and businesses across Member States.

To facilitate the integration of the European 'foreign bodies' into the private law systems of Member States, directives have long served as the primary harmonisation instrument. These directives prove minimum standards that must be adopted into national law, ensuring a baseline level of compliance across the EU. Importantly, this approach allows national legislators to maintain or implement new national measures that provide a higher degree of protection than those stipulated by the private law directives. While this flexibility can empower Member States to enhance legal protections for

38 | Mańko, 2015, p. 14.

their citizens, it also introduces the potential for significant deviations during the transposition of directives into national law. Consequently, this has resulted in various differences in the organisation and application of the relevant legal institutes across Member States. The outcome is a fragmented landscape of the European private law, which is understood and defined in diverse ways within the legal doctrine. In a narrower sense, the European private law encompasses the private law rules outlined in the EU Treaties and the later legislation enacted based on these treaties, standing for the formal legislative framework of the EU. This includes directives, regulations, and decisions that directly affect private law matters. Conversely, when considered in a broader sense, the European private law extends beyond the rules contained in the EU primary, secondary, and tertiary law. It also incorporates the national laws of Member States that derive from these EU sources, effectively creating a hybrid legal environment. Furthermore, it encompasses internationally unified private law, non-binding legal principles developed by scholarly groups (such as the Principles of European Contract Law³⁹), and the case law of the Court of Justice of the European Union. This broader definition reflects the complex interplay between the EU law and national legal systems, illustrating that European private law is not only shaped by formal legislation, but also by the diverse legal traditions and practices of Member States. As such, it underscores the challenges of achieving true harmonisation while respecting the unique legal identities of each Member State. Overall, the evolving nature of the European private law highlights the need for ongoing dialogue and cooperation among Member States to foster a more coherent and integrated legal framework that supports the internal market.⁴⁰

39 | Dudaš, 2012, pp. 323–327.

40 | Mišćenić, 2012, pp. 699–700.

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EXEMPTIONS TO PRIMARY LAW AND EQUALITY OF MEMBER STATES

Michael Siman¹

ABSTRACT

European Union (EU) law generally applies within the territories of its Member States, with certain exceptions, both permanent and temporary, to this rule. This paper aims to examine the nature of these exceptions and their potential impact on the consistency of EU law and the principle of equality of Member States. The analysis categorises and defines the various exceptions, identifies their distinguishing features, and assesses their consequences within the EU legal framework.

KEYWORDS

*EU primary law
territorial scope
opt-out clause
opt-in
equality of Member States*

1. Introduction

The European Union (EU) respects the equality of Member States before the Treaties,² which form the constitutional core of the Union's legal order and are part of primary law. The EU 'has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply',³ taking precedence over the national legal systems of Member States.⁴ The Treaty on European Union did not specify its territorial scope, limiting itself to the use of the term 'Member State'.⁵ The EU does not possess its own territory but refers to

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2 | Article 10 of the Consolidated version of the Treaty on European Union (OJ C 326, 26.10.2012, pp. 13–390) (hereafter referred to as 'TEU').

3 | Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, C 6/64, EU:C:1964:66.

4 | E.g. Judgment of the Court of 9 March 1978, *Amministrazione delle finanze dello Stato/Simmenthal*, C-106/77, EU:C:1978:49.

5 | Lenerts, 2005, p. 351.



the territory of its Member States when applying Union law. It is exclusively the Member States that decide on the acquisition or loss of their state territory and, thus, also on the territorial scope of Union law, including the airspace above their land surfaces and coastal waters over which they exercise their sovereignty and state jurisdiction.⁶

Based on the above, the territorial scope of the EU's legal order is generally confined to the territories of its Member States, with certain exceptions to this rule. These exceptions could, in practice, appear to create an unequal status among Member States because they are not applied uniformly across all Member States, as we will demonstrate in this paper. Are these exceptions objectively justified, or do they lead to an undesirable fragmentation of EU law in the affected areas?

As for the primary law of the Union, it would be difficult to find a legal basis for exceptions to its territorial scope outside of primary law itself, which consists of the founding Treaties, their revisions, the Charter of Fundamental Rights of the EU, accession treaties, and other supplementary acts. Exceptions to primary law, which directly reflect not only in primary law but also in other sources adopted on its basis, could be classified, based on their presumed duration, as exceptions of a permanent or temporary nature. This paper aims to define the exceptions to primary law, categorise them based on their nature, and assess the practical impacts these exceptions might have on the consistency of Union law and the equal status of Member States.

2. Permanent exceptions to primary law

These exceptions were not negotiated for a fixed period, making them permanent. Among these permanent exceptions, we include the opt-out clauses, specifically associated with Member States such as Denmark, Ireland, and Poland. The United Kingdom also negotiated such opt-out. However, this paper does not address the case of the United Kingdom, given its withdrawal from the Union. In addition to these permanent opt-out clauses, we can also classify permanent exceptions related to overseas or outlying territories within this category.

| 2.1. *European territories of Member States*

The scope of primary Union law is not uniform in terms of European and overseas, or outlying territories of Member States. In accordance with Article 52 TEU, any part of the European territory of the Member States falls under the territorial scope of Union law. In addition, the primary law of the Union also applies to European territories for which the Member State is responsible in foreign relations.⁷ The above basically applies to Gibraltar.⁸

6 | Siman and Slaštan, 2012, p. 101.

7 | See Article 355 (3) of the Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390) (hereafter referred to as 'TFEU').

8 | See Declaration n. 55. of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland: 'The Treaties apply to Gibraltar as a European territory for whose foreign relations a Member State is responsible. This does not imply changes to the respective positions of the Member States concerned'.

The founding treaties also regulate exceptions to the territorial scope, namely that the treaties do not apply, in their entirety, to the Faroe Islands and partially apply to the sovereign territories of the United Kingdom of Akrotiri and Dhekelia in Cyprus to the extent specified in Protocol No. 3 to the Act on the Conditions of Accession from 2003, to the Channel Islands and the Isle of Man to the extent specified in the Accession Treaty from 1972, and to the Åland Islands to the extent specified in Protocol No. 2 to the Act on the Conditions of Accession of the Republic of Austria, the Republic of Finland, and the Kingdom of Sweden.⁹

It is further necessary to briefly mention Cyprus. The provision of Article 52 TEU states that the primary law of the Union applies to the entire Republic of Cyprus. However, the above must be applied in connection with Protocol No. 10 on Cyprus annexed to the Accession Treaty of 2003. According to Article 1 of this Protocol, the application of Union law is postponed in those parts of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective administration. The Council is entitled to cancel this postponement unanimously on the basis of the proposal of the Commission. In case of solving the Cyprus problem (i.e. the reunification of Cyprus), the Council, based on the proposal of the Commission, will unanimously decide on the adjustment of the conditions of Cyprus' accession to the EU, taking into account the Turkish population in Cyprus.

2.1.1. Outlying overseas territories of Member States within the scope of Union law

In addition to that mentioned so far, Article 349 of the Treaty on the Functioning of the EU provides for the possibility of adopting special measures for the application of treaties to defined overseas territories of Member States (Guadeloupe, French Guiana, Martinique, Réunion, Saint Bartholomew, Saint Martin, Azores, Madeira, and the Canary Islands), whose development is due to the economic and social structure negatively affected by their remoteness, island location, small area, unfavourable topographical and climatic conditions, or economic dependence on a small amount of products.

These special measures may be adopted by the Council on a proposal from the Commission and after consulting the European Parliament in the areas of customs, trade or tax policy, free zones, agricultural and fisheries policy, supply of raw materials and basic consumer goods, state aid and access to structural funds, and the horizontal program of the Union. The measures take into account the particularities and limitations of these overseas territories without disrupting their integrity and the coherence of the legal order of the Union.¹⁰ Therefore, Union law may apply to the mentioned territories with the possibility of accepting exceptions through acts of secondary law.

Based on the initiative of the Member State concerned, the European Council may adopt a decision that changes or supplements the status of a Danish, French, or Dutch country or territory in relation to the Union. The European Council decides unanimously after consultation with the Commission.¹¹

9 | See Article 355(4)(5) of the TFEU.

10 | Article 355(1) of the TFEU.

11 | See Article 355(6) of the TFEU and Declaration No. 43 to Article 355 (6) of the Treaty on the Functioning of the European Union.

2.1.2. *Other overseas countries and territories of Member States with special association with the Union*

In accordance with Article 355 Paragraph 2 of the TFEU, some non-European countries and territories that have special (constitutional) relations with Denmark, France, the Netherlands, and the United Kingdom are associated with the EU. A taxative calculation of these countries and territories is given in Annex II to the founding treaties.¹² These overseas countries and territories (OCTs) are subject to special arrangements for association listed in the fourth part of the TFEU, Articles 198 to 204, and in Protocol No. 34 on special arrangements for Greenland.¹³

This association aims to support the economic and social development of the OCT and to establish close economic relations between the OCT and the Union as a whole. Its essence is based on equal treatment (expansion of the scope of contracts) in trade relations between Member States and these countries, equal participation in public tenders and supplies financed by the Union, freedom of establishment,¹⁴ and free movement of goods.¹⁵

The detailed rules and procedures for the association of the OCTs with the Union are adopted unanimously by the Council at the proposal of the Commission or, in accordance with an extraordinary legislative procedure, unanimously at the proposal of the Commission and after consultation with the European Parliament, usually for a period of ten years.¹⁶ Currently, until 31 December 2013, Decision No. 822/2001 on overseas association¹⁷ stipulates that based on the initiative of the Member State concerned, the European Council may adopt a decision that changes or supplements the status of a Danish, French, or Dutch country or territory in relation to the Union. The European Council decides unanimously after consultation with the Commission.¹⁸ Association according to Article 355 Paragraph 2 TFEU is directly based on the provisions of the treaty and cannot be confused with association established by a special international treaty based on Article 217 of the TFEU with any independent non-member state.

Overseas countries and territories are constitutionally linked to their Member States but are not part of the Union as such. Based on Article 355 Paragraph 2 TFEU, the

12 | Greenland, New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Mayotte, Saint Pierre and Miquelon, Aruba, Netherlands Antilles (Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten), Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territories, British Indian Ocean Territories, Turks and Caicos Islands, British Virgin Islands, and Bermuda. This list varied considerably and after the Second World War, it mainly included the French and Belgian colonies in Africa, which gradually gained full independence and today have contractual relations with the EU based on Article 217 TFEU (see in particular the Partnership Agreement between the African, Caribbean and Pacific Group of States, on the one hand, and the European Community and its Member States, on the other, signed in Cotonou on 23 June 2000).

13 | See also Declaration No. 60 of the Kingdom of the Netherlands to Article 355 of the TFEU.

14 | Article 199 (1-5) of the TFEU.

15 | Article 200 of the TFEU.

16 | See Article 203 of the TFEU.

17 | Council Decision (EC) No. 822/2001 of 27 November 2001 on the association of overseas countries and territories with the European Community (Decision on Overseas Association), (OJ L 314, 30.11.2001, pp. 1-77).

18 | Article 355(6) TFEU.

provisions of the treaty do not in principle apply to the OCTs, except for the fourth part of the treaty, which is devoted exclusively to the OCT-EU association. A fundamental difference exists between the OCTs and the outlying territories listed in Article 355 Paragraph 1 TFEU. In contrast to the OCT, the outlying territories are not only constitutionally connected to the relevant Member State but also form an indivisible part of the Union and are, in principle, bound by Union law in its entirety. Therefore, it is not appropriate to make any quantitative or qualitative comparison of the OCTs with the outermost regions in terms of benefits provided by the EU and obligations towards the EU.¹⁹

There are significant differences among the OCTs²⁰ themselves in terms of the degree of autonomy vis-à-vis the respective Member State with which they are linked, as well as in the economic and social spheres. However, no overseas country or territory is a sovereign state. In addition, they are dependent on the import of goods and energy. Exports of goods from the OCTs to the EU or within their respective geographic regions remain generally limited.²¹

2.1.3. Former overseas countries and territories of Member States outside the scope of Union law

The Treaties do not apply to (former) OCTs that maintain special relations with the United Kingdom of Great Britain and Northern Ireland and are not included in the list in Annex II to the founding Treaties. This provision of Article 355 Paragraph 2 of the TFEU

19 | See Commission Green Paper 'Future relations between the EU and overseas countries and territories', SEC(2008) 2067, COM(2008) 383 final, point 2.1 [Online]. Available at: <https://op.europa.eu/en/publication-detail/-/publication/fbafa331-f91b-4018-8929-d495f7dc82d9> (Accessed: 20 September 2024).

20 | Regarding OCTs, see e.g. judgment of 8 February 2000, *Emesa Sugar*, C-17/98, EU:C:2000:70.

21 | Unlike third-world countries, all nationals of the OCT are, in principle, citizens of the Union within the meaning of Article 9 TEU. More precisely, all nationals of Greenland and the French and Dutch OCTs automatically also have the nationality of these Member States. From 21 May 2002, citizens of the British OCTs also became British citizens; however, they can renounce this citizenship and remain citizens of the British Overseas Territories only and are not required to have a passport identifying them as British citizens. As citizens of the Union, nationals of the OCT are also entitled to rights arising from Union citizenship, such as the right to free movement and residence (but not work) in the territory of the Member States. Citizens of the OCT may also have the right to vote or stand for election to the European Parliament if the conditions set by the relevant Member States in accordance with Union legislation are met. This is the case, for example, with nationals of the French OCTs. In the case of the islands of Saint-Pierre, Miquelon and Mayotte, their specific connection with the Union is also reflected in the use of the euro in these OCTs, although their monetary regime is not specified in the TFEU as they are not part of the Union (Council Decision [EC] No. 1999/95 of 31 December 1998 concerning monetary adjustments in the French territorial communities of Saint-Pierre and Miquelon [OJ L 30, 4.2.1999, p. 29–30]). No other OCTs use the euro; however, the French Pacific OCTs are exploring the possibility of replacing their currency with the euro. It should also be noted that, although the general provisions of the Treaties do not apply to the OCTs, unless there is a specific reference to them, the jurisdiction of the Court of Justice of the EU includes proceedings on a preliminary question, which, in accordance with the TFEU, is requested by a court whose jurisdiction includes the OCTs, as well as actions brought under the conditions laid down in the TFEU by plaintiffs from the OCT, which are directed against legal acts adopted by the EU.

applied to Hong Kong until 1997, whose special relations with Great Britain were completed on 30 June 1997.

All other OCTs of Member States that are not listed in TFEU²² fall under EU law. Examples include the Spanish cities of Ceuta and Melilla in North Africa.²³

As a general rule, the exceptions outlined in this subsection do not allow for an ‘opt-in’ mechanism in cases where a Member State expresses interest in foregoing the application of a given exception. These exceptions are established based on objective grounds and, in our view, do not give rise to contentious debates regarding the equal status of individual Member States or the potential fragmentation of EU law.

| 2.2. Opt-out clauses

Permanent opt-out clauses may also pertain to primary law itself, meaning that the legal basis for these exceptions cannot be found in any lower-force legal norm but solely within the ‘constitutional framework’ of EU law. These exceptions limit the territorial scope of the relevant EU law because the Member States in question are excluded from the *ratione loci* application of the EU law from which they have opted out.²⁴ As mentioned earlier, all exceptions to primary law naturally also impact secondary acts adopted on the basis of primary law. These opt-out clauses may appear to be unjust in terms of the position of the Member States. As T. Duttie et al. state, opt-outs allow less integration-friendly Member States to maintain their preferred level of integration without exercising a veto over the more ambitious projects of the majority, a concept referred to as ‘constitutional differentiation’.²⁵

The creation of these clauses presupposes that the majority of Member States have a shared interest in advancing integration within a specific area, where consensus among all Member States was necessary. The issue arises when a Member State is unable to contribute to this consensus. In such cases, the solution is either to refrain from integration in the relevant area or to establish a mechanism by which integration remains viable despite the disinterest of one or more Member States. Notably, opt-outs have occurred exclusively among acceding countries and never among the original founders of the integration process.

These clauses must be viewed from two perspectives. On one hand, they may appear unjust, as they were granted only to certain Member States, and if another Member State sought a similar exception, it would likely require the revision of primary law, which is a complex process. Opt-out clauses were introduced in cases where consensus among Member States was necessary to advance integration, such as the introduction of a new Union policy or significant changes to primary law, such as the inclusion of the EU Charter of Fundamental Rights in primary law.

From a more positive perspective, these clauses allowed a Member State, despite not wishing to pursue a particular degree of integration, to refrain from obstructing the other Member States and permit progress in the integration process with the insertion of an

22 | Article 355, Paragraph 2 of the TFEU (special association of the OCT), or Article 355(1) of the TFEU (outlying overseas territories).

23 | See Article 25 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ L 302, 15.11.1985, pp. 23–465).

24 | Geursen, 2024, p. 370.

25 | Duttie et al., 2017, p. 408.

exception. Whether similar clauses might be accepted during potential future revisions of primary law remains an open question. However, it is difficult to envision such clauses being introduced *ex post* to policies in which these states actively participated in the policymaking process.

We will now briefly look at the opt-outs of the Member States. First, several provisions of Union law regulating economic and monetary union, which are not automatically binding on the Denmark, can be cited.²⁶ Therefore, we can say that it is the only country exempted from the obligation to adopt the euro. Thanks to the negotiated clause, a key referendum was passed in Denmark and the Danish government accepted the treaty.²⁷ Denmark has negotiated specific exemptions within EU law, outlined by the European Council. These provisions apply only to Denmark, both now and in the future. Regarding the third stage of the Economic and Monetary Union (hereinafter referred to as 'EMU'), Denmark has opted out, meaning it will not adopt the euro or be bound by the economic policy rules of EMU members. Denmark will retain control over its own monetary policy and continue to participate in the European Monetary System. Additionally, Denmark maintains autonomy over its social welfare and income distribution policies.²⁸ Based on Protocol No. 22 on the position of Denmark, Denmark has to opt out also in defence policy and justice and home affairs. Denmark, as a sort of leader in opt-out clauses, in accordance with the protocol, will not prevent the other Member States from cooperating on these matters.

Based on Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security, and justice, Ireland has an opt-out in the area of freedom, security, and justice. The last permanent opt-out is the Polish one, which, by virtue of Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, binds itself to the Charter.

It is fundamentally difficult to dispute that permanent opt-outs create a form of multi-level cooperation within the founding treaties,²⁹ which may, to some extent, negatively affect the equal standing of Member States within the EU. Through these clauses, Member States naturally safeguard their sovereignty by creating differentiation. However, we concur with the view that the result may be that opt-outs are generally perceived as controversial, potentially leading to a fragmentation of the EU³⁰ and its legal order. We discuss these impacts in the conclusion.

Finally, we consider it necessary to add that the difference between the exceptions that apply to island and outlying territories and permanent opt-outs is the possibility, a kind of option, for a Member State with a permanent opt-out to decide whether to make

26 | Protocol on certain provisions relating to Denmark, annexed to the Treaty establishing the European Community (1992).

27 | Adler-Nissen, 2014, pp. 6–7.

28 | Denmark: 'EMU opt-out clause?' Summaries of EU legislation, 16 August. [Online]. Available at: <https://eur-lex.europa.eu/SK/legal-content/summary/denmark-emu-opt-out-clause.html> (Accessed: 16 December 2024).

29 | Duttie et al., 2017, p. 422.

30 | Adler-Nissen, 2014, p. 2.

use of the clause. Even this option can be changed subsequently.³¹ Therefore, with permanent opt-outs, Member States that have negotiated them can, within the limits of the scope of these block opt-outs for individual policies, moderate in the future the extent to which they are bound by the acts adopted under that policy. For example, Denmark, which, based on a referendum held in June 2022, has participated in the Common Security and Defence Policy of the European Union since 1 July 2022.³²

3. Transitional exceptions

There is a fundamental difference between temporary and permanent exemptions in terms of how they evolve. In this category of temporary exemptions, we include those contained in Accession Treaties, which are typically negotiated for specific areas and cease to apply once the agreed-upon period expires.

| 3.1. Accession treaties

Accession treaties without their components are generally only two-page documents (legal provisions usually consist of only three to six articles). All the conditions of accession of future Member States of the Union are regulated in acts in the conditions of accession, which are attached to the accession treaty and have the same legal force as these treaties.

Acts on the conditions of accession mainly contain changes to the founding treaties related to the enlargement of the Union, including changes in the composition and functioning of its institutions and bodies and the establishment of exceptions and transitional periods for Member States, during which certain provisions of Union law do not apply temporarily. Exceptions and the transitional period can be separately regulated for each acceding state in a separate annex to the act on the conditions of accession.

The provisions of the acts concerning the conditions of accession, including their protocols and annexes, which are part of the accession treaties and which directly contain changes to the acts of the institutions of the Union, are, in fact, provisions of primary law that can only be changed or repealed by the procedure applied in the revision of primary law, unless the act of accession itself provides otherwise. Therefore, the Court of Justice cannot assess the validity of these provisions.³³ In this context, it is necessary to remember that the legal nature of the secondary acts themselves, changed by the act of accession, remains unaffected, and the institutions of the Union can later amend,

31 | For example, in the case of the Brussels I bis Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L 351, 20.12.2012, pp. 1–32), where we find in the Preamble that it does not participate, but subsequently concluded the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ, 2005 1116, L299).

32 | Heiming, 2023.

33 | Judgment of the Court of 11 September 2003, *Austria v Council*, C 445/00, EU:C:2003:445, Paragraph 62; Judgment of the Court of 28 April 1988, *LAISA v Council*, C-31/86, Paragraph 12. See, for example, Article 7 of the Accession Act.

supplement, or cancel the secondary acts concerned through standard legislative procedures; however, they cannot change the specific provisions of the act concerning the conditions of accession containing changes to these secondary acts.³⁴

On the other hand, secondary law includes those provisions of acts on the conditions of accession, which authorise the institutions of the Union to adopt the necessary changes to acts related to the accession of new states to the Union.³⁵ For example, the Treaty on the Accession of the Slovak Republic and other States to the EU³⁶ was signed on 16 April 2003 in Athens and entered into force on 1 May 2004. The Act on the Conditions of Accession of the Slovak Republic and other States to the EU³⁷ is attached to the Accession Treaty³⁸ and contains mainly institutional changes and changes to acts related to accession, establishes exceptions and transitional periods, and also regulates some international law obligations, for example, Article 6 Paragraph 5 of the Act on the Conditions of Accession contains the obligation of new states to accede to the Agreement on the European Economic Area and Article 6 Paragraph 10 contains the obligation to withdraw from the Central European Free Trade Agreement.

It follows from Article 2 of the Act on the Conditions of Accession³⁹ that the acts adopted by the institutions before accession are binding on the new Member States and are applicable in these States from the date of accession.

34 | See, for example, Articles 8 and 9 of the Act concerning the conditions of accession.

35 | Judgment of the Court of 28 April 1988, *LAISA v Council*, C-31/86, Paragraphs 12 and 18. See, for example, Articles 21 and 57 of the Act concerning the conditions of accession.

36 | Full title: Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the EU) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic to the EU (OJ L 157, 21.6.2005, pp. 11–27). See Annexes, Treaty of Accession, p. 1171 (hereafter referred to as ‘the Accession Treaty’).

37 | Full title: Act on the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic and on the amendments to the Treaties on which the EU is founded, OJ L 236, 23.9.2003, pp. 33–49.

38 | See Article 1(2) of the Accession Treaty.

39 | Article 2 of the Act on the conditions of accession reads:

‘From the date of accession, the provisions of the original treaties and acts adopted by the authorities and the European Central Bank before accession shall be binding on the new member states and shall be applied under the conditions laid down in these treaties and in this act’.

In addition, according to Article 58 of the Act on the Conditions of Accession,⁴⁰ the text of the acts of the Union institution, which were adopted before the accession of the Slovak Republic to the European Union and which are drawn up in the official languages of the acceding Member States (including the Slovak language), are as binding as the texts drawn up in the official languages of the old Member States and are also published in the Official Journal of the European Union.

Exceptions and transition periods in relation to the Slovak Republic are primarily defined by Annex XIV⁴¹ of the Act on the Conditions of Accession⁴² on the free movement of capital, economic competition, agriculture, transport, taxes, energy, and the environment.

| 3.2. *Economic and Monetary Union*

We have decided to include the area of economic and monetary union among the temporary exemptions. To some extent, until Member States meet the Maastricht convergence criteria, they have a sort of 'exemption' from the obligation to adopt the common currency, which will lapse once these criteria are met. The Treaty does not establish a specific timeline for entering the euro area; instead, it allows Member States to devise their own strategies for fulfilling the requirements for adopting the euro.⁴³ As practice shows, the lack of a fixed deadline and the absence of mechanisms to force a Member State to adopt the euro means that not every Member State complies with this obligation. It is conceivable that, under certain circumstances, infringement procedure according to Article 258 TFEU for failing to fulfil Member State's obligations under the Treaty could be invoked in these cases, provided certain conditions are met.

| 3.3. *Enhanced cooperation*

The final area we have incorporated into the temporary exceptions is the exception of the so-called opt-in clause, which manifests as enhanced cooperation. In the case of a permanent opt-out, consensus among Member States is a prerequisite, allowing a State to join only under the condition of opting out. Conversely, an opt-in requires a lack of consensus among Member States and a subsequent interest from certain Member States to engage in enhanced cooperation.

The EU has grown over the last few decades, increasing the number of Member States from six to 27. Despite the progress made so far, Member States still have reservations in

40 | Article 58 of the Act on the Conditions of Accession reads,

'The texts of the acts of the authorities and the European Central Bank adopted before accession prepared by the Council, the Commission or the European Central Bank in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages will be from the date of accession authentic under the same conditions as the texts drawn up in the present eleven languages. They will be published in the Official Journal of the European Union, if the versions in the current languages have also been published in this way'.

41 | MFA announcement no. 185/2004 Coll.; OJ EU L 236, 23.9.2003, pp. 915–924. See Annexes, Annex XIV to the Act on Conditions of Accession, p. 1197.

42 | See Article 60 of the Act on the Conditions of Accession in the areas of free movement of workers and freedom to provide services.

43 | European Commission: Who can join and when? [Online]. Available at: https://economy-finance.ec.europa.eu/euro/enlargement-euro-area/who-can-join-and-when_en#national-target-dates-for-adoption-of-the-euro (Accessed: 30 September 2024).

terms of their varying conceptions of the Union. Furthermore, certain objective factors, such as economic and legal differences due to different national legal systems, are likely to complicate uniform integration. For this reason, the principle of coherence, based on the idea of uniform integration at economic, political, and legal levels, will be difficult to achieve, given that the Union is characterised by continuous enlargement and that the consequence is heterogeneity.

Consequently, it is necessary to progress in a differentiated manner, for example by allowing cooperation with only some of the Member States or by leaving some Member States free to participate in cooperation. However, in this regard, the system of enhanced cooperation is currently the only one to be codified in the founding treaties. Thanks to enhanced cooperation, it is possible for Member States wishing to closely collaborate to use the Union's institutions, bodies, mechanisms, and procedures to achieve the goals of such cooperation. The enhanced cooperation allows participating Member States to organise broader cooperation than that initially provided for by the treaties within the framework of the policy concerned. It allows the establishment of a more flexible decision-making mechanism to authorise a limited number of Member States to advance Union integration more quickly when not all Member States are capable of adopting the same pace. This regulation in the founding treaties helps overcome blockages in certain Union policies, including common foreign and security policies.

Furthermore, the enhanced cooperation can be regarded as the forefront integration that can be followed, even in stages, by the subsequent accession of remaining Member States to that cooperation. There are two sets of provisions implementing the mechanism of enhanced cooperation into the founding treaties. First, Article 20 TEU, which governs the general authorisation and conditions of enhanced cooperation in the EU, and second, Article 326 TFEU et seq., which govern the conditions, rights, and duties related to enhanced cooperation incumbent on the Member States, notwithstanding their participation. According to Article 20 TEU, enhanced cooperation is permitted in all EU competences except for exclusive ones. It has to promote the objectives of the Union, protect its interests, and strengthen its integration process. The participation condition of at least nine Member States is required, which makes the enhanced cooperation more open and flexible regarding the fact that the EU currently has 27 Member States.

The enhanced cooperation remains as *ultima ratio* respecting the principle of subsidiarity since it can be triggered only if the objectives pursued cannot be achieved by all Member States within an acceptable period. In this regard, the Court of Justice ruled that the Union's interests and the process of integration would not be protected if all fruitless negotiations could lead to enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the Union as a whole. The expression 'as a last resort' highlights the fact that only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation.⁴⁴

Of course, any acts adopted within the enhanced cooperation are addressed exclusively to participating Member States and are not part of the Union's *acquis* regarding the accession of candidate countries to the EU.

44 | See the Judgment of 16 April 2013, *Spain and Italy v Council*, C-274/11 and C-295/11, EU:C:2013:240 Paragraphs 49 and 50.

It follows from the wording of Article 326 TFEU that the provisions of acts adopted within the framework of enhanced cooperation cannot be in conflict with Union law. In this context, the founding treaties require respect for the equality of Member States and the principle of loyalty, as enhanced cooperation must not, under any circumstances, undermine economic and social cohesion or lead to obstacles or discrimination in trade between Member States.⁴⁵ Article 327 TFEU establishes an obligation of mutual respect and loyalty, since the enhanced cooperation must respect the competences, rights, and obligations of non-participating Member States and, vice versa, non-participating Member States cannot prevent the development of such cooperation.

The equality of access by Member States to closer integration within the EU is also ensured by the fact that the enhanced cooperation is open – not only at the stage of its establishment but also after its implementation – to all Member States, provided that they fulfil the required conditions. This provision underlines the provisional nature of the enhanced cooperation regime, which should lead to the gradual participation of all Member States in such cooperation and its subsequent incorporation into the Union *acquis*. In this regard, the participating Member States should encourage other Member States to join the established enhanced cooperation.

According to Article 329 TFEU, which describes the process of the initial establishment of enhanced cooperation, a minimum of nine Member States wishing to cooperate must submit a request to the Commission, which has a margin of discretion to check whether the formal conditions for that cooperation are met. It is unclear whether the Commission is authorised to also control possible political consequences of that cooperation. Then, the Commission may submit the cooperation proposal to Council, which, after obtaining the consent of the European Parliament, can give authorisation to proceed with that enhanced cooperation.⁴⁶

Once the conditions required for implementing enhanced cooperation are met and the Council has adopted a corresponding decision, the participating States are entitled to use the bodies, procedures, and legal instruments of the EU within the limits of the objectives pursued by the enhanced cooperation. According to Article 330 TFEU, all Member States may participate in the deliberations; however, only the members of the enhanced cooperation Council have the right to vote since they are the only ones bound by the law adopted in this framework. This is to ensure that non-participating Member States are informed about the activities of enhanced cooperation, which would facilitate their subsequent accession.

According to Article 331 TFEU, which describes the process of the accession to the existing enhanced cooperation, the Member State wishing to participate in that cooperation must fulfil the conditions for such participation and adopt all provisions of that cooperation and shall notify its intention to the Council and the Commission. Then, the Commission shall examine whether the conditions of participation have been fulfilled

45 | See Article 327 of the TFEU.

46 | Regarding the enhanced cooperation falling within the scope of the Common Foreign Affairs and Security Policy, the process is slightly different: the request of the Member State is first addressed to the Council and then forwarded to the High Representative for Foreign and Security Affairs and to the Commission for their opinion and the European Parliament is notified.

and shall either confirm the participation of the Member State concerned or indicate the arrangements to be adopted to fulfil those conditions.

The Council and the Commission ensure that activities conducted under enhanced cooperation align with the Union's other policies and initiatives.⁴⁷ Some authors also propose an EU Court of Justice judicial review of the compliance of the proposed enhanced cooperation with the founding treaties.⁴⁸

The provisions of the founding treaties on enhanced cooperation are still relatively little used. To date, strengthened cooperation based on Article 20 TEU has been established in the following areas: divorce and legal separation,⁴⁹ matrimonial and registered partnership property issues,⁵⁰ Unitary EU patent,⁵¹ and the European Public Prosecutor's Office.⁵² The permanent structured cooperation⁵³ should also be considered a special type of enhanced cooperation based on Article 42 TEU.

All existing cases of enhanced cooperation have arisen as an *ultima ratio* measure following the failure to find an agreement in the Council voting unanimously on a draft legislative proposal by the Commission. There is a great variety in the number of participating Member States, in the regulatory technique used, in the type of secretariat or other administrative body chosen for the operational stage, and in the financing and staffing provisions. The number of participating Member States is usually far above the necessary threshold of 9 and varies between 17 and 26. In terms of participation, it is also interesting to note that Austria, Belgium, France, Germany, Greece, Italy, Portugal, and Slovenia participate in all cases of enhanced cooperation (all of them among eurozone Member States), whereas Eastern, Northern, and opt-out Member States are less likely to engage in enhanced cooperation.

The enhanced cooperation framework is governed by the subsidiarity, since, if a contradiction occurs between the enhanced cooperation provision and standard Union provision, it is possible to deduce from Article 326 TFEU the primacy of standard Union law over enhanced cooperation law. However, the proportionality of the scope of the enhanced cooperation regime is not explicitly defined. The question of the extent to which

47 | See Article 334 of the TFEU.

48 | Piris, 2014.

49 | Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III) (OJ L 343, 29.12.2010, pp. 10–16).

50 | Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ L 183, 8.7.2016, p. 1). Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ L 183, 8.7.2016, p. 30).

51 | Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJ L 361, 31.12.2012, p. 1).

52 | Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ L 283, 31.10.2017, p. 1).

53 | Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States (OJ L 331, 14.12.2017, p. 57).

a cooperation regime is permitted outside the procedure provided for by the founding treaties remains unresolved.

Furthermore, although Article 20 TEU states that Member States may establish enhanced cooperation; however, it does not explicitly exclude that there may be other forms of cooperation. Thus, cooperation outside the EU seems, in fact, possible, following the example of the initial intergovernmental Schengen Convention. Some specific cases of enhanced cooperation could provoke free riding by non-participating Member States; therefore, it is important to continuously support other Member States to join that cooperation.

3.3.1. *Schengen acquis*

In this chapter, we consider the Schengen acquis as the Court of Justice has included it under enhanced cooperation in its case law. The Schengen acquis, which was initially created on an intergovernmental basis, was later incorporated as a form of enhanced cooperation. The Schengen acquis became part of the EU acquis on the basis of Protocol No. 19 on the Schengen acquis integrated into the framework of the EU ('Schengen Protocol'), attached to the TEU and TFEU. However, not all standard provisions governing enhanced cooperation laid down by Article 20 TEU are fully applicable to the Schengen acquis. For example, based on Article 7 of the Schengen Protocol, the Schengen acquis forms an integral part of the Union law that every acceding candidate State must adopt.

The Court of Justice recalled in this regard that it follows from the Schengen Protocol that the integration of the Schengen acquis into the EU framework is based on the provisions of the founding treaties on enhanced cooperation. In particular, it follows Article 327 TFEU that the implementation of enhanced cooperation is structured by the distinction between participating States, which are bound by the acts adopted in that context, and non-participating States, which are not. Moving from the status of a non-participating Member State to that of a participating Member State is governed generally by Article 331 TFEU and means that the Member State in question is required to apply the acts already adopted within the framework of the enhanced cooperation concerned.⁵⁴ The Schengen area comprises 29 Member States (of which three are non-EU countries), including Denmark, which has a special position, Ireland which has an opt-out, and Cyprus, which should soon become a member of this area.

4. Concluding remarks

This paper has focused on exceptions to the territorial scope of EU law, particularly primary law. As noted, these exceptions can be classified according to their temporal framework into temporary and permanent exceptions. We contend that in the case of the EMU, the exceptions can be regarded as both cumulatively temporary and permanent. In addition to the negative exceptions to the application of EU law, the paper also addresses positively framed exceptions, specifically the opt-in mechanism, which enables Member States to engage in enhanced cooperation. Apart from permanent opt-outs and, to some

54 | See, for example, Judgement of the Court of Justice of 8 September 2015, *Spain v European Parliament and Council*, C-44/14, ECLI:EU:C:2015:554.

extent, the fragmentation of law associated with opt-ins, the remaining exceptions do not provoke significant debate.

Diverging views emerge regarding permanent opt-out clauses. How should we perceive permanent opt-outs negotiated by current Member States of the EU – Denmark in certain areas, Ireland in other areas, and Poland in relation to the Charter of Fundamental Rights? It is objectively undeniable that the negotiation of these opt-outs by the Member States concerned was driven by political motivations. The prerequisite for these agreements was the desire of the Member States to secure the adoption of amendments to the founding treaties, which would have been unattainable without their participation. From this perspective, it is difficult to dispute that, in a somewhat positive sense, opt-outs contribute to the EU's integration process, as they allow Member States to moderate their positions on specific issues during treaty negotiations, rather than issuing a full rejection. The legal basis for these opt-outs lies in the protocols annexed to the founding treaties, which constitute primary EU law. The question as to why other Member States did not avail themselves of this option at the time of treaty adoption is irrelevant; what is more pertinent is why it would be difficult to adopt such opt-outs retrospectively. Given that this concerns EU primary law, introducing new opt-outs would necessitate revising primary law, a process that requires consensus. In our view, this question could be raised during future revisions of the founding treaties, although we do not anticipate retroactive application to existing policies but rather to any new measures introduced by future revisions. Therefore, the perceived disadvantage faced by other Member States stems purely from their failure to raise objections at the time of the treaty's adoption or during the introduction of new policies for which they may now wish to opt out.

Additionally, one could argue in favour of opt-outs by drawing on public international law. From the perspective of Member States, the founding treaties are, in essence, international treaties, albeit with a special status within EU law, as they form the constitutional foundation of EU primary law. Nevertheless, Member States can typically attach reservations to international treaties, whereas this option is absent in EU primary law, which, to some extent, is replaced by the opt-out mechanism. On the other hand, a valid argument against opt-outs is that the unequal status of Member States and their unequal participation in the integration process could potentially lead to the fragmentation of EU law. As such, opt-outs can be viewed both as a threat to the uniformity of Union law and as a means to advance integration despite the disinterest of certain Member States, thus overcoming the issue at hand. Ultimately, the objective outcome is that Member States are not treated equally.

If the principle of equality among Member States within the EU is to be maintained, the current reality is that while most Member States have achieved the same level of integration, some have not reached this level, and in the case of opt-ins, certain Member States have even exceeded it.

In the context of proposals and considerations for the future, we suggest excluding the possibility of introducing new opt-outs. Although we support the opt-in cooperation model in the form of enhanced cooperation, this mechanism also has certain shortcomings and has been subject to criticism. As R. Böttner notes, 'The files on establishing and implementing enhanced cooperation are all characterised by different timeframes and intensity of discussions and different levels of political controversy, all of which are factors that eventually led to enhanced cooperation'. Some enhanced cooperation agreements, such as the European Public Prosecutor's Office or cooperation on European

patents, were discussed for years. On the contrary, ‘the proposal for the financial transaction tax met strong resistance in principle so that willing member states resorted to enhanced cooperation relatively quickly’.⁵⁵ Here, we strongly recommend establishing an obligation to explore all possible avenues to reach a consensus, with sufficiently long and thoughtful negotiations, allowing Member States adequate time to consider options—rather than rushing into decisions. We believe this is an appropriate form of cooperation, provided the conditions are met and it is only used when a reasonable amount of time has been allocated for States to attempt to reach a consensus. Only if, after ample time and all possible efforts, a consensus cannot be achieved should the mechanism of enhanced cooperation follow as a last resort.

However, the status quo undeniably leads to a lack of clarity and uniformity in EU law. This also raises the question of the ‘free rider’ issue in terms of equality. To what extent should the non-participation of Member States be reflected in the rules governing budget contributions? Since even Member States benefiting from their exemptions may, to some degree, benefit from the areas they opt out of, we propose that the first step towards ensuring equality without unnecessary doubt could be to draw a clear line and refrain from applying corrective mechanisms to adjust the contributions of these Member States.

55 | Böttner, 2022, p. 1148.

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CHANGE IN THE PERCEPTION OF THE STATE SOVEREIGNTY

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ABSTRACT

This study aims to explore the shifting perceptions of state sovereignty by analysing it from two distinct perspectives, an 'inside-out' view and an 'outside-in' approach. By examining these two perspectives, this study aims to analyse state sovereignty, reflecting its dynamic nature and the factors involved in its interpretation and manifestation, particularly while accepting international treaty obligations. Moreover, it explores the raison d'être of sovereignty, questioning its underlying purpose and the principles that sustain its relevance in today's globalised world.

KEYWORDS

sovereignty
Wimbledon case
coexistence and interdependence of states

1. Introduction

The concept of state sovereignty, a cornerstone of international relations and international law, has evolved significantly over the centuries. Traditionally, sovereignty was understood as the absolute authority of a state to govern its affairs without any external interference. However, in modern times, this once rigid notion has become more fluid, reflecting the complexities of an interconnected world. This study seeks to examine the evolving perceptions of sovereignty of a state by analysing it through two distinct points of view: an 'inside-out' and an 'outside-in' attitude. The inside-out perspective focuses on how states themselves perceive and exercise their sovereignty, particularly through legal frameworks. A key focus here is the landmark Wimbledon case decided by the Permanent Court of International Justice (PCIJ), which highlights the ongoing tension between

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state autonomy and the obligations imposed by international treaties adopted by states themselves.

In contrast, the outside-in perspective examines how external factors, including international organisations and the broader global community, influence and reshape the understanding of sovereignty. This approach investigates the fundamental purpose of sovereignty, challenging its core principles and assessing its continued relevance. By looking into these two determined perspectives, this study examines the evolving nature of state sovereignty and highlights the factors that shape its current interpretation and application, particularly within international law, where sovereign states are considered equal entities.

The Wimbledon case, decided in 1923, serves as a pivotal point for the inside-out analysis. This case involved a dispute over the right of passage through the Kiel Canal, with Germany asserting its sovereignty in opposition to the terms laid out in the Treaty of Versailles. The court's ruling underscored that state sovereignty is not absolute and can be limited by international agreements, confirming the balance between national authority and international obligations having been approved by those national authorities. The case illustrates how states must navigate their sovereign rights while adhering to the broader framework of international law and the commitments they have voluntarily undertaken.

From the outside-in perspective, the study explores how globalisation, transnational issues, and the increasing influence of international organisations have redefined the concept of sovereignty with the impact on its internal manifestation. Global challenges, such as international security and human rights transcend national borders, demanding a more cooperative and interdependent understanding of sovereignty. This change reflects the growing recognition that the well-being of individuals and the international community often requires imposing limits on traditional notions of state autonomy.

In this context, the *raison d'être* of sovereignty is revisited considering its ultimate purpose: the protection and promotion of human welfare. This study examines whether sovereignty should be regarded as an end in itself or as a means to facilitate broader global cooperation and security. The study argues that contemporary sovereignty must adapt to the requirements of an interconnected world, where the rights of individual states are balanced against and interlinked with the needs and interests of the international community.

By examining state sovereignty from both the inside-out and outside-in perspectives, this study aims to contribute to the ongoing discussion on the relevance and application of sovereignty in contemporary international law. It aspires to provide insights into how sovereignty can be reinterpreted to meet the challenges of the 21st century, accepting that it remains a fundamental principle for both state authority and global cooperation. Finally, the selected two perspectives highlight the flexibility required in understanding sovereignty today, emphasising that while states continue to have a crucial role in the international system, their actions are increasingly influenced by global factors that cross traditional borders.

2. Historical and philosophical background of the term sovereignty

This subsection addresses a concept that not only academics encounter, but one that indirectly affects everyone. Although sovereignty may not be a topic of everyday conversation for most people, its influence is experienced across various aspects of our lives. This subsection focuses on the theoretical dimensions of sovereignty, exploring key questions such as whether it is legally possible to cede or transfer a state's sovereignty, even partly. Moreover, it examines the reasons underlying such transfers, questioning whether ceding sovereignty leads to its limitation or, conversely, to a more efficient exercise of sovereign power. In particular, it explores whether this change allows states to prioritise not only their own national interests, but also the collective goals of the international community.² This approach has been selected to indicate the manifestation of state sovereignty in relation to other primary subjects of international law. Thus, the existing necessity of at least minimal cooperation between states denies the theory of absolute state sovereignty.³

The concept of state sovereignty can be observed in several dimensions. For example, it is a concept that can be examined as a political phenomenon, as a principle of public international law, and as a concept occurring in the practice of international bodies and organisations.⁴ This study focuses on state sovereignty in terms of its development, which is at a stage where sovereignty can be understood as a responsibility.⁵ This approach was introduced by the International Commission on Intervention and State Sovereignty, highlighting the need to adapt to the evolving circumstances under which state sovereignty is exercised. While acknowledging these changes, it remains crucial to recognise that the concept of state sovereignty holds an irreplaceable position in both international law and relations. This is particularly true in areas where the state bears the 'responsibility to protect.' Additionally, in the realm of international treaties, it is important to emphasise that irrespective of the reasons for adopting such agreements, it is always the state that negotiates, implements, and enforces them. Moreover, the state remains the primary entity against which international legal responsibility can be invoked. Therefore, sovereignty continues to be a fundamental pillar of international order, even as it adapts to the demands of a globalised world.

3. State sovereignty in historical and philosophic-legal context

While examining the current system of international relations, one must be aware of several factors that have their origins in historical facts. One of these factors is the

2 | Gioia, 2006, p. 1099.

3 | Boutros Boutros-Ghali, 1993, pp. 468–498.

4 | Mrázek, 2007, pp. 729–767.

5 | Responsibility to Protect, p. 13 [Online]. Available at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (Accessed: 12 September 2024).

particularity of international law as it relates to its subjects.⁶ The classical international order has its basis in the Westphalian system of international relations, which was legally verbalised by the Peace of Westphalia in 1648.⁷ This was a major landmark in history, which not only ended the Thirty Years' War, but also completed the process of creating states that have since been independent from the ecclesiastical state. The two major figures in international relations, the Pope and the Emperor, ceased to be essential and most important members of the international community.⁸ Having begun in 1555 by Peace of Augsburg with the principle *cuius regio, eius religio*, independent states are coming to the fore. The chief feature of the emerging system points to the coexistence of independent states that are equal to each other. Defined by fixed borders and represented by noble families, the state asserted its legitimacy during this period. It no longer needed an emperor or the coronation of a pope. Europe at this stage of its development was divided into territorially delimited units which presented themselves as sovereign and equal.⁹

The beginning of the Westphalian period can be regarded as a certain phase in the development of the sovereign equality of the state; a stage of its emergence. The second phase of the development and transformation of sovereignty can be observed in the decolonisation period of the 20th century.¹⁰ Furthermore, it was a period when new independent states were being established. Many nations exercised their right to self-determination during this period. Moreover, after the Second World War, this was a situation in which the United Nations (UN) already existed, that is, an organisation, of which one of the guiding principles is the principle of the sovereign equality of all its members.¹¹ Both states and the organisation itself should act in accordance with this principle.¹² At this stage of development, the existence of a system of individual sovereign states was confirmed; state sovereignty is understood as one of the cornerstones of international law and international relations, from which other rules of general international law can be derived, for example, the principle of non-interference in the internal affairs of the state.¹³

6 | Mráz, Poredoš and Vršanský, 2003, p. 19.

7 | See Article LXV. of the Treaty of Westphalia, October 24, 1648, Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies [Online]. Available at: <https://is.muni.cz/el/1423/podzim2008/MVZ430/um/Treaty-of-Westphalia.pdf> (Accessed: 16 September 2024).

8 | Azud, 2008, p. 177.

9 | Klučka, 2004, pp. 12–16.

10 | Stacy, 2003, pp. 2029–2060.

11 | Article 2 paragraph 1 of the UN Charter: The organisation is based on the principle of the sovereign equality of all its Members.

12 | The above also applies to non-members of the United Nations insofar as it is necessary for the maintenance of international peace and security. See Article 2 paragraph 6 of the UN Charter: The organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

13 | Article 2 paragraph 7 of the UN Charter: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Closely related to the notion of sovereignty is the notion of mutual equality, equality under the law. It is the basic rule of law between nations, *ius inter gentes*, law inter nations, that is, international law.¹⁴ There is no 'hierarchically supreme power' to force states to fulfil their obligations. However, considering that states do not live in a vacuum, their sovereignty has its limitations.¹⁵ The international community would struggle to cooperate and coexist effectively without sovereignty. In this context, it is noteworthy that the role of sovereignty in state cooperation can be considered from two distinct perspectives. On the one hand, sovereignty is often perceived as a major obstacle, limiting the potential for collaboration between states. On the other hand, sovereignty is the most crucial expression of a state's authority and independence, making it essential for genuine and meaningful cooperation between nations. Therefore, sovereignty not only defines the limits of state interaction, but also empowers states to engage in cooperative efforts on equal footing, preserving their autonomy while pursuing shared goals.¹⁶

The Westphalian system of international relations has undergone numerous stages of transformation since its inception.¹⁷ Similarly, general international law has evolved significantly over the centuries, adapting to the changing dynamics of global interactions. In recent times, the undeniable influence of globalisation has further shaped this evolution. What was once perceived as the absolute independence and autonomy of sovereign states has gradually changed into a more complex and nuanced concept of asymmetric interdependence.¹⁸ This modern understanding acknowledges that while states remain sovereign, their ability to act independently is increasingly influenced by global economic, political, and social factors. This change highlights the interconnectedness of nations, where sovereignty coexists with mutual dependence in a globalised world. The consequence of this transformation is not merely a desire, but a growing necessity for states to cooperate on multiple levels and with varying degrees of intensity. In recent years, the scope and focus of the international arena have shifted significantly. The classical understanding of international law has been redefined, particularly in relation to the emerging concept of the international community as a collective entity. While states continue to hold their status as the primary actors in international law, particularly in areas such as security, the role of sovereignty has evolved. The era where sovereignty served as the overarching, unifying principle for the governance of the global system has come to an end.¹⁹ Instead, the international order now requires more nuanced forms of collaboration and shared governance that reflect the complexities of an interconnected world. States and the international community face a challenge that creates the conditions for a third phase in the evolution of the concept of sovereignty.²⁰ Within this framework, sovereignty could be considered as a responsibility and an organising principle for realising universal norms and values, such as protecting fundamental human rights or safeguarding peace

14 | Brownlie, 2003, p. 287.

15 | Čepelka and Šturma, 2003, p. 12. Also Podgor, 2004, p. 3.

16 | Schreuer, 2002, pp. 163–180.

17 | For another understanding of the Westphalian system redefinition see e.g. Țuțuianu, 2013, pp. 43 et seq.

18 | Koskeniemi, 2005, pp. 212, 234, 477, 482–483.

19 | Clapham, 1999, p. 115.

20 | Stacy, 2003, pp. 2035 et seq.

and security, which are also related to holding perpetrators of the most serious crimes criminally accountable under international law.²¹

Both of the first two phases aforementioned were based on the concept of territorial delimitation. Moreover, reflections of the developments outlined can be observed in the works of legal and political theorists.²² Among them, in relation to the notion of sovereignty, the following three, whose work is based on presenting and examining a certain type of contract with a territorially determined sovereign on one side, should be mentioned.

The first of these works, *Leviathan* by T. Hobbes, presents a sovereign that has minimal obligations to its population.²³ This stems from the fact that it provides them with order and security within the borders of the state, which is most significant. These two factors are a significant step forward in comparison with the chaos that occupies a prominent place in times of lawlessness.²⁴ In a sense, he compares the state of relations within the international community to that which was typical at the national level in the period before the emergence of states. J. Locke's *Second Treatise of Government* marks a shift to the sovereign having a wider range of duties. These include the protection of the life, security, and private property of its inhabitants.²⁵ This is to be applied also externally by the sovereign.²⁶ However, simultaneously, these areas themselves constitute restrictions on regulation through legislative means.²⁷ J. J. Rousseau's *The Social Contract* present a coherent idea of the social contract that addresses the common good and the general will, which is manifested in the enactment of laws made by the people.²⁸ Similar to Locke, Rousseau agrees with Hobbes that there is a natural state. However, they disagree with him that it is a state of war.²⁹

Today, we can observe the emergence of a new concept of a 'contract' between the sovereign state and its population, one that reflects a broader and deeper understanding of the state's obligations to its citizens. Central to this evolving notion is the idea of effective governance, where the authority of the government is defined not solely by its autonomy, but by its responsibility to protect and uphold human rights. In this context, it appears that the minimum standards for human rights have begun to take precedence over the traditional notion of absolute sovereignty. Since human rights issues are increasingly addressed and enforced by the international community as a whole, we could, from a philosophical standpoint, argue that the international community itself has become a third party to this contract. This suggests the emergence of a new social contract, in

21 | Schrijver, 2000, pp. 95–98.

22 | Jean Bodin, 16th century, is considered the first theorist to address the concept of sovereignty. According to him, sovereignty is the supreme power over the population in a certain territory and as such is absolute, not limited either from outside (whether by the Pope or the Emperor) or from inside (subjects). Sovereignty, according to Bodin, is indivisible, eternal, and as such cannot be created for a specific period of time. Thus, an office can be established, but not a sovereign. For Jean Bodin see e.g. Malenovský, 1993, p. 19.

23 | Hobbes, 1660.

24 | *Ibid.*, Chapter 17.

25 | Locke, 1690.

26 | *Ibid.*, Chapters 2, 3, 8, 16.

27 | McCormick, 1999, pp. 123–136, 124.

28 | Rousseau, 1762.

29 | Koskeniemi, 2005, p. 90.

which both the international community and the individuals within states play a critical role, further shaping the relationship between sovereign powers and their populations.³⁰ This has several consequences, not excluding the perception of sovereignty as such. As already mentioned, it is necessary to simultaneously stress in this context that the role of states remains important, for example, in the adoption and implementation of international commitments. The difference lies in the factors that influence this process.³¹

Further, the end of the Cold War allowed for the emergence of new states, which led to a debate on the meaning and limitations of sovereignty. Considering the 75 independent states in 1945 and more than 190 independent states in 2024, it is necessary to realise that the more pressing challenge today is to redefine the content of the notion and manifestation of state sovereignty, not the question of its very existence.³²

While globalisation has undoubtedly become a powerful force, it does not imply the decline of the concept of the territorial state. However, it is crucial to consider a much broader and more complex network of interconnected relationships that shape today's international landscape. In many respects, we are witnessing the evolution of a 'new' form of international law. The novelty of this emerging legal framework is reflected in various developments, such as the growing number of international organisations, the recognition of individual criminal responsibility on a global scale, and the expansion of international justice. This evolving international legal order no longer solely regards individual states or specific groups of states; instead, it now serves the broader interests of the international community and individuals, who can increasingly demand that their rights be respected.

A significant example of this shift is the decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case. This ruling underscored how the approach to addressing issues that affect the international community has fundamentally changed. The focus is no longer primarily on the sovereignty of a state; rather, it has shifted towards the protection and empowerment of an individual. The *Tadić* case is a clear symbol of this broader transformation, as it highlights the growing importance of international norms that prioritise human rights and individual accountability. In this sense, international law is adapting to a new reality where states are not the only subjects of concern, rather individuals and their rights have become central to the international legal order.³³ This reflects a profound change in how we approach global governance, justice, and accountability in the 21st century: state sovereignty is a means to ensure international peace and security. For example, it manifests itself in the active preparation and effective implementation of international treaties.

30 | Safferling, 1999, pp. 126–163, pp. 154–155.

31 | Ibid., pp. 155 et seq.

32 | Azud, 2006, pp. 341–357, 354.

33 | ICTY, *Prosecutor v. Tadić*, 1995, paragraph 97.

4. Manifestation of the sovereign rights

While examining the general rules of international law, states are undoubtedly recognised as complete, full-fledged subjects of public international law.³⁴ Their status reflects a territorial approach to the effective exercise of state power over a population inhabiting a certain part of the earth's surface. Moreover, this approach is reflected in the notion of a nation and an insurgent party as a subject of international law. Moreover, their status is determined by the effective exercise of control over a particular territory and the population inhabiting that territory. However, in the case of a nation and an insurgent party, they are only temporary subjects of international law, leading to the emergence of the sovereign state itself.³⁵

The concept of sovereignty and independence, and equality, is used in the field of international relations to describe an entity that has complete authority.³⁶ Such an entity requires distinctive constitutive elements. A state is constituted as its subject in the field of international law by having a permanent population, a delimited territory, its own government capable of effectively exercising state power and the ability to enter into relations with other comparable entities, that is, states.³⁷

Territorial sovereignty is exercised by a state both in relation to its territory internally and externally. The exercise of power internally is divided into three chief components, the legislative, executive, and judiciary.³⁸ It is always the state that decides on the content of the legal norms applicable and applied in its territory.³⁹ It is also the state that is responsible for adopting the necessary legal acts that constitute the legal basis for securing the various rights and obligations declared or assigned.⁴⁰ It is nowadays well accepted that it is jurisdiction of a state that is a consequence of sovereignty or its inseparable part.⁴¹ Sovereignty not only has its internal manifestation that is relevant mostly for its territorial jurisdiction, but also an external aspect that is important towards other sovereigns and among them.

At the international level, it is the state sovereign that decides upon adoption of legally binding acts as proven by the Wimbledon case decided by the Permanent Court of International Justice in 1923. This case highlights the complex interplay between state sovereignty and international obligations. The case arose when the German government denied passage to the SS Wimbledon, a British ship carrying munitions for Poland, through the Kiel Canal, citing neutrality in the Polish-Soviet War as its justification. However, the Treaty of Versailles, which Germany had signed, mandated free passage through the canal for vessels of all nations in times of peace and war.

34 | Warbrick, 2006, p. 218.

35 | Mráz, Poredoš and Vršanský, 2003, pp. 82–85. See Canada Case: Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, 115 International Law Review 1998, pp. 579–591, paragraphs 111–146.

36 | Full authority does not equal absolute authority.

37 | Azud, 2005, p. 127.

38 | Shaw, 2003, p. 576.

39 | In case of *ius cogens* it is an international community as a whole.

40 | As for access to justice see Shelton, 2005, p. 8.

41 | Brown, 1998, p. 424.

The PCIJ's decision in the Wimbledon case underscored the principle that state sovereignty includes the capacity to enter into international treaties and, crucially, to be bound by them. By signing the Treaty of Versailles, Germany had voluntarily agreed to certain limitations on its sovereignty, including the obligation to allow passage through the Kiel Canal. The court emphasised that sovereignty does not imply unfettered freedom from international commitments; rather, it includes the power to undertake international obligations and to respect them.⁴²

The court rejected Germany's argument that adhering to the treaty would compromise its neutrality and sovereign rights. Instead, the PCIJ held that international treaties, once ratified, become part of the legal obligations that a sovereign state must uphold. This landmark ruling affirmed that international law could impose limitations on national sovereignty without infringing upon it. The decision highlighted that the voluntary nature of treaty commitments did not undermine sovereignty but redefined it within a broader international context.⁴³

Furthermore, the Wimbledon case illustrated that a state's sovereign decision to adopt an international treaty carries with it the responsibility to comply with the treaty's terms, even if doing so conflicts with the state's immediate interests or policies. Thus, the PCIJ's ruling reinforced the idea that international cooperation and legal commitments are integral to the functioning of a stable international order. Moreover, it demonstrated that sovereignty, while foundational, is not absolute and must coexist with the principles of international law.

The case highlighted how international courts view the relationship between state sovereignty and international obligations. It held that states, by their sovereign will, can and do accept constraints on their autonomy through treaty obligations, which they must then respect. This ruling has had implications for the development of international law, particularly in how it balances state sovereignty with the necessity of adhering to international agreements.

In conclusion, the Wimbledon case underscores the dual nature of sovereignty: the right to govern independently and the responsibility to abide by international commitments. It highlights the evolving nature of sovereignty in an interconnected world where state actions are increasingly governed by international legal frameworks. This case remains a critical reference point for understanding how international treaties can shape and limit state actions, reinforcing the importance of legal obligations in maintaining international order and cooperation.

The external sovereignty of the state covers the various aspects accessible to states in a space in which the classical hierarchical stratification is absent, with a supreme, decisive authority empowered to issue the final decision. It is a space of equal players in which cooperation, negotiation and bargaining are the decisive means of communication, to solve the problem between those equal players.⁴⁴

Sovereignty, by its very nature, expresses a relationship with other states and organisations of states. It is a relationship that is largely determined by law. The concomitants of sovereignty and equality of states are the right to exercise their jurisdiction over their own territory and population, and simultaneously, the obligation not to interfere in the

42 | PCIJ, Case of the S.S. Wimbledon, p. 25.

43 | Ibid.

44 | Koskenniemi, 2005, pp. 24 et seq.

sphere of exercise of jurisdiction of other states. Certainly, respect for the obligations arising from customary and treaty international law must not be disregarded.⁴⁵ In this context, it is necessary to point out an area which is reserved to national jurisdiction. It is an area in which international law cannot interfere. However, simultaneously, it is an area whose scope has been narrowed to a considerable extent by the development of international relations, in particular by their intensification.⁴⁶ The principle of non-interference in the internal affairs of the state is enshrined in several legal instruments, such as Article 2(7) of the UN Charter. However, this principle must be interpreted considering the view that serious violations of human rights are of concern to the international community as a whole and may, under certain conditions, justify, for example, prosecution based on universal jurisdiction.⁴⁷ Moreover, in the case of state responsibility for breach of international law obligations, a state cannot rely on its domestic law.⁴⁸

Regardless of the difference in national or international approach, the ultimate goal of law is the same at both levels. It is the welfare and security of individuals.⁴⁹ The *raison d'être* of the state does not lie in its existence as such. Its aim is to protect and improve the status and situation of its citizens. Although the world is constantly changing, the protection of its fundamental values and stability continue to be clear objectives of the law. *Hominum causa omne jus constitutum est* (every legal act is created for the purpose of benefiting the individual).

However, even if the goal is the same, the means and methods of achieving that goal differ. The necessity of friendly cooperation in the international field has several implications. Considering economic and political conditions, states, in their efforts to exercise their power more and more effectively, are also cooperating in ways that may appear to some as a surrender of sovereignty.⁵⁰ The result is clear when reviewing the last third of the 19th century and the entire of the 20th century. It is about the creation and functioning of international organisations. The strengthening of international relations has allowed states to create a number of permanent entities whose purpose is to work within a framework defined by states. These entities, governmental international organisations, are empowered to act by their founding charters. It is through an international treaty concluded between sovereign states that international organisations have acquired a certain type of derivative sovereignty, which is not based on the concept of territory, but on the concept of content, the subject matter of the entrusted circle of relations.⁵¹ States are in turn members of these entities, international organisations, and can change (whether to narrow, abolish or expand) their powers. An organisation is entitled to enjoy a certain status, which depends on the purpose of its establishment. The subjectivity of an international organisation is an essential component of its existence. Otherwise, it could not achieve the objective set by its founders, the sovereign states.⁵² States, as complete,

45 | Brownlie, 1998, p. 289.

46 | Fenyk and Kloučková, 2005, p. 16.

47 | Harvard Research Draft Convention 1935, in: Harris, 2004, pp. 266 et seq.

48 | Article 3, Article 21, Article 27 of Vienna Convention on the Law of Treaties.

49 | Brierly, 1944, p. 97.

50 | Potočný and Ondřej, 2003, p. 234.

51 | Evans, 2006, pp. 280–286.

52 | See also *Bernadotte* Case, ICJ Reports 1949, p. 179. Upon autonomous exercise of power by international organisations unintended and unanticipated by the states see e.g. Barnett and Finnemore, 1999, pp. 699 et seq.

primary subjects of international law, are capable of ceding part of the exercise of their sovereignty to new legal entities with derivative personality for the purpose of streamlining the exercise of their sovereign rights to improve the status of individuals, particularly their welfare and security, in different areas and in different ways.⁵³

5. Conclusion

The concept of state sovereignty, once considered absolute, has transformed in response to the demands and development of modern international relations and international law. As demonstrated throughout this article, the notion of sovereignty is no longer confined to the rigid, autonomous authority of states to govern their internal affairs without interference. Instead, it has evolved into a more flexible and interdependent concept, shaped by both internal considerations and external global factors. The dual perspectives explored in this study, both inside-out and outside-in, provide a comprehensive framework for understanding the modern manifestations of sovereignty and the factors that shape its application.

From the inside-out perspective, state sovereignty remains central to a state's ability to govern itself, regulate its internal affairs, and take decisions on behalf of its population. The Wimbledon case has not only highlighted the continuing relevance of sovereignty in international law, but also underscored the limitations imposed by international obligations. By ratifying treaties, states voluntarily limit their sovereign powers, demonstrating that sovereignty in the modern world is not an absolute or unfettered right but is balanced against international commitments. The PCIJ's ruling in Wimbledon illustrates that states must exercise their sovereignty within a broader framework of international law, which they have opted to influence and adhere to.

Moreover, the article has reflected the increasing influence of factors that impact how sovereignty is understood and practiced. As globalisation intensifies, states are more interconnected than ever before, leading to the need for cooperative governance on issues that cross national borders. This includes global challenges such as human rights protection and security, where no single state can effectively act alone. In this context, sovereignty is not a limited territorial unit and can no longer be viewed solely as a tool for protecting national interests; it must also serve as a means for states to engage with and contribute to the international community.

The development of interpretation of sovereignty also questions its *raison d'être*, its ultimate purpose. In the past, sovereignty was focused on the protection of state power and its territory. However, nowadays, sovereignty is increasingly considered as a means to promote broader interstate cooperation, human well-being, and security. It may be considered as a tool to ensure and contribute to the functioning of the international system while addressing universal challenges. This development reflects a growing recognition that the well-being of individuals often depends on coordinated action and cooperation between states that influences traditional understanding of state sovereignty.

Nevertheless, this change in the perception of the state sovereignty does not mean that sovereignty has lost its relevance. Contrarily, sovereignty remains a cornerstone of

53 | See also Brus, 2002, pp. 14 et seq.

the international legal system. States continue to be the primary subjects in international law, and their consent is required for the adoption of legally binding international treaties. However, the way and the reason in which and why states exercise their sovereignty has changed. Nowadays, state sovereignty is defined not only by its ability to act independently, but also by its ability to become engaged and fulfil its commitments towards the international community.

To summarise, state sovereignty, once a rigid and absolute concept, has evolved into a more nuanced and flexible principle. The analysed perspective demonstrates that states continue to have authority over their affairs, but its manifestation is constrained by international law, particularly by international treaties. Moreover, international factors influence the way how states exercise their sovereignty, balancing between their autonomy and interdependence. To conclude, the ongoing reinterpretation of sovereignty reflects the importance of both state sovereignty and interstate cooperation to protect the well-being of individuals. Sovereignty remains fundamental to the structure of the international system, however, its meaning and manifestation has been developed, reflecting the changing nature of the international community in which states operate.

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THE RELATION BETWEEN EU LAW AND THE CONSTITUTIONS OF MEMBER STATES IN THE CONTEXT OF NATIONAL IDENTITY

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ABSTRACT

The question on the relation between EU law and the constitutions of Member States is and has been a crucial question in the interplay or collaboration between national Constitutional Courts. The Court in Luxembourg maintains its doctrine on overall supremacy of EU law, but some constitutional courts disagree. The author will show, especially with regard to selected countries, like Croatia, how some constitutional courts elaborate their stand on the matter. For example, the Croatian Constitutional Court only briefly stated that the Constitution is above EU law, without any explanation. Other constitutional courts dealt with this issue more methodically and through various decisions through time. There are serious issues regarding the principle of supremacy and the relation of EU law and constitutional provisions of the constitutions of Member States, especially in those cases in which the respective constitutional court established its constitutional identity doctrine. Therefore, the author will try to show what is (or should be) the argumentation on this matter.

KEYWORDS

principle of supremacy
EU law
constitutions of Member States
hierarchy of norms
legal systems

1. Introduction

When applying law, it is sometimes necessary to establish the hierarchy of legal norms which make a legal order. In the past, this task was considerably easier, as legal orders were predominantly comprised of norms originating in a specific country, without much outside influence and/or interference. However, today's legal systems and legal

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orders are much more complex and intertwined. Maybe a good example of how the legal orders of national States became more complex is the implementation (or incorporation) of international treaties into domestic legal orders. This phenomenon started especially after the Second World War and the UN Conventions. Maybe the best example in the European context, before the emergence and consolidation of EU law, is the European Convention for Human Rights and Fundamental Freedoms (ECHR) which has had a tremendous impact on legal systems of every single Member State of the Council of Europe. This has been particularly a result of the establishment of the European Court of Human Rights (ECtHR) whose judgements are binding for all Member States. Currently, the same applies to EU law and the judgements of the Court of Justice of the European Union (CJEU). This is because of the principle of supremacy which dictates that the norms of a) international treaties, b) EU law, etc. are of a higher legal standing than domestic legal norms. This is usually not considered controversial, as many constitutions contain norms concerning the higher legal standing of such legal norms. However, it has always been presumed that all norms of a given legal system must be aligned with the constitution. After several judgements of the CJEU (see *infra*), this has not been considered as 'set'. Namely, the CJEU formed its doctrine of supremacy of EU law even with regard to national constitutions of Member States. This doctrine, however, is not accepted by all constitutional courts of the Member States. Therefore, this paper will show the development of the relation of EU law in the context of the hierarchy of legal norms in a legal system with the constitutions of Member States.

2. Legal system and the hierarchy of norms

As Guastini states, it can be assumed, although this is debatable, that a legal order is a set of rules (or norms).² The components of a legal system are independent and dependent rules. Independent rules are those whose existence does not depend on the previous existence of other rules (such are constitutional rules). All remaining rules are dependent since they have been issued by a subject invested with law-making authority by a pre-existing rule or since they derive inferentially from pre-existing rules.³ In the second place, a distinction has to be made between expressed and unexpressed rules. Expressed rules are those rules which are explicitly stated or formulated in a legal provision, and unexpressed rules are those unstated rules which are derived from expressed rules either by logical inference or by persuasive juristic arguments.⁴ Thirdly, a distinction has to be made between primary and secondary rules. Primary rules are rules of conduct addressed to legal subjects and secondary rules are power-conferring rules addressed namely to State organs, regulating the production and application of primary rules of conduct.⁵

It is said, as a rule, that for a legal rule (norm) to be a part of a legal system the main criterion is its validity. However, the highest legal rule in the hierarchy of sources – the

2 | Guastini, 2024, p. 203.

3 | Guastini, 2024, p. 204.

4 | *Ibid.*

5 | Guastini, 2024, p. 205.

constitution – cannot be neither valid nor invalid as there is no source above it. That is why we should say that every legal system is composed not only of valid rules, but also of independent rules, neither valid nor invalid as the constitution.⁶ Secondly, there are many legal rules that are *de iure* invalid as they are either unconstitutional or unlawful (bylaws), but they also make a certain legal system until they are declared as such. Therefore, Guastini concludes that validity is not the criterion of adherence of the rules to the legal system, but the criterion should be simple ‘existence’, namely the actual enactment by a ‘prima facie’ competent normative authority.⁷

Following the determination of the characteristics of a legal system, it is now obvious that it is comprised of many different norms, it must be stated (although it is obvious) that not all these norms are of an equal hierarchical standing. Namely, all legal systems are hierarchical by nature.⁸ Kelsen states that there is only one kind of hierarchy – the relationship between the rules which regulate law creation and the rules created according to them.⁹ However, modern legal theorists find that this kind of hierarchy cannot exist today as there are, for example, ‘super-constitutional’ principles which cannot be modified or derogated not even by means of the procedure of constitutional amendment (eternity clause¹⁰).¹¹ Guastini therefore recognises four hierarchical structures: formal hierarchy (between secondary rules which regulate the creation of law and the primary rules created according to them); substantive or material hierarchy (a first rule R1 is materially higher-ranked than a second rule R2, while a third rule R3 states that R2 may not contradict R1); logical hierarchy (between rules and meta-rules – for example, between a derogatory rule and the derogated one (R1 is hereby derogated); axiological hierarchy (this is a hierarchy regarding the value of the rules concerned and are derived from the value-judgements of interpreters).¹² From all this, it must be concluded that a legal system presents a pyramidal structure. A logical question is, then, how the pyramid is formed, which rule(s) is (are) on the top of the pyramid and so on. Perhaps the best answer can be found through the material hierarchy according to which a lower standing norm is not allowed to take a form which would conflict with the content of a higher standing norm. Material hierarchy often reflects the formal hierarchy.¹³ As a rule, it is common to refer to the constitution as the basic norm, as Kelsen stated – at the top of the system there is a *Grundnorm* – a basic norm¹⁴ (the German Constitution is referred as the (*Grundsgesetz* or Basic Law). Or as Hart stated, at the top of every legal system there is a ‘rule of recognition’ which defines the validity or membership of all the remaining rules of a legal system at hand.¹⁵ Therefore, it is valid to say that it is (was) commonly accepted that the constitution

6 | Guastini, 2024, p. 206.

7 | Guastini, 2024, p. 207.

8 | Guastini, 2023, p. 219.

9 | Kelsen, 2012, p. 5.

10 | For example, the Italian Constitutional Court finds that certain ‘supreme’ principles of the Constitution are above all other constitutional norms and are exempted from the amendments of the Constitution despite the application of the constitution amendment procedure set forth in Article 138 of the Constitution. See Guastini, 2023, p. 225.

11 | See Guastini, 2024, p. 209.

12 | Guastini, 2024, pp. 209–210.

13 | Guastini, 2023, p. 222.

14 | Kelsen, 2015, p. 115; Kelsen, 2012, p. 196.

15 | Hart, 1994, p. 101.

is on the top of the pyramid which makes a given legal system. However, this began to change after 1963. Namely, the claim on the EU as a new, autonomous legal order was subsequently developed as a central point of myths which were further used for ideological purposes.¹⁶ The principle of supremacy of EU law was forged *ex nihilo* and it was also presented as a mechanism for ensuring unity and effectiveness of Community law and the equality of Member States (Costa, see *infra*).¹⁷ This principle was further strengthened when it was interpreted as referring also to the constitutions of all Member States in 1970 (*Internationale Handelsgesellschaft*, see *infra*). Therefore, as a result, the CJEU tipped the scale in favour of EU law, demolishing the pre-established pyramid of legal system. It should be highlighted that the principle of primacy is not yet embodied in positive EU law (meaning that it is not encompassed neither in the TFEU nor in the TEU).¹⁸

3. The principle of supremacy of EU law in the practice of the CJEU with special regard to national constitutions

The principle of supremacy (also referred to as 'precedence' or 'primacy') of European Union (EU) law is based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU Member State (national law), EU law will prevail. If this were not the case, Member States could simply allow their national laws to take precedence over primary or secondary EU legislation, and the pursuit of EU policies would become unworkable.

The principle of supremacy of EU law has developed over time by means of the case law (jurisprudence) of the CJEU. It is not enshrined in EU Treaties, although there is a brief declaration annexed to the Treaty of Lisbon in this regard.¹⁹ As the CJEU stated in its famous judgment *van Gend & Loos*, the EU constitutes a new legal order of international law for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.²⁰

In *Van Gend en Loos v Nederlandse Administratie der Belastingen*²¹, the CJEU declared that the laws adopted by EU institutions were capable of creating legal rights which could be enforced by both natural and legal persons before the courts of the Member States. Therefore, EU law has a direct effect. According to the principle of supremacy of EU law, in case of a conflict between EU law and the law of the Member States, EU law prevails.

16 | Rasmussen, 2014, p. 136; Horvat Vuković, 2019, p. 250.

17 | Rasmussen, 2014, p. 13; Horvat Vuković, 2019, p. 250.

18 | Trstenjak, 2013, p. 72. Only a Declaration concerning supremacy annexed to the Treaty of Lisbon and adopted in 2007 by the Intergovernmental conference which adopted the Treaty of Lisbon, refers to this principle. The Declaration refers also to an Opinion of the Legal Service of the Council on the supremacy of EU law from 2007.

19 | European Union: Primary of EU law (precedence, supremacy) Summaries of EU legislation. [Online]. Available at: <https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html> (Accessed: 16 November 2024).

20 | Trstenjak, 2013, p. 71.

21 | Case 26/62 *Van Gend en Loos*, ECLI:EU:C:1963:1.

However, this principle does not mean that the CJEU can invalidate the national law, which conflicts with EU law. It rather means that in case of a conflict between national law and directly effective EU law, which cannot be solved by consistent interpretation of national law, national courts of the Member States must apply EU law instead of the national law.²²

In *Costa v ENEL*²³, the Court further built on the principle of direct effect and captured the idea that the aims of the treaties would be undermined if EU law could be made subordinate to national law. As the Member States transferred certain powers to the EU, they limited their sovereign rights, and thus in order for EU norms to be effective they must take precedence over any provision of national law, including constitutions. This view of absolute primacy of EU law has been echoed through the CJEU's case law ever since.²⁴ In the narrative of the CJEU, the doctrine of supremacy was laid down in *Costa v ENEL* in 1964, but was part of EU law from the outset.²⁵ However, supremacy in fact became a reality when it was accepted by national courts, and different national courts accepted it at different times, with uniform acceptance not being achieved until the early 1990s.²⁶

Further examples of cases in which the CJEU affirmed the supremacy of EU law include *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*²⁷, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*²⁸, *Marleasing SA v La Comercial Internacional de Alimentacion SA*²⁹.

In these cases, the CJEU clarified that the primacy of EU law must be applied to all national acts, whether they were adopted before or after the EU act in question. Where EU law takes precedence over conflicting national law, the national provisions are not automatically annulled or invalidated. However, national authorities and courts must refuse to apply those provisions as long as the overriding EU norms are in force. The principle

22 | Trstenjak, 2013, p. 72.

23 | Case 6/64 *Costa*, ECLI:EU:C:1964:66.

24 | Bruggeman and Larin cite Case C-119/05 *Lucchini*, ECLI:EU:C:2007:434, para 61; C-213/89 *Factortame*, ECLI:EU:C:1990:257, paras 17–18; Case C-409/06 *Winner Wetten*, ECLI:EU:C:2010:503, para. 61.

The only two possible exceptions, i.e., where a relative interpretation of the primacy of EU law is used, could be seen in *Omega* and *Sayn Wittgenstein*. In these cases, the CJEU seemed to depart from the strict, unconditional hierarchy it maintained in its case law discussed above, and which was taken up again later. In *Omega*, the German Federal Administrative Court (*Bundesverwaltungsgericht*) asked the CJEU whether it could prohibit a laser gaming facility from providing services deemed to infringe the principle of human dignity as enshrined in the German Constitution, even if it were to restrict the free movement of goods and services in EU law. The Court found this prohibition to be justified based on public policy exceptions provided for in EU Treaties. In *Sayn Wittgenstein*, the question arose whether a law abolishing nobility as an expression of the constitutional principle of equality in Austria posed a legitimate restriction to the free movement of persons in EU law. The CJEU explicitly relied on Article 4(2) TEU in justifying the derogation based on public policy grounds. In both cases, the Court allowed for limitations to the EU's fundamental freedoms, but not stemming (only) from domestic constitutional principles, but based on policy objectives, it deemed legitimate in EU law. Bruggeman and Larin, 2020, p. 22.

25 | Nagy, 2024, p. 72.

26 | Ibid.

27 | Case 11-70 *Internationale Handelsgesellschaft mbH*, ECLI:EU:C:1970:114.

28 | Case 106/77 *Simmenthal SpA*, ECLI:EU:C:1978:49.

29 | Case C-106/89 *Marleasing SA*, ECLI:EU:C:1990:395.

of supremacy therefore seeks to ensure that people are uniformly protected by EU law across all EU territories.

It should be noted that the supremacy of EU law only applies where Member States have ceded sovereignty to the EU – in fields such as the single market, environment, transport, etc. However, it does not apply in areas such as education, culture or tourism.³⁰

Some scholars argue that the notion of ‘constitutional identity’ is used by various constitutional courts (some of which are less and less politically independent) to carve out ever-larger areas of ‘constitutional identity’ by themselves and thus undermine the supremacy of EU law. Namely, national constitutional and supreme courts as well as other Member State institutions play a crucial role in both cooperating with and in counterbalancing the CJEU.³¹ However, the CJEU further expanded its powers after the entry into force of the Charter of Fundamental Rights because this enabled the CJEU to act as a constitutional court. Its slow broadening of powers with special reference to *Fransson*³² erodes the functioning of national courts even in situations which are only ‘in the reach’ of EU law.³³

4. The practice of the ECtHR with regard to the relation of the ECHR and national constitutions

In this part of the paper, the ECtHR’s *Sejdic Finci v. Bosnia and Herzegovina* judgement³⁴ will be presented to illustrate that the ECtHR once considered a constitutional provision in violation of the European Convention, therefore conferring a higher status to the Convention than to the constitution of a Member State of the Council of Europe.

In this judgement, the ECtHR ruled that Bosnia and Herzegovina violated Article 14 of the Convention, taken in conjunction with Article 3 of Protocol No. 1 as regards the applicants’ ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina. Specifically, the Constitution of Bosnia and Herzegovina is, in reality, an international agreement (the Dayton Agreement). The Constitution of Bosnia and Herzegovina is an annex to the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (‘the Dayton Agreement’), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. As part of a peace treaty, the Constitution was drafted and adopted without the application of procedures which could have provided democratic legitimacy. It constitutes the unique case of a constitution which had never been officially published in the official languages of the country concerned but was agreed and published in a foreign language, English. The Constitution confirmed the continuation of the legal existence of Bosnia and Herzegovina as a State, while modifying its internal structure (see paragraph 6 of the judgement). The Constitution makes a distinction between ‘constituent peoples’

30 | European Union: Primary of EU law (precedence, supremacy) Summaries of EU legislation.

31 | Bruggeman and Larik, 2020, p. 21.

32 | C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.

33 | Horvat Vuković, 2019, p. 254.

34 | *Sejdic Finci v. Bosnia and Herzegovina*, Grand Chamber, application nos. 27996/06 and 34836/06, 22 December 2009.

(persons who declare affiliation with Bosniacs, Croats and Serbs) and ‘others’ (members of ethnic minorities and persons who do not declare affiliation with any particular group because of intermarriage, mixed parenthood, or other reasons). In the former Yugoslavia, a person’s ethnic affiliation was decided solely by that person, through a system of self-classification. Thus, no objective criteria, such as knowledge of a certain language or belonging to a specific religion were required. There was also no requirement of acceptance by other members of the ethnic group in question. The Constitution contains no provisions regarding the determination of one’s ethnicity: it was seemingly assumed that the traditional self-classification would suffice (see paragraph 11 of the judgement). Only persons declaring affiliation with a ‘constituent people’ are entitled to run for the House of Peoples (the second chamber of the State Parliament) and the Presidency (the collective Head of State).

The applicants of the case describe themselves to be of Roma and Jewish origin respectively. Since they do not declare affiliation with any of the ‘constituent peoples’, they are ineligible to stand for election to the House of Peoples (the second chamber of the State Parliament) and the Presidency (the collective Head of State).

The first question the ECtHR had to resolve was whether the respondent State may be held responsible. Although the Constitution of Bosnia and Herzegovina is an annex to the Dayton Agreement, itself an international treaty, the power to amend it was, however, vested in the Parliamentary Assembly of Bosnia and Herzegovina, which is clearly a domestic body. In those circumstances, leaving aside the question of whether the respondent State could be held responsible for putting in place the contested constitutional provisions, the Court considered that it could nevertheless be held responsible for maintaining them (see paragraph 30 of the judgement).

The ECtHR stated that this exclusion rule pursued at least one aim which was broadly compatible with the general objectives of the Convention, as reflected in the Preamble to the Convention, namely the restoration of peace. When the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and ‘ethnic cleansing’ (see para 45. of the judgement). The ECtHR asserted that it did not need to decide whether the upholding of the contested constitutional provisions after ratification of the Convention could be said to serve a ‘legitimate aim’, the maintenance of the system in any event did not satisfy the requirement of proportionality (see paragraph 46 of the judgement). Thus, the ECtHR concluded that the applicants’ continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacked an objective and reasonable justification and therefore breached Article 14, taken in conjunction with Article 3 of Protocol No. 1. Secondly, the ECtHR also found that the impugned precondition for eligibility for election to the Presidency constituted a violation of Article 1 of Protocol No. 12.

Therefore, the Grand Chamber of the Court had no doubts that a constitutional norm could be found in violation of the Convention and that it was the duty of the respondent Member State to rectify the situation – i.e. to amend its Constitution (how this was realistic with regard to Bosnia and Herzegovina shows the fact that today, in 2024, the judgement has not yet been implemented). There are two dissenting (one of which is partly concurring and partly dissenting) opinions with the judgement. I will cite from judge Bonello’s dissenting opinion:

‘the Court has almost unlimited powers when it comes to granting remedies to established violations of Convention-acknowledged human rights – and that surely is as it should be. But do these almost unlimited powers include that of undoing an international treaty, all the more so if that treaty was engineered by States and international bodies, some of which are neither signatories to the Convention nor defendants before the Court in this case? More specifically, does the Court have jurisdiction, by way of granting relief, to subvert the sovereign action of the European Union and of the United States of America, who together fathered the Dayton Peace Accords, of which the Bosnia and Herzegovina Constitution – impugned before the Court – is a mere annex?’

This reveals that the question raised was not whether a constitution can be found in violation of the Convention, but whether the ECtHR has the power to undo an international treaty. Therefore, it is the stand of the ECtHR that the Convention has supra-constitutional strength. When one sees, for the example, the practice of the Croatian Constitutional Court which gave the Convention quasi-constitutional strength as it found that a violation of the Convention also means, by itself, the violation of the Constitution, one can truly say that perhaps the Convention is really above all other sources of law in Council of Europe Member States when it comes to the protection of human rights and fundamental freedoms. However, no other cases in which the ECtHR weighed the provisions of another constitution against the Convention occurred, so the answer is still vague, but it can be said that similarly to the CJEU’ earlier example, the ECtHR, with *Sejdić Finci*, also tipped the scale in favour of Convention law, demolishing the pre-established pyramid of a legal system.

5. The standpoint of national constitutional courts with regard to the relation of EU law and national constitutions

The legal theory divides Member States into three groups according to their position on the supremacy of EU law in relation to the national constitution: Member States that acknowledge full supremacy, Member States that acknowledge limited supremacy of EU law in relation to the national constitution, and Member States that principally assume supremacy of the national constitution over EU law.³⁵ It should also be highlighted that Article 4(2) TEU stipulates that the Union shall respect the ‘national identities, inherent in their fundamental structures, political and constitutional’ of the Member States. It should also be mentioned that the Maastricht Treaty bound the Union to respect the ‘national identities’ of Member States (see Article F 1.), which the Lisbon Treaty tried to autonomously define national identities, inherent in the State’s ‘basic structures, political and constitutional’.³⁶ For this reason, the concept of ‘national’ identity is equalised in the literature with ‘constitutional’ identity – as national identities function as a border for *intra vires* actions of EU bodies.³⁷ Interestingly, contrary to constitutional identity, which

35 | Trstenjak, 2013, p. 74.

36 | Horvat Vuković, 2019, p. 256.

37 | Ibid.

has a clear textual basis (Article 4(2) of the TEU), the doctrine of supremacy has never been codified in EU Treaties.³⁸

It should be highlighted that some national constitutional courts contested the notion of supremacy of EU law with regard to national constitutions, especially with regard to the protection of human rights. The first was the famous *Bundesverfassungsgericht* (BVerfGE) as early in 1967 when it invoked its right to control EU law in this sense, and the second was the Italian Constitutional Court which established its *controlimiti*³⁹ doctrine in 1973.⁴⁰ This prompted the CJEU to incorporate guarantees of fundamental rights in its *Nold* judgement⁴¹ in 1974. However, the BVerfGE rejected the supremacy of EU law over constitutional norms guaranteeing fundamental rights and freedoms in its famous *Solange I* judgement.⁴² This prompted an interesting interaction between the CJEU and the BVerfGE, in which the CJEU convinced the BVerfGE to remain neutral, as long as it was convinced that EU law provided effective protection which was significantly similar to that stemming from the Grundgesetz and that protected their essential meaning, what BVerfGE did in its equally famous *Solange II*⁴³ judgement.⁴⁴ The CJEU overcame this problem by reading human rights into EU law as general principles of law. In 2000, these general principles of law were codified in the EU Charter of Fundamental Rights and became a cornerstone of the European constitutional architecture.⁴⁵ Therefore, the problem of accepting the supremacy of EU law in matters related to the protection of human rights and fundamental freedoms was settled by court dialogue. There has

38 | Nagy, 2024, p. 68.

The Constitutional Treaty aimed to resolve the issue by providing in Article I-6 that '[t]he 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'; however, the Treaty was not adopted. When it was converted into the Lisbon Treaty, this provision was specifically rejected as having the very constitutional character that was disallowed by the European *pouvoir constituant*. This rejection might potentially give rise to a *contrario* arguments. Article I-6 was replaced with Declaration 17 on Primacy attached to the Lisbon Treaty. Although the Declaration may be interpreted in such a way that the Member States signed up for the CJEU's narrative of supremacy, it is ambiguous how much legal weight national constitutional courts will give to 'recall[ing]' the CJEU's case law. More importantly for the present analysis, however, the Declaration gives no hint as to interpretive primacy. *Ibid*.

39 | The Italian Constitutional Court, in its 1973 *Frontini* judgement, started developing its *controlimiti* doctrine, a version of which has remained actual to this day. The Court reasoned that Italy's participation in European integration brought about certain limitations of Italian sovereignty. However, these limitations themselves must find their limits within core principles of the Italian constitution. The transfer of sovereignty to the European Community (EC) does not 'give the organs of the EEC an unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of man'. See Corte costituzionale (Corte cost.) [Constitutional Court], 18 December 1973, n. 183, G.U. 1973 (It.). The Court subsequently further developed its doctrine in the *Granital* and *FRAGD* cases. See Corte costituzionale (Corte cost.) [Constitutional Court], 5 June 1984, n. 170, G.U. 1984 (It.); Corte costituzionale (Corte cost.) [Constitutional Court] 21 April 1989, n. 232, G.U. 1989 (It.). Scholtes, 2021, pp. 536–537.

40 | See Horvat Vuković, 2019, p. 253.

41 | *C 4/73 Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, ECLI:EU:C:1974:51.

42 | *Solange I*, BVerfGE 37, 271 (2 BvL 52/71), p. 280.

43 | *Solange II*, BVerfGE 73, 339 (2 BvR 197/83), pp. 378–381.

44 | Horvat Vuković, 2019, p. 253.

45 | Nagy, 2024, p. 73.

been no documented case where a national constitutional court has refused to honour a CJEU judgment for breaching nationally protected fundamental rights. The ‘Solange’ compromise has worked effectively, resulting in two distinct and parallel fundamental rights regimes. On the one hand, national constitutional courts have deactivated their constitutional review powers, but have reserved the right to use them, if necessary.⁴⁶

Later, the BVerfGE’s 1993 Maastricht judgment, for instance, framed national limitations to the reach of EU law as a matter of sovereignty as *Kompetenz-Kompetenz*, or the capacity to decide who is competent.⁴⁷ The now famous ruling of the BVerfGE with regard to the *Weiss* case⁴⁸ in which the German court found the ruling of the CJEU *ultra vires*, also shows the problems with the CJEU’s interpretation of the principle of supremacy of EU law.

The Italian Constitutional Court invited, in *Taricco*⁴⁹, the CJEU to ‘re-interpret’ its ruling and indicated that otherwise it would be compelled to pronounce it *controlimiti*, following the Italian version of the Solange principle.⁵⁰ In this case, the court held that Italian legislation concerning VAT was not aligned with EU law. However, the Italian Constitutional Court found that compliance with the ruling of the CJEU would result, from the perspective of Italian law, in a violation of the prohibition of retroactive application *in peius* of criminal law.⁵¹ The Italian Constitutional Court admits that European law and decisions of the CJEU may not only prevail over national legislation but also derogate from the Constitution. Nevertheless, when the implementation of EU law results in the violation of the fundamental principles of the Constitution, the Constitutional Court claims to maintain jurisdiction and competence to intervene in protection of the core principles of the Italian Constitution.⁵² This prompted the so called ‘Tarrico saga’ in which the Italian Constitutional Court, after the *Tarrico* decision, referred three new questions⁵³ to the CJEU.

46 | Nagy, 2024, p. 85.

47 | Scholtes, 2021, p. 537.

48 | Case C-493/17 *Weiss*, EU:C:2018:1000.

The CJEU found that the measure in question, although more economic than monetary policy, was still covered by the European Central Bank’s monetary competence. In turn, the BVerfGE found the ruling *ultra vires* and, hence, concluded that it was to be ignored. It established that it could not rely on the CJEU’s judgment, as its central part was ‘simply not comprehensible’ and ‘objectively arbitrary’ and took the interpretation of the relevant provisions of EU law into its own hands. Its ‘independent’ interpretation concluded that the ECB decisions ‘manifestly’ violated ‘the principle of proportionality’. See in Nagy, 2024, p. 78.

49 | C-105/14 *Tarrico and Others*, EU:C:2015:555.

50 | Nagy, 2024, p. 75.

51 | Capelli, 2023, p. 94.

52 | Capelli, 2023, p. 95.

53 | To begin with, the Constitutional Court asked the European Court of Justice whether Article 325(1) and (2) TFEU were to be interpreted as requesting criminal courts to disregard national limitation periods rules even in cases where (1) a sufficiently precise legal basis for setting aside such legislation lacks and when (2) limitation is part of the substantive criminal law in the Member State’s legal system and is as such subject to the principle of legality. Finally, the Italian Court interrogated the CJEU as to whether the judgment in *Taricco I* was to be interpreted as requiring the criminal courts to disregard national legislation concerning limitation periods even when the setting aside such legislation would contrast with the supreme principles or with the inalienable human rights recognised under the Constitution of the Member State. Capelli, 2023, p. 99.

In response to the request for a preliminary ruling on behalf of the Italian Constitutional Court, the CJEU delivered a conciliatory decision in which it accepted that, with the view of ensuring the respect of the principle of legality as understood by the Italian Constitutional Court, the national judges could apply the Italian provisions concerning the statute of limitations even if this would result in a violation of the Member States' duty to protect the financial interests of the Union (the *Tarrico II* case⁵⁴). However, in the *Tarrico II* decision the CJEU continued to uphold the doctrine of the supremacy of EU law but gave Member States discretion with regard to ongoing criminal cases in a procedural field of law, namely limitation periods, provided that the matter had not yet been harmonised by EU law. Thus, the CJEU in *Taricco II* refuses to attenuate or to allow any exception to the primacy of EU law but shows itself conciliatory. At the same time, the Court avoids a direct confrontation over whether and how to resolve a discrepancy between EU law and national constitutional law principles.⁵⁵ The response of the Italian Constitutional Court came⁵⁶ shortly after and the Court affirmed that, while the Court of Justice had the sole authority to interpret EU law uniformly and determine whether it had direct effect, it was also undeniable that, as recognised by the *M.A.S. and M.B.* judgement, the Italian legal system could not accept an interpretive result that violated the principle of legal certainty in criminal matters.⁵⁷

Both the Spanish and the French Constitutional Courts read the clause contained in Article 4(2) of the TEU as 'containing an implicit limit to the primacy of European law whenever that law would affect national constitutions, or at least their fundamental structures'. The Spanish Constitutional Tribunal, in the course of the ratification of the Constitutional Treaty, argued that Article I-5 directly incorporated into the Treaty the reservations to supremacy that national constitutional courts had been making for years.⁵⁸ The French *Conseil Constitutionnel* came to a similar conclusion. It found that, despite the express inclusion of a supremacy clause in the CT, because Article I-5 shows that the Treaty 'has no effect upon [...] the place of [the French Constitution] at the summit of the domestic order'. In 2006, the *Conseil* went further in practically developing a constitutional identity doctrine for the first time. It found that the transposition of European directives must not run counter to principles of French constitutional identity 'unless the constituent [power] has agreed to this'. From this, the *Conseil* has effectively developed a doctrine of constitutional identity that must prevail over community law.⁵⁹

Also, the Polish Constitutional Court and the Romanian Constitutional Court have each expressly pronounced a CJEU ruling non-binding for being *ultra vires*.⁶⁰

It is interesting to mention how the Croatian Constitutional Court 'solved' the problem of absolute supremacy of EU law. In a 2015 decision⁶¹ the Court stated:

'The Constitutional Court lastly finds that there is no need to question, in this constitutional procedure, the material alignment of the referenda question with EU law as the Constitution

54 | Case C-42/17 *M.A.S. and M.B.*, ECLI:EU:C:2017:936.

55 | Capelli, 2023, p. 101.

56 | Judgement No. 115/2018.

57 | Capelli, 2023, p. 102.

58 | Scholtes, 2021, p. 537.

59 | Scholtes, 2021, p. 538.

60 | Nagy, 2024, p. 75.

61 | U-VIIR-1159/2015, 8 April 2015, Official gazette 43/2015.

is, by its legal strength, above EU law (highlighted by the author). In other words, with regard to items I. and II. of the ruling of this decision, there are no reasons to conduct the examining with regard to the law which is in force in the Republic of Croatia on the basis of the Treaties and in the light of Article 141.c of the Constitution.'

This decision represents the only decision of the Croatian Constitutional Court with regard to the principle of supremacy of EU law. The Court did not, in any way, explain why it held that the Constitution is, by its legal strength, above EU law. It just stated this as a matter of fact. It is almost as the Court was, at the time, oblivious of the importance of the question it just, so laconically, resolved and the ongoing debate between the CJEU and other constitutional courts of the Member States. This was also highlighted by Horvat Vuković who wrote that 'such laconic dismissal of EU law supremacy must be taken as a reckless omission of the Court to clarify the boundaries of effects of EU law in the context of preservation of specific Croatian constitutional identity'.⁶²

With this in mind, it must be concluded that the Croatian Constitutional Court did not, in any way, set the 'rules of the game' when discussing the relation of EU law, principle of its supremacy and the Constitution. With its laconic wording, the Court summarily dismissed the long-standing CJEU case law on the principle of supremacy. Therefore, the only possible conclusion is that the Croatian Constitutional Court does not recognize the principle of supremacy with regard to the Constitution.

We can clearly see the emergence of a more pronounced constitutional identity and an equivalent concept. While the founding States we studied have been examples of constitutionally formulating the limits to which they have adhered in the supranational legal order for decades, the content and name of these limits have also changed over time. German examples have been referred to several times, from the *Solange I* decision to the Own Resources Decision, through which we can see the search for the way in which these specificities have been formulated. At the same time, the protection of the 'inner core' of the constitution in the regime-changing States emerged at a time when a more streamlined constitutional court doctrine was available, which may be attributed to the more uniform language of the courts in the use of concepts. In this sense, constitutional identity is linked to the protection of the Constitution and to the value of the primacy of the Constitution.⁶³

6. Conclusion

The pivotal question, when talking about the relation of EU law and national law, including Member States' constitutions, is the question of the principle of supremacy of EU law. This principle does not exist in legal texts forming EU law. It was introduced by the CJEU in *Costa* in 1964. However, the CJEU needed to go through several obstacles⁶⁴ in order to enforce this new principle. The first was perhaps the easiest – to establish that this principle is indeed a 'real' legal principle that Member States need to obey. The

62 | Horvat Vuković, 2019, p. 262. See, also Bačić, 2023, p. 130.

63 | Berkes, 2023, p. 403.

64 | See Nagy, 2024, p. 71.

second was the problem of protecting human rights in the application of EU law, which was found by several constitutional courts as lacking. This problem was solved through a dialogue between the CJEU and the constitutional courts, especially with the BVerfGE, as constitutional courts accepted that adequate protection of human rights in EU law exists. There has been no documented case where a national constitutional court has refused to honour a CJEU judgment for infringing nationally protected fundamental rights. The 'Solange' compromise has worked effectively, resulting in two distinct and parallel fundamental rights regimes.⁶⁵ However, the third problem shows to be difficult to solve and it is linked with CJEU *ultra vires* actions according to the Member States' constitutional courts. In such cases, the constitutional courts were forced to block the implementation of a CJEU ruling (the cases of the BVerfGE and the Polish and Romanian constitutional courts) or seek, through dialogue, that the CJEU backtracks (the *Tarrico* saga). It is obvious that at least some constitutional courts are not ready to give the CJEU *carte blanche* in the interpretation of EU law with regard to its implementation in a manner which could violate their constitutions, or at least their constitutional identity. When such problems occur, they appear to be insolvable because both courts 'in conflict' 'claim to be 'to be right' and as 'border organs' operating at the threshold between law and politics, they both are advocating Kelsenian 'basic norms' that are mutually not reconcilable'.⁶⁶ This is why Graser advocates for a new institution: a European court that could be invoked when Member States see a violation of interests of the kind described above; a court that would be composed of Member State judges delegated to that institution only on the occasion of such disputes, and of some judges, in addition, of the European Court of Justice; an institution, hence, which would not just avoid any suspicion of an integrationist bias, but also be able to transcend the particularistic national views.⁶⁷

65 | Nagy, 2024, p. 85.

66 | Hilpold, 2021, p. 190.

67 | Graser, 2023, p. 45.

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QUIS CUSTODIET IPSOS CUSTODES – INTERPRETATIVE AND SCOPE JUDGMENTS AS AN ACTIVIST SUBSTITUTE FOR A UNIVERSALLY BINDING INTERPRETATION OF THE POLISH CONSTITUTIONAL TRIBUNAL

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ABSTRACT

The Constitutional Tribunal in Poland has a special position compared to other constitutional courts of this type. Although it is sometimes compared to a classic constitutional court that can interpret the provisions of the Constitution in a binding manner, it has lost this type of authority in the course of institutional evolution. Since 1997, the Constitutional Tribunal has lost the right to issue generally binding interpretations of law. However, as a politically active court, it has assumed that the specific form of judgment, interpretative judgments, will be used to de facto restore the competence taken away under the current Constitution. Judicial activism has become the reason for the politicisation of the Tribunal and its inclusion in the dispute over the judiciary in Poland. The article analyses the impact of activism on the constitutional crisis in Poland. It puts forward postulates concerning the so-called constitutional reset and the implementation of the idea of the enduring Constitution and the inactive court.

KEYWORDS

Constitutional Tribunal
Polish Constitution
constitutional crisis
universally binding interpretation
judicial activism
enduring constitution

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1. Introduction

Contemporary literature on the subject is rich in studies on the so-called interpretative and scope judgments issued by the Constitutional Tribunal². At the same time, there has yet to be a consensus in the doctrine today regarding the status of such judgments issued by the Constitutional Tribunal. On the one hand, we have studies referring to the established line of jurisprudence of the Supreme Court, critical of the idea and power of the impact of interpretative and scope judgments. On the other hand, the constitutional court tries to prove its unquestionable authority in this matter.

The position of the Supreme Court comes down to a statement, consistent with the provisions of the Constitution (Article 239, paragraph 2), about the lack of possibility for the Constitutional Tribunal to issue universally binding interpretations (of the parliamentary acts) and thus the lack of any other than operative power of interpretations contained in interpretative and scope judgments.³ The position of the Constitutional Tribunal comes down to the understanding of Article 190, paragraph 1 of the Constitution, which speaks of the finality and universal validity of judgments in such a way, that the interpretation is given when issuing an interpretative or scope judgment. Although it cannot be considered a legal interpretation, it is an element of the decision, final and universally binding. When comparing these positions, it is clear that the Supreme Court accuses the Constitutional Tribunal of acting *praeter legem*, and thus prompts lawyers in Poland to ask the question in the title: *Quis custodiet ipsos custodes* – Who will guard the guards?

A review of the literature on the subject and the positions of the highest state bodies indicates a huge disproportion in the scope of citing the positions of the Supreme Court and the Constitutional Tribunal. Constitutionalists discussing the issue of interpretative and scope judgments often ignore or significantly limit the arguments presented by the Supreme Court. At the same time, historical and theoretical analysis indicates the correctness of the arguments conducted by the Supreme Court, not the Constitutional Tribunal. The logic of the constitutional system introduced under the Constitution of 1997 excludes the possibility of functioning interpretative and scope judgments in the form postulated by the Polish constitutional court. As those judgements are *de facto* becoming a backdoor introduction of the universally binding interpretation of the acts of parliament. As this is the main focus, not *ad casum* interpretation that serves as a tool for keeping legal system coherent.

The presented paper is devoted to verifying the truth of the thesis that the Constitutional Tribunal, by issuing interpretative judgments, which are *de facto* identified in its case law with universally binding interpretation, being politically active, goes beyond the framework imposed on it by the Constitution. To verify the above-mentioned thesis,

- 2 | An overview of the publications can be found in the section on the substance of the dispute between the Supreme Court and the Constitutional Tribunal.
- 3 | A scope judgment is when the Constitutional Tribunal determines the conformity or non-conformity of a legal provision with the Constitution within a specific (subjective, temporal, or objective) scope of its application. An interpretative judgment is contained in a judgment whose conformity or non-conformity with the legal constitution is confirmed by the Constitutional Tribunal in its specified understanding (interpretation). More on the classification of the Constitutional Tribunal judgements: Dominowska, 2008. More on the interpretative and scope judgements: Woś, 2016; Kustra, 2011.

the analysis will be carried out on the historical premises of the political activism of the Constitutional Tribunal, subsequent constitutional regulations providing the framework for its functioning, theoretical and legal assumptions present in them, and case law. Additionally, the positions issued by the supreme state authorities in case SK 17/18 directly concern the provision of Article 401(1) of the Act of 17 November 1964 - the Code of Civil Procedure, which will provide extra analytical material. Article 401(1) has been of historical importance to the establishment of the Supreme Court's set of rulings opposing Constitutional Tribunal claims regarding both interpretative judgments, e.g., Resolution of the Seven Judges of the Supreme Court of 17 December 2009 (III PZP 2/09).

2. Constitutional court and the democratic principles

The emergence of the institution of a constitutional court in political systems (systems of government) has led to renewed questions about the essence of democracy, sovereignty, the division of powers, and their relationship with the concept of the rule of law (or the rule of law, as defined in the Constitution of the Republic of Poland). The experience of the emergence of constitutional courts, whether based on the American model or Kelsen's⁴ indicates that the disruption of classical systems of the division of powers (both Rousseau's tripartite division and Constantine's quadrangular division of powers) is inevitable. The experience of various forms of constitutional courts, over several centuries, also indicates the inevitable occurrence of judicial activism. A phenomenon, about which there is a predominance of negative opinions on the western coast of the Atlantic⁵ – is perceived as a destructive and undesirable element, and is perceived more inconsistently in Europe. The fact remains, however, that judicial activism is largely related to the guardians going beyond their assigned role and granting competencies that shape the legal and political system. Activist, precedent-setting, and groundbreaking judgments (landmark cases) became the basis of granting shaping competencies to both the Supreme Court in the USA⁶ and the Court of Justice of the European Union.⁷ The systemic position that the constitutional courts themselves have given themselves (and even the increase in the importance of the judiciary about the other separate branches of power) has led researchers to put forward the theoretical concept of judgeocracy⁸.

The influence and practice of constitutional courts on democracy and parliamentarism has been analysed by lawyers and political scientists for years. Although in Poland the discussion on the status of the Constitutional Tribunal flared up with a new force in the so-called mainstream (both academic and common) only after 2015, such considerations have a long history outside the country⁹. An example of this type of analysis is

4 | Kelsen, 2009.

5 | See: Grover, 2020; 2006.

6 | *Marbury v. Madison*, 5 U.S. 137.

7 | *Van Gend en Loos*, 26/62.

8 | See: Pokol and Teglas, 2019.

9 | Debates on the position of the Constitutional Tribunal and the need to eliminate universally binding interpretation as a tool of the Polish constitutional court were part of the debate in the Sejm in the 1990s when a new constitution was drafted. Some remarks on that will be given later in this article.

the argument of Dian Schefold¹⁰ concerning the German case, translated into Polish. The author points out that in the German tradition, it was only the fall of the monarchy (and the authority of the monarch – understood as the legitimacy to exercise power) that opened up the examination of statutes by courts and, subsequently, allowed for the interpretation of the fundamental law. Before World War II, in the author's opinion, the activity of constitutional judges (as a conservative element) was aimed at the democratic devices introduced by the constitution of the so-called Weimar Republic. After the war, the special role of judicial review of statutes was no longer a subject of controversy at all. The Constitutional Tribunal, however, remains 'a kind of counterweight to the sovereignty of the people, a 'surrogate sovereign out of necessity'.'¹¹

In Poland, although discussions on the assumptions and forms of constitutional control were held already in the interwar period,¹² the decades of the Polish People's Republic, and in particular the time of what can be called, following the example of the 'long nineteenth century', the 'long period of transformation' significantly changed, not only the way of conducting debates, but also their context. The introduction, together with the amendment of the Constitution of the Polish People's Republic in 1982,¹³ of a body of provisions establishing the Constitutional Tribunal, the debate on the drafts (fifteen)¹⁴ of the act on the Constitutional Tribunal and the adoption of one of them in 1985,¹⁵ and finally the commencement of adjudicatory activity in 1986, were part of the broader context of social, political and economic changes in Poland. Ignoring these conditions may result in omitting the *ratio* of consent to an active attitude,¹⁶ which is still presented despite the disappearance of these circumstances,¹⁷ as is the case with other constitutional courts.

3. Universally binding interpretation in Poland

The original legal basis did not give the Constitutional Tribunal the authority to issue a universally binding interpretation of the Constitution (generally binding). The authority in this respect under the Constitution of the Polish People's Republic, until the amendment of 1989¹⁸ and the accompanying Act of 29 May 1989 on the transfer of the previous competencies of the Council of State to the President of the Polish People's Republic and

10 | Schefold, 1986.

11 | Schefold, 1986, p. 114.

12 | Alberski, 2010, p. 93.

13 | Journal of Laws 1982 r. no. 11, item 83.

14 | Alberski, 2010, p. 112.

15 | Journal of Laws 1985 r. no. 22, item 98.

16 | See more: Smolak, 2005.

17 | The American and European courts already cited owe their position to activism, which was initially perceived as an element of a broader set of actions aimed at creating a new social, political and economic order. In the case of the USA, it was a federation that de facto replaced the union of free states operating on the basis of a treaty such as the Articles of Confederation and perpetual union. In the European case, it was the idea of communities, and then the European Union, which required the content of treaties accepted by sovereign countries - reluctant to renounce directly, i.e. in the letter of the law, the attributes of their sovereignty.

18 | Journal of Laws 1989 no. 75 item 444.

other state bodies¹⁹, was held by the Council of State. Thus, it was the Council that could freely shape the normative content of the provisions of the constitution – reading in particular from the general clauses – such norms that would correspond to the ideological assumptions of the political system at that time. However, the Council of State only used these competencies in an incident in the 1950s. It should be pointed out that this did not result from respect for the idea of the separation of power, but rather the logic of functioning in an undemocratic regime, where such interpretations of the constitution were not necessary to achieve the intended effect on the scale of the political or legal system.

Granting competence to issue universally binding interpretations²⁰ strengthened the Constitutional Tribunal's already existing ability to create lines of case law that change the legal reality. Lines concerned such fundamental issues for political and legal systems as the principle of a democratic state of law, equality before the law, or even the lack of retroactivity. It is worth noting that the legal changes of 1989 did not abolish the possibility of rejecting a resolution on the unconstitutionality of an act by the Sejm. It could reject the resolution of the Constitutional Tribunal by a qualified majority of two thirds. Although the origins of this regulation were pre-transformation, it should be noted that from the point of view of the concept of the separation of powers, such a solution is desirable. Classical tasks set before judicial bodies – i.e. tasks that were set before them when the concepts of Rousseau or Constant were put forward – did not contain any elements of constitutional justice. Leaving (although a qualified majority) the last word on the justification for introducing a given solution into the legal system and expressing an opinion on its potential conflict with the constitution is an expression of protection of the competencies of the legislative authority. Ultimately – especially in the Polish conditions after 1992²¹ – the Sejm (for a brief time) was the constituent (the body adopting and preparing the constitution) and the legislator in the legislative process. Thus, having the right to reject the resolution of the Constitutional Tribunal, it exercised, in a way, the competence to issue (in this negative way) an authentic interpretation.²²

Following the case law of the 1980s, the foundations for the future socio-economic transformation were laid in the political and legal sphere by the Constitutional Court. This special role played by the Constitutional Tribunal in the critical period for the Polish state became – in the author's opinion – the reason why judicial activism was tolerated immediately after the transformation period.²³

19 | Journal of Laws 1989 no. 34 item 178.

20 | According to Article 5 of the amended Act, the Constitutional Tribunal established a universally binding interpretation of statutes. In the analyzed legal situation, such interpretation was therefore limited to the basic type of generally applicable law.

21 | When the Small Constitution of 1992 was adopted.

22 | The main accusation against active constitutional courts is that they shape legal reality through their rulings. Although they are not legislators par excellence, i.e. they do not issue normative acts and, consequently, regulations, they do introduce previously unknown norms into the legal system through their rulings. See the comments on the *Roe v. Wade* and *Planned Parenthood v. Casey* rulings.

23 | Tolerance turned into instrumentalization only with the maturation of the Polish political class, which inevitably recognized the active Constitutional Tribunal as a key institution of the Polish political system. The culmination of this maturation and awareness process was the years 2005–2007, when the judgments of the constitutional court managed to stop some reforms of the then parliamentary majority. These events were not without significance for the nominations of 2015, which led to the political crisis around the Constitutional Tribunal.

The change of the political regime and the adoption of the so-called Small Constitution in 1992²⁴ opened a new chapter in the history of the development of the Polish political and legal system and the Constitutional Tribunal. Although the formal scope of competencies – especially when we talk about the most important for this work, the competencies to issue interpretations and adjudicate on the unconstitutionality of normative acts – did not change much, the Tribunal actually became an element of the system of deepening political and economic transformation. The Polish constitutional court also became an institution reforming the democratic political system in *statu nascendi*. Already in 1993, it adopted a resolution that influenced relations between itself and the Sejm, as well as the adjudicative practice itself. By the resolution of 20th October 1993 on the interpretation of Article 7 Section 2 of the Act of 29th April 1985 on the Constitutional Tribunal²⁵ specified that ‘the Sejm is obliged to consider the ruling of the Constitutional Tribunal on the non-conformity of the act to the Constitution no later than within six months from the date of presentation of the ruling to the Sejm by the President of the Constitutional Tribunal’. This resulted from the linguistic interpretation of the analysed provision, however, from the moment of adopting the resolution, it was no longer possible to apply other interpretations.²⁶ Moreover, in the event that the ruling of the Constitutional Tribunal was deemed justified, the Sejm should make appropriate changes to the act covered by the ruling or repeal it in part or in whole within the period specified in Article 7 Section 2 of the Act on the Constitutional Tribunal. Finally, the failure of the Sejm to adopt the relevant resolution within six months was treated as an expression of tacit consent as to the content of the ruling. Although this last point significantly streamlined the process and did not allow for maintaining a specific state of suspension and uncertainty as to the constitutionality of the provisions, it was nevertheless a clear example of an expansive interpretation and judicial activism.

It should be clearly emphasised here (which will also be important for the perception of interpretational judgments after 1997) that contrary to the above-presented concept of the institution of the Sejm’s review of a judgment on unconstitutionality as a form of expressing an authentic interpretation, which may dismiss a legal one, but issued by a body outside the circle of the institution of legislative power, the Constitutional Tribunal limited the Sejm’s activity to only influencing the legal effects of the judgment. Thus, from the point of view of the concept presented by the Tribunal, the Sejm did not make a specific interpretation and stood guard over the normative system created by itself, but suspended the legal effects of the judgment, which could not be changed or derogated in any way. In the justification for the cited act, we read in extenso that:

24 | Journal of Laws 1992 no. 84 item 426.

25 | Constitutional Tribunal decision ref. No. W 6/93.

26 | A similar issue was raised in judgment K 34/15 concerning the obligation of the President of the Republic of Poland to accept an oath from a judge of the Tribunal elected by the Sejm. It is worth citing the content of this judgment, however, which clearly differs (due to the lack of authority to issue a legal interpretation by the Constitutional Tribunal) from the content of the resolution of 1993. In judgment K 34/15 we read: ‘Article 21 section 1 of the Act referred to in point 1, understood in a way other than that providing for the obligation of the President of the Republic of Poland to immediately accept an oath from a judge of the Tribunal elected by the Sejm, is inconsistent with Article 194 section 1 of the Constitution’.

This is therefore a classic example of an interpretative judgment, which de facto is to replace the lost competence to issue abstract legal interpretations in the form of acts.

‘The establishment in Article 33a Section 2 of the Constitution of the Republic of Poland of the condition for the Sejm to consider judgments of the Constitutional Tribunal on the non-conformity of an act to the Constitution does not mean that they do not have binding legal force until they are considered (and accepted) by the Sejm, and also - as discussed below - in the event of their failure to be considered by the Sejm within a specified period. According to Article 33a Section 1 of the Constitution of the Republic of Poland, the judgment of the Constitutional Tribunal is the basis for determining the conformity or non-conformity of an act to the Constitution (‘The Constitutional Tribunal shall rule on the conformity of acts to the Constitution...’). The binding judgment, and not its projection, is subject to consideration by the Sejm (Article 33a Section 2 of the Constitution). In accordance with Article 7 Section 1 of the Act on the Constitutional Tribunal, the President of the Constitutional Tribunal submits to the Sejm a ‘judgment determining the non-conformity of a legislative act to the Constitution.’

Therefore, according to the clear wording of the Constitutional Tribunal Act, judgments are final (Article 30, Section 1 of the Constitutional Tribunal Act), and judgments establishing the inconsistency of statutes with the Constitution cannot be challenged – unlike judgments concerning other acts – in the procedure of reconsideration of the case (Article 30, Sections 2-3 of the Constitutional Tribunal Act). The consideration of the judgment and its acceptance or rejection by the Sejm has legal significance, however, when it comes to the legal effects of the judgment on the applicable law. Until then, the effects of the judgment establishing the inconsistency of the statute with the Constitution remain under a legal condition (*conditio iuris*) and in this sense depend on the resolution of the Sejm, if – as discussed below – it was adopted within the period specified by the statute’.

The above-outlined legal status and competencies of the Constitutional Tribunal remained in force until 1997 when the Constitution of the Republic of Poland came into force. The adoption of the ‘full constitution’ meant not only the introduction of a new legal regime, but also the closing of a certain stage of development of the political and legal system, which was expressed, in particular in the wording of the final and transitional provisions to the new fundamental law.

4. Formation of the post-1997 Constitutional Tribunal

The 1997 Constitution can be seen as the culmination of systemic transformation. All devices of both a temporal and extraordinary nature were not only derogated by it but also lost their *raison d’être* from a doctrinal point of view. This qualitative leap is particularly visible in the body of regulations concerning the functioning of the Constitutional Tribunal.

The provisions concerning the constitutional court,²⁷ although they can also be found in earlier chapters – when it comes to the legislative procedure, have been gathered primarily in Chapter VIII – Courts and Tribunals. However, equally important, from the point of view of the analysis conducted and the dispute between the Constitutional Tribunal and the Supreme Court, are the transitional and final provisions of the Polish constitution.

27 | The Act on the Constitutional Tribunal will not be analysed because its provisions are not the subject of controversy between the Supreme Court and the Constitutional Tribunal.

There we find regulations concerning the legal interpretation – the universally binding interpretation of law, which could be issued until the entry into force of the Constitution of the Republic of Poland of 1997.

The current fundamental law has significantly limited the scope of the Tribunal's activity. Article 188 of the Constitution introduced an enumeration of cases in which the constitutional court may adjudicate, i.e.: the conformity of acts and international agreements with the Constitution; the conformity of acts with ratified international agreements, the ratification of which required prior consent expressed in the act; the conformity of legal provisions issued by central state bodies with the Constitution, ratified international agreements and acts; the conformity of the purposes or activities of political parties with the Constitution; and the constitutional complaint referred to in Article 79, paragraph 1. The five-point catalogue has been supplemented with the competence contained in the provisions of Article 189, which recognizes the constitutional court as a court of competence.

The most important change was to deprive the Tribunal of the authority to issue an interpretation of the universally binding law. Although, in accordance with the principle of legalism (Article 7 of the Constitution), each organ of public authority, and courts and tribunals, being a separate authority, are nothing more than a branch of public authority, must act within the limits and on the basis of the law, the issue of the lack of authority to issue a legal interpretation was more broadly specified in the final provisions.

The key to the matter under analysis is Article 239 of the Constitution.²⁸ It states in paragraph 1 that within 2 years from the date of entry into force of the Constitution, rulings of the Constitutional Tribunal on the inconsistency with the Constitution of statutes adopted before the date of its entry into force are not final and are subject to review by the Sejm, which may reject the ruling of the Constitutional Tribunal by a majority of two thirds of the votes, in the presence of at least half of the statutory number of Deputies. This does not apply to rulings issued as a result of legal questions submitted to the Constitutional Tribunal. This indicates a certain period of adaptation to the new, post-transformation legal reality. On the other hand, paragraph 2 states that proceedings in cases on determining the universally binding interpretation of statutes by the Constitutional Tribunal, initiated before the entry into force of the Constitution, are subject to discontinuation. Thus, a certain chapter of the functioning of the constitutional court is definitively closed. Moreover, paragraph 3 clarifies that on the date of entry into force

28 | Commentaries on the Constitution stress that Constitutional Tribunal was strip of the right to formulated universally binding interpretations. It is also important to indicate that different scholars provide different approach to the relationship between universally binding interpretation and interpretational judgements. Piotr Tuleja indicates that 'The elimination of interpretative resolutions by the Constitutional Tribunal was cited as an argument against the Tribunal's issuing interpretative judgments. This argument is invalid because interpretative judgments are not intended to provide a generally binding interpretation of provisions but to specify the conditions under which a provision may remain in the legal system and do not require repeal on the grounds of unconstitutionality.'

Monika Haczykowska, Wiesław Skrzydło, and Piotr Winczorek do not make such remarks in their comments. Moreover, Piotr Tuleja issued his comment in 2023, that is after a new iteration of the dispute over the scope of competencies and position of the Constitutional Tribunal. Thus, his judgment – going against the suggestions arising from the Supreme Court's case law – may (although it does not necessarily have to) have an ideological tinge.

of the Constitution, resolutions of the Constitutional Tribunal in matters concerning the interpretation of statutes lose their universally binding force. Final court judgments and other final decisions of public authorities made by taking into account the meaning of provisions established by the Constitutional Tribunal through a universally binding interpretation of statutes, remain in force.

The cited provisions, although *clara non sunt interpretanda*, are the basis for conducting the dispute between the Supreme Court and the Constitutional Tribunal on whether, in the light of the regulation stating that the judgments of the Constitutional Tribunal have universally binding force and are final (Article 190 of the Constitution), the interpretational judgments have *de facto* the value of a universally binding interpretation of the law. It is also worth pointing out here the attitude towards presenting not only a linguistic interpretation but also an authentic one, giving the floor to the members of the Constitutional Committee of the National Assembly and its experts, who have repeatedly raised the issue of the possibility of making a universally binding interpretation of both laws and the constitution itself.

‘Kazimierz Działocha: The universally binding interpretation of the provisions of the Constitution, made by the Constitutional Tribunal, which ‘lives’ the Constitution and whose entire legal existence is based primarily on the fact that it is to protect the Constitution, should not constitute the competence of the Constitutional Tribunal. Otherwise, the Constitutional Tribunal would be the only one to interpret the provisions of the Constitution in an official, official manner.

Prof. P. Winczorek rightly suggests to me that the Constitutional Tribunal would then become a permanent constituent assembly. This would be – without accusing the Tribunal of anything – exalting this body too much above the proper constituent assembly, i.e. the body authorized to establish the provisions of the Constitution. Besides, the Constitutional Tribunal interprets the provisions of the Constitution anyway, it just does so incidentally on the occasion of specific decisions on the conformity of law with the Constitution.

In this case, the Constitutional Tribunal enhances and sometimes even supplements the constitutional provisions. However, this is a completely different situation. The Constitutional Tribunal only occasionally interprets the provisions of the Constitution when it must decide on a specific case of compliance or otherwise of legal provisions with the Constitution. The Tribunal does not interpret the Constitution in a universally binding manner. This would be too much, considering the place of the Constitutional Tribunal among the constitutional organs of the state²⁹

The creators of the Constitution, or in the future authors of commentaries on it such as Prof. Działocha³⁰ and Prof. Winczorek, pointed out the flaws of the solution consisting of assigning the Constitutional Tribunal the right to issue a legal interpretation. Although in the cited, clearly conducted lecture against the powers to which the Polish constitutional court has claimed the right since 1997, the interpretation of the Constitution was mentioned, the content of the Constitution already deprived the Tribunal of the right to issue a universal interpretation of ordinary laws. The cited fragment of the debate of the Constitutional Committee and the drafting of the Constitution means that such an authentic, purposive, functional interpretation – apart from the linguistic one, limited above to a short sentence – goes in a direction unfavourable for the Tribunal in the dispute with the Supreme Court outlined below.

The above-mentioned summary of the history of the development of regulations concerning the functioning of the Constitutional Tribunal, the doctrinal assumptions underlying subsequent regulations, and the context of transformation, are only the proper canvas on which it is possible to resolve a (practical) dispute between courts. Omitting any of these elements and attempting to abstract the adjudicatory practice from the doctrine and purposefulness of the introduced regulations is however, a part of the dispute that has been going on for years.

5. In activist search of substitute of universally binding interpretation

The literature on the subject is rich in studies on interpretational (and scope) judgments.³¹ However, the problem of most studies is the acceptance of the perception or doctrine developed by the Constitutional Tribunal itself. A body which, from the point of view of the provisions of the Constitution, has the same strong authority to interpret it as any other (because there is nobody authorised to issue a legal interpretation). Moreover, a body that, in the words suggested by Professor Winczorek and quoted above, has the authority to issue a universally binding interpretation of the Constitution should not have, because this violates the idea of the separation of powers and would place the Tribunal

30 | It is worth noting that Prof. Kazimierz Działocha was a judge of the Constitutional Tribunal in the years 1985-1993. His statements from 1995 are therefore doubly important. Firstly, because they were made by a member of the Constitutional Commission, and secondly, as a former judge of the constitutional court – giving understanding for the need for self-restraint of the guards, who are no longer controlled by anyone, and a deep concern for the implementation of the principle of separation of powers.

31 | See: Woś, 2016; Dąbrowski, 2017; Tuleja, 2009; Białogłowski, 2013; Janas, 2016; Hermann, 2015.

itself as a super-constituent assembly³² that never ends its deliberations. However, in a place where issues of dispute between the Tribunal and the Supreme Court are raised, citing primarily the studies of the former and the doctrine developed by it, and then academically adjudicating on the correctness of the views is a specific offense against the principle of *nemo iudex in causa sua*. It is becoming the case that the basis for resolving a dispute is the positions developed by one of the parties.

The first interpretational judgment was issued in case U 12/92 concluded with a judgment of 20th April 1993.³³ This case concerned an implementing act – a regulation. The first interpretational judgment concerning an act was issued on 18th October 1994.³⁴ The history of interpretational judgments therefore precedes the regulations of the Constitution of 1997, which limited the possibility of issuing a universal interpretation of provisions by the Tribunal. Nevertheless, it was already under the rule of the current Constitution, and more precisely in 2009, that the Supreme Court, adopting a resolution in case file reference III PZP 2/09, questioned the authority and practice of the Tribunal. From that moment on, the escalation of the conflict between the Court and the Tribunal resulted in a transition to the phase of a dispute over competencies. It seems, however, that the date of 2015, which has not been noticed in the literature on the subject, is a turning point for the ongoing dispute. Namely, after the interpretative (and scope) judgments that had a negative impact on the dynamics of the dispute over the Constitutional Tribunal and led (as an element of a chain of events) to a state crisis, the Supreme Court did not take the opportunity to indicate the correctness of its own previous position and even adopted a silent attitude towards the practice of the Polish constitutional court.

The dispute between the Supreme Court and the Constitutional Tribunal is focused on three issues. First, the possibility of issuing interpretational judgments. Second, the binding force of interpretational judgments. Third, interpretational judgments as grounds

32 | Returning to the comparative legal analysis conducted 'on the margin', it should be pointed out that the problem of violating the separation of powers and the encroachment of the constitutional court as a kind of permanent constituent and at the same time an undemocratic legislator (although acting at the level of norms and not regulations) is the subject of attention not only of Polish constitutionalists. The issue of boundaries for individual branches of power was the subject of a lecture delivered by the US Supreme Court when it justified its ruling in the case of *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. It states that 'without any grounding in the constitutional text, history, or precedent, Roe imposed on the entire country a detailed set of rules.' The scheme Roe produced looked like legislation, and the Court provided the sort of explanation that might be expected from a legislative body. Finally, 'The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. Roe and Casey arrogated that authority. The Court overrules those decisions and returns that authority to the people and their elected representatives.' A comparison of the arguments and fragments of the Supreme Court judgment with the practice and manner of issuing judgments by the Constitutional Tribunal (while maintaining proportions resulting from the differences in legal systems) indicates far-reaching similarities in torts aimed at the idea of separation of powers and manifested by activism. Scope and interpretation judgments, which are useful in the nature of introducing a universally binding interpretation, are in fact an attempt to take over the competences of the legislative authority – although at the level of norms, not regulations. The justifications for the judgments issued in these cases, similarly to the American practice – exposed by the Supreme Court itself – have more similarities to legislation than to the process of applying the law and adjudicatory practice.

33 | Constitutional Tribunal decision ref. No. OTK ZU 1993, item 9.

34 | Court decision ref. No. K 2/94; Court decision ref. No. OTK ZU 1994, item 36.

for reopening court and administrative proceedings under Article 190 section 4 of the Constitution.³⁵ The last of the fields of dispute, in the context of the presented analysis, should be treated as a formal reason for issuing a number of opinions by the Supreme Court and secondary to the issue of the possibility of issuing such judgments and, in the event of their issuance, their binding force. In the literature on the subject, there is a view that the dispute – due to the weight of the arguments of both parties – cannot be unequivocally resolved.³⁶ This chapter, which can be concluded from the manner of the analysis conducted so far, is a voice supporting the opponents of the Tribunal's activity. This voice is heard using the above-mentioned historical and legal analyses (which allow for the search for an authentic interpretation of the Constitution) and those resulting directly from the theory of the separation of powers. Additionally, they are supplemented by an analysis of the effects of interpretational judgments at the level not of the implementation of procedural law provisions (which is the subject of analyses in the literature indicated above), but of the level of the legal and political system.

The institution of interpretative judgments (and then broad judgments) borrowed from the German system is de facto a way for the Constitutional Tribunal to circumvent the lack of authority to issue a universally binding interpretation. Transferring the interpretation to the extended operative part of the judgment is to ensure that it will enjoy the status specified in Article 190 Section 1 of the Constitution, i.e. it will be universally binding and final. This is also the position of the Tribunal. Each time it issues a broad or interpretative judgment, it maintains the position that although it does not have the authority to issue a legal interpretation, its interpretation of the provisions and the norms extracted from it should gain universally binding value – just like the judgment itself in whose operative part they were indicated. The purpose of issuing interpretative and broad judgments is to ensure the stability of the case law and the normative system. The Tribunal and its case law³⁷ follow the principle of interpreting statutes in accordance with the Constitution³⁸. This type of action is also supposed to be an expression of judicial restraint³⁹ in a perspective where all interpretative judgments are treated as affirmative (i.e. indicating compliance with the Constitution). It seems, however, that the scale of the negative consequences for the legal and political system (leaving aside the complete lack of a legal basis, which violates the principle of legalism and the operation of *praeter legem* to achieve competences and actions clearly undesirable by the Constituent Assembly) speaks in favour of rejecting this creative concept.

Before entering into a lasting dispute with the Constitutional Tribunal, the Supreme Court had an inconsistent judicial practice in the field of interpretative judgments. An example of early judgments supporting the position of the Tribunal is the judgment of 22 November 2002,⁴⁰ in which the Supreme Court directly spoke of being bound by interpretation. Moreover, before 2009, there were also a number of judgments that supported the thesis on the possibility of reopening civil proceedings on the basis of an

35 | Dąbrowski, 2017, p. 29.

36 | Morawski, 2010, p. 40; Dąbrowski, 2017, p. 32.

37 | Constitutional Tribunal decision from 24 February 1997 r., court decision ref. no K 19/96; Court decision ref. No. OTK ZU no 1/1997, item 6.

38 | This method once again becomes a reason for referring to American jurisprudence, from which it originates. See: Ziński, 2016.

39 | Garlicki, 1987.

40 | Court decision ref. no. IV CKN 1497/00.

issued interpretative judgment⁴¹. The opposite position indicating that ‘due to insufficient authorization in the provisions of the Constitution [interpretative judgments - from the author] cannot, however, have the desired effect in court practice’ was expressed in the resolution of 3rd July 2003⁴². What is interesting for this early phase of relations between the Supreme Court and the Constitutional Tribunal is the statement that ‘the interpretation of legal provisions made by the Constitutional Tribunal is not binding on the courts, but in a specific case there are no reasonable grounds to question its accuracy’, contained in the judgment of 21st May 2003⁴³.

The position of the Supreme Court expressed in the aforementioned resolution of 17th December 2009 and adopted at the request of the Commissioner for Citizens’ Rights was aimed at eliminating previous discrepancies in the judgments of the Supreme Court and common courts. The Supreme Court stated in the resolution that

‘a judgment of the Constitutional Tribunal stating in the verdict the inconsistency of a specific interpretation of a normative act, which does not result in the loss of the binding force of the provision, does not constitute a basis for reopening the proceedings on the basis provided for in Article 401(1) of the Code of Civil Procedure’.

However, what is most important for the presentation of the position of the Supreme Court was found not in the verdict (Article 401(1) of the Code of Civil Procedure – it can be treated as a pretext for the lecture), but in the justification. There you can read, in extenso:

‘The issue of the constitutionality or unconstitutionality of a given provision should not be resolved on the basis of the criterion of its interpretation shaped in relation to the interpreted provision in the practice of the Supreme Court or the practice of common courts. This position is confirmed by the deprivation of the Constitutional Tribunal of the competence to establish a universally binding interpretation of statutes as of the date of entry into force of the Constitution of the Republic of Poland of 1997. Although the Constitutional Tribunal no longer establishes a universally binding interpretation of statutes, it still issues interpretative judgments containing in their operative parts an interpretation of the provisions of law subject to review in terms of their conformity with the Constitution. Meanwhile, since, in accordance with Article 239, section 3 of the Constitution, resolutions of the Constitutional Tribunal on establishing the interpretation of statutes have lost their universally binding force, therefore, in the current legal situation, it should be assumed that interpretative judgments establishing a universally binding interpretation of statutes should be treated identically to any other form of non-binding interpretation. Consequently, the interpretation of legal provisions contained in the operative parts of such judgments does not have a universally binding value, because it goes beyond the content of Article 188 point 1 in connection with Article 190 Section 1 of the Constitution (resolution of 6 May 2003, I CO 7/03, not published).’

41 | Court decision ref. No. III UO 6/08, III UO 10/08, III UO 12/08. Decision was not publicly publish, quoted accordingly to Dąbrowski, 2017, p. 38.

42 | Court decision ref. no. III CZP 45/03; Court decision ref. no. ONSC 2004, no. 9 item 136.

43 | Court decision ref. no. IV CKN 178/01; Court decision ref. no. ONSC 2004, no 7-8, issue 123.

In its resolution, the Supreme Court used the ratio behind the current constitutional regulations, reconstructed in a different way above in this chapter. Although it did not cite a quasi-authentic interpretation, which can be issued based on the minutes of the Constitutional Committee of the National Assembly, it followed the indications present in them. However, the Supreme Court did not address the issue of the lack of legal basis and did not directly indicate the action of the Tribunal *praeter legem*, which would essentially mean entering not into a dispute of competencies, but an objection to the legality of the action of the Polish constitutional court.

The dispute concerning the possibility or non-application of Article 401(1) of the Code of Civil Procedure in connection with the issued interpretative judgment may find another stage in the proceedings before the Constitutional Tribunal. On the basis of the constitutional complaint filed on 20 May 2018, the complainant requests an examination of the constitutionality of Article 401(1) of the Code of Civil Procedure, understood in such a way that it excludes the possibility of reopening the proceedings in the event that the Constitutional Tribunal issues an interpretative judgment stating in its operative part that a specific interpretation of a normative act is inconsistent with the Constitution. The complainant therefore directly requests an interpretative judgment to be issued regarding the provision that became the basis for the Supreme Court to issue a resolution (having the force of a legal principle) indicating the unjustification for issuing interpretative judgments in general, or at least questioning their validity. These proceedings, file reference number SK 17/18, have been effectively suspended for over four years. The positions on the matter were presented by the Sejm of the Republic of Poland, the Commissioner for Human Rights, and the Prosecutor General⁴⁴. The positions submitted indicate that the suggested solution to the problem is to dismiss the case. Nevertheless, for several years now, the Constitutional Tribunal has been facing an opportunity to act in this case, following the example of the 'conservative ruling' of the US Supreme Court, in which it would reject its own activist practice to date. However, such a solution seems unlikely, because the clothes tailored for the Constitutional Tribunal by the Constituent Assembly are clearly too tight, and the activist attitude allows for the exercise of unlimited influence, as the Constitutional Court is the last of the guardians, on the shape of the legal and political system of Poland.

6. Another brick in the wall of 2015 constitutional crisis

The literature on the subject is focused primarily on the problem of the influence of interpretational (and scope) judgments on the functioning of common and administrative courts.⁴⁵ Less attention is paid to the influence of interpretational judgments on the overall functioning of the legal (constitutional) and political systems. They also include the problem of the position of the Constitutional Tribunal itself and its politicisation through an activist attitude. Comments on this were made by Bogusław Banaszak, who

44 | Letter of the Prosecutor General dated 7.11.2019 r, ref. no. PK VIII TK 53.2018; Letter of the Commissioner for Human Rights dated 8.08.2018, ref. no. V.51 0.112.20 18.KM/GH; Letter of the Speaker of the Sejm dated 3.07.2019, ref. no. BAS-WAKU-1877/18.

45 | See: Majer, 2020; Bernatt, Królikowski and Ziółkowski, 2013; Trzaskowski, 2003.

wrote directly that the Tribunal ‘does not play the role of a <negative legislator>, but transforms into a positive, <substitute legislator>⁴⁶ Adam Sulikowski wrote more broadly about the issue of law-making activity and its democratic nature.⁴⁷

Sławomir Tkacz⁴⁸ conducted a broad review of the literature on the Constitutional Tribunal as a guardian – which is also the subject of this chapter. He pointed out, following Adam Sulikowski, that ‘the claim about the indispensability and thus legitimacy of activist adjudicatory techniques of constitutional courts has generally been accepted, which include, for example, discovering extra-textual principles or values in constitutions. It was not noticed or was attempted to be kept silent that such ‘discovered’ norms are often intended to simply provide a systemic camouflage to mask the message that a given act is, in the opinion of judges, irrational or that its introduction would be inappropriate.⁴⁹ He also emphasised, with which one can agree, that until the crisis surrounding the Constitutional Tribunal, none of the subsequent parliamentary majorities, no party, whether opposition or government, had denied the activist competencies of the Polish constitutional court. Moreover, it should be noted that it was this consensus of the political scene regarding the activist attitude, and consequently, the political activity of the Constitutional Tribunal, that became the reason for the crisis of 2015, which extended into the following years. The case and the judgment of 3rd December 2015⁵⁰ can serve as an example of the influence of activism on the legal and political system. However, it should once again be emphasised that the original source of the problem was in the activity of the constitutional court itself, about which Lech Morawski wrote as early as 1994:

‘On the level of official declarations, the Constitutional Tribunal assumes the pose of an almost saint who never sins against the indications of legal texts. On the level of what it actually does, however, the matter is not so obvious.’⁵¹

The 2015 crisis was directly related to the consensus of the political class regarding the tacit consent to the Constitutional Tribunal going beyond the framework assigned to it by the Constitution, which incidentally, the Supreme Court has been emphasising since at least 2009. The claim about the tacit consent and consensus of the political class on the activist actions of the Constitutional Tribunal results from the analysis of available statements of political leaders of the leading Polish political parties. In particular, statements that would concern strong criticism of judicial activism by the Supreme Court when it spoke about the interpretative judgments of the Constitutional Tribunal. In this respect, it should be noted that there were no such statements. The political class silently passed over suggestions concerning the Tribunal’s activist position. The Tribunal allowed for solving political (or economic and political) problems that were inconvenient for politicians held accountable in a democratic process, which does not include a meritocratic element.

46 | Banaszak, 2009.

47 | Sulikowski, 2005, pp. 19–36.

48 | Tkacz, 2018.

49 | Tkacz, 2018, p. 11. Compare with: Sulikowski, 2016, p. 255.

50 | Court decision ref. no. K 34/15.

51 | Morawski, 1994, pp. 11–12.

Logical reasoning can also be supplemented by the use of legal reasoning and the *qui bono* principle. Consensus and consent to judicial activism, particularly the issuance of interpretative (or scope) judgments, creates the possibility of control of the legal system. Control utilising politically active judges appointed in the political decision-making process. Although this thesis carries an emotional charge in the conditions of Polish science, especially due to the still fresh issue of the dispute over the Constitutional Tribunal and the rule of law - also for constitutionalists - it is nothing new in world science. In this context, it is worth mentioning Sonja Gover with her book 'Judicial Activism and Democratic Rule of Law,' Anton Scalia with his extensive writing on originalism and activism, and Christopher Wolfe with his analytical book entitled 'Judicial Activism.'

An example of the resolution of an important economic issue by an activististic Tribunal is the case of the judgment of 8th November 2000 (SK 18/99), in which the Tribunal recognised the constant practice of public universities in Poland, which - contrary to the literal interpretation of the constitution guaranteeing free studies (Article 70 of the Constitution) - charged tuition fees for evening and part-time studies. A student raised the issue of constitutionality. It is worth emphasising that evening and full-time students, in extreme cases, e.g., law studies studied together, but some people in the lecture hall had to pay for the lecture, and some did not. The judgment of the Tribunal sanctioned this practice.

An example of a judgment that contained elements of a scope and interpretation judgment and which simultaneously pursued specific political goals was the Judgment of the Constitutional Tribunal of 11 May 2007 (K 2/07). This judgment concerned an act that introduced an obligation to disclose (a lustration element) collaborators of the communist security service by persons in prominent positions such as directors, deans, and rectors of universities or representatives of professions of public trust. The Tribunal found that disclosing collaborators of the security service in a system that violates fundamental rights, freedoms, and human dignity would be inconsistent with the Constitution to a certain extent or consistent, but only in the appropriate sense. The constitutional point of reference in this judgment was primarily Article 2, stating 'The Republic of Poland is a democratic state of law, realizing the principles of social justice', and Article 30, 'The inherent and inalienable dignity of the human being is the source of freedom and rights of the human being and the citizen. It is inviolable, and its respect and protection is the obligation of public authorities' and Article 31.3.

'Restrictions on the exercise of constitutional freedoms and rights may be established only by statute and only when they are necessary in a democratic state for its security or public order, or for the protection of the environment, health and public morality, or the freedoms and rights of other persons. These restrictions may not violate the essence of freedoms and rights.'

A review of the cited articles of the Constitution shows that the Tribunal based its judgment primarily on general clauses. However, the judgment blocked a political reform that was important for the government, which de facto benefited the opposition. In the short term, the judgment became one of the reasons for early elections and a change of government.

Recalling the *qui bono* principle again, it can be justified that politicians find it convenient to have 'their' ideological majority in the Tribunal, which actively circumvents the ban on issuing a universally binding interpretation of the law. This allows us to understand

better the essence of the dispute over the Constitutional Tribunal from 2015, where both sides wanted to secure the majority by prematurely filling vacancies that did not yet exist or by not recognising the earlier filling of vacancies to appoint a new majority in the Tribunal. These actions, analysed together, indicate that the political class not only tacitly accepted the activist nature of the Polish constitutional court but also openly acted (and still acts) to dominate it by ideologically close judges for purely utilitarian purposes.

The crisis situation of 2015/2016 was related to the period of transition of power after the 2015 elections, which resulted in the emergence of a new parliamentary majority with a different ideological profile than the previous one. Moreover, the coalition that was to resign from the offices of the executive power (as well as the new coalition that was to form the government) remembered the experience of 2007, in which the lustration process, which was to include, among others, higher education, was stopped only by the judgment of the Constitutional Tribunal of 11th May 2007.⁵² A judgment that could only be issued thanks to the composition of the composition of the constitutional court. However, 2015 was supposed to be a breakthrough year in the history of Polish politics and constitutional justice, as for the first time in history, general elections and the transition of power coincided with the expiry of the term of office of 5 out of 15 judges of the Constitutional Tribunal. What is more, the beginning term was supposed to be the one in which a new majority in the Constitutional Tribunal would be elected in the first 2 years. Thus, the predictions of Jerzy Zajadło from 2009 came true, writing: 'If one of the dominant political forces in Poland gained full power, which we cannot rule out, [...] it would be able to construct the composition of the Tribunal in such a way as to make it a body de facto politically subordinate to the parties controlling the legislative and executive power.'⁵³ The third condition *sine qua non* for this action had to be (apart from political dominance in the two branches of power) the end of the term of office of many judges, which is precisely what happened in the years 2015-2017.

The analysis of the judgment of 3rd December 2015 completely disregards the issue of political culture and the incomprehensible (also for the Constitutional Tribunal) decision to elect two judges as a kind of 'promotion' by the outgoing Sejm of the seventh term. The individual provisions of the judgment are of both an interpretational and scope-related nature, which in a rather paradoxical way clasps together the cause and effect of the crisis. It grew out of activism and ended with an activist judgment.

The Tribunal ruled that Article 21 section 1 of the Act referred to in point 1 of the ruling,⁵⁴ understood in a way other than that provided for the obligation of the President of the Republic of Poland to immediately accept the oath of office from a judge of the Tribunal elected by the Sejm, is inconsistent with Article 194 section 1 of the Constitution. By trying to introduce an interpretation of the provision into the ruling once again, it tried to give it a universally binding force and a final character.

It further ruled that Article 137 of the Act referred to in point 1 of the verdict, in the scope in which it concerns judges of the Tribunal whose term of office expires on 6 November 2015, is consistent with Article 194 section 1 of the Constitution, and in the scope in which it concerns judges of the Tribunal whose term of office expires on 2nd and

52 | Court decision ref. no. K 2/07.

53 | Zajadło, 2009, p. 134.

54 | Article 3 of the Act of 25 June 2015 on the Constitutional Tribunal (Journal of Laws, item 1064) with Article 2 and Article 197 of the Constitution of the Republic of Poland.

8th December 2015, respectively, is inconsistent with Article 194 section 1 of the Constitution. The judgment in the part in which it can be considered as broad was to have a somewhat 'Solomon-like' character, nevertheless, it was an attempt to mitigate the effects of broad activism through further activist action.

Significantly, the 2015 bench did not use the wisdom of its own institution's experience. A similar situation, i.e. the coincidence of determining the content of the applicable law with an attempt to resolve a dispute over the interpretation of the law, had already occurred in the past. This case was reported in the following way during the session of the Constitutional Committee of the National Assembly, which was to decide on the competencies of the Tribunal, by its then president Andrzej Zoll:

'I am very sorry to refer to one of the cases, but this case very well illustrates the doubt expressed by MP W. Cimoszewicz⁵⁵. I am referring to the interpretation made by the Constitutional Tribunal in the scope of the provisions of the Broadcasting Act. The problem arose whether the provision stating the president's right to appoint the chairman of the National Broadcasting Council gives the president the competence to dismiss the chairman of the Council. The interpretation that we established, stating that the president does not have such competence on the basis of the relevant provision, could not be transferred to a specific decision. The Constitutional Tribunal could not state in the interpretation made that the dismissal of a specific person was invalid from the point of view of law. The Tribunal is not allowed to do this. Therefore, we are dealing with two different planes. Determining the content of the law through interpretation means one thing, and resolving a specific dispute on the basis of the interpretation of a provision means another.'⁵⁶

The result of the practice of issuing scope and interpretational judgments and presenting them – contrary to the position of the Supreme Court as equal legal interpretations – was the 'attack on the Constitutional Tribunal' announced in the media, which in the light of the presented analyses was not an attack, but a consequence of the actions of this body. It should be emphasised once again that this was a consequence predicted by constitutionalists – in the cited articles – years before the events of 2015.⁵⁷

7. Summary and de lege ferenda

One should agree with the position of the Supreme Court on the lack of authorisation of the Constitutional Tribunal to issue a legal interpretation under the guise of issuing

55 | Włodzimierz Cimoszewicz asked a question regarding disputes regarding competences, whether it is possible to resolve them by issuing an interpretation of generally applicable law. He asked whether if such an interpretation dispelled all doubts regarding competences, then maybe there would be no need to grant the Tribunal the powers of a court of competence, and only leave the power to issue a legal interpretation.

56 | Biuletyn. Komisja Konstytucyjna Zgromadzenia Narodowego, 1995, no. 25, p. 34.

57 | This fact became the reason why the author of this text suggested that in 2015 there was not an 'attack on the Tribunal', but an 'attack by the Tribunal' - or more precisely its finale. See: Szczepański: *Zamach na trybunał? Nie, raczej zamach Trybunału* (interview conducted by Anna Wittenberg), 'Gazeta Prawna' 22.04.2016.

scope and interpretative rulings. It should also be emphasised – which results from the content of the provisions of the Constitution and is echoed in the debates held within the Constitutional Committee of the National Assembly – that the role of the Tribunal was meant to be, and has been defined very narrowly. The catalogue of competencies deliberately excluded the possibility of issuing a universally binding interpretation of both statutes and the Constitution itself. One should also agree with Marcin Dąbrowski that the wording of Article 188 of the Constitution means that ‘as a rule, the process of reviewing the constitutionality of law should take on a binary character’⁵⁸. Moreover, although in the process of applying the law, an operative interpretation and reconstruction of the norm from the provision must inevitably be made, the wording of point 3 in Article 188 of the Constitution, which speaks of the control of regulations, indicates the obligation of far-reaching restraint of the judges of the constitutional court when they make interpretations. Moreover, when the regulation is to be subject to control, and not one of its interpretations (reconstructed norm), then Marcin Dąbrowski’s position becomes the only one consistent with the content of the Constitution. Thus, interpretational and scope judgments should not take place at all.

Since the politicisation of the Constitutional Tribunal through its activist rulings became the cause of the 2015 crisis, which ultimately went beyond the Polish political and legal system, the *de lege ferenda* postulate should be the introduction of a regulation protecting Poland from such actions in the future. The postulated change would have to mean the implementation at the level of the provisions of the Constitution of the prohibition of issuing scope and interpretational judgments by the Constitutional Tribunal. Moreover, following the model regulation, i.e. the one contained in Article 239 of the Constitution, the provision should also cover previously issued scope and interpretational judgments. The lack of binding them should be confirmed (they cannot be considered non-binding, because according to the position of the Supreme Court they have never been binding). The introduction of such regulations would be revolutionary in terms of both practice and doctrine. The Polish legal community would also have to find a new path for shaping the doctrine of constitutional law, which largely stems from the body of interpretational and scope judgments. In the new legal reality, their power of influence would be very limited.

However, the most important change resulting from the proposed amendment would be the depoliticisation of the Constitutional Tribunal. Limiting activist attempts that led – with the participation of the Polish political class – to a state crisis also seems to be in line with the principle of a democratic state of law, which must ensure respect for the Constitution, the separation of powers, and the legality of the actions of bodies (regardless of which branch of government they represent).

58 | Dąbrowski, 2017, p. 33.

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JUDICIAL DEFERENCE IN THE RELATIONSHIP BETWEEN CONSTITUTIONAL COURTS OF THE MEMBER STATES AND THE EUROPEAN COURT OF JUSTICE

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ABSTRACT

The concept of judicial deference is generally seen as a tool that judges use to avoid getting involved in areas they may consider to be beyond their expertise or jurisdiction. It is often discussed in the context of the connections between the constitutional courts and state authorities with regulatory or law enforcement powers. The concept of judicial deference can also be applied to the relationships of constitutional justice in the EU. In the complex context of the EU legal order, judicial deference becomes particularly important in the relationship between the constitutional courts and the European Court of Justice (ECJ). In our study, we will first analyse the concept of 'judicial deference' in the context of EU constitutional justice. Then we will examine the limits of power and intervention of the constitutional courts and ECJ, especially in sensitive areas such as the interaction of legal systems, fundamental rights, and constitutional identity. The goal of this scientific article is to analyse these unique features and challenges and to show that balanced judicial deference is crucial for the development of an 'Ever-integrated Union.'

KEYWORDS

judicial deference
constitutional courts
preliminary reference
European Court of Justice
equality

1. Introduction

The theme of conflicts between courts in the European Union (EU), reflecting the complex development of the relationships between constitutional and

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quasi-constitutional courts (ECJ), is a common topic in legal debates. It is natural to be fascinated by the 'fights' between judges, on the one hand because of their status as guardians of the 'balance' of justice (so apparently alien to the 'passions' of battles), and on the other hand, because of the contexts in which such tensions occur, 'brimming' with ingredients, including those of a political nature. Sometimes, these phenomena are perceived as exaggerated, raising doubts about the solidity and future of the EU construction. As a possible solution, the theme of judges' dialogue has been explored as a way to address these conflicts in various dimensions and forms. The notion of 'dialogue' seems to be used in this context in a very broad sense, and perhaps sometimes inappropriately. Often, it is not about dialogue in the form of a 'conversation' but rather via parallel 'monologues'.³

Therefore, examining and addressing the topic of dialogue in constitutional justice⁴ and following the general developments in the field, we consider that one more theme or direction could adequately fill the analysis of the relationship between judges and the constitutional courts, namely the (judicial) 'deference'. Even though it is usually discussed in the context of the connections between constitutional courts and state authorities with regulatory or law enforcement powers, the concept of judicial deference can also be applied to the relationships of constitutional justice in the EU. This approach, also promoting the idea of equality among constitutional courts within the EU, has constructive implications for shaping an 'Ever-integrated Union'.

A guiding framework regarding the concept of 'judicial deference' in constitutional justice could be found by following the works of the Congress of the Conference of European Constitutional Courts (CECC), hosted in 2024 by the Constitutional Court of the Republic of Moldova, with the topic Forms and Limits of Judicial Deference: The Case of Constitutional Courts⁵. In the preamble of the Questionnaire sent to the members of the Conference in order to prepare for the Congress, judicial deference is described as

'a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters which are perceived to be beyond their expertise or legitimacy to decide.'

In light of this definition, the Questionnaire approach is oriented towards the relationships between the constitutional courts and, in particular, the authorities representing the legislative power. However, exceptionally, such relationships are mentioned when the interpretation and application of EU law is in question, for example in the Report of the Constitutional Court of Austria⁶ which deals tangentially with the formal limits of the powers of this Court in relation to the powers of the ECJ, mentioning the preliminary reference as a connecting tool.

Our approach concerns applying judicial deference in the context of relationships between constitutional courts and the ECJ. In these relationships, the discussions are

3 | See, for example, Tremblay, 2005, pp. 617–648.

4 | See Varga and Berkes, 2023; Toader and Safta, 2016; Safta, 2022, pp. 78–91.

5 | The Questionnaires of the XIXth Congress of the Conference of European Constitutional Courts, Forms and Limits of Judicial Deference: The Case of Constitutional Courts. [Online]. Available at: <https://cecc.constcourt.md/pages/congress/en/questionnaire.html> (Accessed: 10 September 2024).

6 | The Report of Constitutional Court of Austria, Pct. 4c, p. 8. [Online]. Available at: https://cecc.constcourt.md/pages/congress/national_reports_for_the_CECC_Congress_2024/Questionnaire_Austria_EN.pdf (Accessed: 10 September 2024).

not about the separation of ‘powers’ between authorities performing different functions in the state, but rather a ‘separation’ of competences, which is crucial for the proper functioning of the EU legal system. We can analyse the ‘spectrum of deference’ and the concept of ‘no-go’ areas of the constitutional courts and the ECJ in their relationship in a similar way as debated in Congress with reference to the relationships between courts, the legislative and executive branches.

In our study, we will first analyse the concept of ‘judicial deference’ in the context of EU constitutional justice. We will then examine the limits of power and intervention of the constitutional courts and ECJ, especially in sensitive areas such as the interaction of legal systems, fundamental rights, and constitutional identity. We will also look at judicial deference in the context of using of the instrument of preliminary reference. We will consider questions such as: how deferential can a constitutional court or ECJ be without being accused of abandoning their role as a guarantor of fundamental laws and defender of the EU legal order, or of judicial avoidance? How active can a constitutional court or ECJ be without becoming overly authoritarian, infringing jurisdiction, and conflicting or evolving unpredictably? Are there tools to keep a constitutional court or ECJ within a reasonable margin of appreciation in this regard? Where is the fair balance and, more importantly, how does this fair balance correlate with the equality and effectiveness of access to constitutional justice in an ‘Ever-Integrating Europe’? The conclusion of this study invites reflection on the role of judicial deference in the equation of the legal relationships that shape the EU legal order.

2. Judicial deference in European constitutional justice

2.1. The concept of ‘judicial deference’

In reviewing the responses to the Congress of the CECC Questionnaire regarding the definition of ‘judicial deference’, it is clear that this concept is generally not explicitly mentioned in the case law of constitutional courts. Similarly, there is limited analysis of it in legal doctrine. The concept is used exceptionally in the case law, for example of the Czech Constitutional Court, which stated that

‘the term was used once (...) in the judgment file No I. ÚS 980/14 of 18 June 2014, in which the Constitutional Court (...) stated the following: ‘However, this certain deference on the part of the Constitutional Court to the decisions of the general courts on detention is conditioned precisely by the general courts’ careful assessment of the specific circumstances of individual cases’”⁷

Certain Courts refer in their Reports to the development of the concept in the doctrine⁸, while others reveal that the doctrine does not even address this concept in rela-

7 | See Report of the Czech Constitutional Court. [Online]. Available at: https://cecc.constcourt.md/pages/congress/national_reports_for_the_CECC_Congress_2024/Questionnaire_Czech%20Republic_EN.pdf (Accessed: 10 September 2024).

8 | Report of the Constitutional Court of Austria.

tion to the topic of constitutional justice.⁹ A view that brings the term closer to its literal meaning is provided by the French Constitutional Council Report, which shows that the concept of 'deference',

'can be defined in French as a 'respectful consideration' or as a 'condescension mixed with consideration and dictated by a motive of respect', escapes the French legal vocabulary'¹⁰

(and has no place in the practice or in the case law of the Constitutional Council).

Regardless of approaches and nuances, it seems that the idea of judicial deference is linked to the extent of the Courts' actions, as determined by their jurisdiction outlined in the Constitution.¹¹ Many reports discuss related concepts such as 'self-limitation'¹², 'the principle of minimal interference with the powers of other public authorities',¹³ 'judicial self-restraint'¹⁴, 'judicial restraint',¹⁵ 'judicial activism'¹⁶ or 'positive legislature',¹⁷ the 'margin of appreciation' ('rechtspolitischer Gestaltungsspielraum')¹⁸, 'the legislator's option',¹⁹ or 'legislative expediency'. All these concepts lead to the notion of a certain level of judicial deference intervening in specific fields or legal questions. Thus, the Constitutional Court of Portugal²⁰ explained that

'we take the term 'judicial deference' to refer to the practice, by a court, of choosing to give significant weight to judgments of other public authorities (the legislature, administrative bodies, or the executive) on a particular matter.'

In this light, it can be briefly concluded that the term 'judicial deference' refers to the respect shown by constitutional courts for the role and competence of other authorities. It appears that the concept of judicial deference includes both objective and technical aspects governed by the regulations of the role, organisation and functioning of constitutional courts, as well as subjective elements influenced by factors that shape the

9 | Report of the French Constitutional Council.

10 | Ibid.

11 | See the Report of the Constitutional Court of Croatia. [Online]. Available at: https://cecc.constcourt.md/pages/congress/questionnaire/Questionnaire_Croatia_EN.pdf (Accessed: 10 September 2024).

12 | See Report of the Czech Constitutional Court; see also Report of the Constitutional Court of Latvia. [Online]. Available at: https://cecc.constcourt.md/pages/congress/questionnaire/Questionnaire_Latvia_EN.pdf (Accessed: 10 September 2024).

13 | Ibid.

14 | Report of the Constitutional Court of Austria.

15 | Report of the Constitutional Court of Lithuania. [Online]. Available at: https://cecc.constcourt.md/pages/congress/national_reports_for_the_CECC_Congress_2024/Questionnaire_Lithuania_EN.pdf (Accessed: 10 September 2024).

16 | Ibid.

17 | Ibid.

18 | Report of the Constitutional Court of Austria.

19 | Report of the Constitutional Court of Romania. [Online]. Available at: <https://cecc.constcourt.md/pages/congress/en/national-reports.html> (Accessed: 10 September 2024).

20 | Report of the Constitutional Court of Portugal. [Online]. Available at: https://cecc.constcourt.md/pages/congress/questionnaire/Questionnaire_Portugal_EN.pdf (Accessed: 10 September 2024).

interpretation of these rules and the mutual respect among judges and courts. In the realm of constitutional justice, judicial deference is also linked to the principle of loyal cooperation, which is equally important in the relationships between courts within the EU.

| 2.2. The interest of exploring 'judicial deference' in the European constitutional justice

Given the very specific focus of this study, we will use the term 'constitutional justice' to refer to the courts in the EU Member States (MS) that closely align with the European/Kelsenian model of constitutional review (specialised courts), in their relation with the ECJ²¹. The following MS have typical centralised and specialised constitutional courts, tribunals or councils: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. We will also refer to the European Court of Human Rights (ECtHR) in the context of the development of judicial dialogue in the sphere of fundamental rights protection. This is the 'three-dimensional' frame of reference in which we will place our analysis, regarding judicial deference in the EU constitutional justice.

Due to the specific role and jurisdiction, it can be said that the judges of these courts, 'look different and behave differently'²² and their jurisdictional interaction results in a continuous 'shaping' of European constitutionalism. As guardians of the fundamental laws, they are responsible for upholding the core values around which the EU is built. The coherence of the European legal order itself is often the responsibility of the courts called to interpret and apply the national constitutional framework on the one hand, and the EU constitutional framework on the other: 'the system is, in fact, regulated by judges, who often carry out interpretations in compliance with the various rules'²³.

Since the role and powers of the constitutional courts are established by the Constitution and the law, but the law can also establish, as in the case of Romania,²⁴ that the constitutional court is the only one entitled to decide on its jurisdiction, the extent to which constitutional courts interpret and exercise their powers, striking a balance between activism and judicial deference, not only impacts access to constitutional justice, but also the entire system of authorities and legal relationships in which they operate. In this regard, noting the lack of references to judicial deference, the Constitutional Court of Portugal specified in its Report²⁵, that this

'should not, however, lead us to conclude that questions related to judicial self-restraint are not a relevant theme for the PCC. Self-restraint is one of the judicial virtues meant to guide the way in which the Court exercises its power of constitutional review, and a relevant one at that.'

21 | As a *sui generis* 'constitutional court' as long as it is responsible for guaranteeing the legal order of the EU created by the Treaties, see Lenaerts, 2013, pp. 13–60.

22 | Bell, 2006, p. 1; Claes and de Visser, 2012.

23 | Mathieu, in Călin, 2015, p. 223.

24 | Article 3 (2) of Law No 47/1992 on the organization and functioning of the Constitutional Court, republished (Official Gazette no. 807/3 December 2010). 'In the exercise of its powers, the Constitutional Court shall be the only authority entitled to decide upon its competence'.

25 | Report of the Constitutional Court of Portugal. [Online]. Available at: https://cecc.constcourt.md/pages/congress/questionnaire/Questionnaire_Portugal_EN.pdf (Accessed: 10 September 2024).

Furthermore, in a complex system like the EU, these continuous ‘adjustments’ of competences are significant. The ‘separation and balance’ of competences of the courts at both national and EU levels are crucial for the harmonious evolution of the EU’s legal order. However, this ‘adjustment’ does not work very harmoniously, as long as tensions and even conflicts appear repeatedly. As a result, beyond the inherent political aspects, it is important to study which are the most sensitive aspects that can challenge the constitutional courts and the ECJ regarding the establishment of competence limits in their relations within the EU. Factors such as judicial deference influence this process, so understanding them is crucial for creating legislative and institutional support measures to harmoniously shape the future of the EU.

3. Judicial deference – areas, intensities and sensitivities

| 3.1. *Relationships between legal orders within the EU: About ‘no-go’ areas in constitutional review at the cross-roads of legal systems*

As for the ‘conflicts’ we were referring to above, complex discussions are determined by the issue of the primacy, or priority of EU law, given the sometimes antagonistic positions of the constitutional courts and the ECJ on this subject.

Accession to the EU puts certain challenges in front of the national constitutional systems, such as the transfer of legislative powers to EU institutions, the direct effect and the priority or primacy of EU law in relation to contrary national rules, and the resettlement of the institutional relationships within each MS. These challenges have been enhanced by the different ways of regulating the relationships between the respective MS and the EU or the national legal order (identifying how the Treaties are incorporated into the legislation of the Member States), which inherently lead to a lack of uniformity in the approaches of the national authorities in their relationship with the EU.

Also the doctrine does not have a uniform approach. When it comes to the EU structure, there exists a lot of legal literature analysing it in relation to the concepts of monism and dualism, or different models such as: the model of distinct but interacting legal orders (27 legal orders plus 1); the model of a party belonging to the legal order of the member states (EU law must be understood as an aspect of each legal order); the model of the one and large order: there is only the EU legal order, so the national orders are below this order^[26]. However, as expressed in an answer to the question – monism or dualism in the EU, formulated by the former judge of the German Federal Court Gertrude Lubbe Wolff, ‘the relationship between EU law and the national law of the member states of the UE raises more questions than it can be reasonably answered by attaching any of these labels’²⁷ (A/N monism, dualism or legal pluralism). Or, in other words,²⁸ it is doubtful whether ‘the choice between monism and dualism is a meaningful and far-reaching one when it comes to determining the best way to integrate EU law. (...) Monism and dualism do not offer a solution regarding the hierarchisation of norms between legal orders. That is

26 | Dickson, 2008, pp. 9 et seq; Dickson, 2012, pp. 46 et seq., Călin, 2015.

27 | Ibid., p. 209.

28 | Millet, in Călin, 2015, p. 309.

not their purpose. Because of this, by themselves, these theories do not help us determine which rule will apply in the event of a conflict’.

In the complex and ambiguous legal environment, the tasks of the courts are undoubtedly tricky. This study focuses on the constitutional courts’ competence limits at the intersection or competition of rules within the EU regulatory system. It is interesting to analyse issues such as: in this amalgam of regulations, can ‘no-go’ areas be identified in the sense of a clear separation of powers in terms of the review of legal rules? Can a constitutional court review an EU act, and conversely, can the ECJ rule upon the compliance of the MS’s national act with the same state’s Constitution? Can a national rule be in accordance with the Constitution but contrary to EU law and vice versa? We will advance a few ideas on each of these questions.

Thus, when it comes to the authority of constitutional courts to assess EU regulations, it is important to distinguish between primary regulatory acts and secondary EU law. As for the first category, we can discuss the power of certain constitutional courts to review amendments to international treaties, including EU treaties. The rationale for such control is clear: it aims to prevent the introduction of norms that conflict with the constitution into the national legal system, or to facilitate the alignment of constitutional provisions with international rules in order to create a coherent legal system. For example, in Romania, according to the Constitution, the constitutionality of treaties can be reviewed by the Constitutional Court, before ratification, pursuant to Article 146 b) ‘upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 Senators’ or after ratification, through the exception of unconstitutionality, a conclusion resulting from the *per a contrario* interpretation of the provisions laid down in the first sentence of Article 147 (3) of the Constitution, according to which ‘if the constitutionality of a treaty or international agreement has been found according to Article 146 b), such a document cannot be subject of an exception of unconstitutionality’.

So far, the CCR has not been vested with the review of treaties or acts amending EU treaties.²⁹ Other European constitutional courts have been vested in this regard and have ruled, such as the German Federal Constitutional Court, in notorious cases. In this hypothesis, we believe that it is entirely up to the MS to establish appropriate constitutional boundaries in order to conciliate the interests at stake and the coherence of the EU legal order. The concept of deference could be approached by considering the extent and manifestation of the sovereign will within a State, such in the rulings of the German Federal Constitutional Court on the conformity of the Treaty of Lisbon with the German Constitution, where it is held that

‘As long as within the limits of a European federal state it is not possible for a unitary European people, as the subject of legitimization, to be able to politically effectively formulate a majority will, according to the principle of equality, it means that the peoples of the European Union within the member states will be the determining carriers of public power, including the authority of the Union. For the accession to a European federal state, in Germany it would be

29 | Toader and Safta, 2023, pp. 110–127.

necessary to rewrite the Constitution, in order to explicitly renounce the sovereign statehood guaranteed by the fundamental law. In the present case, there is no such act.³⁰

In this context, we can analyse the relationship between the constitutional courts and the ECJ by considering how common principles, such as the rule of law, are interpreted. This can lead to a harmonious articulation of the constitutional foundation of the EU, which includes national Constitutions and EU Treaties.

The second category of rules, which is secondary law, raises more sensitive issues. Its regulations and directives are developed based on the EU Treaties, within a different normative system of reference than the national one. As a result, its 'constitutional' review should be carried out by the ECJ, not by the constitutional courts of the MS. Just as the ECJ cannot rule on a national regulation about that state's Constitution, neither can the constitutional courts rule on the compatibility of a directive or regulation or rules adopted by the EU institutions in relation to the EU treaties.

It cannot be ignored, however, that the issue of the compatibility of EU secondary law with the Constitution of the MS could arise. In this scenario, the national constitutional court must decide to involve the ECJ, in line with the principle of judicial deference and within its limits of competence. The most appropriate method is to use the preliminary reference. Of course, there is also the possibility of delimitation, in the sense of stating the lack of competence of the national court to rule upon the EU act. However, if that act raises serious issues in terms of constitutionality, a simple delimitation does not aim to achieve access to constitutional justice; rather it is an act of judicial avoidance. Similarly, we consider that the situation in which the national court finds only the unconstitutionality of the national act transposing the EU act is also a form of judicial avoidance; if the two acts overlap to the point of identity, the flaws found equally affect them. Laudable only by the 'Solomonic' way of avoiding conflicts (sense in which we have referred several times to the way in which the Constitutional Court of Romania found the unconstitutionality of the law transposing the Data Retention Directive³¹), such an approach gives a solution only in the short term and does not solve the substantive issue (or delays its settlement). In such situations, acknowledging this limitation of the competence of the constitutional courts represents an act of judicial deference with a clear reflection in the principle of rule of law. If the constitutional courts were to assume a 'constitutional review' of EU secondary law, it would act against the competence of the ECJ, potentially causing conflicts and difficulties to assess in terms of legal effects. In this sense ECJ stated in the case C- 430/21 that

'if a constitutional court of a Member State considers that a provision of secondary EU law, as interpreted by the Court, infringes the obligation to respect the national identity of that Member State, that constitutional court must stay the proceedings and make a reference to the Court for a preliminary ruling under Article 267 TFEU, in order to assess the validity of that provision in the light of Article 4(2) TEU, the Court alone having jurisdiction to declare an EU act invalid (see, to that effect, judgments of 22 October 1987, Foto-Frost, 314/85, EU:C:1987:452,

30 | Decision of 30 June 2009 – 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, in Selection of decisions of the German Federal Constitutional Court, pp. 609–616. [Online]. Available at: https://www.kas.de/c/document_library/get_file?uuid=a9bd5fee-847e-3a3f-e251-4b909eaec632&groupId=268877 (Accessed: 16 May 2024).

31 | See Toader and Safta, 2023.

paragraph 20, and of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 96).'

As concerns the other perspective, meaning the national regulations, some recent tensions in constitutional justice have highlighted the issue of national laws that have been deemed constitutional but are being challenged for their compatibility with EU law. Can these laws be found to be in violation of EU law and therefore no longer applicable?

The ECJ seemed to answer affirmatively in cases concerning the laws of justice in Romania (establishment of the Criminal Investigations Directorate), meaning the Case C-430/21³², having as its subject-matter a request for a preliminary ruling formulated pursuant to Article 267 TFEU by the *Curtea de Apel Craiova* (Court of Appeal, Craiova, Romania). The ECJ ruled, *inter alia*, on the question of whether if the second paragraph of Article 19 (1) of the TEU in conjunction with Article 2 TUE and with Article 47 of the Charter must be interpreted in the sense that it opposes a regulation or a national practice by virtue of which the ordinary courts of a member state do not have the authority to review the compliance with EU law of a national legislation that the constitutional court of this member state found to be in compliance with a national constitutional provision that requires compliance with the principle of primacy of Union law (i.e. what the CCR did through Decision No 351/2021). Noting, from the referral decision, that ordinary courts are deprived of this competence when the national constitutional court has ruled that the legislative provisions in question are in accordance with a national constitutional provision that stipulates the relationship between national and EU law, ECJ ruled that

'the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law.'

The saga of the ECJ and CCR decisions in this case were well-known and have been the subject of numerous studies.³³ In our opinion, the tensions related to this topic could have been avoided by appealing to judicial deference. In the case of the CCR, it could have reached out to the ECJ by making a preliminary reference. This could have been done because the dispute ultimately revolved around the legal value of certain recommendations from the European Commission in the implementation of the Mechanism Cooperation and Verification (so, not only an internal constitutional matter). As for the ECJ, which has the authority to interpret EU law, it should have found a way to allow the involvement of the constitutional court to participate in the case when its legal decisions are being questioned. In the absence of such a tool or at least practice (once again, judicial deference), errors or escalation of conflict situations could easily occur. Following these events, the

32 | ECJ – C-430/21 RS, 22 Judgment of the Court (Grand Chamber) of 22 February 2022 Proceedings brought by RS, Request for a preliminary ruling from the *Curtea de Apel Craiova*.

See, also, Case C-107/23 PPU, Lin: Request for a preliminary ruling from the *Curtea de Apel Braşov* (Romania) lodged on 22 February 2023 — Criminal proceedings against C.I., C.O., K.A., L.N., S.P.

33 | See, for example, Selejan-Gutan, 2022; Selejan-Gutan, 2021.

conflicts appear to have subsided, but we believe that the conflictual issue still persists. The ruling by the ECJ in the aforementioned cases focused on the independence of the national judge in relation to the constitutional court and the ECJ. It is correct to be considered unacceptable for the national judge to be prevented from seeking clarification from the ECJ on a problem related to EU law. However, the outcomes of this conflict between courts should be considered beyond just the independence of the judges. It should also be viewed in terms of legal certainty and the scope of authority of each court. In other words, the case-law of the ECJ in discussions have left us with a serious problem in managing in the EU. Allowing courts of law to choose not to apply decisions of the constitutional courts, which are binding according to the Constitutions, raises significant issues of coherence in the normative system within the EU. What happens when a decision of the constitutional court is challenged by a court of law? Can a domestic law comply with the Constitution and still conflict with EU Treaties? Does this indicate a problem with aligning the Constitution with EU Treaties, or is it only about the interpretation of that norm by the constitutional court? What has happened with the decision of the constitutional court in question?

Judicial deference could prevent the radicalisation of such situations and the raising of problems that seem at this moment without short-term solutions. From this perspective, it could be argued that challenging the effects of a decision of a constitutional court is, as a rule, a 'no-go' area of competence for the ECJ or other authorities. We can only discuss involving a mechanism for control and balance when the independence of that constitutional court is in question, and this mechanism should be carefully configured. The correction of certain judgment errors should be the responsibility of the respective constitutional courts, just as with the ECJ itself, which is not infallible. Or perhaps, from a different perspective, this issue could be an argument in favor of establishing an International Constitutional Court³⁴. However, removing the authority of either the constitutional courts or the ECJ, or assuming the role of 'controller' of one over the other, does not promote legal certainty and harmonisation.

| 3.2. Complementary or overlapping competencies? Protecting the fundamental rights within the EU

In the realm of EU constitutional justice, a significant issue lies in the overlapping or complementary jurisdiction of different high courts (such as constitutional courts, ECJ, ECtHR) in protecting fundamental rights and freedoms. This issue arises when different sets of fundamental rights are simultaneously applicable, including those outlined in national constitutions, the Charter of Fundamental Rights of the European Union, and the Convention for the Protection of Fundamental Rights and Freedoms.

The most extensive recent debate (in terms of participating courts) took place at the XVIIIth Congress of the Conference of European Constitutional Courts held in Prague (26 -29 May 2020), with the topic Human rights and fundamental freedoms: the relationship of international, supranational and national catalogues in the 21st century.³⁵ The central issue of the debate is summarised in the General Report of the Congress in which it is shown that

34 | Albert, 2023; Marzouki, 1999.

35 | Questionnaire [Online]. Available at: <https://web.archive.org/web/20240518055612/https://www.cecc2017-2020.org/congress/xviii-th-congress/questionnaire/> (Accessed: 18 May 2024).

'both national and international catalogues of human rights are identical in that they contain a similar list of rights (...). National catalogues have entrusted the protection of fundamental values and fundamental human rights (...) to constitutional courts or equivalent judicial bodies. If these bodies are empowered not only to abstractly review constitutionality but also to provide a posteriori protection of human rights and freedoms, they must also address the question of the source of human rights and freedoms and the normative definition of such a source. Thus, in addition to the application of their national catalogues of human rights (...) they must evaluate, respect and protect the fundamental rights contained in international legal documents. The contemporary approach to the material rule of law is characterized by an effort to eliminate contradictions and gaps in the system of protection of fundamental rights. (...) This brings the European constitutional and equivalent courts to the question of the relationship between national, supranational and international catalogues of human rights. Is there a hierarchy between them? Are they competitive or complementary? What legal system should the Constitutional Court apply first?'³⁶

Ideas such as 'layers of protection' have been developed in the debates ('in the European legal space, the highest level of protection can be achieved by different layers of protection that interact and complement each other, rather than by layers that are well separate'³⁷). The importance of the principle of subsidiarity ('the protection mechanism established by the Convention has a subsidiary nature in relation to the national system of guaranteeing human rights' ECtHR – *Handyside v. Great Britain*, paragraph 48)³⁸ and the use of Convention/practice ECtHR as the 'common denominator' of the protection of fundamental rights in Europe was also emphasised. However, the General Report of the Congress reveals the lack of a consensus among European countries regarding the approach of these multiple catalogues:

'no uniform structure of application practice of international human rights catalogues'; 'each constitutional court de facto individually chooses a specific model for determining a particular human rights catalogue if one right is protected in more than one catalogue'.

This lack of coherence is also due to the fact that 'with a few exceptions (Romania), the method of determining the human rights catalogue is not normatively determined on the national level'.

In view of the present study, we are particularly interested in what the General Report identifies as 'solutions in the practice of constitutional courts' for 'the overlapping of human rights catalogues', in which the following are listed: the 'anti-collision' course, meaning 'the possibility to manoeuvre and decide flexibly on the application of a catalogue only when there are several options available' (e.g. Italy); to weigh the extent

36 | Rapport Général: XVIIIe Congrès de la Conférence des Cours constitutionnelles européennes [Online]. Available at: https://web.archive.org/web/20240518055627/https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/General_Report/Rapport_General_General_Report_e-version.pdf (Accessed: 18 May 2024).

37 | The recording of the proceedings of the Congress [Online]. Available at: https://web.archive.org/web/20240518051927/https://usoudcz-my.sharepoint.com/:f/g/personal/david_krev_usoud_cz/EuIYvnC4eEdMlQ8skqXGgRsB8TC2AOzTPy9yzYOGdQzjZg?e=UR7EKc (Accessed: 18 May 2024).

38 | Radu, 2021, p. 37.

and effectiveness of the protection of a particular right in a particular catalogue, which results in priority of the legislation that provides a higher level of protection of rights (e.g. Belgium or Slovenia); to look for reference points within the guidelines set out in the Constitution itself (Poland) or to take into account the catalogue argued by the petitioner in his or her constitutional complaint. With the exception of the last method, all other solutions engage, to a greater or lesser extent, judicial deference, the most relevant example in this regard being the example of the Constitutional Court of Italy, which in its Report refers to the well-known ‘Taricco saga’ using the word ‘respect’ repeatedly. Thus, answering the question about the relationship, hierarchy, and competition of the catalogues of human rights in light of the protection afforded, Constitutional Court of Italy³⁹ emphasised that

‘the multitude of catalogues protecting human rights has become a given in constitutional case law, and has its basis in the need (about which there is a consensus across Europe) to ensure higher levels of protection’.

According to the Constitutional Court of Italy, the relations between the Union and the MS

‘are defined according to the principle of loyal cooperation, which implies mutual respect and assistance. This entails that the parties are united in diversity. There would be no respect if the requirements of unity were to demand the cancellation of the very core of values on which the Member State is founded. And there would also be no respect if the defence of diversity were to extend beyond that core and end up hampering the construction of a peaceful future, based on common values, referred to in the preamble to the Nice Charter’ (Order no. 24 of 2017).

All the actors must participate in the affirmation of rights. The Court has envisaged a

‘framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the ECJ [...] in order that the maximum protection of rights is assured at the system-wide level’ (Judgment no. 269 of 2017).

In the same way, for ‘all courts required to apply the ECHR, including the Constitutional Court’, there is a necessary dialogue inherent in the ‘progressive nature of the formation of case law’ (Judgment no. 49 of 2015).

The conclusions of the Congress reveal a trend of gradual synchronisation of the protection of human rights at both national and international levels. Overcoming the various conflicts determined, in particular by the lack, until a certain moment, of an own catalogue of the EU in the field, means that the decisions of the constitutional courts converge

39 | The Constitutional Court: 18th Meeting of the Conference of European Constitutional Courts, 26-29 May 2020, Prague Human Rights and Fundamental Freedoms: the Relationship of International, Transnational and National Catalogues in the 21st century [Online]. Available at: https://web.archive.org/web/20240518060224/https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/Questionnaire/National_Reports/English/Italy_-_Questionnaire_XVIII_Congress_of_CECC_eng.pdf (Accessed: 18 May 2024).

towards a harmonious expression of the protection systems, as results, for example, from the Report of the German Federal Constitutional Court⁴⁰ which reveals that

‘in its more recent case-law, however, the Federal Constitutional Court has emphasised the ‘interrelationship’ between the Constitution and the Charter, as well as the ECHR as a common foundation. Here the idea of multi-level fundamental rights protection (Grundrechtsverbund) emerges’.

However, the challenges continue to exist, being determined by the difficulties regarding the identification of the catalogues applicable in a specific case (because the boundaries between the particular human rights catalogues are not ‘impermeable’), and the lack of uniformity of the protection standards. Therefore, the competences incident in various specific cases to decide are in question and, consequently, the judicial deference. The use of instruments such as advisory opinions (related to the EtCHR) and preliminary references (related to the ECJ) could help prevent conflicts and provide a way for constitutional courts to affirm their views on human rights protection standards. From this perspective, we could analyse how constitutional courts address problems related to the standards of protection of fundamental rights in their interactions with the ECJ. This includes examining the ECJ’s decisions and how they are integrated into constitutional reviews, as well as the decisions made by the constitutional courts in specific cases. It is crucial to consider nuances, as judicial deference involves substantive analysis rather than just a formal dialogue lacking substantial relevance.

| 3.3. Constitutional identity: avoiding to turn a shared issue among equals into a divisive one

The issue of national/constitutional identity seems to be the most suitable ground for explaining and affirming the importance of judicial deference. Thus, Article 4(2) TEU currently reads as follows: ‘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’.

A contentious question in this context is who has the authority to define national identity: the national constitutional courts or the ECJ? This issue has sparked intense debates and has been the subject of extensive legal literature and varied opinions.⁴¹ Starting from the idea that constitutional identity is, in essence, the legal expression of national identity, and constitutional courts are the guarantors of the constitution, it appears within their competence to appreciate what this identity means. At the same time, the concept of national identity is enshrined in Article 4 TEU, and the ECJ are competent to interpret binding treaties, therefore the concept of national identity is also

40 | We chose it as a relevant example because this court is the author of the counter-limits doctrine (including the protection of fundamental rights), opposed to the primacy of EU law; see XVIIIth Congress of the Conference of European Constitutional Courts, 2020 – National Report: Germany. [Online]. Available at: https://web.archive.org/web/20240518060233/https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/Questionnaire/National_Reports/English/Germany_-_Questionnaire_XVIII_Congress_of_CECC_eng.pdf (Accessed: 18 May 2024).

41 | See for example Varga and Berkes, 2023.

enshrined in treaties. Choosing between the two options would place European courts in irreconcilable positions. In our view, addressing this topic in the context of judicial deference could provide a mechanism for harmonious cooperation while respecting the authority of each of the involved courts.

Thus, the constitutional courts are the guarantors of the constitutions and best placed to assess the content of national identity and its legal reflection. The ECJ is the guarantor of the Treaties and the best placed to determine EU values and possible incompatibilities with these values, concentrated in what the ECJ has more recently defined as ‘very identity of the European Union as a common legal order’.⁴² In the light of judicial deference, the definition of constitutional identity would mean a collaboration between the courts by way of a preliminary reference,⁴³ in which the competence of the constitutional courts would be to identify the elements subsumed to the national/constitutional identity, and the ECJ only to check whether the elements thus identified do not collide with the values or constitutional identity of the EU. We think that to this conclusion lead the text of the TEU and also the case law of the ECJ. Thus, Article 4 TEU speaks of the Union’s respect for the ‘national identities’ of the MS, shedding light on the national plan, including the definition of the national or constitutional identity by a national authority. The ECJ, in the Case C-156/21 and C-156/21 established that

‘The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.’

Also, the ECJ stated that article 4(2) TEU has neither the object nor the effect of authorising a constitutional court of a Member State [...] to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court⁴⁴.

In this way of ‘shared’ competence, the identity ‘as a red line’, limit of the integration and source of conflicts, of which some authors talk⁴⁵, can be converted into the identity as a dialogue bridge. Thus, the definition of national identity would not pit the MS versus the EU but would put the MS together within the EU, while respecting the specific nature of the EU legal order, which is fundamentally different from that of a federal state. In the context of another project within CEA (discussing the topic of federalisation), we

42 | Case C-156/21 Hungary v Parliament and Council ECLI:EU:C:2022:97, paragraph 127, and case C-157/21 Poland v Parliament and Council ECLI:EU:C:2022:98, para 145.

43 | For a perspective on the role of preliminary ruling procedure in the application of Article 4(2) TEU see also Drinóczi and Mohay, 2018.

44 | C-430/21 RS EU, paragraph 71.

45 | Perju, 2020, ‘both national and supranational European courts have recognized identity not only as a political safeguard of Europe’s admittedly ‘sui generis’ community in the process of progressive integration’ but also, and importantly, as a doctrine that ‘[constitutionalizes] national identity’ at both national and European levels.’ This highly adaptable doctrine has been used both defensively, as a closure mechanism that shields nation-states from deeper supranational integration, as well as offensively as a sword against the authority of the EU; see also the special issue published by European Public Law on that topic. See Fromage and de Witte, 2021.

deliberately selected federal states like Brazil⁴⁶ and India⁴⁷ to highlight the uniqueness of the EU as a state structure. Despite substantial differences in the structure of their federal structure, the concept of national and constitutional identity is unfamiliar in these countries. This legal concept is specific to the EU, where states differ significantly from a socio-cultural and historical perspective. Additionally, the various geopolitical contexts and regional conflicts have influenced and continue to influence the constitutional dynamics of the EU MS. Therefore, the constitutional identity of the states is not fixed and cannot be universally and permanently defined. Instead, it is a dynamic concept that can be nuanced in relation to each MS. Perhaps that is why the CC of Romania, when it defined the constitutional identity in Decision 390/2021 by referring to the provisions of Article 152 of the Constitution of Romania (limits of the revision of the Constitution, so-called eternity clause⁴⁸) refers to those constitutional values and principles as representing the 'fundamental identity core of the Romanian Constitution'. Therefore, there is a wider content of the Romanian constitutional identity, and the Court accepts and affirms the possibility of identifying new elements that can be subsumed under the constitutional identity.

The concept of deference implies that constitutional courts should understand that constitutional identity does not mean to set 'red lines', but rather aim to provide a clear legal interpretation of what constitutional identity entails in order to preserve national identity. On the other hand, the role of the ECJ is to protect the EU order and each MS, setting limits to preserve the fundamental values of the EU, to which all MS have agreed, for both current and aspiring members. By protecting EU values, the ECJ protects, in fact, all MS and their very identity. It was emphasised⁴⁹ in this regard that before accession, a candidate State for EU membership must align its own constitution and national identity with those values. Once accession takes place, it is therefore presumed that the new MS respects the values on which the EU is founded and thus may join a legal structure based on the principle of mutual trust. In the light of that principle, each MS is equally committed to upholding those values and in so doing, to respecting EU law provisions that implement them. That compliance must be guaranteed for as long as a MS remains within the EU, since it is essential for the enjoyment of all the rights derived from the application of the Treaties to that MS. Such an approach would give substance to the idea of 'equality' and 'equal partners', respecting the competence of each and the coherence of the EU legal order.

46 | See Safta, 2023.

47 | See Safta, 2023.

48 | Article 152 stipulates a series of values, principles which cannot be amended, such as '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', respectively 'no revision shall be made if it results in the suppression of the citizens' rights and freedoms, or of the safeguards thereof'.

49 | Lindeboom and Wessel, 2023; Lenaerts and Gutiérrez-Fons, 2023, pp. 1495–1511.

4. The preliminary reference and judicial deference

One of the tools repeatedly mentioned in the previous section is the preliminary reference, as a formal instrument and framework for the exercise of judicial deference. It was suggestively characterised as a kind of central nervous system, contributing to the organisation of legal, economic, and political integration.^[50] However, this nervous system must be supported for proper and efficient functioning, both through legislative measures and the approach by the constitutional courts.

The data shows that, unlike regular courts, constitutional courts use this tool much less frequently. There are also notable differences in approaches among the constitutional courts. According to statistical data available on the ECJ page for the period 1952-2023, the situation of preliminary referrals formulated by the constitutional courts is as follows: Austrian Constitutional Court (4); Belgian Constitutional Court (40); Bulgarian Constitutional Court (0); Croatian Constitutional Court (1); French Constitutional Council (0); German Federal Constitutional Court (2); Hungarian Constitutional Court (0); Italian Constitutional Court (7); Latvian Constitutional Court (1); Lithuanian Constitutional Court (2); Constitutional Court of Luxembourg (1); Constitutional Court of Malta (1); Polish Constitutional Tribunal (1); Constitutional Court of Portugal (1); Constitutional Court of Romania (1); Constitutional Court of Slovakia (1); Slovenian Constitutional Court (5); and Spain Constitutional Court (1). Why are constitutional courts more reticent, and why do they differ from each other?

In an interesting analysis carried out by Marek Pivoda in 2019, entitled *Constitutional Courts and Preliminary References to the CJEU*⁵¹, the factors which might affect the decision of a particular court to refer or not to refer a preliminary question to the ECJ were classified into several categories: the type of the constitutional proceedings of the pending case (Procedural Factors); institutional factors including engagement of a CC in advisory opinion procedure according to the Protocol No. 16 to the ECHR, the caseload of the CC, the overall establishment of the CC and the existence and quality of analytical departments; factors concerning the personal characteristics of judges as well as structural factors.

In our opinion, all these factors are influenced by the concept of deference. We need to consider both the objective and subjective perspectives when discussing the tool of preliminary reference, as they are closely related. We can talk about the deference of the legislator when creating the regulations of the process before the constitutional court and the instrument available for the judges, as well as the deference of the court itself in terms of actively engaging with international courts or the ECJ. This includes considering the judges on the court at a given time, who bring their own legal education and their willingness, or lack thereof, to engage with the construction of the EU.

The current EU law's preliminary referral procedure poses a challenge for the practice of deference. It fails to facilitate a genuine dialogue between equal partners and may lead to concerns among constitutional courts about losing their powers. It may be necessary

50 | XVIth Congress of the Conference of European Constitutional Courts: National report and their summaries. [Online]. Available at: <http://www.vfgh.gv.at/cms/vfgh-kongress/en/xvi-kongress-2014/landesberichte.html> (Accessed: 15 November 2024).

51 | Pivoda, 2019.

to adjust this mechanism to give a voice to answer and argue to the constitutional court and not just a voice to ask. The idea of a ‘reverse preliminary ruling’⁵² suggested by the scholars could balance the partnership required for more integrated European constitutional justice. Of course, it is possible to follow up a preliminary question with another one, which would allow the ECJ to adjust its position based on the arguments presented by the constitutional court. The Tarico saga serves as a good example of this. However, this process is complex and time-consuming. Ultimately, the focus of justice should be on the litigants and their rights, which includes resolving cases within a reasonable timeframe rather than solely relying on court proceedings.

5. Conclusions

In discussing the role of the ECJ, Professor Kochenov argues that

‘the ECJ is the main driver of negative integration, while the legislator is in charge of positive integration. The scope of the latter is infinitely narrower than the scope of the former, making dialogue with the legislator much less impactful in the EU’s constitutional context.’⁵³

Being in agreement with the idea of this integrative power of the ECJ, we also believe that in the complex landscape of the EU legal order, the ECJ has to act as ‘co-pilots’ with constitutional courts, respecting each other’s competences, because they have similar functions, even at different levels, which justifies the idea of their equality and partnership. The constitutional courts shouldn’t be subordinate to the ECJ, and vice versa.

Why this plea for judicial deference? In a fascinating analysis about the political and legal culture of European integration⁵⁴, professor J.H. Weiler advanced the concept of the ‘habit of obedience’: the MS ‘have learned to live with and by EU law’⁵⁵. However, EU law is a creation of the MS, through the EU institutions, acting within the limits of the competences established in the treaties. Therefore, we should aim to promote a culture of deference (not obedience), implying mutual respect between national and EU institutions. This is essential to ensure that we stay aligned with our common goals. Both the constitutional courts and the ECJ should uphold their roles without forgetting their responsibilities. We don’t need blind obedience or conflicts. A balanced deference could be the key to the evolution of a more integrated EU within the current framework of the Treaties and Constitutions.

The topic is actual and relevant, also in the light of very recent developments in ECJ case law about the relationship between constitutional courts and the ECJ, and the effects of the decisions of the constitutional courts within the EU legal order. Thus, in the Judgment in Case C-792/22 | *Energotehnica*, decided on 26th September 2024, that the ECJ established that a national court is not required to apply a decision of its constitutional court that infringes EU law. In that regard, the Court states that national judges must be

52 | See Bóka and Krajnyák, 2023; and also Krajnyák, 2024.

53 | Kochenov, 2023, pp. 1–16.

54 | Weiler, 2011, pp. 678–694.

55 | See Zgliniski, 2018, pp. 1341–1385.

able to refuse to follow a decision of their constitutional court if that decision is contrary to EU law. Where that is the case, they cannot incur disciplinary penalties.⁵⁶

Our study is for sure limited, as developing each of the highlighted points would require an in-depth analysis in itself. Nevertheless, some ideas were expressed to raise awareness about the importance of efficient tools to maintain the coherence of constitutional justice within the EU and to preserve and develop the EU legal order. All the questions mentioned in the introduction stand as topics for future debates in light of the points discussed in the sections of this article. Judicial deference should be expressed in both legislative measures and the formation of judges. From a legislative perspective, the preliminary referral mechanism should be improved to facilitate this exercise in deference, which is essential for a real formal 'dialogue' between the constitutional courts and the ECJ. As for the formation of judges, we can learn from the past and analyse, after emotions have died down, to discern between real juridical problems or subjective ingredients.

56 | ECJ – Judgment of the Court in Case C-792/22 | *Energotehnica*, Press release [Online]. Available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-09/cp240150en.pdf> (Accessed: 28 September 2024).

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DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION AND THE (EQUAL) REPRESENTATION OF THE INTERESTS OF MEMBER STATES: EUROPEAN DEMOCRACY IN LIGHT OF THE EQUALITY AMONG MEMBER STATES

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ABSTRACT

The history of European construction dates back more than seven decades and has undergone major changes throughout this period in terms of its geographic extent, depth, institutional framework, and setting of this cooperation. However, the nature, shape, and objective of this construction are still the subject of active discussion and debate. An important part of this discussion has been the question of 'democracy' and 'democratic legitimacy' since the establishment of this cooperation after the Second World War. Democracy is not only a fundamental value of the Member States and the requirement of adherence according to the Copenhagen criteria but also an expectation towards the European Union. The notion of 'democratic deficit' has long been introduced to characterise the shortcomings of the democratic legitimacy of European institutions. However, the approach of creating European democracy and a European public or political space and the role of Member States or national political institutions in this process have been among the key questions of the 'Conference on the Future of Europe'. Therefore, this paper aims to explore institutional reform at the European Union level or a better use of national institutional potentials that would help create a democratic legitimacy for the European decision-making process. The paper explores whether the various methods of increasing democratic legitimacy affect the equality of the Member States and how these two principles can be reconciled.

KEYWORDS

democratic deficit
European Parliament
democratic legitimacy
national parliaments
equality of Member States

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1. Introduction

The nature and ultimate objective or mission of the institutionalised European cooperation have been subject to constant public, legal, and academic debates since its beginning. Is it an association of States, is it a union of citizens, or is it perhaps a union of different peoples? Is it a cooperation that creates a supranational entity or is it rather a cooperation among equals? Is it perhaps an institutionalised platform that more influential Member States can use to remain on the world stage? The questions of European democracy and democratic legitimacy as well as the related question of equality or equal representation among the Member States will depend on the responses to these questions. These debates have not only been present in the past but also define the ongoing discussions on the future of European construction. In addition, the question of democracy and the search for democratic legitimacy has run through the entire history of European integration.³

Since the launch of the idea of uniting the coal and steel production in France and Germany under one supranational organisation, the ‘High Authority’ in the Spring of 1950, the question of democratic – parliamentary regimes or representative democracy – oversight has continuously existed and posed an institutional and academic dilemma. While the Paris Treaty of 1952 establishing the European Coal and Steel Community (ECSC) set out a strong supranational structure with democratic oversight by national parliamentary systems, the Rome Treaty of 1957 envisioned the evolution of a future European democratic institution and Europe-wide election.⁴ In addition, the Member States continuously reinforced in the Founding Treaties that democratic legitimacy is their (legal) expectation vis-à-vis the European institutions and their governance structure.⁵ This set the stage for the evolution of and debates around the institutional framework of European democracy.

On the other hand, European construction was established by countries that all had democratic parliamentary systems. It was a fundamental and underlying feature of European cooperation, which later became an essential feature of European identity.⁶ Participatory democracy has also been a major distinction from that in countries that

3 | See, for example, Bertonecchini and Chopin, 2010, pp. 66–79.

4 | The shape and purpose of the democratic control of the competence of the supranational institutions was a subject of intense debate between European countries during the treaty negotiations. See Middelaar, 2009.

5 | According to Article 2 of the Treaty on European Union: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. In addition, ‘Article 2 TEU is not a mere statement of policy guidelines or intentions, but contains values which, as has been set out in paragraph 145 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles’. (See Judgement of 16 February 2022 in Case No. C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98, paragraph 264).

6 | The Declaration on European identity adopted at the Copenhagen European Summit of 14 and 15 December 1973 stated:

‘Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights.’

were occupied and remained Eastward of the Iron Curtain. After the fall of the Berlin Wall, democracy has become a formal and basic condition for those countries that wish to join European integration according to the Copenhagen accession criteria adopted in 1993.⁷ In other words, the democratic functioning of EU Member States has become a trademark of European cooperation that distinguishes it from other regions and countries of the World.

When Alexis de Tocqueville made his journey to the New World in 1831, he wanted to explore the institutional and societal conditions that established the circumstances for democracy as well as for democratic rule overseas and wrote his powerful book: *De la démocratie en Amérique*,⁸ which later became notable both in America and in the old continent.⁹ In light of the historical evolution – both the successes and failures – and the recent institutional, economic, and other challenges of European construction, the role and function of European democracy in the institutional setting of European cooperation along with the viable ways of its reinforcement are worth examining. The dilemma is particularly timely since the Maastricht Treaty of 1993 and the subsequent revisions have envisioned cooperations in the fields of internal and external security (second and third pillars of the cooperation) that are different in many respects from the original areas of market and economic integration. Furthermore, the first pillar that is the original market integration has begun to include more political elements. Whereas market integration requires the Member States to adopt a more passive and rule-abiding approach, political integration requires more active participation and decision or rulemaking from the members.¹⁰ This shift and difference have a crucial impact on how European democracy; the democratic legitimacy, democratic oversight, and conflict-resolution function of democratic debates and deliberations are conceived or approached.¹¹ It also has an impact on the interests of the Member States and the principle of their equality.¹¹

Against this background, this paper first provides an overview of the role, historical evolution, and dilemma of democracy and democratic legitimacy of European construction (II). Mainly due to the ongoing crisis period, the question of democracy has been the focal point of reform proposals. This paper discusses these reform proposals in light of the interests and equality of the Member States (III). The paper concludes by highlighting the potential avenues of reinforcing the democratic legitimacy of European construction (IV.).

7 | European Commission, 2024. Also see Judgement of 10 December 2018 in Case No. C-621/18, *Wightman and Others*, ECLI:EU:C:2018:999, paragraphs 62 and 63.

8 | Tocqueville, 2007.

9 | The technocratic market integration is also characterised as ‘policies without politics.’ See, Schmidt, 2006, p. 317.

10 | One of the key questions throughout the development of European integration has been the formation of an institutional avenue and structure that is both receptive to a ‘European public opinion’ or ‘public opinions across Europe’ and capable of channelling or embodying their sentiments and views in the European governance structure. Since the current structure seems to be weak or rather incapable of fulfilling this function, it would be essential to create a new institutional setting. See, for example, de la Baume, 2015.

11 | The equality of the Member States is a principle enshrined in Article 4 paragraph 2 of the Treaty on European Union.

2. The historical evolution of the role of democracy in European construction

As mentioned above, the question of democratic oversight was already present in the negotiations leading to the establishment of the ECSC in 1950. The six founding Member States agreed to provide the arrangement of their national parliaments with oversight functions in response to the establishment of a strong supranational institution that is the 'High Authority' with autonomous competences.¹² The model institution was the recently established Council of Europe and its 'Consultative Assembly'.¹³ Accordingly, the Paris Treaty establishing the ECSC envisioned an 'Assembly' – *l'Assemblée* – that consisted of 78 representatives of the Member States' national parliaments in proportion to the number of their population.¹⁴ Under the institutional structure of the ECSC, the national parliaments were entrusted to fulfil a rather strong democratic control over the operation of the supranational 'High Authority'.¹⁵ In this model, democratic control was established by the agreement and exercised through the democratic institutions of the Member States, and therefore, the interests of the Member States were also represented. As the subsequent events that led to the next phases of European cooperation showed, the model of 'mining cooperation' was successful, and the Assembly turned out to be an efficient partner of the 'High Authority' in solidifying the first steps of European integration. However, the scope of this cooperation only concerned a quite narrow and specific area relating to rather technical questions that fall outside of most public and political debates, even though this cooperation also had a '*finalité politique*.' Therefore, the ECSC was not able to engage the popular sentiment or create a public space for debates, conflicts, and conflict resolution.

Five years later, based on these experiences, the Rome Treaty established a common 'Assembly' for the European Communities.¹⁶ The delegations of national parliaments con-

12 | It was the German Federal Republic who favoured and supported the introduction of the democratic control of the national parliaments over the High Authority. See, for example, Middelaar, 2009.

13 | Articles 22–35 of the Treaty on the Council of Europe established the Consultative Assembly in 1949 [Online]. Available at: <https://rm.coe.int/1680935bd0> (Accessed: 31 July 2024). In 1994, the Committee of Ministers decided to use the 'Parliamentary Assembly' denomination instead of the 'Consultative Assembly.' In addition, the idea of a 'European Assembly' was proposed during the Hague Congress in May 1948. See Historical events in the European integration process – The Hague [Online]. Available at: <https://www.cvce.eu/recherche/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/5c35593d-484a-4f53-b0bd-a6605110c3b3> (Accessed: 31 July 2024).

14 | Articles 20–25 of the ECSC Treaty [Online]. Available at: <https://eur-lex.europa.eu/legal-content/HU/ALL/?uri=CELEX:11951K/TXT> (Accessed: 30 December 2023).

15 | Article 23 of the ECSC Treaty.

16 | The separate Assembly of the ECSC ceased its operation in 1958 and a common Assembly was established for the ESCS, the European Economic Community, and for the European Atomic Energy Community. See, for example: The European Parliament: Historical background [Online]. Available at: https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.1.pdf (Accessed: 15 August 2024).

tinued to provide democratic oversight, and their numbers were increased.¹⁷ However, the scope of action and the competence of the new 'Assembly' were more limited compared to the 'Assembly' of the ESCS. Accordingly, the 'Assembly' assumed an advisory role and their opinions had no binding effects on the Council of Ministers.¹⁸ At the same time, the Rome Treaty created an expectation to prepare the design of a European election with direct universal suffrage.¹⁹ This provision set the stage for the evolution of European democracy and the democratic institution in the coming decades.

In the meantime, the 'Assembly' leaned on its future role as the representative of the peoples of the Member States²⁰ and later – in its hope – the representant of a European electoral community. Therefore, even though the actual competences were quite narrow, the 'Assembly' was envisioned to become a significant player in the future of European integration. In this spirit, the focus and emphasis of the subsequent developments of European democracy was placed on the supranational (treaty-based) institution, whereas the role of the national parliaments – along with the interests of the peoples of the Member States – has gradually become secondary. This development has weakened the relationship and interaction between public discourse and opinion formation and political action.

The process began with a semantic and thus rather symbolic debate on the denomination of the 'Assembly.' Even though the Member States gave the name 'Assembly' in the treaty text, the 'Assembly' itself adopted a 'Rules of Procedure' to declare itself a 'Parliament' in March 1958. Its primary motivation and objective were to show its desire to represent the European (sovereign) people on the one hand and to become a legislative forum on the other. Many of the Member States refused to accept the 'semantic coup' of the 'Assembly' for nearly two decades as they had a different vision regarding the nature of European construction and what democratic legitimacy means in this cooperation.²¹ Only the Single European Act of 1986 adopted and incorporated the term 'European Parliament' in the text of the treaty.²²

However, the development was not only semantic as the competences and scope of action of the European Parliament were the subject of further and continuous debates. David Ian Marquand introduced the notion of 'democratic deficit' in the academic and political discourse in the 1970s, referring – in a misleading way – to the operation of European construction and its institutions and to the shortcomings of the operation of

17 | Article 138 paragraph 2 of the Treaty of Rome [Online]. Available at: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT> (Accessed: 10 January 2024).

18 | However, it is also true that the gradual formation of the common and then internal market rather required the technocratic mindset and approach of the European Commission (the previous 'High Authority').

19 | See, Article 138 of the Treaty of Rome, 'L'Assemblée élaborera des projets en vue de permettre l'élection au suffrage universel direct selon une procédure uniforme dans tous les États membres'.

20 | According to Article 137 of the Rome Treaty: L'Assemblée, composée de représentants des peuples des États réunie dans la Communauté, exerce les pouvoirs de délibération et de contrôle qui lui sont attribués par le présent Traité.

21 | Among others, Charles de Gaulle and Margaret Thatcher rejected this idea.

22 | See the preamble of The Single European Act [Online]. Available at: <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/single-european-act> (Accessed: 30 December 2023).

the European Parliament.²³ From then on, it has been used to underpin the justification for the reinforcement and expansion of the competences of the European Parliament vis-à-vis the Council as the co-legislator. Accordingly, the competence of the European Parliament has been gradually increased for the past half century at each treaty revision.

The development has been coupled with – as the Rome Treaty set out in Article 138 – the establishment of the direct election of the representatives of the European Parliament since 1979. It has created not only a further reference point of direct legitimacy and thus a continuous increase of the competence of the European Parliament but also a shift away from the potential role of the national parliaments or other democratic institutions in the democratic functioning of European cooperation. Consequently, a supranational structure has the dominant view and narrative to reinforce European democracy, the democratic basis of the European institution and of the creation of a European public space. This way of thinking also meant a shift away from the Member States (and their political institutions) and, thus, reduced the expression or pursuit of their interests. As highlighted later in this paper, the direction of this development will eventually aim to create its own basis of democracy without the Member States or their democratic institutions. At the same time – as a comprise for the direct election of members of the European Parliament – the institutionalisation of the European summits within the framework of the European Council in 1974 provided an avenue for the Member States to participate and a common platform for strategic governance of European cooperation.²⁴ It has become increasingly important as shown in the historical turning points and events since the 1990s.

The fall of the Berlin Wall along with the adoption of the Maastricht Treaty of 1993 opened a new dimension for a European democratic discourse as the prospect of European autonomy and political cooperation appeared on the horizon. The Member States created political layers of their institutionalised cooperation including questions of external and internal security. They were no longer passive subjects of economic and market regulations but began to play an increasingly active role in the formation of autonomous European policy areas. They also introduced the concept of European citizenship. This was a watershed moment in the history of European integration and the supranational way of thinking wished to exploit it. Accordingly, the introduction of the co-decision procedure elevated the European Parliament to its long-desired role of co-legislator. The subsequent treaty revisions gradually expanded the legislative areas in which the co-decision competence applies, continuously strengthening the position of the European Parliament.²⁵ Furthermore, in 2003, on the 40th anniversary of the Elysée Treaty, a Franco-German compromise provided the European Parliament with the competence to elect – based on the proposal of the European Council – the President of the European Commission in exchange for the establishment and institutionalisation of the position of the president of the European Council.

23 | Marquand, 1979.

24 | See The European Council [Online]. Available at: <https://www.europarl.europa.eu/factsheets/en/sheet/23/the-european-council> (Accessed: 11 August 2024).

25 | The Treaty of Amsterdam in 1997 and the Treaty of Nice in 2001 See The European Parliament: Historical background [Online]. Available at: https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.1.pdf (Accessed: 31 December 2023).

What started in Maastricht in terms of the establishment of the institutional settings of a political integration was supposed to end with the adoption of the Constitutional Treaty by the Convention on the Future of the European Union a decade later.²⁶ The Constitutional Treaty would have shifted the democratic legitimacy of European construction from the (peoples of) Member States to the European citizens. However, two referenda – organised in France and in the Netherlands – rejected the draft Constitutional Treaty. The introduction of the concept of European citizenship could not restore or create the interaction or links between public opinion and political action. The Member States, equally holding the constituting power of European construction, halted this type of democratisation process by which they would be ultimately forced into the passenger seat of European construction. Consequently, the Member States remained the ‘master of the Treaties,’ and European construction continued to be based upon an interstate treaty structure. Furthermore, one of the most important and relevant lessons of the Convention is that the constituting power of European construction continued to belong to the Member States, who retained their equal (sovereign) rights to renew, reform, or modify the Founding Treaties. In other words, the Member States need to reach unanimity to be able to modify or renew the Founding Treaty, which reflects the principle of equality as the constituting power of European construction. Consequently, European democracy and the democratic legitimacy of European institutions have been created and are a function of the underlying Treaty structure. As the Founding Treaties require, only democratic political communities can participate in European construction.

3. The current institutional setting and reform proposals in light of the equality and equal representation of the interests of the Member States

As a consequence of the failure of the Constitutional Treaty, the current institutional structure is provided by the Lisbon Treaty of 2007, which terminated the differences between the institutional structure of economic (European Community) and political (European Union) integration. However, one of the important and relevant innovations of the Lisbon Treaty concerned the European Parliament. It provides that the European Parliament represents the citizens at the Union level.²⁷ This was a major shift from the earlier treaty provisions that stipulated the objective of the European Parliament as ‘the peoples of the States brought together in the Community’,²⁸ which, according to the origi-

26 | The Convention on the Future of the European Union by the Laeken Declaration of the European Convention in 2001. The purpose of the Convention was to draft a Constitutional Treaty for European integration.

27 | Article 10 of the Treaty on European Union: ‘1. The functioning of the Union shall be founded on representative democracy. 2. Citizens are directly represented at Union level in the European Parliament’.

28 | Article 189 of the Maastricht Treaty (Nice consolidated version): ‘The European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty’.

nal thoughts, 'shall consist of representatives of the peoples of the States'.²⁹ This shift had a symbolic force as it continued to influence the perception of the European Parliament as the future representative of a transnational European democracy. As discussed below, it has viewed itself not as the representative of the national political communities or peoples but as the representative of the citizens that form a single political body. Accordingly, the European Parliament has used the treaty base to strengthen its position vis-à-vis the Member States for the last decade. It tries to achieve what the European Convent and the Constitutional Treaty failed to realize, namely, to become the (sole) constitutive power of European democratic legitimacy without the Member States or their peoples.

The Lisbon Treaty also empowered the national parliaments along with the role of the national political communities to check the principle of subsidiarity and proportionality and encouraged interparliamentary cooperation. Furthermore, as detailed in the conclusion of this paper, the national political communities continue to have multiple roles that define the nature and future of European construction also respecting the principle of equality and equal representation of Member States.

The self-perception of the European Parliament has been illustrated by its aspiration to solidify its position and expand its competence vis-à-vis the Council and the Member States for the past decade. During the 2019–24 term, the European Parliament considered and prepared numerous proposals that serve this purpose. The report on the stocktaking of the European elections of 2019 already emphasised the importance of the introduction of the 'lead candidate system' (*Spitzenkandidaten*)³⁰ as well as the 'transnational list' as the hallway of a so-called European political and public space.³¹ Under this report, the national political communities would no longer play a role in the European Parliamentary election while the Council – the institution representing the Member States – would undergo a gradual transformation and become a second legislative chamber of the Union.³² Subsequently, the European Parliament adopted a separate report about the election of its members by direct universal suffrage.³³ The document aimed to introduce a Union-wide constituency from which Members are elected on the basis of 'transnational lists'.³⁴ It was coupled with a resolution on the right of the initiative of the European Parliament, which has been its longstanding demand to be granted the competence to a general direct right

29 | Article 137 of the Rome Treaty: 'The Assembly [European Parliament], which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the advisory and supervisory powers which are conferred upon it by this Treaty'.

30 | See, Navracscs, 2020.

31 | See, paragraphs W) and AD) and paragraphs 14–15 and 20 of the European Parliament resolution on stocktaking of European elections.

32 | See, paragraphs U) and 21 of the European Parliament resolution on stocktaking of European elections.

33 | Motion for a European Parliament legislative resolution on the reform of the electoral law of the European Union (2020/2220(INL)) [Online]. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2022-0083_EN.html (Accessed: 10 July 2024). It was followed by the 2015 electoral law reforms proposal [Online]. Available at: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA\(2015\)558775](https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2015)558775) (Accessed 10 July 2024).

34 | See, especially, paragraph 19 of the Motion for a European Parliament legislative resolution on the reform of the electoral law of the European Union (2020/2220(INL)).

of legislative initiative. acquire competence to a general direct right of legislative initiative.³⁵ The European Parliament also reinforces and reflects its desire to position itself as the representative of a European demos without the 'constraints' of national political communities.³⁶ Finally, the European Parliament also debated a resolution on the statute and funding of European political parties and European political foundations.³⁷ The proposed resolution strengthened the transnational dimension of the European political parties to support the establishment of a single European public space.

Besides the proposals of the European Parliament, the Conference on the Future of Europe held between 2020 and 2022 also put forward similar conclusions.³⁸ The introduction of a union-wide – transnational – electoral list, the leading candidate system, and the legislative initiative have been recurrent themes.³⁹ Based on these proposals, the Conference also suggests the restructuring of the European institutions to reflect the functions of a sovereign federal state.⁴⁰ The overall objectives of these proposals too are to create an autonomous European public space and strengthen its legitimacy via a transnational institutional arrangement without relying on the Member States. To this end, the recommendations include re-opening the discussion about a constitution⁴¹ and re-launching the European Convention.⁴²

The common focus and goals of these aspirations reflect the self-perception of a European Parliament that will enhance democratic legitimacy by reducing the attachment to the institutions of the Member States. The idea of creating a transnational political space does not correspond to the principle of equality of the Member States, nor does it respect their sovereignty.

Nevertheless, the Lisbon Treaty – reflecting the consensus of the Member States – as well as the nature and regulation of the parliamentary election, does not reflect the self-perception and ambitions of the European Parliament. The elections take place within national frameworks and their stakes mostly concern or relate to national political communities. Consequently, the European electorate is divided along the lines of national

35 | European Parliament resolution of 9 June 2022 on Parliament's right of initiative [Online]. Available at: [https://oeil.secure.europarl.europa.eu/oeil/de/procedure-file?reference=2020/2132\(INI\)](https://oeil.secure.europarl.europa.eu/oeil/de/procedure-file?reference=2020/2132(INI)) (Accessed: 10 January 2024). European Parliament resolution of 9 June 2022 on Parliament's right of initiative (2020/2132(INI)) [Online]. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0242_EN.html (Accessed: 10 January 2024).

36 | The document compares the desired competences of the European Parliament to the legislative bodies of the Member States.

37 | Draft European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council on the statute and funding of European political parties and European political foundations (recast) (COM(2021)0734 – C9-0432/2021 – 2021/0375(COD)) [Online]. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2022-0223_EN.html (Accessed: 10 January 2024).

38 | The Conference on the Future of Europe was a joint initiative by the European Parliament, the Council of the EU and the European Commission, launched on 10 March 2021 [Online]. Available at: <https://www.consilium.europa.eu/en/policies/conference-on-the-future-of-europe/> (Accessed 15 January 2024).

39 | See Proposal No. 39 of the Report on the Final Outcome of the Conference on the Future of Europe, p. 81.

40 | Ibid, p. 83.

41 | Ibid, p. 83.

42 | Ibid, p. 84.

political systems; thus, the Member States continue to function as a filter in European Parliamentary elections. Instead of a transnational characteristic, the European political space consists of a multitude of – competing and complementing – national political spaces and debates. It is also reflected in the fact that the agenda is largely set by the national political communities and the Members of the European Parliament's attachment to national delegations are defining their viewpoints and positions.

Furthermore, the principle of degressive proportionality as a fundamental election rule of the European Parliament has been adopted that allows the less populous Member States to be overrepresented while the more populous Member States agree to be under-represented.⁴³ The rationale behind this regulation as well as its underlying objective is to reduce the differences among the Member States and therefore help realise a more equal representation of the national political communities at the European level. From the perspective of the Member States, the European Parliament rather represents – within the constraints of the competence set by the Treaties – the European aspects of national political communities. This vision is in contrast to the actual self-perception of the European Parliament.

4. Conclusion: Reinforcing democratic legitimacy in light of the principle of equality of the Member States

The self-perception of the European Parliament has been oriented towards weakening the division between national political communities across European integration. However, by doing so, the European Parliament itself has become one-sided as it fails to take into account the major fault lines and differences in European construction. Therefore, it has failed to put the existing debates, different viewpoints, tensions, and conflicts on a democratic stage. These differences originate in the different historical paths of the national political communities, which have been and still are an integral part of the European identity; and this variety serves as a source of inspiration and innovation in the old continent. Instead of offering a forum that considers different viewpoints or debating or resolving these conflicts, the European Parliament has drifted towards a supranational idea that is interested in weakening the role of national political communities in European cooperation. However, since the fault lines and differences among national political communities have remained an integral part of European construction and political debates, the European Parliament is weakening both democratic legitimacy and the space for European democratic debates as well as the equality and equal representation of the Member States. As a result, even though their competences have been steadily increasing for the past three decades, the European Parliament has been struggling to discuss relevant questions or to attract the opinions of the peoples. Therefore,

43 | See The European Parliament: organisation and operation [Online]. Available at: <https://www.europarl.europa.eu/factsheets/en/sheet/20/the-european-parliament-organisation-and-operation#:~:text=The%20concept%20of%20degressive%20proportionality%20means%20that%20although,the%20number%20of%20seats%20relative%20to%20its%20population.> (Accessed: 10 July 2024).

the European Parliament also distorts the public discourse in Europe but, nevertheless, continues to propose an institutional framework, including particularly the right to a general legislative initiative, which largely differs from the institutional balance that the Member States agreed on or what the Founding Treaties reflect.

To reinforce the basis of democratic legitimacy in European construction, a national political system for the Member States and their institutions should be considered by establishing avenues for their active participation. These institutions can channel and present the multitude of national political spaces and debates towards European construction. However, their involvement should also be aligned with the ‘principle of equality’ of the Member States. In this sense, this principle is not contrary to the evolution of European democracy since it is conceived as a construction of national democratic systems and political communities. In other words, the national political discourses, along with the traditions, histories, and legal and constitutional cultures, are all essential components of an evolving European democracy.

The national democratic forums – national assemblies and parliaments – have been provided with two essential avenues into the decision-making process of European cooperation. However, interstate institutions, the Special Council of the Ministers of the Paris Treaty composed of national ministers, became the blueprint of the Council of the European Union. Members of democratically elected governments have assumed a legislative role since the beginning. Furthermore, the institutionalisation of European summits within the framework of the European Council in 1974⁴⁴ not only provides a common forum for the strategic governance of European construction but also serves as an essential bridge between the peoples of the Member States and the European institutions, thus continuously infusing democratic legitimacy. Democratic legitimacy lies in the democratic responsibility and accountability of government officials as well as the heads of states or governments to their national parliaments and peoples.⁴⁵ This parliamentary oversight is an essential guarantee of the separation of the constitutional functions between the executive and legislative powers, which also include – albeit to a different extent – the national democratic oversight of the government’s participation in European construction. The extent of this oversight function currently depends on the concrete constitutional structure and tradition. However, by increasing the influence of national democratic institutions, the operation of both Councils will enjoy greater democratic legitimacy and at the same time also express the equal representation of the Member States. It is by no coincidence that the meetings of the European Council are the most mediatised events of the European decision-making process and political life since they attract the attention of national democratic communities. They can speak on behalf of and also to the peoples of Europe. Yet, even though the European Council has the responsibility and competence to discuss and adopt the strategic direction of the European Union, it does not have a solidified place in its institutional arrangement. It is

44 | See The European Council [Online]. Available at: <https://www.europarl.europa.eu/factsheets/en/sheet/23/the-european-council> (Accessed: 10 July 2024).

45 | See Treaty of Lisbon (2007/C 306/01) Article 8 A paragraph 2 ‘Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens’.

not part of the legislative process, and its conclusions cannot be judicially enforced. It has a leadership role without the necessary institutional establishment.

A related question is the voting scheme of the European Council and the Council of Ministers. Each Member State is represented, which indicates their equality in terms of representation; however, the voting scheme might differ. The Founding Treaties introduce three different schemes: unanimity, qualified majority, and simple majority. The requirement of unanimity ultimately safeguards the principle of sovereign equality of the Member States. However, the decision-making of the European Council has been characterised by a strong tendency of consensus, even though the given question is to be decided by a simple majority.⁴⁶ This tendency shows respect for the equality of Member States and ultimately the will of the national democratic community as the authors of these decisions. The qualified majority introduced by the Lisbon Treaty requires the favourable vote of 55% of the Member States that encompass at least 65% of the population of the European Union. The rationale behind the adoption of the qualified majority vote has been to better serve the purpose of democracy and democratic considerations by introducing or adding the notion of 'citizens' into the inter-state decision-making process. Even though this type of voting aims to satisfy the principle of democracy between states and citizens, it might also lead to a conflict. By referring to a single European political community (European demos), it provides greater weight to certain states, thus weakening the principle of equality and equal representation between the Member States and the inter-state characteristic of the decisions of the European Council. However, if the decisions are to be adopted by national political communities, the qualified majority voting scheme cannot provide equal rights to them.

The second avenue for the participation of national political forums is a more direct, albeit still limited, role in the European decision-making process. Under this scenario, national parliaments would serve as a counterbalance of supranational aspirations such as the European Parliament and the Commission. The first such role of the national parliaments after the introduction of universal suffrage in 1976 was to establish the Conference of Parliamentary Committees for European Union Affairs (COSAC) at the time of the fall of the Berlin Wall in 1989. However, this attempt turned out to be rather powerless as the institutionalisation of the role of national parliaments has faced strong opposition from supranational institutions such as the European Parliament and the European Commission. Consequently, the mainstream institutional reform aspirations have not included this perspective in the possible reform options of European construction.

The Lisbon Treaty also introduced a limited role of national parliaments.⁴⁷ The early warning system (EWS) or yellow card procedure has included national parliaments in the European legislative process by providing them with the right to indicate whether a legislative proposal would fall under national competence and exceed the competence of the European Union. One third of the national parliaments gained the right to initiate such a 'subsidiary control' over the European 'draft legislative acts.' However, the reasoned opinions of national parliaments remain non-binding as the European Commission is

46 | The search for consensus has its historical roots in the Luxembourg compromise of 1966. See, for example, Middelaar, 2009, pp. 99–138.

47 | See, Protocol (No 2) to the Treaty on European Union on the application of the principles of subsidiarity and proportionality.

only required to review the draft legislation.⁴⁸ Partly for this reason, the EWS has been criticised for the 'lack of teeth' or its inefficiency in safeguarding the principle of subsidiarity⁴⁹ and for failing to reinforce democratic legitimacy.⁵⁰ While the EWS would have given national parliaments a counterweight role, a recent initiative formulated at the 2013 COSAC meeting in Dublin would envision a more proactive role by providing them with the indirect right to initiate legislative acts within the existing treaty framework and within the parameters of the current political dialogue.⁵¹ This initiative aims to reinforce the connection between the EU and the peoples of the Member States by further involving the national political systems and institutions in European construction.⁵² Furthermore, national parliaments are able to provide a framework to maintain permanent relations and interactions between national public discourses and political actions. Therefore, the right of initiative of national parliaments is also aligned with the principle of the equality of the Member States which might also contribute to making the national political systems rival in the eyes of the European Parliament.⁵³

The question of ways to reinforce the democratic legitimacy of European construction has been present since the beginning; however, it has become one of the central questions since the fall of the Berlin Wall. Creating a cooperation that is increasingly political requires the ability to democratically discuss the differences and conflicts, and forging a common position that can ultimately lead to autonomous – European action requires the involvement of the national political spaces and discourses. Their equality expresses and also guarantees the protection of national identities. There are vital links that tie together sovereignty, equality, democratic rule, and identity because sovereignty provides the framework for democratic rule and for democratic discourse to unfold. European democracy is therefore a democracy of national democracies that provide equal representation of the interests of the Member States. The increased participation of the national political institutions offers a way to reinforce the democratic discourse of European construction by also taking into account the principle of equality and equal representation of the interests of the Member States.

48 | In the case of the 'orange card' procedure, the reasoned opinions of the national parliaments represent at least a simple majority of all the votes allocated to them, the European Commission must review the proposal and decide whether to maintain it. See Protocol (No 2) to the Treaty on European Union on the application of the principles of subsidiarity and proportionality.

49 | See Controlling Subsidiarity in Today's EU: the Role of the European Parliament and the National Parliaments (Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 732.058 – April 2022) [Online]. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732058/IPOL_STU\(2022\)732058_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/732058/IPOL_STU(2022)732058_EN.pdf) (Accessed: 20 January 2024).

50 | Boronska-Hryniewiecka, 2017, p. 248.

51 | '(...) national parliaments should be more effectively involved in the legislative process of the EU not just as the guardians of the subsidiary principle but also as active contributors of that process.' Contribution of the XLIX COSAC Dublin, 23–25 June 2013.

52 | Boronska-Hryniewiecka, 2017, pp. 254–257.

53 | The European Parliament rejects or at least is deeply suspicious about the institutionalisation of the national parliaments. See, for example, Boronska-Hryniewiecka, 2017, pp. 259–260.

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EU COMMON MINIMUM STANDARDS FOR CRIMINAL PROCEEDINGS WITH RESPECT TO VICTIMS OF CRIME

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ABSTRACT

This article explores the implementation of common minimum standards in Polish criminal procedure, particularly focusing on the protection and rights of victims of crime. With Poland's accession to the European Union, the country has aligned its criminal legislation with EU directives, including the key Directive 2012/29/EU, which has improved the position of victims in criminal proceedings. This article focuses on how the Polish legal framework has integrated these minimum standards through its core criminal laws, including the Code of Criminal Procedure, while highlighting essential victim rights such as protection, compensation, and access to justice. Moreover, the article addresses the unique challenges posed by the need to balance state power and individual dignity under criminal law. Special attention is given to victims' protection against secondary victimization and the need for procedural safeguards. It underscores the broader impact of EU-driven legislative changes and their role in shaping a more just and supportive environment for victims across member states.

KEYWORDS

EU
Poland
criminal proceedings
common minimum standards
victim's rights

1. Introduction

While European states were not united in the common organism of the European Union, each of them created their own policy for criminal legislation, separately from the others. Entry into the European Union system automatically meant that certain guidelines and recommendations binding this Union system together and arising directly from it, began to be translated into national legislation, including those concerning criminal

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matters². Given the fact that criminal law is an important and sensitive element of state legislation, it is worth considering what the minimum standards applicable to criminal procedure are and how they function, which have been adopted directly into national law in Poland from the European Union, particularly with regard to the protection of the most vulnerable subjects such as victims of crime.³

2. The legal basis for conducting criminal cases in Poland

In order to take a structured approach, it is important to note that the criminal law system in Poland is based on three basic codes.

The first is the Act of 6 June 1997 Criminal Code⁴. This piece of legislation sets out the fundamental rules for the way in which individuals incur criminal liability, covering inter alia, description of the offence, circumstances excluding the unlawfulness of the act, rules for the sentencing, issues related to the statute of limitations for incurring criminal liability, provides for a catalogue of penalties and criminal measures, etc.

The second is the Act of 6 June 1997, Code of Criminal Procedure⁵. Formal criminal law is also called procedural criminal law, criminal process or criminal procedure. Formal criminal law is a set of legal provisions regulating the rules of conduct of public authorities in criminal cases, the rules of their initiation and conduct, and the procedure and forms for carrying out particular procedural actions. Criminal law also provides a catalogue of powers and duties of procedural authorities, defines a catalogue of procedural parties together with their rights and duties, and a catalogue of procedural authorities and other participants in criminal proceedings. Moreover, it lays down the rules for collecting, recording and introducing into criminal proceedings the evidence collected in the case.⁶ There is a close relationship between formal criminal law and substantive criminal law. Formal criminal law plays a subordinate role to substantive criminal law, by activating and implementing substantive criminal law.⁷

The third is the Act of 6 June 1997, the Executive Penal Code⁸, containing the provisions necessary for the enforcement of sentences imposed in criminal proceedings or other decisions taken therein⁹. In particular, the provisions of the Executive Penal Code contain rules for the execution of penalties, punitive measures, compensatory measures (to make good the damage caused by the crime), precautionary measures, and other decisions made in criminal proceedings, etc.¹⁰

2 | Schütze, 2021; Kaczorowska-Ireland, 2016; Horspool and Humphreys, 2012; Barnard and Peers, 2023; Davies, 2009; Garnett and Parsons, 2017, pp. 502–516; Moorhead, 2012, p. 125.

3 | Greer, 2007, pp. 20–49; McCart, Smith, and Sawyer, 2010, pp. 198–206; Bakker, Morris and Janus, 1978, pp. 143–148; Maguire, 1991, pp. 363–433; Cohen and Miller, 1998, pp. 93–110; Hembree and Foa, 2003, pp. 187–199.

4 | Act of 6 June 1997 – Penal Code. (Journal of Laws of 1997, No. 88, item 553).

5 | Act of 6 June 1997 – Code of Criminal Procedure. (Journal of Laws of 1997, No. 89, item 555).

6 | Skorupka, 2017, p. 26.

7 | Dudka and Paluszkiwicz, 2021, p. 22.

8 | Act of 6 June 1997 – Executive Penal Code (Journal of Laws 1997 No. 90 item 557).

9 | Gerecka-Zołyńska and Sych, 2014, p. 17.

10 | Kuć, 2017, p. 19.

3. The peculiarities of the criminal law system in the state as a background for determining minimum standards

The aforementioned three legal acts in force in Poland form the foundations of criminal law. They are the pillars of the criminal law system in the state, which is triggered by the unauthorised entry of an individual into the area of orders and prohibitions characteristic of criminal law. This criminal legislation is an essential element of the state's criminal policy.¹¹ Nevertheless, there are many types of policies in place in every country, from with social policy, health policy, insurance policy, economic policy to criminal policy.¹² Therefore, it is often assumed that all restrictions on an individual's negative behaviour which is contrary to the law falls within the scope of the state's criminal policy in the broadest sense.¹³ Thus, 'penal policy is one element of criminal policy, by which we mean a system of diverse and interrelated state and social measures aimed at preventing crime, removing the causes of and circumstances conducive to crime, and reducing as far as possible—under the given conditions—the possibility of criminogenic factors of all kinds'.¹⁴ There is no doubt that 'criminal policy originates within criminal law and is embodied by the application of that law in practice'.¹⁵ It presupposes the activation of criminal sanctions defined in the law that take away or restrict a person's natural freedom in various respects, from property to liberty.¹⁶ However, in the light of this, there is no doubt that criminal policy, with its legal elements, is a very sensitive element within the functioning of the state.¹⁷ It shapes the state's attitude towards the individual and also distinguishes a given state from other states. Criminal law, together with the criminal policy pursued by the state, is an example of the state's monopoly on power. Criminal policy, as an internal element of the functioning of the state, can never and should never be delegated outside the borders of the state. It applies within the state and is an immanent feature of the state. Criminal policy is characterised by its multifaceted nature and its strong links to and source being located directly in the public authority of a state. This is because both substantive criminal law and formal (procedural) criminal law are areas of public law, unlike, for example, civil law, which belongs to private law. The very fact that we are dealing with public law sets per se a kind of interesting characteristic. Indeed, public law (*ius publicum*) can be defined as a set of legal norms whose main task is to protect the public interest, i.e. all individuals and entities functioning in the public interest¹⁸. It is worth mentioning here that the distinction between public law and private law has its roots in Roman law¹⁹. The well-known Roman term is '*publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia quaedam privatim*', meaning that 'public law is that which concerns the

11 | Krajewski, 2019, p. 41.

12 | Opalek, 1986, p. 238.

13 | Pływaczewski, 2021, p. 115.

14 | Krukowski, 1982, p. 94.

15 | Migdał, 2008, p. 125.

16 | Wielec, 2017, p. 151.

17 | Jarocho, 2023, p. 29.

18 | Liżewski, 2018, p. 47.

19 | Kania-Chramęga, 2021, p. 119.

system of the Roman state, private law that which concerns the benefits of individuals, for there are some [norms] generally useful, some private'²⁰.

In light of these preliminary assumptions, it is possible to try to outline the peculiarities of criminal law as a characteristic element of public law in the state and, at the same time, as a characteristic element of the state's criminal policy.

The first peculiarity of the field of criminal law, is a very pronounced lack of equality of position between the entities within legal relationships arising and functioning in this area. In this field, one party is always the state and its organs, while the other party is often an individual functioning in that state, who – in *statu esse* – is subject to the authority of that state. The point is that the norms of public law are addressed to all those who make up and function within a given society. While it is society that is sovereign vis-à-vis its authority, it is the authority that governs and provides security for society. This concept is very familiar in legal theory and philosophy and in legal doctrines in the form of the concept of the social contract.²¹ Very briefly, it can be assumed that, according to the aforementioned theory of the social contract, legitimate power over society (the state) is built on a common consensus, because it derives from the granting of consent by society to this power to undertake, vis-à-vis this society, various actions, some of which are even highly offensive actions.²² An element of this agreement is the consent of society to the use of repressive measures against its members by the state authority in order to maintain, among other things, social peace and order.²³ However, it is the use of these kind of summary measures, characteristic of criminal law, which often involves interference with individual rights. This, moreover, is precisely the essence of the criminal law system. An elementary feature of it, which also partly derives from the aforementioned social contract, is the *ius puniendi*, which belongs exclusively to the state authority, and thus the exercise of the so-called right to punish the individual as a response to that individual's behaviour, if such behaviour is incompatible with the standards of the state.²⁴ The community agrees to grant the state the very dangerous right to punish individuals, doing so in the spirit of the assumption that the authority will do so to a certain extent and with respect for certain universal guarantees and titular minimum standards. Therefore, this element in the form of the right to punish belonging only to the state authority makes it the dominant power vis-à-vis the individual. It is the criminal law system, as a set of regulations, everywhere in the world that is characterised by the aforementioned lack of equality of subjects.

The second feature of the area of criminal law – apart from the presented lack of preservation of equal positions of subjects – is the use of the repressive element. For nowhere else are the elements of repressive influence on the individual by the authorities so strongly developed as in the field of what is broadly understood as criminal law. Repression can be defined as a set of sanctions, envisaged as a reaction to the unlawful behaviour of all members of a community; it is a harsh, often violent measure used as a

20 | Żeber, Rominkiewicz and Szymoszek, 1998, p. 11.

21 | Porębski, 1986, p. 220.

22 | Peno, 2015, p. 81.

23 | Zamecki, 2011, p. 15.

24 | Kania, 2017, p. 33.

form of pressure, punishment or retaliation.²⁵ Repression is an immanent feature of the field of criminal law, and moreover a necessary one due to its effectiveness and observance, as well as for prevention. Substantive criminal law is a field where the principles of criminal responsibility are presented, the forms of offences are defined, there are exemptions from criminal responsibility and, finally, penalties are provided for the offences in question. Any criminal punishment is a particularly harsh measure based on the aforementioned coercive element, which is specific to the area of criminal law, and can only be imposed by a state authority. Criminal punishment is activated because of the negative behaviour of the perpetrator of a crime as a response to the crime they have committed. Criminal punishment – depending on its type – entails a certain degree of freedom (for example – through loss of liberty), moral or economic discomfort for the perpetrator and his or her family.²⁶ It is worth noting that several objectives of criminal punishment can be distinguished between. One major objective is that of justice, which is understood as a response to the crime committed and as a kind of reparation and compensation for the wrong that has been done to society by committing the crime. Another purpose is the preventive purpose, where the punishment is intended to have a rehabilitative and educational effect on society and is intended to prevent recidivism. A further purpose is the compensatory purpose of punishment, which is that of repairing the damage caused by the crime and compensating the victim.²⁷

The third feature is the conflictuality of this field, or perhaps more precisely the axiological conflictuality, i.e. the occurrence of collisions and clashes of certain guiding values. *Prima facie*, the very essence, and assumptions of the criminal field in their simple juxtaposition provoke a conflict. One example is the value of human dignity, which is fundamental to all democratic legal systems and thus regarded as the supreme value at the heart of the basis of criminal proceedings conducted in any democratic state.²⁸ In this spirit, the Polish Constitution of the Republic of Poland emphasises the idea of respect for human dignity in the preamble, stating that the inherent and inalienable dignity of the human person is the source of human freedoms and rights, and then in the provision of Article 30, maintaining that the inherent and inalienable dignity of the human person is the source of human freedoms and rights. It is thus recognised that ‘freedoms and rights find their justification in the very humanity and dignity of the human person. No one can deprive a person of this dignity, for it is inalienable. Freedoms and rights are not established, but declared, guaranteed and protected. The legislator’s task is merely to formulate them in normative terms’²⁹. Dignity as a source of rights requires taking into account the individual with all his or her potentialities and directing this right towards the development of the state and the individual³⁰. The provision of Article 30 of the Constitution therefore treats dignity not only as a foundation of rights, but also as a value and a legal norm³¹. The same is true of international and European Union legislation, where dignity is also

25 | Wielki Słownik Języka Polskiego. [Online]. Available at: <https://wsjp.pl/haslo/podglad/33819/represja/4620735/w-polityce-odczyt-na-dzien-1-X-2024> (Accessed: 1 October 2024).

26 | Miłek, 2008, p. 253.

27 | Chmieliński, 2013, p. 33.

28 | Wielec, 2017, p. 154.

29 | Winczorek, 2000, p. 47.

30 | Wiśniewski and Piechowiak, 1997, p. 19.

31 | Granat, 2014, p. 3.

a supreme value.³² However, dignity is often in conflict or even collision with the field of criminal law. For example, the use of preventive measures, subjecting an individual to examinations, criminal isolation, etc. all mean that, despite the fact that dignity is the highest value, it can often be affected by repressive interference by the public authorities involved in criminal proceedings. The same is true in the field of criminal law, which is, of course, also recognised as the basis and core value of criminal proceedings³³; however, it will not always be able to be known without any limitations. Classically, originating from Aristotle and developed by St Thomas Aquinas, the concept of truth means ‘the correspondence (adequacy) of the content of a judgment with the actual state of affairs to which that judgment refers (*veritas est adaequatio conformitas intellectus et rei*).³⁴ In the context of criminal proceedings, material (objective) truth is the findings made by the relevant procedural authority reflecting a true, i.e. real and actual, account of the event, which is the substructure for a specific decision in criminal proceedings.³⁵ Formal truth, on the other hand, is an established account that is merely the unilateral result of an authority’s action, taken on the basis of evidence and recognised only by that authority, or on the basis of other findings presented by the parties or other authorities involved, in complete isolation from the actual course of events that give rise to criminal proceedings³⁶. Here, the aforementioned collision occurs when the truth, despite the possibility of knowing it, nevertheless is not or cannot be known. This fundamentally leads to a situation in which, although the truth is an important element of the determination in criminal proceedings, we do not succeed in knowing it at all costs. A limitation to learning the truth is, for example, the evidentiary prohibitions functioning in Polish criminal proceedings, which are treated as direct blocks to learning the truth and are binding in the name of protecting other values. Examples of these prohibitions include the prohibition of evidence of confessional secrecy or the prohibition of evidence in the form of journalistic secrecy.³⁷

A fourth feature of the criminal law system is its hermeticity, by which it is understood as something closed and inaccessible to external influences³⁸. This is because the vast majority of criminal law is primarily the domestic law of a country with negligible international connotations and influences. Criminal law, as the core and main element of a state’s criminal policy, is essentially a closed system, belonging to and modelled only internally. The hermeticity of criminal law therefore consists in the fact that it is each individual state which creates its criminal law system, its solutions and its criminal policy, intended for its citizens who will be subject to criminal responsibility if committing a criminal act. In this sense, the hermetic nature of criminal law must be understood as an independent system specific to a particular state, designed by that state as part of its criminal policy. Sometimes it is partly susceptible to external factors. Among other things, it is not possible for external organisations, e.g. the EU, to shape a catalogue of penalties or define a crime as a basis for criminalising an act in a given country. Criminal law is clear in this respect and depends only on decision-making factors within the

32 | Polak and Trzciński, 2018, p. 257.

33 | Oręziak, 2020, pp. 187–196.

34 | Izydorczyk, 2014, p. 111.

35 | Boczek, 2020, p. 21.

36 | Kmiecik and Skrętowicz, 2009, p. 85.

37 | Wielec, 2012, p. 143.

38 | Nowadays, the influence of new technology on criminal proceedings is noticeable, see: Karski and Oręziak, 2021, pp. 55–69; Oręziak and Świerczyński, 2019, pp. 257–275; Oręziak, 2019.

state. European integration, on the other hand, can, to a certain extent, set the general direction of a country's criminal law system by focusing on setting universal minimum standards.

4. The concept of the victim as a fundamental participant in a criminal case

The term victim does not appear in Polish criminal legislation. It is a concept from the field of victimology³⁹. Victimology itself is the area of study which deals with victims of crime and the study of their role in the genesis of crime, in particular the identification of factors that create vulnerability to becoming a victim of crime and methods to prevent this process.⁴⁰ The concept of victim is therefore a largely academic one.

On the other hand, in legal terms, in the context of criminal proceedings in Poland, the concept that directly relates to the concept of victim is the concept of victim⁴¹. Here, the situation is completely different, as the term victim is a term directly defined and functioning in the provisions of the Code of Criminal Procedure. This refers to the provision of Article 49 of the Code of Criminal Procedure, where the injured party is a natural or legal person whose legal interests have been directly violated or threatened by an offence. In addition, the wronged party may also be a non-corporate entity, i.e. a state or local government institution or other organisational unit to which separate provisions confer legal capacity. An insurance company is also considered a wronged party to the extent to which it has covered the damage caused to the wronged party by the offence or is obliged to cover it. In Poland, in cases of offences against the rights of persons performing gainful employment, sometimes the authorities of the State Labour Inspectorate may exercise the rights of the wronged party, if only within the scope of their activity they have disclosed the offence or requested the initiation of proceedings. On the other hand, in cases of offences by which damage has been caused to the property of an institution or an organisational unit, if the body of the wronged institution or organisational unit does not act, the rights of the injured party may be exercised by the state control authorities which, within the scope of their activity, have disclosed the offence or have requested the initiation of proceedings.⁴²

39 | Maliszewski and Lewandowski, 2023, p. 61.

40 | Kuźniarowska, 2019, p. 116; Bieńkowska, 2000, p. 79.

41 | Park and Len-Ríos, 2010, pp. 591–606; Larson, 1940, p. 467; Sandoval-Villalba, 2009, pp. 243–282; Allan and Carroll, 2017, pp. 10–32; Kvastek, 2021, p. 65.

42 | Kulesza, 1995, p. 17; Czarnecki, 2019, p. 26.

5. European Union law as a determinant of minimum standards in criminal matters

Given the specificities outlined above and the particularities of criminal law analysed, it is now worth turning to an analysis of the European Union's legislation and legislative initiatives specifically oriented towards criminal law.

Poland has been a member of the European Union for many years. The date of Polish accession to the European Union is 1 May 2004, when Poland, along with nine other countries: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia and Slovenia were granted full membership of the community⁴³. It is worth mentioning that Poland's accession to the European Union was the result of a very complicated and long period of transition, which came immediately after the collapse of the communist system in the whole of Central and Eastern Europe.⁴⁴ Of course, being already a full member of the European Union, Poland adopts the designated legislative directions of the highest bodies of the Union⁴⁵. In criminal matters, these will be a series of directives that oblige the Polish authorities to construct certain solutions in the area of criminal law.

However, the point of reference in this analysis is the position of the victim and, in terms of criminal law, the position of the victim. Therefore, European Union directives in this context should be concerned with protecting and significantly improving the position of the victim throughout the entire sequence of procedural steps in a criminal case. Thus, among others, European Union legislation in the form of the Directive of the European Parliament and of the Council of the European Union of 25 October 2012. (2012/29/EU) implementing the Directive on the rights, support and protection of victims of crime establishing minimum standards and replacing the Council Framework Decision (2001/220/JHA)⁴⁶ resulted in changes to the criminal law in Poland, mainly to the rules of criminal procedure.⁴⁷

43 | Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese 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 Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union OJ L 236, 23.9.2003, pp. 17–930.

44 | Chruściel and Kloc, 2013, p. 89.

45 | Bicchi, 2010, pp. 976–996; Toshkov, 2010; Bondarouk and Mastenbroek, 2018, pp. 15–27; Bachtrögl, Fratesi and Perucca, 2020, pp. 21–34; Steunenbergh and Rhinard, 2010, pp. 495–520; König and Luetgert, 2009, pp. 163–194.

46 | Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA OJ L 315, 14.11.2012, pp. 57–73.

47 | Bieńkowska and Mazowiecka, 2009.

This Directive aims to ensure that victims of crime receive adequate information, support and protection and are able to participate in criminal proceedings. It obliges Member States to ensure that victims are recognised and treated in a respectful, sensitive, personalised, professional and non-discriminatory manner in all their contact with victim support services or restorative justice services, or with competent authorities acting in the framework of criminal proceedings. In doing so, the rights set out in this Directive shall apply to victims in a non-discriminatory manner.

Particular importance is attached here to the protection of the child. Where the specific type of victim is a child, then in the application of this Directive, Member States shall ensure that the child's best interests shall be a primary consideration, to be assessed on a case-by-case basis. Priority shall be given to an approach tailored to the child, taking into account the child's age, level of maturity, views, needs and concerns. The child and the person with parental responsibility for the child or the child's other legal representative, if any, shall be informed of any measure or right specifically addressed to the child. According to the directive, the concept of victim covers a natural person who has suffered harm, including physical, mental, moral or emotional harm or material loss, directly caused by a criminal offence and family members of a person whose death has been directly caused by a criminal offence, where they have suffered harm as a result of the death of that person. The term 'family members' means the spouse, a person who is in a close and continuous relationship with the victim in a common household, relatives in the direct line, siblings and dependents of the victim. The term 'child' here means any person under the age of 18.

This directive introduces a number of victims' rights, which have to be implemented in the field of criminal law area in the Member States. At the same time, these victims' rights form the nucleus of minimum standards in the field of criminal law.

The first group of these standards pertains to the general position of the victim's rights in a criminal case. Here, the victim has the right to understand and be understood, which means that the relevant internal legal acts of the state should include solutions to help victims understand and be understood from the moment of their first contact with the competent authority and during any further necessary interactions with them as part of the criminal proceedings, as well as when receiving information from these authorities. This will be achieved by ensuring that information is provided to victims in simple and accessible language, either orally or in writing. It is also important that the delivery of information considers the personal characteristics of the victim, including any types of disabilities that may affect the victim's ability to understand or be understood. Another right in this group is the right to receive information from the moment of first contact with the competent authority. This means that from the moment of initial contact and without unnecessary delay, victims should be offered basic information, including: the procedures for reporting a crime and the victim's role in such procedures; how and under what conditions the victim can obtain legal advice; legal assistance, and other forms of support; how and under what conditions the victim can receive protection, including protective measures; how and under what conditions the victim can receive compensation; and how and under what conditions the victim is entitled to both oral and written translation services. Other rights granted to victims are those when filing a report of a crime. This means that victims should receive written confirmation from the relevant authority of the Member State that a formal report of the crime has been submitted, including basic information about the reported offense. In turn, the general right to receive information

49 | Filip, 2010, p. 5.

they voluntarily agree, to actively participate in resolving the issues arising from the crime with the help of a trained and impartial third party. Restorative justice is 'often a way of responding to crime which focuses on the needs of the victim, enabling all those directly affected by the crime – victim, offender, their families, and community members – to actively participate in the process of repairing the harm done.'⁵⁰ Here, the right is aimed at avoiding so-called re-victimization.⁵¹ Therefore, in order to protect the victim from secondary and repeat victimization, intimidation, and retaliation, Member States take measures to be applied during the provision of restorative justice services. The right to legal aid, as provided in the directive, ensures victims have access to legal assistance if they have the status of a party in criminal proceedings.

Another right is the right to reimbursement of costs, which grants victims participating in criminal proceedings the possibility of obtaining reimbursement for expenses incurred due to their active involvement in the proceedings, according to their role in the criminal justice system. The right to the return of property ensures that, based on a decision of the competent authority, victims promptly receive the return of any recoverable property seized during the criminal proceedings, unless it is necessary for the purposes of the proceedings. The right to a decision on compensation from the offender during criminal proceedings guarantees victims the right to obtain, within a reasonable timeframe, a decision regarding compensation from the offender, unless national law stipulates that such a decision is made in a separate legal proceeding.

The final right is for victims residing in another Member State, which ensures the possibility of taking appropriate measures to minimize difficulties when the victim resides in a Member State other than the one where the crime was committed.

The third group consists of the rights of victims with specific needs. This group begins with the right to protection. According to the directive, without prejudice to the right of defense, Member States ensure the availability of measures to protect victims and their family members from secondary and repeat victimization⁵², intimidation, and retaliation – including measures to mitigate the risk of emotional or psychological harm – and to protect the dignity of victims during questioning or while giving testimony. Another right in this group is the right to avoid contact with the offender. In this sense, Member States are required to establish the necessary conditions to ensure that victims and, if necessary, their family members can avoid contact with the offender in the premises where criminal proceedings are conducted, unless such contact is required in the interest of the proceedings. The right to protection of victims during the investigation phase ensures that, without prejudice to the right of defence and in accordance with judicial discretion, Member States ensure that during the investigation: victims' interviews are conducted without undue delay after the crime has been reported to the competent authority. An important right is the protection of privacy. Here, according to the directive, Member States ensure that competent authorities can take appropriate measures during criminal proceedings to protect the privacy, including the personal characteristics and image of victims and their family members. Additionally, Member States ensure that

50 | Łukawska-Malicka, 2022, p. 43.

51 | Tkacz, 2020, p. 118; Bieńkowska, 2007-2008, p. 67.

52 | Wolhuter, Olley and Denham, 2008; Farrell, 1992, pp. 85–102; Rock, 2017, pp. 30–58; Green, 2012, pp. 107–134; Walsh et al., 2003, pp. 233–238; Hope and Trickett, 2008, pp. 37–58; Roccato, 2007, pp. 119–141; Brunt, Mawby and Hambly, 2000, pp. 417–424.

competent authorities can take all lawful measures to prevent the public dissemination of any information that could lead to the identification of, for example, a child victim. An interesting right for victims in this group is the individual assessment to determine the victim's specific protection needs. This means that Member States ensure that victims are subjected to a timely individual assessment, in accordance with national procedures, to identify specific protection needs, particularly the risk of secondary and repeat victimization, intimidation, or possible retaliation. Special attention is given to children in this regard. The directive outlines the right to protection for child victims during criminal proceedings, which includes firstly, during the investigation, all interviews with a child victim can be recorded audiovisually, and these recordings can be used as evidence in criminal proceedings. Secondly, during the investigation and trial, in accordance with the role of victims in the criminal justice system, the competent authorities shall appoint a special representative for the child victim if – under national law – the persons exercising parental authority cannot represent the child victim due to a conflict of interest between them and the victim, or if the child victim is unaccompanied or separated from the family. Thirdly, if the child victim has the right to legal counsel, they shall have the right to their own legal counsel and representation, in their own name, in proceedings where there is or could be a conflict of interest between the child victim and the persons exercising parental authority.

6. The field of Polish criminal law as a determinant for minimum standards in criminal cases

As indicated above, the field of Polish criminal law consists of three basic types of codifications (the Criminal Code, the Criminal Procedure Code and the Executive Criminal Code). When analysing this field, it is worth noting that to a great extent, the issue of minimum standards for the victim is the provisions of criminal procedure. Furthermore, it is here that it should first be determined how the position of victims in a criminal case has been safeguarded in the light of the EU directive on victims' rights analysed here. It is the respect for the position of the victim according to this directive that should ensure that victims throughout the EU have the right to equal access to support services, in order to enable victims to benefit fully from the rights that are laid down in the directive. Member States were required to transpose the provisions of this Directive into national law and implement them in practice by 16 November 2015⁵³.

Due to the extensive nature of Polish procedural and criminal legislation, only a fragmentary and example-based analysis of the title issue will be possible here.

The first of the victim's rights in the Polish legal order, and the most fundamental, is the right to report the possibility of a crime. According to the provisions of Article 303

53 | See Judgment of the Court of 4 December 1974, *Yvonne van Duyn v Home Office*. Reference for a preliminary ruling: High Court of Justice, Chancery Division – United Kingdom. Case 41-74 (ECLI:EU:C:1974:133); Judgment of the Court of 5 April 1979, *Criminal proceedings against Tullio Ratti*. Reference for a preliminary ruling: Pretura di Milano – Italy. Case 148/78 (ECLI:EU:C:1979:110).

of the Polish Code of Criminal Procedure, if there is a justified suspicion that an offence has been committed, a decision to launch an investigation shall be issued either *ex officio* or as a response to a notification of an offence. This decision shall specify the act under investigation and its legal qualification. Additionally, upon learning that a crime prosecuted *ex officio* has been committed, any person has a social obligation to notify the public prosecutor or the Police. Such notification may be made orally, in which case a report shall be drawn up, or in writing in the form of a written notification addressed to the law enforcement authorities.

Further rights of the victim include the right to legal aid. This is defined, *inter alia*, by the provision of Article 51 § 2 of the Code of Criminal Procedure, according to which, if the victim is a minor or totally or partially incapacitated person, their rights are exercised by a legal representative or a person under whose permanent custody the victim remains. In addition, if the victim is an incapacitated person, in particular due to age or health, their rights may be exercised by the person in whose custody the victim remains. By contrast, if the victim is not person, procedural actions are carried out on behalf of the victim by the party authorised to act on their behalf. Legal assistance is also guaranteed to the victim by providing them with legal support through the action of their attorney. Therefore, pursuant to Articles 87(1) and 88 of the Code of Criminal Procedure, the victim may appoint an attorney during the course of criminal proceedings. If the victim demonstrates that their financial situation does not allow them to bear the costs of an attorney without harm being caused to themselves and their family, they may apply to the public prosecutor (in pre-trial proceedings) or to the court (in court proceedings) for the appointment of an attorney *ex officio*. The age of the victim is also relevant, as pursuant to Article 171(3) of the Code of Criminal Procedure, if the victim is under 15 years of age, any actions involving them should, as far as possible, be carried out in the presence of their legal representative or actual guardian, unless this is prevented in the interests of the proceeding themselves. In cases of offences committed with the use of violence or unlawful threats and in cases of offences against liberty, against sexual freedom and morals and against the family and guardianship, pursuant to 185a of the Code of Criminal Procedure, an adult designated by the victim is entitled to be present when the victim is cross-examined, as long as this does not restrict the freedom of expression of the person under cross-examination. The victim may also exclude the judge or prosecutor on the basis of a motion, if any circumstance causes a justified doubt as to their impartiality.

The guarantees outlined above are only examples of the implementation of the European Union Directive referred to. It is worth pointing out that there are several standards for the rights of victims in criminal cases for which the legal bases lies outside the Code of Criminal Procedure.

These bases include the Law of 28 November 2014 on the Protection and Assistance of the Victim and Witness⁵⁴. This Act sets out the terms, conditions and scope of protection and assistance measures for victims and witnesses. The Act applies if there is a threat to the life or health of persons close to the victim or witness in connection with pending or completed criminal proceedings involving the victim or witness or criminal fiscal proceedings involving the witness. Measures of protection and assistance include protection during the trial, personal protection, and assistance with relocation. This protection

54 | Act of 28 November 2014 on protection and assistance for injured parties and witnesses (Journal of Laws of 2015, item 21, of 2024, item 1228).

during a procedural action is the protection that can be given in the event of a threat to the life or health of the protected person during and for the duration of the procedural action. Protection during a procedural activity may consist of the presence of police officers in the vicinity of the protected person during a procedural activity involving them, on the way to the place where the activity is carried out or on the way back. Personal protection, on the other hand, may be granted in the event of a high degree of danger to the life or health of the protected person in connection with criminal or criminal fiscal proceedings. Personal protection may consist of permanent presence of police officers near the protected person, temporary presence of police officers near the protected person, temporary observation of the protected person and the environment in which they are staying, or indicating to the protected person safe places to stay and the time and safe manner of movement in determining the extent, conditions and manner of contact of the protected person with other persons. Furthermore, relocation assistance may be provided in the event of a high degree of danger to the life or health of the protected person in connection with criminal or fiscal criminal proceedings, if there is a need for long-term protection and other means of protection and assistance may be insufficient, in cases whose trial at first instance falls within the jurisdiction of the district court, and in particularly justified cases also in other cases. Assistance in the area of relocation consists of taking organisational measures enabling the protected person to stay in a different place than the previous one by providing temporary accommodation ensuring basic living needs are met, assistance in renting a flat, assistance in moving, and assistance in dealing with important life issues related to the change of residence. A person who has been assisted to relocate and who has no source of income or cannot work because of a risk to life or health may be granted financial assistance to meet basic living needs, to cover all or part of the costs of temporarily providing housing or renting accommodation, and to cover the costs of obtaining certain health care services.

Another example is the issue of legal aid including that implemented in provisions outside the Criminal Procedure Code. One example is the special law of 5 August 2015 on free legal aid, free civic counselling, and legal education⁵⁵. The Act sets out the rules for the provision of free legal aid, the provision of free civic counselling, as well as the rules for the implementation of legal education tasks. Free legal aid and free civic counselling are available to an entitled person who is unable to bear the costs of paid legal aid.⁵⁶

Other rights of the victim include the right to an interpreter, the possibility of mediation, the right to request compensation for damage or harm suffered or the right to information, and the right of access to the case file.

The victim also has a number of rights in the course of the dynamics of criminal proceedings. Among other things, he or she has the right to lodge legal remedies such as a complaint against a refusal to initiate an investigation or prosecution, which is available to the victim, as well as to the state, local government or social institution that submitted the crime report. For example, free legal assistance includes informing an individual about the applicable legal situation and their rights or obligations, including in connection with pending proceedings or indicating to an entitled person how to solve their legal problem, or drafting a letter, with the exception of pleadings in pending pre-trial

55 | Act of 5 August 2015 on free legal aid, free civic counselling and legal education (consolidated text: Journal of Laws of 2021, item 945, of 2024, item 928).

56 | Jakubiak-Mirończuk, 2021, p. 36.

proceedings, mediation, free of charge, preparation of a draft letter requesting exemption from court costs or appointment of an ex officio legal aid attorney or an advocate, legal adviser, tax adviser or patent attorney, and information on the costs of the proceedings and the financial risks related to the referral to court.

Another example of the protection of the victim's rights is the Act of 7 July 2005 on State Compensation to Victims of Certain Crimes⁵⁷. According to this act, a victim who has suffered specified bodily injury or health disorder as a result of a criminal offence and has not obtained compensation from the perpetrator or from other sources is entitled to claim compensation on the basis of an application to this effect, which shall be submitted within 2 years of the commission of the offence to the district court of the victim's place of residence.

A recent example of the protection of a victim in a criminal case is the Charter of Victims' Rights, which operates in Poland⁵⁸. However, it is not a document in the legal sense of the word. It dates from 1999, when it was drawn up by the Polish Ministry of Justice in cooperation with governmental and non-governmental institutions and organisations; it was promulgated in October 1999 and is a set of applicable rights for victims of crime. This document is not a law, but is primarily intended to provide assistance to any victim in situations where their rights are not respected.⁵⁹ It also defines the specific and central position of the victim of a crime in the actions taken by public authorities such as the police, the prosecution service or the judiciary, who, when collecting evidence in a criminal case and establishing and judging the facts in a criminal case, must bear in mind this special situation in which the victim of a crime finds themselves. To a certain extent, this document is also intended to neutralise or make more predictable and controllable the very strict features of criminal law previously referred to in this paper.

Polish criminal procedure attaches great importance to situations where the victim may be a child. This is, of course, connected with the procedural activity of questioning. In the system of Polish criminal procedure, it is worth noting that a child may be questioned in two ways. The first is that of ordinary interviewing as a witness.⁶⁰ In such case, the standards for questioning anyone in criminal proceedings apply, as long as they are assigned the role of witness. This refers to the provision of Article 171 of the Code of Criminal Procedure, and according to these rules, the person being questioned must be allowed to speak freely within the limits set by the purpose of the activity in question, and only then may questions be asked to supplement, clarify or verify the statement. In addition to the authority carrying out the interview, the parties, defence lawyers, attorneys and experts also have the right to ask questions. Questions shall be put directly to the person being interviewed, unless the authority orders otherwise. However, the specific rules for the questioning of a child under this option are that, if the person questioned is under 18 years of age, the activity with his/her participation should, as far as possible, be carried out in the presence of a legal representative, a de facto guardian or an adult indicated by the child, unless this is not possible in the interests of the proceeding,

57 | Act of 7 July 2005 on state compensation for victims of certain prohibited acts (consolidated text: Journal of Laws of 2016, item 325).

58 | Karta Praw Ofiar. [Online]. Available at: https://www.zielona-gora.po.gov.pl/pdf/polska_karta_praw_ofiary.pdf (Accessed: 1 October 2024).

59 | Borowicka, 2003, p. 192.

60 | Cora, 2018, p. 279; Osiak-Krynicka, 2024; Bachera and Chmielewska, 2016, p. 143.

or the child opposes it. In addition, leading questions are inadmissible. Questions put to the witness must not concern their sex life unless this is relevant to the outcome of the case. Furthermore, it is categorically unacceptable to influence the statements of a person being questioned by means of coercion or unlawful threats, the use of hypnosis or chemical or technical means influencing the mental processes of the person or aimed at controlling their unconscious reactions in connection with the interview. Explanations, testimonies and statements made under conditions excluding freedom of expression or obtained in contravention of the prohibitions indicated may not constitute evidence in the course of criminal proceedings. In addition, prior to the first interview, a person under the age of 18 shall be provided with information on the course, manner and conditions of the interview. The information shall contain a descriptive or graphic representation of the course, manner and conditions of the interview. At least three days should elapse between providing this information and the date of the hearing, unless in the interests of the proceedings, this is not possible.

A second mode of questioning known as the protective mode of questioning, has recently been introduced in Poland for cases where a witness is a child and also a victim. This is provided for under Article 185a of the Code of Criminal Procedure, which sets out the rules for questioning a minor victim.⁶¹ The standards arising from this provision introduce a special mode, the main purpose of which is to protect the minor from secondary victimisation, i.e. from being victimised again through the activities of law enforcement and the judiciary. The most important features of this mode are the introduction of the principle of a single interview, cross-examination in a court session with the participation of an expert psychologist, interview in a Friendly Investigation Room, recording of the interview, the absence of the accused during the interview, and the possibility of preparing the minor for the interview. In this context, in cases of offences committed, *inter alia*, with the use of violence or unlawful threats, offences against liberty, offences against sexual liberty and decency offences against family and guardianship, a victim who has not reached the age of 15 at the time of interview shall be interviewed as a witness only if his/her testimony may be of significant importance for the outcome of the case, and only once. Additional questioning should only take place if significant circumstances have come to light, the clarification of which requires a second interview, or if a request for evidence by the accused is granted, because they did not have a defence counsel when the victim was interviewed for the first time. The hearing shall be conducted by the court in a session with the participation of an expert psychologist immediately, and no later than within 14 days from the date of receipt of the request. The prosecutor, defence counsel and the victim's attorney have the right to participate in the hearing. The victim's representative in the trial (the legal representative or the person under whose permanent custody the victim remains, or an adult person indicated by the victim, shall also have the right to be present at the interview, if this does not restrict the freedom of speech of the person being interviewed. If the accused notified of this activity does not have a defence counsel of choice, the court shall appoint a defence counsel *ex officio*. At the main hearing, the pre-recorded video and audio recording of the interview shall be played and the record of the interview shall be read out. In addition, one of the new solutions introduced into the area of criminal law in Poland is Article 185e of the Code of Criminal Procedure. This provision introduces the so-called friendly mode of interview for persons with mental

61 | Wielec, Horna-Cieślak and Masłowska, 2019, p. 69.

or developmental disorders or disorders affecting their ability to perceive or reproduce perceptions, with regard to whom there is a justified fear that interview under ordinary conditions could adversely affect their mental state or would be significantly impeded.⁶² Therefore, if a witness has a mental disorder, developmental disorder, disturbance of their ability to perceive or reproduce their perception and there is a reasonable fear that questioning under other conditions than those indicated in this provision would adversely affect their mental state or would be significantly impeded, a witness shall only be heard if their testimony is likely to be of material importance for the outcome of the case, and only once, unless important circumstances come to light, the clarification of which requires a second hearing, or if a request for evidence is granted by an accused person who did not have defence counsel at the time of the first hearing of the witness.

The hearing shall be conducted by the court in a session with the participation of an expert psychologist, no later than within 14 days from the date of receipt of the request. The prosecutor, defence counsel and attorney have the right to attend the hearing. The psychological expert taking part in the hearing should be a person of the gender indicated by the witness, unless this will impede the proceedings. If the witness has problems with verbal communication, the interrogation shall be conducted using the assistive and alternative communication used by the witness. An expert with appropriate knowledge of assistive and alternative communication shall take part in the interview.

7. Final conclusions

The aim of this analysis was to identify common minimum standards in the area of criminal law in relation to victims of crime. The mechanism of analysis here was the clash between provisions in regulations originating from the European Union with the specificity of criminal law and legal regulations in this area. It has been attempted to create at least an exemplary model of universal minimum standards for this type of law, which would determine the axis of implementation of EU law into individual systems of national law. There is no doubt that criminal law, broadly understood, is a specific type of law in any legal system of any country. The standards for implementing Union law into national law should respect the specificity and profile of that law. Thus, three elements collide: the first is the specificity and profile of criminal law; the second is the essence and intent of EU legislation in the form of the directive analysed here; and the third is the specific provisions of national law – in this case the area of criminal law in Poland – which have been amended or completely reintroduced in Poland through the implementation of EU law a number of provisions. This has made it possible to establish four fundamental minimum standards.

The first is the standard of individual dignity. The point here is that at the core of criminal law in particular, the individual is often confronted with the omnipotent empire of the state. Indeed, it has been shown that only the state has the power to dispose of a penalty as a legal measure. Punishment is a permanent and recognisable element of the functioning of criminal law and the state has a monopoly on punishment. Therefore, any interference in the internal system of a state, especially in criminal law, even if caused

by the implementation of an EU directive, must first and foremost respect the standard of human dignity. It takes precedence over all other elements of any legal regulation.

The second is the standard of maintaining reliable information about the situation in which an individual finds himself in the field of criminal law. It is worth recalling here that an individual enters this field by committing a prohibited act, i.e. a crime. By committing this crime, the individual causes (an)other person or persons to become drawn into this field – people who would probably never have been involved in this field of law if a crime had not been committed against them. This arrangement, of course, involves two opposing entities: the perpetrator of the crime and the victim. Both of them – as the two most important forms in criminal law – need to be aware of what is happening in the criminal proceedings taking place in their case. Hence the obligation of the prosecuting authority to inform them of their situation in the criminal case.

The third is the standard of justice, but even more broadly, because of restorative justice. The point is that the evil and harm that has been done to the victim of the crime has been repaired. Restorative justice is an area where the offender and the victim try to have a constructive dialogue about the harm done and what can be done to remedy the situation and try, albeit in part, to restore the situation to that which existed before the crime was committed. It is widely accepted that ‘restorative justice is a process in which the parties involved in a particular crime jointly determine how to deal with the consequences of that crime and its consequences in the future’.⁶³ Therefore, the standard of restorative justice – in a legal context – can be understood as a set of rules that allow certain rules, processes and final results of cooperation between the offender, the victim and society. It should be a kind of azimuth for the creation of such rules in the field of criminal law that would allow the fostering of this very difficult relationship.⁶⁴

The fourth is to eliminate the very unfavourable and damaging process of double victimization. To commit a crime to the detriment of any victim is to always bring harm. In a three-part relationship such as a). the commission of a crime; b). harm; c). the victim, in the first place we see that the source of harm is the commission of a prohibited act, i.e. a crime. However, as indicated above in this analysis, it may be the case that the victim not only feels harm caused by the commission of the offence against him or her, but also that harm occurs immediately after the commission of the offence. This is where the negative process of double victimisation comes in. So, we have two wrongs, the first which is primary, because it arises from the crime, and the second which arises from the circumstances surrounding the crime. In this sense, double victimisation – secondary victimisation is a negative process in which the victim of a crime suffers another, secondary harm from other people – environment, family, relatives or from public authorities, including judicial authorities⁶⁵. It is therefore necessary to create legal solutions that make it possible to understand the situation of the victim.

The four indicators mentioned above are in fact the four basic minimum standards established in the field of criminal law to protect victims of crime.

63 | Marshall, 1999, p. 5; Szczepaniak, 2016, p. 125; Kuliński, 2023, p. 73.

64 | Antoniak, 2012; Bieńkowska, 2008, p. 66.

65 | Ibid. p. 67.

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